The Busy Practitioner's Guide to Student-edited Law Journals

Which articles appearing in student-edited law journals should we be familiar with? We identified four recent articles that we think could be of great interest to you. We selected topics that cover Medicaid rules and eligibility; modification and termination of irrevocable trusts; ethical and malpractice concerns in estate planning; and the problem with restricted spending philanthropy. We then asked our board members to review the articles for your benefit and to determine if they are "must reads." The articles themselves can be found on our website, *www.trustsandestates.com*. We hope you enjoy the reviews.

Anna Sulkin, associate legal editor, Trusts & Estates

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AUTHOR: John A. Miller, Weldon Schimke Distinguished Professor of Law at University of Idaho College of Law in Moscow, Idaho

ARTICLE: "Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning and Policy," *Elder Law Journal* (forthcoming)

For estate planners today, mere awareness of elder law, particularly planning for Medicaid eligibility, is barely enough: Fluency is quickly becoming the norm. Many planners have discovered that the Medicaid rules are every bit as arcane, difficult and—dare one say, arbitrary—as the transfer tax rules and, just like tax planning, require consideration of federal law and potentially the law of several states.

Into this environment comes Professor Miller with a provocative thesis: In many instances, divorce is the best Medicaid strategy for married couples, even though, in most other contexts, the law favors marriage over divorce. I'll return to this thesis in a moment but first should mention that this article follows the earlier "Preserving Wealth and Inheritance Through Medicaid Planning for Long-Term Care," by Prof. Miller, with Sean Bleck and Barbara Isenhour, at 17 *Mich. St. J. Medicine & Law* 153-196 (2013). The more recent article discusses various Medicaid planning techniques that the prior article covered, with an emphasis on techniques that most effectively prevent state recovery of Medicaid expenditures from both the institutional spouse's estate and the community spouse's estate. Indeed, the article provides a fascinating discussion of recovery in common law states, where recovery is founded on the surviving spouse's right of election against a deceased spouse's estate (a right that exists in almost all common law states) versus in community property states, where the author argues no recovery right ought exist but one may be "discovered" by a court that's either result oriented or confused.

Avoiding estate recovery when financial assets are involved may not be particularly difficult. For example, the author points out that in many states, "liberal income rules and the restrictive resource rules make the purchase of an annuity for the community spouse with excess resources an important planning tool for middle class couples." However, annuity planning isn't effective for the marital home. The article quickly summarizes a number of potential strategies that may be effective, such as giving away a remainder interest outside the look-back period or, in some instances, simply paying the transfer penalty, before turning to what the author describes as "the emerging planning tool of choice" for married couples of moderate wealth, namely divorce.

The article notes that after a divorce, the assets

allocated in the dissolution decree to the non-applying former spouse are neither countable resources for the Medicaid applicant nor are subject to estate recovery. Indeed, the author believes that a legal separation—not allowed in all states—has the same effect. When the institutional spouse lacks capacity, state law will almost certainly require a guardian ad litem who will be hard-pressed to agree to less than a fair allocation of assets, even if divorce is allowed at all. Nonetheless, argues Prof. Miller, an equal division of assets may be helpful to the couple. The article identifies four situations in which divorce might make sense: (1) the community spouse is healthy and/or motivated to provide an inheritance to someone not the institutional spouse, that is, the community spouse wants to secure his own assets and control their disposition; (2) the community spouse has a significant amount of wealth or income in his own right; (3) the institutional spouse's likely expenses are great because of age and infirmity; and (4) there's no financial reason not to divorce, such as a Social Security or pension reduction. These considerations are explored more fully in a number of helpful and interesting examples.

We return now to the author's thesis that the Medicaid rules have the unusual effect of encouraging divorce. In determining to which spouse income belongs, Medicaid follows the "name on the check rule" but considers assets on an aggregate basis for married couples. Prof. Miller urges Medicaid to adopt the income rule for asset allocation, for both spend down and estate recovery purposes. This principle of disaggregated assets would better fit new models of marriage: "[i]n this age of heterogeneity and individualism, the fairness of imposing the financial burden of one spouse's long-term disability on the other spouse has become doubtful." Of course, although estate recovery is estimated to capture only 1 percent of Medicaid spending, if that 1 percent were eliminated, an offsetting funding source would be sought. Filial support requirements are one such source, but they too are controversial.

Long-term care involves families and money, the very stuff of estate planning. We do ourselves and our clients a disservice when we leave that planning to others. Prof. Miller's articles are a good point of departure.