ESTATE PLANNING FOR PERSONS WITH SPECIAL NEEDS PRESERVATION OF GOVERNMENTAL BENEFITS, AND LEGAL STATUS

PATRICK K. RESO, Esq.
Seale & Ross, PLC
200 N. Cate Street
Hammond, LA 70401
Phone (985) 542-8500
Fax (985) 542-4111
e-mail: reso@sealeross.com

Madisonville Office:

337 Hwy 21, Suite A
Madisonville, LA 70447

Patrick K. Reso was born in 1964 in New Orleans, Louisiana. He graduated from the University of New Orleans in 1987, with a Bachelor of Science Degree in Business. Patrick graduated from Loyola Law School in 1990, where he was a member of the Loyola Law Review. Prior to joining Seale & Ross in 1996, Patrick practiced with a premier tax and estate planning firm in New Orleans. Patrick is a partner at Seale & Ross, PLC and his practice areas include estate planning, successions and succession litigation, commercial real estate, collections, mergers and acquisitions, general business and corporate law.

Patrick is a Board Certified Tax Law Specialist and a Board Certified Estate Planning and Administration Specialist, designations awarded by the Louisiana State Bar Association. He is also listed in 2008, 2009 and 2010 Louisiana *Super Lawyers*. He served for many years on the board of directors of TARC in Hammond, and is a past President of the Northshore Estate Planning Council, an association of estate planning professionals, including Lawyers, CPAs, Life Underwriters, Certified Financial Planners and Trust Officers. Patrick, his wife Connie, and their children, Paris and Christopher, reside in Hammond.

1. Estate Planning for people with special needs includes the following special considerations:

A. **Combination of Techniques**. Estate Planning for people with special needs combines traditional estate planning techniques with special attention to the disabled person's needs. The plan will include the whole family, but will be tailored to the special needs of any disabled family members. The plan will include an analysis of available governmental benefits and the effect the plan will have on continued receipt of or availability of those benefits in the future.

The plan must generally stretch beyond the life of the parent and must last throughout the lifetime of the disabled family member. The plan might be for the parents or siblings of a disabled person, or for the disabled person himself who has already inherited substantial assets or who is the recipient of a personal injury award. The plan must also include coordination with the extended family of the disabled person because a thoughtful bequest by an aunt, uncle or grandparent or family friend could completely negate any plan the parents put in place, whether an outright bequest or a bequest to a deficient trust is made to the disabled person.

What are the goals and needs of the client and his or her family? What resources are available to meet those needs? How will the resources be transmitted and managed to meet the goals and needs? Can governmental benefits be preserved if assets are left to a disabled child? Can state reimbursement claims be avoided?

B. **Equality between children** - should they leave more or less to the disabled child? If a bequest is made to a disabled child, will he become disqualified from benefits? Will leaving nothing to a disabled child solve this problem? What if governmental benefits are reduced or are not available in the future because of changes in the law or budgetary constraints? Who will take care of the disabled person? What if the disabled child's share is left to a sibling with the "understanding" that those resources are to be used for the disabled child's benefit?

C. **Asset management needs are greater**: The planner must consider the cost of care for a disabled person including extraordinary medical expenses, special equipment, handicapped accessible vehicles and homes, cost of care in an institution, group home or assisted living facility, home nursing care, speech and physical therapy, lost opportunities for the care giver, etc. For example, families without disabled children might plan to put their children through college, and the resources needed may be $20,000 per child per year for four years. A client with a disabled child may need sufficient resources to pay the cost of care for that child

for the remainder of the child's life. The cost of care in a private nursing home or group home can easily exceed $20,000 per year, and the may live in this setting for more than 60 years. As suggested by one commentator, "this is equivalent to financing a Harvard education for every year for the rest of the child's life." Sullivan, "*An Estate of the Heart: Planning for Families with Disabled Children*", Life Association News 82 (July 1994). If round the clock nursing care is required, at $16.66 per hour, the annual cost would be $146,000 per year.

D. **How will the resources of the parent or the disabled person himself be used to satisfy the disabled person needs? What are the options:**

The family might consider leaving the disabled child's share to another family member with the understanding that family member will care for the disabled person. Problems arise if the custodian of the funds is faced with creditor's claims, bankruptcy, divorce, or death.

Should the client leave less to the disabled child to preserve benefits or more in because the needs are greater or because the healthy children can fend for themselves? Can the disabled child manage the assets? Will he or she be subject to undue influence by others? Does he have the capacity to transmit any assets remaining at his death through a will?

Form an inter vivos or testamentary Third Party Special Needs Trust (discussed below). Considerations include:

- Who will serve as Trustee?

- For any non-forced portion, provide for an income interest in trust with power to invade principal, with siblings as principal beneficiaries to avoid estate recovery;

- Has the forced portion been satisfied? Should the testator convert assets to assets which are not counted in determining the forced portion? See LSA R.S. 9:1841 regarding mandatory distributions of income where the legitime is held in trust. Will mandatory distributions of income cause the beneficiary to fail the income test?

- how can the mandatory income distributions with respect to the forced portion be controlled so that governmental benefits are not jeopardized?

- Provide for shifting interests if the disabled child dies intestate and without descendants (or without descendants with respect to portion which does not constitute legitime).
- consider a usufruct to the spouse

- If the disabled person's own assets are involved, form a "Self Settled" Special Needs Trust

2. Forced Heirship: Will a mandatory bequest under the rules of Forced Heirship cause my child to lose governmental benefits? Can I simply bypass my child and leave his share to his siblings?

Louisiana is the only state with forced heirship. Under Louisiana law, a portion of the estate of a decedent is reserved for certain children, who can only be deprived of that portion in narrowly defined instances. This required children's portion is referred to as the "forced portion" with the balance being the "disposable portion". Under current law, only children who are age 23 or younger or disabled are forced heirs. Disabled children are children, who because of mental incapacity or physical infirmity, are permanently incapable of either managing their affairs or taking care of their persons. This definition was further expanded to include children who have, according to medical documentation, an inherited, incurable disease or condition that may render them incapable of caring for their persons or administering their estates in the future. What does this mean? Are alcoholism and diabetes inherited incurable diseases which may render an heir incapable of caring for their persons or affairs one day in the future? This provision may be unconstitutional as it was not authorized by the Constitutional Amendment (Article XII, Sec. 5). Disabled grandchildren may also be or become forced heirs of a grandparent if their parent predeceases the grandparent.

