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Understanding Incapacity & Strategies to Plan for Continuum of Care

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THE FOUR WAYS THAT OWNERSHIP OF PROPERTY IS TRANSFERRED AT DEATH

PROBATE:

Probate assets are the only assets transferred pursuant to the decedent's Will.

BY WILL

Probate assets: titled in only ONE individual's name

(Note: A Trust set out in a Will is referred to as a Testamentary Trust and it does not avoid probate administration.)

Through the probate process, assets pass to the Beneficiaries named in the Will (can be individual/s or Trust/s)

NON-PROBATE:

BY JOINT OWNERSHIP

Typical Examples:

Husband/Wife
Parent/Child
Grandparent/Grandchild
Among Siblings

Assets pass to surviving, titled owners (can be individual/s or Trust/s)

BY CONTRACT

Beneficiary Designations:

Life Insurance Policies
IRA Accounts
Annuities
Brokerage Accounts: TOD
Real Estate: Beneficiary Deeds
US Savings Bonds: POD
Motor Vehicles (DOR): TOD
Bank Accounts: POD
Personal Property: Deed of Gift

Assets pass to Beneficiaries, pursuant to Beneficiary, TOD or POD provisions (can be individual/s or Trust/s)

BY TRUST

A **legal entity** that is similar to a family corporation.

Assets pass to the beneficiaries named in the Trust (children, grandchildren, etc.)

Deed of Gift: Household Items and similar personal property

Pour-Over Will

KEY: DOR = Department of Revenue; TOD = Transfer on Death; POD = Paid on Death

What is Elder Law?

Elder law is not so much about the type of law that it is, but it is more about the **types of clients** that it serves.

Elder law attorneys help **people who are elderly** and **people who are disabled** with their **legal needs** and the various issues that arise within the **continuum of care**.

This often includes **working with a client's financial planner** to ensure that money is available to pay for the **quality of care** that the client **desires**.

Estate Planning vs. ElderLaw

Estate Planning

Traditional estate planning focuses on the **movement of wealth** from one generation to the next.

Elder Law

Elder law focuses on **life planning**, not just transfers that could occur at death.

Generally, elder law emphasizes on the issues that arise from today's longer life spans, rather than death- related transfers

Capacity Issues

When the person no longer has capacity, the following occurs...

If planned **earlier**:

- **Powers of attorney** are in place
- **Healthcare and advance directives** are in place
- Other **estate planning** documents are in place
- The person has **communicated his or her wishes**

If **failure** to plan:

- **Guardianships and conservatorships** may be needed
- The family may face **immediate crisis**

Legal Standard of Capacity

- **Attorney must determine** that the **principal has the capacity** necessary to execute the power of attorney.
- The law **does not specify** the “**requisite capacity**” needed.
- Generally, the principal must **understand the nature of the act** and its legal **consequences**.
- Legal determination is **not the same** as a medical determination.

Powers of Attorney

Durable Power of Attorney

- The power of the attorney-in-fact to act on the principal's behalf **continues despite the principal's incapacity**, whether or not a court decrees the principal to be incapacitated.

Power of Attorney (without "Durable" language)

- The power of attorney is **revoked** and the power of the attorney-in-fact to act for the principal automatically **stops if the principal becomes incapacitated**.

Durable Powers of Attorney – Financial

- **Principal:** the person who creates and signs the Durable Power of Attorney
- **Attorney-in-Fact:** the person who the principal appoints to act on his or her behalf and in his or her best interest

Durable Powers of Attorney - Financial (cont'd)

The attorney-in-fact (AIF) has a duty to:

- Act **in the interest** of the principal
- **Maintain contact** with the principal
- **Communicate** with the principal
- **Follow his or her wishes**
- **Avoid self-dealing**
- Use a **high degree of care**

Once the Durable Power of Attorney is signed, the attorney-in-fact has a **fiduciary relationship** and **obligation** to the principal.

