WHERE REAL ESTATE AND ESTATE PLANNING COLLIDE

KRISTEN QUINNEY PORTER
KRISTEN QUINNEY PORTER, LLC
755 Loop 337, Suite A
New Braunfels, Texas 78130
830.358.7632
kporterlaw@gmail.com

PATRICIA F. SITCHLER
Schoenbaum, Curphy & Scanlan, P.C.
112 East Pecan Street, Suite 3000
San Antonio, Texas 78205
210.224.4491
pfsitchler@scs-law.com

State Bar of Texas
ADVANCED ELDER LAW COURSE
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CHAPTER 3

KRISTEN QUINNEY PORTER
KRISTEN QUINNEY PORTER, LLC
PO Box 312643, New Braunfels, TX 78131
Phone: 830-358-7632

EDUCATION:

- J.D. degree - Baylor University 1995
- BBA degree in accounting and economics – Baylor University 1992

EMPLOYMENT HISTORY:

- KRISTEN QUINNEY PORTER, LLC – October 13, 2013 to Present
  *Attorney-at-Law and owner of the firm.

- KIESLING, PORTER, KIESLING & FREE, P.C. – March 1996 – October 12, 2013
  *Attorney-at-Law – Work with large clients to develop residential and commercial subdivisions beginning with the title examination of the property, purchase of the property through the sale and closing of the lots; form homeowners associations, draft restrictions and prepare easements; work with financial institutions in the financing of the purchase of property and the developmental costs; draft mechanics lien and other construction documents; draft leases; counsel business clients; form business entities; produce and establish estate plans including trust, for clients of all wealth ranges; advise and council clients with regard to probate procedures as well as attending probate proceedings, preparation and handling of Decedent's Estate tax return.

- PAKIS, GIOTIS, BEARD & PAGE - August 1995 – February 1996
  *Law Clerk – researched cases involving property, procedure, family law and torts; drafted various documents including motions for summary judgment and abstracts of judgment.

- FEDERAL DISTRICT JUDGE WALTER SMITH, Western District of Texas - May 1995 – July 1995
  *Intern - Researched issues for Judge's opinions, wrote responses to prisoner petitions, observed criminal and civil trials and responded to motions for summary judgments. .

- SHEEHY, LOVELACE & MAYFIELD, P.C. - May 1994 – August 1994
  *Law Clerk – researched cases involving property, trusts, civil rights, torts and contracts, drafted memos and briefs, including a brief for the Supreme Court of Texas.

- INTERNAL REVENUE SERVICE - January 1993 – May 1993
  *Data Transcribe – reviewed and entered tax forms.

PROFESSIONAL ACTIVITIES AND LICENSES:

- Licensed Escrow Agent for New Braunfels Title Company
- Member of the College of the State Bar
- Moderator for the State Bar of Texas 2011 Real Estate Strategies
- Presenter at 2011 State Bar Real Estate Drafting Course - Overview of the S.A.F.E. Act
- Co-presenter at 2012 State Bar Advanced Real Estate Course and 2012 State Bar Advanced Elder Law Course– Where Real Estate and Estate Planning Collide
- Member of panel at 2012 University of Texas Estate Planning, Guardianship and Elder Law Conference – The Collision of Real Estate Law and Elder Law: Panel Discussion
- Speaker for Retired Teachers Association – Basic estate planning issues

AFFILIATIONS:

- Member of Central Texas Advocacy for Seniors
- Board Member of Central Texas Communities in Schools
- Board Member of Children at Heart Ministries
- Past President and Member of the Comal County Bar Association

FAMILY:

- Married to Gregory Porter, a coach at Madison High School
- Stepmom to Grayson Porter, a senior at Baylor University
- Mom to Zachary Porter, 9, and Paxton Porter, 4

PATRICIA "PATTY" FLORA SITCHLER, CELA*

Shareholder, Schoenbaum, Curphy & Scanlan, P.C.
112 E. Pecan St. Suite 3000
San Antonio, Texas 78205
210.224.4491
210.224.7983 (fax)
pfsitchler@scs-law.com

Patty is a Shareholder in the firm of Schoenbaum, Curphy & Scanlan in San Antonio, a tax and estate planning boutique until Patty brought a new dynamic to the firm–government benefits law. Her clients routinely come in to plan for life and death with Advanced Directives and Estate planning; to talk about nursing home eligibility and use of the Medicaid program; to preserve eligibility for government benefits (SSI, Medicaid and Medicare) in light of a personal injury award and to help young families obtain benefits for disabled children to enhance the child's potential.

Patty is *Certified as an Elder Law Attorney by the National Elder Law Foundation as recognized by the Texas Board of Legal Specialization. She is also a Fellow in the American College of Trusts and Estate Counsel, and an active member of groups focused on Trust, such as the Special Needs Alliance. She is named in the 2011 Inaugural Edition, *Martindale-Hubbell Bar Register of Preeminent Women Lawyers* and again in 2012 & 2013, *Best Lawyers in America* in Elder Law (2007-2013), listed in *Texas Monthly Super Lawyers 2004-2013* in Elder Law, listed in the top 50 Lawyers in South and West Texas (2013) by *Texas Monthly Super Lawyers*, and listed in *Scene in SA San Antonio's Best Lawyers* in Trust and Estate Law (2008-2013). In the fall, 2013, Patty was named the Outstanding Attorney in San Antonio in Elder Law and Estate Planning by the San Antonio Business Journal. She enjoys law so much that in her spare time, she is an Adjunct Professor of Law at St. Mary's University teaching Elder Law, is co-author of a book entitled *Elder Law* published by Thomson-Reuters (formerly West Publishing). But if you ask Patty what her greatest achievements are, she would say they are her daughter, Kristen, who is a University of Texas Law School grad and General Counsel for FoodCorps, her son, Jason, who is an Aggie/Penn State grad now working in Denver as a geo-mechanical engineer and her first grandchild, Isaac James, who will have to choose between UT & A&M someday.

Patty grew up on the southside of San Antonio and after spending most of her life as a city girl, she is now experiencing the joys of living in the country among the Live Oaks and Blackjack trees of La Vernia, Texas (population 933).

Special thanks to H. Clyde Farrell of Farrell & Pak, PLLC, in Austin, Texas, Fidelity Title Company, Stewart Title, First American Title, and Old Republic Title Company for their invaluable insight and comments in writing this paper.

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WHERE REAL ESTATE AND ESTATE PLANNING COLLIDE

I. REAL ESTATE PERSPECTIVE

Almost any time a piece of property is bought, sold or mortgaged a title company is involved in the transaction. In most situations, the transactions are easy and end with happy buyers and sellers. However, there are occasions when a title issue or problems with documents arise and the closing becomes troublesome. In these instances it is important to know the parties that are involved in the transaction so that the closing can get back on track. This paper is designed to give an overview of the title companies and the positions of the some of the more common underwriters on issues important to elder law attorneys.

II. ELDER LAW PERSPECTIVE

When disability strikes, families may determine that it is advisable to transfer ownership of real property in fee simple or reserving some incidence of ownership to the Grantor. In some cases such transfers are accomplished by agents appointed in a power of attorney. And in some instances, transfers of property are required to satisfy government benefit eligibility requirements. This paper is further designed to give an overview of the intersection of Elder Law issues in light of real property law.

III. DEFINITIONS

A. Title Company

The definition of a title company is a business firm that examines real property records and issues insurance policies to indemnify the owner and lender against financial loss resulting from unknown title defects or prior claims against the property.

A title company consists of several different departments. Each department has a specific job to do in the closing. These departments include the following:

1) **Escrow Agent** – the person or entity that holds the funds, closes the transaction and acts as a neutral third party.
2) **Title Plant** – the department holding the records of a title company and reviewing the Official Public Records for the purpose of issuing title insurance on real property.
3) **Underwriter** – the insurance company that issues the insurance policy.
4) **Title insurance** – a contract to indemnify the insured against loss or damage caused by defects in the title to real property.
5) **Title Insurance commitment** – the document issued prior to closing which sets forth the conditions under which a title insurance company will issue a title policy.
6) **Title Insurance policy** – the document issued after closing which sets forth the contract of indemnity. Can be issued to an Owner and/or a Lender.

Additional definitions that are important include the following:

A title company can be a privately owned title company (sometimes referred to as an independent title company) or can be owned by an underwriter (sometimes referred to as a direct issue title company). Each of these title companies can write policies on any underwriter with which that Title Company has a license. However, many times a direct issue title company will only be licensed to write policies on its owner/underwriter while an independent title company is licensed with many underwriters. At times this gives the independent title companies more flexibility when determining what is required to insure a transaction.

B. Medicaid

Medicaid Assistance Program and Medicaid Assistance waiver programs are governmental programs that provide an array of benefits including medical care, housing, rehabilitation as well as durable goods for those persons who meet certain physical and financial guidelines. When an individual has few resources (assets), a small monthly income and a medical need, the individual may be eligible for a specific Medicaid program. The most commonly accessed Long Term Care Medicaid nursing home benefit. Other Medicaid programs are Intermediate Care Facilities for the Intellectually Disabled (ICF-ID) and waiver programs such as the Star Plus Waiver, formerly known as the Community Based Alternative program.[1] Medicaid should not be confused with Medicare. Medicare is health insurance that purchased by either by paying into the Social Security System through wage withholding and includes the spouse of an insured worker or by paying a premium for the product. Medicare does not pay for long term care nursing home costs, assisted living and most in-home benefits.

C. Medicaid Estate Recovery Program

Medicaid Estate Recovery Program also known as MERP was enacted in 2003, effective March 1, 2005.

[1] Information about the various Medicaid programs can be obtained from www.dads.state.tx.us and then by searching for Handbooks for each of the noted programs.

The purpose of MERP is to comply with the federal law requiring states to pass legislation to recover certain Medicaid payments made on behalf of a qualified individual from the individual's probate estate.[2] Texas was one of the last three hold-out states resisting estate recovery. When the law and subsequent regulations were crafted, the State had the option of creating a very strict or a very lenient estate recovery program.[3] In Texas, MERP IS NOT A LIEN STATUTE.[4] As evident by the state's reluctance to enact and enforce estate recovery, the State fashioned regulations making the State an unsecured creditor[5] and allowing an individual to avoid estate recovery with adequate planning. Thus, the rules that were enacted limited estate recovery to the probate estate[6] with full knowledge that an individual could pass assets outside of probate. Typical methods of passing real property outside of probate are with a Deed retaining a Life Estate and ownership as Joint Tenants with Rights of Survivorship.

D. Ladybird Deed also known as an Enhanced Life Estate Deed or a Deed with a Power of Appointment

A deed in which a grantor transfers property to a grantee retaining a life estate along with the power to sell the property retaining the proceeds of the sale thus cutting off grantee's right to the property pursuant to Texas Estates Code sec. 111.052.

