Medicaid Pre-Planning:
What Every Traditional Estate Planner Should Know

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Estate Planning & Probate Section
April 8, 2011

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I. Spousal Impoverishment

A. Spouses Treated as An Economic Unit

1. Transfers between spouses are not penalized
2. The income and resources of the applicant's spouse will be considered in the financial eligibility process

B. Income and Resource Limits

1. Income based on name on the check (not community property rules)
2. The applicant's income is limited to $2,022/month (can use QIT Trust)
3. The spouse can have unlimited "income" without disqualifying the applicant
4. "Income" for this purpose means defined-benefit pensions, immediate annuity payments, and social security; it generally doesn't include investment income generated by resources
5. The spouse will be allowed to keep a portion of the applicant's income, to the extent necessary to meet the Minimum Monthly Maintenance Needs Allowance (MMMNA) of $2,739
6. The spouse will be assigned a Spousal Protected Resource Amount (SPRA), which is the dollar amount of countable resources the spouse can keep without disqualifying the applicant

C. Calculating the SPRA

1. Determine snapshot date: First day of the month in which applicant first entered the nursing home or hospital and stayed for 30 days or more.
2. Calculate total countable resources on the snapshot date.
3. Divide that number by 2.
4. If result from step 3 is less than $109,560, the result is the SPRA (unless the spouse is eligible to increase it). If the result is more than $109,560, the SPRA will be $109,560 (unless the spouse is eligible to increase it).
5. Increasing the SPRA: If the spouse's income, plus the applicant's income (minus $60 personal needs allowance) is lower than $2,739 per month ($32,868 per year), the SPRA will be set at the dollar amount necessary to generate enough interest to bring the total income up to $2,739, using the interest rate on one-year CDs.
6. These figures are adjusted for inflation each year.

SPRA Example

Bob (applicant): 73 years old with an aggressive form of Alzheimer's

Bob's Income: $1,319.50/month from Social Security

Donna (spouse): 57 years old

Donna's Income: commission-based, most recently zero due to Bob's care needs

Assets:	$ 4,325	(checking & savings)
	89,014	(Donna's IRA)
	121,300	(homestead, w/mortgage)
	137,580	(rental property, w/mortgage – home of daughter)
	73,050	(rental property in foreclosure – out of state)
	273,500	(rental property – retirement home – out of state)
	$ 698,769	Total Assets

Couple's Combined Income:	$ 1,319.50	
	- 60.00	(Bob's personal needs allowance)
Couple's Remaining Income:	$ 1,259.50	
MMMNA:	$ 2,739.00	
	- 1,259.50	
Monthly Income Shortfall:	$ 1,479.50	
Annualize	x 12	
Annual Shortfall:	$17,754.00	

One-Year CD Rates ÷ [ranged from .30% - 1.53% at banks they used]

Assets Needed to Produce the Shortfall of $17,754.00:

$5,918,000.00 (.30%)
$1,160,392.10 (1.53%)

II. Medicaid Bed System

A. In addition to being financially and medically eligible for Medicaid, the applicant has to be in a "Medicaid bed" in order to receive benefits. This means that the nursing home has certified the bed with the Texas Medicaid program.

B. Many nursing homes have not certified all of their beds for Medicaid.

C. Many nursing homes have waitlists for their Medicaid beds, and they will not put you on the waitlist unless you are a private-pay patient in their facility.

D. At the more-desirable nursing homes, some patients will spend over a year on the waitlist before a Medicaid bed opens up. That means they could wind up paying over $50,000 to get into a Medicaid bed.

E. In one case, a patient had been on the waitlist for almost a year, when the caseworker issued the second denial. (The clients, a married couple, were not represented at that point.) When the nursing home found out about the denial, they took the patient off the waitlist. When the community spouse informed the nursing home that she had retained counsel to pursue a third application, the nursing home put the patient back on the waitlist — at the bottom.

F. The Medicaid bed system may violate federal law. But no one has yet volunteered to be the test case. So clients have to factor this system into their plans. A client with only $50,000 can't give it away or shelter it in some way, because it will be needed to obtain placement in a Medicaid bed.

