Organizing Your Legal Affairs

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What is an Elder Law Attorney?[2]

The Elder Law practice encompasses all aspects of planning, counseling, educating, and advocating for the senior client concerning illness, incapacity and death. Rather than being defined by technical legal distinctions, elder law is defined by the client to be served. In other words, the lawyer who practices elder law may handle a range of issues but has a specific type of clients - - seniors.

A senior's legal problems are a unique function of the aging process. They can be complex and include estate planning problems, the problems of incapacity and the cost of quality care.

Elder law attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client. Under this holistic approach, the elder law practitioner handles general estate planning issues and counsels clients about planning for incapacity with alternative decision making documents. The attorney also assists the client in planning for possible long-term care needs, including nursing home care and Medicaid.

Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the elder law practice.

Elder law attorneys are concerned with problems unique to the elderly. The elder law attorney works as their advocate. Elder attorneys are dedicated to ensure delivery of quality legal services for the elderly and to advocate for their rights. There are three major categories that make up elder law:

1. Estate planning and administration, including tax questions;

2. Medicaid, disability and other long-term care issues; and

3. Guardianship, conservatorship and commitment matters, including fiduciary administration.

Other areas include retirement benefits, Medicare, disability benefits and litigation.

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[2] "*What is an Elder Law attorney,"* Courtesy of Sean W. Scott, Esq.

The needs of elder clients extend beyond their legal problems. The clients may be frail or ill and require home health care or replacement in an institutional facility. The clients may be well but fearful that future illness may deplete financial resources, and thus may need to consider a long-term care insurance policy. If a client is a caretaker and is overwhelmed with the demands of caring for a person who is suffering from some form of dementia, the client may need other support services offered by various religious organizations of nonprofit organizations, such as the Alzheimer's Association. Meeting the needs of the client(s) depends on moving beyond conventional legal work to offering practical assistance. Quite often the attorney is the right person to provide information about home care, nursing homes, special geriatric health programs, adult day care and respite care; handling even a few elder-law cases quickly leads to an accumulation of such information and contacts with the right people.

The following is an exhaustive list of the areas in which an elder law attorney will practice:

1. Health and Personal Care Planning (including advance medical directives and living wills);

2. Pre-Mortem Legal Planning (wills and trusts);

3. Fiduciary Representation (including guardianship, trustees and personal representatives);

4. Legal Capacity Counseling (advising how capacity is determined and the level of capacity required for various legal activities);

5. Individual Representation (of those who care or who may be the subject of guardianship or conservatorship procedures);

6. Public Benefits Advice (including Medicaid, Medicare, social security and veteran's benefits);

7. Advice on Insurance (including health, life, long-term disability and burial/funeral policies);

8. Resident Rights Advocacy (including advising patients of their rights and remedies in matters such as admissions, transfer, discharge policies and quality of care);

9. Housing Counseling (reviewing options and financing of options such as mortgage alternatives, life care contracts and home equity conversion);

10. Employment and Retirement Advice (pension, retiree health benefits and unemployment benefits);

11. Income, Estate and Gift Tax Advice;

12. Counseling about Tort Claims against Nursing Homes;

13. Age and/or Disability Discrimination Counseling (including employment and housing and Americans with Disabilities Act); and,

14. Litigation and Administrative Advocacy (including will contest, contested capacity issues and elder abuse).

Estate Planning

What is Estate Planning?

Estate Planning is planning for your property, your loved ones and yourself in the event of death or incapacity. By far, the most important aspect of estate planning is early planning to eliminate or minimize problems **before** the crisis happens.

Why Early Planning is Essential

One of my law professors used to say about estate planning not completed early:

> *"trying to correct an estate planning problem after the fact, is like trying to unscramble an egg."*

It is absolutely critical that individuals have their estate planning documents in place before they need them. Otherwise, when the individual encounters a crisis situation when they do need a certain estate planning document it may be too late to execute the document, due to capacity issues.

An example may illustrate my point more clearly:

> Mr. and Mrs. Johnson have no will or powers of attorney in place. A majority of the marital assets are in Mr. Johnson's name. Mr. Johnson has a stroke and is now incapacitated. Mrs. Johnson is now faced with trying to access the assets in Mr. Johnson's name to help pay for his care. Without a financial power of attorney in place, the financial institutions will not allow Mrs. Johnson to have access to her husband's accounts. Therefore, Mrs. Johnson will have to petition the local court for a conservatorship for Mr. Johnson, to gain access to the assets in his name.

The conservatorship is costly and time consuming and could have been avoided with proper early estate planning.

Estate Planning Tools

In order to implement a client's estate plans, elder law attorneys use estate planning documents as the legal tools to secure early planning. These documents come in many forms. Some definitions of estate planning documents are as follows:

WILLS

A Will is a legal document that allows for the distribution of your property upon your death. Wills can come in many different forms, from very complex wills that have different trusts for tax planning purposes, to simple wills. Each will should be tailored for the client's individual needs and form wills should be avoided.

If you die without a Will, or revoke your previous will without making a new will, your property will be distributed according to state law, and that may not be the way you want. You should review your Will every time there is a significant change in your family or financial situation. At a minimum, you should review your Will every three years.

Do not write on the Will. Changing your Will is often done by a Codicil. However, if you are changing beneficiaries or changing the amounts being given to beneficiaries, it is a better practice to redo the Will.

