7 Things to Know Before Dying

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Probate

Your estate will be probated whether or not you have a will unless one of two conditions is met:

- Your estate lacks sufficient value and type of assets to require probate (a condition found in only a small percentage of cases), or
- You've planned your estate to utilize planning methods that bypass probate.

Note that having a will does not avoid probate. In fact, having a will ***guarantees*** your estate will go through the probate process.

Probate means to "prove" a will, *i.e.* the act of proving that an instrument purporting to be a will was signed and executed in accord with legal requirements. During probate, a court makes sure that the will bearing your signature is a genuine statement of how you wished your estate to be distributed. The court also oversees how your probate estate is distributed to your beneficiaries and heirs.

Probate is the court process to pass on the estates of individuals who have died and to appoint and swear-in a personal representative (formerly Executor / Executrix) who:

- Follows the deceased's instructions as provided by a will, if any
- Notifies heirs, creditors and public of passing
- Takes inventory of estate property
- Pays bills of the deceased person
- Files the final income tax return
- Pays estate taxes, if necessary
- Distributes estate property such as home, bank accounts, etc
- Divides and distributes household belongings

Probate Court cases can be filed with or without the help of an attorney. Do-it-yourself stock forms are available. After reviewing the packet of paperwork involved and the responsibilities of serving as personal representative of an estate, most people hire an attorney to help them. Hiring an attorney is usually the most expensive part of probate.

Before the court will transfer property to your beneficiaries or heirs, it must be satisfied that your estate has paid all of its bills and taxes. For that reason, the court may freeze your estate's probate assets at the beginning of probate. These assets might include savings accounts and safe deposit boxes. This freeze could last until the probate process is completed. In most cases, the court gives

your survivors an allowance so they have money while probate is progressing. That allowance is taken from the assets of the estate.

How an account or property is titled controls who receives the account or property after the owner's death. Assets held in Joint Tenancy With Right Of Survivorship (JTROS), Payable On Death (POD) accounts, Transfer On Death (TOD) accounts, life insurance, Transfer On Death Deeds (TODD), and trust property pass automatically to the named survivor or beneficiary without a court probate proceeding. If an estate contains any real property or assets worth more than $30,000 that are titled in the sole name of the decedent or as "tenants in common," then the estate will require probate.

The personal representative must pay claims in the order of priority, after making provisions for family and personal property allowances, if applicable. The order in which claims will be paid out of the estate are as follows:

- Costs and expenses of administration, including compensation of personal representatives and of persons employed by the personal representatives, such as attorneys, accountants, appraisers, and others;
- Reasonable funeral expenses;
- Debts and taxes with preference under federal law;
- Reasonable medical and hospital expenses of decedent's last illness, including compensation of persons attending to the decedent;
- Debts and taxes with preference under other laws of New Mexico; and
- All other claims, such as utility and credit card bills.

In very small estates, if the value of the entire estate, less liens and encumbrances, does not exceed the family allowance, personal property allowance, cost and expenses of administration, decedent's reasonable and necessary medical and hospital expenses, and reasonable funeral expenses, the law allows the personal representative to immediately distribute the estate assets without giving notice to creditors. This is called a summary administration.

If the deceased owns real properly located in another state, there will be an ancillary probate in the county where the property is located, to distribute that property. This will result in additional expenses due to the additional court procedures and travel required.

Downsides of probate:

- Complicated
- Lack of privacy, content of the probate is public record
- Costs usually between 3%-7% of the estate, inclusive of attorney's fees, personal representative fees, appraisal fees and court costs
- Lengthy process, typically a minimum of 6 months, often closer to a 18 months or more before heirs receive property left to them by the deceased

How public is probate?

Imagine doing this. On a blank sheet of paper list all of your assets; every asset that you own, your financial assets, your real estate assets, everything. List a detailed description of your assets. For each and every asset, give a to-the-penny dollar value. On a second sheet of paper list all of your liabilities, who your creditors are, what the purpose of each debt is, and a dollar value of each and every debt. On a third sheet of paper list who your estate will be distributed to, how it will be distributed, what specific gifts of property will be distributed and to whom, and who will be

disinherited from your estate. Take these papers down to the probate court. Walk up to the probate clerk, hand these 3 sheets to the probate clerk and instruct him to post these sheets on the bulletin board in the hallway because you want the whole world to know exactly what is going on in your estate right now while you are still alive. While few would be willing to do such a thing while they are alive, the process that I just described to you is functionally what happens (as required by law) when your estate goes through probate.