III. Application Process

A. Similar to an Income Tax Audit

1. The caseworker will ask for a lot of supporting documentation.
2. Part of the advocate's job may be to negotiate down the level of documentation required.
3. Many applicants give up because the process is so burdensome. The state government relies on this attrition rate in balancing budgets, so simplifying the process is not in their interest.
4. Preparing the client to make it through the application process is more valuable than any legal document you could draft.

B. Caseworkers

1. Caseworkers are assigned to areas (nursing homes within an area) and the application must be sent to the appropriate caseworker.
2. The paperwork will refer to the applicant as the "client," but caseworkers are not attorneys, and they are adverse to their "clients."

3. Caseworkers have workloads of approximately 1,100 cases at any given time, so it is in the caseworker's best interest to find a way to quickly dispose of the application.

4. Caseworkers typically ignore requests by attorneys to communicate with the attorney, not the family. Families must be counseled to refer all telephone calls and correspondence from caseworkers to the attorney so as to avoid any inadvertent statements that cause more questions.

5. From the Texas Medicaid Eligibility Handbook, section F-4222: "Do not routinely develop the value of household goods and personal effects. Do so only when a person lists items of value exceeding $500 on his application."

C. Deadlines

1. When asking for additional documentation, caseworkers will give you 10 days to provide it, then issue a denial.

2. It is important to have all documentation ready to go BEFORE filing the application

D. Denials

1. Denials can be a routine part of the process and are often based on caseworkers following their "policy," as stated in the Texas Medicaid Eligibility Handbook, rather than the "rule," as published in the Texas Administrative Code.

2. Appeals must be timely and will be heard, typically, by an independent agency via a telephone hearing. Attorneys are welcome participants by the independent hearing agency.

IV. What Clients Should NOT Do

A. Don't do anything that the Medicaid attorney will later have to undo (or worse, that can't be undone)

1. It is possible to get good quality care under Medicaid, but also possible to get poor quality care.

2. Don't put clients in a position that will force them to accept the worst that Medicaid has to offer by reducing their ability to be flexible with their assets while looking for an appropriate Medicaid bed.

B. Don't Set Up a Living Trust

1. A Revocable Living Trust will usually have to be unwound when the settlors apply for Medicaid – assets are within the control of the Medicaid applicants, so are included in the asset calculation.

2. Single and Married Applicants: Homesteads in trusts are countable resources.

3. Married Applicants: A spousal special needs trust can only be created "by will" under 42 USC 1396p(d)(2)(A).

C. Don't Purchase Annuities

1. Annuities will be considered assets, but clients will have limited ability to access the funds.

2. Lack of liquidity makes planning difficult and unnecessarily costly.

3. Yes, there are Medicaid-compliant annuities (with specific requirements, such as Medicaid listed as the primary beneficiary and a restricted payout period), but they cannot be purchased in advance, because we won't know the appropriate terms until the client is ready to apply.

D. Don't Make Other Illiquid or Long-Term Investments

1. Life insurance
2. Time shares
3. Mineral interests
4. Securities that are not publicly-traded

E. Don't Make Gifts

1. Gifts within 5 years of the application constitute ineligible transfers – penalty period is the amount of the gift divided by current divisor ($130.88 in 2011).

2. Example: Gift of $100,000 results in penalty period of 764 days Medicaid will not pay for the long-term care ($100,000/$130.88 = 764).

3. A gift can backfire if not part of a comprehensive plan (intended payback)

4. Don't change names on assets.

5. Don't add children's names to assets.

F. Don't Try to Avoid Probate

1. Most probate avoidance techniques will interfere with Medicaid planning.

2. A well-planned probate costs $2,000. Delaying Medicaid benefits by one month while we undo your probate avoidance plan can cost the client $4,000 in lost benefits. Two months, $8,000. Three months, $12,000. And so on.

G. Don't "Spend Down" Too Soon

1. "Spending Down" includes things like paying off debt, purchasing pre-paid funeral plans, and making needed improvements to real property (as well as paying for the nursing home).