The forced portion is one-quarter of the estate for one forced heir and one-half where there are two or more forced heirs. However, in no event can a forced heir's share exceed what the forced heir would have inherited had there been no Will. For example, if the decedent had five children, two of whom are "forced heirs", each of these forced heirs will receive only 1/5 of the estate, rather than 1/4 each.

Two mechanisms exist in Louisiana that are permissible burdens on the forced portion. The first is the "usufruct", which is defined as the right to use a thing and receive the fruits, such as rents or profits, of that thing. For example, the forced portion may be left to a forced heir subject to a usufruct in favor of the surviving spouse. This usufruct may be either "legal", whereby the usufruct terminates upon the spouse's remarriage or death, or "lifetime", meaning that this usufruct will continue for the spouse's life regardless of whether he or she remarries.

The other mechanism for controlling the forced portion is that it may be left to the forced heir in Trust. Special rules apply to such a Trust, including a requirement that the income must be distributed not less than annually to the forced heir, after taking into account other income

received by the heir. Under LSA R.S. 9:1841, when the "legitime" or "forced portion" is placed in trust, the Trustee, after taking into account all other sources of income and support to be received by the forced heir during the year, must distribute to the forced heir the net income sufficient for the health maintenance, support, and education of the forced heir. This relatively new statute is useful in special needs estate planning, as the prior rule required distribution of all net income, regardless of whether additional income would be received from outside sources. In other words, the Trustee can now withhold a distribution of income if it is not necessary for the forced heir's health, maintenance, support or education.

Any estate plan should include provisions for forced heirs if any exist, and should also include an alternative provision in the event a child, who is 24 years old or older, becomes disabled. Many people leave much more than the forced portion to their children, while others may seek to disinherit a child completely. Each family situation is unique and must be analyzed accordingly. Many people mistakenly think that children inherit the "forced portion" if they die without will. The children actually inherit the entire estate, not just the forced portion, if there is no Will, subject to a "legal" usufruct (terminates on remarriage) to the surviving spouse over community property only. In the absence of a Will, children inherit free and full ownership of 100% any separate property.

3. Community and Separate Property:

Several states have some form of community property laws that govern the ownership, and management of property acquired by a husband and wife. Louisiana law creates a community property regime between married couples, and property is either community, separate or both. Each spouse owns an undivided one-half interest in community property, while separate property belongs to that person exclusively.

The matrimonial regime created by Louisiana law may be altered in a Prenuptial or Postnuptial Agreement, and many clients utilize these vehicles for a number of reasons. For example, two persons desiring to get married may enter into a Prenuptial Agreement in order to protect property from liability and to shield property from the claims of creditors. Community property laws are especially important with respect to estate planning since a person's estate includes both that person's separate and community property, and the inheritance rights of spouses and children vary depending on how the property is characterized.

Community property generally consists of all property acquired during the marriage through the effort, skill, or industry of either spouse, regardless of whose name appears on the title. All revenues from separate property will also be considered community property unless this revenue is reserved by the owner in a properly drafted written declaration. Separate property includes property acquired before marriage, property received through a gift or inheritance to the spouse individually, and property acquired with separate funds. All obligations incurred during the marriage are presumed to be community obligations unless these obligations were not for the common interest of the spouses. Special rules are applied where community property is used to satisfy separate obligations or to improve the separate property of the other spouse. Community

property issues are also important with respect to life insurance and retirement plans, as will be seen below.

4. Wills and Estate Planning - who gets what?

A.) WITHOUT A WILL

Louisiana law dictates how a person's property will be distributed. Different rules will apply depending on whether property is community or separate.

For Community Property: If a decedent is survived by children and a spouse, the children will inherit the "naked ownership" of the community property subject to a "legal" usufruct in favor of the surviving spouse. This usufruct will not apply to any separate property owned by the decedent, and will terminate if the surviving spouse remarries.

If the decedent has no surviving spouse, the children will inherit in full ownership. If a child has predeceased the decedent, that child's children will inherit the predeceased's child's portion through representation. If a decedent leaves no children or other direct descendants, his interest in the community will pass to the surviving spouse.

For Separate Property: Children or other descendants will inherit the decedent's separate property in full ownership. If he leaves no descendants, the decedent's brothers and sisters, or their children, will inherit the "naked ownership", subject to a usufruct in favor of the decedent's parents. If no parents are left, then the brothers and sisters will take in full ownership. The surviving spouse will inherit the decedent's separate property only in the event the decedent leaves no children or other direct descendants, no siblings or their direct descendants and no parents. As described above, the descendent has very little control over how his property is distributed if he leaves no Will. In addition to this lack of control, other reasons exist for executing a valid Will.

B.) WITH A WILL

The Testator (a person with a Will) can, within limits, control his estate, and a properly drafted Will can provide numerous estate planning opportunities, including the following:

1.) Leave the disposable portion (which would be the entire estate if there is no "forced portion") to anyone he desires, such as a surviving spouse, specified family members, friends or charities.

2.) Make special bequests of cash, personal property, business interests, etc.

3.) Provide that the usufruct in favor of the surviving spouse will apply to both community and separate property, even if forced heirs of a prior marriage are present, and that this usufruct will be for the spouse's lifetime.

4.) Provide for the care of disabled children or parents.

5.) Trusts may be established for children who need the protection of the Trust and which will eliminate the need for court supervision of a minor child's estate.

6.) Provide for the disposition of the ownership of life insurance policies on the life of another.

7.) Conserve estate assets by proper tax planning to utilize the "unified credit", discussed below, the marital deduction, generation skipping transfers, and charitable bequests.

8.) Provide for the sale of the family business.

9.) Designate a Tutor (guardian) to care for minor children.

10.) Specify how debts, expenses and taxes are paid or allocated.

11.) Name an attorney to represent the estate.

12.) Provide for alternate heirs should the primary heirs die before the Testator.

13.) Provide for the disposition of property located in other states.

14.) Provide that uneven lifetime gifts to children will not reduce the favored child's interest in succession property and thereby avoid "collation", which is the fictitious adding of property back to your estate before it is divided.

15.) Provide that an heir or legatee must survive for up to 6 months and if not, leave that portion to some other heir or legatee.

16.) Avoid inherent problems in the stepchildren situation.

17.) Provide for some or all of a person's after-born children, grandchildren, nieces, nephews, etc., who were born after the Testator's death through the use of a class Trust.

18.) Eliminate, reduce or defer death taxes.

A properly drafted Will is a foundation of any estate plan and we recommend that all of our clients consider a Will regardless of the size of their estate. For clients with existing Wills, we recommend that these Wills be reviewed to ensure that the Will is still valid under Louisiana law, and that the bequests made are still appropriate.

