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OREGON’S ELECTIVE SHARE AND MEDICAID*

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INTRODUCTION

In both estate planning and estate administration, a lawyer may need to address how Medicaid eligibility affects the elective share. When a married person cannot pay indefinitely for an ill spouse’s nursing cost, then the sick spouse may someday qualify for the Medicaid program.

Oregon’s Medicaid agency just issued (September 2001) a policy letter confirming that a surviving spouse’s failure to claim the elective share may, unless a hardship exists, be considered a disqualifying transfer, triggering a penalty period.

Now, Oregon elder law attorneys will need to develop approaches to estate planning and administration in light of the new policy.

This article represents one attorney’s analysis of current Oregon law on the elective share and Medicaid. No standard of practice has yet been developed to deal with this topic in Oregon, and the strategies discussed here are not the final word on the subject. Many of us over the years have tried to predict where state policy may go, and we have experimented with different drafting approaches. The illustrative trusts attached to this article do not represent the only possible planning approaches.

Elective share claims will be more frequent in taxable estate administration, because 2001 transfer tax changes increase the amount of assets passing to credit shelter trusts, thus disfavoring the surviving spouse. Oregon's new Medicaid policy will certainly increase elective share claims in more modest estates. This article addresses the elective share claim driven by the eligibility rules of Oregon's Medicaid program.

I. OREGON MEDICAID AGENCY POSITION

Oregon's Medicaid administrative agency, the Department of Human Resources' (DHR)

Seniors and People with Disabilities Services (SPDS), has just interpreted its administrative rules to require that a surviving spouse claim the elective share or be penalized. The executive letter declaring the state policy is attached to these materials as Appendix A.

Although there are no reported appellate cases in Oregon on the elective claim as a Medicaid disqualifying transfer, recent reported cases from other jurisdictions

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Reflect the general nationwide rule: *a surviving spouse's refusal to claim the elective share will cause a period of Medicaid disqualification.* The trend in the development of the law is now clear.

Oregon's Medicaid agency occasionally, in the past few years, nominated a private attorney as conservator for an institutionalized surviving spouse to claim the ill spouse's elective share. The SPDS describes its elective share process for the first time in the new policy letter attached to these materials.

Medicaid-driven elective share claims to date have been resolved by settlement (usually by payment of some part of the elective share to the state-nominated conservator, who spends it down for care). The law about elective share claims in Medicaid situations is not developed in Oregon, with no statute directly on point and no reported case precedent, leading estates to compromise the elective share claim rather than take on expensive test case litigation.

Under the Oregon SPDS policy, local units inform the DHR Estate Administration Unit (EAU) whether the Medicaid recipient client receives less than 25 percent of the community spouse's estate. Then, the EAU will determine whether "it is cost effective or legally practical" for the client or a conservator for the client to assert his or her elective share. The local office will determine whether an undue hardship exists, which may cause the local unit to drop the request for an elective share, but the cited hardship regulation, OAR 461-140-0300(3), provides no guidance on what an undue hardship might be.

The recent policy letter confirms that the EAU will seek appointment of a conservator for the ill surviving spouse who is "financially incapable." OAR 411-026-0080. Because most surviving spouses on Medicaid are in nursing or assisted living facilities, they are likely to need a conservator appointed to make an elective share claim.

Oregon's elective share law sets out standards to be met before a conservator for the surviving spouse can successfully claim an elective share. The prerequisites to a successful claim for the elective share by a conservator are discussed below, in part V. of this article.

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II. ELECTIVE SHARE IN THE ELDER LAW PRACTICE

In the elder law practice, elective share issues arise during probate estate administration and during estate planning.

A. Probate Estate Administration

The lawyer advising a personal representative will deal with the issue of the elective or forced share if an ill or institutionalized spouse (whether on Medicaid or not) receives less than 25 percent of the probate estate.

When the lawyer meets with the personal representative, and learns that a spouse who is in heir by intestacy or a devisee under the will *receives less than 25 percent of the probate estate*, and:

1. Spouse resides in a foster home, assisted living facility, or nursing home, then the lawyer should learn whether Medicaid pays for that facility care; or
2. Spouse is ill, but not yet on Medicaid, then the lawyer for the estate should inquire whether Medicaid might be needed in the foreseeable future.

Even though the new Oregon Medicaid policy letter as written describes only *current* Medicaid recipients being forced to claim the elective share, the state could conceivably impose a penalty period on *applicants* for Medicaid as well as current recipients, as happens in some states.

If the decedent left the surviving ill spouse some or all of the estate, then an interested person may ask whether the ill spouse can disclaim the inheritance, effectively passing the spouse's estate share to other heirs. Of course, the capacitated spouse can disclaim a share of an estate, and an agent or a conservator (with court authority ORS 125.440(4)) can sign a disclaimer. However, simple disclaimer of an inheritance is a Medicaid disqualifying transfer and triggers a penalty period. Oregon's new Uniform Disclaimer of Property Interests Act, effective January 1, 2002, will not allow disclaimers "if the purpose or effect of the disclaimer is to prevent recovery. . . ."

Or. Laws 2001, chapter 245, section 17.

The attorney for the estate can help the personal representative understand the conflict between the interests of heirs who stand to benefit from a disclaimer and the

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disclaimant. Heirs with great expectations do not want to be in the position of the heir (also the personal representative) in the Maryland case of *Troy v. Hart*, 116 Md. App.

468, 697 A.2d 113, 119 (Md. App. 1997), where the appellate court advised the state of

Maryland to seek return of disclaimed assets by constructive trust suit directly against the heirs.

If an ill spouse or the legal representative of the ill spouse wants to go ahead with a disclaimer, despite the impact on public benefits, the attorney for the estate should send the disclaimant to another attorney for counsel. That independent counsel may assist in disclaimer or may advise against it. To convince the lawyer to advise a disclaimer, family members may promise to pay for the ill person's care during a disqualification period—but the promise may not be kept.

The ill surviving spouse is entitled to notice of the probate proceeding. If the spouse was bypassed in the decedent's will and currently receives Medicaid assistance, the personal representative should prepare for the state's likely elective share demand.

Estate planning for the community spouse, as discussed below can limit or prevent a successful claim for the elective share.

B. Prenuptial and Postnuptial Agreements

Oregon law permits waiver of the elective share by prenuptial or postnuptial agreement. *See Day v Vitus*, 102 Or App 1240, 792 P2d 1240 (Or App 1990), and the Oregon statute on point:

114.115 Election barred by agreement. The right of the surviving spouse to elect under ORS 114.105 may be barred by the terms of a written agreement signed by both spouses. The agreement may be entered into before or after marriage. [1969 c.591 s.113]

If the marital agreement was executed long before the Medicaid recipient spouse fell ill, ideally before the marriage took place, then the state will have no reason to challenge the agreement after the death of one spouse. Some elder law attorneys recommend a postnuptial agreement waiving the elective share as a planning technique.

However, a postnuptial agreement signed after the spouse became ill may be later challenged for lack of capacity or, as in a recent New York case, be considered a

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disqualifying transfer as of the date of death of the community spouse. *Dionisio v. Westchester County Dept. of Social Services*, 665 N.Y.S.2d 904 (A.D.2 Dept. 1997).

The New York Medicaid administrative agency issued a denial of benefits to Jeanette Dionisio, declared that her execution of a waiver of elective share (two weeks before entering a nursing facility; twenty months before applying for Medicaid) was a disqualifying transfer. In a very

unusual twist, the agency found that the period of disqualification *began with the date of her husband's death, not the date the waiver was signed.*

When Mr. Dionisio died, he left an estate valued at \$469,500, and he had made no provisions in his will to provide for his wife. Mrs. Dionisio's share of her husband's estate would have been one-third, or \$156,500, under New York's elective share law.

When Mrs. Dionisio applied for Medicaid four months after his death, the Westchester County Department of Social Services ultimately denied Mrs. Dionisio's application for medical assistance on the ground that, by waiving her marital rights to a portion of her husband's estate, she had transferred resources for the purpose of qualifying for medical assistance, effective with the date of her husband's death. *Dionisio v. Westchester*

County Dept. of Social Services, 665 N.Y.S.2d at 905.

The Dionisio estate argued that the postnuptial waiver fit an exception to the regular Medicaid transfer restrictions, in that it occurred solely for regular estate planning reasons and not for the purpose of divestment of assets to qualify for Medicaid. However, the New York court held that a presumption existed that the postnuptial waiver of elective share was for Medicaid qualification purposes and further found that the personal representative had not rebutted that presumption in the hearing.

Under federal Medicaid law, transfers of assets made exclusively for a purpose other than to qualify for medical assistance are not disqualifying. 42 USC 1396p(c)(2)(C). Waivers executed long before an illness, as part of normal estate and marital planning, should withstand scrutiny. When conventional postnuptial agreements are done, which typically include waivers of elective share, practitioners might document in the agreement all of the consideration, so that the estate planning (non-Medicaid) reasons are apparent on the face of the document.

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Oregon has no reported cases on waiver of the elective share as a disqualifying transfer. If Oregon's Medicaid agency someday attacks an elective share waiver as a Medicaid disqualifying transfer, when will the disqualification period commence? Does the disqualification period begin on the date of signing, or on the date of the community spouse's death, as in *Dionisio v. Westchester County Dept. of Social Services*?

C. Estate Planning

If the estate planning client's spouse resides in a care facility, will that spouse later need Medicaid assistance? If the healthier spouse, called the "community spouse" in Medicaid regulations, protected some assets or the home from nursing home costs by qualifying the ill spouse for Medicaid, the community spouse may, and usually does, alter his or her will to bypass the institutionalized spouse to some degree.

