ELDER LAW DEVELOPMENTS

Wednesday, September 24, 2014
10:45 a.m.
ICLEF
36th Annual Judge Robert H. Staton
Indiana Law Update
Indiana Convention Center
500 Ballroom
100 S. Capitol Avenue
Indianapolis, Indiana 46225

BY

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I. Changes to the Indiana Medicaid Program.

A. Indiana no longer a § 209(b) state effective June 1, 2014.

1. Medicaid is a cooperative program involving both the federal and state governments which share costs and responsibility.

2. When Congress enacted the Supplemental Security Income (SSI) Program in 1972, it allowed states the option to provide Medicaid to everyone receiving SSI (called an "SSI State") or to not provide Medicaid to everyone eligible to receive SSI (commonly referred to as the § 209(b) option).

   a. Under the § 209(b) option, a state could elect to provide Medicaid assistance to just those individuals who met the eligibility requirements for state-administered programs on January 1, 1972 rather than providing Medicaid to every person receiving SSI benefits.

   b. Indiana was one of 11 § 209(b) states.

3. A § 209(b) state can have rules which are more restrictive than the rules for SSI, but cannot be more restrictive than the rules which were in effect in that state on January 1, 1972.

4. Some Indiana rules were a little more restrictive than SSI rules, but Indiana did have less restrictive rules for real estate.

   a. In Indiana, there is no limit on the amount of real estate one may have as long as it is producing at least some positive return, while for SSI, income producing real estate is exempt only if it has equity value of less than $6,000 and produces at least six percent income.

b. In Indiana, real estate is not counted as long as one is attempting to sell or rent it.

B. Beginning June 1, 2014, Indiana became an SSI state.

1. It entered into an agreement under § 1634 of the Social Security Act, allowing the Social Security Administration to determine eligibility for Indiana Medicaid (called a Section 1634 Agreement).

2. Although Indiana did not adopt Medicaid expansion under the Patient Protection and Affordable Care Act (ACA), Public Law 111-148, it is proceeding with other Medicaid changes based on health insurance subsidies through the federal Marketplace.

a. This will allow Indiana to eliminate its spend down system.

b. Requires persons with income over 100 percent of the federal poverty line (FPL) to purchase insurance through the Marketplace.

3. Persons with income between 100 percent and 400 percent FPL will receive subsidies to assist them with the purchase of health insurance under the ACA.

4. Changes from Indiana's conversion to an SSI state:

a. Persons receiving SSI will automatically qualify for Medicaid.

b. SSA decisions on disability are binding for Medicaid.

c. The income spend down system has been eliminated.

d. Persons below 100 percent FPL will qualify for Medicaid with no spend down.

e. Those above 100 percent FPL will be ineligible for Medicaid, unless institutionalized or eligible under a Medicaid Waiver.

f. Persons in an institution (nursing home or hospital) and persons on a Waiver are subject to an income eligibility test of 300 percent of FPL, which is $2,163 in 2014. This is called the “special income level” (“SIL”). Persons with gross income above the SIL must have a qualified income trust (sometimes referred to as a Miller trust) to be eligible.

g. Persons with severe mental illness who have income less than 300 percent FPL can qualify for full Medicaid under a new Behavioral and Primary Health Care Coordination (BPHC) Program (this is a new Medicaid rehabilitation option available to persons who meet certain needs-based criteria).

5. A “dual eligible” (i.e., a person with both Medicare and Medicaid) who has income above 100 percent FPL will lose spend down coverage, but the income limits are being raised for the Medicare Savings Programs (sometimes referred to as “Medicare Buy-In Programs”).

a. The income limit for QMB (which pays the co-pays and deductibles for Medicare-covered services that Medicare does not pay) will increase to 150 percent FPL.

b. The income limit for SLMB/Q1 (the only benefit available is payment of the Medicare Part B premium) will rise to 185 percent FPL.

c. Persons with income above 185 percent FPL will not be eligible for any assistance.

d. Persons with income above 150 percent FPL can purchase Medicare supplemental insurance if the are eligible for Medicare.

C. The Centers for Medicare & Medicaid Services (CMS) issued a letter on May 30, 2014 approving the Indiana Medicaid changes effective June 1, 2014.

