

## Legal Planning for the Expected and Unexpected Events in Life

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## Tools in Estate Planning

- Wills
- General Durable Powers of Attorney
- Healthcare Power of Attorney/Living Will
- Trusts

## Last Will and Testament

- Plan for the distribution of assets individually owned at time of death
- Names an Executor to attend to the inventory of assets, payment of bills and taxes and distribution of the remainder of the estate to named beneficiaries
- Admitted to Probate Court following death

## Last Will and Testament Issues

- Example 1: Revising Aged Wills
- Example 2: Unmarried Persons and the Statute of Descent and Distribution
- Example 3: Selecting Guardian for Children
- Example 4: Per Stirpes vs. Per Capita
- Example 5: Testamentary Capacity and Undue Influence

## General Durable Power of Attorney

- Names an agent and successor agents to manage financial affairs
- Sets forth specific powers and prohibitions for the actions of the agent

## General Durable Power of Attorney Issues

- Example 1: Hot Powers
- Example 2: Access to Records and Accounts
- Example 3: Nomination of Guardian
- Example 4: Gifting, Self-Dealing & Medicaid
- Example 5: Digital Assets Clause

## Health Care Power of Attorney

- Is a Power of Attorney that becomes effective when the Principal is unable to make health care decisions
- Provides for the release of medical information to named agents
- Allows for the designation of a guardian over person and/or estate

## Health Care Power of Attorney

- Can direct the withholding of artificial nutrition and hydration when the Principal is terminally ill and permanently unconscious as determined by two independent physicians
- The agent must act according to your known wishes, however, if those wishes are unknown then in your best interest

## Health Care Power of Attorney Issues

- Example 1: Placement and Living Quarters
- Example 2: Establishes Care Plan
- Example 3: Reciprocity in Other States
- Example 4: Guardianship Priority

## Living Will Declaration

- A document that states your direction for comfort care in the event you are in a terminal condition
- Takes priority over your Health Care Power of Attorney

## Trusts

- Agreements for the management of financial affairs and the distribution of assets according to a plan
- A trustee is named to act under the terms of the trust agreement
- The settlor of the trust and the trustee can be the same person

## Trusts

- Probate Avoidance
- Privacy For Administration of Estate
- Speedier Resolution of Administration
- Less Expense and Red Tape After Death
- Ruling From the Grave

## Reasons To Have a Trust

- Special Needs Child
- Ownership of Real Property in More Than 1 State
- Spendthrift Beneficiaries
- Second Marriage
- Minor Children

## Planning for Long Term Care

- Private Long Term Care Insurance
- Private Pay
- Medicaid
- VA Benefits

## Medicaid Criteria for Nursing Home and Waiver Programs

- Residency – must be a resident of Ohio
- Age or Disability – 65, blind, or disabled
- Income Eligibility
- Resource Eligibility

## Resource Eligibility

### Single Applicant

- \$2,000 in cash or assets
- One car worth (no value limit)
- “Burial Funds” and “Burial Contracts”
- A home if there is an intent to return

## Resource Eligibility

### Single Applicant (continued)

- Whole life insurance with a face value of \$1,500 or less and term life of any value
- Assets with no true market value
- Household goods/furnishings and personal effects

## Resource Eligibility

### Married Couple

- Same as individual for the institutionalized spouse except:
- the Residence is exempt if spouse living in community and equity is \$552,000 or less

## Resource Eligibility

### Married Couple (continued)

- Community Spouse Resource Allowance

## Burial Funds-Revocable Burial Arrangements

- Medicaid excludes up to \$1500 for the applicant and spouse only
- Is in addition to the burial space
- Includes preparation of the body for burial, transportation, embalming, cremation, flowers, clothing and services
- Not a resource

## Irrevocable Prepaid Burial Contract

- Not a resource
- If any part fits definition of burial funds there is a reduction of the burial funds exclusion
- If any part is attributable to the purchase of a burial space there is no reduction
- Exempt for applicant, spouse, children and siblings

## Snapshot Date

- JFS conducts resource assessment to determine couple's resources on snapshot
- Snapshot is first day of the first continuous period of institutionalization for 30 days
- Resource assessment determines how much of the countable resources the community spouse can keep.