5. What is a succession or Probate proceeding?

Many people have the misconception that a Will may increase the cost of probate and entangle their estates in a long and drawn-out process. This is not the case in Louisiana. A Succession proceeding is a judicially supervised process by which assets are gathered, debts, taxes and expenses are paid, and the remainder is distributed to the rightful heirs or legatees. The Succession proceeding is necessary whether or not the decedent had a Will at the time of his death. If the decedent left a Will, it must be submitted to the Court where it will "probated" or proved.

Most attorneys in Louisiana handle Succession proceedings on an hourly basis and many can be handled for under $2,500. Court costs are typically about $200 to $300, depending on several factors. Without a Will, when an estate requires administration, the Court will appoint an "Administrator" and there are often several people who vie for the job. This process may be avoided with a validly drafted Will whereby an Executor or Executrix is named. While an Administrator will be required to post a bond and will be entitled to a fee of 2.5% of the value of the entire estate, an Executor may be named to serve without bond and without compensation. The Administrator or Executor's job is to collect, preserve and manage Succession assets and to generally take all actions which the decedent could have had he been alive.

These actions include the power to continue any business, lease Succession property, invest Succession funds, execute contracts, borrow money, sell or exchange property, and to settle or pay Succession Debts. Court authority is required for many of these actions. The Executor or Administrator, referred to as the "Succession Representative" will also prepare an inventory listing all of the assets of the Succession together with their respective values. After the Succession Representative demonstrates to the Court that all debts have been paid, all legacies have been delivered, and all inheritance or estate taxes have been paid, a Judgment of Possession is granted placing the heirs in possession of the remainder of the estate.

Where the debts of a decedent are relatively small and no administration will be necessary, the heirs can be placed in possession immediately upon filing of the Petition for Possession. Your heirs or legatees will not be personally liable for your debts or obligations, but rather will only be responsible up to the value of their inheritance.

6. What is a Trust?

Louisiana adopted a modern Trust Code in 1964 that is similar to the Trust laws of other states. The Trust relationship is created by the transfer of title to property by the "Settlor" to one or more fiduciaries, the "Trustee", to be administered for the benefit of designated income and principal "beneficiaries".

A Trust may be created inside a valid Will (known as a testamentary Trust), which will

come into existence at the moment of the Settlor's death. Alternatively, a Trust can be created during lifetime (an inter-vivos Trust), by a notarial act or private act duly acknowledged. Several types of Trusts are available and they may be revocable, irrevocable, funded, or unfunded. Irrevocable Trusts are typically used to shift property and/or income from the Settlor to other family members and to remove future appreciation from the Settlor's estate. The Irrevocable Trust is used to transfer assets to the next generation or generations, while ensuring that these assets are managed properly and not wasted by irresponsible or under age children. Furthermore, the Trust can protect assets from the claims of the beneficiary's creditors, if designated as a "Spendthrift" Trust.

Whether a Trust is made inter-vivos or created by a Will, the most important decision the Settlor must make is who the Trustee will be. Additionally, the nature and extent of the Trustee's powers and duties can be specified in the Trust instrument (those not specified will be governed by the Louisiana Trust Code). In many instances, it is appropriate to name a bank with a Trust department to serve as Trustee. The bank will typically charge a fee of approximately 1% - 1.5% (graduated downward after first million) of the value of the Trust per year.

As discussed above, the legitime or forced portion of a forced heir may be placed in Trust for a period of time or for the forced heir's entire lifetime. The income attributable to the forced portion must be distributed to the forced heir at least annually, unless a surviving spouse has a usufruct over the property or is the income beneficiary of the Trust.

A "class" Trust can provide for the automatic addition of future born members of the class of Trust beneficiaries such as children, grandchildren, great-grandchildren, nieces or nephews, etc., as long as one member of the class is in being at the time the Trust comes to existence.

With a Trust, if a principal beneficiary dies during the term of the Trust, his or her interest will vest in his or her heirs or legatees. If the principal beneficiary leaves no descendants or legatees (*i.e* the beneficiary leaves a Will leaving his entire estate to his spouse or friend), the Trust instrument may provide for a successor principal beneficiary. If the forced portion is not involved, the Trust may provide that the portion any beneficiary who leaves no descendants will go to someone else chosen by the Settlor of the Trust.

There are several different types of Trusts available and the advantages and disadvantages of any particular Trust must be examined for each estate planning client.

7. LEGAL STATUS – Interdiction, Continuing Tutorship and Powers of Attorney

This summary is not a substitute for professional and personal legal advice. Each person's legal situation is different and it is playing with fire to "do it yourself" when it comes to legal matters, national advertisements notwithstanding. You would not buy a book on removing your appendix in three easy steps if you had a sharp pain in your right side. Please seek out and consult an attorney, preferably one that specializes in estate planning by going to the following link on the internet: *www.lascmcle.org/specialization/estate-roster.asp.*

Alternatively, your general practice lawyer is probably competent to assist you with all or most of your needs, and if not, will refer you to someone who is. Yes, lawyers charge a fee for their services, but probably a much more reasonable fee than you expect. Fees estimated below are not quotes – each person's case presents different challenges. There is no room for error in matters of legal status, particularly where public benefits are involved. If you fail to qualify for, or you lose public benefits for your child and have to pay for his appendectomy, or are called upon to reimburse many years worth of public assistance payments, you will regret having saved a few hundred or a few thousand dollars.

All persons in Louisiana are either minors or adults. All minors are legally incompetent (unless emancipated). Once a minor turns 18, he is automatically an adult regardless of his mental or physical abilities. Adults may be legally competent or legally incompetent, but are presumed to be competent until declared otherwise.

There are also some gray areas, where one can argue that a loved one is, or is not, competent depending on the situation presented. Medical experts may be needed to reach a final determination. For example, just because a person is diagnosed with Down's Syndrome does not necessarily mean that he or she is not competent to sign a power of attorney or will, etc., although many persons with this condition will be incompetent to do so.

When it comes to competency, each adult person is different and must be evaluated based on his or her strengths and weaknesses. A court may declare that someone is legally incompetent to handle his person (where does he live, what and when does he eat, who does he associate with, etc.) or his financial affairs, or both, through an "interdiction" proceeding. Sometimes this is necessary to deal with assets the person already has, or inherits, or receives through a personal injury award. Sometimes it is necessary to protect the person from being taken advantage of by others. Interdiction is not the same as "judicial commitment." A coroner or other physician may temporarily "commit" a person to psychiatric hospital confinement when that person is a danger to himself or others, and the court may extend the commitment for longer periods.