2. Many clients (particularly married couples) will benefit from a good spend-down plan.

3. But if a married couple spends down before the snapshot date, they will have reduced their CSRA, will be required to spend down additional money after the snapshot date, and the spouse will retain less in assets.

V. What Clients SHOULD Do

A. Purchase Long-Term Care Insurance.

B. Simplify Assets.

1. Get all securities in street name
2. Consolidate bank accounts
3. Liquidate assets that will take time to liquidate (mineral interests, non-homestead real property, time shares, small life insurance policies)

C. Organize Financial Information.

D. Execute a Comprehensive Power of Attorney that allows the Agent to engage in selected Medicaid planning strategies.

EXHIBIT "A"

Medicaid Pre-Planning
Tips and General Advice
for Preparing to File an Application for Nursing Home Benefits

1. Do not take any of the following actions unless you have discussed it with a Medicaid lawyer and it is part of a comprehensive Medicaid plan:
    a. Do not buy any annuities, life insurance, or other insurance or investment products. Complicated investments can affect your Medicaid eligibility.
    b. Do not take out a reverse mortgage or home equity loan.
    c. Do not give away your home or put anyone else on the deed.
    d. Do not set up or purchase a living trust.
    e. Do not try to avoid probate. Many probate avoidance techniques wreak havoc with Medicaid planning.
2. Do not move your money around any more than necessary. When you apply for Medicaid, the caseworker may ask for documentation for every account that was closed in the previous five years, and producing those records can be difficult. If you do close a bank account, save all receipts, deposit slips, and other documentation showing where the money was transferred.
3. Keep all bank statements, deposit and withdrawal receipts, cancelled checks, etc. in an organized format.
4. If you own any stocks in certificate form, start working to get them transferred into street name at a brokerage firm that provides quarterly statements.
5. If you own mineral interests or small life insurance policies (under $20,000), consider selling them or cashing them in now. Assets like these often cannot be liquidated quickly or without bureaucratic hurdles, which can delay the processing of your Medicaid application.
6. Maintain a detailed list of assets, including account numbers, market values, and notes indicating where statements and contracts can be found.
7. Start collecting copies of the following documents to provide to the caseworker:
    a. Contracts for all annuities and life insurance policies.
    b. Certificates of deposit.
    c. Bank statements.
    d. Annual Notices of Benefit Amount for Social Security and other pension benefits.
    e. Settlement statements for any real property sales.
    f. Contracts for pre-paid funeral plans.

EXHIBIT "B"

Customizing the Power of Attorney to Facilitate Medicaid Planning

This article is excerpted from Dianne Reis's book, Texas Estate Planning, available from James Publishing at http://www.jamespublishing.com.

A. Durable Power of Attorney

1. General Points

§5:50 The Statutory Form Is Not Ideal for Medicaid Planning

The Texas statutory form of power of attorney is not well-suited to Medicaid planning. [For powers of attorney generally, see Chapter 4, Ancillary Documents.]

Form: See the following form at the end of Chapter 4:

- Form 4-1, Durable Power of Attorney

However, the need for nursing home benefits frequently does not arise until the applicant has lost the capacity to engage in the transactions and administrative acts that facilitate the Medicaid eligibility process.

Clients who are relying on Medicaid as their source of funding for long-term care may wish to include additional provisions in their powers of attorney that will speed up eligibility and help preserve assets for the healthy spouse.

[§§5:51-5:59 Reserved]

2. The Power to Create and Fund Trusts

§5:60 Statutory Form Does Not Allow the Creation of Trusts

The standard form does not authorize the attorney-in-fact to create an irrevocable trust and fund it with the principal's assets. [*See* Prob C §499(6) (authorizing transfers to a trust only if the trust is revocable and was previously created by the principal); *Filipp v. Till*, 230 SW3d 197, 203 (Tex. App. — Houston [14th Dist.] 2006, no pet.) (identified in some sources as *Ritter v. Till*) (holding that a trust created by an attorney-in-fact was void because "[a]n agent acting under a power of attorney cannot have the requisite intent to create a trust").]