1. The CMS approval letter is attached as “Exhibit 1."

2. The state plan amendment can be found at http://www.medicaid.gov/State-resource-center/Medicaid-State-Plan-Amendments/Downloads/IN/IN-13-012.pdf.

D. Other general Medicaid changes:

1. For community (non-waiver) Medicaid, the income standard (i.e., 100 percent of FPL) is $973 for an individual and $1,311 for a married couple. Persons with countable income below that level and otherwise eligible will qualify with no spend down, while those with income above that level will not qualify for Medicaid.

2. The standard income disregard will now be $20 rather than $15.50.

3. The prior community Medicaid income standard was $721 for a single individual and $1,082 for a married couple.

a. The result of the change is that a single person who is a Medicaid recipient with countable income between $721 and $973 and who previously had a spend down will continue to be eligible and the spend down will be eliminated.

b. A person with income above the new 100 percent FPL standard will be ineligible. If that person has no insurance, then that person can purchase insurance on the Marketplace with a subsidy.

4. The resource standards will increase to $2,000 for a single person and $3,000 for a married couple.

5. Waiver recipients and nursing home residents will not be subject to the 100 percent FPL income cap.

    a. If the applicant/recipient has income above the SIL of $2,163, a Miller trust (also called a QIT) will be needed.

    b. For nursing home residents, the liability calculation will be the same as it is now, but the income above the SIL must be run through a Miller trust.

        (1) It is now clear that long term care insurance payments made directly to the nursing facility will not be treated as income for the purpose of determining the SIL.

        (2) A Medicaid Flash Bulletin issued by the FSSA on June 18, 2014 makes it clear that the VA Aid and Attendance and Housebound allowances are not considered income and thus should not be counted in an individual's income budget.

6. Healthy Indiana Plan (HIP).

    a. The new income standard for HIP is 100 percent FPL.

    b. Participants with income over 100 percent FPL must get insurance through the Marketplace.

    c. HIP slots for adults with children are not limited, but there are limited slots for non-custodial adults and childless adults, and there are many people on the waiting list.

    d. HIP is a waiver program with special requirements:

(1) Participant may not be eligible for health insurance through the individual's employer.

(2) There is no resource test.

(3) Requires recipients to contribute to Personal Wellness and Responsibility (POWER) accounts modeled after Health Savings Accounts (HSA) in an effort to require recipients to "have skin in the game."

(4) Services are more limited than Medicaid and are administered by managed care entities.

7. Indiana's rules regarding real estate will generally not change.

   a. The Medicaid rules retain the home and the "for sale or rent" exemptions.

   b. Income-producing property will still be disregarded.

   c. There will be no transfer of property penalty for transferring "actively managed" business property.

8. The Medicaid buy-in program for working individuals with disabilities (MedWorks) is not affected.

   a. This program is available for persons who are working and who have earnings of at least $65 per month.

   b. This program allows working individuals with disabilities to be eligible to buy Medicaid coverage at a modest cost.

   c. To avoid inconsistency in the definition of "disability" for the purpose of Medicaid disability, the applicant must have a severe medical impairment rather than to refer to the ability to work.

d. A person who ceases working will be subject to income limits and might not be eligible for Medicaid if his or her income exceeds 100 percent FPL.

e. It might be to a person's benefit to continue to work at least part time and preserve MedWorks eligibility.

E. Medicaid Program exhibits.

1. Eligibility Screening Guides ("Exhibit 2").

2. Digest of Final Rule [LSA Document #13-533(F)] summarizing changes in Title 405 from the Indiana Register ("Exhibit 3").

3. Resource guide for Behavioral and Primary Healthcare Coordination Program ("Exhibit 4").

II. Indiana Statutory Changes - Senate Enrolled Act No. 36

A. SEA No. 36, effective July 1, 2014, allows a court to impose a penalty by order if there is a failure to comply with the request of a guardian, personal representative, or in conjunction with a small estate affidavit.