The best way to revoke a Will is to tear up the original. Normally you should not revoke your Will unless you have prepared a new will. Your Personal Representative should know who your attorney is, in case your Personal Representative has questions for the attorney after your death.

You should keep your Will in a safe, but accessible, place. Attorneys normally recommend that you keep it in a safety deposit box in your bank or a fireproof safe at home. If your Will leaves property in a way significantly different from the way it would pass if you die with no Will, then a secure location is extremely important. If you name a bank as Personal Representative (Executor), you could let the bank keep the original Will in its Will vault. You should keep a photocopy of your Will at home for reference and annual review. It is not necessary for anyone other than you, to have copies of your Will.

DURABLE POWER OF ATTORNEY

A General Power of Attorney is a document which allows you, as the principal, to appoint an agent to act on your behalf. As agent, you are allowed to take any legal action the principal would take. Durable means the document continues to be valid even after you become incapacitated. All powers of attorney terminate upon the principal's death.

If you are incapacitated, a Durable Power of Attorney is crucial, because it allows your agent to pay your bills, manage your assets, and generally attend to your affairs. Typically, the issue of capacity is of greater concern to the elderly, but anyone can become incapacitated from an accident or an illness.

Some people are unwilling to execute a Power of Attorney because they feel that the agent then has control of their assets. The solution is to choose an agent you trust, and keep the original (not a copy) Power of Attorney in your possession, and informing the agent where it is.

If you don't have a Power of Attorney, and you become incapacitated, the court may appoint someone to serve as your conservator and guardian. This procedure is expensive, time consuming and very stressful. By naming an agent to assist you with your affairs, you can name a loved one or friend to act on your behalf, instead of leaving the decision regarding who will act for you to the courts.

As an elder law attorney, we always recommend that our clients execute a Durable Power of Attorney, regardless of their age. As long as the client has the capacity to understand what the document allows the agent to do and how the document will be used, every individual should consider executing a power of attorney. However, there are some issues to consider when executing a power of attorney.

First, there is no formal supervision of your agent. Second, third parties like banks, title companies and stock brokers are sometimes hesitant about recognizing Durable Powers of Attorney, especially if the Power of Attorney is older than two years. It is a good idea to reaffirm your Power of Attorney annually. This can be done by a "reaffirmation sheet," which is a paper you sign and notarizes saying you reaffirm the document. It is advisable to execute a now Power of Attorney every three-to-five years to include the changing laws and requirements.

Finally, a Durable Power of Attorney is only as good as it is drafted. Generally "form" documents are not favored and may not be accepted. Your Power of Attorney should be detailed and tailored to your specific needs. It should also have specific language and requirements which makes it a Durable Power of Attorney.

A Durable Power of Attorney is very important and it is one of the least expensive tools available for estate planning. Remember, the time to execute a power of attorney is before you may need it, not when an accident or illness has already occurred.

ADVANCE MEDICAL DIRECTIVES

You have a legal right to refuse unwanted medical treatment. This means you can accept, reject, or withdraw any medical procedures or treatments offered. However, if you become incapacitated, you will not be able to make or communicate your decisions regarding your health care. Someone else will have to make these

decisions for you. This person is known as a surrogate. To act on your behalf, your surrogate should know your wishes regarding medical treatment and life support.

"Advance medical directives" are the legal documents that you execute and give to your surrogate so that he or she may act as your decision maker.

The two legal documents used to make advance medical directives are the Living Will and the Medical Durable Power of Attorney. If you become incapacitated and you did not previously sign an advance medical directive, a guardian may have to be appointed by the court to make decisions for you. The following will describe the two documents normally used, the living will and the Durable Medical Power of Attorney.

LIVING WILL

A "Living Will" is declaration, in document form, regarding your health care wishes. This document states generally that, if you are in a terminal condition or irrevocable coma, you do not want to be kept alive by medical procedures which merely postpone death.

The Living Will may be executed by any competent adult, called the declarant, who is eighteen (18) years of age or older. The document must be signed by you and the signing must be in the presence of at least two witnesses, who must also sign. A witness cannot be a doctor, nurse, or other employee of the attending physician or treating facility, or an heir or one who stands to inherit. You may revoke the Living Will at any time.

Once the Living Will is executed, it can be applied when you have been certified as being in a terminal condition by at least two physicians; have been in a coma for at least seven days, and not pregnant. The physician must give notice to the nearest family members and wait another forty-eight hours after certification for a response. If there is an objection, a court hearing is held and a guardian ad litem is court-appointed for you. With court permission the physician may withhold life support, but withholding life support under this Act does not include withholding pain medication.

Your attending physician must honor the directives of the Living Will, or relinquish your care. The statute governing living wills specifically states that death due to compliance with the Living Will is not suicide or homicide.

A Living Will only applies in situations where death is imminent. It does not apply where death is not imminent, but you are unable to make medical decisions for yourself.

MEDICAL DURABLE POWER OF ATTORNEY

A Medical Durable Power of Attorney (MDPOA) appoints an agent to speak for you regarding medical treatment decisions when you cannot do so yourself. An MDPOA has much wider application than a Living Will because it actually names an agent to look out for your wishes. MDPOA's are also much more flexible, because you can set forth your wishes regarding "quality of life" issues.

Health care providers are required to comply first with your wishes first, then a Living Will if one is executed, and finally the decisions of your agent under an MDPOA. Health care providers are protected from liability for following your wishes, as stated in a Living Will, or under an MDPOA.