§5:61 Medicaid Applicants May Need to Create Trusts

The inability of an attorney-in-fact under the statutory form power of attorney to create a trust is a problem because federal law allows Medicaid applicants to create three different types of trusts that will not be considered countable resources. [*See* 42 USC §1396p(d)(4).]

All three trusts are required to be irrevocable, so even if the settlor creates the trust before losing capacity, the power of attorney must explicitly authorize the agent to transfer assets to the trust.

Two of the authorized trusts are self-settled supplemental needs trusts, which are beyond the scope of this book but which can be beneficial in the right circumstances.

The third trust is a Miller Trust, or Qualified Income Trust (QIT). [*See* §5:100.]

An applicant whose income exceeds the income cap will be required to create a QIT before qualifying for benefits, and the caseworker will inform the applicant of this requirement. However, the caseworker is not allowed to create a QIT for an applicant because it is considered the practice of law. [*Medicaid Eligibility Handbook*, App XXXVI, 1st para.] The caseworker will advise the client either to hire an attorney or to create his or her own QIT using a model form provided by the state. [*Medicaid Eligibility Handbook*, App XXXVI.] Once the QIT is created, the caseworker will review it for compliance and then continue with the eligibility process.

§5:62 Establishing a QIT for an Incapacitated Person

In practice, the QIT can be created and funded by anyone who has possession of the applicant's funds, regardless of whether that person has authority under a power of attorney. [*See* H. Clyde Farrell, *Financing Long-Term Care in Texas*, January 2007, Edition 12.0, page 52.]

Furthermore, the nature of a QIT, and Medicaid's procedural treatment of it, seems more in substance like an administrative act than a traditional trust transaction. Thus, it could be claimed that the creation and funding of a QIT is authorized under the power of attorney act by the section dealing with the administrative actions related to government benefits. [Prob C §502(3).]

However, there is a risk that the Medicaid agency will someday start rejecting QITs of incapacitated persons unless they are created by a duly-appointed guardian or an explicitly-authorized attorney-in-fact. If the client's family has to pursue a guardianship solely to set up the QIT, it could cost several thousand dollars in legal fees and several months of lost eligibility.

These problems are minor ones and are unlikely to prevent eligibility because the Medicaid agency is unlikely to require families to pursue guardianships. However, even if the Medicaid agency is not concerned about the agent's authority, the ambiguity in the law creates an ethical dilemma for the attorney representing the attorney-in-fact at application time. An attorney cannot advise an attorney-in-fact to take actions that are not authorized by the power of attorney, even if no one's interests would be harmed. Including explicit authority in the power of attorney to create a QIT sidesteps this issue.

§5:63 Extent of Authority May Vary

The authority could be limited to the creation and funding of a QIT.

SAMPLE FORM

I authorize my agent to create and fund a Qualified Income Trust, as defined in 42 USC §1396p(d)(4)(B) (or its successor statute) and any federal or state guidance issued thereunder.

However, the client might want to grant broader authority to create other types of trusts as well. To avoid changes to the client's estate plan, the power of attorney could require that the trust not deviate from the dispositive scheme in the client's will.

SAMPLE FORM

I grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

This sample would not only allow a QIT or a self-settled supplemental needs trust, but also would allow the attorney-in-fact to create a revocable trust for the purpose of avoiding probate or managing assets during incapacity. This might be useful if the client moves to a new state after becoming incapacitated, or if other circumstances change in a way that would make a revocable trust advisable.

For example, the estate recovery program in the new state might extend to life estates but not revocable trusts, which might create a need to revoke a Lady Bird deed and convey the family home to a revocable trust. Note that this sample allows the creation of irrevocable trusts as well, since a QIT has to be irrevocable.

[§§5:64-5:69 Reserved]

3. The Power to Make Gifts

§5:70 Guardians Cannot Make Medicaid-Motivated Gifts

Texas law grants guardians the ability to use the ward's funds to make tax-motivated gifts. [Prob C §865.]