IV. TRANSACTIONS

A. Arm's Length Transaction

A transaction in which real property is sold to a bona fide purchaser for its fair market value. In a typical arm's length transaction the buyer and seller deposit the contract and all funds with the Escrow Agent. The escrow agent then contacts their title plant who researches the public records and determines who owns the property and what documents filed of record, such as easements, restrictions and mineral reservations, affect the title to the property. Then the plant, with the consent of the underwriter, issues a title commitment. The title commitment contains the conditions under which a title insurance policy may be issued. For example, in order to issue a title policy on a transaction to sell a homestead, the underwriter may require both the husband and wife to sign the deed even though the deed only listed the husband as the buyer. The escrow agent sends this title commitment to the parties involved in the transaction. Once all matters are resolved the buyer and the seller meet with the escrow agent to close the transaction. The escrow agent sends the signed documents to the title plant which then records the documents in the Official Public Records of the county where the property is located and issues a title policy on the underwriting company.

The escrow agent is the face of the transaction and is involved in drafting the settlement statement, contacting the bank, obtaining the pay-off information for any outstanding loans, insuring that the proper parties are present to execute the documents and other similar functions. The title plant examines the public records to determine who owns the property and what encumbrances affect the property. If the property is located in more than one county, more than one title plant may be involved in the transaction. The underwriter issues the policy and has the final decision making authority when questions arise regarding the acceptance of documents and the issuance of the insurance.

An example of a typical title insurance commitment is set forth as Exhibit A to this paper. Schedule A shows the current owner of the property, the buyer, the proposed lender and the property description. Schedule B lists all of the items that affect the property. Schedule C contains the requirements for closing the transaction and Schedule D lists the parties involved in the title company.

While all title companies and closers conduct their business based on their individual risk tolerances, they are all under the rules established by the Texas Department of Insurance. These rules state such things as how much the title policies costs and what the policy must contain.

In 1989, the Council of the Section of the Real Estate, Probate and Trust Law of the State Bar of Texas approved the formation of a committee to study the formulation and development of title examination standards.[7] These standards are designed to provide guidance for real estate and oil and gas practitioners who examine titles and might be useful when speaking with title companies. However, it must be noted that the standards do not apply to title examination for purposes of title insurance and, as stated in the Disclaimer and Introduction, "these standards do not

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[2] 1 T.A.C. sec. 373.101

[3] Texas Department of Aging and Disability Services Reference Guide (2006), p. 19.

[4] MERP makes the State of Texas an unsecured creditor just like a credit card creditor or retail creditor. The only advantage for the state is that MERP gives the State priority over other unsecured creditors. The State is a Class 7 unsecured creditor whereas a credit card company or retailer is a Class 8 unsecured creditor. Texas Estates Code sec. 355.102.

[5] 1 Texas Administrative Code Chap. 373.

[6] 1 Texas Administrative Code sec. 373.105(6)

[7] Title 2-appendix to the Texas Property Code Preface

apply to the exercise of discretion by a title insurance company in determining the insurability of title."[8]

B. Gift of Land

When real property is transferred by gift, title insurance is rarely part of the transaction. However, if the real property is subsequently sold in an arm's length transaction, the Gift Deed or other transfer document will be in the chain of title and scrutinized by a Title Company in the process outlined above. It is crucial for the Elder Law attorney to be aware of current trends in real property law so that the passage of title is as smooth as possible.

V. ESTATE PLANNING FOR THE DISABLED CLIENT

A. General Discussion of the Principles of Elder Law

> "A frequently used euphemism for the practice of elder law is 'Medicaid planning' because of the need of many clients to utilize the Medicaid program to pay for health care and housing costs. Many of our elder citizens did not expect to live into their eighties and nineties. The costs of health care for one spouse can easily exhaust assets leaving both spouses nearly destitute. The Medicaid program will help pay housing costs and the costs of medical care in a nursing home if an individual meets certain medical and financial requirements.[9] Critics will criticize Medicaid planning as the manipulation of Medicaid laws or "gaming the system."

And yet, is it gaming the system to transfer assets to a Family Limited Partnership to obtain a discount in the value of property for federal gift tax and estate tax? Would any taxpayer complete a form 1040 with all earnings and then jump to the tax tables to pay the maximum possible tax or would a taxpayer take all legal deductions and tax credits in calculating the taxpayer's income tax liability? Congress has specific legislation allowing a disabled person under the age of 65 to transfer assets to a trust for him/herself while maintaining eligibility for Medicaid in order to afford the high costs of medical care while maintaining some assets to provide for some level of quality of life.[10] However, if the person is age 65 or older, that person is penalized for wanting quality of life. A transfer penalty will be assessed for transferring assets to a trust for the grantor's benefit.[11] The practice of elder law is the practice of simply explaining the application of current Medicaid laws so that an individual may apply for Medicaid if disability requires it. Thus, the practice is not only ethical but a necessity for those most frail in our society.

B. Transferring Property from One Spouse to the Other

The Medicaid Long Term Care Nursing Home benefit (Nursing Home Medicaid) will pay for some or all of the cost of nursing home care including the nursing home cost and attendant medical costs of the institutionalized spouse. However, there are income and asset limitations for Nursing Home Medicaid eligibility. In the Spousal Impoverishment Act of 1988[12], Congress provided that all non-exempt resources of **both** spouses will be counted toward the resource limitation regardless the classification of the property as community or separate.[13] One-half of the couple's resources will be set aside for the well spouse (referred to as the "community spouse") with a minimum set aside amount of $23,448.00 and a maximum of $117,240.00 (for 2014). The institutionalized spouse can only keep $2,000 in countable assets to meet asset eligibility requirements.[14] As a result of the $2,000 asset limit, the institutionalized spouse must transfer any countable assets out of his/her name to the community spouse.[15] Failure to transfer assets from the institutionalized spouse to the community spouse will result in disqualification for Nursing Home Medicaid benefits.[16]

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[8] Title 2-appendix to the Texas Property Code Disclaimer and Introduction

[9] Abshire, Farrell, Sitchler, Wright, *Texas Elder Law*, Texas Practice Series West Publishing 2013-2014, pages 40-41 citing to TEX. HUM. RES. CODE ANN. §§ 2.001-32.257 (Vernon 2009); *see also* Medicaid Eligibility for the Elderly and Persons with Disabilities Handbook, TEXAS HEALTH AND HUMAN SERVICES (2014), http://www.dads.state.tx.us/handbooks/mepd...

[10] 42 U.S.C. §1396p(d)(4)(A) & (C).

[11] Medicaid Eligibility for the Elderly and Persons with Disabilities §F-6723 provides that a transfer to a Pooled Trust results in a transfer penalty for persons 65 or over. Transfers to a .trust created under 42 U.S.C. §1396p(d)(4)(A) are statutorily limited to persons under age 65.

[12] 42 U.S.C.A. §1396r-5; *see also,* Medicaid for the Elderly and Persons with Disabilities, Chapter J (Spousal Impoverishment) & Appendix XXXIII.

[13] MEPD Appendix XXXIII.

[14] Medicaid for the Elderly and Persons with Disabilities Appendix XXXIII.

[15] Medicaid for the Elderly and Persons with Disabilities I-3500. There are no penalties for transfers between spouses.

[16] *Id.*

It is not unusual to find that the Institutionalized spouse no longer has capacity to transfer assets. If the husband and wife have properly planned for disability they will each have a valid durable power of attorney that will allow the community spouse to transfer assets out of the institutionalized spouse's name to him/herself. Failure to make these required transfers using the power of attorney would result in loss of Medicaid eligibility and potential impoverishment of the couple or worse, eviction from the nursing facility for failure to pay the high costs of care because Medicaid is no longer paying the costs.

C. Ability to Transfer Property from One Spouse to the Other So That the Property is the Grantee's Separate Property.

The Texas Title Examination Standards that is an appendix to the Texas Property Code states in its Standard 14.30, Conveyances Between Spouses:

> "An examiner must consider property conveyed by one spouse to another to have become the grantee's separate property regardless of whether consideration is recited. However, effective January 1, 2000, a conveyance or agreement signed by both spouses may convert separate property to community property if such intention is specified.
>
> **Comment:** Texas courts have always held that a deed from husband to wife, absent evidence of any contrary intention, vests the estate in the wife as her separate property. See, e.g., Taylor v. Hollingsworth, 176 S.W.2d 733, 736 (Tex. 1943); Story v. Marshall, 24 Tex. 306 (1859). This is true whether the property is the husband's separate property or community property, and whether or not consideration is given. Dalton v. Pruett, 483 S.W.2d 926, 928–29 (Tex. Civ. App.—Texarkana 1972, no writ). Although the principal cases deal with conveyances from husband to wife, there seems no reason that the same law would not be applied to deeds from wife to husband after the statutory equalization of the rights of spouses with respect to marital property. See In re Marriage of Morrison, 913 S.W.2d 689 (Tex. App.—Texarkana 1995, writ denied."

Thus, transfers between spouses should be effective to convert community property to the separate property of the grantee spouse.

Including language in the Durable Power of Attorney allowing the agent to convey and partition property to the spouse of the principal is advisable if a Medicaid application is anticipated.[17] If one spouse becomes eligible for Nursing Home Medicaid, all of that spouse's countable assets except for $2,000 will need to be transferred to the community spouse to maintain eligibility for Nursing Home Medicaid and to allow the community spouse to establish an estate plan to protect the Medicaid recipient in the event he or she is the surviving spouse. Once assets are transferred to the community spouse by the Medicaid recipient, the community spouse may want to execute a new Will leaving assets in a Testamentary Trust for benefit of the Medicaid recipient spouse. For clearly, the community spouse is the safety net for the institutionalized spouse, providing daily support, purchasing personal items and overseeing the proper care of the institutionalized spouse. Should fate result in the death of the supportive spouse, a proper estate plan will leave a legacy in trust or through the children to carry on for the supportive spouse. Failure to institute the revised estate plan for the community spouse could result in assets passing back to the Medicaid recipient spouse resulting in loss of Medicaid and dissipation of supportive funds.[18]

D. Medicaid Estate Recovery

In **1987**, the Texas Legislature buried an estate recovery law in a statute reorganizing a governmental department. The law allowed the State of Texas to place a lien on the home of a Medicaid recipient in order to obtain reimbursement for state Medicaid expenditures made on behalf of the recipient. Ultimately, the law met with so much opposition from Texas residents that the legislature repealed it in the following **1989** legislative session.

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[17] Language in the power of attorney that could indicate the principal's intent to authorize the agent to partition property could be in the following form:

If I should apply for Medicaid long term nursing home care benefits or Community Based Alternative benefits or any related need-based governmental benefit, my Agent has the power to gift and transfer my assets without limitation to my spouse to be characterized as the sole and separate property of my spouse. Evidence of my agent's power under this paragraph shall be a copy of the completed and filed application form necessary to apply for a need-based government benefit. Filing of such application form combined with the transfer of property to my spouse without necessity of any order of action shall be conclusive evidence of the change in character of property as my spouse's sole and separate property.

[18] Planning to avoid Medicaid estate recovery is not against public policy. See discussion of Medicaid Estate Recovery enactment and subsequent regulation. Planning for the well spouse's premature demise is similar to Tax planning to avoid payment of estate taxes or income taxes.

Medicaid is a federal-state cost sharing program. States that participate in the Medicaid programs receive federal dollars but must also contribute State dollars as a condition of participating in the programs. Thus, Medicaid is governed by federal law with states creating the rules to enforce the federal laws. All rules are subject to federal scrutiny and approval as a condition of receiving federal Medicaid funding. However, since the states are able to fashion rules subject to federal guidelines, there are 50 sets of rules.