1. Under amended IC 29-1-8.4.5, a distributee entitled to payment or delivery of property belonging to the decedent (or someone acting on a distributee's behalf) may present to the court having jurisdiction an affidavit containing the information required under IC 29-1-8-1(b) (pertaining to the non-probate transfer of property by affidavit), and the court may, without notice of hearing, enter an order that the distributees identified in the affidavit are entitled to payment or delivery of the property. A court may, upon notice of hearing, order attorney's fees and costs to a person bringing an action under IC 29-1-8-4.5(a) if the person indebted to

the decedent or holding property of the decedent (other than a regulated insurance company) acted in bad faith and refused to pay or deliver the property or refuse to respond within 30 days after receiving an affidavit from the person bringing an action for enforcement if the affidavit is consistent with Indiana law. In the case of an insurance company, a court may upon notice and hearing order attorney's fees and costs if the regulated insurance company failed to respond in accordance with Indiana law and the affidavit presented is consistent with Indiana requirements.

2. Under new IC 29-1-13-17, if a person fails to comply with a personal representative's written demand or instruction regarding the property of the decedent, the personal representative may bring an enforcement proceeding to compel compliance with the written demand or instruction. The court may award attorney's fees and costs to the estate in the enforcement proceeding if the person indebted to the decedent or holding property of the decedent, other than a regulated insurance company, acted in bad faith, or refused to respond within 30 days, if the demand or instruction was consistent with Indiana law. The court may upon notice and hearing award attorney's fees and costs to an estate bringing an enforcement proceeding against a regulated insurance company if the insurance company failed to respond in accordance with the Indiana Code Title 27 after receiving written demand or instruction and the written demand or instruction is consistent with Indiana law.

3. Under new IC 29-1-9-12, a guardian may bring an enforcement proceeding to compel compliance with regard to a written demand or

instruction if it is issued within the scope of the guardian's authority and consistent with Indiana law. Attorney's fees may be awarded to the guardian if the person indebted to the guardianship or holding property acted in bad faith in failing to comply with the guardian's written demand or instruction, or refused to respond within 10 days after receiving the guardian's written demand or instruction if the demand or instruction is consistent with Indiana law.

B. SEA No. 36, Sec. 29, amends IC 30-5-6-4 to make it clear that an attorney-in-fact is required to deliver an accounting to the child of the principal if requested. It should be remembered that:

1. An attorney-in-fact is required to keep records of all transactions for six years after the date of the transaction or until the records are delivered to the successor attorney-in-fact.
2. Accountings are only required to the extent stated in the power of attorney or as required by IC 30-5-6-4(c).
3. The accounting is required to be delivered within 60 days after the court-ordered or written request.
4. After the death of the principal, then unless a court orders otherwise, an attorney-in-fact is not required to render an accounting unless a request is made properly within nine months after the date of death.

C. SEA No. 36, Sec. 28, amends IC 30-5-5-18 to make it clear that a delegation of authority continues even if the attorney-in-fact who delegated the authority fails or ceases to serve.

1. Language conferring general authority with respect to delegating authority allows an attorney-in-fact to delegate his or her authority.

2. The authority to delegate will continue unless the principal revokes the delegation of authority or the delegation is revoked by another attorney-in-fact who is named in the power of attorney and who currently has authority and priority to act for the principal.

3. The delegation would also be terminated if the power of attorney expires or it is otherwise invalid or unenforceable, or if the power of attorney specifically provides in the delegation that authority is terminated when the attorney-in-fact who delegated the authority fails to serve or ceases to serve.

D. SEA No. 36, Sec. 3, amends IC 29-1-8-1 to require that the recipient under a small estate affidavit must be a "distributee" as defined in the Probate Code.

1. The purpose of this change is to prohibit creditors from using the small estate affidavit procedure to collect on or file claims.

2. The affidavit is required to list all distributees rather than, as previously required, to list each "other person" that is entitled to a share of the property which is the subject of the affidavit.

E. SEA No. 36, Sec. 30, amends IC 32-17-14-26 to remove the requirement from the TOD affidavit of a death certificate.

1. This avoids the disclosure of information that could contribute to identity theft.

2. The previous section required that the affidavit include a certified copy of the death certificate certifying the owner's death, while the requirement now is only that the affidavit list the date of death.

