

# *Elder Law for the Paralegal, Part II*

PRESENTED BY:

The Elder & Disability Advocacy Firm of  
Christine A. Alsop, L.L.C.

6654 Chippewa Street, St. Louis, Missouri 63109  
(314)644-3200

[www.AlsopElderLaw.com](http://www.AlsopElderLaw.com)

to our office

We offer complimentary car service for  
those who do not have transportation



# Estate Planning vs. Elder Law

## 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 attorneys will emphasize the issues arising out of today’s longer life spans, rather than death-related transfers.

# What is Elder Law

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

Lawyers who practice in the area of elder law help elderly and people who are disabled with their legal needs and issues that arise with the continuum of care.

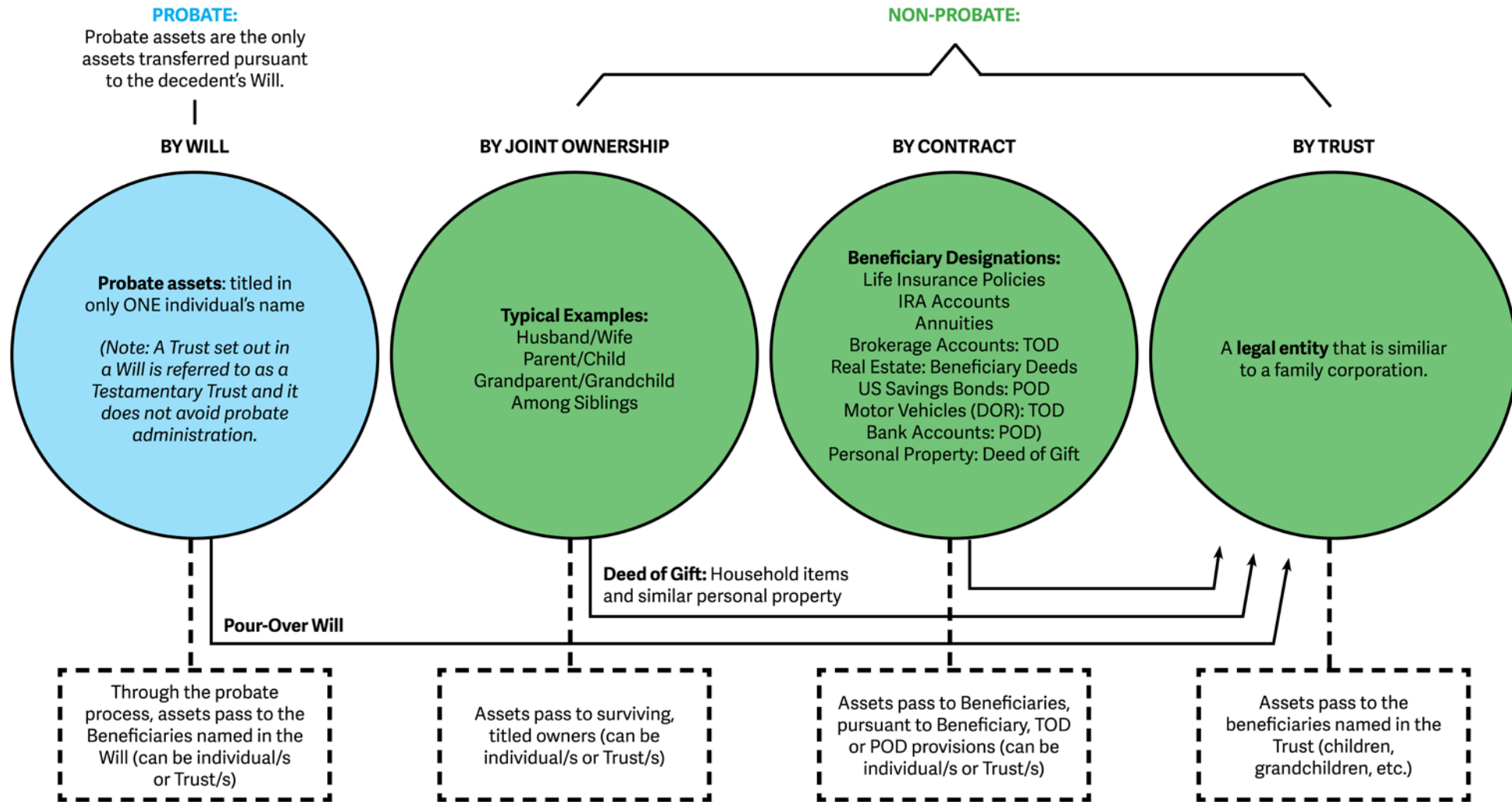
This often includes working with a client's financial planner to ensure that the money will be there for the quality of care the client desires.