However, the Code contains no similar provision for making Medicaid-motivated gifts. Thus, the only way for an incapacitated person to make gifts for the purpose of qualifying for Medicaid benefits is through a power of attorney.

§5:71 Statutory Form Is Not Designed for Medicaid Gifts

The gifting power contained in the statutory power of attorney form is tailored for estate tax planning. [See Prob C §490.] To avoid giving the agent too much power, the statutory form limits gifts to the amount that will qualify for the gift tax annual exclusion, which is a dollar amount per year and per recipient.

In contrast, the Medicaid transfer penalty provisions are calculated on a monthly basis, and the number of recipients is not a factor. Furthermore, Medicaid ignores all gifts made more than five years before application, regardless of size.

Thus, authority to make gifts that is based on the federal gift tax has the potential to be either too broad or too narrow, depending on the client's circumstances. If an attorney-in-fact makes gifts that are not authorized by the power of attorney, the Medicaid agency could take the position that such gifts are revocable and therefore available to the applicant as countable resources.

The IRS has provided conflicting guidance on whether the statutory form allows the agent to make gifts in the absence of a specific gifting power. [See Technical Advice Memorandum 9403004 (concluding that the agent did not have the power to make gifts under a Texas statutory form that did not mention gifting authority); Technical Advice Memorandum 9347003 (concluding that the agent did not have the power to make gifts under the Texas statutory form, despite the existence of a court order declaring that the power of attorney did authorize gifts); but see Private Letter Ruling 199944005 (recognizing gifts made under a Texas power of attorney that did not mention gifts, where the principal had a history of making gifts); for an extensive discussion of the authorities on this topic, see generally Kathleen Ford Bay, *Tax, Fiduciary, and Other Issues Regarding a Financial Power of Attorney*, Advanced Estate Planning and Probate Course 2002, State Bar of Texas.]

§5:72 Giving Assets to Spouse

A common Medicaid strategy is for a married applicant to transfer all assets to the applicant's spouse as that spouse's separate property. Such a transfer is exempt for Medicaid purposes, and eligible for the unlimited marital deduction for federal tax purposes.

If an agent does not have authority to make unlimited gifts to the spouse, the agent can still transfer assets into the spouse's name, but those assets remain community property. [*See* Fam C §3.003.]

If the community spouse dies first, half of the community property reverts to the institutionalized spouse, who then loses eligibility until those assets are spent down. If the institutionalized spouse dies first, half of the community property is part of his or her estate. Some states place liens on the property of Medicaid recipients to secure later reimbursement. [*See generally* 42 USC §1396p(a).] Texas does not currently impose liens, but could decide to do so in the future.

In contrast, if the community spouse owns all of the couple's assets as separate property, he or she can leave them to the institutionalized spouse in the form of a supplemental needs trust, which will not affect eligibility but can be used to enhance the institutionalized spouse's qualify of life by paying for items that are not covered by Medicaid. If the institutionalized spouse dies first, all assets will be safely in the name of the community spouse.

Unfortunately, transferring all assets to one spouse cannot be done when both spouses are healthy, because it is difficult to know which spouse may be institutionalized first. It is also risky because of its effect on the couple's rights in a divorce proceeding. Thus this is not an advisable strategy unless the benefits are immediate and significant. However, at that point the institutionalized spouse may have already lost the capacity to sign a partition agreement.

§5:73 Statutory Form and Self-Dealing

The statutory power-of-attorney form creates another obstacle to Medicaid planning because it does not authorize self-dealing. If the client wishes to authorize the attorney-in-fact to make gifts to himself or herself, this authority should be explicitly stated in the power of attorney.

This issue is likely to arise if the client has appointed his or her spouse as attorney-in-fact, but wishes to authorize unlimited gifts to the spouse.

§5:74 Transfer of Remainder Interest

It might become advisable for the attorney-in-fact to transfer a revocable remainder interest in the homestead to an heir in order to avoid estate recovery. [*See* §5:110 (Lady Bird deeds).]