F. SEA No. 36, Sec. 8 through Sec. 17, amend the Indiana Uniform Principal and Income Act (UPIA) to state that unless the will states otherwise, a specific gift in the will does not carry income to the beneficiary.

1. The amendments of the various provisions of the UPIA are intended to apply for the purpose of determining the period during which an income beneficiary is entitled or eligible to receive any net income of a trust.

2. The provisions state that the interest of a settlor in a revocable living trust ends and becomes a terminating income interest when the settlor dies; property that becomes a part of the trust by reason of the settlor's death, or is distributed to the trust from the settlor's estate, becomes a part of the terminating income interest when the property is received by the trust.

3. SEA No. 36, Sec. 13(c), states specifically that a decedent's estate is not a terminating income interest.

4. It is clear from the Indiana Probate Code that the income on a specific gift under the will remains with the residue; the foregoing changes are intended to clarify the UPIA and to eliminate any potential conflict.

G. SEA No. 36, Sec. 6 and Sec. 20, provide a default rule for wills and trusts where property is specifically gifted but there is no mention of any liens or encumbrances.

1. Sec. 6 amends IC 29-1-17-9 to make it clear what is meant by reference to a lien and that a gift of property actually subject to a lien or

encumbrance is made subject to the lien or encumbrance unless stated otherwise; it also goes on to clarify that a general requirement to pay all debts is not a requirement to pay such liens and encumbrances.

2. Sec. 20 deals specifically with gifts of property in a trust. Unless stated otherwise, a gift of property is made subject to liens and encumbrances; again, a general requirement to pay all debts does not affect this default rule.

H. SEA No. 36, Sec. 18, Sec. 19 and Sec. 21, amend IC 30-4-3-6 to address the required information to be given to beneficiaries of a trust unless the trust provides otherwise.

1. The trustee has a duty to keep the following beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to protect their interests:

   a. Current income beneficiaries; or

   b. A beneficiary who will become an income beneficiary upon the expiration of the term of the current income beneficiary, if the trust is irrevocable.

2. A trustee is deemed to have satisfied the requirements of IC 30-4-3-6(b)(7) by providing a beneficiary, upon the beneficiary's written request, with access to the trust's accounting and financial records concerning the administration of the trust and the trust property.

3. Upon a trust becoming irrevocable (i.e., in the case of a revocable trust, upon the death of the settlor), and upon the written request of an income beneficiary or remainderman, the trustee has a duty to provide promptly a

copy of the complete trust instrument to the income beneficiary or remainderman.

III. Judicial Decisions

A. State Board of Funeral and Cemetery Service v. Settlers Life Insurance Company, 2014 Ind.App. Lexis 105 (Ind. App. 2014). This Court of Appeals decision is interesting because it addresses an insurance product sold as a means of eliminating or reducing assets for the purpose of Medicaid qualification.

1. Eva Hughes bought a policy from Settlers in the amount of $10,000 which is payable either to a named beneficiary on proof of death or which can be assigned to an optional trust (it is an irrevocable assignment to a National Guardian Life Insurance Company (NGL) Trust), Settlers being a subsidiary of NGL. If the insured does not assign the policy, it is in effect a standard life insurance policy, payable on death to the named beneficiaries for any purpose. If it is assigned to the irrevocable NGL Trust, the proceeds cannot be used to pay for anything other than funeral expenses, and the proceeds may only be spent on funeral and burial goods and services.

2. The Pulaski County DFR determined that the policy disqualified Ms. Hughes for Medicaid because the funeral trust did not meet the requirements of the Indiana Pre-Need Act.

    a. The policy was later assigned to the funeral home.

    b. While the DFR was working to determine Ms. Hughes' Medicaid eligibility, the funeral home filed a complaint with the Department of Insurance.

c. After the Department of Insurance rejected the complaint, the Department of Insurance sent the complaint to the Office of the Attorney General, which filed a motion to cease and desist with the State Board of Funeral and Cemetery Service.

3. The State Board of Funeral and Cemetery Service issued a cease and desist order determining that Settlers was selling “insurance policies that are simultaneously assigned into irrevocable funeral trusts which restrict dispersal of funds to funeral expenses designated as pre-paid services or merchandise by IC 30-2-13-8" without the certificate of authority required by IC 30-2-13-33.