# *BASICS OF ESTATE PLANNING*


# THE FOUR WAYS THAT OWNERSHIP OF PROPERTY IS TRANSFERRED AT DEATH



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




# Elder Law can touch upon other issues:

- ❖ Eligibility requirements of various government benefits, such as Medicaid, the Veteran's Administration (VA), Medicare and others
  - ❖ Planning for incapacity through Powers of Attorney
  - ❖ Guardianships and conservatorships
  - ❖ Fiduciary litigation
  - ❖ Special Needs Trusts for the benefit of disabled individuals
- 





*DEALING WITH THE DEMENTED OR  
INCAPACITATED*



# Available Legal Tools in Dealing with an Incapacitated Client

- ❖ Durable Powers of Attorney
  - Health
  - Finance
- ❖ Guardianship/Conservatorship
- ❖ Trusts





# The Incapable Client

- ❖ When the person no longer has capacity, the following occurs:
- ❖ If planned earlier:
  - Have Powers of Attorney
  - Have Advance Directives
  - Other Estate Planning Documents
  - Have Communicated their Wishes
- ❖ If Failure to Plan:
  - Guardianships/Conservatorships
  - Family in Crisis



# The Legal Tool Available Depends

- ❖ Voluntary:

- Principal must have legal capacity at the time the document or device is created

- ❖ Involuntary:

- Individual no longer has legal capacity and voluntary tools not in existence or not applicable



# Ethical Considerations

- ❖ Missouri Rules of Professional Conduct, Rule 4.1-14(a), requires the attorney to maintain, to the extent possible, a normal attorney-client relationship with a client who has diminished capacity. Comment 3 to the Rule provides, “the lawyer must keep the client’s interest foremost” .



# Powers of Attorney

- ❖ Governed by Missouri Law
  - §404.700-404.737
- ❖ Durable Power of Attorney Act
- ❖ Principal=Person who makes the POA
- ❖ Principal appoints an Agent
  - Attorney in Fact (AIF)
- ❖ Agent=Person appointed by the Principal to act in the Principal's best interests



# Durable Power of Attorney Over Finances

- ❖ Principal=person who makes the POA
- ❖ Principal appoints an Agent (Attorney in Fact)
  - Under a duty to act in the interest of the principal
  - Avoid self-dealing
  - High degree of care
  - Fiduciary relationship-trust
- ❖ Duty to maintain contact with the principal, communicate with them and follow their wishes
- ❖ Powers include:
  - Manage property and business affairs
  - Apply for government benefits
  - Manage all bank accounts, hire a lawyer
  - Enter into a contract



# Types of Financial Powers of Attorney

- ❖ Springing:

- Effective at some future happening

- 1 or 2 physician certifications

- ❖ Durable

- ❖ Non-Durable POA's terminate if and when the principal becomes incapacitated





# Durable Powers of Attorney

- ❖ Survives the incapacity of the P
- ❖ Effective as soon as P signs
- ❖ Not valid where it is later determined that the person lacked the mental capacity to execute
- ❖ Survives death only with right of sepulcher
- ❖ Effective tool used to prevent guardianship
  - Make financial decisions
  - Prevent state/court involvement



# Legal Standard of Capacity

- ❖ Attorney must determine that the P has the capacity necessary to execute the POA
- ❖ Law doesn't specify what is the "requisite capacity" needed
- ❖ Generally, principal must understand the nature of the act and its legal consequences
- ❖ Legal determination which is not the same as a medical determination



# Legal Standard of Capacity

- ❖ Attorney must determine that the P has the capacity necessary to execute the POA
- ❖ Law doesn't specify what is the "requisite capacity" needed
- ❖ Generally, principal must understand the nature of the act and its legal consequences
- ❖ Legal determination which is not the same as a medical determination



# The Agent

- ❖ Fiduciary relationship-trust
- ❖ Exercise high degree of care
- ❖ Duty to:
  - Act in the best interest of the principal
  - Maintain contact with the P
  - Communicate with the P
  - Follow P's wishes
  - Avoid self-dealing



# Health Care Power of Attorney

- ❖ Principal=person who makes the POA
- ❖ Principal appoints an Agent (Attorney in Fact)
- ❖ Duty to maintain contact with the principal, communicate with them and follow their wishes
- ❖ Powers include:
  - Request and review medical records
  - Consult with medical staff
  - Make medical decisions
  - Consent for procedures
  - Right of sepulcher



# The Law

- ❖ Governed by Missouri Law §404.820
- ❖ Principal must give Agent the authority to direct a health care provider to *withhold or withdraw* artificially supplied nutrition and hydration
- ❖ Must be specifically stated in the Power of Attorney
- ❖ Cannot require if medically cannot tolerate





# The Law Continued

- ❖ The Agent:
  - Cannot require or withdraw with intent to cause death
  - Cannot require if Principal can ingest through natural means and
  - Must consider appropriate measures within the current standards of medical practice to provide comfort to the patient



# Patient's Right to Information

- ❖ Before an AIF or an MD may authorize the withdrawal of nutrition or hydration which the patient may ingest through artificial means, the MD must:
- ❖ Explain to the patient the intention to withdraw nutrition and hydration and the consequences for the patient and to provide the opportunity for the patient to refuse the withdrawal of nutrition and hydration; or
- ❖ Document in medical record that the patient is comatose or consistently in a condition which makes it impossible for the patient to understand the intention to withdraw nutrition and hydration and the consequences to the patient



# Responsibility of the Agent

- ❖ Follow Missouri Law §404.822
- ❖ Take the following steps when making a decision:
  - Determine the medical facts
  - What is the diagnosis and prognosis?
  - What are the options?
  - What are the benefits of treatment?
  - What are the burdens of treatment?




