Using a No-Contest Clause in Wills and Trusts

If you are worried that disappointed heirs could contest your will or trust after you die, one option is to include a “no-contest clause” in your estate planning documents. A no-contest clause provides that if an heir challenges the will or trust and loses, then he or she will get nothing.

A no-contest clause may be a good idea if you have a beneficiary who may be upset by the property distributed to him or her. However, no-contest clauses (also called in terrorem clauses) only work if you are willing to leave something of value to the potentially disgruntled heir. You must leave the individual enough so that a challenge is not worth the risk of losing the inheritance.

Most states allow no-contest clauses, but there may be restrictions. In many states, if the contest is based on probable cause or good faith, then the no-contest clause is unenforceable. That means that if the court determines there is a good reason for the contest, the clause won’t prevent the challenging heir from inheriting. In addition, a no-contest clause may apply to some portions of your estate plan, but not others. For example, your heirs may be able to challenge your executors without violating a no-contest clause.

Two states –Florida and Indiana – will not enforce no-contest clauses no matter what. If you write your will in a state that enforces no-contest clauses and then move to Florida or Indiana, the no-contest clause will be void.

If you include a no-contest clause in your estate plan, you need to be sure there are no mistakes. If you leave out important property or aren’t clear about property in your possession, your heirs could be completely disinherited if

they try to fix any mistakes.

While a no-contest clause can be a good tool, there are other ways to discourage a will contest. To learn more, click here. Talk to your elder law attorney to determine the best method to protect your wishes.

ela

Effort to Fix Medicare's 'Observation Status' Loophole Gathers Steam

Support is building for legislation to correct a technicality in Medicare law that is preventing thousands of hospital patients from being covered for a subsequent nursing home stay.

Medicare pays all or part of the costs for up to 100 days of a nursing home stay, but only if the patient was first admitted to a hospital as an inpatient for at least three days. To avoid financial penalties from Medicare if they readmit patients too quickly, hospitals are increasingly not admitting patients at all but rather placing them "under observation" to determine whether they should be admitted.

Although Medicare's guidelines say it should take no more than 24 to 48 hours to make this determination, in reality hospitals sometimes keep patients under observation for up to

a week. If the patient moves to a nursing home after the hospital stay without having been admitted or admitted for fewer than three days, the patient must pick up the tab for the nursing home – Medicare will pay none of it (unless the patient is lucky enough to be in a Medicare Advantage plan that chooses to cover the costs).

In a 2013 report, the Inspector General for the U.S. Department of Health and Human Services identified more than 600,000 hospital stays that lasted for three or more nights but did not qualify the patient for coverage of nursing home care. In a recent report, AARP's Public Policy Institute found that between 2001 and 2009, Medicare claims for observation status grew by more than 100 percent.

But as hospitals' use of observation status expands and more beneficiaries are being denied nursing home coverage, the issue is attracting increased attention. In January, the observation status loophole made the NBC Nightly News in a three-minute segment titled "The Two Words That Cost Medicare Patients Thousands."

Rep. Joe Courtney (D-CT) has introduced bills since 2010 to allow the time patients spend in the hospital "under observation" to count toward the requisite three-day hospital stay for Medicare coverage of skilled nursing care. The legislation has gone nowhere, but Courtney is now optimistic that Congress will finally take action. His latest bill, H.R. 1179, was introduced with Iowa Republican Rep. Tom Latham and has 137 co-sponsors. A companion bill in the Senate introduced by Sen. Sherrod Brown (D-OH), S. 569, has 25 co-sponsors.

And last week, the American Bar Association passed a resolution urging Congress to enact the bills or similar legislation. In announcing news of the ABA's resolution, the Center for Medicare Advocacy, which has sued to force the government to change its rules governing how hospitals admit

patients, said that it “and other advocacy groups are hopeful that increased awareness of the Observation status problem will lead to a solution.

ela

Medicaid Expansion Signups Hindered by Fear of Estate Recovery

A fear that the government will seize their house after they die is causing some people to not sign up for expanded Medicaid under the Affordable Care Act (ACA). A long-standing provision in Medicaid law allows states to recoup Medicaid costs by putting a claim on the home or other assets of older deceased Medicaid recipients.

In 1993, Congress passed a law requiring that states try to recover from the estates of deceased Medicaid recipients whatever benefits they paid for the recipient’s long-term care. But the law allows states to go further and recover all Medicaid benefits from individuals over age 55, including costs for any medical care, not just long-term care benefits.

The ACA gives states the option of expanding Medicaid eligibility to individuals and families with incomes up to 133 percent of the poverty line, and so far 26 states have taken this option. Now that more people are becoming eligible for Medicaid under the ACA, there are potentially more people who may have their houses (or other valuable assets) sold after

they die to pay off Medicaid debt. People subject to this estate recovery would have to live in one of the 26 states, and their state would have to be recovering the costs of all Medicaid benefits, not just long-term care. Still, there are protections: the state cannot take a house if there is a surviving spouse, a child under age 21 or a child of any age who is blind or disabled.