## Example

- Sally purchases a separate \$1500 revocable burial funds contract for flowers and cremation
- Sally then buys an irrevocable prepaid burial contract with provision for preparation of the body, transportation and funeral services at a cost of \$2,000.
- Sally loses her \$1500 burial funds exemption

## Community Spouse Resource Allowance (CSRA)

- Minimum of \$23,844 or one-half of couple's countable resources not to exceed \$119,220.
- Divide couple's resources as of the snapshot date by 2.
- Community Spouse (CS) can retain all if under \$23,844, one-half, or \$119,220 if one-half exceeds \$119,220.

## Example

Mrs. Smith was admitted to the hospital on 01/01/16 and released to long term care on 02/01/16. Mr. Smith applies for Medicaid on 02/10/16. Mr. and Mrs. Smith's countable resources on 01/01/16 totaled \$300,000.00

## Example

- Mr. Smith will be permitted to retain \$119,220.00
- Mrs. Smith will retain \$2,000.00
- Remainder must be spent down for benefit of Mr. or Mrs. Smith.

## Income Eligibility

- Single Applicant if above Special Income Level (\$2,199.00):  
Total Gross Income and subtract:
  - (-) \$20.00 income deduction
  - (-) Medical insurance premium
  - (-) Medicare Part B premium
  - (-) Medicaid reimbursement rate for facility
  - (-) Recurring medical expenses and past unpaid medical expenses.

## Income Eligibility

If after the above deductions the income is above the Medicaid need standard (\$643.00), the individual is ineligible for Medicaid based on his or her income.

A QIT can resolve this.

## Qualified Income Trust (QIT)

- The individual's excess income is placed in a QIT and it is not counted as income for purposes of determining Medicaid eligibility
- The QIT must be irrevocable
- Only the individual's income can be placed in the QIT
- The source of income placed in the QIT must be identified
- The individual cannot transfer or assign to the trust his or her right to receive the income
- Trust assets are not counted as a resource in determining eligibility for Medicaid
- QIT account must be opened in participating bank
- Income may be directly deposited into the QIT account
- Funds cannot be used to pay for funeral expenses or preneed insurance premiums

## Distributions from a QIT

- Distributions must be made in the same calendar month in which the income was deposited; in the following priority:
  - Personal needs allowance of \$50
  - An amount of up to \$15 per month for bank fees associated with the QIT
  - Monthly Maintenance Needs Allowance for Community Spouse
  - Patient Liability to the facility

## Example 1

- Mr. Smith was admitted to nursing facility on 08/01/16. The only source of income for Mr. and Mrs. Smith is Mr. Smith's Social Security disability benefits of \$2,500. Mrs. Smith is the Trustee of Mr. Smith's QIT. The bank has agreed to waive its monthly fee
  - Mrs. Smith is entitled to an excess shelter allowance and is entitled to receive all of Mr. Smith's income after deduction of Mr. Smith's \$50 per month personal needs allowance
  - Mr. Smith's Social Security Disability benefit will continue to be directly deposited into the joint checking account of Mr. and Mrs. Smith
  - At least \$301 will be transferred into the QIT each month
  - \$50 will be transferred to Mr. Smith's individual account for his personal needs allowance
  - Mrs. Smith will receive \$251 from the QIT
  - Mrs. Smith is entitled to the remaining \$2,199 of Mr. Smith's income