Should the healthier spouse unexpectedly die before the institutionalized spouse, the personal representative and heirs usually wonder if the institutionalized spouse will continue to receive public benefits. The Medicaid recipient spouse will be disqualified by receipt of assets over \$2,000.

Some spouses leave funds to support the institutionalized spouse, knowing the spouse will then leave the Medicaid program and pay his or her own nursing costs until the inherited funds are spent down. The attorney for the community spouse usually suggests that any funds left for the ill spouse be administered by a trustee for the ill spouse's benefit.

Should the community spouse wish to leave a surviving institutionalized spouse less than the elective share amount (25 percent of the net probate estate), or wish to bypass the institutionalized spouse entirely, then the client should now be told of Oregon's new formal policy requiring an elective share claim by a Medicaid recipient.

Some elder law attorneys have suggested the community spouse completely bypass the surviving spouse, using nonprobate transfers. Other attorneys have suggested that the community spouse leave not less than the elective share amount to a special needs trust for the ill spouse.

No case law precedent indicates the more certain approach.

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The client may insist on limiting what the surviving institutionalized spouse receives. Probate avoidance techniques and use of an elective share trust are discussed in more detail below.

III. PROBLEMS WITH PROBATE AVOIDANCE TECHNIQUES

Some Oregon planners suggest avoiding an elective share claim by recommending probate avoidance. Current Oregon law permits the elective share only against the probate estate. Therefore, inter vivos transfer from the community spouse to other heirs, or a community spouse revocable living trust, will defeat an elective share claim under current law. These techniques have risks, described below, and may not be possible in Oregon if the legislature enacts augmented elective share proposed legislation.

A. Inter Vivos Transfers May Be Challenged

In situations where a surviving spouse has been completely bypassed, or where probate of some assets is required, the state-nominated conservator in Oregon has routinely challenged premortem transfers by the community spouse as voidable for lack of capacity, undue influence by the children, and breach of fiduciary duty (if transfers are accomplished with a power of attorney, even one giving general gifting powers). Most elder law attorneys have seen these state challenges to inter vivos transfers. Usually, the challenges arise after death of a spouse has triggered an elective share claim.

In some cases, the state nominates a personal representative to sue non-bona fide purchasers to void the decedent's inter vivos transfers. An estate claimant against an insolvent estate can petition the probate court to order a personal representative to avoid the decedent's void or voidable transfers. ORS 114.435 requires that the personal representative "shall take necessary steps to recover [the property]."

There is no statute of limitations on the personal representative's authority to avoid the decedent's void or voidable inter vivos transfers. The statute of limitations may be tolled by an ill spouse's lack of capacity. Because of the potential attacks on inter vivos transfers by the Oregon Medicaid Estate Recovery Unit nominees, the heirs of a

¹ *Bezzini v. Dept. of Social Services*, 49 Conn. App. 432 (Conn App 1998).

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client relying on inter vivos transfers to avoid an elective share claim may not be able to keep the transferred property.

B. Revocable Trust Problems

What has happened in other states with use of a community spouse revocable trust to avoid a Medicaid-driven elective share claim? Planners sometimes use a revocable trust to avoid a probate estate elective share. A recent Connecticut case illustrates the worst possible result for the family. Reported cases are rare, but in some states local Medicaid agencies are reported to treat the posteligibility transfer of the community spouse's homestead to a revocable living trust as an "improper transfer," disqualifying for the Medicaid recipient spouse.

In *Bezzini v. Dept. of Social Services*, 49 Conn. App. 432 (Conn. App. 1998), a

Connecticut court allowed a Medicaid agency to treat a community spouse's revocable trust as a disqualifying transfer, as of the date the husband died, disqualifying the surviving Medicaid recipient wife.

Charles Bezzini, ill with prostate cancer, established and funded a revocable living trust in March 1993. The trust contained no provisions benefitting Mrs. Bezzini. On June 3, 1993, Mr. Bezzini died. Four months later, in October 1993, Mrs. Bezzini went to a nursing home. In February 1994, eight months after her husband died, Mrs. Bezzini applied for Medicaid benefits. The agency found that a Medicaid disqualifying transfer occurred *on June 3, the date of Mr. Bezzini's death*, when the sons became entitled to \$469,142.80 as sole beneficiaries of the husband's revocable trust.

The Connecticut Appeals Court agreed with the state agency's denial of benefits, remarking that had the husband transferred his property by will, no disqualifying transfer would have occurred, because Mrs. Bezzini would have been entitled to her elective share.¹ Connecticut permits the elective share only against the probate estate, not an augmented estate. The court held that an actual transfer occurred on the date of the husband's death, when the trust became irrevocable and the trustor's interest was extinguished.

²There is a 60-month look-back period for transfers from a revocable trust. 42 USC 1396p(d)(3)(A)(iii).

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In this Connecticut case, using a community spouse trust to bypass the spouse, avoid the elective share, and benefit the children backfired. Mrs. Bezzini, who did not apply for benefits until a year after her husband created his trust and eight months after he died, was disqualified for Medicaid benefits.²

C. Augmented Estate Elective Share Reform

Oregon may follow the national trend toward an augmented estate elective share law. If this likely change in the elective share law occurs, entire categories of probate avoidance property will become subject to the elective share. Legislative proposals to expand the Oregon elective share to nonprobate property are being discussed now.

What would the expansion of the elective share to an augmented estate mean?

For example, in 1999, Florida passed an augmented estate elective share statute effective for persons dying on or after October 1, 2001. In Florida, the elective share claim goes against not only probate property, but against property passing by joint or survivorship ownership, revocable trust, retirement plan assets, and property transferred within one year of death. Section 732.2025–2155, Florida Statutes.

If Oregon follows the national trend and enacts an augmented estate elective share law, then much probate avoidance planning to avoid the elective share claim will be ineffective.

IV. A CONSERVATIVE APPROACH TO ESTATE

PLANNING FOR THE ELECTIVE SHARE

In light of the uncertainties about the Medicaid-driven elective share claim, if a client wants to bypass a spouse in some degree in his or her estate plan, the lawyer might recommend the spouse receive *at least 25* percent of the net probate estate. The client wants the spouse's inheritance managed by relatives, so a trust for the surviving spouse is arranged.

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When using this conservative approach to elective share planning, the elder law attorney might suggest the client choose between two forms of trust: a full support trust (Appendix C), or a form of special needs trust (Appendix D) drafted anticipating the potential elective share claim. These two forms of trust are discussed below. When recommending either a full support or a special needs trust for the elective share, the lawyer will be concerned with valuation of the restricted trust interest, and the likely conservatorship hearing on the need for an election, considering the provisions of the will and nonprobate transfers (ORS 114.155), the best interests of an incapacitated spouse, the recommendations of the protected person's guardian (ORS

125.425(1)), and the potential bar or reduction in the elective share claim if the spouses did not live together. ORS 114.135.

The estate planning attorney can advise the client about an elective share challenge and determine whether the client wants to leave an outright sum or a sum in trust to the surviving spouse. The conservative approach is to not completely bypass the ill spouse and to not rely on probate avoidance alone to defeat the elective share. I do very little complete bypass planning, unless the ill spouse has substantial assets in his or her own name or separate living trust.

A. Elective Share Trust

The elective share trust could be a full-support spousal testamentary trust, intended to be spent down entirely on nursing and other medical care, without regard to public benefits eligibility. An illustrative form of mandatory support testamentary trust, with annotations, is attached to these materials as Appendix C.

Alternatively, the elective share trust could restrict payments in some way, and not be drafted as a full support trust. In New York, a form of income-only right of election trust was sometimes used in recent years. Vincent Russo & Marvin Rachlin, *New York Elder Law Practice*, section 16.4 p. 708 (West, 1997) However, in New York, the spouse may refuse to accept any benefit under a will, elect completely against the will, and take 33 percent of the estate assets. Vincent Russo, a New York practitioner, reported to the National Academy of Elder Law Attorneys at its November 1999 Institute that the New York Medicaid agency refused to let the ill spouse accept an income-only testamentary trust instead of the outright elective share.

³42 USC §1396p(d)(4)(b).

⁴42 USC 1396p(d)(4).

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An income-only elective share trust could raise the beneficiary's income above the Oregon income cap. Monthly income over the income cap can be managed currently with an income cap trust,³ preserving benefits while reducing the use of tax dollars. Practitioners in other states sometimes recommend the estate planning client leave 100 percent of his or her estate to an income-only trust for the surviving spouse, where the value of the life interest will be at least equal to the elective share. Because the full support or special needs right of election trust is contained in a will, and is not part of an inter vivos trust, it need not provide payback of Medicaid assistance, and it is not subject to federal Medicaid restrictions on inter vivos trusts.⁴

The Oregon elective share is *reduced* by the value of property given under the will and limited by the value of certain nonprobate property. The elective share may be denied altogether, or reduced, where the spouses live apart. ORS 114.105; 114.125; 114.135.

Why should an estate planning client consider an elective share trust, rather than leaving the elective share amount outright to a spouse? Some practitioners will argue that an outright devise of 25 percent of the net estate would avoid future problems. In a testamentary trust situation, if

the state forces the share claim, the heirs may lose control of 25 percent of the net estate placed in the trust, *plus* an additional sum if the trust interest is valued at less than 25 percent of the net estate.