According to the *Washington Post*, the realization that their house might be subject to estate recovery is giving some with low incomes second thoughts about signing up for Medicaid, even though not doing so will likely mean going without any insurance at all. ACA plans bought in the regular marketplace are not subject to estate recovery, but individuals who qualify for expanded Medicaid coverage are not able to get a subsidy to buy coverage in the marketplace. If someone doesn't want to be subject to estate recovery, there are two options: buy a plan from the marketplace without a subsidy, or buy no insurance at all.

In order to encourage people to sign up for Medicaid, both Oregon and Washington have changed their rules to allow estate recovery only for long-term care debt. In addition, advocates are asking the federal government for clarification on whether Medicaid estate recovery will apply to people who purchase expanded Medicaid coverage. A spokesman for the Centers for Medicare and Medicaid Services told the *Post*, "We recognize [the] importance of this issue and will provide states with additional guidance in this area soon."

For the *Washington Post* article, click here.

For more on Medicaid's estate recovery rules, click here

ela

Probate v. Non-Probate: What Is the Difference?

When planning your estate it is important to understand the difference between probate and non-probate assets. Probate is the process through which a court determines how to distribute your property after you die. Some assets are distributed to heirs by the court (probate assets) and some assets bypass the court process and go directly to your beneficiaries (non-probate assets).

The probate process includes filing a will and appointing an executor or administrator, collecting assets, paying bills, filing taxes, distributing property to heirs, and filing a final account. This can be a costly and time-consuming process, which is why some people try to avoid probate by having only non-probate assets.

Probate assets are any assets that are owned solely by the decedent. This can include the following:

- Real property that is titled solely in the decedent's name or held as a tenant in common
- Personal property, such as jewelry, furniture, and automobiles
- Bank accounts that are solely in the decedent's name
- An interest in a partnership, corporation, or limited liability company
- Any life insurance policy or brokerage account that lists either the decedent or the estate as the beneficiary

Non-probate assets can include the following:

- Property that is held in joint tenancy or as tenants by the entirety
- Bank or brokerage accounts held in joint tenancy or with payable on death (POD) or transfer on death (TOD) beneficiaries
- Property held in a trust
- Life insurance or brokerage accounts that list someone other than the decedent as the beneficiary
- Retirement accounts

When planning your estate, you need to take into account whether property is probate property or non-probate property. **Your will does not control the distribution of non-probate property**. Check the ownership of your property and your accounts to make sure jointly owned property will be distributed the way you want it to. It is also important to review your beneficiary designations.

Contact us to determine whether your property is being distributed according to your wishes.

ela

Using an Annuity to Keep the Spouse of a Medicaid Applicant from Becoming Impoverished

When one spouse qualifies for Medicaid to pay for a nursing home stay, the spouse who is at home is often left without many resources. While Medicaid has rules to prevent community spouses from impoverishment, the protections aren’t always

enough. There are steps that you can take to increase the community spouse's income, and as a recent case illustrates, an annuity may be a good option.

In order to qualify for Medicaid coverage, the applicant can have no more than $2,000 in resources (in most states). In general, the community spouse may keep one-half of the couple's total "countable" assets up to a maximum of $115,920 (in 2013). Called the "community spouse resource allowance," this is the most that a state may allow a community spouse to retain without a hearing or a court order. The least that a state may allow a community spouse to retain is $23,184 (in 2013).

One way to ensure that the community spouse has enough money to live on is for the community spouse to purchase an annuity. By purchasing an annuity, the spouse turns a countable resource into an income stream, which should not be counted by Medicaid. The annuity must meet certain qualifications in order to not be considered an asset transfer, including be irrevocable and name the state as a remainder beneficiary. (For more information on annuities and Medicaid planning, click here.)

Some states have improperly denied Medicaid benefits to an applicant whose spouse has purchased an annuity, but a recent decision by a U.S. Court of Appeals makes clear that community spouses can purchase annuities under current federal law.

North Dakota resident John Geston entered a nursing home, and his wife purchased a single-premium annuity for $400,000, which would give her $2,735 a month in income over 13 years. The annuity provided that it could not be sold or transferred, and it named the state as a remainder beneficiary. Mr. Geston applied for Medicaid benefits, but the state denied him benefits on the grounds that the annuity was an available asset under state law. Mr. Geston sued in federal court, challenging the state law. In *Geston v. Anderson* (8th Cir., No.

12-2224, Sept. 10, 2013), the 8th Circuit Court of Appeals decided in favor of the Gestons, ruling that the annuity was not a resource and should not be counted in determining Mr. Geston's eligibility for Medicaid. To read the full case, click here.

Before purchasing an annuity or applying for Medicaid, you should consult with your attorney who can tell you the best way to protect your spouse.

ela