4. The trial court determined that the Pre-Need Act applies only to sellers of pre-paid services and merchandise, not to a company which pays a death benefit to the insured’s survivors with the restriction that, if the insured chooses to transfer the policy to the NGL Trust, the money may only be used for funeral and burial expenses purchased after the insured’s death. The Court of Appeals affirmed.

5. The Settlers product is not designed to cover pre-need purchases, but rather to provide for “at-need” services or merchandise to be purchased after the insured dies.

6. The advantages highlighted by Settlers of its product are:

a. Its product can be used at any funeral home, so a purchaser who is uncertain at the time of purchase where he or she wants to be buried obtains flexibility by purchasing the product;

b. It can be used for any funeral or burial services or product, which is an advantage for an individual who is not sure whether he or she would like to be buried or cremated; and

c. It would allow those individuals who wish to allow their survivors to choose which goods and services to purchase to do so.

B. Hutchison v. Trilogy Health Services, LLC (Ind. App. 2014), Ind. Ct. App., 30A01-1307-SC-316, Jan. 30, 2014, http://www.in.gov/judiciary/opinions/pdf/01301407jsk.pdf. In this case, the Court of Appeals ruled that a daughter who signed a nursing home admissions agreement as a responsible party was not liable for her mother's expenses because she did not have authority over her mother's finances.

1. Alexis Hutchison signed a "move-in agreement" in behalf of her mother, Martha Farber, pursuant to which the "responsible party" agreed to pay "...the full amount of the resident's income and resources that the responsible party/agent controls or accesses, and agrees to be personally responsible and liable to the facility for the income and resources of the resident that the responsible party/agent withholds, misappropriates for personal use, or otherwise does not pay over to the facility...".

2. The nursing facility obtained a default judgment in small claims court against Farber and Hutchison.

a. After filing a notice of appeal, the trial court set aside the previously-entered default judgment and set the matter for trial.

b. The nursing facility's business manager testified that the nursing facility did not have in its records any power of attorney giving any sort of financial authority to Hutchison.

c. There was also testimony suggesting that Hutchison was told that signing the agreement did not make her personally responsible.

d. The trial court nevertheless found in favor of the nursing facility and against Hutchison.

e. The Court of Appeals noted the provisions of federal law which prohibit a nursing home certified as eligible for Medicare or Medicaid reimbursement from requiring a guarantee as a condition of admission or extended care.

(1) Federal statutes do not state specifically that these facilities are precluded from requiring an individual who has legal access to a resident's income or resources to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care.

(2) A section in the Indiana Administrative Code provides that a nursing facility may require an individual who has legal access to a resident's income or resources to sign a contract, without incurring personal financial liability, to provide payment to the facility from the resident's income or resources.

(3) The Court noted that Indiana has not yet addressed the legality of responsible party provisions and whether they are inherently illegal, finding that it was unnecessary to reach that result.

(a) The Court found that there was no evidence that Hutchison ever had any authority to manage, use, control or access her mother's income, financial accounts, or other resources.

(b) The Court found that the admission agreement obligated the responsible party only to the extent that the responsible party had access or control of the resident's income and resources.

(c) The Court reversed the judgment of the trial court and remanded with the instructions to enter judgment in favor of Hutchison.

C. Linda M. Turner v. Sally A. Kent and Stanley J. Kazlauski (Ind. App. 2014), Ind. Ct. App., 64A05-1310-TR-510, Jul. 31, 2014. The Court of Appeals ruled that the use of a form to accomplish specific gifts which was not actually incorporated by reference in the Trust was not a valid amendment to the trust and was ineffective to dispose of the subject property.

1. A separate writing prepared after the execution of a trust provided for specific gifts of real property. The Indiana Trust Code, IC 30-4-3-1.5(c) allows a settlor to amend a revocable trust by "comply[ing] with a method provided in the terms of the trust." Here, the trust provided for amendment

via a signed writing. The Court found that the specific gifts form must be construed as an incorporation by referenced document because that was the settlor's intention.