# 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 Health Care Directives

- ❖ Pre-printed forms
    - Available in the hospital, health care facilities
  - ❖ Statutory Living Will
  - ❖ Advance Directive drafted by an Attorney
- 



# Statutory Living Will

- ❖ In 1985, Missouri adopted the Life Support Declaration Act
  - VAMS §§459.010 *et seq*
- ❖ Applies only to “death prolonging” procedures
  - When terminal
  - Which artificially prolong the process
    - Does not apply to the persistent vegetative state
    - Does not apply to withholding or withdrawing food or nutrition





# 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

- ❖ A 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

- ❖ Process where a person is appointed by the court to manage the property of a minor or of an adult person who has been legally determined to be disabled.
- 



# Guardianship – The Law

- ❖ Guardianship law is statutory
- ❖ Governed by Chapter 475 of Missouri Law
- ❖ Guardianships are filed in the county where the person is domiciled or if no domicile, the county where the person may be found
- ❖ Domicile=where a person intends to reside



# 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 or physical condition
  - cannot manage their financial resources
  - likely that serious harm will occur





# Important Terms

## ❖ 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 he 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

- ❖ Least Restrictive Environment
  - Only impose on the person such restraint that is necessary to prevent him from injuring himself or others
  - Provide him with the care and treatment appropriate for him considering his physical, mental condition and financial means



# Important Terms

- ❖ Alleged incapacitated person
  - Respondent
  - Protectee
  - Ward
- ❖ Attorney
  - Court appointed attorney
  - Guardian ad litem
    - Ad Litem-for the purposes of the lawsuit
- ❖ Private counsel




# The Petitioner

- ❖ Process begins with the filing of a Petition for Appointment of a Guardian and/or Conservator
- ❖ Any person can file a petition
- ❖ Does not need to be a relative or even an interested party
- ❖ Can be filed in an emergency
- ❖ The Department of Health and Senior Services can file a petition for guardianship



# Notice

- ❖ Notice is required by law
  - ❖ Must notify persons serving as guardian or conservator, anyone with fiduciary power, (serving as power of attorney) any person having the care and custody of the person
  - ❖ Closest relatives
- 



# Service

- ❖ Missouri Law requires the proposed ward or the alleged incapacitated person receive personal notice
  - Also referred to as the Respondent
  - Hand delivered to the alleged incapacitated person
- ❖ This is purely statutory and must be followed for the court to have the power to exercise its jurisdiction
- ❖ All other interested parties may receive notice by mail



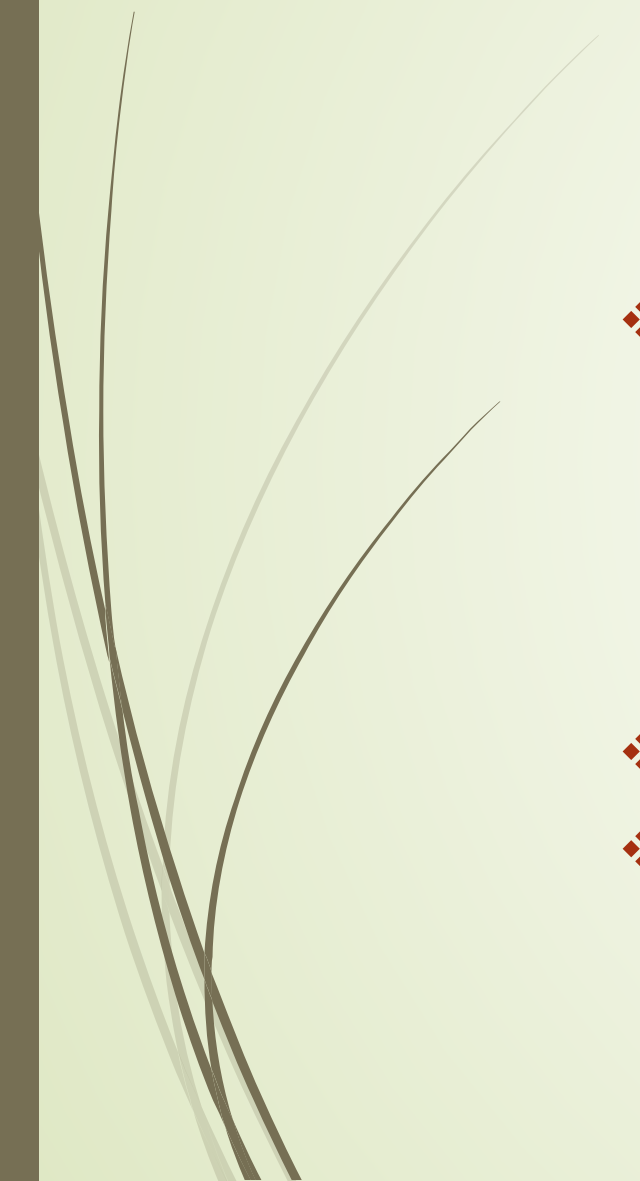
# Respondent's Rights

- ❖ Right to have a jury trial
  - Jury would decide the issue of disability and incapacity only but the court determines who is to serve as the guardian and/or conservator
- ❖ Right to remain silent
  - Respondent cannot be made to testify
- ❖ Right to have the hearing open or closed
- ❖ Right to be present at the hearing