With probate, anyone in the world can go down and look this information up. Anyone includes unscrupulous solicitors, creditors, and nosey neighbors or relatives. All of the people that you would not what to know what is going on in your estate would be able to do so after you die. If you are a surviving spouse you would be the person about whom all of this information would be known. Probate is ***completely*** public.

Probate in fact is so public that you can go on the Internet and look up the full text of the wills of the following wealthy and famous people: Joe DiMaggio, Jacqueline Kennedy Onassis, Chief Justice Warren Burger, President Richard M. Nixon, John Lennon, Elvis Presley, Walt Disney, Marilyn Monroe, "Shoeless" Joe Jackson, Babe Ruth, and many others. Or you can buy the book “Wills of the Rich and Famous” on Ebay for about five dollars that contains all of the wills listed above, and dozens more. Just remember, where wills are completely public, Living Trusts are completely private.

New Mexico has a special "short cut" law for estates valued at $30,000 or under. If your assets are worth $30,000 or less, an Affidavit of Successor in Interest would transfer ownership without a court probate. This law applies to bank accounts, stocks, bonds, mobile homes, cars, and other personal property, but does not apply to land, houses, or other “real property”. Ownership of land, houses (other than mobile homes) and other real property will eliminate eligibility for this short cut because this type of property must go through probate to pass title. A person entitled to receive a decedent's personal property can sign an Affidavit of Successor in Interest if:

- The total amount of the decedent's personal property that requires a probate is $30,000 or less;
- Thirty days have passed since the person died; and
- No one has applied as personal representative of the estate

***A good source for finding out more information about Probate and its disadvantages is on the Internet at AARP.org. Many of the statistics and figures used were acquired from the AARP site and they have more detailed information through their reports on Estate Planning.

Ways to Title Property and Avoid Probate: Worth the Risk?

The following ways to hold title to property avoid the probate process. Learn more to decide which ones are right for you. Remember that a living trust also bypasses the probate process and its pros and cons are discussed in that section.

POD – Payable on Death Account

This is simply a way to pass on a bank or savings account and bypass the probate process. You ask your bank to change the account to a POD and fill out a form. You name who will have possession and use of the account upon your death. As soon as, but not one minute before, they can produce a death certificate for you, the account becomes theirs. They do not have ownership or access to the account before your death.

PODs are an excellent way to pass cash onto family members immediately upon your death to help cover bills and funeral expenses.

TOD – Transfer on Death Account

The same principal as the POD, you name to whom the account will transfer to upon your death. Used in checking and savings accounts. Also an excellent way to transfer accounts to beneficiaries.

TODD – Transfer on Death Deed

New Mexico is one of the few states to offer the Transfer On Death Deed (TODD). It is a document that transfers the deed to a particular piece of property to a named beneficiary upon the owner's death. The deed is filled out and filed with the county in which the property is located. Once the beneficiary can produce a death certificate, the property becomes legally theirs to sell, etc. This type of transfer does bypass the probate process; however, it does have some associated risks.

If a creditor of the original owner has a claim left unsatisfied by the estate, a probate may be opened to force the beneficiary of the property to either pay the debt or sell the property in order to satisfy the debt. This type of transfer is not completely probate proof. Further, if you pass property to a beneficiary in this manner, they own the property instantly upon your death. If that beneficiary is in some type of financial trouble at that time with creditors of their own they can put a lien on that property, or force its sale to satisfy the beneficiary's debts. Lastly, the Estate Recovery Act, discussed in the "Taxes to Consider" section would allow the state to seize the property to recoup costs associated with Medicaid or any other government assistance program paid out for the benefit of the original owner.

The right choice for a few, but the risks outweigh the benefits for most people.

JTROS – Joint Tenancy with Right of Survivorship

Ownership of property as joint tenants does bypass the probate process. The property must be appropriately titled, with strict attention paid to the wording of the deed, or the joint tenancy will fail. When you own property in JTROS, this means that 2 or more people each own an undivided share of the property. When one of the owners passes away, the other owner(s) take that share and absorb it into their share.

