2020 Elder Law Institute
October 2, 2020
Day 2 Index

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Section Twelve

Tax Issues in Medicaid Planning

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Section Twelve

Tax Issues in Medicaid Planning……..Jennifer L. VanderVeen, Esq., CELA

I. COVID Related Tax Issues

a. "Recovery Rebates"

Most people have now received their payments from the Treasury Department of $1,200 per person. For FSSA purposes, these are being treated as tax refunds and are exempt assets for twelve months.

b. Waiver of Early Withdrawal Penalty

The CARES Act allows for distributions of up to $100,000 for "coronavirus related" purposes from retirement plans. The distribution can be spread over three years for tax purposes or to repay the loan from the plan within three years. The distribution will not be subject to the 10% penalty for an early distribution.

The usual allowances for an early distribution are expanded to include anyone who:

- Is diagnosed with COVID-19 or has a spouse or dependent diagnosed;
- Is quarantined due to COVID-19;
- Loses a job, has hours reduced or is laid off due to COVID 19
- Has self-employment reduced due to COVID-19
- Cannot work due to child care closures
- If any household member is a "qualified individual"

c. Waiver of Required Minimum Distributions

Required minimum distributions from retirement plans are waived for 2020. If an individual had already taken their required distribution, it could have been re-contributed back to the account, so long as it was done before August 31, 2020

d. Charitable Contribution change

For tax years beginning with 2020, taxpayers will be able to deduct up to $300 of charitable contributions as an "above the line" deduction – allowing those taxpayers who do not itemize to take a charitable deduction.

e. Carryback/Carryover allowances for net operating losses

For taxpayers with net operating losses, those losses can now be carried back for five prior years (an increase from two years). This may allow taxpayers to go back and file amended

returns to claim carry backs. In addition, the limitation of deductible net operating losses to 80% of taxable income has been lifted, allowing taxable income to be entirely offset by any applicable net operating losses.

II. SECURE Act and Special Needs Trusts

The SECURE Act's rules eliminating stretch IRAs contain an exemption for "eligible designated beneficiaries" which are defined as your spouse, minor children, any person who is less than 10 years younger than the decedent and any person who is disabled or chronically ill. The law also allows accumulation trusts established for the sole benefit of a person who is disabled or chronically ill to be treated as an eligible designated beneficiary.

There is also the opportunity to get the stretch via an "applicable multi beneficiary trust." All beneficiaries must be individuals and one beneficiary must be disabled or chronically ill at the time of the account owner's death. The trust can then either provide that no benefits will be paid until the death of the eligible beneficiary or must immediately divide into separate trusts for each beneficiary.

III. Home Office Deductions

Many elder law attorneys may be able to claim the home office deduction for the first time this year. Everyone should review IRS publication 587 (https://www.irs.gov/pub/irs-pdf/p587.pdf) to determine whether the deductions is applicable to them.

One important point to note – because of the elimination of miscellaneous itemized deduction, this deduction is only available to people who are self employed or independent contractors. It also requires a dedicated space in your home that is used for client meetings. I have specifically reviewed all available guidance and regulations. There is no clear guidance as to whether Zoom meetings will qualify as using the space for client meetings. In a previous ruling, the Ninth Circuit held that telephone calls were not sufficient, but in a time where in person meetings are not possible, there is a strong argument that Zoom meetings would meet the test.

IV. Payment to Family Members for Provision of Caregiving Services

When payments are made to relatives for services and/or housing, these transactions are more thoroughly scrutinized than payments in arm's length transactions to agencies. Both for the IRS and for FSSA, the relatives providing the services must be paid as employees and have prepared certain documents.

Documents needed for payment of family caregivers. If individuals are paying family members for care, certain documents are required to provide evidence that the payments are not gifts and are, in fact, payments for services rendered. **All documents must be prepared and signed before any payment is made for these services.** For purposes of qualifying an individual for any improved pension program through the Veteran's Administration, the VA will allow these payments as Unreimbursed Medical Expenses, lowering the amount of income for the VA applicant and allowing benefits if they lower the income level below the required point.

The basic documents required are:

1. A written agreement for a service contract that provides, at minimum, the following:
    a. Arrangements for prospective services
    b. A detailed outline of the services to be performed

       The hourly compensation for each service. A source for a reasonable fee for a service is www.bls.gov, which can show what categories of occupations are paid. Also, local care managers can provide average rates for home care services. An affidavit from a care manager can be attached to the contract to verify the rates.

    c. The manner and method of payment, avoiding lump sum or advanced payments, or payments for services prior to the date of execution of the contract
2. A running log of the time spent each day or each week for each service—a log sheet should be prepared in advance
3. A running log of the time spent each day

Tax withholding and Employment Forms

1. A Form W-4 to commence employment should be filled out by the family caregiver who is the prospective employee and submitted to the IRS.
2. Form 941 must be completed quarterly and Form 940 at the end of the year.
3. A Form W-2 must be completed for the employee at the end of the year.
4. Indiana Form WH-4.
5. Online registration through IN-NewHire.com

6. Workers' compensation forms, including quarterly UC-1 and UC-5.

7. Unemployment department forms must be completed.

Multiple services are available to deal with these forms and withholding taxes. I have used Home Pay from Care.com with clients in the past. Local accountants may also offer services as reasonable rate.

V. QLAC – Qualified Longevity Annuity Contracts

Final regulations regarding Qualified Longevity Annuity Contracts were published by the Internal Revenue Service (IRS) in June, 2014. (*See Internal Revenue Bulletin – July 21, 2014 – TD 9673 attached)* These regulations under sections 401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), 408A(c)(5) and 6047(d) of the Internal Revenue Code. These new regulations allow for the purchase of certain annuities within retirement accounts that essentially provide a mechanism for the deferral of required minimum distributions (RMDs) on the portion of the account within the QLAC.

A QLAC is limited to the lesser of $135,000 or 25% of the balance in the account (as determined on the previous December 31). This amount is set to be indexed annually in increments of not less than $10,000 with any amount less than a multiple of $10,000 being rounded down to the nearest $10,000.

If a QLAC fails because the contract exceeds these limits, it may be "saved" as long as the excess premiums are refunded to the non-QLAC portion of the account no later than the end of the calendar year following the year in which the purchase was made. QLACs must state, in their terms, that they are intended to be QLACs and they cannot be variable or indexed annuities. They must be irrevocable, with no cash surrender value. However, the value of the assets in a QLAC are not included in the calculation of the RMD amounts for any year until the QLAC payments begin. QLAC payments must begin no later than age 85. However, the participant may select an earlier start date, if allowed by the contract. The maximum age may be adjusted annually to reflect changes in mortality.

A QLAC may offer a return of premium (ROP) benefit at the death of the annuitant or a life annuity to a surviving spouse, but they are not required to do so. If the ROP is provided, it must be paid no later than the end of the calendar year following the calendar year of the participant's death and will likely be treated as an RMD in that year. It will not be eligible for rollover.

VI. Elderly Dependent Tax Credit

Just as you claim a dependent credit for your children, clients can potentially claim a tax credit if they support their elderly parents. IRS Publication 501 discusses this in great detail. There are two tests to determine if a client can claim the credit. First, the parent being claimed cannot earn more than $4,200. Social Security benefits are not considered income for this test (unless the Social Security income is treated as taxable due to the receipt of other income). VA benefits are also not included.

Second, you must provide more than half of the parent's total support expenses during the year. Providing a parent with lodging is considered to be support equal to the fair rental value of the room provided. However, a parent does not need to be living with you to qualify as a dependent.

If two or more people together provide more than half of the support, they may enter into a multiple support agreement that allows one of them to claim the exemption. All parties must file IRS Form 2120 to memorialize this agreement.

VII. Principal residence exclusion

For individuals who meet the ownership and use tests below and who have not excluded any other gain from the sale of a home within the previous 2 years, up to $250,000 ($500,000 for a married couple filing jointly) of gain on the sale of a home may be excluded from income.

Ownership and use test. During the five year period immediately preceding the sale the taxpayer must have:

a. Owned the home for at least two years; and
b. Lived in the home as the taxpayer's principal residence.

Disability exemption. If during the five year period immediately preceding the sale, the taxpayer becomes unable to care for himself or herself and needs to enter a licensed nursing facility, the taxpayer only needs to have owned and lived in the home for periods aggregating at least one year to claim the exclusion

Special rules for joint filers. If only one spouse meets the ownership and use tests, the exclusion is limited to $250,000. If either spouse meets the ownership test and both spouses meet the use test, the exclusion is increased to $500,000. If one spouse passes away and both spouses met the ownership and use test at the date of the deceased taxpayer's death, the surviving spouse may still claim the $500,000 exclusion if the surviving spouse has not remarried and the sale takes place no longer than two years after the death of the decedent.

VIII. Net Investment Income Tax

Pursuant to IRC Section 1411, there is now an additional 3.8% income tax imposed on passive investment income. This is payable by individuals, estates and trusts. For individuals, the tax is payable on the lesser of the net investment income or the excess of MAGI over $250,000 for joint taxpayers, $125,000 for married filing separately, or $200,000 for all other taxpayers. These taxpayers must file IRS Form 8960.

Net investment income includes all interest, dividends, capital gains, rental and royalty income, non-qualified annuities, income from businesses that trade in financial instruments and businesses that are considered passive activities under IRC Section 469.

It has been clear and settled for a number of years that for an individual to avoid having an activity treated as passive, the taxpayer must meet the material participation test. However, it has never been clear whether a trust or estate could avoid passive income treatment. In 2007, TAM 200733023 held that bringing a special trustee into the trust would not meet the material participation test. TAM 201317010 further clarified that only a trustee fully acting in a fiduciary role could be considered in determining the material participation of a trust.

In March 2014, the Tax Court issued its decision in Aragona Trust (142 T.C. No. 9, Mar. 27, 2014). While this decision does not directly address the net investment tax implications for trusts, it does clearly state how a trust (and, by extension, an estate) can avoid having trust income treated as passive. The Court basically set out three principals for avoiding passive income treatment. First, structure of the underlying entities must support the active involvement of the trustees. A member managed LLC is a good example of an entity that supports active involvement by the trustees. Second, what is the trustee's relationship to the business interest? If the trustee is independently involved in the business outside of his trust involvement or if the trustee takes an active role in the management of the business, the income may not be considered passive. Finally, the Court said that the IRS should look to state law and what the trustee's liabilities and obligations are to the beneficiaries of the trust. If the trustee owes no duty to the beneficiaries, the trustee's actions will carry less weight.