# Respondent's Rights

- ❖ Right to legal representation
    - A court appointed attorney and right to employ a private attorney
    - Appointed attorney must meet with the Respondent before the hearing
  - ❖ Right to present evidence on his behalf
  - ❖ Right to cross-examine witnesses who testify against him
- 



# Proof of Incapacity

- ❖ Levels of incapacity exist
  - Partial incapacity
  - Partial disability
- ❖ Burden of proving incapacity is on the Petitioner
- ❖ Must prove by clear and convincing evidence
  - Clearly convinces the fact finder
  - Evidence that 'tilts the scales' in the affirmative when weighed against the opposition
  - Fact finder's mind is left with the abiding conviction that the evidence is true
- ❖ Examination by physician, interrogatories
  - Extremely difficult to prove without medical testimony



# Waiver of Rights

- ❖ Due to the seriousness of the proceeding, any waiver of rights must be affirmatively waived by the Respondent on the record
  - Guardianship and Conservatorship is a restriction of a person's civil liberties
  - Should not be taken lightly by any of the parties
- ❖ Private counsel-hearing required for the court to determine that the Respondent has the capacity to make the choice to hire their own attorney before the court appointed attorney may withdraw



# Who May Be Appointed

- ❖ Sole discretion of the trial court
- ❖ Section 475.050 governs and is hierarchal
- ❖ Court considers the suitability of appointing the following persons:
  - Court considers the person nominated by the Respondent if the person is able to make and communicate a reasonable choice at the time
  - Person nominated in a DPOA, within 5 years of the hearing if the person could make and communicate a choice
  - Spouse, parents, children, siblings or other close relatives



# Who May Be Appointed

- ❖ Any other person nominated in a will or POA within 5 years
- ❖ Does not have to be the person who filed the petition
- ❖ Except for good cause shown, the court shall follow the respondent's most recent valid nomination of an eligible person
- ❖ If the valid nomination was within 5 years before the hearing, the court is not required to follow but may consider



# The Court's Findings

- ❖ Court makes a finding as to whether incapacity or disability exists
- ❖ If so, the extent of incapacity or disability
- ❖ Whether a supervised living situation is needed
- ❖ High degree of supervision required by the courts
- ❖ Whether supervision of finances is needed and to what extent






# Guardian's Authority

- ❖ Guardian-must always act in the best interests of the protectee
- ❖ "Guards the person"
  - Must act and make decisions about the protectee's care
  - Housing
  - Treatment
  - Education
- ❖ Authority over all personal decisions





# Conservator's Authority

- ❖ Responsible for the protection and management of the protectee's money
- ❖ "Conserves the money"
- ❖ Supervised by the court, manages the financial estate
  - Requires strict accounting
  - Court order necessary to authorize all expenditures
  - Conservator must work with an attorney no matter how large or small the estate



# Emergencies

- ❖ 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



# Helping the Client: Beyond Drafting


- ❖ What is the health of the senior, and is there enough time to be of assistance?
- ❖ What resources are available to the senior?
- ❖ When dealing with multiple parties, what ethical issues arise?
- ❖ Is there sufficient time to determine the key issues?



# Helping the Client: Beyond Drafting

Elder law attorneys rely on:

- ❖ Social workers, geriatric physicians and other specialists to assist the client
- ❖ Financial advisors and banks to notify and/or report suspicious activities or behaviors



# Long Term Care - Considerations

- ❖ Is Long Term Care Insurance in place?
- ❖ Does Long Term Care Insurance provide good coverage?
- ❖ Is Long Term Care Insurance still possible?
- ❖ What is the use of Immediate Care Annuities?
- ❖ How can a Financial Planner help?



# Long Term Care - Options

- ❖ The three most common care options are:
  - home health care
  - assisted living and
  - nursing home care
- ❖ Paying for long-term care comes from three sources:
  - self-pay
  - long-term care insurance
  - government benefits





# Long Term Care - Cost

- ❖ Research shows that at least 70 percent of people over 65 will need long term care services and support at some point in their lifetime.
- ❖ In St. Louis, a good nursing home charges between \$6000 to \$7500 a month for skilled nursing care.
  - ▀ Rural area nursing homes cost less
  - ▀ Care concerns do not evaporate just because nursing home charges more
- ❖ Not all St. Louis nursing homes accept Medicaid and most require a waiting period.
  - ▀ Facilities that are 100% Medicaid ready are usually not on the same level as those that offer both private and Medicaid beds
- ❖ Use of social worker or geriatric case manager to sort out needs of client





# Medicaid

- ▶ In Missouri, referred to as “MO HealthNet.”
  - ▶ Different than Medicare (a non-means tested benefit). Medicare does not pay long-term care costs.
- ▶ Medicaid tests resources and to a certain extent, income.
  - ▶ Resource limit for almost all Medicaid is \$999.99.
  - ▶ Community Spouse rules allow spouse that remains in the home up to \$119,220 in 2016. The Minimum Community Spouse Resource Allowance for 2016 is \$23,844
  - ▶ Division of Assets determines the resources that the community spouse can keep and the amount of any “spend down” required to meet Medicaid eligibility.
  - ▶ Division is only done with married people—not used in single Medicaid applications.