On June 4, 1992, new laws were passed that affected Living Wills and Medical Durable Powers of Attorney. The new law stated that a previously executed Living Will would take precedence over an MDPOA. This new law meant that a previously executed Living Will would "trump" the authority given to an agent under an MDPOA. Since living wills are much less comprehensive than an MDPOA and they do not allow for an agent to stand up for your health care wishes, most elder law attorneys favor MDPOA's over living wills. In addition, because of the laws established in 1992, you will always want to revoke any previously executed living will, when you execute a new MDPOA. You can do this within the MDPOA itself, with a clause stating that you are revoking any previous living wills.

CPR DIRECTIVES

You may now execute a CPR Directive, which directs that CPR should not be performed on you. If you want a CPR Directive it is advisable that you wear an official necklace or bracelet to notify emergency medical personnel.

The CPR Directive is a form you can obtain from your family physician, a home health agency, or a licensed health care facility. If you do not have access to one of these sources, you can obtain a CPR Directive from the University Hospital or Denver General Hospital.

The "CPR Directive form" actually consists of two documents: 1) a three-part form; 2) a form for you to order your CPR Directive bracelet or necklace. You should retain the original executed CPR Directive form, as only the original unaltered CPR Directive, or an CPR Directive bracelet or necklace is valid to prevent CPR.

PROXY MEDICAL DECISION-MAKER

If you become incapacitated and you did not previously sign an advance medical directive, a proxy can make some medical decisions for you. Your physician must first try to locate as many of the following people as possible: your spouse, your parent, your children or grandchildren, and your close friends. These family members and friends select a proxy medical decision-maker for you. Then the proxy has authority to make limited medical treatment decisions for you. The proxy may not withdraw artificial nourishment or hydration "tube feeding" except under limited circumstances that are specified by statute.

LONG-TERM CARE INSURANCE

Long-Term Care (LTC) Insurance is a new type of private health insurance that is designed to cover long-term care costs. Services covered by such policies include skilled, intermediate, or custodial care received in a nursing facility, the home, or assisted living facilities.

LTC insurance can range from providing simple assistance with activities of daily living (such as bathing, eating, hygiene, household chores, etc.), to full time skilled care or even respite care for a family member or friend who is a care giver. The type of coverage you get depends on your individual needs and the amount of premiums you are willing to pay. Currently, you can get long term care policies in a wide variety of coverage plans. You can get plans that only pay a certain amount for your daily care, such as $50 per day or $200 per day. You can get plans that last for only a few years, up to unlimited coverage that last as long as you need care. You can also get plans that have a built-in addition to coverage that keeps up with inflation and rising care costs. Finally, there are now plans where a husband and wife can share the coverage, depending on who needs the care first, or most. A couple can buy a plan that covers six years of long term care for either spouse. Therefore, the husband can use three or four years first, and the wife can use the remaining years later.

Updating and Maintaining Your Estate Planning Documents

Leave a list for your family specifying location and explaining the following items:

- Name, address and phone number of your clergyman/rabbi, attorney
- Will, trust, living will and power(s) of attorney
- Birth and marriage certificates
- Records of business and investment interests
- Contracts (including installment purchase agreements)
- Account numbers for checking, savings and credit union accounts
- Social Security, IRA and pension plan numbers, and the administrator or contact person accountant/tax preparer, physician(s), stockbroker and insurance agent(s)
- Burial or cremation preferences
- Safe deposit box and key, checkbooks/passbooks
- Registration and proof of ownership for vehicles
- Real estate deeds, title policies, closing statements, mortgages, record of
- Debts besides normal monthly bills
- Income tax returns
- Mortgage payments, tax receipts and leases
- Stock certificates and bonds (plus records of cost and date of purchase)
- Records of loans, credit cards and charge accounts, record of divorce, veteran service and discharge records
- Insurance policies -- life, medical, health, disability, property, auto and mortgage
- Receipts for appraisals of valuables

When to Change Your Will

You have recently married or divorced.

The birth or death of a child, grandchild, parent or spouse.

A change in whom you want to name as a trustee or personal representative or guardian.

You have minor or disabled children or grandchildren and you don t have a will which names a guardian or creates a trust.

You have a parent who is disabled and there has been no planning for long-term care.

Your estate has increased in value, or you have inherited property, but you have not provided for any estate tax planning in your will.

You have moved from a community property state to a common law state, or you have moved from a common law state to a community property state.

You have a disabled spouse and you have not provided for a trust, or a trust in your will.

You have remarried and you have children by a prior marriage and/or children by a second marriage.

You have adopted a child, or your child has adopted a child.

There has been a change of ownership in the family business.

Your child has filed for divorce or bankruptcy.

You have an estate subject to federal estate tax and your will uses a pre-1981 marital formula clause.

You have purchased or sold property that was specifically devised in your will.

You have acquired assets in another state that you have not placed in a trust.

A loved one has entered or is about to enter a nursing home.

You need to take advantage of the new family estate tax business exclusion; or
You are contemplating making significant gifts to your children.

Conservatorships and Guardianships

On June 1, 2000, Colorado enacted House Bill 00-1375, affecting sweeping changes to Colorado's law on guardianships and conservatorships. The new law became effective January 1, 2001.