In the Federal Medicare Catastrophic Coverage Act of 1988 ("MCCA") Congress addressed the issue of Estate Recovery; however, the MCCA did not make estate recovery mandatory. The legislative history clearly sets out the mandate of Medicaid Estate Recovery:

> "The purpose of the Committee bill is to deter those who, through 'gifting' or other disposal, knowingly seek to shelter assets from dissipation due to nursing home costs. The bill is not intended to penalize those who inadvertently, or through lack of sophistication, did not receive adequate compensation. Nor is the bill intended to deny eligibility to those who transfer resources to relatives or others by way of compensation for the informal care which these individuals have given to the applicant or beneficiary; the imposition of a penalty in such circumstances would have the unfortunate effect of discouraging family members and friends from caring for the frail elderly or disabled and helping them remain independent for as long as possible."

House Report No. 100-105(kk) 1988 U.S. Congress and Adm. News, p. 803, 897.

In the Federal Omnibus Budget Reconciliation Act of 1993, Medicaid estate recovery became mandatory to all states. Yet, after the 1987 Medicaid lien fiasco, the Texas Legislature resisted implementation of estate recovery for ten years. As one of the three last states to enact Medicaid Estate Recovery, Texas passed a law in 2003 fulfilling its obligation under the 1993 federal law. On June 10, 2003, Governor Perry signed House Bill2292, allowing the State of Texas to recover payments made on behalf of a person who receives Medicaid benefits.[19] The law effecting estate recovery was brief:

> "SECTION 2.17. Subchapter B, Chapter 531, Government Code, is amended by adding Section 531.077 to read as follows: Sec. 531.077. RECOVERY OF MEDICAL ASSISTANCE. (a) The commissioner shall ensure that the state Medicaid program implements **42 U.S.C. Section 1396p(b)(1)**. (b) The Medicaid account is an account in the general revenue fund. Any funds recovered by implementing 42 U.S.C. Section 1396p(b)(1) shall be deposited in the Medicaid account. Money in the account may be appropriated only to fund long-term care, including community-based care and facility-based care."

The federal law in the noted section 42 U.S.C. §1396p(b)(1) is a creditor statute,[20] requiring a state to recover expenditures from the estate of a deceased person who received Medicaid benefits--thus the name "estate recovery." It is important to note that the Texas legislature chose (b)(1) of the federal law to implement as opposed to (b)(2), the lien statute. The Texas Legislature was very careful to avoid the controversy created in 1987 **and thus the 2003 legislation clearly is not a lien statute**.

The federal statute does not set out the rules for estate recovery--leaving the rule making to the Commissioner of the Texas Department of Health and Human Services ("HHSC") heading up the State Medicaid program. Federal law does set out basic requirements along with guidelines and options in the law and in Section 3810 of the Federal State Medicaid Manual. Upon passage of the Medicaid Estate Recovery Statute, the Texas Legislature sent a strong message to the HHSC rule maker to make rules that would be lenient yet comply with the federal legislative intent noted above. In compliance with that mandate, HHSC ultimately fashioned rules that would limit Medicaid estate recovery to the "probate estate" of a deceased Medicaid beneficiary, thus clearly allowing for assets to pass outside of probate to avoid Medicaid Estate Recovery. The State complied with the federal law but respected its history of protecting families and their needs as they age. Thus, it is not against public policy to plan to avoid Medicaid Estate

[19] Governor Perry stated that if the Medicaid Estate Recovery provision had been a stand-alone bill, he would have vetoed it. But since it was in a larger piece of legislation that was desirable, he signed the bill. Robert T. Garrett, Dallas Morning News, published June 13, 2003.

[20] "(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of— (i) nursing facility services, home and community-based services, and related hospital and prescription drug services,…" *See also,* 1 T.A.C. §373.103.

Recovery. In fact, it was anticipated by the State Legislature as well as Congress.[21]

Under the Regulations promulgated pursuant to the enactment of the Medicaid Estate Recovery law, the State is a Class 7 unsecured creditor as described in Texas Estates Code §355.102,[22] just above VISA, Sears, and all other unsecured Class 8 creditors. As an unsecured creditor, an executor or an administrator can send permissive notice to the creditor pursuant to Texas Estates Code §§403.056 & 308.054 and if the State fails to comply with the Estates Code requirements within four months of notice, the State will lose its right to recover from the Estate. However, other than §§403.056 & 308.054 of the Texas Estates Code, it is the author's opinion that there is no statute of limitations barring the State's right to recover.[23]

Basic debtor-creditor law provides that there is a contract between the debtor and creditor. A breach of contract—failure to pay the debt—allows the creditor to sue the debtor on the debt but until a judgment is received and abstracted, no lien arises to attach to the property. Thus, a creditor of the seller would have no claim against the buyer of real property owned by the Estate because there is no lien against the property. Nor would the creditor have a claim against the title insurance because the creditor only has acontractual claim against the buyer, not a secured claim against the real estate. The Elder Law author of this paper found no cases that allowed an unsecured creditor to assert a claim against property without a lien. In fact, in one case, where a creditor took possession of debtor's property, sold it and retained the proceeds to pay a valid debt, the Court held that without a lien right, the creditor had converted the property and was liable to the debtor for damages, regardless of a valid unsecured debt.[24]

As an unsecured creditor, the State has a right to recover from the decedent's estate subject to certain exemptions,[25] waivers[26] and allowable deductions for certain expenses paid on behalf of the Estate.[27] The State of Texas has outsourced this right of recovery to a private debt collector[28]; however, the private debt collector must adhere to the Fair Debt Collections Act in its dealings with the subsequent owners of decedent's property (executors, administrators, heirs and legatees) and does not have sovereign immunity when it fails to comply with the law.[29]

As noted previously, there has been much confusion about the Texas Medicaid Estate Recovery Statute. Even though the State clearly enacted a creditor statute, learned attorneys have referred to the possibility of a "lien" statute or some encumbrance on real property creating much confusion and angst.[30] In an effort to clarify the law, Professor Gerry Beyer published his *Updated Primer on Lady Bird Deeds*. In it he recognizes that only a probate creditor's unsecured claim exists for Medicaid estate recovery.[31] Professor Beyer goes on to point out:

> "If the grantee sells the property after the death of the grantor of a lady bird deed, there would be no recourse against a title company

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[21] Congress allows states to opt into a very lenient form of estate recovery as evidenced by the rules approved in Texas. The Texas Department of Aging and Disability Services Reference Guide (2006) states: "MERP was written into Texas law as part of House Bill 2292, passed in 2003 by the 78th Regular Session of the Texas Legislature. As the state's Medicaid agency, the Health and Human Services Commission was responsible for developing the program requirements. The MERP rule finalized in the Texas Administrative Code in December 2004, was fashioned as a very lenient program within the federal parameters." p.19.

[22] The Rules found in Chap. 373 of the Texas Administrative Code still refer to Texas Estates Code §355.102.

[23] State v. Durham, 860 S.W.2d 63 (Tex. 1993).

[24] Jones v. City Nat. Bank, 166 S.W. 442 (Tex.Civ.App. –Ft. Worth 1914, writ granted with no additional writ history)

[25] 1 Texas Administrative Code sec. 373.207.

[26] 1 Texas Administrative Code sec. 373.209.

[27] 1 Texas Administrative Code sec. 373.213.

[28] HMS, Inc., 5615 High Point Drive, Suite 100, Irving, Texas 75038.

[29] *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. Or 1996) cert. den'd 521 U.S. 1106 and 521 U.S. 1111.

[30] See for example, Victor A. Kormeier, Jr., *Lady Bird Deeds*, State Bar of Texas Advanced Elder Law, March 5, 2009. The Author begins the paper by asking "Is the State of Texas going to have a lien on the property for Medicaid Estate Recovery Program?" p. 1 raising the specter of a potential claim against the property. While concluding that it would require further legislative action to create a lien right, the author goes on to state without citation: "Title insurance companies may require a release or a statement that Medicaid will not pursue recovery…" But recovery against whom? Not the purchaser of the land since a creditor's claim does not attach to the property. Subsequent articles have perpetuated this groundless uncertainty. *See also*, Michael Lucksinger, JD, CPA, *Medicaid Recovery and Revocable Life Estate ("Lady Bird") Deeds,* Advanced Real Estate Conference, Chapter 9, p. 4, 2011. In the following article, the author incorrectly states that Medicaid Estate Recovery is a lien statute: G. Roland Love, *Voluntary and Involuntary Liens,* State Bar of Texas Real Estate Law 101, July 2011, San Antonio, Texas, p. 20..

[31] Gerry W. Beyer & Kerri M. Griffin, *Updated Primer On Lady Bird Deeds*, Est. Plan. Devel. Tex. Prof., April 2011, at p. *3.

> should the property not be used to pay the Medicaid Estate Recovery Claim. The creditor (e.g., the State) would have a right to follow any money improperly paid but would not have a claim on the title to the property—the subject of the title insurance. A title company may be involved with a sale while the grantor/Medicaid beneficiary is living, and in that case the deed's reservation of the right to sell without liability to the grantee controls. Without a right in the state of Texas to create a lien, the property may be conveyed unencumbered. Of course, the proceeds paid to the Medicaid beneficiary may cause the beneficiary to lose benefits eligibility."[32]

Ultimately the State has no right to file a lien or lis pendens or any other right against the real property of a deceased Medicaid recipient unless a judgment is taken and such judgment is abstracted as required for any creditor. The State's right to recover is limited to the same rights as any other unsecured creditor. As an unsecured creditor, the State must prove up the debt and if the State is unable to prove up a valid debt, then as with any unproven debt, the executor, administrator or heir must reject the claim

Executors owe a fiduciary duty to the beneficiaries of the estate.[33]. An executor/administrator has no fiduciary duty to unsecured creditors.[34] Texas Estates Code §403.051 provides that the Independent Executor shall approve, classify and pay or reject claims according to Texas Estates Code Section 355.102 Classification of Claims against Decedent's Estate. If a claim is not paid, Texas Estate Code § 403.059 provides that the appropriate method of collecting the claim is by suit against the independent executor. Additionally, if the specific property inherited has been sold, the distributees can be held personally liable for the value of the property received."[35]

> "A personal representative may be held personally liable for damages to an estate or its heirs or beneficiaries for the value of estate property lost or damaged due to the representative's failure to properly carry out his or her duties. Texas Estates Code §351.151. Any interested person may file suit against the representative for breaching his or her fiduciary duty. Texas Estates Code § 351.151. Both the personal representative individually and his or her surety, if any, can be held liable for the resulting damages. Texas Estates Code § 351.151."[36]

Thus, an executor must audit any claim against Estate assets made by the State under the Medicaid Estate Recovery Program. The State must fulfill nine requirements according to the Texas Administrative Code in order to have a valid claim for debt against the Estate.[37] The State has the burden of proof that it has complied with the law. Paying Medicaid Estate Recovery claim without properly auditing the claim, is in the Elder Law author's opinion, a breach of the Executor's fiduciary duty to the beneficiaries. It is the Elder Law author's further opinion that the executor would be liable to the beneficiaries to the extent of any improper payment to the State and any other creditor.