# Medicaid Income

- ❖ Income and resources are two separate issues. Do not get them confused!
- ❖ For Vendor Medicaid (or Nursing Home Medicaid) an applicant's income cannot exceed the actual cost of the monthly nursing home bill; otherwise there is nothing for Medicaid to contribute.
- ❖ The income considered by Medicaid is Social Security and pension; dividends and interest are not income. Rent can be income.
- ❖ Surplus income is paid to the nursing home with Medicaid making up the difference.
- ❖ Community spouses are entitled to a Minimum Monthly Maintenance Needs Allowance = \$1991.25 for 2016
- ❖ The Maximum Monthly Maintenance Needs Allowance is \$2,981 for 2016



# Non Countable Resources

- ❖ Exempt resources include
  - House
  - Vehicle
  - Personal property (non-collections)
  - Life insurance with a \$1500 or less cash value or a pre-need, irrevocable burial contract



# Transfer Penalties

- ❖ Penalty divisor is \$4889 for 2016
- ❖ Transactions for the five year preceding application are subject to “look back” and imposition of penalties
- ❖ Penalty will be imposed for transfers made for less than fair market value



# Medicaid Myths



- ❖ *Myth:* “I have to give away everything I own to get Medicaid.”
  - *The Truth:* A person is permitted to own some property, and still be eligible for Medicaid. Some things, like the home you live in or a pre-paid burial plan, do not count against Medicaid eligibility. For a married couple when one spouse is entering a nursing home, the other spouse will be able to keep some of the marital assets.
  
- ❖ *Myth:* “If I put my property into my spouse’s name, I will be eligible for Medicaid.”
  - *The Truth:* Assets are counted, regardless of which spouse’s name is on the title. It may be possible, however, for an asset to be re-titled into the name of the healthy spouse, after Medicaid benefits have been approved for the spouse needing nursing home care.



# Medicaid Myths



- ❖ *Myth:* “Medicare will cover my nursing home bill.”
  - *The Truth:* Medicare only covers a small amount of the nursing home care provided in the US. This is a surprise to many people. In general, Medicare will pay for 20 days of nursing home care if the person was in the hospital for at least 3 days prior to entering the nursing home and the person required skilled care (such as physical therapy). Medicare will pay part of the costs for an additional 80 days, but only if the resident continues to need skilled care.
- ❖ *Myth:* “If I enter a nursing home as a private pay resident, I must use up all my assets before I can get Medicaid.”
  - *The Truth:* Some nursing homes may tell you that your only option is to spend all of your assets to privately pay for nursing home costs, but this is because they get paid less under the Medicaid program. You may want to seek the advice of an attorney who understands the Medicaid rules to learn what other options you may have.





# Medicaid Myths



- ❖ *Myth:* "I can only give away \$10,000 a year under Medicaid rules."
  - *The Truth:* The \$10,000 per year rule is a federal gift tax rule (and the amount has been increased and applies only to people with a very large estate.) Under the Medicaid rules, a gift that creates ineligibility causes the person to be ineligible for a number of months determined by the value of the gift divided by the Medicaid divisor. See # 3.
- ❖ *Myth:* "My income may have to be used to pay my spouse's nursing home bill."
  - *The Truth:* The healthy spouse gets to keep his or her own income. In fact, the healthy spouse is guaranteed a minimum monthly income and, if necessary, some of the nursing home resident spouse's income will be attributed to the healthy spouse.





# Medicaid Myths

- ❖ *Myth:* "I can hide my assets and get Medicaid."
  - *The Truth:* Intentional misrepresentation in a Medicaid application is a crime with significant penalties.
- ❖ *Myth:* "I can depend on the Medicaid rules not changing for many years."
  - *The Truth:* Medicaid rules change, so do not depend on what a friend or neighbor has told you. It is best to consult with an attorney who understands Medicaid law and knows what the current rules are.



# Medicaid

In order to qualify for Medicaid, the applicant must:

- ❖ Be a United States citizen
- ❖ A resident of Missouri
- ❖ Meet the age limitations
- ❖ Be permanently and totally disabled
- ❖ Meet the financial eligibility criteria which pertains to the income and assets of the applicant



# Veteran's Benefits

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



# Veteran's Benefits

Basics: Individuals who are veterans may be eligible for certain benefits termed "aid and attendance."

- ❖ Veteran must have served at least ninety days on active duty; one day of which had to have been during a war time period
- ❖ Veteran must have had an other than dishonorable discharge
- ❖ Claimant's physician must declare him/her as housebound and/or in need of assistance from another individual, which may include services offered by home health care, assisted living or nursing home care
- ❖ Claimant, if married, must have less than \$50,000 in assets, excluding home, car and personal belongings
- ❖ Claimant, if single, must have less than \$30,000 in assets, excluding home, car and personal belongings
- ❖ Meet income requirements
- ❖ Widowed spouse must have been married to the veteran at the time of the veteran's death or have had children by the veteran and never remarried