Although a revocable remainder interest has no monetary value according to the Medicaid agency, it might still be considered a gift for state law purposes. In that case, an attorney-in-fact would not have authority to execute a Lady Bird deed without specific authority in the power of attorney instrument.

The standard paragraph authorizing annual exclusion gifts is not sufficient to grant this authority because future interests do not qualify for the annual exclusion. Thus, the power of attorney should specifically authorize transfers of remainder interests.

[§§5:75-5:79 Reserved]

4. Need for Power to Be Immediately Effective

§5:80 Gifts May Need to Be Made Before Caseworker Is Involved

Clients who intend to engage in Medicaid planning through a power of attorney should make the power of attorney immediately effective, rather than rely on a springing power that is effective only upon a determination of incapacity.

The attorney-in-fact might need to enter into the contemplated transactions before a caseworker is involved, which means the attorney-in-fact would have to prove after the fact that a springing power had in fact taken effect at the time of the transaction. This differs from many common agency transactions, in which the third party is involved at the time of the transaction and frequently will be bound by its decision to allow the transaction to take place.

§5:81 Proving Incapacity May Be Difficult

There is little guidance available on the issue of what documentation Medicaid will require to prove that a principal was incapacitated at a particular time in the past.

The statutory power of attorney form states that the principal will be considered incapacitated if a physician certifies in writing that the principal is mentally incapable of managing her financial affairs. [Prob C §490.]

However, obtaining written certification from a physician can be difficult if the physician is concerned about possibly violating the privacy provisions of the Health Insurance Portability and Accountability Act, because an incapacitated patient cannot consent to the disclosure. [*See* Kathleen Ford Bay, *Tax, Fiduciary, and Other Issues Regarding a Financial Power of Attorney*, Advanced Estate Planning and Probate Course 2002, State Bar of Texas, p. 5 ("The author knows a brain specialist — i.e., neurologist, who says that he would never sign such a certification" because of privacy and other liability concerns).]

Even if the physician is willing to certify the client's incapacity, the time required to obtain the certification could delay a transaction that needs to be completed quickly. If the caseworker challenges the timing or validity of any transaction on the ground that the agent lacked authority because the client was not incapacitated, the client could lose months of eligibility or impoverish the community spouse. The safest route is to make the power of attorney immediately effective.

[§§5:82-5:89 Reserved]

5. Sample Clauses to Modify the Statutory Form

§5:90 How to Use These Clauses

The following forms are designed to fit in the "Special Instructions" section of the statutory durable power of attorney form. [Prob C §490.]

To use these forms, have the client initial the sentence that authorizes gifts, but replace the statutory gift language with the customized forms.

Form: See the following form at the end of Chapter 4:

- Form 4-1, Durable Power of Attorney

§5:91 Broad Gifting Power

This form provides a fairly broad gifting power. The agent is authorized to make gifts to himself or herself, and no dollar limit is imposed.

A broad power is the most likely to allow the use of whatever strategies might become available under future laws. However, there is a risk that an unlimited power would be treated as a general power of appointment in the agent, which could cause part or all of the principal's net worth to be included in the agent's estate for estate tax purposes if the agent dies while serving as the agent.

Furthermore, an unlimited power carries greater potential for abuse or unexpected results. For example, an unlimited power allows the agent to transfer all the property to one child at the expense of the other children. This might be desirable if that child qualifies for an exception to the transfer penalties, such as the caregiver child exception. However, it might not be desirable if the agent is using it to rearrange the principal's estate plan to suit the agent's desires.

SAMPLE FORM

I grant my agent (attorney-in-fact) the power to apply my property to make gifts, including gifts to the agent himself or herself, in any amount and for any purpose. This power includes, but is not

limited to, the power to make a gift of a remainder interest or life estate in any of my property. I also grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

§5:92 Per Stirpes Gifts to Children for Medicaid

This form allows per stirpes gifts to children, for Medicaid purposes. It thus requires that gifts be made:

- Equally among the client's children.
- Only for the purpose of qualifying for government benefits or avoiding estate recovery.

This protects against the risk that the agent will abuse a broad gifting power by transferring all property to one child. [*See* §5:91.]