Under Oregon's elective share law, the nonprobate assets received by the surviving spouse do not offset, dollar for dollar, the probate elective share. That is, the heirs with great expectations may be irritated that the life insurance, IRAs, a tenancy-by-the-entireties house, or other nonprobate assets are placed into spend-down status, and also 25 percent of the probate estate (the 25 percent may be comprised of a trust income interest and outright assets to fill up a share).

The right of election trust, in the nonprobate offset form illustrated, gives the heirs more control over how the funds are spent and takes into account the likely nonprobate transfer values. But the heirs evaluating fighting a Medicaid-driven elective

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share claim want to know how a spousal trust interest is valued. Will—or need—the trust value offset the entire potential 25 percent of the net estate elective share claim?

B. Valuation of the Interest in an Elective Share Trust

The interest in the elective share trust must be valued, and if it is valued at less than 25 percent of the net estate, the ill beneficiary might be forced to claim the elective share to fill up the share. The court *may* deny the share or disapprove an additional sum to fill up the share, for the reasons noted above. If the spouse's conservator is allowed by an Oregon court to claim any elective share, then the claim's value is *directly offset* by a mandatory lifetime income interest in a trust. The actual statute wording is complex, but it is worth reviewing now:

(1) The elective share consists of one-fourth of the value of the net estate of the decedent, but the elective share shall be reduced by the value of the following property given to the surviving spouse under the will of the decedent:

(a) Property given outright;

(b) The present value of legal life estates; and

(c) *The present value of the right of the surviving spouse to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will that is capable of valuation with reasonable certainty without regard to the powers forfeited under subsection (2) of this section.*

(2) Except as to property applied under subsection (1) of this section to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, the spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in subsection (4) of this section and the testator has not provided otherwise, but the spouse forfeits any general power of appointment.

A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under subsection (1)(c) of this section, or to apply additional principal or income in behalf of the electing spouse, may not be exercised in favor of the electing spouse. ORS 114.105.

⁵The value of an income interest (or remainder interest) in a trust is determined under life expectancy actuarial tables issued by the IRS. Regulations 20.2031-7(d)(7), Table S. To value the life interest, you need to know the age of the surviving spouse and the applicable federal rate from the IRS web site for the month the interest is valued, and you need to look at Table S.

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Please note that an elective share claimant, if successful, keeps any trust income interest but forfeits any right to trust principal. The value of a mandatory support trust should be equal to its corpus. The ill spouse will be self-supporting, go off the public benefit programs, and pay his or her own way until the trust is exhausted. The state likes this result and will have little incentive to devalue the trust and claim additional assets.

In the illustrative full support trust, the statutory elective share amount is *reduced* by the value of the nonprobate assets passing to the surviving spouse, if any. This reduction in the trust corpus may be challenged by the state, but it is defensible in the court hearing that may later be held to limit or deny an elective share claim. A reduction for nonprobate property is also desirable to the heirs, who may find in the uncertain world much probate avoidance property going unintended to the surviving spouse.

Any nonprobate property and the illustrative testamentary support trust corpus will be spent down for care of the ill spouse and keep him or her off Medicaid until exhausted. The potential heirs would rather see an offset against the trust for nonprobate property than see both nonprobate assets and one-quarter share of the probate estate be spent down. If the state wants to force then ill spouse going off benefits to file a claim, then the personal representative can determine whether to reject the claim and seek a hearing to limit or deny an elective share claim.

In the illustrative special needs trust, the beneficiary is given a mandatory lifetime income interest and a discretionary lifetime special needs principal interest. If the spouse's conservator is allowed by the court to claim any elective share, then the claim's value is *directly offset* by the value of the mandatory lifetime income interest.

The IRS has a standard approach to valuing an income interest.⁵ The life income beneficiary's interest is the present value of the right to receive the income from the principal sum for the beneficiary's life, based on the age of the beneficiary at the time

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of valuation and the applicable federal rate from the IRS website for the month of valuation.

The IRS has no standard approach to valuing a discretionary trust interest. “The interest of a beneficiary of a completely discretionary trust is not a present interest—any distribution to the beneficiary is dependent upon the trustee’s subsequent exercise of discretion.” Price, *Estate Planning* (2001), section 2.5.2, p. 114. Thus, the value of the discretionary principal interest in the illustrative elective share special needs trust is an issue of fact to be decided by a court.

Both illustrative trusts give the surviving spouse 25 percent of the net estate, reduced by nonprobate property, and both trusts give the spouse a mandatory lifetime income interest. The illustrative support trust then gives the spouse full rights, as needed for support, to the principal of the trust. The illustrative special needs trust gives a fully discretionary special needs only principal interest.

V. PRACTICAL TIPS FOR HANDLING THE MEDICAID-RELATED ELECTIVE SHARE CLAIM

If the Oregon Medicaid agency forces a capacitated spouse to make an elective share claim, or seeks appointment of a conservator to make an elective share claim, what should the estate lawyer do? The estate administration lawyer should determine whether the elective share can be barred completely, or reduced substantially, considering the facts of that case. Factors to consider include nonprobate property received by the surviving spouse, which reduces the amount needed for support, any hardship on the family, and the value to the surviving spouse of any interest left in trust.

If one of the illustrative forms of trust is used, the personal representative of an estate has two strategic choices.

1. Resist any elective share claim forced by the Medicaid agency, arguing that under the circumstances of the case, the court should deny the claim for elective share or reduce the claim to the value of the trust interest given. Here, the illustrative support trust should be easily defensible, and the special needs trust income interest will offset any elective share granted, and the discretionary

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special needs principal distribution would be lost forever to the ill surviving spouse if any elective share was allowed.

2. Accept the elective share claim, reduce the surviving spouse’s interest in the corpus of either trust to the income interest only under ORS 114.105(1)(c), valued by the IRS table, and give additional probate assets outright to fill up the elective share. The corpus of the income-only trust can continue to grow for eventual distribution to the other heirs.

An elective share trust permits either defensive strategy, substantially reducing the risk to the estate from the claims of a surviving spouse.

If the personal representative chooses to resist a Medicaid-driven election, the estate notifies the spouse and the spouse's court-appointed representative, if any, and seeks a hearing before the probate court in the estate administration matter.

If the state seeks appointment of a conservator for the purpose of making the elective share claim, the notified relatives can also file an objection to appointment of the state nominee. Perhaps the estate and relatives would seek a combined hearing in the probate and conservatorship courts on the issue of whether an election is in the best interests of the surviving spouse, as well as on the statutory prerequisites to an elective share claim by a conservator.

A conservator may successfully elect against the will only after meeting the requirements of ORS 114.155:

114.155 Election by court or conservator of surviving spouse. An election under ORS 114.105 may be filed on behalf of a financially incapable surviving spouse by a court acting under ORS 125.650 or by the conservator of the estate of the spouse. The court or conservator may elect against the will only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets, whether or not owned by the spouse, available for such support. The election is subject to the approval of the court, with or without notice to other interested persons. [1969 c.591 s.117; 1973 c.823 s.109;

1995 c.664 s.85]

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To meet that standard, a conservator for a surviving spouse must show that the elective share is needed to pay support, taking into account nonprobate property arrangements, and the conservator needs court approval to make the election.

In addition to meeting the requirements of ORS 114.155 above, the court (if acting under the "other protective order" authority of ORS 126.650) and the conservator must show that elective share claim is in the best interests of the protected person, and the conservator must further consider the recommendations of any guardian for the protected person. ORS 125.425(1). Before the state-nominated conservator can successfully assert a claim for the elective share of a separated spouse, the guardian for the ill spouse or other interested persons can petition for a hearing to limit or deny the elective share.

Oregon's elective share law permits a court to deny, or reduce, the elective share of a separated spouse, after considering all of the circumstances of the particular case.

Most surviving spouses receiving Medicaid assistance are in nursing facilities, separated from their community spouses, so this separated spouse limitation on the elective share will apply in most of the institutionalized surviving spouse cases.

114.135 Denial of election or share reduction when decedent and surviving spouse living apart. If the decedent and the surviving spouse were living apart at the time of the death of the decedent, whether or not there was a decree for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court determines reasonable and proper or may grant the full elective share in accordance with the circumstances of the particular case. The court, in deciding what elective share, if any, should be granted, shall consider the length of the marriage, whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other relevant circumstances. [1969 c.591

s.115]

VI. THE FUTURE: STATUTORY PROTECTION AS IN FLORIDA

To provide our clients with an elective share safe harbor, especially in light of likely augmented estate elective share reform, I recommend that senior advocates, and the Elder Law Section in particular, support statutory protection of special needs trusts. 1-17

In 2001, the Florida legislature amended its augmented elective share law, permitting its 30-percent elective share to be satisfied from a devise of 30 percent of the augmented estate to a fully discretionary “qualifying special needs trust” defined as follows: “. . . a trust established for a disabled surviving spouse with court approval before or after a decedent’s death, if commencing on decedent’s death:

“(a) The income and principal are distributable to or for the benefit of the spouse for life in the discretion of one or more trustees less than half of whom are ineligible family trustees. For purposes of this paragraph, ineligible family trustees include the decedent’s grandparents and any descendants of the decedent’s grandparents who are not also descendants of the surviving spouse; and (b) During the spouse’s life, no person other than the spouse has any power to distribute income or principal to anyone but the spouse. “The requirement for court approval shall not apply if the aggregate value of all property in all qualifying special needs trusts for the spouse is less than \$100,000.”

Florida Code 732.2025(8) (2001).