Public benefits laws are tricky in that benefits are sometimes paid in error to a person who was not technically entitled to those benefits or a person may fail to qualify for benefits if he exceeds the income or assets limits associated with the benefit program. For example, if your incompetent child has $20,000 in his name that you have been saving for him over the years

(savings bonds, UTMA account, savings account, stock certificates, etc), and just before his name comes up on the N.O.W. waiver you transfer those funds out of his name into your own name (meaning he makes a donation of those funds to you) to show that he does not exceed the $2,000 asset limit, you may very well qualify, at first. Then, years later, upon closer inspection, the state authorities discover the improper transfer and argue that your son was not competent to make a gift to you. You will then owe back years of public benefits and may be denied future benefits.

Sometimes a person is competent but then becomes incompetent as a result of an illness or injury, or just old age. Sometimes an incompetent person regains competency – i.e. a case where a person in a coma suddenly regains consciousness, or, where a minor who is legally incompetent simply because he is under 18, becomes "competent" the moment he turns 18. In any event, all persons who turn 18 are automatically adults, and parents will lose the power to act (legally) on behalf of their child.

As a practical matter, many people continue to speak for their disabled children into their 50s, 60s or beyond, simply because the people they are dealing with in daily life do not make competency of the child an issue out of pure kindness to the parent (the pharmacist or doctor who shares medical information with you about your disabled adult child or the banker who lets you sign your child's name). However, when it comes to qualification for or preservation of governmental benefits, it is extremely important that you (or your child) have the legal authority to take action with respect to your child's assets, not to mention your child's living arrangements and continued personal well being.

Powers of Attorney:

A power of attorney is a legal arrangement that involves three sets of people. First is the "principal", the person granting the power. Second is the "agent", the person accepting and receiving the power with the corresponding duty to act on the principal's best interest. And lastly, the third parties (bank, school, doctor, pharmacist, etc.), who will be called upon to read and accept (or not) the power of attorney, allowing the agent to act for the principal.

When someone grants a power of attorney to you – you are not their "power of attorney" – you are their agent (technically, you are their "attorney in fact" as opposed to "attorney at law"). With a valid power of attorney, the principal's affairs may be handled by the agent (whether the principal is competent or incompetent), but only if the power of attorney is signed at a time when the person was competent. It's too late to get a power of attorney from a person after he is in a coma or has late stage Alzheimer's. The person must be competent to sign a legal document at the time the document is signed. The attorney who handles the execution of the power of attorney must make a judgment call as to the person's competency, just as she does every time she handles the preparation and execution of a last will and testament.

Neither an unemancipated minor nor an incompetent adult may execute a valid power of attorney (or any other legal document such as a donation, will, etc.), even if no court has actually ruled on that person's competency. If the incompetent person does execute a legal document, any interested person could challenge it and ask the court to declare the document null. You proceed at your own risk when incompetent people sign documents giving you assets or powers over them. Civil and even criminal penalties may apply (for example, the son who has the incompetent parent in a nursing home sign over all the parent's assets to that son to the exclusion of the other children).

A disabled child may be able to grant a valid power of attorney to a parent once the child turns 18 (i.e. a physically disabled child with no mental disabilities, or a mildly mentally disabled child). Note that if you (or your competent child) grant a power of attorney to someone, you (or your child) retain the right to act – however you have essentially "cloned" yourself so that another person, the agent, may also act or you.

All powers of attorney are not created equal! They are as varied as the birds in the sky. Some are very broad, and some are very limited. Some are also very poorly written and may not include the powers you assume they include. "Catch all" phrases are usually deficient in some important respects (i.e. the power to make donations or to sell real estate must be expressly stated in the power of attorney). Agents are not liable for actions of the principal, but may be sued by the principal if the agent acts negligently (i.e. agent allows insurance to lapse on the home and home burns down). Powers of attorney can typically be obtained for a couple hundred dollars or less.

In Louisiana, all powers of attorney are "durable" (whether they say so or not) unless they expressly provide to the contrary. This means that the power of attorney is still valid even if the principal becomes incompetent. However, most powers of attorney expressly provide that they are "durable", simply because third parties will erroneously look to see if that language is included. Some powers of attorney are "springing", meaning they are no good unless and until the principal *is* incompetent (i.e. as certified by two physicians). In this author's view, these "springing" powers should be avoided. The typical reason for making it "springing" is the principal does not want the agent to have any power while the principal is competent, for fear that the agent will "clean him out." If you don't trust the person to be your agent now, don't name them as your agent at all, especially once you are incompetent. Third parties may be reluctant to accept the springing power of attorney – how do they know the doctors are really doctors? You don't want 20 questions or delays. You want immediate action.

The name of the game is you want the third party to accept the power of attorney and allow the agent to act – otherwise it is useless or will require a court order to enforce it. By the time you get that court order, the crisis or event which caused you to present the power of attorney in the first place may have resolved itself in a manner you didn't want to see happen. For that same reason, old or "stale" powers of attorney should be updated every 5 years or so. Powers of attorney may be revoked easily by notarial act, but make sure the agent knows you

have revoked it and make sure third parties (like the banks that hold your accounts) know as well.

If a power of attorney won't work because your child is not competent, the child may be submitted to an interdiction proceeding. In the case of mentally disabled children, another less expensive and faster procedure known as a "continuing tutorship" can be used if implemented after the child's 15th birthday but before the child turns 18. Each procedure has its own benefits and drawbacks.

Interdiction:

Interdiction is the process of having the court judicially declare that someone is incapable of managing his person or his affairs or both. Full interdiction is appropriate when, due to an infirmity, a person is unable consistently to make reasoned (but not necessarily prudent) decisions regarding the care of his person or his assets, or where he is unable to communicate his decisions. If less restrictive means are available (i.e by using a power of attorney) then interdiction is generally not appropriate. Limited interdiction is available for a person who can care for his finances, but not his person, or vice versa, or any aspect of either.