The requirement that the gifts be made for the purpose of qualifying for Medicaid poses a potential problem, as it would prevent the use of the non-Medicaid purpose exception to the transfer penalty. [*See* §5:25.] The client might in fact have a desire to make gifts for a different purpose. One solution would be to simply delete that requirement, while keeping the per stirpes requirement. [*See* §5:93.]

SAMPLE FORM

I grant my agent (attorney-in-fact) the power to apply my property to make gifts to my children in equal shares, including gifts to the agent himself or herself, for the purpose of obtaining governmental benefits or public assistance, or for the purpose of minimizing or eliminating a future claim for reimbursement of public benefits. If any child is deceased, any gift that would otherwise have been made to such child shall be made to or for the benefit of such child's descendants, per stirpes. This power includes, but is not limited to, the power to make a gift of a remainder interest or life estate in any of my property. I also grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

§5:93 Per Stirpes Gifts to Children for Any Purpose

This form allows per stirpes gifts to children for any purpose.

SAMPLE FORM

I grant my agent (attorney-in-fact) the power to apply my property to make gifts to my children in equal shares, including gifts to the agent himself or herself, for any purpose. If any child is deceased, any gift that would otherwise have been made to such child shall be made to or for the benefit of such child's descendants, per stirpes. This power includes, but is not limited to, the power to make a gift of a remainder interest or life estate in any of my property. I also grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

§5:94 Per Stirpes Gifts to Children for Any Purpose, Plus Unlimited Gifts to Spouse for Medicaid

If the client is married, he or she might want to include a power to make unlimited gifts to his or her spouse for the purpose of qualifying for Medicaid.

This form is similar to the previous form, allowing per stirpes gifts to children for any purpose, but also allowing unlimited gifts to the spouse for Medicaid purposes.

SAMPLE FORM

I grant my agent (attorney-in-fact) the power to apply my property to make gifts to my spouse, even if my spouse is serving as my agent, for the purpose of obtaining governmental benefits or public assistance, or for the purpose of minimizing or eliminating a future claim for reimbursement of public benefits. I also grant my agent the power to apply my property to make gifts to my children in equal shares, including gifts to the agent himself or herself, for any purpose. If any child is deceased, any gift that would otherwise have been made to such child shall be made to or for the benefit of such child's descendants, per stirpes. This power includes, but is not limited to, the power to make a gift of a remainder interest or life estate in any of my property, and the power to execute a

partition agreement with my spouse. I also grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

§5:95 Annual Exclusion Gifts, Plus Unlimited Gifts to Spouse for Medicaid

This form allows unlimited gifts to the spouse for Medicaid purposes, but limits all other gifts to the gift tax annual exclusion.

This has the added advantage of allowing gifts to charity, which would allow the agent to continue any charitable giving that the principal had been engaging in before becoming incapacitated.

SAMPLE FORM

I grant my agent (attorney in fact) the power to apply my property to make gifts, except that the amount of a gift to an individual other than my spouse may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift. I further grant my agent the power to apply my property to make gifts to my spouse, even if my spouse is serving as my agent, for the purpose of obtaining governmental benefits or public assistance, or for the purpose of minimizing or eliminating a future claim for reimbursement of public benefits. This power includes, but is not limited to, the power to make a gift of a remainder interest or life estate in any of my property, and the power to execute a partition agreement with my spouse. I also grant my agent the power to create and fund a trust that provides for the disposition of my property at death on terms substantially similar to those of my will.

§5:96 Charitable Giving

Just as the previous form [§5:95] allows for charitable giving, any of the other powers could be altered to allow charitable giving.

The following sentence could be added to allow general charitable giving:

SAMPLE FORM

I also grant my agent the power to apply my property to make gifts to any charitable organization qualified under section 501(c)(3) of the Internal Revenue Code.

The following sentence could be added to allow charitable giving to the principal's usual charities:

SAMPLE FORM

I also grant my agent the power to apply my property to make gifts to any charitable organization to which I have made gifts in the past.