I am encouraged by an unpublished Connecticut decision permitting a testamentary income-only trust to satisfy the elective share (distinguishing the testamentary instrument from the revocable trust instrument) in *Bezzini v. Commissioner of Social Services, supra. See Skindzier v. Commissioner of Social Services*, Unpublished Opinion, 0501376, Connecticut Superior Court, Judicial District of New Britain, at New Britain, decided and filed January 4, 2001. Available on LEXIS. I attach that court decision to these materials as Appendix B.

In Oregon, the issue of the elective share and Medicaid is quite unsettled, with neither explicit statutory protection or case law on point. Private elder law attorneys will develop the case law supporting their planning, slowly and painfully, and seek opportunities (I hope) to participate in elective share law reform.

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APPENDIX A—OREGON SPDS POLICY LETTER

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**APPENDIX B—*SKINDZIER V. COMMISSIONER OF SOCIAL SERVICES*,
UNPUBLISHED OPINION ISSUED JANUARY 4, 2001,
CONNECTICUT SUPERIOR COURT, 2001 CONN. SUPER.**

Victoria Skindzier v. Commissioner of Social Services

0501376

**SUPERIOR COURT OF CONNECTICUT, JUDICIAL
DISTRICT OF NEW BRITAIN, AT NEW BRITAIN**

2001 Conn. Super. LEXIS 12

January 4, 2001, Decided

January 4, 2001, Filed

NOTICE:

[*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE

JUDGES:

Aurigemma, J.

OPINION BY:

Aurigemma

OPINION:

MEMORANDUM OF DECISION

This is an administrative appeal from the decision of the Department of Social Services, which denied the application of the plaintiff, Victoria Skindzier, for Medicaid benefits on the grounds that a testamentary trust which was created pursuant to the Will of the plaintiff's husband was an improper transfer in violation of Medicaid transfer of asset rules. The appeal is filed pursuant to the Uniform Administrative Procedure Act ("UAPA"), *General Statutes §§4-166 et seq. and 4-183*.

On December 31, 1997 Mrs. Skindzier's co-conservators filed an application for medical assistance on behalf of Mrs. Skindzier with the Department of Social Services. Mrs. Skindzier has been disabled for a number of years by both blindness and advanced Alzheimer's disease and needs the care and supervision of a convalescent home in order to survive. Mrs. Skindzier has been institutionalized in a nursing home since June 1995. On July 23, 1998 the application was denied on the basis [*2] of an informal

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opinion from the Attorney General's office that the death of Mrs. Skindzier's husband and the terms of his Will constituted a transfer of assets done for the purpose of qualifying Mrs. Skindzier for medical assistance. Mr. Bernard Skindzier, Victoria Skindzier's spouse, executed a will on March 26, 1996 at a time when he was suffering from prostate cancer which had metastasized. He died two months later on May 20, 1996. Under the terms of Bernard Skindzier's Will, most of his property passed to the trustee of two trusts. The trustee was to pay all net income from the trusts to Mrs. Skindzier. Upon her death, the assets of the trust are to be distributed to various individuals. The amount distributed to the trusts was \$ 675,000.

Mrs. Skindzier's income from Social Security, a pension and testamentary trusts pays a substantial portion, but not all, of her monthly care costs. She has no assets of her own and applied for Medicaid assistance to cover the shortfall.

The court's review of the decision of an administrative agency is highly deferential.

Neri v. Powers, 3 Conn. App. 531, 537, 490 A.2d 528 (1985); see also *General Statutes §4-183(j)*. "Ordinarily, [*3] this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . An agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . It is for the courts, and not administrative

agencies, to expound and apply governing principles of law. . . . *Connecticut Light & Power Co. v. Texas-Ohio Power, Inc.*, 243 Conn. 635, 642–43, 708 A.2d 202 (1998).” (Internal quotation marks omitted.) *Connecticut Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services*, 244 Conn. 378, 389, 709 A.2d 1116 (1998).

The plaintiff is aggrieved by the decision of the Fair Hearing Officer because [*4] she has been denied benefits for a state medical assistance program as a result of the hearing and its findings. Mrs. Skindzier has no access to the principal of the trusts for her benefit; is severely disabled by illness and old age and is unable to work. She has no other means of paying or providing for her essential medical needs other than through state medical assistance. *Water Pollution Control Authority v. Keeney*, 234 Conn. 488, 662 A.2d 124 (1995).

No court of this state has considered whether a testamentary trust created pursuant to a Will constitutes a transfer of assets for the purpose of qualifying for Medicaid. Therefore, under *Connecticut Light & Power Co. v. Texas-Ohio Power, Inc.*, 243 Conn. 635, 642–43, 708 A.2d 202 (1998) and *Connecticut Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services*, 244 Conn. 378, 389, 709 A.2d 1116 (1998), the decision of the Fair Hearing Officer in this case is not entitled to special deference. “The federal Medicaid program was enacted in 1965 as a cooperative federal-state endeavor designed to provide health care to needy individuals. 42 U.S.C. §1396 [*5] et seq.; *Atkins v. Rivera*, 477 U.S. 154, 156, 106 S. Ct. 2456, 91 L. Ed. 2d 131 (1986). The

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program provides federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons. *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784, reh. denied, 448 U.S. 917, 101 S. Ct. 39, 65 L. Ed. 2d 1180 (1980). *Clark v. Commissioner*, 209 Conn. 390, 394, 551 A.2d 729 (1988). States are not required to participate in the program, but once a state chooses to adopt the program it must establish a plan conforming with the requirements of the federal statute. *Id.* Connecticut has elected to participate in the program and has assigned to the department the task of administering the program. General Statutes [Rev. to 1993] §17–134a et seq.”

Matarazzo v. Rowe, 225 Conn. 314, 319, 623 A.2d 470 (1993).

“As originally enacted [the] Medicaid [Act] required participating States to provide medical assistance to categorically needy individuals who received cash payments under one of four welfare programs established elsewhere in the Act. . . . The categorically [*6] needy were persons whom Congress considered especially deserving of public assistance because of family circumstances, age, or disability. States, if they wished, were permitted to offer assistance also to the medically needy—persons lacking the ability to pay for medical expenses, but with incomes [or resources] too large to qualify for categorical assistance. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37, 101 S. Ct. 2633, 69 L. Ed. 2d 460 (1981). [*Matarazzo v. Rowe*, *supra*, 225 Conn. 319.] Connecticut has chosen to cover the medically needy.” (Internal quotation marks omitted.) *Forsyth v. Rowe*, 226 Conn. 818, 823–24, 629 A.2d 379 (1993). The medically needy become eligible for medical assistance by spending their income on medical expenses to such an extent that their net income, after deducting the medical expenses, falls below the income eligibility set

by the state in its plan. See 42 U.S.C. §1396a(2)(17) and *Ahern v. Thomas*, 248 Conn. 708, 714, 733 A.2d 756 (1999).

Federal Medicaid law contains certain provisions to prevent people from transferring their assets for less than fair [*7] value so that they or their spouse can qualify for Medicaid payments. In this case the Commissioner of Social Services claims that the testamentary trust created pursuant to the terms of Mr. Skindzier’s will was a “transfer” made for the purpose of qualifying his spouse, the plaintiff, for Medicaid benefits. The plaintiff argues that federal law specifically exempts trusts created by will from being considered to be such a disqualifying transfer and that neither state, nor federal law requires that a husband provide assets sufficient for his wife’s medical care after he dies. Federal statute sets forth the standard for determining if a disqualifying transfer of assets has taken place:

The State plan must provide that if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance for [nursing facility] services. . . . The look-back date specified in this subparagraph is a date that is 36 months (or in the case of payments from a trust or portions of a trust that are treated as assets disposed of [*8] by the individual pursuant to paragraph (3)(A)(iii) or 3(B)(ii) of subsection (d) of this section, 60 months) before the date specified in clause (ii). [The date specified in clause (ii) is the date the individual is both institutionalized and has applied for medical assistance.] 42 U.S.C.A. §1396p(c)(1).

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Subsection (d) of 42 U.S.C.A. §1396p provides:

(d) Treatment of trust amounts

(1) For purposes of determining an individual’s eligibility for, or amount of, benefit under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.

(2) (A) For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of a trust and if any of the following individuals established such trust *other than by will*:

(i) The individual.

(ii) The individual’s spouse. . . .

(B) In the case of an irrevocable trust—

(ii) any portion of the trust from which, or any [*9] income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was

foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date. Emphasis added. Connecticut Uniform Policy Manual Section 3025.05 defines a transfer of assets as follows:

A. An individual who transfers an asset for the purpose of establishing or maintaining eligibility is ineligible for any program, subject to the provisions of this chapter. The transfer of asset rules set out a number of exceptions to the rule set forth in A above, including Section 3026.10E:

Transfers Made Exclusively for Reasons Other than Qualifying. An individual may transfer an asset without penalty if he or she provides clear and convincing evidence that the transfer was made exclusively for a purpose other than qualifying for assistance. [*10]

The Uniform Policy Manual also provides in Section 3026.15:

1. The Department considers an individual who transfers an asset pursuant to a court order to have made the transfer to comply with the court order, rather than qualify for assistance.

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As used in the foregoing sections, the word “transfer” refers to voluntary, purposeful actions taken by living persons.

The defendant’s position in this appeal is based largely on its justifiable intention to follow the Supreme Court’s admonition in *Forsyth v. Rowe*, 226 Conn. 818, 828–29, 629 A.2d 379 (1993) that the Medicaid system should be preserved for those who are truly financially needy:

Our conclusion reflects the legislative concern that the Medicaid program not be used as an estate planning tool. The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the state. Congress enacted the Medicaid qualifying trust provision as an addition to the “provisions designed to assure that individuals receiving nursing home and other long-term care services under Medicaid are in fact poor and have not [*11] transferred assets that should be used to purchase the needed services before Medicaid benefits are made available.