A guardian is responsible for a protected person's well being; a conservator is responsible for the person's estate or financial affairs. A guardianship proceeding is one in which the appointment of a guardian is sought; a proceeding for appointment of a conservator is referred to as a "protective proceeding". A person alleged to be incapacitated or in need of protection is called the "Respondent" unless and until a guardian or conservator is appointed. A person for whom a guardian has been appointed is called a "ward"; a person for whom a conservator has been appointed is called the "protected person".

The new laws are generally friendlier to the constitutional rights of those to be protected and those attempting to protect them. The Respondent is now required to be present in the courtroom. An absence will be excused for good cause only. Further, the Respondent has the right to examine all witnesses. Emergency appointments for incapacitated adults cannot last more than 60 days before there is a full hearing, and appointments of temporary guardian cannot last more than six months.

The Respondent is now entitled to an attorney and will receive an attorney simply by asking. It is no longer necessary for attorneys to petition the court for approval to represent a Respondent in a guardianship or protective proceeding. Further, attorney fees may be paid from the conservatorship estate without prior court approval.

The definition of "incapacity" has changed. The old definition focused on the physical and mental status of the person to be protected. The new law focuses on the functional ability of the person to be protected. The ability to function is evaluated against the person's own resources at home and re-evaluated with hypothetical technological assistance. Specifically, the new definition states:

> "'Incapacitated person' means an individual, other than a minor,
> who is unable to effectively receive or evaluate information
> or both or make or communicate decisions to such an extent
> that the individual lacks the ability to satisfy essential requirements
> for physical health, safety, or self-care, even with appropriate
> and reasonably available technological assistance."

The Colorado Department of Health Care Policy and Financing must now be given notice as an "interested party" when a proposed protective proceeding involves applying for Medicaid benefits or taking action to become or remain eligible for Medicaid benefits.

Notice of all proceedings must also be given to persons having responsibility for care or custody of the Respondent. This would include the nursing home where a Respondent resides. The nursing home will now play an integral role in any protective proceeding and is considered an interested party in any proceeding where the individual is present in the nursing home.

A parent can delegate any power over a minor, except the power to consent to marriage or adoption, by a power of attorney and without any court proceeding. Such a delegation cannot be effective for more than 12 months.

A guardian or conservator may petition the Probate Court for permission to maintain an action for dissolution of marriage on behalf of a protected person. In cases where a person has an estate of less than $10,000, the court can order distribution of the estate without appointing a conservator.

Guardianship for Incapacitated Person

A guardian may be appointed by the court for an adult who is determined to be an "incapacitated person" under the new definition. The court will no longer be concerned as much with whether an individual is mentally incapacitated as with whether the individual can function and with whether the individual can communicate decisions. Presumably, if the individual cannot receive information, the individual cannot function; and if the individual cannot communicate, even with technology, the individual cannot make decisions. On the other hand, persons with mentally incapacity may still be able to function, make decisions and communicate to some degree so that they may not yet require a guardian, or may require only a limited guardian.

Upon the filing of a petition for appointment of a guardian for an incapacitate person, the court must appoint a visitor whose duty is to conduct an investigation into the matters alleged in the petition and to report his or her findings to the court. The visitor must interview the Respondent and explain the Respondent's rights under the law. The visitor must also interview treating physicians and proposed guardians. The visitor must then report to the court regarding the scope and appropriateness of guardianship, and the extent to which the Respondent can perform daily functions, either with or without supportive services, benefits, or technological assistance. The visitor must also make recommendations to the court regarding the appropriateness and

qualifications of the guardian; the appropriateness of the Respondent's proposed dwelling; whether a professional evaluation of the Respondent is necessary; and whether the court should appoint an attorney to represent the Respondent.

The court may also appoint a visitor after appointing a guardian, to review the guardian's report; interview the guardian and ward; or undertake any other investigation the court assigns.

The court is required to first consider a limited order before granting full powers to a conservator or guardian. This means that the order must be tailored to encompass what the Respondent is capable of handling and eliminate that from the control of the guardian or conservator.

Guardians may not serve in dual roles. Therefore, the guardian cannot be the same person or entity as the conservator. Further, the guardian may not be appointed and also serve as a direct service provider. Finally, those whom the court entrusts to act as guardian may not employ the same person as both a case manager and a direct services provider. Thus, case management agencies may still serve as guardians, but they will no longer be allowed to use their staff to provide services. One case management agency may be the guardian, while looking to its competitor for services. Not surprisingly, anyone providing long-term care cannot be appointed guardian.

The court may also appoint a guardian *ad litem* if the court feels it necessary to ensure that the best interests of the Respondent are represented. The duties of the guardian *ad litem* are not the same as those of the Respondent's attorney, whose job is to represent the Respondent, but not necessarily the Respondent's best interests.

If the court determines that a guardian is not effectively performing his or her duties, and that the welfare of the ward requires immediate action, the court may suspend the powers of the guardian and appoint a temporary substitute guardian. The temporary substitute guardian cannot be appointed for a period of more than six months.

If there is an emergency that endangers the health or safety of the Respondent, and no one else has authority to act, the court can appoint an emergency guardian. In some circumstances, an emergency appointment may be made without notice; but notice must be provided within 48 hours after appointment and a hearing must be held within 10 days after appointment. An emergency appointment cannot last longer than 60 days.

The guardian is required to file a report with the court within 60 days after appointment and at least annually after that. The report must contain the following information:

a. The current mental, physical and social condition of the ward;

b. All living arrangements of the ward during the reporting period;

c. The medical, educational, vocational and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;

d. A summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

e. Whether the guardian considers the current plan for care, treatment or rehabilitation to be in the ward's best interest;

f. Plans for future care; and

g. A recommendation as to the need for continued guardianship or any changes in the scope of guardianship.