In other words, if there were three owners and one dies, there would be two owners remaining. The joint tenant does not have the right to give his share to anyone other than the other owners. The remaining owner(s) automatically inherit that share. What this means is you can't change your mind and gift or give your share away to someone else. You would have to retitle the property, if the other owner(s) agreed. Also, this means that the last person living owns the property outright, so they get to decide who inherits it, which may be someone you never intended to receive your share of that property. The most important disadvantage about JTROS is that you put your share of the property at the risk of all the joint tenants. If one owner goes bankrupt, defaults on a loan or is sued, a lien may be placed on his share and a sale of the property could be forced to satisfy the debt.

You are never protected under this type of ownership arrangement.

Living Trust

A living trust is a document created while you are alive and is also known as an intervivos trust (as opposed to a testamentary trust, created at death through your will). They are often referred to as Revocable Management Trusts.

The Trustor or Settlor (person creating the trust) puts money and/or property into to the trust, to be held for the benefit of one or more persons, the beneficiaries. This is called funding the trust. Funding the trust is an integral part of formation. Without proper funding, or the transfer of assets to the trust, those assets remain in the probate estate and the trust will at least partially, fail. May attorneys will prepare a trust for clients and do not walk the client through funding the trust. Do not let this happen to you.

Once the trust is funded (owns assets) it is managed by a Trustee. Often the Trustee is the same person who created the trust. This allows the Trustor/Trustee to manage the assets placed into the trust. The Trustor can also be the beneficiary of the trust, so that any income or distributions from the trust are returned to the Trustor, as long as they are living. If no longer living, the assets in the trust can be distributed all at once, or over time according to the directions laid out in the trust, to whomever the Trustor named as contingent beneficiaries.

A trust is just a set of instructions that dictate how the assets owned by the trust are to be managed. The Trustor helps the estate planning attorney to decide what type of instructions the trust will have, thereby deciding by whom, and how, the assets inside the trust will be managed. The Trustee is legally obligated to follow the instructions laid out by the trust.

A living trust is usually revocable (you may make changes to, or revoke the trust completely); however, some trusts are irrevocable (no changes or revocation possible). Irrevocable trusts are usually used in situations where estate taxes may be an issue.

Advantages:

- Better protection from probate
- Better prediction of future
- Avoid ancillary (additional) probate if you own property in more than one state
- Privacy is ensured
- Ability to name alternative beneficiaries
- Ability to name guardianships
- Ability to manage assets past death
- Ability to protect spendthrift child (susceptible to creditors or overspending)
- Portable, trusts are valid in all states because they are interpreted under the laws of the state in which they were prepared as opposed to will s which are interpreted under the laws of the state in which the will is probated

Disadvantages:

- Funding, property must be properly transferred to the trust for the trust to be effective
- Some on-going maintenance
- Longer creditor claims period than for individuals

Other forms of trust for more advanced estate planning include:

- Marital Bypass Trust or Credit Shelter Trust (protects the estate from estate taxes by fully utilizing both available - husband's and wife's - exemptions, thereby doubling the amount of exclusion for a married couple)
- QTIP or Qualified Terminable Interest Property trust (same as above but allows the first spouse to die the ability to control the distribution of the entire estate and not just a portion)
- Generation Skipping Trust (used to transfer assets from grandparents to grandchildren or to generations other than their children)
- ILIT or Irrevocable Life Insurance Trust (a trust used to hold insurance to plan for estate taxes and so that the value of the insurance may accumulate tax free and outside of the estate)

Durable Power of Attorney

In simple terms, a Power of Attorney is a document by which a person appoints someone else to act as his or her agent to do one or more acts. The powers granted can be limited or all encompassing, can continue indefinitely or can terminate at a particular time, can be effective immediately or at some future time or upon the happening of some event (such as upon incapacity), and generally authorize another to do all or only some of the things the person can do themselves.

A Durable Power of Attorney is one that continues to be valid and enforceable even after the person making it becomes incompetent or incapacitated. The durability power is required in order to help avoid a guardianship proceeding in the case of incompetency and allows the agent to continue to act for the incompetent person.

Advantages of a Durable Power of Attorney over a guardianship:

- The agent can generally act on most matters on behalf of the incompetent person without court approval
- No regular court filings required
- Matters are more private avoiding potentially embarrassing public hearings
- The agent is chosen by you and not the court

If an agent is unable to continue to serve under a Durable Power of Attorney, a family member or some other interested party can always request the court to appoint a guardian at a later time even if the incompetent person's care started out under a Durable Power of Attorney.