In an interdiction proceeding, a Petition for Interdiction is filed with the court asking that the person be declared incompetent and asking that the petitioner (or some other person) be appointed as "Curator" (guardian). The Petition is then served on the allegedly incompetent person. Fifteen days after the person fails to respond to the suit (since, presumably, he is incompetent and will not know what to do with a lawsuit), an attorney will be appointed by the court to represent him. That attorney will meet with your child and will then report back to the court. A hearing is held, and if everyone is in agreement that interdiction is appropriate, the court will "interdict" the person, meaning he will be declared incompetent and unable to manage his affairs and/or his person. After that, if fully interdicted, he will be unable to marry, sign a contract, give away his assets, etc. Instead, a curator (guardian) will be appointed for him who will make all personal and financial decisions (or one or the other in case of limited interdiction). Curators are not liable for harm caused by the interdicted person unless the curator is negligent in supervision (i.e. leaves a loaded gun on the table where the interdicted person can get it).

A full interdiction removes all powers to enter into legal arrangements or sign legal documents. But it also removes privileges such as the right to vote, drive a car, etc. If you want to protect your child, but not remove all his or her rights, then a limited interdiction may be available, however it is sometimes difficult for a court to understand why you think your child can't manage his money, balance a checkbook or decide where he should live, but should retain the right to vote or drive a car, get married, etc. An interdiction proceeding may take approximately 3 - 6 months to complete (assuming it is not contested by the defendant) and can be expensive (typically $3,000 - $5000, plus court costs and attorney ad hoc fees). Interdiction may also be granted on an emergency basis, but at a much higher cost, as more court appearances are required.

Continuing Tutorship:

In many instances a tutorship proceeding is necessary where a minor needs a legal representative to manage his or her affairs. Although a father is automatically the manager of his child's affairs (while married to the child's mother), things get more complicated in the case of divorce, or where one or both parents are deceased. When the parents are divorced, the parent who is awarded custody will be the one entitled to be the tutor. If joint custody is granted, the parents have the right to be named co-tutors. If a parent dies, the right to appoint a tutor shifts to the surviving spouse. If both are dead, the court must appoint a tutor. For example, if a young couple dies in a plane or car crash leaving minor children, the family of the father may compete with the family of the mother for tutorship of the children.

In the case of divorce, once custody is determined, a tutorship proceeding will be necessary if the minors have assets that require management. An unemancipated minor can't manage his or her own assets (since he is legally incompetent) and the court may appoint an adult to manage those assets. With a properly drafted will, the parents can name whom they want to serve as guardian (tutor) in advance to avoid disputes. Powers over the person may be given to one tutor, and power over a minor's property (assets) may be given to a different tutor. Example, one person may have custody of the minor's person (where he goes to school, where he lives, etc.), but have no say so whatsoever in the minor's financial affairs. Additionally, even where both parents are alive, if a minor has or inherits real estate or other assets that require management, a tutorship proceeding will be necessary, although the father (or mother if the father is absent or deceased) is the "natural" tutor which is enough for many situations like the power to file a lawsuit. Tutorship is simply the process of having a guardian appointed for a minor that needs a legal guardian. Regular tutorships end when the minor reaches the age of eighteen (18).

"Continuing" tutorship is a special form of tutorship available for mentally disabled children between the ages of 15 and 18, who possess less than 2/3 of the average mental ability of a "normal" child of the same age. A continuing tutorship proceeding essentially makes the child a permanent emancipated minor in the eyes of the law, with the same powers enjoyed by an emancipated minor with powers of administration. Continuing tutors are not liable for any harm caused by their child once the child turns 18, unless they are negligent in supervision (i.e. send child out in back yard with a hunting bow and quiver of arrows).

Having a continuing tutor is similar to the situation where a competent person grants a power of attorney to another, as opposed to an interdiction where the interdicted person generally had no legal right to conduct his or her own affairs (except in case of limited interdiction discussed above). If the child is competent to give you a power of attorney, then a continuing tutorship proceeding won't be necessary (or at least won't accomplish much). Possessing less than 2/3 of the average mental ability of a child of the same age does not necessarily mean the child is not competent to sign a power of attorney.

A Petition for Continuing Tutorship is filed together with supporting medical evidence and the affidavit of the coroner stating that the minor qualifies for continuing tutorship. If the court is in agreement, a tutor is appointed upon posting a bond and taking the oath of office. No hearing or court appearance is necessary and the entire proceeding can be handled within a few days through the mail and at minimal costs (i.e. about $1500 plus court costs). Sometimes the coroner wants to interview the minor, and sometimes the medical records presented are sufficient without a personal interview. A tutorship proceeding may be revoked or modified by the court, or may be entirely superceded by an interdiction proceeding if more control by the guardian becomes necessary.

8. Governmental benefits available:

A. **Social Security** - What Social Security benefits are available for a disabled person? In addition to benefits upon retirement, a disabled individual may receive SSDI based on his or her own work history if under retirement age and if the worker has at least 20 credits in the 40 quarter period preceding the disability, or if disabled before age 22, based on the work history of a parent who (1) has reached retirement (50% of parent's benefit), (2) has become disabled (50% of parent's benefit), or (3) has died (survivor's benefits). Benefits based on the work history of a parent or spouse are known as "Survivor's and Dependant's Benefits". Social Security benefits become available to a disabled child (regardless of age as long as disabled before age 22) when the parent retires, becomes disabled, or dies.

Important Definition: "Disability" is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. The impairment must be so severe that the claimant is unable to do his or her previous work or any other "substantial gainful activity" which exists in the national economy. 42 U.S.C.A. Sec. 416(i)(1) and 423(d)(1)(A). A child under age 18 is disabled if the child has a medically determinable physical or mental impairment that results in "marked severe functional limitations." 42 U.S.C. Sec. 1382c(a)(3)(H). Social Security does not cover "partial disability."

What if the disabled person can perform certain tasks? Should he or she work? If the person makes more than about $950 per month, Social Security would consider this gainful employment and deny benefits; Work requiring extensive supervision will not be counted.

B. **Medicare** - about one-third of men and over 50% of women who reach age 65

will need nursing home care. About 25% of the over 85 population live in a nursing home.

Medicare is automatic for (1) persons over 65 or (2) for persons who have received SSDI for more than 24 months and (3) for disabled individuals who have received survivor's or dependant's benefits for more that 24 months.

Part A pays for hospital care and skilled nursing care at home. Part B is optional, requiring a monthly premium, and pays for physician and outpatient services. For person over 65 and only after a three day stay in the hospital followed by admission to a nursing home within 30 days, Medicare will pay for the first 100 days of skilled care in a skilled nursing facility, however, only the first 20 days are paid in full. "Medigap" or Medicare supplement policies will generally not cover nursing home care beyond the 100 day period.