## Example 2

- Mrs. Jones is a widow and resides in a nursing home. She receives a pension of \$1,100 per month and Social Security benefits of \$1,200 per month, for a total income of \$2,300 per month. Her daughter, Ms. Williams, is her agent under a General Durable Power of Attorney and is her Representative Payee for Social Security. Ms. Williams is also the Trustee of Mrs. Jones' QIT. The bank charges a \$15 per month maintenance fee.
  - Mrs. Jones' pension and Social Security will continue to be directly deposited into her current checking account
  - Each month Ms. Williams will transfer at least \$101 into the QIT
  - Mrs. Jones will receive her \$50 personal needs allowance
  - The bank will deduct a \$15 maintenance fee each month
  - Ms. Williams will pay the nursing home \$36 from the QIT
  - Ms. Williams will pay the nursing home \$2,199 from her mother's personal checking account

## Community Spouse Monthly Income Allowance (MIA)

- CS retains all of her income
- CS also entitled to receive part of institutionalized spouse's (IS) income if CS income falls below the Minimum Monthly Maintenance Needs Allowance (MMMNA)
- MMMNA = \$2003.00/MAX \$2,981.00

## MIA

- Can keep more of the MMMNA if housing expenses exceed Excess Shelter Allowance (ESA) of \$601.00
- Housing expenses include rent, mortgage, property taxes and insurance, condo fees, and a Standard Utility Allowance of \$510.00

## MIA Sample Calculation

- Mrs. Smith's (IS) income is \$3,000 per month, Mr. Smith's (CS) is \$500.
- Shelter costs: mortgage - \$450; homeowner's insurance - \$50; property taxes - \$150; utility allowance- \$510.
- IS Medicare Supplement Policy, \$150

## MIA Sample Calculation

Shelter Costs:	\$1,160
Less ESA standard:	- <u>\$601</u>
Total ESA:	\$559
MMMNA:	\$2003
Plus ESA	+ <u>\$559</u>
Total:	\$2,562
Less CS income	- \$500
Mr. Smith will receive \$2,062.00 (MIA) from Mrs. Smith's income.	

### Patient Liability - Individual

- Gross income less
  - \$50 personal needs allowance
  - Health insurance premiums (Medicare and supplemental)
  - Health insurance deductibles and co-pays
  - Unpaid past medical expenses
- Remaining income paid to nursing home.

### Patient Liability – Married Couple

- IS Gross Income less
  - \$50 for IS personal needs allowance
  - Health insurance premiums (Medicare and supplemental)
  - MIA

### Patient Liability Calculation

- Mr. and Mrs. Smith
  - Mrs. Smith's income: \$3,000
    - Less PNA: -\$50
    - Less Medical Insurance: -\$150
    - Less Mr. Smith MIA: -\$2,062
- \$748.00 patient liability to nursing home

### Patient Liability for PASSPORT

- Based on the special individual maintenance needs allowance (65% of the Special Income Level)
- $\$2,199 \times 65\% = \$1,430$  for 2016

### Patient Liability for Assisted Living Waiver

- ALW maintenance needs allowance is SSI benefit standard
- \$733 for 2016

### Transfers of Assets

- Look-back period is 5 years
- Penalty period begins the later of:
  - first day of the month that the improper transfer occurred or
  - the date the individual is otherwise eligible for Medicaid but for the transfer.

### Transfers of Assets (Continued)

- Penalty is calculated by dividing the gifts by the Average Private Pay Rate (APPR).
- Whole months and partial months are calculated.
- APPR is \$6,570.00

### Transfer Calculation

- \$100,000 gifted to son on 10/01/2014.  
Client down to \$1,500 on 01/01/2016 and applies for Medicaid.
- \$100,000 divided by \$6,570 = 15.22
  - Disqualification period begins 01/01/2016.

### Not Improper Transfers

- Intent to transfer for fair market value (i.e. caregiver agreement)
- Transfer of resources to spouse
- Transfer of resources to disabled child or to a trust for the benefit of the disabled child

### Not Improper Transfers

- Transfer of home to spouse, disabled child, child under 21, siblings who have equity in home, or "caregiver-child"
- A return of assets improperly transferred (no partial credit)
- ABLE Accounts

### Planning for Medicaid

- Exemption Planning
- Gifting
- Planning Involving the Home
- Trusts
- Caregiver Agreements