Durable Powers of Attorney - Financial (cont'd)

Powers include:

- Manage **property** and **business affairs**
- Apply for **government benefits**
- Manage all **bank accounts**
- Hire an **attorney**
- Enter into a **contract**

Durable Powers of Attorney - Financial (cont'd)

- **Survives the incapacity** of the principal
- Effective as soon as the principal **signs**
- **Not valid** where it is later determined that the person **lacked the mental capacity** to execute
- Survives death only **with right of sepulcher provision**
- Effective tool used to **prevent guardianship**
 - Attorney-in-fact can make **financial decisions**
 - **Prevents state/court involvement**

Types of Financial Powers of Attorney

Springing Power of Attorney:

This type of power of attorney is **effective only when the principal is incapacitated** or when some other stipulated event or condition occurs, thus “**springing**” the power of attorney into action. These documents require **1-2 physician certifications**.

Non-Springing Power of Attorney:

This type of power of attorney is effective immediately upon execution of the document and remains effective in the event of the principal’s disability or incapacity.

Healthcare Powers of Attorney

- **Principal:** the person who creates and signs the Healthcare Power of Attorney.
- **Healthcare Agent:** the person who the principal appoints to act on his or her behalf and in his/her best interests.
- **Successor Agents**
- **Co-Agents:** not recommended
- Clause effective only when certified as “**incapacitated**”
 - Must be followed with **how** that incapacity is certified
 - Written document or entry in the **medical record**
 - **1 or 2 physicians**

Healthcare Powers of Attorney (cont'd)

The healthcare agent has a duty to:

- **Act in the interest** of the principal
- **Maintain contact** with the principal
- **Communicate** with the principal
- **Follow his or her wishes**
- **Avoid self-dealing**

Healthcare Powers of Attorney (cont'd)

Powers include:

- Request and review **medical records**
- Consult with **medical staff**
- Make **medical decisions**
- Consent to **procedures**
- **Right of sepulcher**



The Law

The healthcare agent:

- Cannot require or withdraw artificially-supplied nutrition and hydration with an **intent to cause death**
- Cannot require artificially-supplied nutrition and hydration if the principal **can ingest through natural means**
- Must consider appropriate measures within current medical practice standards to **provide comfort to the patient**



Those Who Cannot Serve

- **Attending physician**
- **Employee** of an attending physician
- **Owner or operator** of a health care facility where the patient is a resident, unless:
 - Related
 - Members of the same religious community
 - Governing law §404.815

Types of Healthcare Directives

- **Pre-printed forms**
 - Available in the hospital and healthcare facilities
- **Statutory Living Will**
- **Advance Directive** drafted by an Attorney

Living Will

- **Declaration/statement** that a person makes regarding:
 - Whether or not they want certain **medical treatments** to be **withheld or withdrawn** under certain circumstances
- Given effect only if the person is **terminal** and **not able to make treatment decisions** §459.025
- Can be **general** or **specific**
- Statute suggests a **basic form**

Advanced Directives

- Personalized to meet a **client's wishes**
- Anticipate and purposefully make the document **dynamic**
 - Substituted judgment
 - Best interest
- Provide for anticipated decisions
 - **Autopsy** consent
 - **Anatomical gifts**
 - **Right of sepulcher**

Guardianship vs. Conservatorship

Guardianship

A legal process where a person who has been **appointed by a court** to have the **care and custody** of a **minor** or an **adult person** who has been **legally determined** to be **incapacitated**

Conservatorship

A legal process where a person is **appointed by a court** to manage the **property** of a **minor** or of an **adult person** who has been **legally determined** to be **disabled**

Important Terms

Disabled

- person who is **unable** by reason of any **physical** or **mental condition** to **receive** and **evaluate information**; or
- to **communicate decisions** to such an extent that the person **lacks the ability** to manage his **financial resources**.
- Layman terms:
 - has a **mental** and/or **physical condition**
 - **cannot manage** their **financial resources**
 - likely that **serious injury** or **harm** will occur

Important Terms (cont'd)