H. Rep. No. 99–265, 99th Cong., 1st Sess. 71 (1985).

However, the defendant has not pointed to any federal or state law which indicates that a trust set up under a Will was meant to be a disqualifying transfer for Medicaid purposes. This is not surprising because Congress has consistently distinguished between testamentary transfers and inter vivos transfers, thus demonstrating an intention to differentiate between the disposition of assets occurring before and after death. In specifying which trusts will disqualify an applicant for medical assistance (Medicaid Qualifying Trusts), Congress has specifically exempted testamentary trusts, recognizing the difference between assets which pass by Will and those which pass by lifetime gift.

In defining transfer of assets, *42 U.S.C. 1396p(c)(1)*, set forth above on page 5, also defines the look-back date, which is critical in determining whether a potentially disqualifying transfer of assets took place. The definition of the look-back date “. . . is a date that is 36 months (or, in the case of [*12] payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) of subsection (d) of this section, 60 months). . . .” Subsection (d), entitled “Treatment of trust amounts” provides that that subsection applies only to trusts “other than by will.” Emphasis added.

If subsection (d) excludes trusts established by will and if subsection (c) refers to subsection (d) in determining the applicable date for transfer of assets, one reasonable interpretation is that Congress intended to completely exclude testamentary trusts from the transfer of asset section.

The portion of Medicaid law which deals with periods of ineligibility of spouses further reinforces the plaintiff’s argument that Congress did not mean for the Medicaid laws to apply to decedents or their estates. In *42 U.S.C. §1396p(c)(4)* Congress requires apportionment of any period of eligibility between the two spouses. Since a deceased

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person is not eligible for medical assistance, this section reinforces the concept that Congress was not legislating about estates in the transfer of asset rules regarding spouses. A married couple consists [*13] of two living partners in subsection (c) (transfer of assets provision), otherwise, the subsection pertaining to apportionment of eligibility is meaningless or impossible to apply.

The Connecticut legislature has also distinguished dispositions by Will from those by inter vivos trusts for Medicaid purposes. If a person establishes an inter vivos trust for the benefit of himself or his spouse after 1992, and then applies [or his spouse applies] for state assistance within the “look-back period” established by Medicaid law (*42 U.S.C.A. §1396p(c)*), the trust may be dissolved by court order and the trust corpus returned to the settlor of the trust. *Connecticut General Statutes §45a-486*. The legislature could have included testamentary trusts within this framework of disfavored trusts, but chose not to do so, apparently recognizing the distinction between voluntary lifetime gifts and bequests as a result of the involuntary act of dying.

In *Bezzini v. Department of Social Services*, *49 Conn. App. 432*, *715 A.2d 791 (1998)*, the Appellate Court considered a case in which the spouse of the Medicaid applicant had substantial assets and created an [*14] inter vivos trust which had the effect of making those assets unavailable for the applicant’s care. *Bezzini* is important in the context of the present case because the Court differentiated between inter vivos and testamentary trusts in a disqualifying transfer of assets case.

In *Bezzini*, the plaintiff’s spouse, Charles Bezzini, who had been diagnosed with prostate cancer, established a revocable inter vivos trust, naming himself as the sole beneficiary during his lifetime. Charles Bezzini named the couple’s two sons as the trustees and sole beneficiaries of the trust. Unlike the trusts set up by Mr. Skindzier, the *Bezzini* trust contained no provisions for the care and maintenance of the plaintiff.

In *Bezzini* the plaintiff claimed that the inter vivos trust served the same purpose as a Will, transfer of asset rules did not apply to the postmortem distribution of property through a Will, and by analogy they should not apply to the transfer into the inter vivos trust. The Appellate Court held that inter vivos trusts and testamentary trusts were different because testamentary trusts were governed by the state's probate rules including the common law statute of Wills. [*15] In so holding, the Court clearly implied that the Medicaid transfer of asset rules do not apply to post mortem transfers such as the one at issue in this case:

A Will is a unique kind of transfer, with special rules associated with the proper execution and administration thereof. *Barnes v. Viering*, 152 Conn. 243, 246, 206 A.2d 112 (1964); *Crane v. Manchester*, 143 Conn. 498, 500–01, 123 A.2d 752 (1956). The creation of a revocable trust is not a testamentary act and need not conform to the requirements of the common law statute of Wills. *Cramer v. Hartford-Connecticut Trust Co.*, 110 Conn. 22, 33–34, 147 A. 139 (1929).

Under a Will, a spouse need only claim the spousal share if disinherited; see *General Statutes* §§45a–436; *DelVecchio v. DelVecchio*, 146 Conn. 188, 192–93, 148 A.2d 554 (1959). Alternatively, a spouse

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is unable to claim a spousal share against a trust. *Cherniack v. Home National Bank & Trust Co.*, 151 Conn. 367, 370–71, 198 A.2d 58 (1964). . . . We conclude, therefore, that the rules applicable to wills should not be applied to the plaintiff's situation where a revocable trust was [*16] the chosen instrument of the plaintiff's spouse.

49 Conn. App. at 442–43.

As the *Bezzini* court recognized, a Will is a unique kind of transfer, which must be executed and administered in accordance with special rules. In this case the “transfer” occurred by virtue of the terms of Mr. Skindzier's Will after his death. The defendant makes no claim that either the execution or the administration of Mr. Skindzier's Will was not done in accordance with Connecticut probate or estate law.

Connecticut law does not permit a deceased person to continue to own property.

The statutes of this state set forth a procedure for the orderly transfer of a deceased person's assets either according to his Will or the laws of intestacy. See e.g., *Connecticut General Statutes* §§45a–273, et seq. Under the laws of this state competent testators are free to leave their property as they wish, subject only to the limitations of a spousal elective share and a family allowance. *Connecticut General Statutes* §§45a–320, 45a–321, 45a–436.

There is no dispute that in this case after the death of Mr. Skindzier the proper procedures set forth under the probate statutes were followed. Mr. Skindzier's [*17] medical and other bills were paid during the administration of the estate, and his surviving spouse was granted a family allowance pursuant to §45a–320 of \$ 30,000 during the administration of the estate. An attorney

was appointed by the court to protect Mrs. Skindzier's interest during estate administration while new conservators were appointed to replace the deceased Mr. Skindzier.

Both the court appointed attorney and the conservators could have filed an election against Mr. Skindzier's Will under the terms of §45a-436(a), which provides: (a) On the death of a spouse, the surviving spouse may elect, as provided in subsection (c) of this section, to take a statutory share of the real and personal property passing under the Will of the deceased spouse. The "statutory share" means a life estate of onethird in value of all the property passing under the Will, real and personal, legally or equitably owned by the deceased spouse at the time of his or her death, after the payment of all debts and charges against the estate. The right to such third shall not be defeated by any disposition of the property by Will to other parties.

They did not elect against Mr. Skindzier's [*18] estate because Mrs. Skindzier received much more income under the terms of Mr. Skindzier's will than she would have had she elected her statutory share under §45a-436(a). However, for the purposes of this case, it was their ability to elect against the estate, rather than the actual election, which is significant.

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The *Bezzini* court specifically recognized the ability to elect a statutory share under the probate laws of this state as a distinction between an inter vivos trust of which the spouse is not a beneficiary, and a Will under which the spouse is disinherited. In the former case the spouse has no statutory remedy or ability to reach any of her spouse's assets, while in the later case, a spouse can reach some portion of those assets, that is, the spousal elective share. *49 Conn. App. at 442-43.*

The plaintiff argues that labeling the testamentary trust a disqualifying transfer here is tantamount to federal preemption of the law of Wills, an area traditionally left to the states. The defendant admits that federal law has not preempted this state's law of Wills. He further states that the "Department is merely applying Medicaid rules to the Skindziers." Brief of [*19] Defendant Commissioner of Social Services, p. 8.

Notwithstanding the foregoing assertion, application of the Medicaid rules to Mr. Skindzier's testamentary transfer as the Commissioner has done is untenable absent federal preemption of this state's law of Wills. There simply is no requirement in the state of Connecticut that a decedent leave any amount to provide for the care of a spouse.

The similarity between the ultimate effect of the trust in *Bezzini* and the trusts in the present case have apparently caused the Commissioner to downplay, if not completely ignore, the significant distinction between ante mortem and post mortem transfers of assets. Other than the fact that Mr. Skindzier attempted to provide income to care for his ailing wife, while Mr. *Bezzini* did not, there is no practical difference between the effect of the inter vivos trust in *Bezzini*, and the testamentary trusts in this case. Both trusts passed assets to persons other than the spouse of the settlor/testator.

The time of the transfer in relation to the death of the transferor creates the crucial distinction between the *Bezzini* case and this case. In *Bezzini* the trust was created before the settlor's [*20]

death, but only became irrevocable after his death. *49 Conn. App. at 440*. In this case the trust was not created until after Mr. Skindzier died. Upon his death, Mr. Skindzier was not required to leave any amount to his spouse in his Will or otherwise provide for his spouse after his death.

It is an unfortunate irony that if Mr. Skindzier had not used the vehicle of a testamentary trust to provide for the care of his spouse, but had instead disinherited her completely, his actions would have appeared less like those prohibited in *Bezzini* and Mrs. Skindzier's application might have been granted.

For the reasons set forth above, the court finds that the plaintiff has been prejudiced because the administrative decision was in violation of statutory provisions in that the disposition of Mr. Skindzier's assets under a testamentary trust was not a disqualifying transfer under state or federal Medicaid law. The appeal is, therefore, sustained.