Given the detail required, guardians may need to seek the assistance of case managers to prepare their annual reports.

In matters where the direction of an agent under a medical durable power of attorney is at odds with the direction of the guardian, the direction of the agent prevails, absent a specific court order to the contrary. A guardian may not revoke a medical durable power of attorney without court approval.

Protective Proceedings

A conservator may be appointed by the court for a minor or an adult who is incapacitated, missing, detained or unable to return to the United States. The appointment of a conservator must also be necessary to prevent waste or dissipation of the protected person's assets; to obtain or provide for the support, care, education or welfare of the protected person or someone entitled to support by the protected person.

If the petition requests appointment of a conservator, other than for a minor, and the protected person is not represented by an attorney, the court must appoint a visitor. The visitor's powers and duties are similar to those in a guardianship.

Conservators may not serve in dual roles. Therefore, the conservator cannot be the same person or entity as the guardian. Further, the conservator may not be appointed and also serve as a direct service provider. Finally, those whom the court entrusts to act as conservator may not employ the same person as both a case manager and a direct services provider.

While a petition to establish a conservatorship is pending, the court may issue orders to preserve and apply the Respondent's property for the support of the Respondent or the Respondent's dependents. The court may appoint a special conservator for this purpose and may do so after a preliminary hearing without notice to others.

Income trusts, disability trusts and pooled trusts for disabled persons are still allowed for persons on Medicaid. However, disability trusts and pooled trusts are no longer limited to funding with proceeds from personal injury settlements and judgments or certain lump sum SSI benefits. This means that any property belonging to a protected person may be used to fund a disability trust or pooled trust in order to qualify, or maintain, eligibility for Medicaid benefits.

Unless the court makes specific findings as to why a bond is not required in the particular case, the court must require the conservator to furnish a bond, conditioned upon the conservator's faithful discharge of his or her duties as conservator.

Within 90 days after appointment, the conservator must file an inventory and a financial plan for protecting, managing, expending and distributing the assets and income of the protected person's estate. The financial plan must be approved by the court. A conservator must also file an amended financial plan whenever a change in circumstances requires a substantial deviation from the original financial plan.

The conservator must also file annual reports to the court. Each report must contain a complete accounting of all financial activities during the reporting period. The report must also contain the following:

1. The services provided to the protected person; and

2. Any recommended changes to the plan for conservatorship, recommendations as to the continuation of the conservatorship, changes in the scope of the conservatorship.

The conservator is entitled to a hearing on all issues raised in the annual report. After notice and a hearing, any order from the court which allowed the report adjudicates all liabilities of the conservator, his or her attorney, and any other agents of the conservator concerning all matters adequately disclosed in the report.

The conservator is permitted to pay the reasonable fees of the visitor, guardian, conservator, the conservator's lawyer or any other lawyer whose services resulted in a protective order or an order beneficial to a ward or a protected person's estate, guardian *ad litem*, physician or any other person appointed by the court. No court order is required.

A guardian or conservator is entitled to be reimbursed for his or her time, expenses and disbursements, including reasonable attorney's fees, for defending or prosecuting a proceeding in good faith, whether successfully or not. However, if the guardian or conservator is unsuccessful in defending an action for breach of fiduciary duty, he or she is not entitled to recover expenses to the extent any breach of fiduciary duty is found.

If a guardian or conservator is required to defend his or her fees or costs, the court must conduct a review of those fees.

A conservator has the power to continue, modify or revoke a financial power of attorney. All agents under powers of attorney, except medical powers of attorney, previously created by the protected person are forbidden to take action under the power of attorney without the conservator's authorization. Those agents must also report to the conservator regarding all actions taken under the power of attorney and must provide the conservator with an accounting.

A conservator, with express court approval, may also make, amend, or revoke a protected person's will under certain circumstances; and may disclaim an interest in real property. With conservators given the authority to change a will, modify a trust or remove beneficiaries on an insurance or annuity product, conservators will need not only to be professional, but extremely careful.

A conservatorship terminates upon the death of the protected person or upon the court's determination that conservatorship is no longer needed to protect the person's assets.

Long-Term Care Planning

PAYING FOR LONG-TERM CARE

According to a study published by the New England Journal of Medicine almost half of all Americans will spend some time in a nursing home. The average cost of a nursing home in the United States is approximately $5,000 per month, and in some areas it exceeds $10,000 per month.

There are five ways to pay for a nursing home: private pay, long-term care insurance, Medicare, Veterans benefits, and Medicaid. Only about 5% of Americans have long-term care insurance. Many are uninsurable or cannot afford such insurance. At most, Medicare pays part of 100 days. Less than 1% of nursing home residents are receiving Veterans benefits.

The major alternative to private pay is, therefore, Medicaid. The rules of eligibility for Medicaid are strict. However, by carefully designing a complete Medicaid plan, security can be ensured for the Community Spouse and a legacy can be preserved for children. Failure to design a sophisticated plan may result in the Community Spouse being unable to maintain his or her standard of living. In some instances, the family home may have to be abandoned.