IX. GIFT TAXES

For 2020, each donor has an annual gift tax exclusion amount of $15,000 per recipient for gifts of a present interest. Since a contribution to a trust is not a gift of a present interest, to make it a gift of present interest one could give a beneficiary the right to withdraw a certain amount contributed for a short period, usually 30-60 days. This could make it a gift of a present interest.[1] It is not advisable to provide the person with a disability the right to withdraw the funds placed into the trust, however, as that amount would be considered "available" to the beneficiary for public benefits purposes. However, a Crummey Power can be given to a remainder beneficiary.[2]

Gifts which are not of a "present interest" are not eligible for the $1,000 annual exclusion per donee. As such, the grantor would need to file a Form 709 gift tax return and apply a portion of his or her lifetime gift tax exemption.

a. The lifetime gift tax exemption is currently $11,580,000. If the lifetime gifts (not including the excluded amount of $15,000 per recipient per year) exceed $11,580,000, actual gift tax would be due.

b. The United States gift tax was enacted in order to prevent taxpayers from being able to avoid United States estate tax with "death-bed" transfers and other transfers during life. Consequently, the United States gift tax and estate tax laws are closely related and intertwined with one another. In fact, a decedent's taxable gifts made during life must be reported on his or her estate tax return.

c. Preparing Gift Tax Returns

The source of United States gift tax law is Chapter 12 of Subtitle B (Estate and Gift Taxes) of the IRC. The IRS has issued treasury regulations that provide interpretative guidance of the gift tax statutes contained within the IRC. Of course, there are additional sources of guidance as to the interpretation and application of United States gift tax in the form of various revenue rulings, revenue notices and procedures, private letter rulings (which cannot be cited precedent), and case law. This primer is intended to be general in nature and not a complete or thorough expository on every aspect of gift tax law.

[1] *See Crummey v. Comm'r*, 397 F. 2d 82 (9th Cir. 1968), Rev. Rule 73-405, 1973-2 C.B. 321.
[2] *See Estate of Christofani v. Comm'r*, 97 T.C. 74 (1991), AOD 1996-010.

Generally speaking, the United States gift tax applies to the gratuitous transfer of property made by a donor (*i.e.*, the transferor or the individual making the gift) during her lifetime. It does not tax the property itself. Responsibility for payment of any gift tax owed generally rests with the donor, not the donee (*i.e.*, the transferee or the individual receiving the gift). So, it is the donor's responsibility to comply with gift tax laws and file a gift tax return, if required. Consequently, United States gift taxation and gift tax returns may be an issue when an individual is divesting assets in order to qualify for Medicaid.

i. To What Transfers Does Gift Taxation Apply?

As mentioned above, the gift tax applies to all gratuitous transfers of property.[3] The reach is quite broad. Gratuitous transfers of property include transfers to trusts, other legal entities, and individuals. The gratuitous transfer can be direct, such as a gift of cash to another person, or can be indirect, such as payment of another's credit card bill. Property includes real property, personal property, tangible property, and intangible property.

ii. What Value Is Assigned To The Transferred Property?

Generally, the fair market value of the transferred property on the date of the gift is the value that must be reported on IRS Form 709.[4] A commonly cited legal maxim as to gift tax valuation can be found in the treasury regulations: "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts."[5] As a result of this legal principle, valuation of property can be manipulated downward by taxpayers due to lack of ownership and control and lack of marketability, both of which lead to discounted valuations. If a donor uses valuation discounts in order to reduce the impact of gift taxes, the donor must check a box in Schedule A on the top of Page 2 of IRS Form 709.

Donors filing gift tax returns should substantiate and document valuations for gifts of property other than cash or publicly-traded securities. Appraisals for real estate and closely-held business interests should be obtained and attached as exhibits to IRS Form 709. IRS Form 712 should be requested from the insurer whenever the ownership of a life insurance policy is gifted from donor to donee.

iii. Where Are Gifts Reported On IRS Form 709?

[3] *See* IRC § 2511.
[4] *See* IRC § 2512.
[5] *See* Treasury Regulation § 25.2512-1.

Each gift subject to only gift tax (not gift tax and generation-skipping transfer tax, which are beyond the scope of this primer) is reported in Part 1 of Schedule A on Page 2 of IRS Form 709. The donor must report (1) the donee's name and address, (2) the donee's relationship to the donor, (3) a description of the gift, (4) the donor's adjusted basis (cost) of the gifted property, (5) the date of the gift, and (6) the value of the gift. Reporting the donor's adjusted basis (cost) on IRS Form 709 is important because the donee assumes the donor's basis. See IRC § 1015. This is referred to as "carryover basis." The total value of all the gifts reported in Part 1 of Schedule A is reported at the bottom of Part 1.

It is extremely important to analyze whether the donor's gift is subject to only gift tax law or is subject to both gift tax law and generation-skipping transfer tax law so that proper reporting is assured.

iv. What Gifts Do Not Need To Be Reported On IRS Form 709?

1. Gifts to political organizations do not need to be reported on IRS Form 709.[6]

2. Gifts that qualify for the educational and medical exclusion.[7] Gifts that are made directly to an educational institution or medical provider that are in payment for the benefit of another are not taxable gifts and do not need to be reported on IRS Form 709.

3. Gifts that qualify for the annual exclusion.[8] The annual exclusion applies to any gift or gifts made by a donor to a donee that currently totals $15,000 or less within a calendar year. The amount can increase based on inflation. In order for a gift to qualify for the annual exclusion, the donee must receive a present interest in the property transferred by the donor.[9] Consequently, gifts to a trust for the benefit of another (*i.e.*, a donee) do not qualify for the annual exclusion. Such a gift is the gift of a future interest because the donee will receive the gifted property at some future point in time and does not have a present possessory interest in the gifted property.

v. Annual exclusion gifting

Annual exclusion gifting is an extremely popular way of transferring wealth to family members because it avoids the necessity of having to file gift tax returns and does not require the donor to use any of her lifetime gift tax exclusion, which is currently

[6] *See* IRC § 2501(a)(4). See IRC § 527(e) for the definition of a political organization.
[7] *See* IRC § 2503(e).
[8] *See* IRC § 2503(b).
[9] *See* IRC § 2503(b)(1).

$11,580,000. However, many donors who want to make annual exclusion gifts do not want their children and grandchildren to receive the gifted property outright, but prefer the gifted property to be held in trust for their future benefit. The question then becomes how to qualify gifts to a trust for the annual exclusion. This introduces us to the Crummey withdrawal right.

The Crummey withdrawal right comes to us via case law. A Crummey withdrawal right is usually a short-term power given to a trust beneficiary to appoint to herself (or simply withdraw) some property from a trust. Typically, the settlor (*i.e.*, a donor) makes a contribution to the trust and the trust beneficiary (*i.e.*, the donee) has the power to withdraw the contributed property from the trust for a period of 30 days. Upon the expiration of the withdrawal period, the right of the beneficiary to withdraw the contributed property expires. The fact that the beneficiary has the right to withdraw the contributed property during the withdrawal period is legally sufficient to "transform" the settlor's contribution to the trust from the gift of a future interest to the gift of a present interest. The trust beneficiary is deemed to possess a general power of appointment during the withdrawal period (because the trust beneficiary can appoint the property to herself).[10]

If the trust beneficiary merely fails to withdraw the property from the trust within the prescribed withdrawal period, the trust beneficiary's power of appointment is deemed to have lapsed, which has certain gift tax consequences as to the trust beneficiary.[11] If the trust beneficiary waives her right to withdraw the property from the trust within the prescribed withdrawal period, the trust beneficiary's general power of appointment is deemed to have been released, which has other gift tax consequences as to the trust beneficiary.[12]

There is one exception to the annual exclusion limit of $15,000 per year per donee. A donor can make a gift of up to five years worth of annual exclusions for a donee if the gifted property is transferred to a IRC § 529 college savings plan for the benefit of the donee.[13] This exception allows a donor to gift up to $70,000 to a donee in one calendar year. If a donor elects to do this, the donor is deemed to have made five years worth of annual exclusion gifts to that particular beneficiary and any other gift made by the donor to that particular donee during the five year period would necessitate the filing of IRS Form 709 on the part of the donor. If a donor wishes to

[10] *See* IRC § 2514(c).
[11] *See* IRC § 2514(e).
[12] *See* IRC § 2514(e).
[13] *See* IRC § 529.

use this special rule, the donor must check on a box in Schedule A at the top of Page 2 of IRS Form 709.

vi. What Happens After All Gifts Are Reported On Schedule A Of Page 2?

The total value of all gifts (including gifts/transfers subject to generation-skipping transfer tax, which are included in Parts 2 and 3 on Page 2) from Part 1 of Schedule A on Page 2 is reported on Line 1 of Part 4 of Schedule A on Page 3 of IRS Form 709. Part 4 is the section of IRS Form 709 where the current year's gifts are determined.

If the annual exclusion is applicable to any of the gifts reported on Line 1, the amount of the annual exclusion is reported on Line 2 of Part 4 on Page 3. The annual exclusion amount reported on Line 2 is then subtracted from the total gift amount reported on Line 1 and the result is then reported on Line 3.

It is now necessary to determine whether any portion of the amount included on Line 3 of Part 4 of Schedule A on Page 3 is subject to any deductions. There are two primary gift tax deductions that are available to donors. The first is the marital deduction.[14] Just like the marital deduction for estate tax purposes, the marital deduction for gift tax purposes is unlimited. A spouse can gift an unlimited amount of property to the other spouse and no gift tax will be owed because of the unlimited marital deduction.

The total value of gifts from a donor spouse to a donee spouse must be reported on Line 4 of Part 4 on Page 3. The value of the annual exclusion applicable to those gifts must be reported on Line 5. The value reported on Line 5 must be subtracted from Line 4 and the result is entered on Line 6. The result represents the value of the marital deduction.

The other deduction available to donors is the charitable deduction.[15] The value of qualifying charitable gifts to qualifying charities less the amount of the annual exclusion that is applicable to each qualifying charity is to be reported on Line 7. The reported amount is the value of the charitable deduction.

The value of the marital deduction as reported on Line 6 and the value of the charitable deduction as reported on Line 7 are added together and the sum total is reported on Line 8 of Part 4 of Schedule A on Page 3. Line 8 reports the total value of gift tax deductions.

[14] *See* IRC § 2523.
[15] *See* IRC § 2522.

The value reported on Line 8 is then subtracted from the value reported on Line 3 and the result is reported on Line 9.

If any generation-skipping transfer tax is owed due to generation-skipping transfers reported elsewhere on IRS Form 709, the tax owed serves a deduction for gift tax purposes and the generation-skipping tax amount is to be reported on Line 10. The amount reported on Line 10 is then subtracted from Line 9 and the result is reported on Line 11 of Part 4 of Schedule A on Page 3. The result is referred to as taxable gifts, which is reported on Line 1 of Part 2 on Page 1 of IRS Form 709.

vii. Where Are Prior Taxable Gifts Reported?

Prior taxable gifts are reported on Schedule B of Page 3. Prior taxable gifts are gifts by the donor in previous years that necessitated the filing of IRS Form 709. Most of the time, the donor will have used part of her unified credit in order to have avoided paying gift tax on the prior taxable gifts. Both the value of the prior taxable gifts and the amount of unified credit used (if any) must be reported. The total amount prior taxable gifts as reported on Line 3 of Schedule B on Page 3 must be reported on Line 2 of Part 2 on Page 1. The total amount of unified credit used in the past as reported on Line 1 of Column C of Schedule B on Page 3 must be reported on Line 8 of Part 2 on Page 1.

viii. Why Are Prior Taxable Gifts Reported?