2. The Court stated that although an effort is always made to construe a trust instrument in a manner which renders the trust operative and effective, the Court cannot vary or delete terms used in the instrument. The Specific Gifts Form clearly stated that the trust incorporated the specific gifts form by reference and that the Court was obligated to construe the form in that manner.

3. The plain language of the Indiana Code section 30-4-2.1-11(a)(2), permits a trust to incorporate by reference specific gifts of "tangible personal property."

   a. Because the statute does not expressly permit specific gifts of real property, the Court concluded that they were prohibited.

   b. The Court's conclusion found support in the definitions contained in the Indiana Trust Code for "real or personal property" and for "tangible and intangible personal property and real property."

   c. The Court found the Specific Gifts Form to be an invalid incorporation by reference of specific gifts of real property.

IV. Changes in Reverse Mortgages.

A. HUD has imposed changes to home equity conversion mortgages (HECMs) effective September 30, 2013.

1. Eliminates the HECM Standard and the HECM Saver options.

a. HECM Standard was the traditional arrangement to offer the senior the highest “cash out” options, an adjustable or fixed rate option, and the ability to receive 100 percent of the proceeds in a lump sum.

b. The HECM Saver, introduced in 2010, was designed for the more affluent client: it offered less proceeds, eliminated or reduced the up-front mortgage insurance premium (MIP), and brought the closing costs down to be closer in line with conventional loans.

2. Both options include an origination fee, mortgage insurance premium (MIP) and closing costs (appraisals, title search, inspections, surveys, etc.).

a. The new reverse mortgage product offers adjustable and fixed-rate options, but the options are considerably different.

b. The amount of funds a senior can access is lower than the traditional reverse mortgage, but higher than those available with the HECM Saver.

c. MIPs have been increased.

d. The portion of the proceeds that can be accessed in one lump sum is now a maximum of 70 percent.

(1) Even that amount will be allowed only for “mandatory and legal obligations” such as paying off an existing mortgage.

(2) The “pay-off” for accessing less is a significantly lower MIP.

B. Reasons for the change.

1. HUDs MIP Fund has been projected to be in the negative by billions of dollars due to high record defaults.
2. Part of the problem was deemed to be due to the fact that many “needs-based borrowers” were receiving the maximum amount up front, but not budgeting for ongoing expenses (taxes, insurance, etc.).

C. Possible benefits of a reverse mortgage.

1. A couple who sells their home for less than they had planned, and purchases a new home, may finance a part of the purchase with a reverse mortgage and retain a portion of the proceeds from the first home, improving their financial position and lowering the monthly principal and interest payment.
2. A couple can refinance their existing mortgage balance utilizing a reverse mortgage, thus avoiding monthly principal and interest payments while establishing a credit line.

D. Reverse mortgages involve significant closing costs and are relatively expensive products.

1. There are numerous sources for estimates and “calculators” to determine the loan principal that will be available, an estimate of costs, etc.
2. Borrowing limit will be affected by the interest rate, whether it is an ARM, the age of the borrower, and other factors.
3. It is interesting to note that marketers of reverse mortgages never recommend that people obtain legal advice, and in fact most marketing is conducted in such a way as to discourage a holistic and comprehensive analysis.

4. There have been many examples and allegations of predatory lending practices, and adequate protections against such practices do not exist.

a. State deceptive and unfair trade practice laws are frequently inadequate to address the problems of consumer deception.

b. In Florida, the Attorney General in January of 2008 issued a warning to seniors to be “wary of reverse mortgage scams.”

c. In California, First Alliance Mortgage Company agreed to a settlement in the amount of $60 million for alleged “predatory lending” charges.

d. In seeking information regarding the propriety of a reverse mortgage, most of the information is directed to the question whether a reverse mortgage is the best option and whether the person really needs a reverse mortgage. However, the initial question really should be “does the borrower have a thorough understanding of what a reverse mortgage really is?” Many elderly are being taken advantage of because they do not understand what they are buying.

E. Roll of reverse mortgages in long term care and public benefits planning.

1. Reverse mortgages have higher closing and servicing costs than conventional loans.

a. When clients die or move out of their homes soon after taking out a reverse mortgage, they end up paying a lot of money for a short-term loan.

b. This makes reverse mortgages unappealing for clients in their 80s or in poor health.

