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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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.