The importance of reporting prior taxable gifts (as well as current gifts) is so that the IRS knows exactly how much of the donor's unified credit for gift tax purposes has been used in her lifetime previously and how much gift tax is owed if the donor's unified credit has been completely used.

ix. What Other Issues Should The Elder Law Practitioner Know About Preparing IRS Form 709?

Part 1 on Page 1 is where personal information about the donor is reported, which includes name, social security number, address, legal residence, and citizenship. If the donor died during the gift tax year, that fact must be reported by checking a box on Line 8 of Part 1 on Page 1 and reporting the date of death. The total number of donees must be reported on Line 10.

Gift tax returns are due on April 15 of the year following the reporting year. The reporting year is the calendar year when the gifts were made. For example, a 2020 gift tax return (which is used to report gifts made in 2020) is due on April 15, 2021

Gift tax returns can be extended one of two ways. If the donor needs to request an extension on her income tax return, the filing of IRS Form 4868 ("Application for Automatic Extension of Time To File U.S. Individual Income Tax Return") also automatically extends the deadline for the donor's gift tax return. If the donor does not need an extension on her income tax return, the donor must file IRS Form 8892 ("Application for Automatic Extension of Time To File Form 709 and/or Payment of Gift/Generation-Skipping Transfer Tax").

If the donor needs to file either IRS Form 4868 or IRS Form 8892 to extend the deadline in which to file her gift tax return, the donor should make sure to pay any expected amount of gift tax on or before April 15 in order to avoid penalties and interest. If the donor anticipates owing any gift tax, IRS Form 8892-V should be included along the donor's check and the appropriate extension request form.

The final issue to be aware of is gift-splitting between spouses. Spouses can agree to split gifts to lessen the impact of using the annual exclusion and unified credit. See IRC § 2513. In the author's opinion, gift-splitting is more complex than it sounds. The practitioner should read and understand the law, the regulations, IRS Form 709, and its instructions before reporting "gift-splits" on a donor's gift tax return.

Tax Topics for Elder Law Attorneys

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COVID Tax issues

- No RMDs required this year
- Period to reinvest RMDs already taken expired August 31
- Waiver of withdrawal penalties if withdrawal is due to COVID related issues
- Charitable contributions now an above the line deduction for up to $300
- Special rules for net operating losses

HOME OFFICE DEDUCTION

- No RMDs on the portion of the account in the QLAC
- Reduce RMDs when income is higher
- Guarantee future stream of income

SECURE ACT

- Major changes to IRA rules
- Push RMDs out to 72
- No age limit on contributions
- Elimination of stretch for inherited IRAs
- Some exemptions for "eligible designated beneficiaries"
  - Spouses
  - Minor children
  - Persons with disabilities
- As drafted currently, would not allow for conduit trusts

QUALIFIED LONGEVITY ANNUITY CONTRACTS

- Deferral of RMDs
- Irrevocable Deferred Income Annuity
- Maximum investment of the lesser of $125,000 or 25% of account
- Amount held in QLAC not included in calculating RMD
- Payments must begin no later than age 85

UPSIDE

- No RMDs on the portion of the account in the QLAC
- Reduce RMDs when income is higher
- Guarantee future stream of income

DOWNSIDE

- For large IRAs, no major impact on RMDs
- No access to principal if needed
- Will you live long enough to recover your investment?
- No stretch for beneficiaries of QLAC

IRA ROLLOVER RULES

- As of 2015 taxpayers are limited to one rollover per year
- Violations subject to 10% early withdrawal tax
- Will be treated and penalized as excess contributions to new IRA
- Geared towards “loans via rollover”
- Does not apply to trustee to trustee transfers

DEDUCTING FIDUCIARY FEES

- Fees must be split into two categories
  - Costs customarily incurred by individuals
    - No longer deductible
    - Miscellaneous itemized deductions eliminated
  - Costs specific to an estate or trust
    - Not subject to 2% floor
    - Probate court fees and costs, publication fees, etc

SALE OF PRIMARY RESIDENCE

- Capital Gains Exclusion under Section 121
- Maximum of $250,000 gain ($500,000 if married filing jointly)
  - Only one spouse needs to meet ownership requirements
  - Can use $500,000 exclusion for up to 2 years after death of spouse if all conditions met as of date of death
- Can only exclude one sale per 2 year period
- Applies to sales of remainder interest
  - But not if sold to family members

WHO QUALIFIES?

- Occupied as principal residence
- Can be owned by grantor trust
- Owned for at least 24 months of past 5 years
- Principal residence for 24 months (730 days)
  - Address listed on tax returns
  - Voter registration
  - Driver's license or car registration
  - Near where you work or bank
  - Near residence of family members
  - Belong to recreational clubs or religious organizations

EXCEPTIONS

- Disability will drop the “own and use” period to one year aggregate
- If you or your spouse moved to obtain or provide medical or personal care for family member, may be eligible for partial exclusion based on time owned
- If your spouse dies, and you don’t fully meet the requirements, you still may be eligible for a partial exclusion

PAYMENTS TO CAREGIVERS

- Medicaid and VA require written agreement
- But how should it be taxed
- VERY FEW meet the requirements for independent contractors
- MUST be withholding and paying employment taxes
- Many services to help

QLACs and MEDICAID

- They are irrevocable, with no cash value
- Within life expectancy
- But, pushes income off to later date when you may be institutionalized

ELDERLY DEPENDENT CREDIT

- If parent does not earn more than exemption amount (AGI)
- Child provides half of support (including fair market value of housing if parent lives with you)
  - If you meet this threshold, child can deduct medical expenses paid on parent's behalf and take dependent exemption

Example

- Mom has SS income of $12,500 per year
- She lives with daughter and son in law (FMV rent of $10,000 per year, including her share of utilities)
- Mom spends $11,000 per year on medical expenses, clothing, and recreation
- Mom's 1/3 share of groceries total $2,000 per year
- Value of transportation provided to Mom is $500 per year
- Kids provide more than ½ of Mom's support

THE STATUS OF DECANTING

- Still no final regulations
- IRS refusing to issue PLRs on decanting
- Guidance plan for 2016 included final regulations
- Hasn't appeared on guidance plan since

TRUST MERGER RULING

- PLR 201516036
- Two trusts created for benefit of son and descendants
  - One created by father, other created by wife
  - Both had GST allocated
  - Distribution terms were different
  - Merged Trust A into Trust B
  - IRS held no loss of GST exemption

2017 RULING ON GST ISSUES

- PLR 201711002
- Decanting must not shift any beneficial interest in the trust to any beneficiary who occupies a lower generation than the original beneficiaries
- Decanting cannot extend the time for vesting of any beneficiary's interest in the trust beyond the period provided for in the original trust.

NET INVESTMENT INCOME TAX

- Additional 3.8% surtax on investment income
- Passive investments
- How to avoid for trusts and estates
  - *Aragona* case
  - Majority of trustees meet significant participation test
- May need to add co-trustees or segregate business assets with different trustees

BASIS REPORTING ISSUES

- For all 706s due after February 29, 2016
- Executor must send a statement to each beneficiary and the IRS reporting the value of the property received – Form 8971
- Establishes beneficiary's basis if property did not qualify for charitable or marital deduction
- Must be provided 30 days after return is filed

GIFT TAX RETURNS

- Are you filing them?
- Why you should – it's all about the basis

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Section Thirteen

New Medicare Payment System for Skilled Nursing Facilities, and an Update on *Jimmo*

Dennis Frick
Senior Law Project
Indiana Legal Services, Inc.

Section Thirteen

New Medicare Payment System for Skilled Nursing Facilities, and an Update on *Jimmo*.....Dennis Frick

New Medicare Payment System for Skilled Nursing Facilities, and an Update on *Jimmo*

I. Why Resident Advocates Need to be Aware of Provider Reimbursement Rules

As an attorney who represents clients needing long term care, I do not spend much time learning the rules and processes that determine how medical providers are paid by Medicare.[1] These rules are complex and it is often not apparent how these rules and processes affect residents. There are regulations that govern eligibility for Medicare services and the care that nursing home residents are to receive. See the Indiana regulations at 410 Ind. Admin. Code 16.2-3.1, the federal Nursing Home Reform Law at 42 U.S.C. § 1395i-3, and federal regulations at 42. C.F.R. §§ 483.5 to 483.95. Yet it is important to be aware that provider reimbursement rules create incentives for providers concerning decisions on what residents to accept, what services to provide and how to provide them, and how long that care will be provided to residents. When changes are made in the reimbursement rules, providers make changes to respond to the changes in order to maximize their profits. These changes do not necessarily benefit residents.

This paper relies extensively on materials from the Center for Medicare Advocacy, a national non-profit organization that advocates for Medicare recipients. For information on the Center and to see its large library of information, see https://medicareadvocacy.org. See the webinar "Patient Driven Payment Model: What Does it Mean For Residents?, https://theconsumervoice.org/events/patient-driven-payment-model-webinar/archived as well as various papers and issue briefs at https://medicareadvocacy.org/?s=Patient-Driven+Payment+Model.

[1]This paper focuses on Medicare payment. These same concerns can arise concerning Medicaid provider reimbursement rules and the incentives those rules may create for providers.

II. A New Reimbursement System for Medicare Skilled Nursing Facilities and How it Has Changed Services That Facilities Provide

The Centers for Medicare and Medicaid Services (CMS) published a lengthy final rule at 83 Fed. Reg. 39162 (Aug. 8, 2018) explaining the change in the payment system for Medicare Skilled Nursing Facility (SNF) services implemented on October 1, 2019, responding to public comments, and establishing the final rules for a new payment system. This system governs payment under traditional Medicare, not Medicare Advantage, as Medicare Advantage plans can establish their own payment plans.

The Final Rule provides background and CMS' explanation of the prior and the new payment systems. 42 U.S.C. § 1395yy provides for a Prospective Payment System (PPS) for SNFs. "This methodology uses prospective, case-mixed adjusted per diem payment rates applicable to all covered SNF services ... ." 83 FR at 39164. This means that when a resident enters a nursing home and qualifies for Medicare payment, a daily payment rate is set for that resident based on the needs and characteristics of that resident.

The reimbursement system in place before October 1, 2019 classified residents using Resource Utilization Groups, Version IV (RUG-IV). Under this system, there were two case-mix-adjusted components of payment, nursing and therapy. Resident classification under the therapy and nursing components was based primarily on the intensity of services being received. Only the higher paying therapy or nursing group was used to establish the per diem rate. Once the rate was set, then that rate was used for every day of a resident's stay. Over 90% of Part A covered services were paid using a therapy rehabilitation RUG. CMS observed that the percentage of residents classifying into the Ultra-High therapy category increased steadily. Further, the percentage of residents receiving just enough therapy to be classified as Ultra-High or Very-High increased. CMS concluded that the

increases were related to the facilities' desire to maximize rates rather than being based on residents' needs. 83 FR at 39183 - 39184. CMS cited reports of the Office of the Inspector General and of the Medicare Payment Advisory Commission which concluded that SNFs were increasingly billing for higher paying RUGs, even though the characteristics of residents was relatively unchanged, that Medicare payments for therapy greatly exceed SNFs' costs for therapy, and that the system encouraged the provision of excessive therapy services. 83 FR at 39184 - 39185. CMS concluded that the RUG-IV payment system was encouraging extensive therapy and overpaying for therapy.