Incapacitated

- a person who is unable by reason of any **physical** or **mental condition** to **receive** and **evaluate information** or
- to **communicate decisions** to such an extent that the person **lacks the capacity** to meet **essential requirements for food, shelter, safety** or **other care** such that serious **physical injury** or **harm** is likely to occur
- Layman terms:
 - has a **mental** and/or **physical condition**
 - **cannot meet** their **basic need** for **food, shelter, safety** and **other care**
 - likely that **serious injury** or **harm** will occur

Important Terms (cont'd)

Terms for an alleged incapacitated person

- Respondent - person who a petition is being filed against in court
- Protectee - person who has a conservator (finances)
- Ward - person who has a guardian (health, well-being)

Types of attorneys for alleged incapacitated people

- Court-appointed attorney
- Guardian ad litem
- Ad litem-for the purposes of the lawsuit

Private counsel

Emergency Guardian

If there is a substantial risk of serious physical harm to Respondent's person or

If irreparable damage will occur to property, application for appointment of a guardian ad litem or conservator ad litem may be made

Usually are 30 day appointments

If the guardian is not performing effectively, the court may remove them

If there is a life threatening medical emergency and the person's consent cannot be obtained, the court after a hearing may authorize consent

Court appoints an attorney to act as guardian

Conservator of Assets

A conservator makes decisions regarding the protected person's property and financial matters.

A conservator serves as a fiduciary and manages property and/or assets, and has a duty to act in the best interests of the incapacitated person, not in the conservator's own self-interest.

A conservatorship, similar to a guardianship, is only necessary and appropriate where the incapacitated person is unable to make reasoned decisions regarding his or her finances.

Conservator Duties

Protect, preserve and manage the estate

Use prudent care and ordinary skill

Prosecute and defend actions

Collect debts

Settle all valid claims

Give discharge

Take possession of all the protectee's property whether owned by the disabled person before or after the appointment.

Medicare vs. Medicaid

Medicare: not tested by income or resources;

Medicaid is a shared state-federal program, paid part by both entities and administered by state agencies with federal oversight;

Medicare is entirely a federal program and benefits are paid entirely from federal resources;

Both programs are overseen by the Centers for Medicare and Medicaid Services (CMS) formerly known as the Health Care Financing Administration (HCFA) a component of United States Department of Health and Human Services (HHS).

Medicaid

Medicaid is a welfare program which pays medical bills for the aged, blind and disabled. It is a medical payment program, **not a medical insurance program.**

Medicaid was established in 1965 as an amendment to the Social Security Act. It can be found in Title XIX of the Social Security Act and is found at 42 U.S.C. Section 1396 and 42 C.F.R. Parts, 430, 431 and 435.

The federal government provides matching payments to the state. It is a federal program administered in cooperation with the states. Although some provisions are delegated to state determination, state programs must meet requirements imposed by the federal government.

Qualifications

In order to qualify for benefits, the applicant must

- a) be a United States citizen and a resident of the State of Missouri;
- b) meet the age limitations; and
- c) be permanently and totally disabled; and
- d) meet the financial eligibility criteria which pertains to the income and assets of the applicant.

Resource Limit

Missouri now permits a Medicaid applicant to keep \$3000 in countable resources

Exempt Resources include the Home, Vehicle, Personal Property and either an Irrevocable Burial Contract or a Life Insurance Policy that has a Cash Value of \$1500 or less.

Special rules apply to the spouse who remains in the community.

Medicaid Planning for Incapacity

The state of Missouri will 'look back' for five years from the date of application to determine if a transfer of assets was made without value. The State of Missouri will penalize such transfer by refusing to pay for nursing home care.

Many clients who anticipate a need for long-term care will gift assets and wait five years. However, such gifts can trigger both tax and ownership concerns.

VA Benefits

The Aid and Attendance (A&A) program, administered by the VA, can help veterans and/or their families with the cost of in-home care.