Even though it is clear in the law that the State's claim against a decedent's estate is unsecured with no claim against real property, some underwriters issued memorandums to their escrow officers stating, in effect, that if the chain of title revealed a predecessor in title who died after March 1, 2005, with a creditor's claim filed in probate, the title company was to contact the creditor (HMS, Inc.) inquiring if the claim had been paid and if it was unpaid, the claim should be paid prior to insuring the title. There is no instruction as to whether the claim is valid. According to the memo, the claim in the chain of title simply must be paid. Unfortunately, the seller, if unrelated to the predecessor in title, has no standing to obtain creditor records from the State and determine if there were exemptions that could set aside the claim or if the creditor properly followed regulatory requirements.

Notwithstanding that unsecured creditors have no claim against property, some title companies state that they are beginning to see claims from these unsecured creditors, especially when relying on affidavits of heirship. If the title companies fight such a claim, they

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[32] Gerry W. Beyer & Kerri M. Griffin, *Updated Primer On Lady Bird Deeds*, Est. Plan. Devel. Tex. Prof., April 2011, at *10.

[33] See e.g., *Humane Soc'y v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975) (fiduciary duty of bank arose because it was executor of estate)

[34] *Mohseni v. Hartman*, 363 S.W.3d. 652 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.).

[35] C. Boone Schwartzel, *Unsecured Claims and MERP Claims in Probate"* State Bar of Texas Advanced Elder Law Course, April 2010, Dallas, p. 7-8 citing to *McFarland v. Shaw*, 45 S.W.2d 193 (Tex.Comm'n App. 1932, holding approved).

[36] Nichols, Webb & Klein, *Fiduciary Litigation*, State Bar of Texas Advanced Family Law, 2011, San Antonio, p. 55

[37] The state must satisfy the threshold notice requirements of 1 T.A.C. §373.305, the 30 day notice requirement in 1 T.A.C. §373.307(a) and the 70-day claim filing requirement in 1 T.A.C. §373.205(b).

would likely win; however, it is the goal of the title company to clear up an issue before it becomes a claim. Therefore, those title companies have taken the position that any claim that is known about at the time of sell must be paid before title insurance will be issued.

E. Avoid Medicaid Estate Recovery

Because it was not against public policy to avoid Medicaid Estate Recovery, attorneys began transferring the homestead (the only significant asset in the Medicaid Recipient's estate) to pass outside of the probate estate. There are two ways in which to affect the transfer: through a deed conveying title but retaining a life estate in the property with the power of appointment and as a joint tenant with rights of survivorship.

F. Transferring Property via Ladybird Deed:

A Ladybird Deed is the slang name for an Enhanced Life Estate Deed or a Deed with a Power of Appointment. A Ladybird Deed is appropriate to transfer real property outside of the probate Estate. A grantor transfers property to a grantee retaining a life estate along with the power to sell the property retaining the proceeds of the sale thus cutting off grantee's right to the property pursuant to Texas Estates Code Sec. 111.052. Because the property passes outside of probate there is no Medicaid Estate Recovery. Additionally, since the grantor retains the right to sell the property and keep the proceeds, there is no Medicaid transfer penalty.

G. Transferring property via Joint Tenancy with Rights of Survivorship

One of the techniques that attorneys have used to transfer property outside of the probate estate is a survivorship agreement. Survivorship Agreements are recognized by title companies as long as they meet the requirements of the Texas Estates Code. For unmarried couples Section 101.002 of the Estates Code sets forth the requirements. For community property owned by spouses the requirements of the Survivorship Agreement is found in Section 112.052 of the Texas Estates Code.

As long as the Survivorship Agreement meets the requirements set forth in these sections of the Estates Code, title will pass to the survivor without further action by the individuals or the court. It is important to understand that both parties to the Survivorship Agreement must sign the document. Many times clients will request that when property is deeded to them the deed will state "as joint tenants with rights of survivorship". This alone is insufficient. The deed must contain the additional language and the grantees must sign the deed in addition to the grantor signing the deed.

However, beware of using the Right of Survivorship deed as a technique for avoiding Medicaid Estate Recovery. The State has, on occasion, assessed a transfer penalty because of a belief that selling an undivided interest in the real property makes the property unmarketable resulting in a transfer of asset penalty. The Elder Law author does not agree with the State. If there is a valid agreement existing that clearly requires the grantee to sell if the grantor/Medicaid recipient wants to sell the property, there should be no loss of value. However, there is anecdotal evidence that the State has disregarded such written agreements in the past.

H. Transferring Property Using Powers of Attorney

All estate planning attorneys, and especially elder law attorneys, prepare Powers of Attorney for their clients. Powers of Attorney can be used by the agent to transfer the principal's property. However, particular care must be taken when transferring property using a Power of Attorney. Title companies scrutinize transactions that involve Powers of Attorney.

If the Power of Attorney is not recorded or if the transfer is either to the agent or not for fair market value many title companies will not insure the transaction or subsequent transactions. This is true no matter how broadly the Power of Attorney is drafted. Listed further in this paper are some of the title companies' requirements if a Power of Attorney is used in a transaction. It is important for all attorneys preparing and advising clients about Powers of Attorney to be aware of these requirements.

I. Current Underwriter Positions:

In 2012 there are approximately eighteen title insurance underwriters that are licensed in the State of Texas. While all title companies and underwriters are governed by the Texas Department of Insurance and the rules published by that department, the Texas Department of Insurance does not regulate the risk tolerance of different companies. This leads to variations on coverage. Whether or not an underwriter will issue title insurance on a certain piece of property depends on the risk tolerance of that particular company. If one of the underwriters will not insure the property because of the risk, it might be possible that another insurance company will take the risk. In this paper we have compiled the positions of four of the larger title company underwriters on various matters for your convenience along with possible solutions to problems the presented.

VI. POWERS OF ATTORNEY

One of the basic documents all estate planning attorneys prepare for clients is the power of attorney. For elder law attorneys, an important provision is the

gifting provision. Many elder law attorneys include a gifting and/or self-dealing provision in their powers of attorney. However, in many instances, title companies are reluctant to insure transactions in which the chain of title contains a family transfer under a power of attorney. Following are the positions/requirements to insure under a power of attorney:

A. Fidelity

When presented with a Power of Attorney, the Escrow Agent should:

1) Send a copy of the Power of Attorney to a title officer for review.
2) View (and if necessary) record the original Power of Attorney.
3) Make contact with the person granting the powers.
4) If the principal cannot be contacted find out why.
5) Make sure the principal is aware of the terms of the transaction.
6) Verify that the principal executed the Power of Attorney of their own free will.
7) Verify that the Power of Attorney is still in full force and effect.
8) Do not accept disbursements instruction from the agent that diverts proceeds from the principal.

A Power of Attorney properly executed, acknowledged, recorded and otherwise proper will NOT be relied upon by title insurers in instances where the agent:

1) Delegates his authority if not expressly authorized to do so in the Power of Attorney.
2) Deals with the principal's property for his own benefit.
3) Conveys principal's property to himself.
4) Releases a mortgage made by agent in favor of principal.
5) Mortgages principal's property to himself.
6) Executes a gift deed of principal's property.
7) Executes a mortgage or release of mortgage without valuable consideration.

If the Power of Attorney is durable, subsequent incapacity of the principal will not affect the agent's ability to bind the principal.

If there is a question as to whether the principal was competent at the time of signing the Power of Attorney, the underwriter will require a certification from the physician attending the principal at the time of the execution of the Power of Attorney. (Alamo has the form that they want the physician to sign).

The body of the acknowledgement on a Power of Attorney should read "…on this day personally appeared Joe Smith, attorney in fact for Jane Doe."

For title insurance purposes, a Power of Attorney authorizing an agent to act for a principal in matters concerning real property must be in writing, acknowledged and recorded in the office of the county recorder of the county in which the real property is situated.

The older the power of attorney, the greater the risk that the Power of Attorney may be revoked. The title company prefers seeing that the Power of Attorney is revocable only upon the recording in the deed records of a written revocation.

Because of the ongoing military conflicts, the title company will typically accept military Powers of Attorney even thought the principal cannot be contacted.

B. Stewart

The preferred form is the Texas Statutory Durable Power of Attorney. Be careful when dealing with a Power of Attorney over two years old. Check to make sure that the principal is not deceased or, if not durable, incapacitated and that the Power of Attorney has not been revoked. The following are uninsurable exercises of a Power of Attorney:

1) Conveys principal's property to agent.
2) Releases of a mortgage made by the agent in favor of principal.
3) Mortgages principals' property to himself.
4) Executes a deed of gift.
5) Deals with the principal's property for his own benefit.

C. Stewart Will Consider the Use of Powers of Attorney in Transactions Involving Reverse Mortgages.

The 2014 statutory durable power of attorney form contains warnings to both the agent and attorney in fact as to the rights, duties and implications created when the power of attorney is executed. While we do not believe that a power of attorney without the warnings is invalid, it is not the statutory form and would be examined in the same manner as any other non-standard form.

D. First American

The preferred form is the Texas Statutory Durable Power of Attorney which must be recorded in the real property records. Military Powers of Attorney are allowed for active military service personnel. All other power of attorney forms which are being considered in use in a transaction must be approved by Underwriting.

Self-serving uses by the agent of the power of attorney are not insurable. Verification is required that

the principal is alive on the date of closing, either by direct contact with the principal, contact with the appropriate military office assigned to assist family, or appropriate medical personnel. If the principal is incapacitated at the time of the use of the power of attorney, verification is required that the principal had the necessary capacity at the time of creating/execution of the Power of attorney.

For a mechanic's lien transaction on residential property or a home equity transaction, a power of attorney between spouses may be allowed, but the power of attorney must be very specific to the transaction, describing the lender, the loan amount and the legal description of the property.

E. Old Republic

Prefers the statutory durable power of attorney but that form is not required so long as the form used contains essentially the same wording. Old Republic wants the Power of Attorney to state that the power is not revoked until revoked by an instrument filed of record in the real property records of the county where the property is recorded. Old Republic looks very closely when a power is used to transfer property to the person acting as the agent for the principal. In that case they must be satisfied that there is no self-dealing and/or conflicts of interest that may arise. If transferring to the agent, Old Republic may require consent or ratification from the potential heirs or devisees.

An unrecorded Power of Attorney is not insurable.

If the gifting provision in a Power of Attorney is not checked off, then Old Republic would probably not be willing to insure a subsequent transaction where a gift has been made using the Power of Attorney in an earlier transaction unless there is other satisfactory language present in the Power of Attorney.

F. Possible Solutions

Under current Medicaid eligibility rules, a spouse who is certified eligible for Medicaid benefits can only own non-exempt assets worth up to $2,000. If the spouse owns real property other than the homestead, that property must be conveyed to the community (non-eligible spouse) to maintain eligibility. The Medicaid eligible spouse has up to one year from date of certification to complete the transfers. Failure to transfer countable assets out of the Medicaid eligible spouse's name to the community spouse will result in loss of Medicaid assistance. Often, the only way to accomplish the transfer is by use of a Durable Power of Attorney. Subsequently, the community spouse may need to sell the property for additional cash. However, without the ability to obtain title insurance, a lender will not lend the buyer the necessary purchase funds; thus preventing the sale of the property to allow the community spouse necessary funds for care of both spouses.