Effective October 1, 2019, CMS replaced the RUG-IV classification system with a new system it calls the Patient-Driven Payment Model (PDPM). CMS claims that PDPM "shift[s] payment away from the current service-driven model that has produced nearly homogenized care for SNF beneficiaries, to a more resident-centered model that focuses more on the individual patient's needs and characteristics." 83 FR at 39187. PDPM uses six federal base payment rates, one which is not case-mix adjusted that is used for routine costs and five components that are case-mix adjusted: physical therapy, occupational therapy, speech language pathology, nursing, and non-therapy ancillaries, which is primarily for drug costs. Each of the five case-mix adjusted components has its own case-mix sub-groups. 83 FR 39189. Each of these components is used to set a per diem rate for a resident.

PDPM includes a variable per diem adjustment which is used to reduce the payment rate the longer the resident remains in a facility. CMS concluded that physical therapy, occupational therapy, and non-therapy ancillary service costs typically declined over the course of a resident's stay in a SNF. 83 FR at 39226. CMS concluded that the need for PT and OT decreases gradually after 20 days, so PDPM provides for a 2% decrease in the PT and OT payment components each seven days after day twenty, as follows:

Medicare Payment Days	PT and OT Payment Rate
1-20	100%
21-27	98%
28-34	96%
35-41	94%
42-48	92%
49-55	90%
56-62	88%
63-69	86%
70-76	84%
77-83	82%
84-90	80%
91-97	78%
98-100	76%

Based on Table 30 at 83 FR 39228. So, by the end of a stay, the payment for the PT and OT components for a resident decreases by 24% of the rate for the first twenty days. For non-therapy ancillary costs, CMS concluded the costs are very high at the beginning of a stay, drop rapidly after the third day, and then remain relatively stay. Consequently PDPM provides for paying for non-therapy ancillary costs for days one through three of a SNF stay at three times the rate it pays for these costs during days four through one hundred of a stay.

Before October 1, 2019, nearly all therapy during SNF stays was provided individually. The PDPM system allows up to 25% of therapy to be provided in group (all residents doing the same therapy) or concurrent therapy (two residents doing different exercises), with a group being capped at six residents. 84 Fed. Reg. 38728, 38745 - 38750 (Aug. 7, 2019). CMS concluded that individual therapy is generally best because it is tailored to a resident's individual needs. 83 FR at 39238. It also concluded that there are benefits to group therapy, which "gives patients the opportunity to benefit from each other's therapy regimen by observing and interacting with one another and applying the lessons learned from others to one's own therapy program in order to progress." 84 FR at 38745. So now up to 25% of therapy can be done in a group or concurrent setting.

CMS concluded that PDPM would result in lower rates for residents needing therapy and higher rates for residents with substantial nursing needs. CMS stated:

> [W]e observe that the most significant shift in payments created by implementation of the PDPM **would be to redirect payments away from residents who are receiving very high amounts of therapy** under the current SNF PPS, which strongly incentivizes the provision of therapy, **to residents with more complex clinical needs**. For example, **we project that for residents whose most common therapy level is RU (ultra-high therapy)—the highest therapy level, there would be a reduction in associated payments of 8.4 percent, while payments for residents currently classified as non-rehabilitation would increase by 50.5 percent**. Other resident types for which there may be higher relative payments under the PDPM are: Residents who have high NTA costs, receive extensive services, are dually enrolled in Medicare and Medicaid, use IV medication, have ESRD, diabetes, or a wound infection, receive amputation/ prosthesis care, and/or have longer prior inpatient stays.

83 FR at 39257 (emphasis added).

The PDPM payment system had an immediate impact on the care provided by nursing homes. The Center for Medicare Advocacy reported that thousands of therapists were laid off or had their hours reduced soon after October 1, 2019. It also reported that some facilities were actively recruiting and admitting residents needing a ventilator or needing dialysis, as the payment rates for those residents significantly increased, as much as $1,200 - $1,800 per week for a resident on a ventilator. The Center expressed concern that some poorly rated facilities were expanding their services. The Center also expressed concern with whether SNFs were fully assuring that they had the capacity to provide necessary complex nursing care.

https://medicareadvocacy.org/medicare-snf-payment-model-creates-changes-in-care-and-admissions-what-about-facility-assessments/.

III. The Change in the Reimbursement System Does Not Change Protections for Residents.

Although the PDPM payment system changes the incentives for nursing homes, it does not change the eligibility and coverage rules. A baseline care plan, that includes therapy needs, is to be developed within 48 hours of admission as a part of comprehensive person-centered care planning. 42 C.F.R. § 483.21(a). Therapy should be provided as assessed and ordered in the care plan. CMS has stated that the needs of the resident should still determine what therapy is provided.

> 12.1 Will Medicare still pay for skilled therapy services under PDPM?
>
> Yes, skilled therapy services will still be reimbursed by Medicare under PDPM. While PDPM does change the manner in which patients are classified into payment groups under the SNF PPS, it does not change any of the coverage criteria or documentation requirements associated with the skilled therapy service coverage under PDPM. More importantly, PDPM does not change the care needs of SNF patients, which should be the primary driver of care decisions, including the type, duration, and intensity of skilled therapies, made on behalf of SNF patients.

CMS Patient-Driven Payment Model: Frequently Asked Questions, p. 29, click on the FAQ link at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/SNFPPS/PDPM.

If the facility appears to be over using group therapy, one can point to the following comments from CMS.

> • "[W]e believe that individual therapy is usually the best mode of therapy provision as it permits the greatest degree of interaction between the resident and therapist, and should therefore represent, at a minimum, the majority of therapy provided to an SNF resident." 83 FR at 39239.
>
> • "We continued to stress that group and concurrent therapy should not be utilized to satisfy therapist or resident schedules, and that all group and concurrent therapy should be well documented in a specific way to demonstrate why they are the most appropriate mode for the resident and reasonable and necessary for his or her individual condition." *Id*.
>
> • " because group therapy is not appropriate for either all patients or all conditions, and in order to verify that group therapy is medically necessary and appropriate to the needs of each beneficiary, SNFs should include in the patient's plan of care an explicit justification for the use of group, rather than individual or concurrent,

> therapy. This description should include, but need not be limited to, the specific benefits to that particular patient of including the documented type and amount of group therapy; that is, how the prescribed type and amount of group therapy will meet the patient's needs and assist the patient in reaching the documented goals." 84 FR at 38746.

Although one cannot force a nursing home to accept a resident, once a facility accepts a resident for Medicare covered SNF services, federal law gives residents the right to appeal a premature termination of Medicare coverage. The SNF must issue a "Notice of Medicare Non-Coverage." The form Notice a SNF is to use is attached at Appendix A. Medicare's explanation of the expedited appeal process is at Appendix B. The Beneficiary and Family Centered Care Quality Improvement Organization (BFCC-QIO) for Indiana to which an expedited appeal can be made is Livanta, telephone 1-888-524-9900. See https://livantaqio.com/en/beneficiary/discharge_appeal. See also additional information on Medicare appeal rights from the Center for Medicare Advocacy at https://medicareadvocacy.org/medicare-info/medicare-coverage-appeals/ and https://medicareadvocacy.org/discharge-from-a-skilled-nursing-facility-what-does-it-mean-and-what-rights-does-a-resident-have/.

IV. *Jimmo* and the Right to Receive Therapy Needed to Maintain Functioning

The Center for Medicare Advocacy sued the Secretary of CMS on behalf of five individual Medicare beneficiaries and five national organizations alleging that CMS "imposes a covert rule of thumb that operates as an additional and illegal condition of coverage and results in the termination, reduction, or denial of coverage for thousands of Medicare beneficiaries annually." CMA explained that the "rule" it was challenging "is referred to and implemented by one or more of several phrases, including that the beneficiary needs 'maintenance services only,' has 'plateaued,' or is 'chronic,' 'medically stable,' or not improving. The shorthand term for this rule of thumb masquerading as a

condition of coverage is the Improvement Standard." *Jimmo v. Sebelius*, Civil No. 11-CV-17, U.S. District Ct. for Vermont, Amended Complaint ¶s 1 and 2, filed March 3, 2011.

After the District Court denied CMS' Motion to Dismiss, CMS reached a settlement agreement with the Center. After a fairness hearing, the Court approved the Agreement on January 24, 2013. The Center's website has many articles explaining the results of the lawsuit. https://medicareadvocacy.org/medicare-info/improvement-standard. CMS published information about the settlement agreement at https://www.cms.gov/Center/Special-Topic/Jimmo-Center. This page explains:

> The Centers for Medicare & Medicaid Services (CMS) reminds the Medicare community of the *Jimmo* Settlement Agreement (January 2013), which clarified that the Medicare program covers skilled nursing care and skilled therapy services under Medicare's skilled nursing facility, home health, and outpatient therapy benefits when a beneficiary needs skilled care in order to maintain function or to prevent or slow decline or deterioration (provided all other coverage criteria are met). Specifically, the *Jimmo* Settlement Agreement required manual revisions to restate a "maintenance coverage standard" for both skilled nursing and therapy services under these benefits:
>
> Skilled nursing services would be covered where such skilled nursing services are necessary to maintain the patient's current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided.
>
> Skilled therapy services are covered when an individualized assessment of the patient's clinical condition demonstrates that the specialized judgment, knowledge, and skills of a qualified therapist ("skilled care") are necessary for the performance of a safe and effective maintenance program. Such a maintenance program to maintain the patient's current condition or to prevent or slow further deterioration is covered so long as the beneficiary requires skilled care for the safe and effective performance of the program.
>
> The *Jimmo* Settlement Agreement may reflect a change in practice for those providers, adjudicators, and contractors who may have erroneously believed that the Medicare program covers nursing and therapy services under these benefits only when a beneficiary is expected to improve. The *Jimmo* Settlement Agreement is consistent with the Medicare program's regulations governing maintenance nursing and therapy in skilled nursing facilities, home health services, and outpatient therapy

> (physical, occupational, and speech) and nursing and therapy in inpatient rehabilitation hospitals for beneficiaries who need the level of care that such hospitals provide.

Despite CMS' compliance with the *Jimmo* settlement agreement, some facilities continue to wrongly apply an improvement standard to therapy. If additional therapy will not provide benefits, then it is appropriate for a SNF to end Medicare coverage that is based on the need for therapy. But if continued therapy is needed to maintain functioning and to prevent deterioration, then the therapy is medically necessary and Medicare coverage should continue. The Center for Medicare Advocacy has self-help materials for residents and family members at https://medicareadvocacy.org/self-help-resources-for-improvement-standard-denials/. See also information in Section III above on appealing a decision by a SNF that Medicare will no longer cover a stay in the SNF.