The plaintiff has asked this court to use its discretion to award attorneys fees under *Connecticut General Statutes §4-184a(b)* because the agency acted "without any substantial justification." "Substantial Justification" connotes [*21] reasonableness or a reasonable basis in law or fact. *Burinskas v. Department of Social Services, 240 Conn. 141, 156, 691 A.2d 586 (1997)*. It is a "demanding standard" which has been construed to mean "entirely unreasonable or without any reasonable basis in law or fact." *Id.* Even

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though the agency's practice was found to be contrary to the relevant legislation, its action was not unreasonable or without basis in law or fact so as to subject it to attorneys fees. *Connecticut Ass'n of Not-for-Profit Providers for the Aging v. Department of Social Services, 244 Conn. 378, 401, 709 A.2d 1116 (1998)*.

The plaintiff herself likened the federal Medicaid laws to a "Serbonian bog." See Reply Brief to the Brief of the Defendant Commissioner of Social Services, p. 1, citing *O'Callaghan v. Commissioner of Social Services, 53 Conn. App. 191, 194, 729 A.2d 800 (1999)* and *Ross v. Giardi, 237 Conn. 550, 554, 680 A.2d 113 [fn. 4] (1996)*. In light of the murky nature of federal Medicaid law the court cannot say that the Commissioner's position in this case was without any reasonable basis in law. The court declines to award [*22] the plaintiff attorneys fees under §4-184a(b).

By the court

Aurigemma, J.

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APPENDIX C—ILLUSTRATIVE FORM OF ELECTIVE

SHARE TRUST—FULL SUPPORT TRUST

Form of Full Support Right of Election Trust

(Drafted in Light of Oregon Law)

DISCLAIMER: The following form is not warranted as suitable except to illustrate concepts discussed in this article, and it may not be appropriate for any general or specific use. The user is responsible for determining how the form should be adapted to any particular situation. [Begin with the Vollmar form wills from Basic Estate Planning (1998). Choose one of the wills with a trust, as Professor Vollmar's forms include good basic trust powers and authority. In this illustrate form of elective share trust, the author places the text of the trust in Article 3. The author assumes the drafter will include all of the trustee and trust administration language from a Vollmar form to complete the document.]

ARTICLE 3

SPECIFIC GIFTS AND SPECIAL DIRECTIONS

3.1 Tangible Personal Property. I give any interest I have in household goods and furnishings, personal vehicles, recreational equipment, clothing, jewelry, personal effects, and other tangible personal property for personal or household use, together with any insurance on this property, in substantially equal shares to my daughters who survive me, to be divided among them as they may agree, and if they do not agree, as my personal representative determines in his or her sole and absolute discretion. I may leave a letter of instructions to guide my personal representative, but understand that such a letter is not legally binding.

3.2 [Thomas Petty] Testamentary Trust. If my husband survives me, I give to my trustee, in trust, for the benefit of **[Thomas Petty]**, one-fourth of the value of my net estate reduced by the value of the following property:

(a) Other property given under this will, and

(b) The property not passing under the will but received by **[Thomas Petty]** on account of my death in any form of ownership with right of survivorship, including life estates, life insurance, life estates, employment plan death benefits, annuities, retirement funds, and jointly held or tenancy by the entireties real and personal property.

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3.3 Distributions. My trustee shall administer this share of the net estate funds for the benefit of my disabled husband, **[Thomas Petty]**, as a full support trust. The trust may be known as the **[Thomas Petty] Testamentary Trust**, for the care, maintenance, support, and education of **[Thomas Petty]** for his lifetime, to be administered and distributed as follows.

(a) Income. My trustee shall distribute all the net income of the trust to or for the benefit of my spouse in quarterly or more frequent installments.

(b) Principal. In addition, my trustee shall distribute to or for the benefit of my spouse such portions of principal as my trustee deems necessary for my spouse's health, education, support, and maintenance to enable my spouse to maintain the standard of living which my spouse maintained in my lifetime, and which provides my spouse in the event of disability with dignity and care appropriate to my spouse's needs.

(c) Distribution at Spouse's Death. At my spouse's death, my trustee shall distribute all of the remaining trust property in equal shares to my two daughters, one share for each child who survives me, and one share by right of representation for the then surviving descendants of each child who does not survive me.

NOTES: In this illustration, the client's plan reduces the value of the elective share testamentary trust by the value of survivorship property, *especially* useful if the client does not want, or is not able, to remove the ill spouse's name from other nonprobate assets. The probate provision for the surviving spouse may be only a small part of the total assets passing (probate and nonprobate) to the ill spouse.

The lawyer is planning in an uncertain environment. The married client in a health crisis may not know all of the assets and forms of ownership involved. The elective share law is likely to change, making the augmented estate subject to a claim. The upper cap limit of the elective share law is a very confusing calculation, considering all sorts of property interests passing onprobate.

Direct offset of the probate share by the nonprobate assets, dollar for dollar, is the clearest way to have the personal representative in control of the process postmortem in an uncertain legal environment.

This illustrative trust permits the personal representative to do a direct offset dollar for dollar for nonprobate property. Where a mandatory full support trust is used for the elective share, this approach should cause little concern for the state. The Medicaid recipient leaves the program after receiving the nonprobate assets or the full support trust, and spends down as expected. However,

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someone claiming the elective share might want the probate share plus the survivorship assets up to the 50-percent cap in today's elective share law.

Perhaps another member of the Oregon Elder Law Section can offer a drafting solution to that problem, but that problem is not solved here. This is an unsettled area of the law.

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NOTES

APPENDIX D—ILLUSTRATIVE FORM OF ELECTIVE

SHARE TRUST—SPECIAL NEEDS TRUST

Form of Special Needs Right of Election Trust

(Drafted in Light of Oregon Law)

DISCLAIMER: The following form is not warranted as suitable except to illustrate concepts discussed in this article, and it may not be appropriate for any general or specific use. The user is responsible for determining how the form should be adapted to any particular situation. [Using the Vollmar Basic Estate Planning (1998) form approach to wills, this illustration directs creation of a special needs elective share trust in Article 3 and sets out SNT-specific trust administration directions in Articles 6 and 7. If the will with trust form used in your law office includes other trust administration provisions (as the Vollmar will with trust forms all do), keep those general provisions as usual but the author recommends adding *all* of the Articles 6 and 7 as well.]

ARTICLE 3

SPECIFIC GIFTS AND SPECIAL DIRECTIONS

3.1 Tangible Personal Property. I give any interest I have in household goods and furnishings, personal vehicles, recreational equipment, clothing, jewelry, personal effects, and other tangible personal property for personal or household use, together with any insurance on this property, in substantially equal shares to my daughters who survive me, to be divided among them as they may agree, and if they do not agree, as my personal representative determines in his or her sole and absolute discretion. I may leave a letter of instructions to guide my personal representative, but understand that such a letter is not legally binding.

3.2 [Richard Mills] Testamentary Special Needs Trust. If my husband survives me, I give to my trustee, in trust, for the benefit of **[Richard Mills]**, one-fourth of the value of my net estate reduced by the value of the following property:

(a) Other property given under this will, and

(b) The property not passing under the will but received by **[Richard Mills]** on account of my death in any form of ownership with right of survivorship, including life estates, life insurance, job-related death benefits, annuities, retirement funds, and jointly held or tenancy by the entirety real and personal property.

NOTE: *The personal representative may, as in this draft, reduce the value of the elective share by the survivorship transfers outside of probate, dollar for dollar. This gives the personal representative control over the plan, and moves the issues to one of valuation of the probate and*

nonprobate assets. In many elder law situations, although attempts are made to place most assets into the name of the community spouse at the time the institutionalized spouse goes on Medicaid, some assets (especially beneficiary designation sorts of assets such as IRAs, pension rights, life insurance, and a joint account) will pass to the Medicaid recipient spouse at death. These sums passing at death outside of probate can limit the elective share amount in Oregon. ORS 114.105(1); ORS 114.125.

My trustee shall administer this share of the net estate funds for the benefit of my disabled husband, **[Richard Mills]**, for the spouse's special needs, as a supplement to any public or private benefits which might be available to meet the basic needs of **[Richard Mills]**, according to the purposes and plan set forth in **Article 6** and **Article 7** below. The trust may be known as the **[Richard Mills] Testamentary Special Needs Trust** and shall be administered as set forth below. [Then, later in the will, after the usual provisions, this illustration shows administrative articles devoted solely to the SNT.]

ARTICLE 6

[RICHARD MILLS] SPECIAL NEEDS TESTAMENTARY TRUST The funds distributed under this will to my trustee for the benefit of **[Richard Mills]** shall be held and administered as follows.

6.1 Purposes of Trust. In carrying out the provisions of this trust, the trustee shall be mindful of the probable future special and supplemental needs of the beneficiary, but not of the remainder beneficiaries. I intend that the trustee increases the choices available to the beneficiary so that the comfort and personal dignity of **[Richard Mills]** are enhanced by trust expenditures.

NOTE: This sample form of SNT is not a parking lot for assets, to preserve them for the children. If your client wants a parking lot, you should not include Article 6.1 or Article 6.6 below. My clients seem to want the trust used for the ill spouse; I want to be able to argue that the SNT will benefit the elder more than a cash-out spend-down of the inheritance by the state's nominated conservator in an elective share fight.

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6.2 Distribution.

(a) Income. My trustee shall distribute all the net income of the trust to or for the benefit of my spouse in quarterly or more frequent installments.