C. **Supplemental Security Income ("SSI")** - Joint state and federally funded cash payment entitlement program of up to $674 (for the year 2009[1]) per month to certain "needy" individuals, namely, the blind, aged or disabled, who do not have sufficient resources to meet their basic needs for food, shelter and clothing. The definition of "disability" for SSI purposes is the same as the Social Security definition above. 42 U.S.C.A. Sec. 1382c(a)(3)(A). SSI is not available to residents of state institutions.

1. **Resource Test** - Applicant can have no more than $2,000 in "countable" assets (assets which can be liquidated and used for food shelter or clothing) for an individual or $3,000 for a couple. Similar exemptions as those allowed under Medicaid rules discussed below apply.

2. **Income Test** - Single applicants can have no more than $674 in monthly income. Income includes anything a person receives in cash, such as annuity payments, wages, pension benefits, trust income, rent, royalties, etc. and "in kind" items which are or could be used for food or shelter. Note: In Kind Support and Maintenance ("ISM") which is unearned income in the form of food or shelter (provided by someone else to the applicant such as free room and board) may reduce SSI benefits. Social Security will apply either the Presumed Maximum Value rule or the One-Third Reduction rule ("VTR") to reduce SSI benefits.

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[1] To find the current SSI benefit each year, go to www.cms.hhs.gov/medicaid/eligibility. The rate is effective January 1 of each year.

3. **Trust Assets**: For assets held in trust, test is whether the assets are available or can be used for food, shelter and clothing. Mandatory support trusts or "discretionary" support trusts (i.e. "The trustee shall make distributions necessary for the care, support and maintenance of the beneficiary") will generally be counted. Trust assets will not be counted if the SSI applicant has no power to revoke the trust and to use the trust funds for his or her own support and maintenance, and cannot direct the trustee to use the funds for these purposes.

Trusts with "special needs" or "supplemental needs" distribution language will generally not be counted if the distributions are purely discretionary and subject to these special considerations. The Trustee should make payments directly to third parties and should not make "in kind" payments which result in the beneficiary's receipt of food, shelter or clothing. Cash payments or in kind payments for food, shelter and clothing will be counted for purposes of the income test, however, interest earned (unless the interest income is actually paid to the beneficiary) and assignable cash payments which are irrevocably transferred to the trust will not be counted except in the month of receipt.

Trusts holding the disabled person's own assets will be counted regardless of language in the trust. However, the same exceptions which are applicable to Medicaid mentioned below will apply here as well (Under Age 65 Disability Trust, Pooled Account Trust discussed below). Additionally, "look back" penalties similar to those for Medicaid applicants are applied for SSI applications.

Home - if the trust owns a home, the Trustee can charge the beneficiary rent, and thereby draw the full SSI check ($674). The rent becomes an asset available for the beneficiary's supplemental needs. If the Trustee does not charge rent, then the SSI beneficiary has received in kind income (i.e. rent free home) and the SSI benefits will be reduced accordingly (i.e. by 1/3).

D. MEDICAID BENEFITS

Medicaid is a Joint state and federally administered medical assistance entitlement program for qualified "categorically needy" individuals, namely, the disabled, blind and aged (over 65), people receiving SSI, low income pregnant women and their children and "optional categorically needy" or "medically needy" individuals, namely,

institutionalized aged, blind or disabled persons under expanded income limits, and home and community based "waiver" participants, respectively, discussed below. Medicaid is not affiliated with Medicare discussed above. The purpose is to meet the basic and necessary medical needs of these individuals. The applicant must meet both the "status" test and the "income" and "resource" tests. Individuals who do not belong to a covered category cannot get Medicaid. The income and resource limits vary between the various programs available. Some Medicaid programs are mandatory in that the State of Louisiana must offer them, while others, including community based waiver services, are optional. There has been much progress in moving from institutional bias to home and community based care in the last few years. The federal government pays for about 70% of Louisiana's Medicaid program. There are over 30 different Medicaid programs.

Recipients of nursing home care and the Home and Community Based Waiver Services will also receive full medicaid including but not limited to inpatient, outpatient and emergency hospital services; rural heath clinic services; lab and x-rays; podiatry; physician services; nurse practitioners; occupational; physical and speech therapy; prescription drugs; adult dentures; durable medical equipment; case management; hospice; hemodialysis; home health; chemotherapy; non-emergency medical transportation; ambulance services; mental health clinics; and some optical services such as cataracts, but not eye glasses and routine eye exams :

1. **Residential Long Term Care (nursing home) Benefits**: Medicaid will pay the amount of nursing home care in excess of the patient liability portion. As shown in the eligibility requirements below, after an institutionalized spouse's income is determined, and various deductions are taken, including permitted allocation to the community spouse (living at home and not in need of institutional care), anything left over must be paid to the nursing home.

2. **Home and Community Based Waiver Services.** Waivers are available to people who need the type of medical care available in a nursing home setting but who can be treated effectively at home or in the community without being placed in a nursing home. Income and Resource limits are same as for residential long term care Medicaid except that person can keep all income (up to 3 x SSI rate or $2,022). **To place a person on the waiting list for this waiver, dial 1 (866) 783-5553.** These services do not involve a "waiver" of the income or asset rules, but rather, the "waiver" refers to the requirement that the person be institutionalized to receive full Medicaid benefits. The waiting list can be very long and if too many assets are received by gift, inheritance or personal injury award, the person may be "bumped" if not qualified at the time a slot becomes available, and forced to return to the waiting list and spend down the assets. This makes planning for the entire family a paramount concern.

A. **Elderly & Disabled Adult (EDA)**- waiting list is several years and slots are being made available for people who have been on the waiting list since February 2006. Can be elderly (over 65) or over 21 and disabled. Services include case management; Personal Care Attendant (PCA); personal supervision (day and night); household supports; personal emergency response system; environmental modifications; transitional services for those transferring from nursing home to community. Available to persons who are in immediate danger of being placed in a nursing home within 120 days or who are already in a nursing home.

B. **Personal Care Attendant (PCA)**- personal care attendants for disabled persons who have lost sensory or motor function who need assistance with daily care needs like dressing, ambulation, and related services. Must be age 18 - 55 when admitted to the waiver. Must need at least 14 hours with a maximum is 35 hours per week.

C. **Adult Day Health Care (ADHC)** - provides adult day care at an adult day care facility and is for persons age 65 or older or 22 or older and disabled. Waiting list goes back only to January 2005.

D. **New Opportunities "NOW"** Waiver (formerly MR/DD) - currently, slots are awarded to persons on waiting list since December 1998. Currently, there are over 11,000 people on this waiting list.