{Insert provider contact information here} **Appendix A**

Notice of Medicare Non-Coverage

Patient name: **Patient Number:**

The Effective Date Coverage of Your Current **{insert type}** Services Will End: **{insert effective date}**

- Your Medicare provider and/or health plan have determined that Medicare probably will not pay for your current {insert type} services after the effective date indicated above.
- You may have to pay for any services you receive after the above date.

Your Right to Appeal This Decision

- You have the right to an immediate, independent medical review (appeal) of the decision to end Medicare coverage of these services. Your services will continue during the appeal.
- If you choose to appeal, the independent reviewer will ask for your opinion. The reviewer also will look at your medical records and/or other relevant information. You do not have to prepare anything in writing, but you have the right to do so if you wish.
- If you choose to appeal, you and the independent reviewer will each receive a copy of the detailed explanation about why your coverage for services should not continue. You will receive this detailed notice only after you request an appeal.
- If you choose to appeal, and the independent reviewer agrees services should no longer be covered after the effective date indicated above;
  - Neither Medicare nor your plan will pay for these services after that date.
- If you stop services no later than the effective date indicated above, you will avoid financial liability.

How to Ask For an Immediate Appeal

- You must make your request to your Quality Improvement Organization (also known as a QIO). A QIO is the independent reviewer authorized by Medicare to review the decision to end these services.
- Your request for an immediate appeal should be made as soon as possible, but no later than noon of the day before the effective date indicated above.
- The QIO will notify you of its decision as soon as possible, generally no later than two days after the effective date of this notice if you are in Original Medicare. If you are in a Medicare health plan, the QIO generally will notify you of its decision by the effective date of this notice.
- Call your QIO at: {insert QIO name and toll-free number of QIO} to appeal, or if you have questions.

See page 2 of this notice for more information.

If You Miss The Deadline to Request An Immediate Appeal, You May Have Other Appeal Rights:

- If you have Original Medicare: Call the QIO listed on page 1.
- If you belong to a Medicare health plan: Call your plan at the number given below.

Plan contact information _____

_____

Additional Information (Optional):

Please sign below to indicate you received and understood this notice.

I have been notified that coverage of my services will end on the effective date indicated on this notice and that I may appeal this decision by contacting my QIO.

_____ _____

Signature of Patient or Representative Date

Getting a fast appeal from non-hospital settings

You may have the right to a fast appeal if you think your services are ending too soon from one of these facilities:

- A Medicare-covered skilled nursing facility (SNF)
- A Medicare-covered home health agency (HHA)
- A Medicare-covered comprehensive outpatient rehabilitation facility (CORF)
- A Medicare-covered hospice facility

While you're getting SNF, HHA, CORF, or hospice services, you should get a notice called "Notice of Medicare Non-Coverage" at least 2 days before covered services end. If you don't get this notice, ask for it. This notice explains:

- The date your covered services will end
- That you may have to pay for services you get after the coverage end date given on your notice
- Information on your right to get a detailed notice about why your covered services are ending
- Your right to a fast appeal and information on how to contact the Beneficiary and Family Centered Care Quality Improvement Organization (BFCC-QIO) in your state to request a fast appeal

How do I ask for a fast appeal?

Ask the BFCC-QIO for a fast appeal no later than noon of the first day after the day before the termination date listed on your "Notice of Medicare Non-Coverage." Follow the instructions on the notice.

If you miss the deadline for requesting a fast appeal from the BFCC-QIO, you can request a fast reconsideration from your plan. But, services will only be covered if there's a decision issued in your favor.

What will happen during the BFCC-QIO's review?

When the BFCC-QIO gets your request, it will notify the provider. Then, by the end of the day that the provider gets the notice from the BFCC-QIO, the provider will give you a "Detailed Explanation of Non-Coverage." The notice will include:

- Why your services will no longer be covered
- The applicable Medicare coverage rule or policy, including a citation to the applicable Medicare policy, or information on how you can get a copy of the policy that's being used to explain why your coverage is ending
- How the applicable Medicare coverage rule or policy applies to your situation

The BFCC-QIO will:

- Ask why you believe coverage for the services should continue
- Look at your medical records and the information provided by the plan
- Make a decision by close of business the day after it gets the information it needs to make a decision

If the BFCC-QIO decides that your services are ending too soon:

Medicare may continue to cover your SNF, HHA, CORF, or hospice services (except for applicable coinsurance or deductibles).

If the BFCC-QIO decides that your services should end:

You won't be responsible for paying for any SNF, HHA, CORF, or hospice services provided before the termination date on the "Notice of Medicare Non-Coverage." If you continue to get services after the coverage end date, you may have to pay for those services.

Additional Resources Related to Discharge Appeal:

The Beneficiary Care Management Program (BCMP) is a CMS Person and Family Engagement initiative supporting Medicare Fee-for-Service beneficiaries undergoing a discharge appeal, who are experiencing chronic medical conditions requiring lifelong care management. It serves as an enhancement to the existing beneficiary appeals process. This program is not only a resource for Medicare beneficiaries, but extends support for their family members, caregivers and providers as active participants in the provision of health care delivery.

The BCMP program will focus on these key care management support services:

Discharge Planning and Care Coordination

Healthcare Care Navigation, and

Beneficiary Empowerment and Self Care

The BCMP program is a referral-based program, initiated by your respective Regional BFCC-QIO. If you or a family member have an active discharge appeal, we encourage you to contact the Regional BFCC-QIO to discuss if you could benefit from this service. At your convenience, you may also access additional program information at: https://www.bcmpqio.org.

Section Fourteen

POST Revisited:
Decisions that Matter

Dr. Susan E. Hickman, Ph.D.
Director, IU Center for Aging Research, Regenstrief Institute
Professor, IU Schools of Nursing & Medicine
Indianapolis, Indiana

Section Fourteen

POST Revisited:
Decisions that Matter…….. Dr. Susan E. Hickman, Ph.D.

PowerPoint Presentation

POST Revisited: Decisions that Matter

Susan Hickman, PhD

- Professor, IU Schools of Nursing & Medicine
- Director, IU Center for Aging Research, Regenstrief Institute
- Co-Director, IUPUI RESPECT Signature Center
- Senior Affiliate Faculty, IU Health Fairbanks Center for Medical Ethics

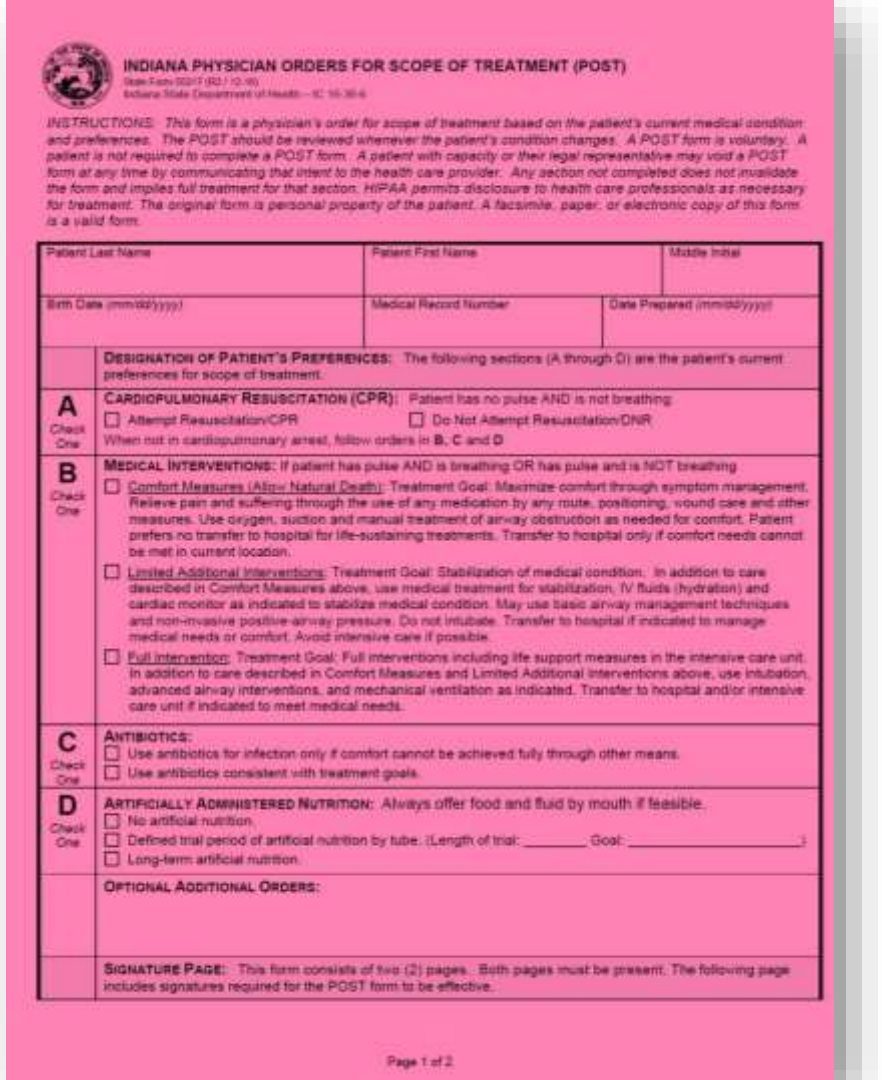
50 years Regenstrief Institute 1969-2019

INDIANA UNIVERSITY
SCHOOL OF NURSING

OBJECTIVES

- Discuss updates from the Indiana POLST and National POLST Program
- Identify policy and legislative activities related to advance care planning in Indiana since 2017
- Describe challenges related to Indiana advance directives legislation and COVID-19

Physician Orders for Scope of Treatment



INDIANA PHYSICIAN ORDERS FOR SCOPE OF TREATMENT (POST)

INSTRUCTIONS: This form is a physician's order for scope of treatment based on the patient's current medical condition and preferences. The POST should be reviewed whenever the patient's condition changes. A POST form is voluntary. A patient is not required to complete a POST form. A patient with capacity or their legal representative may void a POST form at any time by communicating that intent to the health care provider. Any section not completed does not invalidate the form and implies full treatment for that section. HIPAA permits disclosure to health care professionals as necessary for treatment. The original form is personal property of the patient. A facsimile, paper, or electronic copy of this form is a valid form.

Patient Last Name	Patient First Name	Middle Initial
Birth Date (mm/dd/yyyy)	Medical Record Number	Date Prepared (mm/dd/yyyy)

DESIGNATION OF PATIENT'S PREFERENCES: The following sections (A through D) are the patient's current preferences for scope of treatment.