A Durable Power of Attorney is usually one of the following forms:

- A general or business power, which allows the agent to carry on the day-to-day affairs of the incapacitated
- A health-care power, which allows the agent to make health-related decisions for the incapacitated

Unless otherwise specified in a Power of Attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

A Durable Power of Attorney is necessary should you suddenly become incompetent. Without one, the court will appoint a guardian for you with all the associated cost, cumbersome processes and lack of privacy.

Living Will: Advance Health Care Directive

A Living Will allows you to you express your wishes that certain care be provided, or withheld, when you aren't able to make those decisions for yourself. Usually a Living Will directs doctors, hospital and nursing home staff to stop life-sustaining treatment that simply serves to prolong the dying process when you're in a terminal condition or death is imminent. A Living Will, also sometimes called an Advance Health Care Directive, allows your wishes to be carried out when you are incompetent, unconscious or otherwise unable to communicate. In New Mexico, this document is referred to by law as an Advanced Directive to Physicians.

Usually, the Living Will is coupled with a medical power of attorney appointing someone as your agent. Essentially you use the medical power of attorney to determine who acts on your behalf to execute the instructions contained in your Living Will.

It is also important to appoint a successor agent so that if the primary agent whom you've designated dies or is unable to perform the required duties, someone else can step in to make sure that your wishes are carried out.

Unless otherwise specified in a power of attorney for health care, the authority of an agent becomes effective only upon a determination that the principal lacks capacity, and ceases to be effective upon a determination that the principal has recovered capacity.

Unless otherwise specified in a written Advance Health Care Directive, a determination that an individual lacks or has recovered capacity or that another condition exists that affects an individual instruction or the authority of an agent, shall be made according to the provisions of §24-7A-11 of the New Mexico Uniform Health-Care Decisions Act. However, in your directive, you can specify who will determine your incapacity and how they will do so.

An agent must make a health-care decision in accordance with the principal's individual instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent must make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

Your estate-planning attorney will walk you through the process of making these types of decisions and explain to you the possibilities available to you. This document is a powerful tool that everyone should utilize.

Recent changes in the law require that medical powers of attorney address specific privacy issues inside the document. If you have been to the doctor lately, you surely have signed privacy waivers and filled out additional forms relating to privacy. These changes in the law make it necessary to have any medical power of attorney prepared prior to 2003 to be reviewed for adequacy.

Taxes to Consider

Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)

Federal tax law gives you a credit amount that determines whether or not you will have to pay gift or estate taxes. It is an exclusion amount, meaning if your gift and estate taxes owed do not exceed this number, then you owe nothing. Think of it as a running total of taxes you don't have to pay on property transfers you make while you are alive and after you die.

For example, in 2003, the unified credit would be the amount of taxes owed on $1 million dollars, or $345,800. If all the gifts you have given over your lifetime and the worth of your estate at death do not exceed the $1 million, then you do not owe any taxes. In 2004, if the gifts you give do not total over $1 million, you will not be taxed because the credit available to you will be applied. However, whatever amount of credit you use for gifts is deducted from your estate tax credit. In other words, if you use your entire exclusion amount of $1 million for your gifts, then only $500,000 of exclusion will be remaining for your estate upon death.

	For Gift Tax Purposes:		For Estate Tax Purposes:	
Year	Unified Credit Applicable (Tax)	Exclusion Amount	Unified Credit Applicable (Tax)	Exclusion Amount
2002 and 2003	$345,800	$1,000,000	$345,800	$1,000,000
2004 and 2005	$345,800	$1,000,000	$555,800	$1,500,000
2006 to 2008	$345,800	$1,000,000	$780,800	$2,000,000
2009	$345,800	$1,000,000	$1,455,800	$3,500,000
2010	$345,800	$1,000,000	Tax free	Tax free
2011	$345,800	$1,000,000	$345,800	$1,000,000

Federal Gift Tax

The Federal Gift Tax is imposed on taxable gifts that you give to others.

There is a yearly exemption, currently $13,000 per person, under which you may gift without tax consequences. However, should you exceed that amount and the gift is a taxable gift of property (including money), it is subject to the gift tax. You may double that exclusion amount by gift splitting with your spouse. This means that you can split the gift between you and your spouse and each take the exclusion amount, allowing you to give twice the gift and still owe no taxes. Special forms are required to take advantage of gift splitting which your accountant can provide.