The key to Medicaid planning is to act quickly. Failure to act could cost you a considerable amount of money. It is possible to protect significant assets by planning early. In those cases where planning was not done and the person is already in a nursing home assets can also be protected, but the earlier the planning is done, the more money is saved. Married persons care about their spouses, children care about their parents, parents care about their children. By proper planning, the security of the Community Spouse can be maintained and a legacy can be preserved for the children.

PUBLIC BENEFITS

Entitlement vs. Need-Based Benefits

The public benefits programs we will be discussing are divided into two main categories. These categories are: 1) Entitlement Programs (Medicare & SSDI); and 2) Need Based Programs (Medicaid & SSI).

An entitlement program requires the happening of a certain event before you are “entitled” to benefit. For example, you will be entitled to Medicare when you reach the

age of 65, or you are entitled to SSDI if you have earned enough work credits and meet the definition of disabled.

A need-based program is based on your resources. Therefore, the program will set certain limits before you will be eligible. Medicaid requires an income and asset limit, as well as a need for custodial type care. SSI eligibility also has income and asset limits, as well as a requirement to be Age 65 or older, or meet the definition of disability.

In addition, coverage for certain health benefits, such as Medicare and Medicaid are based on whether the individual requires "skilled care" or "custodial care." Skilled care is care that comes from health professionals, such as doctors, nurses, or therapists. Custodial care is assistance with the activities of daily living, such as bathing, toileting, transitioning, clothing, etc.

Medicare will pay for most care if it is considered skilled care, but once the patient has plateaued and is diagnosed as not needing any more skilled care, the Medicare coverage ceases. Medicaid will cover custodial type care.

TYPES OF PUBLIC BENEFITS

Medicare Basics

Medicare is a health insurance program for:

- People 65 years of age and older.
- Some people with disabilities under age 65
- People with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant).

Medicare has two parts:

- Part A (Hospital Insurance). Most people do not have to pay for Part A
- Part B (Medical Insurance). Most people pay monthly for Part B.

Hospital Insurance (Part A)

Medicare hospital insurance helps pay for necessary medical care and services furnished by Medicare-certified hospitals, skilled nursing facilities, home health agencies, and hospices.

The number of days that Medicare covers care in hospitals and skilled nursing facilities is measured in benefit periods. A benefit period begins on the first day you receive services as a patient in a hospital or skilled nursing facility and ends after you

have been out of the hospital or skilled nursing facility and have not received skilled care in any other facility for 60 days in a row. There is no limit to the number of benefit periods you can have.

Medical Insurance (Part B)

Medicare Part B helps pay for doctor's services, outpatient hospital services (including emergency room visits), ambulance transportation, diagnostic tests, laboratory services, some preventive care like mammography and Pap smear screening, outpatient therapy services, durable medical equipment and supplies, and a variety of other health services. Part B also pays for home health care services for which Part A does not pay.

SSDI

Eligibility for Social Security disability (SSDI) is based on prior work and the amount of “work terms” or credits the individual has accumulated. SSDI is an entitlement program and is not based on need. For most people, the medical requirements for disability payments are the same under both programs and a person's disability is determined by the same process.

Disability Defined:

You are considered "disabled" and entitled to disabled worker's benefits if you meet the following conditions:

- You cannot engage in any substantial gainful activity because of a physical or mental impairment. You must not only be unable to do your previous work, but also any other type of work considering your age, education, and work experience. (Note: It does not matter whether such work exists in your immediate area, whether a specific job vacancy exists, or whether you would be hired if you applied for work.) Your impairment(s) is determined medically by a doctor;

- It is expected that your impairment(s) can either result in death or last for at least 12 months in a row; and

- Your impairment(s) must be the primary reason for your inability to engage in substantial gainful activity.

In addition to meeting the definition of disability, you must have worked long enough--and recently enough--under Social Security to qualify for disability benefits. Social Security work credits are based on your total yearly wages or self-employment income. You can earn up to four credits each year. The amount needed for a credit changes from year to year. This year, for example, you earn one credit for each $1,130 of wages or self-employment income. When you've earned $4,520, you've earned your four credits for the year.

The number of work credits you need to qualify for disability benefits depends on your age when you become disabled. Generally, you need 40 credits, 20 of which were earned in the last ten years ending with the year you become disabled. However, younger workers may qualify with fewer credits.

SSI

SSI is short for Supplemental Security Income. SSI disability payments are made on the basis of financial need. It pays monthly checks to people who are 65 or older, or blind, or have a disability and who don't own much or have a lot of income ($698 per month). “Blind” means you are either totally blind or have very poor eyesight. Children as well as adults can get benefits because of blindness. People who get SSI usually get Medicaid also.

If the disabled individual is receiving or is qualified for SSI, they will automatically qualify for Medicaid. If they are receiving SSDI, the amount they are receiving will affect their Medicaid eligibility. If the disabled individual is not eligible for either SSI or SSDI then, in order to become Medicaid eligible, they will still have to meet the “medical needs, income and asset” tests for Medicaid.

MEDICAID

Medicaid is the government’s need-based program that pays for long-term care for those who qualify. The long-term care can either be for institutional care, such as in a nursing home or certain assisted living facilities, or in-home care through Medicaid’s Home and Community Based Services program.

Medicaid has certain asset and income limits for eligibility. Medicaid also allows eligible individuals to hold onto certain assets. There are different rules for single individuals and married couples under Medicaid.

For single individuals, the income limit is $2,094.00 or less for 2012. Interest income, veterans' benefits, annuity payments, dividends, pensions (including Civil Service), and Social Security are all part of income. The Medicare Part B insurance

premium (up to $99.90 for 2012), which is automatically deducted from Social Security benefits, is included as part of income.