A Check One — **CARDIOPULMONARY RESUSCITATION (CPR):** Patient has no pulse AND is not breathing

☐ Attempt Resuscitation/CPR ☐ Do Not Attempt Resuscitation/DNR

When not in cardiopulmonary arrest, follow orders in **B, C** and **D**

B Check One — **MEDICAL INTERVENTIONS:** If patient has pulse AND is breathing OR has pulse and is NOT breathing

☐ Comfort Measures (Allow Natural Death): Treatment Goal: Maximize comfort through symptom management. Relieve pain and suffering through the use of any medication by any route, positioning, wound care and other measures. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Patient prefers no transfer to hospital for life-sustaining treatments. Transfer to hospital only if comfort needs cannot be met in current location.

☐ Limited Additional Interventions: Treatment Goal: Stabilization of medical condition. In addition to care described in Comfort Measures above, use medical treatment for stabilization, IV fluids (hydration) and cardiac monitor as indicated to stabilize medical condition. May use basic airway management techniques and non-invasive positive-airway pressure. Do not intubate. Transfer to hospital if indicated to manage medical needs or comfort. Avoid intensive care if possible.

☐ Full Intervention: Treatment Goal: Full interventions including life support measures in the intensive care unit. In addition to care described in Comfort Measures and Limited Additional Interventions above, use intubation, advanced airway interventions, and mechanical ventilation as indicated. Transfer to hospital and/or intensive care unit if indicated to meet medical needs.

C Check One — **ANTIBIOTICS:**

☐ Use antibiotics for infection only if comfort cannot be achieved fully through other means.

☐ Use antibiotics consistent with treatment goals.

D Check One — **ARTIFICIALLY ADMINISTERED NUTRITION:** Always offer food and fluid by mouth if feasible.

☐ No artificial nutrition.

☐ Defined trial period of artificial nutrition by tube. (Length of trial: _____ Goal: _____)

☐ Long-term artificial nutrition.

OPTIONAL ADDITIONAL ORDERS:

SIGNATURE PAGE: This form consists of two (2) pages. Both pages must be present. The following page includes signatures required for the POST form to be effective.

Page 1 of 2

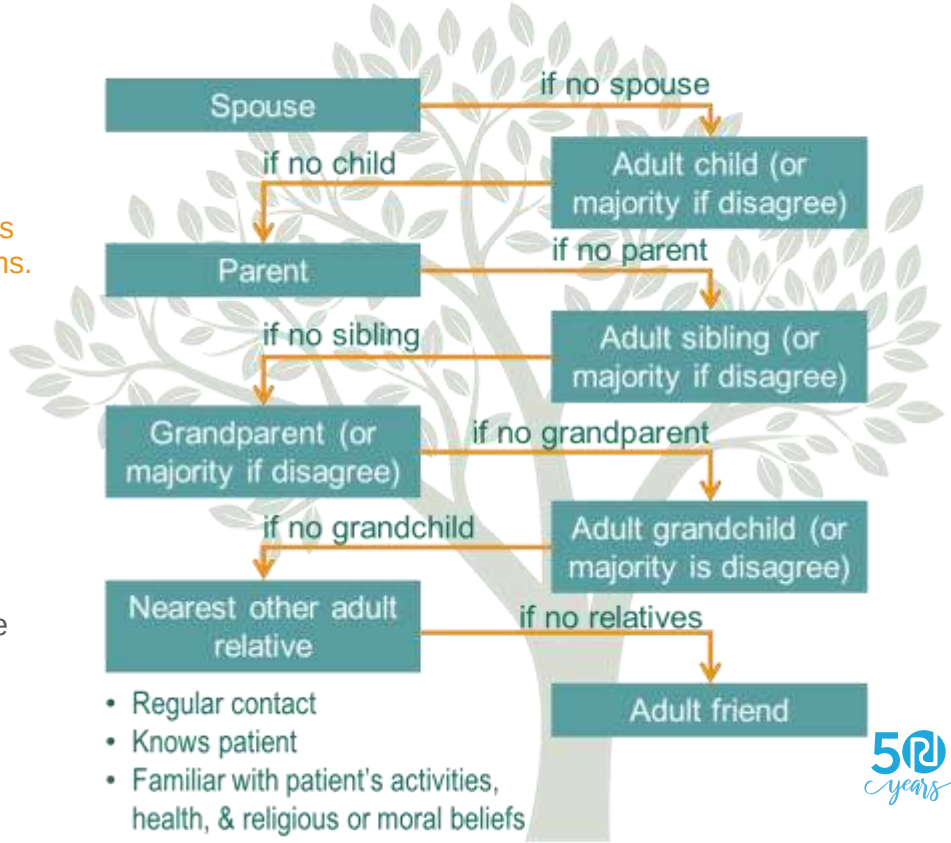
Changes to the Indiana POST Act – July 1, 2018

- Expanded who is required to honor/no duty to perform if not listed
- English only is only valid version
- Identifies elements required to be valid
- Physically unable to sign can authorize
- Out-of-state forms
- Conditions under which HCR can override
- **APRN/PA as authorized signers**

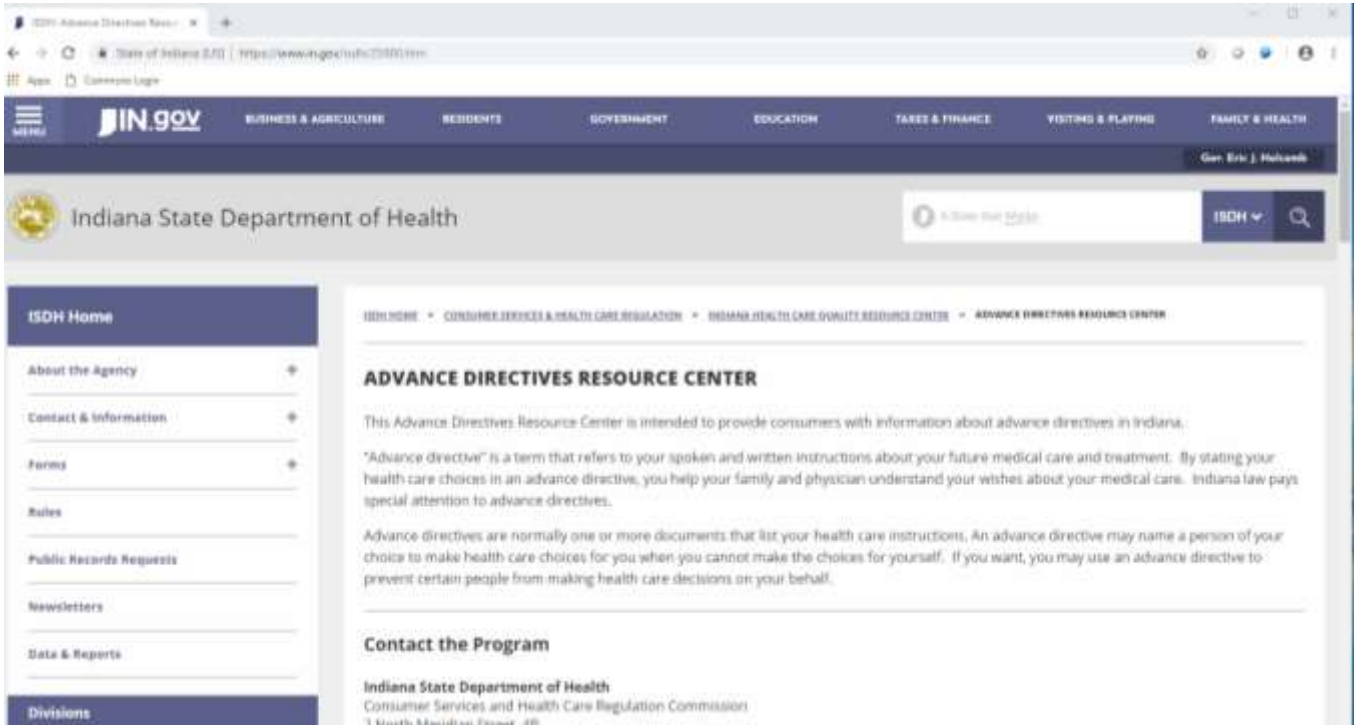
Default surrogates in order of priority

If there is no legally appointed representative, Indiana law allows family members to make decisions. There is a hierarchy or order of priority for these default surrogates.

- The person at the top of the hierarchy is the spouse. This means that if the patient is married, his or her spouse can make decisions for the patient.
- If there is no spouse, you move down the hierarchy.



ISDH Advance Directives Resource Center




The Indiana POST Program
Home
About
Patients
Health Care Providers
FAQs
Additional Resources
Contact
The Indiana POST Program
Physician Order for Scope of Treatment
Download POST Form

Indiana POST Form Translations

Arabic
Burmese
Chinese
French
Korean
Spanish
Vietnamese

Introduction to the Spanish translation of the POST form

POST is a medical order form that gives patients more control over their care during serious illness. POST is used to document a patient's treatment preferences as medical orders. It specifies the types of medical treatment that a patient does and does not want. The orders are signed by the patient or their legally appointed representative as well as by the treating practitioner (physician, advanced practice nurse, or physician assistant). POST is for patients with advanced chronic progressive illness, advanced frailty, terminal conditions, or those unlikely to benefit from cardiopulmonary resuscitation. It is not for healthy adults. Use of the POST is voluntary—a patient cannot be required to have a POST form.

This is a Spanish translation of the Indiana POST form. The translated form is for educational purposes only to be used when discussing a patient's preferences documented on the POST form. The signed POST form must be in English so that emergency personnel can read and follow the orders.

For additional information in English, visit www.indianapost.org. Questions can be submitted through the "contact us" link on that same website.

Introducción a la traducción al español del formulario POST

POST es un formulario de órdenes médicas que les da a los pacientes más control sobre su atención médica durante una enfermedad grave. El formulario POST se usa para documentar las preferencias de tratamiento de un paciente en forma de órdenes médicas. Este detalla los tipos de tratamiento médico que quiere o no quiere un paciente. Las órdenes son firmadas por el paciente o su representante nombrado legalmente, así como por el profesional a cargo del tratamiento (médico, enfermero de práctica avanzada o asociado médico). El formulario POST es para pacientes con enfermedades crónicas progresivas avanzadas, fragilidad avanzada, enfermedades terminales o aquellos que probablemente no se beneficien de la resucitación cardiopulmonar. No es para los adultos sanos. El uso del formulario POST es voluntario, no se puede obligar a un paciente a tener un formulario POST.

Esta es una traducción al español del formulario POST de Indiana. El formulario traducido es solo para fines educativos, para usar cuando analiza las preferencias del paciente documentadas en el formulario POST. El formulario POST firmado tiene que estar en inglés para que el personal de emergencia pueda leer y seguir las órdenes.

Para información adicional en inglés, visite www.indianapost.org. Se pueden enviar preguntas a través del enlace "contact us" (contáctenos) en el mismo sitio web.

La versión en español es solo para fines educativos. (Spanish version is for educational purposes only.)