E. **Children's Choice** - presently working on applications filed by September 2000.

3. **Long Terms Personal Care Services (PCS)** (similar to a waiver) - this program was implemented in response to the *Barthelemy* settlement which arose out of the U.S. Supreme Court decision in *Olmstead*[2]. The applicant for services must meet SSI income and resource limits ($674 per month in income), not the expanded "income cap" of 3 times the SSI

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[2] See *Olmstead v. L.C.*, 527 U.S. 581 (1999) and *Barthelemy v. Louisiana Dept of Health and Hospitals*, 2001 WL 1254859 (E.D. LA 2001).

benefit available for the other waivers and for nursing home care.

Services include assistance with Activities of Daily Living (ADLs) such as eating, bathing, dressing and Instrumental Activities of Daily Living (IADLs) such as light housekeeping, grocery shopping, and food preparation. Skilled nursing, medication administration, respite, and other services are not covered by PCS. Note that a "legally responsible" relative is prohibited from being the personal care worker for a family member (this includes the parents, foster parent, curator, tutor, legal guardian or spouse). **To apply for services, applicants must dial 1-877-456-1146.**

4. **Medicare Savings Program** - for low income recipients of Medicare, Medicaid will pay part of that person's medical costs. Categories include Qualified Medicare Beneficiary (QMB), Specified Low-Income Medicare Beneficiary (SLMB), and Qualified Individuals (QI). All require that the applicant receive Medicare Part A Hospital Insurance. The program may pay Part B premiums and deductibles (QMB) or just Part B premiums (SLMB and QI) depending on income limits. For QMB, income cannot exceed $798 for one or $1,070 for a couple (4/1/05). SLMB - $957 or $1283 for a couple (4/1/05). Resources are limited to $4,000 for a single person and $6,000 for a couple (these numbers are actually higher in 2006).

5. **Medicaid Purchase Plan** - LSA R.S. 40:1299.78 et seq. This "buy in" program is the newest Medicaid benefit implemented January 1, 2004, and is designed to provide medical services to disabled individuals who work despite their disability, but who cannot otherwise afford health insurance coverage. Benefits include prescription drugs, hospital care, doctor services, medical equipment and supplies and medical transportation. Recipients must be between age 16 and 65 and have a disability that meets Social Security standards and must take health insurance if available to them at no cost. Net income must be less than $23,275 annually and countable resources cannot exceed $25,000. If net income is greater than $13,965, recipient must pay a premium for Medicaid coverage. Premiums are very small. So far, only about 100 people have applied for this program as of March 2004.[3]

6. **SSI based Medicaid** - an adult will automatically receive full medicaid benefits (a Medicaid card) if he or she qualifies for and receives SSI. The

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[3] See *Louisiana's Medicaid Program*, a presentation by Ben A. Bearden, Medicaid Director, to the Joint Health and Welfare Committee on March 10, 2004.

long term care Medicaid benefits and the home and community based waivers and other benefits discussed above have income requirements that are more lenient than SSI (3 times the SSI limit of $674).

7. **Extended Medicaid** - Some people have lost SSI through cost of living "COLA" adjustments to their Social Security payments, or other changes in the law. If these people received Medicaid based on SSI, then Medicaid can be lost. Exceptions have been created through the "Extended Medicaid" program permitting these people to maintain Medicaid despite disqualification from SSI. Examples include "Pickle Amendment" cases, Disabled Widows/Widowers, Disabled Adult Children (DACs) also known and childhood disability beneficiaries or CDBs, etc.

9. **"Special Needs" or "Supplemental Needs" or "Luxury" Trusts.** Note that distributions made to the beneficiary of these trusts must continue to meet the income and resource tests. A distribution of cash is "income", and if not spent, that cash becomes a "resource". Careful administration of these trusts is essential and a Trustee familiar with the rules must be selected. A professional Trustee could be supported by a family member "co-trustee" or "protector" so that both financial concerns and personal care concerns are addressed. The trust should include a "spendthrift provision", a facility of payment clause and provide for trustee's fees. These trusts should not be confused with "Medicaid Qualifying Trusts", a misnomer, since those trusts are actually deemed available to the beneficiary.

A. **Self Settled Trust - 42 U.S.C. Sec. 1396p(D)(4)(A)** - Trusts created with the disabled person's own assets, whether acquired by gift, inheritance, personal injury award or from earned income and savings, etc. These trusts are also known as an **Under Age 65 Disability Trust**, "pay back" trusts, or "p(D)(4)(A)" trusts. These trusts are expressly authorized under the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93") and are not counted as assets for purposes of determining Medicaid eligibility if all requirements are met. For SSI purposes, the trust will be examined in accordance with the rules regarding "availability" of funds for food shelter and clothing discussed above with respect to SSI benefits. These trusts must be:

- irrevocable
- funded with assets of the individual (it is permissible to include assets of others as well)
- for the sole benefit of a disabled individual under 65 (at the time created)
- established by a parent, grandparent, legal guardian, or a court (cannot be established by the disabled person)

An Under Age 65 Disability Trust must also include a **"pay back"** provision providing that any assets remaining in the trust after the beneficiary's death will

be paid to Medicaid. Any assets remaining after Medicaid reimbursement can be passed to the beneficiary's heirs.

Note that the "look back" rules will not apply to a transfer to this type of trust.

The OBRA '93 rules do not direct what types of distributions can be made, but HCFA Manual refers to them as "special needs" trusts, and therefore the rules for trusts under SSI should be followed (no distributions for food shelter and clothing) and the trust should contain "special needs" distribution standards to preserve benefits.

B. **Third Party Special Needs Trust** - assets of others (i.e parents, siblings, grandparents)

- OBRA '93 does not apply to testamentary trusts, however, SSI rules should be followed as guidelines to preserve Medicaid eligibility.

- *Inter vivos* trusts will be subject to scrutiny and should follow SSI rules as well, namely, these trusts should be "special needs" trusts and not mandatory or discretionary "support" trusts. The purpose should be to improve upon the beneficiary's quality of life by providing supplemental needs not otherwise provided under governmental assistance programs and should direct that the trustee first seek out and obtain whatever benefits may be available, using trust assets only for needs not covered by such programs.

- Unlike self-settled trusts above, after the death of the disabled beneficiary, the assets are not subject to a "payback" clause, and may pass to other designated substitute beneficiaries.

Note that *Crummey* powers will cause problems since the withdrawal right will be deemed to be an available asset and therefore the annual exclusion may have to be foregone for gifts to these trusts.