2. If the borrower leaves the home for long-term care purposes (e.g., assisted living or nursing home care), the loan must be repaid.

a. If married, the loan does not need to be repaid as long as the spouse is living in the home.

b. If single, or if the community spouse dies, then the loan must be repaid within 12 months of the home being vacated.

(1) The AARP, through its legal arm, has sued HUD on behalf of surviving spouses of deceased reverse mortgage borrowers, who were facing eminent foreclosure and eviction.

(2) The homes were “under water,” and even though the HUD rules governing reverse mortgages stated that a borrower or heirs would never owe more than the home was worth at the time of repayment, the policy was changed in late 2008 to provide that an heir, including a surviving spouse, who is not named on the mortgage, must pay the full mortgage balance to keep the home, even if it exceeds the value of the property.

(3) The position of the AARP was that the change violated existing contracts, and even though HUD later rescinded the 2008 change, the lawsuit was continued due to its impact on the reverse mortgage borrowers who were adversely affected.

(4) The lawsuit was dismissed by the court without prejudice on July 15, 2011, and is considered to be an important but not necessarily permanent victory for HUD. However, the court did not rule on whether HUD's interpretation of the HECM statute was permissible or correct.

(5) The court did not address the plaintiffs' injuries, but found that the plaintiffs' failed to establish redressability - that anything can be done by HUD to change the situation. Because the plaintiffs entered into contracts with private sector lenders, their injuries cannot be redressed by HUD. The court held, essentially, that it was the lenders, not HUD, that were pursuing the foreclosure actions, and that in so doing, lenders were simply relying upon the contractual rights that they had to foreclose under the mortgage instruments signed by the borrowers themselves.

(6) The dismissal, without prejudice, means that the plaintiffs can try this case or a similar case again.

3. Clients who are relatively young and in good health will not receive significant payments from reverse mortgages.

a. Like annuities, reverse mortgages make smaller payments to those with relatively longer life expectancies.

b. Perhaps, then, the optimum age for taking out a reverse mortgage is in one's mid-70s.

4. For clients who wish to pass their home equity on to their heirs, a reverse mortgage will alter their estate plans.

    a. If the loan has not been repaid before death, the home will usually be sold and the lender repaid from the proceeds.

    b. For clients in their 70s who do not care to preserve the home equity, a reverse mortgage could be a viable option to pay for uninsured care, eliminate debt service on a high-end conventional mortgage, or pay for needed home repairs or improvements.

5. The expenses of long-term care may grow to outstrip the reverse mortgage's ability to pay for such care.

    a. If the client's fixed income and income from investments are still not enough to pay for long-term care, then additional resources will be needed.

    b. Reverse mortgage proceeds can also be used to help pay for long-term care insurance.

6. The consideration of a reverse mortgage should be analyzed with a view to the client's possible need for future public benefits.

    a. A reverse mortgage may preclude the client's ability to later obtain such benefits.

    b. While reverse mortgage payments do not affect social security benefits or Medicare, since those programs are not means-tested, recipients of Supplemental Security Income ("SSI") may be adversely affected.

c. While the proceeds of a reverse mortgage do not count as income, such proceeds may be counted as a potentially disqualifying resource to the extent the funds are not spent in the month received.

d. Medicaid eligibility may be similarly affected, as well as eligibility for food stamps (now known as the Supplemental Nutrition Assistance Program or “SNAP”).

e. The impact of a reverse mortgage on a VA supplemental pension (such as the “Homebound” or the “Aid and Attendance” benefits) must also be considered.

f. Excess resources can be avoided by taking the reverse mortgage in the form of monthly tenure payments, or via a line of credit, or some combination of both, and assuring that all payments are spent in the month received.

g. Most reverse mortgages have provisions restricting changes in ownership, so that transfers would trigger the mortgage holder’s right to call the entire loan. This restricts planning opportunities.

h. There have been instances involving parents who have left their home to live with a child, and due to the absence the mortgage holder has started foreclosure proceedings.

i. In one case, *Metlife Home Loans v. Vereen* (N.Y. Sup. Ct., Kings Cty., No. 28586/11, Feb. 11, 2014), a New York trial court held that a mortgage company could not foreclose on a reverse mortgage simply because the mortgage holder neglected to pay a utility bill.