The asset limit for non-exempt items is $2,000 or less. Certain resources are considered as "exempt" and are not considered when attempting to qualify for Medicaid. Exempt assets are:

1. The home with an equity interest of $500,000 or less, including the land on which it sits and adjoining property;

2. Household goods and personal effects;

3. One wedding and engagement ring, and any items required by physical condition, i.e., prosthesis or wheelchair, of any value;

4. One vehicle of any value if used to transport the individual or a member of the individual's household;

5. Value of any burial space;

6. Value of any burial plan if it is irrevocable; if it is not irrevocable, a burial plan of $1,500;

7. Life insurance with a cash surrender value of $1,500.

It is permissible to shift (convert) countable assets to exempt assets such as making improvements to the home, purchasing an exempt vehicle, purchasing an irrevocable burial plan, etc.

If any assets are "given away" within 60 months prior to the date of institutionalization, Medicaid will impose an ineligibility period on the person who made the gift. The ineligibility period is a period in which the person is not eligible for Medicaid.

The period of ineligibility is calculated by dividing the amount of the gift by the average cost of nursing home care in Colorado. This is why it is usually not permissible to give assets away to a third party and immediately qualify for Medicaid assistance.

MARRIED COUPLES & MEDICAID

The income and asset limits for a spouse applying for Medicaid are the same as for a single individuals, listed above. However, for the community spouse (the non-applying spouse) there are additional allowable exemptions. The community spouse is entitled to retain assets as a "community spouse resource allowance" or "CSRA." This year the CSRA is $113,640.00, and this figure goes up each year, indexed by inflation rates.

The community spouse is also permitted to retain all of his or her monthly income. In addition, if the community spouse's income is less than $1,839, a portion of the institutionalized spouse's income will be given to the community spouse in a Monthly Income Allowance (MIA), to bring the community spouse's income up to the $1,839 limit.

The specific Medicaid rules for Married couples are very complex. Most of these rules have to do with how much the community spouse is allowed to retain, over and above the already mentioned exemptions.

An example of how Medicaid will determine what the community spouse is allowed to retain may help you understand the various Medicaid rules regarding married couples:

Mr. Johnson has had a stroke and now has limited mental capacity. He requires assistance with his daily activities, i.e. full time long term custodial care. After a stay at the hospital and a rehabilitation center, he was moved to a nursing facility. His Medicare and his Medi-gap policy paid for his hospital stay and rehabilitation, but he has no coverage for his custodial care at the nursing facility. The monthly cost of this facility is $6,623. Mrs. Johnson starts paying privately for her husbands care at the nursing facility and consults an elder law attorney regarding a Medicaid application.

Mr. and Mrs. Johnson have a home, two cars, personal property, a burial plan, two small insurance policies with low cash values, and approximately $70,000 in cash assets and investment accounts. Mr. Johnson has an income from Social Security and a pension of $1,600. Mrs. Johnson has an income from Social Security of $439.

The elder law attorney informs Mrs. Johnson that she and her husband already meet the income and asset limits and further explains how Medicaid will evaluate their particular situation.

1) Mr. Johnson's income is below the $2,094 income limit for individuals applying for Medicaid. He will be allowed to retain $50 per month for personal grooming expenses.

2) Mrs. Johnson's $439 income is exempt. Further, $1,400 of Mr. Johnson's income will be attributed to Mrs. Johnson by a monthly income allowance (MIA), to bring her income up to the $1,839. Minimum Monthly Maintenance Needs Allowance (MMMNA) allowed by Medicaid, so she can remain in the community and pay her bills.

3) This means that out of Mr. Johnson's income: $50 goes to his personal grooming allowance; $1,400 will go to his wife for her MIA; and the remaining $150 will go to the nursing facility to pay for his care. Provided Mr. Johnson becomes Medicaid eligible, Medicaid will pay the difference between Mr. Johnson's $150 contribution and the monthly nursing home bill.

4) Since the Johnson's countable cash assets of $70,000 are $43,640 below the $113,640.00 CSRA limit, they will also be able to retain their extra car and their two insurance policies as part of there CSRA, as long as value of these assets combined is below $43,640.

5) Mrs. Johnson will have until the next redetermination period (one year from approval) to retitle all assets into her name, so Mr. Johnson meets the individual asset limits. Mr. Johnson can still retain the $2,000 asset amount in his name. This retitling requirement is why powers of attorney are so crucial. Without a power of attorney naming Mrs. Johnson as her husband's agent, she would have to petition the court for a conservatorship just to get the assets out of her husband's name so her husband could become Medicaid qualified.

6) Mrs. Johnson would have to continue assisting her husband with his Medicaid obligations for reporting any changes in status and filling out the yearly redetermination forms.

The above example is a very simple one. Most cases are not as easy. In most cases, the couple has assets above the $113,640.00 limit that they wish to preserve. In addition, they are concerned about possible estate recovery issues with the home. In these more complex situations the Medicaid regulations for married couples become even more complex. This is why it is very important to consult with an elder law attorney, who is well versed in Medicaid law, long before you get to the point of needing to apply for Medicaid.

THE PROBATE PROCESS

When a person passes away, a probate estate is established to disperse the decedent's assets. The word "Probate" describes the legal process under which, an estate is established for the decedent through his or her will, or through the state intestacy statute, if the decedent dies without a will (intestate).