According to one commentator, the Texas Title Examination Standards found in the Appendix to the Texas Property Code discourages over-meticulous objections:

> "One of the most important purposes of uniform title examination standards it so discourage the imposition of unnecessary title requirements"[38]

Title companies should be encouraged to follow these guidelines when the risk of loss is simply not realistic.

Title companies will check to be sure that the principal is alive and, if competent, verify that the principal is aware of the transaction and in agreement with it. Regardless of the fact that a notary notarized the document, if the principal is incapacitated, the title company may require proof that the principal was competent at the time of signing the power of attorney. The attorney should be prepared to confirm to the title company that the client had capacity when the document was signed under the attorney's supervision. If the principal is competent on the date of closing and able to sign, then the principal should sign, and do not rely on the power of attorney. If the principal is unable to sign, then an alternate agent can use the power of attorney to gift/sell to the original agent avoiding the self-dealing issue. This is a potential solution if the family gets along and is in agreement. If this is not possible, the title company may be willing to insure the transaction if it can be shown that the principal's will left the property to the agent and the principal is no longer capable of changing his/her will. The role of the attorney in this situation is to give the title company as much comfort in the transaction as possible.

Additionally, title companies like the powers of attorney to be as broad as possible. One underwriter refused to allow a person to sell a house under a power of attorney simply because the "Banking" powers were not checked which meant that the person may not be able to cash the proceeds check. This was true even though the "real estate" power was checked.

If it is anticipated that the agent will need to obtain a reverse mortgage for the principal, that power should be specifically listed.

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[38] Douglas W. Becker, *The Texas Title Examination Standards,* 32nd Annual Advanced Real Estate Law Course, State Bar of Texas, Chap. 34, p. 6, 2010.

VII. REVERSE MORTGAGES/HOME EQUITY LOANS USING POWERS OF ATTORNEY

A significant issue has developed with a recent Texas Supreme Court Case, *The Finance Commission of Texas, et al. v. Valerie Norwood, et al.,*--- S.W.3d. ---, 2013 WL 3119481 (Tex. 2013), held in part, that Art. 16, sec. 50(u) of the Texas Constitution requiring closing of a home equity loan in the offices of a title company or attorney included signing the power of attorney at closing. So, for example, assume that a spouse suffered a debilitating stroke. In order to return home, the bathroom must be renovated, several doors must be widened and caretakers must be employed. The well spouse intends to borrow sufficient funds using the equity in the home as security for the loan. However, if the well spouse is intending to use an existing statutory durable power of attorney to execute documents on behalf of the ill spouse, the well spouse may be stymied. To add to the dilemma, the Texas guardianship laws are somewhat restrictive as they pertain to home equity loans. A guardian can only use home equity funds to renovate the house or pay for medical expenses.[39] The Court must enter a finding that payment of caregivers including payment of medical expenses. Additionally, establishing a guardianship for the sole purpose of a home equity loan would invalidate a perfectly valid durable POA.[40]

The Texas Bankers Association (TBA) requested a rehearing and there were a number of amicus briefs filed asking the court to reconsider including the execution of a power of attorney as part of the closing documents. On January 24, 2014, the rehearing was denied in an opinion that stated:

> "TBA and the amici argue that requiring a power of attorney, like other closing documents, to be executed "at the office of the lender, an attorney at law, or a title company" works a hardship on borrowers for whom such locations are not readily accessible, such as military persons stationed overseas, others employed in other countries, the elderly, and the infirm. For the military, the Judge Advocate General Corps provides lawyers here and abroad. We recognize that JAG lawyers may not be as accessible to military personnel as civilian lawyers are to most people owning homes in Texas, but we also recognize that soldiers and sailors in harm's way are no less susceptible to being pressured to borrow money and jeopardizing their homes than people in more secure circumstances."
>
> "TBA and the amici argue that the fiduciary duty owed by an attorney-in-fact affords sufficient protection against unfair pressure and unwise decisions, but a suit for breach of fiduciary duty may be a hollow remedy and certainly cannot recover a home properly pledged as collateral. In any event, "[w]hether so stringent a restriction [as limiting the locations where a home equity loan can be closed and, we think, a power of attorney executed] is good policy is not an issue for the Commissions or this Court to consider." **Whether the constitutional provision's intended protection is worth the hardship or could be more fairly or effectively provided by some other method is a matter that must be left to the framers and ratifiers of the Constitution."**

A. Fidelity

1. Home Equity Loans

Powers of attorney will be acceptable in home equity loan transactions under the following guidelines:

1) The power of attorney to be used must be executed at the Texas office of the lender, an attorney or a title company. Fidelity will require a certificate from either the borrower/owner who is the principal under the power of attorney or the agent AND the attorney, loan officer or escrow officer.
2) No power of attorney executed prior to July 3, 2013 will be relied upon
3) The form must be a Texas Statutory Durable Power of Attorney in the form provided under the Durable Power of Attorney Act, Section 481, et. Seq. of the Texas Probate Code (Section 752.051 Estate Code). The power of attorney must include a "special Instructions" portion that specifically provides that the power of attorney is intended to be utilized for the purpose of execution of all documents necessary to consummate the specific home equity loan you are closing.

This special instruction is necessary to comply with the Supreme Court's holding that the execution of a Power of attorney is "…part of the closing process…' Therefore, it must be loan specific

[39] Texas Estates Code sec. 1151.201(b).

[40] Texas Estates Code sec. 751.052.

2. Reverse Mortgages

Regional Underwriter approval must be obtained before relying on a Power of Attorney.

B. Stewart

1. Home Equity

Powers of attorneys may not be used unless executed in the office of the Lender or the title company.

2. Reverse Mortgages

Stewart title will consider the use of a Power of Attorney in Reverse Mortgages.

C. First American

1. Home Equity

First American will consider a Power of Attorney on a home equity loan if they have absolute, unequivocal proof that is was executed in the office of the lender, Title Company or attorney.

2. Reverse Mortgages

First American will not allow the use of a Power of Attorney on reverse mortgage transactions. This was true even before the Norwood case was decided.

D. Old Republic

1. Home Equity

Old Republic will insure a home equity transaction using a Power of Attorney but the Power of Attorney must be transaction specific as to the loan and include the amount of the loan, the name of the lender and a legal description of the property. The Power of Attorney must be less than six months old unless approved by underwriting counsel. The Power of Attorney must be executed in the office of the title company, title agent or title fee attorney.

2. Reverse Mortgage

Old Republic will not insure on a Reverse Mortgage transaction when a Power of Attorney is used.

E. Possible Solutions

While it may be impossible to use a power of attorney to obtain a home equity lien, the spouse may decide to obtain a mechanic's and materialman's lien that is not subject to Art. 16, sec. 50(u) of the Texas Constitution. The more devastating result of *Norwood* would be to apply the holding to to the creation of a reverse mortgage. A reverse mortgage could finance the higher cost of keeping a spouse at home rather institutionalization in a nursing home. However, if the well spouse cannot use a perfectly valid power of attorney to create a reverse mortgage, the only option to obtain the needed financing would be to open a cumbersome and otherwise unnecessary guardianship resulting in the revocation of the power of attorney.

VIII. LADYBIRD/LIFE ESTATE DEEDS

In speaking with title company underwriters, the most important aspect of any lady bird deed is the language. Many times a title company will not honor the power of sale that is in lady bird deeds because it is so poorly worded. The state bar forms have wording that is preferred by the underwriters for reserving Life Estates; however these forms do not always reserve all of the powers that a grantor may want.

The title companies say:

A. Fidelity

These are recognized and do not require the remaindermen to sign on a transfer of title if the deed is set up correctly giving the life estate holder the power to sell. However, the approval of Texas underwriting counsel is required.

B. Stewart

In a life estate coupled with the power to sell the fee simple title, the grantee must be: 1. a bona fide purchaser for value; and 2. totally unrelated by blood or marriage to the life tenant. Stewart will NOT insure the sale of title derived by a life tenant of a power to sell without the joinder of the remainderman without approval of a Texas underwriting counsel.

C. First American

If remaindermen are in the chain of title, First American will require, at a minimum, a quitclaim deed from them disclaiming any interest in the property. This includes situations in which the lady bird has been revoked. Further, even with a ladybird First American would require the remainder to join in the transaction if a loan is involved.

D. Old Republic

Old Republic will occasionally insure on a ladybird deed but typically they require the joinder of both the grantor and the grantee regardless of the language.

E. Possible Solutions

Be careful in drafting Lady Bird Deeds to make sure the language clearly sets out the Grantor's intent. Additionally, drafting attorneys should be advising clients that while the Lady Bird deed is the best option available to avoid Medicaid Estate Recovery, the law could change or the title company policies could change.

The enhanced life estate deed contains the reservation by the Grantor of the Power of Sale without the joinder of the remaindermen. For Medicaid purposes, the reservation must also include the power

to consume the corpus. The State Bar of Texas has the following enhanced life estate language that will suffice for Medicaid purposes:

> "For Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate. Grantor retains complete power, without the joinder of any person, to mortgage, sell, and convey the Property and to spend any proceeds; to exchange it for other property; to lease the surface and subsurface of the Property; to execute and deliver oil, gas, and other mineral leases for any term of years and for a term based on the continuing production of oil, gas, or other minerals from the Property, ending either before or after Grantor's death; and to invest and reinvest all proceeds from the sale or other disposition of the Property and to possess and consume any and all proceeds from the sale or other disposition of the Property to the exclusion of Grantee. This life estate carries with it the right to possess and consume all bonuses, delay rentals, royalties, and other benefits payable on any mortgage, sale, or conveyance under oil, gas, and other mineral leases covering the Property at the inception of this life estate without any duty to the remainderman and without liability for waste."

However, problems arise when the grantor becomes disenchanted with the remainderman. The following language was suggested by Neal A. Kennedy of Hutto Lucksinger Garrett & Kennedy PLLC with some important Medicaid additions, shown in italics, by Patricia Sitchler.

> "For Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate.
> Grantor further retains complete power, without the joinder of any person, to mortgage, sell, and convey the Property, in whole or in part, and to spend any proceeds; to exchange it for other property; to lease the surface and subsurface of the Property; to execute and deliver oil, gas, and other mineral leases for any term of years and for a term based on the continuing production of oil, gas, or other minerals from the Property, ending either before or after Grantor's death; to grant any interest in the Property, by gift, sale or otherwise, so as to terminate the interests of Grantee, as Grantor in Grantor's sole discretion shall decide; and to invest and reinvest all proceeds from the sale or other disposition of the Property.[*] This life estate carries with it the right to possess and consume all bonuses, delay rentals, royalties, and other benefits payable on any mortgage, sale, or conveyance under oil, gas, and other mineral leases covering the Property at the inception of this life estate without any duty to the remainderman and without liability for waste.
> Grantor further reserves the right to cancel this deed by further conveyance, even to Grantor, which may destroy any and all rights which Grantee may possess under this deed.
> Grantee shall hold a remainder interest in the Property and upon the death of Grantor, if the Property has not been previously disposed of prior to Grantor's death, all right, title and interest to the Property remaining shall fully vest in Grantee, subject to such liens and encumbrances existing at that time."