- **Aid & Attendance; Non-Service Connected Veteran**
- **Resource and Income Limitations**
- **Military Service**
- Pending in Congress is a bill that mandates a **3-year penalty** on transfers
- The penalty may be assessed **when application occurs**

Benefits Offered Through the Veteran's Administration

Non-Service Connected Benefit

- **Needs-based** benefit
- Based on **service, medical** and **financial** criteria

Service Connected Benefit

- **Non-needs based** benefit
- Eligibility based on **service connected-injury** for which the Veteran is **rated**

Compensation: Service-Connected

Compensation is a **benefit paid to veterans** with a **disability caused by, or exacerbated by, military service**. Once a veteran can show that they were disabled due to their military service, the Veterans Administration **rates their level of disability** (for example, 20% disabled) and awards an amount of **compensation based** on that **rating**.

This is **available regardless** of the veteran's **level of income** and is **not subject** to Federal or State income **tax**.

Entitlement is established from the **date of separation** if the claim is **filed** within **one year** from **separation**.

www.vba.va.gov/VBA/benefits/factsheets/serviceconnected/compensation.doc

Disability Pension: Non-Service Connected

A **pension** is available to veterans who have **low incomes** and who are **permanently** and **totally disabled** and the **disability** is **not** due to **military service**.

- This can also be referred to as a “**special Monthly Pension**” or an “**Improved Pension**”.
- **Surviving spouses** and **children** are also **eligible**.

Veterans Pension Eligibility

All of the following criteria **must** be met:

- The Veteran discharged from service under **other than dishonorable** conditions
- The Veteran served **90 days or more** of **active duty** with **at least 1 day** during a period of **war time**
- The Veteran is **permanently** and **totally disabled**, or are **age 65 or older**,
- The Veteran's **countable family income** is **below** a **yearly limit set by law**

Permanent and Total Disability

A veteran will be considered **permanently** and **totally disabled** if they are:

- A **patient** in a **nursing home** for long-term care due to the **disability**
- Receiving **Social Security disability** benefits
- Determined to be **totally disabled** by the **Department of Veterans Affairs**

Disability Pension: Non-Service Connected

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Aid and Attendance or Housebound

Veterans

Aid and Attendance (A&A) is a benefit paid in addition this benefit may not be paid without eligibility to pension. A veteran may be eligible for A&A when the veteran:

- Requires the aid of another person in order to perform personal functions required in everyday living, such as bathing, feeding, dressing, attending to the wants of nature, adjusting prosthetic devices, or protecting himself/herself from the hazards of his/her daily environment, OR:
- Is bedridden, in that his/her disability or disabilities requires that he/she remain in bed apart from any prescribed course of convalescence or treatment, OR:
- Is a patient in a nursing home due to mental or physical incapacity, OR:
- The veteran is blind, or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less.

Aid and Attendance or Housebound Veterans (cont'd)

Housebound is paid in addition to monthly pension. Like Aid & Attendance, Housebound benefits may not be paid without eligibility to pension. A veteran may be eligible for Housebound benefits when the veteran who:

- Has a single permanent disability evaluated as 100-percent disabling AND, due to such disability, he/she is permanently and substantially confined to his/her immediate premises, OR:
- Has a single permanent disability evaluated as 100-percent disabling AND, another disability, or disabilities, evaluated as 60 percent or more disabling.

A veteran cannot receive both Aid and Attendance and Housebound benefits at the same time. Aid and Attendance (A&A) is a benefit paid in addition this benefit may not be paid without eligibility to pension. A veteran may be eligible for A&A when the veteran:

VA Institutional Long-Term Care

The VA provides institutional long-term care to eligible veterans through:

VA Nursing Homes

Veterans with sufficient functional impairments receive long-term care at a facility that supports their various medical needs.

State Veterans Homes

Owned and operated by a State which may provide nursing home care, domiciliary care, and/or adult day health care. VA assures quality of care and verification of standards through an annual inspection, audit, and reconciliation of records conducted by a VA medical center.

Questions?

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