ÓRDENES MÉDICAS SOBRE EL ALCANCE DEL TRATAMIENTO DE INDIANA
(PHYSICIAN ORDERS FOR SCOPE OF TREATMENT, POST)

INSTRUCCIONES: este formulario es una orden médica sobre el alcance del tratamiento de acuerdo al problema médico actual y las preferencias del paciente. Las POST deben ser revisadas cada vez que cambie el estado de salud del paciente. Un formulario POST es voluntario. Un paciente no tiene la obligación de llenar un formulario POST. Un paciente con la capacidad necesaria o su representante legal pueden anular un formulario POST en cualquier momento con solo comunicar su intención de anularlo al profesional médico. Cualquier sección que no esté llenada no invalida el formulario e implica tratamiento completo para esa sección. La ley HIPAA permite la revelación a profesionales médicos en la medida que sea necesario para el tratamiento. El formulario original es propiedad personal del paciente. Un facsímile, copia impresa o copia digital de este formulario son formas válidas.

Apellido del paciente	Nombre del paciente / Inicial del segundo nombre
Fecha de nacimiento (mm/dd/aaaa)	Número de historia clínica / Fecha en que fueron preparadas (mm/dd/aaaa)

DESIGNACIÓN DE LAS PREFERENCIAS DEL PACIENTE: las siguientes secciones (A a D) son las preferencias actuales del paciente sobre el alcance del tratamiento.

A (Marque una)
RESUCITACIÓN CARDIOPULMONAR (RCP): el paciente no tiene pulso Y no está respirando
☐ Intente resucitación / RCP ☐ No intente resucitación / DNR
Caso no esté en paro cardíaco, siga las órdenes en **B**, **C** y **D**.

B (Marque una)
INTERVENCIONES MÉDICAS: si el paciente tiene pulso Y está respirando O tiene pulso y NO está respirando:
☐ Medidas de comodidad (permitir la muerte natural): objetivo del tratamiento: maximizar la comodidad a través del control de los síntomas. Aliviar el dolor y el sufrimiento a través del uso de cualquier medicamento por cualquier vía, posicionamiento, cuidado de heridas y otras medidas. Usar oxígeno, succión y tratamiento manual de la obstrucción de las vías respiratorias según sea necesario para la comodidad del paciente. El paciente prefiere no ser trasladado al hospital para recibir tratamientos de soporte vital. Trasladar al hospital solo si no se pueden suplir las necesidades de comodidad en la ubicación actual.
☐ Intervenciones adicionales limitadas: objetivo del tratamiento: estabilización del problema médico. Además de la atención descrita en Medidas de comodidad arriba, usar el tratamiento médico para estabilizar al paciente. Iniciación por vía intravenosa (IV) y monitor cardíaco de la manera indicada para estabilizar el estado médico. Se pueden usar técnicas básicas para manejar las vías respiratorias y presión positiva no invasiva en las vías respiratorias. No entubar. Transferir al hospital si está indicado para manejar las necesidades médicas o de comodidad. Evitar los cuidados intensivos de ser posible.
☐ Intervención completa: objetivo del tratamiento: intervenciones completas, incluyendo medidas de soporte vital en la unidad de cuidados intensivos. Además de la atención descrita en Medidas de comodidad e Intervenciones adicionales limitadas, usar entubación, intervenciones avanzadas de las vías respiratorias y ventilación mecánica, tal como sea indicada. Transferir al hospital a unidad de cuidados intensivos de ser indicado para suplir las necesidades médicas.

C (Marque una)
ANTIBIÓTICOS:
☐ Usar antibióticos para tratar infecciones solo si no se puede lograr la comodidad completamente por otros medios.
☐ Usar antibióticos de manera congruente con los objetivo de tratamiento.

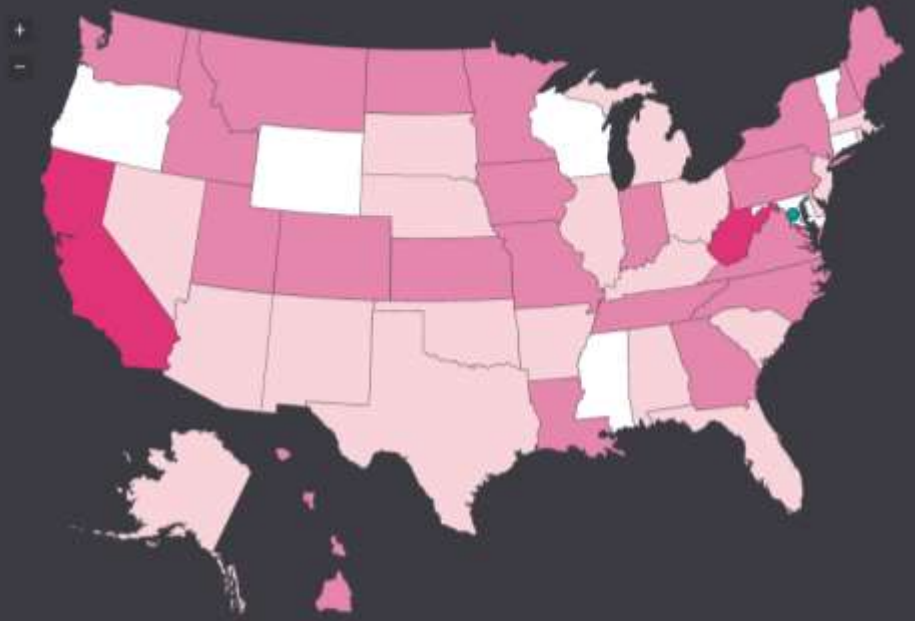
D (Marque una)
NUTRICIÓN ADMINISTRADA ARTIFICIALMENTE: ofrecer alimentos y líquidos por boca siempre que sea factible.
☐ No usar nutrición artificial.
☐ Periodo de prueba definido de nutrición artificial por sonda. (Duración de la prueba: _____ (Objetivo: _____)
☐ Nutrición artificial a largo plazo

ÓRDENES ADICIONALES OPCIONALES:

HOJA DE FIRMAS: este formulario consiste en dos (2) páginas. Ambas páginas tienen que estar presentes. La siguiente página incluye firmas obligatorias para que el formulario POST sea efectivo.

National POLST Paradigm Program Designations

Click a state for more information



- 3 mature
- 23 endorsed
- 21 active
- 7 unaffiliated

Only active programs are eligible for endorsed status; unaffiliated status does not reflect program development. Mature programs also endorsed and counted in both the mature and endorsed program totals. Totals include Washington DC.

LEARN MORE in the text below the map

ADDITIONAL RESOURCES

- DOWNLOAD POLST HANDOUT
- STATE LAWS & REGULATIONS GRID
- STATE LAWS GRID (SINGLE SHEET)
- POLST LEGISLATIVE GUIDE
- SIGNATURE REQUIREMENTS

ADDITIONAL MAPS

- PROGRAM DESIGNATIONS
- LEVEL OF POLST USE FOR EACH STATE
- STATE POLST REGISTRY INFORMATION

National Guidance on Appropriate Use

"POLST….intended for patients who are considered to be at risk for a life-threatening clinical event because they have a serious life-limiting medical condition, which may include advanced frailty."

"HCP not surprised if patient died within 1-2 years."

National POLST Paradigm

Intended Population & Guidance for HCP

National POLST Form Project

National POLST Form: A Portable Medical Order

Patient Information. Having a POLST form is always voluntary.

This is a medical order, not an advance directive. For information about POLST and to understand this document, visit: www.polst.org/form

A. Cardiopulmonary Resuscitation Orders. Follow these orders if patient has no pulse and is not breathing.

YES CPR: Attempt Resuscitation, including mechanical ventilation, defibrillation and cardioversion.

NO CPR: Do Not Attempt Resuscitation.

B. Initial Treatment Orders. Follow these orders if patient has a pulse and/or is breathing.

Full Treatments (required if choose CPR in Section A).

Selective Treatments.

Comfort-Focused Treatments.

C. Additional Orders or Instructions.

D. Medically Assisted Nutrition (CPR+ food by mouth if desired by patient, safe and tolerated)

E. SIGNATURE: Patient or Patient Representative (Signed documents are valid)

Authority:

The most recently completed valid POLST form supersedes all previously completed POLST forms.

F. SIGNATURE: Health Care Provider (Signed documents are valid)

Date

Phone #

Printed Full Name

License/Cert. #

N/A

License #

Copied, faxed or electronic version of this form is a legal and valid medical order. This form does not expire.

2021

The National POLST Form was created because having a single form will make it easier to:

1) Honor patient treatment wishes throughout the United States

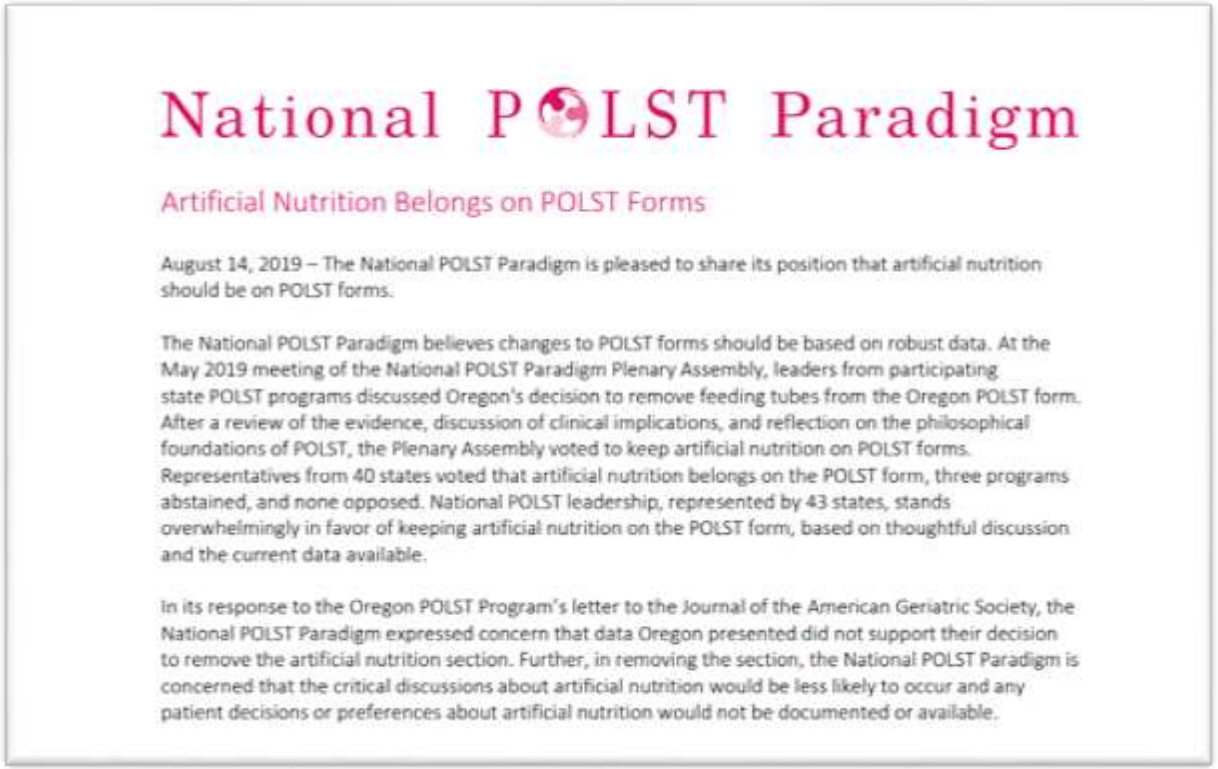
2) Conduct research and quality assurance activities to improve the POLST form

3) Educate about POLST so it is properly used everywhere

Research & Quality Assurance

- Quality Indicators Toolkit at www.polst.org
  - **Quality Indicator 1: Evaluating POLST Form Orders with Treatment Provided**
  - **Quality Indicator 2 (2 approaches): Patient/Resident Appropriateness for POLST Form**

Artificial Nutrition Orders



National POLST Paradigm

Artificial Nutrition Belongs on POLST Forms

August 14, 2019 – The National POLST Paradigm is pleased to share its position that artificial nutrition should be on POLST forms.