# 2016 Service Pension rates

Type of Benefit	Maximum Annual Pension Rate (Income Limit)	Monthly Maximum Annual Pension Rate (Income Limit)
<b>Service Pension (without a dependent; spouse or child)</b>	<b>\$12,868 (medical expenses must be &gt;\$643 to be deducted)</b>	<b>\$1,072 (medical expenses must be &gt;\$53 to be deducted)</b>
With one dependent	\$16,851 (medical expenses must be >\$842 to be deducted)	\$1,404 (medical expenses must be >\$70 to be deducted)
<b>Housebound (H/B) (without dependents)</b>	<b>\$15,725</b>	<b>\$1310</b>
H/B (with one dependent)	\$19,710	\$1,642
<b>Aid &amp; Attendance (A&amp;A) (without dependents)</b>	<b>\$21,466</b>	<b>\$1,788</b>
A&A (with one dependent)	\$25,448	\$2,120
<b>Each add'l dependent child</b>	<b>\$2,129</b>	<b>+\$183</b>
Two Veterans married to each other	\$16,851	\$1,404
<b>Two Veterans married to each other (one H/B)</b>	<b>\$19,710</b>	<b>\$1,642</b>
Two Veterans married to each other (both H/B)	\$22,566	\$1,880
<b>Two Veterans married to each other (one A&amp;A)</b>	<b>\$25,448</b>	<b>\$2,120</b>
Two Veterans married to each other (one A&A, one H/B)	\$28,300	\$2,357
<b>Two Veterans married to each other (both A&amp;A)</b>	<b>\$34,050</b>	<b>\$2,836</b>

# 2016 Survivors Pension rates

Type of Benefit	Maximum Annual Pension Rate (Income Limit)	Monthly Maximum Annual Pension Rate (Income Limit)
Death Pension (without a dependent child)	\$8,630 (medical expenses must be >\$431 to be deducted)	\$719 (medical expenses must be >\$36 to be deducted)
With one dependent child	\$11,296	\$941
Housebound (H/B) (without dependents)	\$10,548	\$879
H/B (with one dependent child)	\$13,209	\$1,100
Aid & Attendance (A&A) (without dependents)	\$13,794	\$1,149
A&A (with one dependent child)	\$16,456	\$1,371
Each add'l dependent child	\$2,198	+\$183






*MEDICARE SET ASIDES AND  
PERSONAL INJURY*





# Introduction

- ❖ Know your client
  - ❖ Know and understand the benefits that the client receives:
    - Medicare
    - SSDI
    - SSI
    - Food Stamps
    - Medicaid
    - Section 8
- 



# Who is Entitled to Medicare

- ❖ A person 65 years of age or older;
- ❖ A disabled person;
- ❖ A person (or child) with end stage renal disease.
- ❖ Individual must be insured; must have sufficient quarters of coverage
- ❖ Individual who is applying on basis of age who is not insured may pay into the system
- ❖ Individual who applies for SSDI is eligible for Medicare within 24 months of eligibility
- ❖ Compassionate Diseases




# Medicare Secondary Payer Act (the MSP)

- ❖ Medicare was created in 1965
- ❖ Medicare Secondary Payer Act was created in 1980



# The Law

- ❖ 42 U.S.C. §1395y
- ❖ 42 C.F.R. §§ 411.20 *et.seq.*
- ❖ Medicare is a secondary payer



# Section 1862(b)(2)(A)(ii) 42 U.S.C. §1395y

- ❖ Precludes Medicare payment for services to the extent that payment has been made or can reasonably be expected to be made promptly under liability insurance (as defined in 42 CFR 411.50)



# Three Compliance Parts; The Present, the Past and the Future

- ❖ In every liability settlement involving a Medicare beneficiary, the parties, including any group health plan or liability insurer, now has three distinct obligations:
  - 1) report the settlement to CMS (the present);
  - 2) resolve any conditional payments (the past) and
  - 3) provide for payment of future medical expenses as a term of the settlement, taking into consideration Medicare's interests (the future).
- ❖ Each obligation carries its own penalty for failure to fulfill it.



# Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA)

- ❖ Enforces Medicare's basic right of recovery and to ensure that Medicare serves as a secondary payer, whenever possible.
- ❖ Section 111: reporting requirements





# What Triggers Reporting

- ❖ The RRE must report a **Total Payment Obligation to the Claimant (TPOC)** which generally represent a 'one-time' or 'lump sum' payment of a settlement, judgment, award, or other payment intended to resolve or partially resolve a claim. The RRE must also report no-fault/Med Pay/PIP and workers' compensation claims.
- ❖ **Mandatory reporting is required when the TPOC date and settlement amount are as follows:**
  - Over \$100,000 – On or after October 1, 2011
  - Over \$50,000 – On or after April 1, 2012
  - Over \$25,000 – On or after July 1, 2012
  - Over \$5,000 – On or after October 1, 2012
  - Over \$2,000 – On or after October 1, 2013
  - Over \$300 – On or after October 1, 2014



# Section 111 and Discovery

- ❖ Section 111 required extensive information disclosure, including a client's SSN for the defendant to report the claim
  - CMS has not been willing to accept less than complete information
  - Information sought is generally not the type exchanged, especially in simple settlements
  - Court compelled disclosure of SSN reasonable in light of defendant's reporting requirements:
    - **Seger v. Tank Connection, LLC**, Docket No.: 8:08CV75, US Dist. LEXIS 49013, D.Neb. (Apr. 22, 2010)
    - **Hackley v. Garofano**, 2010 Conn. Super. LEXIS 1669 (Sup.Ct. July 1, 2010)