NOTE: The mandatory income distribution is designed to meet Oregon's elective share statute permitting offset against the elective share for the value of present interests including a trust income interest. ORS 114.105(1)(c). Because the trust income to a Medicaid recipient might cause his/her total income to exceed the state monthly income limit for Medicaid benefits, the trust might trigger the need for an income cap trust. Should the ill spouse be in the community (i.e., not receiving long-term care Medicaid) and receive SSI-linked Medicaid, then the

mandatory income interest trust should be avoided completely to prevent disqualifying that spouse from the critical program.

It is much harder to plan for the spouse receiving SSI community-based Medicaid, and that planning is beyond the scope of this article.

(b) Principal. In addition, my trustee may distribute for the benefit of my spouse such portions of the principal as my trustee may determine, from time to time and in the exercise of the trustee's sole, absolute, and unfettered discretion, to supplement any governmental or private programs for which the beneficiary may be eligible.

NOTE: Because of Ohio's peculiar statute and administrative code provisions, the entire corpus of this form of discretionary special needs trust will be deemed an available resource. *See* Ohio Rev Code §1339.51(D)(4) (2000). This form of discretionary special needs trust will disqualify the beneficiary for the Ohio Medicaid program. In Ohio, the trust distribution clause must contain explicit exclusionary language barring distributions that affect the beneficiary's eligibility for Medicaid benefits. *See Metz v. Ohio Department of Human Services*, Ohio Court of Appeals for Ottawa County, No. OT-00-048, decided 8/17/01; *Carnahan v. Ohio Department of Human Services* (139 Ohio App 3d 214 (2000)). I ask the Trustee to make reasonable efforts to avoid making principal distributions that supplant services, benefits, or medical care otherwise available to the Beneficiary from governmental or private sources, or both, unless the trustee has determined in his sole, absolute, and unfettered discretion that the benefit to the Beneficiary from the particular trust distribution outweighs the reduction in

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a particular public benefit program that may be a consequence of the trust distribution.

NOTE: This discretionary language used in this trust illustration is one of six trust distribution standards reviewed in the author's article on SNT distribution standards in the *NAELA Quarterly*, which is due out about the same time as this Oregon State Bar presentation, in October 2001. The author suggests this form of discretionary principal distribution language in this elective share trust because its broad discretion supports the argument that the discretionary principal SNT has high value to the ill surviving spouse receiving Medicaid.

6.3 Illustrative Principal Distributions. This trust is not intended to be a countable resource of the beneficiary, and is not available to the beneficiary. It is intended that a spendthrift trust be created for nonsupport purposes, and the following are the sorts of items might be appropriate discretionary principal distributions:

- Dental care and treatment ;
- Education related to disability or services, including attendance at conferences and meetings;
- Medical treatment, drugs and therapies not covered by private health plans or public coverage, or subject to such access and delay problems as to make the item practically unavailable;

- Psychological support services for beneficiary or care providers;
- Recreation and transportation—beneficiary and companion;
- Differentials in costs between housing and shelter for shared and private rooms;
- Supplemental nursing care and similar care that public assistance programs may not otherwise provide, including payments to those providing services in the home;
- Telephone, communication, and television services;
- Mechanical bed or other furniture with therapeutic potential;
- Periodic outings and vacations;
- Companions' expenses for travel, reading, driving, and recreation or cultural experiences;
- Hair and nail care;
- Private rehabilitative training;
- Payments to bring in family and friends for visitation if the trustee deems that appropriate and reasonable;
- Private case management to assist the beneficiary or to aid the trustee;
- Medication, drugs or treatment prescribed by a physician or other healing art practitioner, for which there are not other funds available;

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- Fees and costs for protective proceedings or criminal proceedings;
- More sophisticated medical, dental or diagnostic treatment, including experimental treatment, for which there are not funds otherwise available (for example, the treatment may not be deemed “medically necessary” by the medical care review mechanisms in public or private benefit/insurance systems).

6.4 Purchase of Exempt Assets and Transfer to Beneficiary. The trustee may make discretionary principal distributions to purchase items for the use of the beneficiary that would be considered “exempt” assets for purposes of public benefit law, such as personal household items, transportation devices, medical equipment, or a home. The trustee may, in his or her sole and absolute discretion, distribute such exempt items to the beneficiary. Once distributed, such items are free of trust and the trustee need not account for them; the trustee must report such distributions in the following regular accounting.

6.5 Authority to Initiate Proceedings for Eligibility. In determining whether the existence of this trust has the effect of rendering the beneficiary ineligible for any program of public benefit, the trustee is hereby granted full and complete discretion to initiate action to render the beneficiary eligible for any such program or public benefit, and is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility. All costs relating thereto, including reasonable attorney fees, shall be charged to the trust. The trustee is directed to defend, at the expense of the trust estate, all contest or attacks of any nature against the trust, and the trustee has authority to settle or compromise such claims if the settlement terms are consistent with the trustor's intent.

The trustee may cooperate with any guardian, conservator, or authorized representative of the beneficiary to seek support from all available resources, including but not limited to public programs and private programs, if the trustee determines that the guardian or authorized representative is acting so as to effect the intent of the trustor. Any expense of the trustee, including reasonable attorney fees, shall be a proper charge to the trust.

6.6 Preferential Rights of Beneficiary. The supplemental needs of the beneficiary, if such can be met within the terms of this trust, are preferred to the rights of any remainder beneficiary. The trustee may distribute all principal of the trust, leaving nothing for remainder beneficiaries, in order to accomplish the trust purposes.

6.7 Trust Not Available for Support of Dependents. The trustee shall in no event make distributions for the support of any dependents of the disabled beneficiary.

6.8 Nonassignment/Spendthrift. No interest in the principal or income of this trust shall be anticipated, assigned, or encumbered, or be subject to any creditor's claim or to legal process. Furthermore, because this trust is to be conserved and maintained entirely for the special needs of the beneficiary, no part of the corpus hereof, nor

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principal, nor undistributed income, shall be subject to the claims of voluntary or involuntary creditors for the provision of care and services including residential care, by any private or public entity, office, department, or agency of any state, or of the United States or any other governmental agency. No beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner anticipate or dispose of his or her interest in the trust or the income produced thereby, prior to its actual distribution by the trustee for the benefit of the beneficiary in the manner authorized by this agreement. No beneficiary shall have any assignable interest in any trust created under this agreement or in the income therefrom. Neither the principal nor the income shall be liable for any debts of the beneficiary. The limitations herein shall not restrict the exercise of any power of appointment or disclaimer.

6.9 New York Residency. Should the beneficiary live in the state of New York, or in a state with restrictions on trusts such as New York, then I direct that the provisions of Section 7-1.6 of the Estates, Powers and Trusts Law of the State of New York, or any similar or successor statute thereto, shall not be available to require any invasion of trust funds by the trustee or any court.

NOTE: Avoid cross-state planning without consultation with an attorney in the states where the children might move the elder, or where the elder intends to retire. The trust drafted for Oregon might not work in other states, and elder law attorneys are forced to reform or modify or amend trusts to fit the particular state law.

ARTICLE 7

SPECIAL NEEDS TESTAMENTARY TRUST ADMINISTRATION

7.1 Resignation of Trustee. The trustee may resign the trusteeship at any time. Any resignation shall be in writing and shall become effective only upon written acceptance of the office of trustee by a successor trustee.

7.2 Transfer to Successor Trustee. Upon acceptance of the trustee's office in writing, a successor trustee shall succeed to all rights, powers, and duties of the trustee. All right, title, and interest in the trust property shall then vest in the successor trustee.

The prior trustee shall execute any documents necessary or deemed advisable by the successor trustee to acknowledge transfer of the existing trust property to the successor trustee and shall immediately transfer any property in his or her possession to the successor trustee without warranty. A successor trustee shall not have any duty to examine the records or actions of any former trustee and shall not be liable for the consequences of any act or failure to act of any former trustee.

7.3 No Bond Required. No bond or other undertaking shall be required of any individual trustee of any trust. However, should a court of competent jurisdiction determine, upon the application of any interested person, that it is contrary to the best

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interests of the beneficiary for the trustee not to be bonded, then the trustee shall, as a trust expense, be bonded in such amounts as the court shall determine.

7.4 Accounting. The trustee shall furnish at least once a year to the beneficiary, the beneficiary's guardian and conservator, if any, and to the next nominated successor trustee a statement of account showing in detail all receipts, disbursements, investment transactions, distributions of both principal and income since the last statement of account, and an inventory of current trust assets. The statement of account shall be deemed to have been furnished to the person entitled thereto when it has been placed in the United States mail addressed to that person at the person's last known address even if that person is under a legal disability. Copies of documents evidencing ownership of assets in the name of the trust, and a copy of the most recent trust tax return, shall be attached to the accounting.

7.5 Indemnification. The trustee may require indemnification to the trustee's satisfaction at the cost of the trust, before accepting the trust or taking any step authorized hereunder.

7.6 Rule Against Perpetuities. Despite any other provision of this instrument, each trust created by this instrument shall terminate and be distributed to the persons then entitled to distribution according to its terms, in the manner and proportions stated in this instrument (or, if not stated, then equally) and regardless of their ages, not later than 21 years after the death of the last survivor of my descendants living at my death.