To be a gift, you must not receive anything of value in return for the property given. Furthermore, to be a completed gift, you must give up all control of the property and it must be of a present interest, meaning you currently have full ownership of the property. Gift status may also be given if you sell property for less than fair market value, make a reduced (less than market rate) interest rate loan including any interest free loan. The gift tax amount is keyed to your tax bracket. The gift's value is determined by fair market value. It is important to file a gift tax return with the IRS because this locks them into challenging the value given to the gift to three years. If no return is filed, they can challenge the value even after death.

Make sure gifts are transferred by December 31 in the year you make the gift. Checks must be paid by the bank (make allowances for holidays, postal and other delays) before the last day of the calendar year to count as a gift in that year. If the check does not clear the bank by the last day of

the year, the gift will count in the following year. To be safe, consider giving cashier's checks, money orders, or cash instead of personal checks toward the end of the year.

Not all gifts are taxable. The following gifts are exceptions to the gift tax:

- Gifts to your spouse because of the marital deduction; you can transfer an unlimited amount of property to your spouse but you must be married at the time of the transfer, the receiving spouse must be a US citizen and the receiving spouse doesn't have a terminable interest, meaning that the gift ends upon a condition.
- Most charities because of the charitable deduction; you can transfer property to charity without being subject to gift tax but you must transfer your entire interest in the property to the charity and must be to a qualified charity (restrictions apply see IRS Publication 526 for qualified charities and limitations on deductibility)
- Political organizations because of the political exclusion; gifts to political organizations are generally exempt from gift tax.
- Tuition because of the educational exclusion; the gift must be earmarked for tuition or training and it must be paid directly to the educational institution to be exempt from gift tax.
- Medical expenses because of the medical exclusion; the exclusion applies to payment made to a medical care facility for costs as well as payments for a person's medical insurance but payments must be made directly to the medical institution.

Generation Skipping Transfer Tax (GSTT)

This tax is used to close an old loophole in which wealthy families would transfer property to lower generations, like grandchildren, to avoid estate taxes. GSTT applies whether you transfer the property directly, place the property in trust with remainder to a later generation or benefit a later generation through trust. So there is an additional tax, possibly a hefty one, to property transfers that can be classified as generation skipping to make up for the amount of estate tax you are avoiding.

There is a sizeable exemption amount to work within, however the rules are very complicated. Attorney and Tax Advisor consultations are highly recommended.

Estate (Death) Tax

No matter how big or small your estate is, the estate tax is a concern to you. It rises to $3.5 million in 2009, it drops back down to 1 million in 2011 and is only gone completely in 2010 (giving it the nickname "Assisted Suicide Act of 2010"). It is estimated that the states collectively will lose $19 to $23 billion of death tax revenue between 2003 and 2007, making it unlikely this tax scenario will continue. None of us can control when we die, so best be prepared for the worst case scenario.

Simply defined, the estate tax is a tax on transfers of property from your estate to others. The unified credit applies to estate taxes as it does to gift taxes. Just like with your income tax, the estate tax is constructed from a series of brackets with a steadily increasing marginal tax rate.

To determine your taxable estate, the following formula is used. Take your gross estate minus deductions to get your net estate. Add your net estate plus any taxable post-1976 lifetime gift transfers to get your taxable estate. Multiply your taxable estate times the applicable estate tax rate to get your tentative estate tax. Subtract credits to get your estate tax due.

Your gross estate includes your probate estate, your ownership shares of property held in some form of will substitute (like joint tenancy) and your life insurance value.

Possible deductions available are the marital deduction, which applies to any property left to your spouse, the charitable deduction, deductions for debts on your property and cost-of-dying deductions.

State Inheritance and Estate Tax

New Mexico does not have an inheritance tax.

New Mexico does have what is called a "pick up" estate tax. This means your estate doesn't owe any state estate taxes unless your estate is sizeable enough to owe federal estate taxes. If you do owe federal estate taxes, New Mexico will "pick up" the allowance the Federal government allows for state inheritance taxes. Estate tax rates start at 41 percent of the amount over $1,000,000 and rise to higher percentages for larger estates. For estates worth more than $1,000,000, once the estate tax is calculated, a portion of the tax due is sent to the state, and the remaining tax due goes into the U.S. Treasury.

States typically rely heavily on this tax as a source of income and will likely be forced to initiate their own stand-alone estate tax, already in existence in some states, to maintain this source of income. Should this happen, states would no longer be tied to the exemption amount used by the Federal government and set their own, likely lower exemption amount.