All probate estates have a person who is responsible, under the court's supervision, for the administration of the decedent's estate in Colorado. This person is known as the Personal Representative (formally called executor or executrix).

DUTIES OF THE PERSONAL REPRESENTATIVE

When you are appointed Personal Representative of an estate, the Clerk of the Court will issue Letters which serve as evidence of your appointment and give you authority to act on behalf of the estate. You are the estate's representative for the purpose of settling the decedent's affairs. This process involves the assembly, collection and valuation of the decedent's assets, the payment of debts, expenses of administration and taxes, and the distribution of the remaining assets to the persons entitled to them. This procedure is generally described as "administering the estate."

The first step in the probate process is opening the estate and securing your appointment as Personal Representative. As Personal Representative, you are required to locate and value all of the decedent's assets and prepare an Inventory of those assets within 90 days from the date of your appointment. For tax purposes, the list should state where the property is located. The list also should include all of the property in which the decedent had an ownership interest, including:

1) property held as a joint tenant or co-owner;

2) property held in joint accounts with others;

3) any insurance on her or his life, regardless of who the beneficiary is;

4) a list of any substantial gifts he or she made during her lifetime;

5) any interest he or she had in any trust;

6) any rights he or she had to control the disposition of property owned by someone else; and,

7) any other right or interest in property which he or she held.

In addition to preparation of an Inventory, all of the income of the estate must be collected and accounted for. Complete records must be kept of all cash and investment transactions. All receipts and disbursements should be run through an estate checking account. For your protection, as a fiduciary, you should make every effort to avoid any appearance of impropriety.

Newspaper notice must be published for claims against the estate, unless a period of one year has passed from date of death. In addition, the law requires that you provide notice to any known creditors directly by mail. Creditors claims can be made either by filing them with the Court or by presenting them to you as Personal Representative, either by mail or hand delivery, within four months after the first publication of notice to creditors. Claims need not be on a special legal form. Generally, a regular bill or other statement for services will suffice as a legal claim. Under our Probate Code, claims are deemed to be allowed if you, as Personal Representative, do not take steps to disallow them within 60 days after the end of the four-month claim period.

If the value of all of the decedent's property interests exceeds $5,000,000, a federal estate tax return must be prepared, filed and the tax paid within 9 months from the date of death. The decedent's final federal and state income tax returns for the year of death and the preceding year (if not already filed) must be prepared and filed, if there was sufficient gross income, and any tax due must be paid. If required, the return must be filed and the taxes paid on or before April 15 of the year following the year of death.

A federal fiduciary income tax return (Form 1041) for income received by the estate will be required in all years in which the estate's income exceeds $600.00. The first year begins on the date of death, and will normally end on December 31 (or at the end of any other month which may be selected by the Personal Representative). A Certified Public Accountant can determine the tax year of the estate as well as the need for the preparation and filing of these returns. A Colorado return (Form 104) for income received by the estate will generally be required when a federal return is filed.

After all known debts, administration expenses, and taxes have been paid or provided for, and all remaining assets distributed, the Personal Representative will then prepare a Final Accounting. The accountings will be given to any interested parties.

Also, if administration of the estate is being supervised by the probate court or if the Personal Representative elects to close the estate in a formal court proceeding, the

Final Accounting will also be filed in Court. The Personal Representative will then be able to distribute the last remaining assets to the appropriate distributees.

The administration of an estate is obviously an important process. It clears the title to the decedent's property. It settles legitimate debts and eliminates others. It may establish a new tax basis for the property in the estate, and protects the Personal Representative in making distribution of the property.

CHECK LIST OF THINGS TO DO DURING PROBATE PROCESS

- Authorize body organ donation or bequeathal of body to medical school;

- Call funeral director, memorial society, clergyman or rabbi;

- Tell relatives, friends, and employer;

- Take to a lawyer the original will, recent tax returns, and a list you have made of assets and debts. Ask a lawyer or accountant how you should receive insurance payments, IRAs, and retirement plan funds. Also ask if bills should be paid from cash on hand or through probate proceedings. Begin probate proceedings if necessary;

- Ask relatives or friends to help with telephones, shopping, cooking, child care;

- Arrange funeral or memorial service, reception, and burial or cremation;

- Publish obituary in newspaper;

- Get about 10 certified copies of death certificate (for insurance claims, pension claims, and changes in title of real estate, investments, bank accounts;

- Keep a list of cards, flowers, donations, etc;

- Give change of address to postmaster;

- Notify insurance agents who provided life, medical, health, disability, accident and travel, vehicle, and residential policies. File claim forms. You can ask the insurance company to pay you only enough for immediate needs and to pay interest on the balance until you’ve decided how to take the proceeds;

- Ask the deceased's employer if health insurance can be continued for 18
- months for dependents and co-insureds. Also ask if there is unused vacation or other pay;

- Apply for benefits from Social Security or Civil Service, Veterans' Administration, Pension, and Workers' Compensation;

- Notify bankers and credit card companies and remove the deceased person's name from joint accounts. Some credit card accounts include life insurance which pays off the account balance if the account owner is deceased;

- Notify accountant or tax preparer unless lawyer will do final tax returns;

- Notify stockbrokers to stop any open orders, and remove the deceased person's name from joint stocks and bonds;

- Notify airlines to transfer frequent flyer miles according to their contract or to the beneficiaries named in a will.