(1) The mortgage required payment of all assessments, utilities, etc., and keeping the property insured.

(2) The mortgage company gave a notice of default that did not specify the reason for the default.

(3) The court noted that the mortgage company could not default for merely failing to pay the water bill, it being the intent of the reverse mortgage program to help seniors stay in their homes, and that under federal law, the company was obligated to pay the water bill and charge her account.

7. While the needs-based programs exempt the principal residence (for Medicaid, it is exempt only if valued at or below $500,000, or $750,000 in some states), once it is sold, the proceeds of sale are counted.

   a. Consequently, the proceeds of sale may postpone or disqualify the seller from eligibility for public benefit programs.

   b. If the homeowner leaves the home to go to a residential facility, the reverse mortgage lender will eventually require payoff of the loan, unless a spouse or other co-borrower continues to live in the home.

8. It is easier to coordinate a married couple's reverse mortgage with Medicaid and asset protection planning.

   a. I.e., the death or institutionalization of one spouse will not necessarily impact the Medicaid eligibility of either the institutionalized spouse or the surviving spouse.

b. However, with a single individual, the planning options are less flexible, and a reverse mortgage could place his Medicaid eligibility at risk.

c. E.g., if his condition worsens, and he leaves home, the Medicaid exemption for his principal residence will be lost, and the loan must be repaid.

d. The proceeds of sale remaining after the satisfaction of the mortgage will have to be spent down on his nursing home expenses, or otherwise dealt with as a part of Medicaid crisis planning.

e. Planning flexibility may be substantially diminished because of the existence of the reverse mortgage.

F. Consider a Private Reverse Mortgage Arrangement as an Alternative.

1. Factual scenario: John and Mary Jones own real estate worth approximately $500,000. They would like to use the property to generate $20,000 of liquidity each year, and at their deaths, the property will ultimately pass to their son, James Jones. James is willing to purchase the property, but for various reasons, John and Mary do not want to sell the property (perhaps for tax reasons, or perhaps because there is significant investment or development potential). At the time of the transaction, the applicable federal rate ("AFR") is 4.5%.

2. Consider a private transaction involving the following:

a. James will advance $10,000 on June 1st and December 1st of each year, up to a maximum of $200,000 over a ten-year period.

b. If an amortization schedule is calculated based on a 4.5% annual rate of interest, over the ten-year period a total of $200,000 of principal would be advanced, and accumulated interest to have accrued over the ten-year period would total $54,720.29.

c. If the transaction needs to be revised in the future, the parties can later mutually agree to change the transaction. An arrangement involving a non-private mortgage would be very difficult and expensive, and probably impossible, to change.

d. The parties would sign a promissory note and a reverse mortgage agreement.

e. John and Mary could provide that in the event of their deaths, the property would pass to James, provided that upon receipt of the property, their obligation would be forgiven. If the property is sold in the meantime, of course, then the loan would be repaid, and the accrued interest would be recognized by James as income and would be reported in the year that repayment occurs. James would inherit a stepped-up basis in the property for future capital gain purposes if he receives the property at death, and pay tax on the interest that was forgiven.

f. Such a private arrangement offers much more flexibility in the context of asset protection planning.

g. If either the husband or wife is admitted to a long-term care facility, continued ownership of the real estate by the community spouse will not impact the institutionalized spouse's eligibility for Medicaid.

h. If both spouses, or the surviving spouse, shall be admitted to a long-term care facility, then the equity in the propertry would have to be dealt with, but the equity would have been reduced to the extent of the accumulated loan payments, and a purchase transaction could be entered into with the family member who has been making the reverse mortgage payments in one of various ways which may protect a part or perhaps even all of the equity value of the property.

i. Private arrangements are substantially less expensive to implement, and can be incorporated into the estate plans of parents who might wish to implement such arrangements with one or more of their children.

j. It should be noted that the sale of the property will allow for full access to its residual equity as well as implementation of other effective asset protection arrangements, such as a Medicaid compliant annuity.