What happens with the sunset of the EGTRRA in 2011?

Well, no one expected it to sunset and it was fully predicted by all experts in the field that the legislature would act in 2009. Now we are in limbo and experts disagree on the possible outcomes resulting for the failure to act.

If no legislative action is taken, in 2011 the estate tax will return to an exemption equal to the taxes that would be owed on $1 million dollars, down from $3.5 million. This is a significant decrease. I have been to many hours of legal education in the past year on this very topic with speakers from Washington DC and attorneys from some of the biggest and most influential firms in the United States. The general consensus is ultimately that of confusion and speculation. Currently there are several schools of thought on what the outcome will be and several practices for dealing with the uncertainty.

The House of Representatives passed H.R. 4154 to permanently extend the 2009 system ($3.5 million exemption, 45% rate) on December 3, 2009. The permanent extension passed the House without a single Republican vote — the Republicans are holding out for a larger exemption and lower rates; one proposal is for a $5 million exemption and a 35% rate. The Senate failed to act before the end of the year. Congressional staff members of the House Ways and Means and Senate Finance Committees confirmed on December 31, 2009 that a joint letter stating how the Committee members intend to address the estate tax in 2010 (such an agreed joint letter of intent is sometimes released when tax provisions expire at the end of a year) will not be issued because of the absence of any agreement on what approach to take. At this point, there is "all this massive confusion, this chaos" in the words of Senate Finance Committee Chairman, Max Baucus.*

Retroactivity…Could it be?
There has been talk, and serious talk about retroactive estate taxes. If this were to occur it could mean that the legislature would impose a tax on estates retroactive to January 2009 or another date. There is also much discussion on the constitutionality of the retroactivity.

Basis
For decedents dying after December 31, 2009, the basis of property acquired from a decedent is the lesser of the decedent's adjusted basis or the fair market value of the property on the date of decedent's death. I.R.C. § 1022(a)(2). (Observe, that while no step-UP in basis is allowed, the basis of property can be stepped-DOWN.)*

As you were, Soldier
If no action is taken legislatively and the Act sunsets, it will be as if the Act never existed and we return to the laws that were in place in 2001, effecting gift tax, estate tax, generation skipping tax, carryover basis, etc.

So, what do we do?
Well many of you may have estate plans they are based on formula. Many of us as attorneys base provisions in estate plans on statute or an expected estate tax. If you have any estate planning documents, they must be reviewed by an estate planning attorney fully knowledgeable in the current state of events.

Second, you plan. If you do not have an estate plan, get one. Be suspicious of any attorney who can't fully explain to you the volatile situation that is our current state of affairs. You must retain an attorney that can plan and adequately address you wished and desires in a plan that will actually work in these uncertain times.

Lastly, gather a team of advisors that work together that can communicate openly about your estate and your family to ensure that you are protected from all the pitfalls that are out there. This team, an estate planning attorney, a CPA and a financial advisor is **your key** to making sure you are protected. Only a team can fully understand all the issues an estate may face during and after lifetime.

This summary reflect the views of JulieAnne Leonard, Esq. These materials do not take into account the individual financial status or needs of any one individual and therefore are not intended as legal advice. Although it is believed that this information is reliable, it is not warranted. These opinions and observations are current as of the date of this document and by the nature of the subject, will change as new legislation is passed.

***Some portions of this section copied from "ESTATE PLANNING IN THE SHADOW OF THE ONE-YEAR "REPEAL" OF ESTATE AND GST TAX IN 2010" by Steve Akers.**

Medicaid Recovery

Under the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 (OBRA ’93) all states are required to have an Estate Recovery Program in compliance with such act. In New Mexico it can be found at NMSA 1978, 27-2A-1, 2003. This is an act in which Congress requires the state to demand repayment out of estates for Medicaid benefits previously provided to citizens (over 55) for certain services (nursing homes, etc). There is a homestead exemption as long as there is a surviving spouse and/or heirs under the age of 21. Typically, this act does not apply to property that passes outside of probate. Yet another reason to bypass probate with as many of your assets as possible.

Currently in New Mexico, assets are not often recouped by the state for government benefits incurred by the deceased. This is because we are a poor state overall and often the only asset families have to pass on to their heirs is the home and the state allows them to do that. However, the law is definitely in place and with the decreasing revenue available to the state from federal sources, this will likely become a necessary means of income for the state to offset budgetary shortfalls.