Co-author, Patricia Sitchler, suggested one addition to the language above to insert at the [*]:

> "***and to possess and consume all proceeds from the sale or other disposition of the property to the exclusion of Grantee***."

This language suggested above gives the Grantor flexibility that a conventional enhanced life estate does not.

If it is anticipated that language such as that above is to be used, or if a situation has arisen in which the Grantor desires to convey the property to another remainderman and the deed has other language, it is best to check with a title company underwriter to insure that any future transaction will be insured. A red flag is always raised with the title companies when an event occurs, such as a new conveyance under an enhanced life estate deed, that signals strife, discord and the potential for litigation among family members.

IX. SURVIVORSHIP AGREEMENT

Survivorship agreements have become more and more accepted, however, I have not seen many in practice. In addition, survivorship agreements do not always meet the needs of our clients since both parties would need to execute any agreements to sell or mortgage property. The biggest complaint that title companies have with survivorship agreements is the lack of proper preparation. Following are their comments:

A. Fidelity

All survivorship agreements must be furnished to Regional Underwriting for review and approval. Typically, a survivorship will be approved if it meets the following criteria:

1) The Agreement is in writing, signed by the joint tenants and recorded in the real property records of the county where the property is located prior to the death of the joint tenant or spouse. The agreement must be executed and recorded on or after August 8, 1989.
2) The Agreement must identify the joint tenants bound by the agreement.
3) The Agreement must clearly provide that the joint tenants intend that their existing or subsequently acquired property shall pass to and become the property of the surviving joint tenant on the death of the joint tenant.
4) An affidavit from the surviving joint tenants must be obtain and recorded, which affidavit states:

    a) that the affiant is the surviving joint tenant under the Agreement (which should be identified by the appropriate recording information);
    b) the date of death of the deceased joint tenant, as evidenced by a certified copy of the death certificate attached to the affidavit; and,
    c) that the Agreement was not revoked by the deceased joint tenant or spouse.

5) If the Agreement provides that a revocation of the Agreement must be recorded, the escrow agent should verify that a written revocation has not been recorded.
6) If the Agreement provides for a revocation of the Agreement in a manner other than the recording of a written revocation, the title company must be furnished with satisfactory evidence that the agreement was not revoked prior to the death of said deceased joint tenant.

The term "with rights of survivorship" in a deed does not constitute a written agreement between the parties.

B. Stewart

Stewart will accept a deed that contains the agreement of the parties to a survivorship as set out in Section 112.052 of the Estates code:

1. Statutory Recognition

In Texas, the joint tenancy is recognized by statute (Section 101.002, Estates Code & Section 112.051, Estates Code for agreements between spouses) and case law as a legal form of ownership.

2. Instrument of Creation

A joint tenancy cannot be implied or created by operation of law. A joint tenancy can be created only by:

- A grant through a deed of conveyance.
- A devise in a valid will duly probated.
- Manifestation of Intention - an agreement in writing for spouses\

The intention of the parties to create a joint tenancy must be clear, manifest, unambiguous, and beyond all possibility of dispute. It should be remembered that statutory and judicial presumptions favor tenancies in common over joint tenancies.

3. Language of the Intention

Generally, statutes describe the language necessary to create a joint tenancy. Case law may constitute another source of guidance and information. A joint tenancy is not created in Texas simply by persons being jointly named in a deed.

Depending on the jurisdiction, the following phrases will create a joint tenancy:

- "As joint tenants"
- "As joint tenants with rights of survivorship"
- "As joint tenants with rights of survivorship and not as tenants in common"
- "As husband and wife" (unless otherwise stated).

As regards spouses (Section 112.051, Estates Code), one of these phrases must be used in the agreement:

- "With right of survivorship"
- "Will become the property of the survivor"
- "Will vest in and belong to the surviving spouse"

C. First American

The mere recitation in a deed of a right of survivorship does not give rise to an insurable transaction. Compliance with the statutory provisions or a judicial order is necessary. If the property is being purchased and the purchasers are wanting the deed to contain a right of survivorship clause, title insurance policy will not insure such (similar to a recitation in a deed to "husband and wife" and the title insurance policy does not insure status) and may have further requirements if the statutory provisions are not accommodated.

D. Old Republic

A transaction involving property subject to a right of survivorship will be insurable so long as the

Agreement tracks the statute and is created by a separate, recordable agreement. Simply stating in the deed "…with a right of survivorship…" is not sufficient.

E. Possible Solution

Be sure that the agreement is signed by both parties and tracks the language in the statute. This can be done in the deed so long as the proper language is in the deed and both parties to the survivorship agreement sign (even if they are the grantees).

X. MEDICAID ESTATE RECOVERY PROGRAM PERCEIVED DEBT:

The Medicaid Estate Recovery issue may be one of the most frustrating for elder law attorneys. In most situations, title companies will not insure a transaction if a MERP claim exists, even if the title companies understand that such a claim is not a lien on the property. Following are their positions:

A. Fidelity

MERP needs to be paid or MERP needs to execute a release. The potential MERP claim should be treated as any other possible claim against the estate.

B. Stewart

Makes a decision on a case by case basis as approved by Texas Underwriter.

C. First American

Any notice filed in the probate proceedings or any knowledge by an heir/beneficiary/devisee of a communication received regarding a MERP claim is to be filed must be addressed/paid/released prior to or at the time of Closing.

D. Old Republic

Old Republic will put the following on all commitments:

> "Company has been advised that a record owner died after March 1, 2005. Company should be furnished evidence that the party did not receive Medicaid benefits after March 1, 2005 or evidence the party's estate is not subject to a claim under the Medicaid Estate Recovery Plan."

If there are any questions as to whether an estate is subject to a MERP claim, the heirs/beneficiaries of the deceased owner should complete a MERP Certification Form (the "AMC Form") for submission to DADS. The AMC Form should be completed and signed by the estate representative and faxed to a MERP staff person. According to DADS, the AMC Form will be processed and returned by fax typically within three (3) business days. If DADS indicates there is a MERP claim or they intend to file a MERP claim and the claim will not be satisfied out of the decedent's estate please contact underwriting before proceeding.

E. Possible Solution

A simple way to avoid an issue at closing is to be sure that the MERP claim is released prior to closing. In speaking with the title companies, there may be an issue at closing with an outstanding MERP claim.

In anticipation of a smooth closing, the Attorney representing the Executor, Administrator or Heir should discuss with the underwriter that since Medicaid estate recovery creates no lien right, the Title Company should have no interest in determining whether Medicaid has paid for an elderly grantor's care. "One of the most important purposes of uniform title examination standards it so discourage the imposition of unnecessary title requirements"[41] Thus, the Attorney can point out to the closing agent:

Standard 11.60: Liens for Debts and Taxes:

> Property of a decedent passes subject to unpaid debts and taxes of the estate. Therefore, the examiner must determine whether these are unpaid. In the absence of information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or other person who has knowledge of the facts that all debts of the estate have been paid. …An order of the court probating a will as a muniment of title may be accepted as evidence that all obligations of the estate have been paid other than debts secured by liens on real property. In the latter case, the examiner must determine that the liens do not affect the property under examination. …Comment: Tex.Prob.Code Ann. Sec 37[42] creates a statutory lien on the decedent's estate in favor of the decedent's creditors. *Blinn v. McDonald* 46 S.W. 787 (Tex.1898). The statutory lien is not a lien in the usual sense and is not upon specific property but is a general lien upon all property that is subject to payment of debts. *Moore v. Moore,* 32 S.W. 217 (Tex. 1895).

[41] Douglas W. Becker, *The Texas Title Examination Standards,* 32nd Annual Advanced Real Estate Law Course, State Bar of Texas, Chap. 34, p. 6, 2010.

[42] Now Texas Estates Code sec. 101.051.

> Because a personal representative can sell property to pay debts, it follows that property sold by a personal representative in an authorized sale passes free of the statutory lien."

This comment about a "lien" may be misinterpreted by the Title examiner as creating a lien in favor of the State that attaches to the property. But as noted in the comment, the lien is not the traditional "lien" that attaches to specific property but is simply a way of expressing that creditor's claims are prior to payment to the legatees. Referring to a decedent's estate, Texas Estates Code section 101.051 states that "…property of the estate is subject to payment of and is still liable for debts of the decedent."[43] However, the executor or administrator transferring the property carries the liability, not the property itself. And in fact, an executor or administrator has no fiduciary duty to unsecured creditors.[44]

If the law and logic do not prevail and the title commitment requires release of a potential Medicaid Estate Recovery claim in the chain of title, the contract could terminate due to Seller's failure to close in a timely manner. The Seller has no right to confidential Medicaid files and no personal knowledge to audit a remote claim. Additionally, an executor attempting to sell property to pay superior creditors may be prohibited from completing a required sale by an inferior creditor's claim.

One potential solution is that the Seller could request a release from the State noting that the State has the burden of proving that the State complied with all of the regulations allowing for Estate Recovery.[45] This request for a release may be a time-consuming process and be fruitless if no there is no basis for release. One solution is to include in the earnest money contract a special provision allowing the seller time to obtain a release for anyone in the chain of title. Or, one might convince the Title Company to escrow the MERP claim amount allowing for the sale to proceed and giving the Executor time to resolve any potential MERP claim.

The Elder Law author objects to this whole process of requiring a release since there is not a scintilla of evidence that there is a lien against the property and the Texas Title Examination Standards specifically state:

> "A major goal of title standards is to eliminate technical objections that do not impair marketability and common objections that are based upon a misapplication of the law. An examiner should determine what irregularities, defects and encumbrances have been discovered by the examination. Then an examiner should determine, to the extent reasonably possible, who, if anyone, can take advantage of each irregularity, defect or encumbrance against the owner and/or client, and if there are consequent risks."[46]

One last word about Medicaid Estate Recovery in the Probate process.

An Attorney advising an heir should advise that although an heir may succeed in selling the property despite MERP, the program has a right to trace the funds and sue him or her to recover the MERP claim amount up to the amount of the inheritance. Likewise an attorney advising an executor or administrator should warn the client that he or she may be personally liable for failing to resolve any creditor claim including MERP and selling property subject to a MERP claim (or the claim of any other creditor known to them), may well pass liability on to distributes even to subjecting distributes of the estate to suit by MERP. Finally, the whole exercise can be avoided under current law and policy if a Lady Bird Deed is utilized. Ensuring that execution of a Lady Bird Deed is possible may depend on having sufficient authority in the power of attorney with at least an alternate agent who is not a potential grantee available to sign the deed, if necessary.[47]

XI. AFFIDAVITS OF HEIRSHIP

Title company underwriters take many different approaches on Affidavits of Heirship. As recently as a year ago, an affidavit of heirship could be filed at closing and the title company would insure title. Now, because of claims made against title companies caused by creditors of an estate harassing the buyers and indicating that their property is subject to the creditor's claim, some title companies are taking a more conservative approach. Following are their comments:

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[43] "In enacting a statute, it is presumed that … the entire statute is intended to be effective." Texas Gov. Code (Code Construction Act) section 311.021(2).

[44] Mohseni v. Hartman, 363 S.W.3d. 652 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.).