7.7 Trustee Protection So Long as Trustee Acts in Good Faith. In administration of the special needs trust, trustor recognizes that the trustee is not licensed or skilled in all possibly relevant fields including medicine, social services, investment management, and public benefits law. The trustee may seek the counsel and assistance of experts, at the cost of the trust, and of the beneficiary's guardian or conservator, if any, and any state and local agencies that have been established to assist the disabled or disabled in similar circumstances as the beneficiary. The trustee may use these resources to aid the beneficiary, or the beneficiary's guardian or conservator, as appropriate, in identifying programs that may be of social, financial, or developmental assistance to the beneficiary. However, the trustee shall not in any event be liable to the beneficiary, the remainder beneficiaries of the trust, or any other party for the trustee's acts so long as the trustee acts in good faith. For example, the trustee and the beneficiary's guardian or conservator, if any, shall not be liable for the failure to identify each program or resource that might be available to the beneficiary because of disability.

7.8 No Commingling of Assets. Public assistance benefits of any beneficiary of this trust shall not be commingled with trust assets but shall be separately held by the trustee, should the trustee be a payee or the recipient of those benefits. Nothing in this

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provision shall be construed to require the addition to the trust estate of public assistance benefits received by, or on behalf of, the beneficiary.

7.9 Trustee Decision Final. Under no circumstances can any beneficiary compel a distribution from the trust for any purpose. The trustee's discretion in choosing among particular nonsupport principal disbursements is final as to all interested parties, even if the trustee elects to make no disbursements of principal at all. The trustee's sole and independent judgment, rather than any other person's determination, is intended to be the criterion by which disbursements are made. No judge or any other person should substitute judgment for the judgment of the trustee.

7.10 Termination. Unless sooner terminated as described below, the trust shall terminate upon the death of the beneficiary.

(a) Termination of Trust Based on Administrative Cost. If the trustee shall determine, in the trustee's sole and absolute discretion, that the market value of the trust is so small compared to the costs of administration that continuing the trust will defeat or substantially impair its purposes, the trustee may terminate the trust and distribute the remainder of the trust property including any accrued and undistributed net income outright as though the beneficiary had died.

(b) Termination upon Ineligibility of Beneficiary. In the event the existence of this trust for special and supplemental needs of [Richard Mills] in any respect has the effect of rendering the

beneficiary ineligible for Medicaid or any other benefit or entitlement provided by any public agency, office or department of the State of Oregon, or any other State of the United States or of the Federal Government, the trustee is directed to *terminate this trust*, and the undistributed balance of the trust estate shall be distributed in the same manner as if the beneficiary had died.

(1) It is the trustor's wish that thereupon the distributees shall conserve, manage, and distribute the proceeds of the former trust estate for the benefit of the beneficiary, but this request pertaining to management of trust proceeds and trust distribution after the termination of the trust is precatory, not mandatory.

(2) In determining whether the existence of the trust or trustee's powers has the effect of rendering said beneficiary ineligible for any state or federal public benefit, the trustee is hereby granted full and complete discretion to initiate either administrative or judicial proceedings, or both, for the purpose of determining eligibility, and all costs relating thereto, including reasonable attorney fees, shall be a proper charge to the trust estate.

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7.11 Distribution upon Termination. Upon termination of the trust, the trust shall be divided into equal shares, one share for each child of mine who is then living and one share for the then-surviving lineal descendants of each deceased child. (a) A share established for a surviving child of mine shall be distributed forthwith to the child.

(b) If a child has died before termination, leaving lineal descendants, the deceased child's share shall be distributed by right of representation to his or her then-surviving descendants

7.12 General Trustee Powers. The trustee shall have all powers permitted by Oregon law to trustees, except where the exercise of such powers will conflict with the trust purposes or with the special administrative powers or restrictions of this special needs trust.

7.13 Trust Amendment. I grant the trustee the power to amend this Trust Agreement to ensure that my purposes are met and that this trust is not considered a resource or income so as to disqualify the beneficiary from state or federal assistance. The trustee may not, however, alter the remainder beneficiaries of the trust. If the trust cannot be modified or amended so that its existence does not disqualify the beneficiary from public benefits, then the trustee shall terminate the trust as if the beneficiary had died.

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APPENDIX E—OREGON ELECTIVE SHARE STATUTE

Oregon Law on Elective Share—September 2001

ELECTIVE SHARE OF SURVIVING SPOUSE

114.105 Right to elective share; effect of election. (1) If a decedent is domiciled in this state at the time of death and dies testate, the surviving spouse of the decedent has a right to elect to take

the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent, but the elective share shall be reduced by the value of the following property given to the surviving spouse under the will of the decedent:

(a) Property given outright;

(b) The present value of legal life estates; and

(c) The present value of the right of the surviving spouse to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will that is capable of valuation with reasonable certainty without regard to the powers forfeited under subsection (2) of this section.

(2) Except as to property applied under subsection (1) of this section to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, the spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in subsection (4) of this section and the testator has not provided otherwise, but the spouse forfeits any general power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under subsection (1)(c) of this section, or to apply additional principal or income in behalf of the electing spouse, may not be exercised in favor of the electing spouse.

(3) The right to elect may be barred under ORS 114.115, the share limited by ORS 114.125 or the right denied or the share reduced under ORS 114.135.

(4) A general power of appointment is one that the donee may exercise in favor of the donee, the estate of the donee, the creditors of the donee or the creditors of the estate of the donee, during lifetime or at death, and includes one under which the donee may convey or transfer ownership of the property to whomever the donee may choose. A power to consume, invade or appropriate property for the benefit of the donee that is limited by an ascertainable standard relating to the health, education, support or maintenance of the donee shall not be deemed a general power of appointment. [1969

c.591 s.112; 1997 c.99 s.22]

114.110 [Repealed by 1969 c.591 s.305]

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114.115 Election barred by agreement. The right of the surviving spouse to elect under ORS 114.105 may be barred by the terms of a written agreement signed by both spouses. The agreement may be entered into before or after marriage. [1969 c.591 s.113]

114.120 [Repealed by 1969 c.591 s.305]

114.125 Elective share limited by total property received. (1) The surviving spouse may not receive by election under ORS 114.105 any amount which, together with any of the following

property received by the surviving spouse, exceeds one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of the property:

- (a) The property passing under the will;
 - (b) Joint annuities furnished by the decedent;
 - (c) Proceeds of insurance on the life of the decedent, whether or not the decedent had any of the incidents of ownership at the death of the decedent ;
 - (d) Transfers by the decedent within three years before the date of death, to the extent the decedent did not receive full consideration in money or money's worth;
 - (e) Transfers by the decedent during the lifetime of the decedent as to which the decedent retained power, alone or in conjunction with any other person, to alter, amend, revoke or terminate or to designate a beneficiary;
 - (f) Payments from the employer of the decedent or from a plan created by the employer or under a contract between the decedent and the employer of the decedent, excluding workers' compensation and social security payments;
 - (g) Property appointed by the decedent by will or by deed executed within three years before the date of death, whether the power is general or special, but only if the property is effectively appointed in favor of the surviving spouse; and
 - (h) Property in the joint names of the decedent and one or more other persons, except such proportion as is attributable to consideration furnished by persons other than the decedent.
- (2) For the purpose of subsection (1) of this section, the surviving spouse is considered to receive :
- (a) Any property as to which the spouse is given all the income and a general power to appoint the principal.
 - (b) Life insurance proceeds settled by the decedent on option, if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or installments of the entire principal and interest for any period equal to or less than the normal life expectancy of the spouse.
- (3) As used in subsection (1) of this section, property in the joint names means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor; stocks, bonds or bank accounts in the name of two or more persons payable to the survivor; United States Government bonds in coownership form or payable on death to a designated person; and shares in

credit unions or savings and loan associations payable on death to a designated person or in joint form. [1969 c.591 s.114]

114.130 [Amended by 1955 c.266 s.1; 1965 c.506 s.1; repealed by 1969 c.591 s.305]

114.135 Denial of election or share reduction when decedent and surviving spouse living apart. If the decedent and the surviving spouse were living apart at the time of the death of the decedent, whether or not there was a decree for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court determines reasonable and proper or may grant the full elective share in accordance with the circumstances of the particular case. The court, in deciding what elective share, if any, should be granted, shall consider the length of the marriage, whether the marriage was a first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent in the form of services or transfers of property, the length and cause of the separation and any other relevant circumstances.

[1969 c.591 s.115]

114.140 [Repealed by 1969 c.591 s.305]

114.145 What constitutes election. The surviving spouse is considered to have elected to take under the will unless, within 90 days after the date of the admission of the will to probate or 30 days after the date of the filing of the inventory, whichever is later, the surviving spouse serves on the personal representative or the attorney of the personal representative and files in the estate proceeding a statement that the surviving spouse elects to take under ORS 114.105 instead of under the will. The surviving spouse may bar any right to take under ORS 114.105 by filing in the estate proceeding a writing, signed by the spouse, electing to take under the will. [1969 c.591 s.116]

114.150 [Repealed by 1969 c.591 s.305]

114.155 Election by court or conservator of surviving spouse. An election under ORS 114.105 may be filed on behalf of a financially incapable surviving spouse by court acting under ORS 125.650 or by the conservator of the estate of the spouse. The court or conservator may elect against the will only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets, whether or not owned by the spouse, available for such support. The election is subject to the approval of the court, with or without notice to other interested persons. [1969 c.591 s.117; 1973 c.823

s.109; 1995 c.664 s.85]

114.165 Payment of elective share. Estate property shall be applied in satisfaction of the elective share in the following order, unless the will provides otherwise:

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(1) Any intestate property;

(2) After the intestate property is exhausted, each devisee shall contribute ratably to the elective share out of the portion of the estate passing to the devisee under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible. [1969 c.591 s.118]

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NOTES

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