### Exemption Planning

- Using countable resources to purchase exempt resources.
- Examples:
  - Pay off debts.
  - Pay for home repair or home furnishings
  - Prepaid funeral contracts and cemetery lots
  - Purchase car or residence for CS



## Gifts

- May make gifts 5 years prior to application to individual or to irrevocable trust
- May transfer assets or the home to a disabled child without penalty

## Planning Involving the Home

- Transfers to a child under the age of 21 or who is blind or permanently disabled
- To a brother or sister who lives in the home and who has an equity interest in the home

## Planning Involving the Home

- Transfer to a “caregiver-child”
- Sale of property for 90% of the fair market value

## Caregiver-Child Exemption

- Home may be transferred to caregiver-child
- Child resides in the home and provided care for a period of at least two years
- Care kept parent out of nursing home

## Trusts

Category Three: “exempt trusts”

- Special Needs Trust or (d)(4)(A) Trust
- Qualifying Income Trusts (QIT)
- Pooled Trusts or (d)(4)(C) Trust

## Caregiver Agreements

- Written agreement between recipient and caregiver
- Provide certain services at a specific rate of pay.
- Caregiver may be family member.
- Itemize caregiver responsibilities.

### Caregiver Agreements

- Include calculation for payment.
- Income must be reported to IRS.
- Include a termination clause which states how the recipient and the caregiver may end the agreement.
- Must keep detailed log of services performed

### Estate Recovery

- Estate includes any other real and personal property and other assets in which an individual had any legal title or interest at the time of death (includes J&S ownership, POD accounts, assets with a beneficiary designation).

### Estate Recovery

- Lien may be filed against real property of Medicaid recipient
- No lien against the home if the spouse, minor or disabled child, or sibling who has an equity interest in the home are residing in the home.

### Estate Recovery

- Estate recovery is not permitted from an estate while either the spouse or the minor or disabled child are alive.

### Estate Recovery - Notice

- Person responsible for an estate must give notice to the administrator of the estate recovery program.
- Persons who file a TOD Confirmation Affidavit on Real Estate must file notice to estate recovery

### Veterans Aid and Attendance Benefits

- 2016 Benefit Amounts for non service connected disability
  - Two Veterans / Spouses \$2,837
  - Married Veteran \$2,120
  - Single Veteran \$1,788
  - Surviving Spouse \$1,149

## Official Periods of Conflict

- WWI 04/06/1917 11/11/1918
- WWII 12/07/1941 12/31/1946
- Korea 06/27/1950 01/31/1955
- Vietnam 08/05/1964 05/07/1975
- Gulf War 08/02/1990 DATE TBD

## Qualifying Criteria

- Age/Unemployable
  - Over the age of 65 and/or unemployable
  - Un-remarried surviving spouse has no age requirement
- Qualifying Military Service
  - Honorable Discharge (Any discharge other than dishonorable)
  - Served at least 90 days active duty
  - Served at least one day during a official period of conflict

## Qualifying Criteria

- Medical necessity
  - Must have a medical condition or medical necessity requiring the applicant to live in an assisted or protected environment
  - Doctor is able to document this need with a VA Physicians Report

## Qualifying Criteria

- Cost of Care and Monthly Income
  - No income test, however, you can deduct monthly medical expenses from income
  - If costs of care are greater than income, the full benefit should be awarded
- Allowable Monthly Medical Deductions
  - Entire monthly bill from Assisted Living Facility
  - Entire monthly bill from Board & Care Home
  - Entire monthly bill from in-home care agency or caregiver
  - Insurance Premiums for medical, dental, vision, Medicare Part B & D

## Qualifying Criteria

- Net Worth and Liquid Assets
  - There is no specific dollar amount to determine someone having an excessive net worth. The VA's asset and net worth limit can vary depending on the following factors:
    - Income from other sources
    - Medical Expenses
    - Life Expectancy
    - Convertibility to Cash
    - Dependents

## Exempt Assets

- Primary Residence (If Veteran and/or spouse resides in the home)
- Vehicles
- Normal household objects and possessions