# Conditional Payments



- ❖ Medicare has the right to recover any conditional payment made against the settlement proceeds of a Worker's Compensation or third-party liability case.
- ❖ Sometimes referred to as a "super lien" because of the broad power CMS has
- ❖ From the date of incident to the date of settlement



# Procurement Costs

- ❖ Medicare reduces its recovery automatically to take into account the cost of procuring the judgment or settlement.
  - ❖ The costs include attorney's fees, expert witness fees and court costs. In order to properly calculate this reduction, the claimant's attorney must provide a copy of the fee agreement along with documentation of costs incurred during litigation. 42 C.F.R. 411.37.
- 



# SMART Act Purpose

- ❖ The SMART Act was passed as part of H.R. 1845 and attached onto a Medicare IVIG Access Bill;
- ❖ It reforms several aspects of the conditional payment and MMSEA Section 111 processes
- ❖ Amends Section 1862(b)(2)(B) of the Social Security Act (42 U.S.C. 1395y(b)(2)(B))



# Current State of the SMART Act

- ❖ The final rule will be published in 2014
- ❖ Interim final rule extends the time period for CMS to approve a settlement to as long as 245 days.
- ❖ IFR “ignores the 120-day statutory time-frame” on CMS responding to a request for approval of a settlement.





# Strategies



- ❖ Elder law attorneys who have Medicaid and VA planning as part of their practice try to preserve some or all of the assets for the client or the client's family.
- ❖ Goal: The combined benefits can permit a client to remain in their home with home care and if skilled care is required have Medicaid eligibility in place when needed.
- ❖ Clients try techniques on their own that can lead to catastrophic results.





# Strategies to Plan for a Continuum of Care

## ❖ Medicaid or VA Asset Protection Trusts

- Irrevocable Trust
- For VA planning purposes, the settlor must not retain any possibility of receiving income or principal
- For Medicaid, the settlor must not retain any possibility of receiving principal, but income is permissible.
- Five year look back for Medicaid
- No penalty for VA
- Preserves step-up basis and the 121 Exclusion on the sale of the family home
- A retained limited power of appointment is utilized to cause estate inclusion and the resulting step-up of basis and an to reallocate who will get what shares of the trust assets upon the settlor's death.
- Income can be sprinkled among multiple beneficiaries in order to obtain the best result both for income tax minimization and asset protection (by not distributing to an income beneficiary with creditor problems).



# Immediate Strategies

- ❖ Use of a Special Needs Trust for disabled children
- ❖ Use of caretaker exception to transfer penalty rules
- ❖ Half-a-loaf planning
- ❖ Medicaid annuities



# Planning Frustrations

- ❖ Improperly drafted Financial Durable Power of Attorney or Revocable Trust;
  - Gifting provisions and limitations
  - Older documents
  - Documents that do not permit amendments to existing trusts
- ❖ Greedy or short-sighted children;
- ❖ Tax concerns;
- ❖ Health of the senior and sophistication of the children.



*THE MEDICARE  
SECONDARY PAYER STATUTE*



# Medicare Set-Aside (MSA) Arrangements

- ❖ Section 1862(b)(2)(A)(ii) of the Social Security, Act [42 USC 1395 y(b)(2)], precludes Medicare payment for services to the extent that payment has been made or can reasonably be expected to be made promptly under liability insurance.
- ❖ Medicare has the right to scrutinize any settlement of worker's compensation case or third-party liability case to determine if its right must be protected against a shift to Medicare of any third parties' liability as it relates to future medical care.
- ❖ Unless funds are set aside that will meet the participant's future medical bills, Medicare will not assume liability for future medical treatment when a third party is responsible.



# Sally Stalcup Memo – 5/25/11

- ❖ Stalcup is the MSP Regional Coordinator-Dallas, Texas (pertains to AR, OK, TX, NM, LA).
- ❖ “The Law requires that the Medicare Trust Funds be protected from payment for future services whether it’s a Worker’s Compensation or liability case. There is no distinction in the law.”
- ❖ There is no formal process for review of liability cases.
- ❖ Attorneys must decide based upon the facts of their case whether the Trust Fund must be protected.






# Sally Stalcup Memo – 5/25/11

- ❖ “The fact that a settlement/judgment/award does not specify payment for future medical services does not mean that they are not funded.”
- ❖ “The fact that the agreement designates the entire amount for pain and suffering does not mean that future medicals are not funded.”
- ❖ “Set-aside is our method of choice and the agency feels it provides the best protection for the program and Medicare beneficiary.”






# Charlotte Benson Guidance Memo – 9/30/11

- ❖ Benson is the Acting Director of the Financial Services Group of the Office of Financial Management in Baltimore, Maryland
- ❖ Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability "settlement" has been completed as of the date of the "settlement," and future medical services for injury will not be required, Medicare considers its interest, with respect to future medicals for that particular "settlement" satisfied.
- ❖ When there is such a certification, there is no need for the beneficiary to submit the certification or a proposed LMSA for review. CMS will not provide the settling parties with confirmation that Medicare's interest with respect to future medicals for that "settlement" has been satisfied.
- ❖ The beneficiary and/or their representative are encouraged to maintain the physician's certification.