[45] BURDEN OF PROOF; REGS that state must comply with

[46] Texas Title Examination Standards, Appendix to Texas Property Code, Standard 1.10 Purpose of Title Examination.

[47] H. Clyde Farrell, an Austin Certified Elder Law Attorney, was so kind to edit this paper and include the noted comment. We sincerely appreciate the time he took to read through the materials as well as his 2:00 a.m. epiphany comments.

A. Fidelity

1. Parameters Upon Which the Company Will Rely on an Affidavit of Heirship When Decedent Died Intestate:

   a) The decedent died without a will, there has been no administration of the estate, and more than 1 year has passed since the death;
   b) The Affidavit of Heirship is an acceptable form per the requirements set forth below;
   c) The company has a death certificate, properly certified by the issuing governmental agency, for the decedent and any deceased child of the decedent.
   d) The title company has satisfactory evidence that (i) no federal estate taxes are owing; (ii) that they have been paid or (iii) will be paid in accordance with Texas Department of Insurance Procedural Rule P-11.b.(9);
   e) The title company is satisfied that there are no unpaid debts of the decedent's estate, including hospital bills, debts arising from last illness and Medicaid Estate Recovery obligations;
   f) If the death occurred less than 4 years prior to the date of the conveyance on which you will be insuring, you must obtain an indemnity from all of the heirs with regard to debts of the estate.
   g) The Affidavit of Heirship is filed in the real property records in the county where the real property is located.
   h) Perform a name search to determine what involuntary liens are against each of the various heirs; and,
   i) Include all of the heirs **and their spouses** in the conveyance deed for the subject transaction.

2. Parameters Upon Which the Company Will Rely on an Affidavit of Heirship When Decedent Died Testate But Decedent's Will has Not Been Offered for Probate:

   a) The decedent died leaving a will which was not offered for probate and more than 1 year has passed since the death;
   b) The Affidavit of heirship is in an acceptable form per the requirements set forth below and a copy of the of the Will is attached
   c) The title company has a death certificate, properly certified by the issuing governmental agency, for the decedent and any deceased child of the decedent.
   d) The title company has satisfactory evidence that (i) no federal estate taxes are owing; (ii) that they have been paid or (iii) will be paid in accordance with Procedural Rule P-11.b.(9);
   e) The title company is satisfied that there are no unpaid debts of the decedent's estate, including hospital bills, debts arising from last illness and Medicaid Estate Recovery obligations;
   f) If the death occurred less than 4 years prior to the date of the conveyance on which you will be insuring, you must obtain an indemnity from all of the heirs with regard to debts of the estate.
   g) The Affidavit of Heirship is filed in the real property records in the county where the real property is located.
   h) Perform a name search to determine what involuntary liens are against each of the various heirs; and,
   i) Include all of the heirs **and their spouses** in the conveyance deed for the subject transaction.

B. Stewart

We prefer use of the statutory form of affidavit, when possible. WE STRONGLY ENCOURAGE YOU TO PROVIDE THIS STATUTORY FORM TO ANY ATTORNEY WHO WANTS OUR "APPROVED" FORM. If the affidavit discloses that the decedent left an unprobated will, please require joinder of all heirs and devisees where more than 4 years have passed since the decedent's death. If the affidavit discloses unpaid bills, estate taxes or inheritance taxes that are owed, please require proof of payment. Please call our underwriting personnel if less than 4 years have passed and the decedent left an unprobated will.

C. First American

Please contact Underwriting Counsel if the person has been deceased for less than 1 year. If approval is given to use an Affidavit of Heirship, two disinterested persons are required to be the affiants, the two disinterested persons are required to be the affiants who must have knowledge of the family history and have personally known the decedent for at least 10 years, and must also be executed by all adult heirs mentioned in the affidavit. The Affidavit must contain a penalty of perjury clause. Affidavits will be considered if the person has been dead for a year but underwriting approval must be obtained.

D. Possible Solution

Attach the last will and testament to the Affidavit if one has been executed and the beneficiaries are the same. If there are no debts but the person has been deceased for less than one year, ask the title company underwriter if they will insure on the property if the underwriter is allowed to run a credit check on the

deceased person. Or, if it is imperative that the property is sold quickly, consider filing either a small estate affidavit or an heirship determination in lieu of the Affidavit of heirship.

XII. OTHER MISCELLANEOUS ISSUES

A. Confidentiality Notice Required by Law

The confidentiality notice provision is contained in Section 11.008 of the Texas Property Code. Failure to include this notice will not affect the validity of the instrument as between the parties and the clerk is not allowed to reject the instrument for recording solely because the instrument does not comply with this section. The title companies generally like the following notice to be on all deeds and deeds of trust and most real estate attorneys still include it:

> NOTICE OF CONFIDENTIALITY RIGHTS:
>
> IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS:
>
> YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

B. Quitclaim vs. Deed:

Title Companies do not generally like to insure a transaction with a Quitclaim in the chain of title because the doctrine of after acquired title does not apply in relation to a Quitclaim and a break in the warranty has occurred. Section 5.022(b) of the Texas Property Code specifically provides that no covenant of warranty is required in a conveyance to convey fee simple title. By including the words "grant" or "convey", the deed without warranty actually conveys title to the property and not just the grantor's rights as in a quitclaim. Additionally, the rule of after acquired title applies where the conveyance passes a fee simple title.[48]

> "By definition, a true quitclaim can never purport to convey the land itself; it only conveys whatever interest the grantor may happen to own."[49]

However, recently, a title company examiner has told the real estate author of this paper that the title company will usually insure title if the quitclaim is more than ten years old. However, to avoid any problems it is best to have only special or general warranty deeds in the title.

C. Statutory Requirements for a Correction Deed

In *Myrad Properties Inc., v. LaSalle Bank National Association*,[50] the Texas Supreme Court held that a correction deed executed to add the legal description of property inadvertently omitted from a Trustee's deed was VOID. The Supreme Court went on to say: "To allow correction deeds to convey additional, separate properties not described in the original deed would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property system." Thus, all of those correction deeds that were drafted that made a substantive change to the description may be void. In an effort to resolve the fallout from the *Myrad* case, the Texas Legislature passed the Correction Deed Statutes found in Sections 5.027 ***et. seq.*** of the Property Code effective September 1, 2011. Section 5.031 states that instruments recorded prior to September 1, 2011 that substantially comply with the statute are valid. The Texas legislature made additional changes in 2013 primarily to allow a correction instrument to be used when the legal description for the property was intended to be set out on an Exhibit that was "inadvertently" omitted from the recorded document. A strong argument can be made that if the body of the document says that the legal description is as shown on Exhibit A the omission was inadvertent.

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[48] Blanton v. Bruce, 688 S.W.2d 908 (App.Ct.– Eastland, 1985, no writ) citing to Lindsay v. Freeman, 18 S.W. 727 (Tex. 1892).

[49] Cal L. Donsky & William A. Kramer, *Title to Land*, 43 Tex.L. Rev. 1129, 1132, fn. 40.

[50] 300 S.W.3d 746 (Tex. 2009).

[46] Medicaid for the Elderly and Persons with Disabilities I-4150.

[47] Medicaid for the Elderly and Persons with Disabilities I-4150

48 Texas Finance Code Sctions 156.202 and 180.003

[49] Dodd-Frank Act Title XIV, Section 1401.

[50] Agency Seminar 2005 – Fidelity National Title Insurance Company.

[51] Texas Property Code Section 111.0004 (18)

D. Seller Financing Transactions

There are times that a client owns property and wants to sell that property to someone in exchange for payments. So the attorney drafts the sale documents with the buyer signing a note and deed of trust which gives the client cash flow for the next several years. After a year of receiving payments, the elderly client falls and needs to be admitted to a nursing home. The cash flow from the note helped the client while he was living at home but may now prevent him from qualifying for Medicaid. A negotiable, secured or non-secured promissory note, loan or property agreement is a countable resource and will be counted as an asset belonging to the client even if the note has no demand feature.[46] Further, a non-secured promissory note, loan or property agreement may also be considered a transfer of assets which will penalize the client. This is true because, in the view of the Texas Department of Health and Human Services, by not securing the note, the seller has purposefully reduced the value of the note. [47]

The seller financed transaction becomes even more complicated if it involves residential property. Residential transactions that involve Seller financing is now regulated by three different laws, which are:

1) the 2009 S.A.F.E. Act,
2) Title XIV of the Dodd-Frank law and
3) Chapter 5 of the Texas Property Code.

The current Texas law allows a person to seller finance up to five residential transactions each twelve month period without either being licensed as a registered mortgage loan originator or using one in the transaction.[48] The recently enacted Dodd Frank legislation had provisions effective in 2014 which will cause most individuals to seller finance no more than three residential transactions in any twelve month period. It also has an added requirement that the seller must insure that the borrower can qualify and/or repay the loan.[49] This area of the law is law is unsettled and changing rapidly so before finalizing documents attorneys should check the status of law.

E. Transferring Real Property Into or Out of a Trust

A grantor desiring to transfer property into a trust should make the trustee, not the trust itself, the grantee in the deed.

This is explained by looking at the definition of a trust and the definition and powers of a trustee. A trust is defined a:

> "a relationship wherein one or more persons or entities hold legal title of an asset for the benefit of other persons or entities" [50] A trustee is defined as "the person holding the property in trust, including an original, additional or successor trustee, whether or not the person is appointed or confirmed by a court."[51]

Both of these definitions establish the trustee as the fiduciary acting on behalf of the trust. Looking further at the Texas Property Code, Section 113.004 specifically states that:

> "A trustee may receive from any source additions to the asset of the trust."

All of these contemplate the trustee holding legal title to property.

The grantee in a deed conveying property to a trust should be in a form similar to the following:

1) Ima Penniless, Trustee for the Penniless Trust dated January 1, 2010.
2) Ima Penniless, Trustee for the Penniless Family Trust created under the will of U. R. Penniless, Deceased
3) Ima Penniless, Trustee on behalf of the Penniless Family Trust dated January 1, 2012 FBO U. R. Penniless.

If the Trust is selling a piece of real property the title company must be furnished with a copy of the trust instrument or other document showing that the trustee has the power to consummate the transaction. Typically you can redact provisions that do not pertain to the transaction, such as the beneficiary designations, if your client would prefer that those are not revealed. The title company will need to be satisfied that:

1) the trust exists;
2) the person acting as trustee is identified as the trustee;
3) the trustee has the authority to convey (or encumber) the property; and
4) the trustee has the authority to bind the trust.

Section 113.010 of the Texas Property Code gives the Trustee the inherent authority to sell property in the trust. The title companies will typically accept a broad statement in a trust which gives the Trustee all of the powers in the Texas Trust Code. A trustee additionally has the power to borrow money from any source, including a trustee, purchase property on credit and encumber all or any part of the property as set forth in section 113.015 of the Texas Property Code.