10. **Long Term Nursing Home Care and Home and Community Based Waiver Eligibility - Resource and Asset Tests:**

A. **Resource Test** - A single applicant can have no more than $2,000 in "countable" assets (cash, possessions, IRAs, stocks, bonds, etc. which can be converted to cash). For a couple, the limit is $3,000, except that under the spousal

impoverishment rules, a community spouse may retain about $100,000 in assets. Interests in a succession are "countable" even if the succession has not been opened or if the interest is disclaimed. Usufructs are also "countable" unless it is the usufruct of an exempt asset. Exempt assets include: a wedding and engagement ring; a home and contiguous land on which it sits (up to 160 acres in rural areas); household furnishings and personal effects up to $2000 in equity value; one car (if used for transportation to work, essential daily activities or to transport the individual to medical providers, or, if not used exclusively for these, then a car valued up to $4,500); a burial plot; $10,000 in burial expenses; cash value of permanent life insurance with aggregate face value of less than $10,000; Term life insurance is not countable. As shown below, if a couple is involved and only one needs institutional care, the spouse remaining at home has a larger resource allowance ($100,000);

B. **Income Test** - Applicant can receive no more that 3 times the current SSI eligibility limit ($674)- today this is $2,022 per month. The spouse's income is not considered except with respect to the spousal maintenance needs allowance.

C. **Look back Period and Transfer Penalty** - Transfers for inadequate consideration within 60 months of application/admission will result in a period of ineligibility and as of February 8, 2006, the penalty period will not even begin until the person is in a nursing home and would otherwise qualify but for the transfer. Note that renounced inheritances or disclaimers, or waivers of child support, etc. would be considered transfers for less than adequate consideration triggering the penalty. The number of months of ineligibility is determined by dividing the value of the asset transferred by $4,000 (average monthly cost to a private pay patient for nursing home care). For example, if assets valued at $320,000 are transferred, the applicant will be ineligible for 80 months. However, if the same applicant simply waits 60 months after the donation before applying, no transfer of assets penalty will be imposed.

Note that transfers made to a disabled child by parents who are applying for Medicaid themselves are exempt under special rules as are transfers to or for the sole benefit of a spouse. Other special exceptions exist regarding transfers of a house to a spouse, child under 21 or disabled, and transfers to the individual's sibling or to a non-disabled adult child who has cared for the individual for one or two years, respectively, while living in the home, which enabled him or her to stay out of a nursing home. Such transfers will not result in ineligibility.

D. **Trust assets.** Are assets held in a trust counted? Generally, yes. If the trust is revocable, the assets are necessarily "available". If the trust is irrevocable, any distribution made to the disabled person is available, and any distribution made to a third party will be considered to be a "transfer of assets" subject to the look back

rule. Subject to a few exceptions, all self-settled trusts will be counted. Two of the exceptions include Under Age 65 Disability Trusts and Pooled Asset Trusts discussed above.

Note that placing the home of an institutionalized individual in a trust (other than a SNT) may convert the home from an exempt asset to an "available asset".

E. **Qualifying for Medicaid**

- Wait 60 months after donation equal to or greater than $240,000 before applying for Medicaid, but consider gift tax[4], loss of basis step up, etc;

- Convert countable assets to exempt assets: Purchase or improve a home or make it handicapped accessible; purchase a burial plot; prepaid funeral. Pay off the home mortgage. Pre-pay homeowner's insurance and taxes;

- Certain irrevocable annuities may be purchased if the payout is no longer than the life expectancy of the beneficiary but the monthly payment will be counted as "income" and Medicaid must be named as the residual beneficiary. Specially designed paid up life insurance with no cash surrender value is also a viable tool.
- enter into a contract with a family member care giver. This will not work for prior services performed without compensation, and must provide for month to month payments. Lumps sums payable in advance are no longer permissible under Louisiana's rules.

11. Medicaid Estate Recovery Program

States are mandated to seek reimbursement from the estates of Medicaid recipients after their death, if those services were received by (1) inpatients at nursing facilities, intermediate care facilities for the mentally retarded, or other medical institutions and (2) recipients of nursing home care or other long term care services, including community and home based services and community supported living arrangements, where either (1) or (2) were 55 years of age or older at the time of receipt of benefits. Recovery is delayed while certain persons are still residing in the home (i.e. surviving spouse, disabled children, etc. - no exception for sibling).

In Louisiana, "estate" as used here, does not include non-probate assets. Can assets be transferred to a Revocable Trust (a non-probate asset) to avoid recovery

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[4] Although Louisiana's inheritance tax has long been repealed for deaths after July 1, 2004, the gift tax was not been repealed until recently. After July 1, 2008, there will be no more Louisiana gift tax.

by Medicaid? Yes, but instead, the assets would be treated as "available", probably eliminating the possibility of Medicaid benefits under the "resource" test.

The Department of Health and Hospitals shall not seek recovery against the first $15,000 of an estate or ½ the median value of homes in the relevant parish, which ever is higher. The median value of homes in Tangipahoa Parish is about $75,000, although the assessor's office has not formally analyzed this.

See LSA R.S. 46:153.4. The claim for estate recovery shall have a priority equivalent to an expense of last illness as prescribed in Civil Code Article 3252 *et seq*.

State must follow notification requirements, undue hardship exceptions and a "cost effectiveness" analysis. For example, if even one of the heirs has income of 300% or less of the Federal Poverty Level guidelines (i.e. an heir with a family of three makes less than $52,800 per year), a "hardship" will exist. This should prove useful if Louisiana starts enforcing estate recovery rules. Under the regulation promulgated pursuant to the new recovery statute, an undue hardship may exist where (1) the estate is the sole income producing asset of an heir and income is limited; (2) recovery would result in an heir becoming eligible for public assistance (i.e. Medicaid); or (3) any other compelling circumstances that would result in placing an unreasonable financial burden on an heir.

The regulation (LAC 50:I. Chapter 81) contains a special note: An undue hardship does not exist if the circumstances giving rise to the hardship were created by or are the result of estate planning methods under which assets were sheltered or divested in order to avoid estate recovery. It is the obligation of the heirs to prove undue hardship by a preponderance of the evidence.

See also LSA R.S. 28:386 - a resident of a state-run 24 hour care facility for the developmentally disabled is deemed to have made an assignment of all of his or her property, including any interest in a Trust or a Succession, to the state, up to the cost of services provided.

Note that Louisiana ranks at the very bottom in terms of enforcement of this law, for now. Note that the regulation seems to go well beyond the statute in several respects.