# Types of Arrangements

- ❖ Self-Administered
  - ❖ Custodial Accounts
  - ❖ Special Needs Trust
  - ❖ Pooled Trust
- 



# Other Benefits that Must be Considered

- ❖ SSI
- ❖ Medicaid
- ❖ These “means-tested” benefits could be jeopardized by the receipt of a settlement.
- ❖ Many recipients of Medicaid have no other form of health insurance. The loss of Medicaid could be devastating



# Protecting Other Means Tested Benefits


- ❖ An MSA does not protect other “means tested benefits” and will impact ongoing eligibility.
- ❖ An MSA should be a sub-trust in a Special Needs Trust.
- ❖ Summary
  - Two issues; maintaining “means tested benefits”
    - Dealing with – RSMo. 208.215 - Medicaid Lien;
    - Maintaining “means tested benefits”
      - Special Needs Trusts
      - Other options



# Special Needs Trusts



- ❖ Third Party (“Tidrow”) Special Needs Trust
- ❖ Self-Settled or Pay Back Special Needs Trust
  - 42 U.S.C.1396(d)(4)(A)
- ❖ Pooled Special Needs Trust
  - 42 U.S.C. Section1396p(d)(4)(C)



# Self-Settled or Pay Back- Special Needs Trusts

## 42 U.S.C. 1396(d)(4)(A)

- ❖ The individual must be under age 65 at the time the trust is created and funded
- ❖ The trust may be established by a parent, grandparent, legal guardian, or a court
  - See RSMo. §475.092 and RSMo. §511.030
- ❖ The individual must be disabled (same definition for disability as used for SSDI or SSI)
- ❖ The Trust must contain pay-back provisions
  - Missouri has special requirements
    - See RSMo. §475.092
- ❖ The trust must be irrevocable



# Court Created SNT


- ❖ Missouri's statutory authority for court approval of a pay-back trust is found at Section 475.092.2 RsMo.
- ❖ Trial division has same authority, without appointing a conservator, as probate division under Section 511.030 RsMo.





## Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 126 S. Ct. 1752 (2006)

- ❖ The US Supreme Court ruled unanimously to limit state Medicaid agencies' claims for reimbursement to the portion of any tort settlement attributable to past medical expenses.
- ❖ The agencies may not claim any part of a plaintiff's recovery for lost wages, pain and suffering, or other nonmedical damages.



# WOS v. EMA, U.S. Supreme Court, No. 12-98

- ❖ North Carolina claimed over \$900,000 of a legal medical malpractice settlement won by the parents of a 13-year-old girl born with serious injuries that left her unable to live or work independently.
- ❖ Anti-lien provision in federal Medicaid statute preempted North Carolina's irrebuttable statutory presumption that one-third of tort recovery was attributable to medical expenses
- ❖ The court stated that when “there has been a judicial finding or approval of an allocation between medical and nonmedical damages—in the form of either a jury verdict, court decree, or stipulation binding on all parties—that is the end of the matter.” “With a stipulation or judgment under this procedure, the anti-lien provision protects from state demand the portion of a beneficiary’s tort recovery that the stipulation or judgment does not attribute to medical expenses.”



# Section 202 of the Bipartisan Budget Act of 2013

- ❖ Congress has delayed by two years a provision in last December's budget bill that gives states the ability to recover Medicaid costs from a beneficiary's full personal injury settlement or award.
- ❖ The law, which amends the Social Security Act to negate the U.S. Supreme Court's decisions in *Arkansas Department of Health and Human Services v. Ahlborn* and *Wos v. E.M.A.*, was set to take effect October 1, 2014.



# Missouri Medicaid Lien

- ❖ RSMo. §208.215 – Medicaid is entitled to be repaid from the proceeds of the tort recovery.
- ❖ The lien may be reduced by the trial court.
- ❖ **Estate of Wright v. Mo. Dep't of Soc. Serv.**, WD72706 (Mo. Ct. App. April 19, 2011); court holds that the State's evidence regarding its claim was insufficient; State must demonstrate claim and that payment was in fact made.
- ❖ The lien may be deferred if a Special Needs Trust is properly drafted, approved and funded.



# Is Section 208.215 Unconstitutional

- ❖ Wilhoite is an unreported Western District Federal Court case, 2012 WL 3723304 which holds that Section 208.215 violates the Ahlborn case because it does not state that recovery is limited to the medical paid, and therefore, violates federal law, but that the lien reduction part of 208.215 protects the due process rights of the plaintiff.



# Conclusions

- ❖ Clients do not fit one model or solution
  - Must consider the client's age, financial and social situation
    - Medicaid is not always the best option
    - Long Term Care insurance
    - The role of the Financial Advisor
    - Immediate Care Annuities
  - Must consider impact on client's remaining life
  - Must be a legal resource for client throughout their life



# QUESTIONS?



## The Elder & Disability Advocacy Firm

of Christine A. Alsop, LLC

ATTORNEYS AT LAW

6654 Chippewa Street, St. Louis, MO 63109  
(314) 644-3200 | [www.AlsopElderLaw.com](http://www.AlsopElderLaw.com)

Visit our website, connect with us on social media and subscribe to our blog for valuable resources, legal updates, topical articles, event/seminar information, client testimonials, our monthly firm newsletter, company announcements and more!



---

*To view this presentation, please see the link, Elder Law for the Paralegal - PDF Presentation, listed on our Events & Seminars page on our website underneath the March 23rd entry.*