If your client does not want the trust released to the title company, many title companies will accept an "Affidavit of Trust" or "Memorandum of Trust". Such memorandum should be in recordable form and should state the following:

1) A statement that the trust exists and the date the trust instrument was executed;
2) The identity of the settler;
3) The identity and mailing address of all acting trustees
4) The powers of the trustee, which should specifically include the power needed for the transaction (such as convey, sell or encumber).
5) Whether the trust is revocable or irrevocable
6) The authority of any co- trustees to sign (i.e. whether he can sign individually or if a co-trustees must sign);.
7) Instructions on how the title to trust property should be taken;
8) A statement by the trustee that the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the memorandum to be incorrect;
9) A statement that the trust does not constitue a "passive trust" as defined in Section 112.032 of the Texas Property Code;
10) Such other information as may be relevant to the particular transaction.

It is always advisable to maintain the title insurance on property, including when the property is transferred to a trust owned by the parties. Upon request (and the payment of a fee) the title company can issue an endorsement to the title policy called an Additional insured Endorsement. This endorsement may be issued to an Owner's Policy of title insurance by naming a person as an additional insured in the endorsement if:

1) The underwriting requirements are met,
2) The premium payment is made; and,
3) The additional insured is:

    a) The trustee or successor trustee of a living trust to whom the insured transfers the title after the Policy Date, and/or the beneficiaries of the Living Truste,

F. Title Insurance and Gifting

Is title insurance lost when real property is gifted? The answer is yes and no. The first part of the answer depends on the type of gift deed used. If it does not have warranty language (i.e. a deed without warranty) then you very obviously lose all title insurance. However, if the deed has general warranty language and the recipient later finds out that there is a title problem, the recipient (grantee) can sue the grantor (which might be mom) but then mom can make a claim on her title insurance. Therefore the title insurance is not completely lost. More care has to be taken if a special warranty deed is used in gifting because then mom can only be sued for title issues that arose during her ownership. There is an excellent article written by D'ana H. Mieska and Michael A. Wren entitled "Conveyancing Techniques to Preserve Title Insurance in Real Estate Transactions" found in the 2011 State Bar Real Estate Drafting Course for a more in-depth discussion.

G. Medicaid Will Assess a Transfer Penalty for Disclaiming Property

Filing a disclaimer is a disqualifying transfer of property for Nursing Home Medicaid (and most of the other Medicaid programs) unless an exception to the transfer penalty exists.[5152]

H. Old Medicaid Incremental Gifting Strategies No Longer Avoid Transfer Penalties

Prior to the passage of the Deficit Reduction Act of 2005, monthly gifts up to the amount of the monthly average cost of nursing care could be made without unduly penalizing a person who subsequently applied for Medicaid. However, the law changed effective February 8, 2006 resulting in a penalty period beginning to run on the date the applicant was otherwise eligible.[52] [53] Thus, if a person made a gift in 2009 and subsequently ran out of money in 2012, applying for Medicaid assistance, any period of ineligibility that is assessed as a result of the gift begins running on the date in 2012 when the applicant is otherwise eligible for Nursing Home Medicaid benefits.

I. Other Suggestions/Comments from Title Companies

1) Give the executor the specific power to sell real property in the Will.
2) In a divorce decree use vesting and divesting language and get a warranty deed before the decree is entered.
3) A power of attorney used in a home equity loan transaction must be transaction specific and less than 6 months old. It should identify the lender, the amount of the loan and state that it is going to be used in a home equity transaction.
4) If you are dealing with mom and dad's homestead and the homestead is being sold to a child, mom and dad must move out – at

[52] Medicaid for the Elderly and Disabled Persons Handbook §E-3372.

[53] Medicaid for the Elderly and Disabled Persons Handbook §I-5200

least temporarily – or the title company cannot insure the transaction.

XIII. (NON) ISSUES THAT HAVE BEEN RAISED BY OTHER PRACTITIONERS

A. Selling Real Property by a Grantor Who is Old (And Potentially Received Medicaid Assistance to Pay for Infirmity)

While there should be absolutely no issue regarding Medicaid ESTATE recovery when there is a sale by a living Medicaid recipient, the issue was raises that at closing, a Medicaid Estate Recovery release could be required for a living Medicaid beneficiary who was selling the homestead. Such a request for a release prior to death could create an unfortunate outcome for a disabled person who is in desperate need of cash through a reverse mortgage, sale-leaseback or even outright sale of real property.[53] [54] The Attorney representing the disabled client should beware of the impossibility of obtaining a release from Medicaid Estate Recovery when the person is not even dead! Unsecured creditors cannot prevent a person from spending their funds while in debt to the creditor, without legal process such as an attachment or turnover order. Remember, the state has no lien right on the property for Medicaid Estate Recovery. Thus, if a person needs cash from the sale of the home, the State has no dog in that fight.

[54] Victor A. Kormeier, Jr., *Medicaid Estate Recovery Program (MERP) Real Estate Issues,* State Bar of Texas Advanced Elder Law, March 2009, p. 4.

EXHIBIT A

THE FOLLOWING COMMITMENT FOR TITLE INSURANCE IS NOT VALID UNLESS YOUR NAME AND THE POLICY AMOUNT ARE SHOWN IN **SCHEDULE A**, AND OUR AUTHORIZED REPRESENTATIVE HAS COUNTERSIGNED BELOW.

COMMITMENT FOR TITLE INSURANCE

Issued by

We (_____) will issue our title insurance policy or policies (the Policy) to You (the proposed insured) upon payment of the premium and other charges due, and compliance with the requirements in Schedule B and Schedule C. Our policy will be in the form approved by the Texas Department of Insurance at the date of issuance, and will insure your interest in the land described in Schedule A. The estimated premium for our Policy and applicable endorsements is shown on Schedule D. There may be additional charges such as recording fees, and expedited delivery expenses.

This Commitment ends ninety (90) days from the effective date, unless the Policy is issued sooner, or failure to issue the Policy is our fault. Our liability and obligations to you are under the express terms of this Commitment and end when this Commitment expires.

_____

ATTEST: By: _____

_____
Secretary

_____
Authorized Signatory

CONDITIONS AND STIPULATIONS

1. If you have actual knowledge of any matter which may affect the title or mortgage covered by this Commitment, that is not shown in Schedule B, you must notify us in writing. If you do not notify us in writing, our liability to you is ended or reduced to the extent that your failure to notify us affects our liability. If you do notify us, or we learn of such matter, we may amend Schedule B, but we will not be relieved of liability already incurred.

2. Our liability is only to you, and others who are included in the definition of Insured in the Policy to be issued. Our liability is only for actual loss incurred in your reliance on this Commitment to comply with its requirements, or to acquire the interest in the land. Our liability is limited to the amount shown in Schedule A of this Commitment and will be subject to the following terms of the Policy: Insuring Provisions, Conditions and Stipulations, and Exclusions.

SCHEDULE A

Effective Date: _____ GF No._____

Commitment No. _____, issued _____, 20____, ___m.

1. The policy or policies to be issued are:

(a) OWNER'S POLICY OF TITLE INSURANCE (Form T-1)
(Not applicable for improved one-to-four family residential real estate)
Policy Amount: $
PROPOSED INSURED:

(b) TEXAS RESIDENTIAL OWNER'S POLICY OF TITLE INSURANCE
ONE-TO-FOUR FAMILY RESIDENCES (Form T-1R)

Policy Amount: $
PROPOSED INSURED:

(c) LOAN POLICY OF TITLE INSURANCE (Form T-2)
Policy Amount: $
PROPOSED INSURED:
Proposed Borrower:

(d) TEXAS SHORT FORM RESIDENTIAL LOAN POLICY OF TITLE INSURANCE (Form T-2R)
Policy Amount: $
PROPOSED INSURED:
Proposed Borrower:

(e) LOAN TITLE POLICY BINDER ON INTERIM CONSTRUCTION LOAN (Form T-13)
Binder Amount: $
PROPOSED INSURED:
Proposed Borrower:

(f) OTHER
Policy Amount: $
PROPOSED INSURED:

2. The interest in the land covered by this Commitment is:

3. Record title to the land on the Effective Date appears to be vested in:

4. Legal description of land:

SCHEDULE B

EXCEPTIONS FROM COVERAGE

In addition to the Exclusions and Conditions and Stipulations, your Policy will not cover loss, costs, attorney's fees, and expenses resulting from:

1. The following restrictive covenants of record itemized below (We must either insert specific recording data or delete this exception):

2. Any discrepancies, conflicts, or shortages in area or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.

3. Homestead or community property or survivorship rights, if any of any spouse of any insured. (Applies to the Owner Policy only.)

4. Any titles or rights asserted by anyone, including, but not limited to, persons, the public, corporations, governments or other entities,

   a. to tidelands, or lands comprising the shores or beds of navigable or perennial rivers and streams, lakes, bays, gulfs or oceans, or
   b. to lands beyond the line of the harbor or bulkhead lines as established or changed by any government, or
   c. to filled-in lands, or artificial islands, or
   d. to statutory water rights, including riparian rights, or
   e. to the area extending from the line of mean low tide to the line of vegetation, or the rights of access to that area or easement along and across that area.

   (Applies to the Owner Policy only.)

5. Standby fees, taxes and assessments by any taxing authority for the year _____, and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership, but not those taxes or assessments for prior years because of an exemption granted to a previous owner of the property under Section 11.13, Texas Tax Code, or because of improvements not assessed for a previous tax year. (If Texas Short Form

Residential Mortgagee Policy of Title Insurance (T-2R) is issued, that policy will substitute "which become due and payable subsequent to Date of Policy" in lieu of "for the year _____ and subsequent years.")

6. The terms and conditions of the documents creating your interest in the land.

7. Materials furnished or labor performed in connection with planned construction before signing and delivering the lien document described in Schedule A, if the land is part of the homestead of the owner. (Applies to the Mortgagee Title Policy Binder on Interim Construction Loan only, and may be deleted if satisfactory evidence is furnished to us before a binder is issued.)

8. Liens and leases that affect the title to the land, but that are subordinate to the lien of the insured mortgage. (Applies to Mortgagee Policy (T-2) only.

9. The Exceptions from Coverage and Express Insurance in Schedule B of the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R). (Applies to Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R) only. Separate exceptions 1 through 8 of this Schedule B do not apply to the Texas Short Form Residential Mortgagee Policy of Title Insurance (T-2R).

10. The following matters and all terms of the documents creating or offering evidence of the matters (We must insert matters or delete this exception.):

SCHEDULE C

Your Policy will not cover loss, costs, attorneys fees, and expenses resulting from the following requirements that will appear as Exceptions in Schedule B of the Policy, unless you dispose of these matters to our satisfaction, before the date the Policy is issued:

1. Documents creating your title or interest must be approved by us and must be signed, notarized and filed for record.

2. Satisfactory evidence must be provided that:

   - no person occupying the land claims any interest in that land against the persons named in paragraph 3 of Schedule A,

   - all standby fees, taxes, assessments and charges against the property have been paid,

   - all improvements or repairs to the property are completed and accepted by the owner, and that all contractors, sub-contractors, laborers and suppliers have been fully paid, and that no mechanic's, laborer's or materialmen's liens have attached to the property,

   - there is legal right of access to and from the land,

   - (on a Mortgagee Policy only) restrictions have not been and will not be violated that affect the validity and priority of the insured mortgage.

3. You must pay the seller or borrower the agreed amount for your property or interest.

4. Any defect, lien or other matter that may affect title to the land or interest insured, that arises or is filed after the effective date of this Commitment.