Capital Gains

In 2010, under the EGTRRA, the step-up basis for inherited property is scheduled to be repealed. Your basis in property is the cost you paid for the property. Traditionally, when you inherit property, you get a “step-up” in basis to the fair market value of that property as of the date-of-death of the person you inherited it from. If you then sold that property, there would be less of a capital gains tax due on the proceeds from the sale because of the stepped-up basis. However, if the step up in basis is repealed and the modified carry-over basis is used, you could pay capital gains taxes on the sale of inherited property. The new law has a provision for some property to be given a step-up in basis, up to $1.3 million dollars, however, there are no guarantees. With the proposed repeal of the estate tax, other sources of tax revenue will likely be utilized.

MEDICAID and the Big Myth

No, you don't have to go broke to qualify!

Depending on whose statistics you believe there is a 30% - 40% chance that someone 65 or older will spend time in a nursing home. Statistically speaking, that stay will last at least 2.7 years, with dementia residents usually staying longer.

Medicare is a Federal program that is financed by payroll deductions. It is not a needs-based program, but rather it is more akin to insurance. To be eligible for long-term care benefits under Medicare Part A, the potential recipient must be eligible for Medicare, or have spent at least three full days in a hospital and on a doctor's certification enter a nursing home that offers daily skilled care (and accepts Medicare) within thirty days of the hospital discharge for the same diagnosis. If those conditions are met, the Medicare will pay 100% of the first twenty days of admission for covered Medicare services.

For the next eighty days Medicare pays for all covered services except for the daily co-insurance amount.

After 100 days the resident must pay with private funds or qualify for Medicaid at a Medicaid approved facility.

Unlike Medicare, Medicaid is financed from general revenues. It is a joint Federal/State program that in New Mexico is approximately 75% financed by the Federal Government and 25% by the State. In New Mexico the administration of the Medicaid program is the responsibility of the Human Services Department. Both Federal and State governments have Medicaid regulation. Because the states are given considerable latitude in administering their individual programs, the laws can vary from state to state.

The categorical requirements to qualify for long-term care (and waivers) Medicaid benefits in New Mexico are that the applicant be age 65 or older, blind or disabled, a US citizen, a resident of New Mexico and be in a condition to require nursing home care. For the nursing home benefit the applicant must also have spent thirty days in the facility, assuming eligibility.

In addition, there are two financial eligibility requirements characterized as income and resources. Both the income and resources "tests" have to be satisfied.

Income Test

New Mexico is one of 32 so-called income cap states. Both nursing home and waiver program coverage is limited to persons whose countable and unearned gross income does not exceed $2,022 per month, effective 2009.

Resource Test

Resources are what we commonly think of as assets. New Mexico Medicaid regulations require that the applicant have no more than $2,000 in *countable* resources to be eligible from the resource perspective. The operative word in the regulations is *countable.* Countable resources include cash, CDs, stock, real estate, cash surrender value of whole life insurance policies, some annuities or portions or annuities and personal property.

It is not unusual for clients to transfer assets out of the applicant's name in an effort to impoverish the applicant and, therefore, establish eligibility. It is important to understand Medicaid will require the applicant to produce records to confirm, among other things, that no improper transfers have occurred. If an uncompensated transfer has been made within the prescribed period, currently 60-month look-back period, it will trigger a period of ineligibility. Improper transfers are those that were made for less than fair market value to a party who is not a spouse and not an otherwise exempt recipient under Medicaid regulations.

The length of the penalty period is a calculation based on the gift amount and the amount Medicaid currently pays for nursing home care.

The good news is that Medicaid planning is no longer unethical or illegal. The Attorney General found that applicants have the right to plan to qualify for Medicaid so long as that planning itself is legal.

There are ways to plan ahead to qualify for Medicaid so that the applicant will be eligible when the need arises. Even better, there are ways to save some portion of the estate, sometimes as much as half or more, when a family member requires nursing home care and does not currently qualify for Medicaid. You don't have to spend down everything before Medicaid will become an option. Elder Law and Estate Planning Attorneys who have the desire to help those likely to need long-term care are now able to help those clients pass on much of their estate to those they love, rather than going broke from long-term costs.

Don't let the Big Spend Down Myth fool you. Plan ahead for long-term care.