The National POLST Paradigm believes changes to POLST forms should be based on robust data. At the May 2019 meeting of the National POLST Paradigm Plenary Assembly, leaders from participating state POLST programs discussed Oregon's decision to remove feeding tubes from the Oregon POLST form. After a review of the evidence, discussion of clinical implications, and reflection on the philosophical foundations of POLST, the Plenary Assembly voted to keep artificial nutrition on POLST forms. Representatives from 40 states voted that artificial nutrition belongs on the POLST form, three programs abstained, and none opposed. National POLST leadership, represented by 43 states, stands overwhelmingly in favor of keeping artificial nutrition on the POLST form, based on thoughtful discussion and the current data available.

In its response to the Oregon POLST Program's letter to the Journal of the American Geriatric Society, the National POLST Paradigm expressed concern that data Oregon presented did not support their decision to remove the artificial nutrition section. Further, in removing the section, the National POLST Paradigm is concerned that the critical discussions about artificial nutrition would be less likely to occur and any patient decisions or preferences about artificial nutrition would not be documented or available.

INDIANA PALLIATIVE CARE AND QUALITY OF LIFE ADVISORY COUNCIL (2016-2019)

1. To educate and advocate for quality palliative care;
2. To collect, analyze on, and develop state initiatives concerning the establishment, maintenance, operation, and evaluation of palliative care in Indiana;
3. To make policy recommendations to improve palliative care and the quality of life of individuals with serious illness;
4. To prepare a report not later than January 1 of each year.

IC 16-19-17

ACTIVITIES

- Year 1
  - Identified three focus areas:
    - Advance care planning
    - Access to palliative care
    - Pain medication and management
- Year 2
  - Established Advisory Workgroups to explore potential policy solutions
- Year 3
  - Review and finalized policy recommendations

WORKGROUP RECOMMENDATIONS ADVANCE CARE PLANNING

1. **Revise the Indiana living will/advance directives.**
2. Support development of a registry for advance directives and POST forms.
3. Encourage additional nursing home data requirements: Data collection of advance care planning, advance directives and POST.
4. **Support advance care planning education and training for healthcare professionals.**

Why change Indiana's advance directives?

- Conflicting statutes
- Outdated language
  - ~~28~~ 29 years old!
- Multiple methods to appoint a legal representative
- Unclear decision standards for legal representatives
- Inhibiting innovation

What would change?

- Combine and simplify 3 statutes
- Establish just one mechanism to appoint a legal representative with clear standards of conduct
- Establish general standards - advance directives would require either 2 adult witnesses *or* notarization

Indiana Advance Directives Legislation

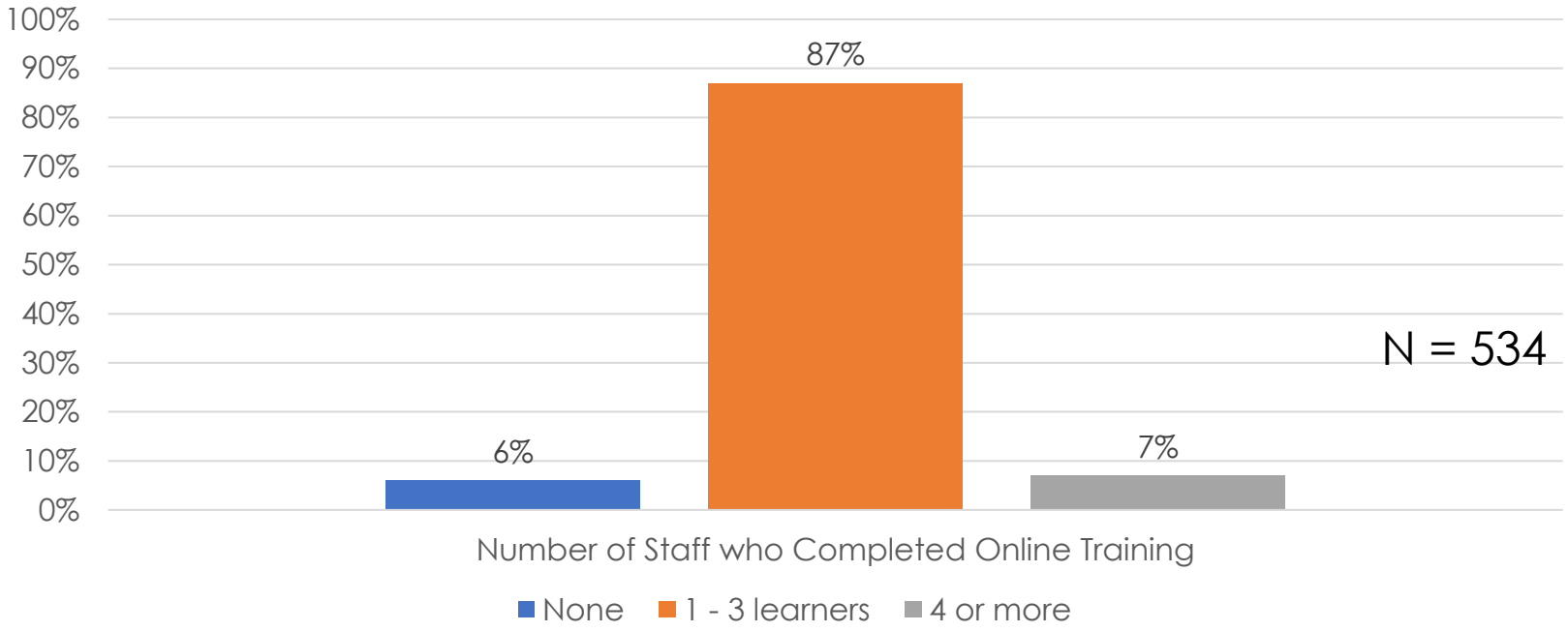
- 2019 House Bill 1516 (Rep. Kirchhofer with Rep. Hatfield)
  - Not introduced

- 2020 House Bill 1317 (Rep. Kirchhofer)
  - One Indiana Advance Directive
    - Health Care Representative Appointment
    - Statement of wishes
  - Additions
    - Add advance practice providers to OHDNR (fix 2018 oversight)
  - Died in committee

VALUE BASED PURCHASING (VBP) TRAINING FOR NURSING HOMES

Utility of VBP Training

VBP Completion Rates



COVID-19 and Advance Care Planning

- COVID-19 complications require urgent decision-making.
- Advance care planning conversations can prepare residents and families for these decisions.
- Proactively identifying and documenting resident/family preferences to *avoid* invasive life-prolonging treatment will help ensure treatments are provided only when aligned with resident wishes.

COVID-19 and Indiana ADs

- Existing statutes require forms be signed "in the presence" of the declarant if unable to sign
  - Technology barriers
  - Transportation barriers
- Visitor prohibitions make obtaining signatures challenging
- Governor's order 20-23 waiting "in the presence" for Healthcare Representative Appointments applies to COVID-19 patients only

Potential Solutions

- IPPC request for Governor's Order – no response

- Allow verbal consent from the declarant/representative if they are unable to sign the form or be present.
  - IC-16-36-6-8(b)(2) and IC-16-36-6-8(c) in the Indiana POST statute
  - IC 16-36-5-11(c)(3-5) in the Indiana OHDNR statute

- Allow HCP reliance on oral statements with documentation
  - IC-16-36-4-8 (b) (2-5) in the Indiana Living Wills and Life Prolonging Procedures statute
  - IC-16-36-1-7(b)(1-3) in health care representative statute

Conclusions

- Work is ongoing to improve Indiana's advance care planning tools
- COVID-19 creates special challenges
- We have opportunities in near future to address multiple legal barriers

Section Fifteen

Preplanning with Trusts for Medicaid Benefits

Rebecca W. Geyer
Rebecca W. Geyer & Associates, PC
Carmel, Indiana

Section Fifteen

Preplanning with Trusts for Medicaid Benefits…….…… Rebecca W. Geyer

Preplanning With Trusts for Medicaid Benefits

There is no denying that people are concerned with the high costs of long term care. In 21 years of practice, I've yet to have a single client come to my office and express that they can't wait to spend all of their life's savings on care costs. To the contrary, people often seek out the advice of elder law attorneys to determine if any steps can be taken to preserve assets in the event of a future care need. Most commonly people ask if they should place their home in their children's names or gift away funds. Certainly gifting of assets can be done outright with minimal costs involved, including the cost of preparing and recording deeds and the cost of preparing and filing a gift tax return. Many financial institutions have their own documents they use for changing ownership of assets so there are typically no out-of-pocket costs for the transferor. So, why are irrevocable trusts often recommended as a pre-planning tool? The answer is that many important benefits are forfeited by outright gifting which can be retained by using an irrevocable trust. These benefits are what give value to using irrevocable trusts in Medicaid planning. This paper will give an overview of the pros and cons of pre-planning with irrevocable trusts.

A. Overview of Trust and Medicaid History

OBRA 93 enacted rules which apply to certain trusts established on or after August 11, 1993[1]. The general concept of the OBRA 93 rules is that assets placed in a trust are either considered as an available resource or are considered to have been transferred under Medicaid law. Assets are considered as an available resource if

[1] The pre-OBRA 93 rules still apply to trusts set up prior to August 11, 1993. The previous rules also still apply to previously established trusts even for assets placed into the trust on or after August 11, 1993, so long as the trust was established before August 11, 1993.

there are **any circumstances** under which payment can be made to the individual. If there are **no** circumstances under which the individual could benefit, then the assets are not an available resource and are treated as transferred when the trust was established. Assets counted as a resource are reviewed using the rules that apply to that type of property; we look through the trust and apply the appropriate rule as if the asset were held in the applicant's name.

Under the pre-OBRA 93 rules, if the applicant/recipient or spouse is the grantor who funds the trust and is also the beneficiary, then the amount of principal counted as a resource is the maximum amount available if the trustee were to exercise full discretion for distribution of the funds. If the trustee has the discretion to distribute any of the principal, whatever amount of principal the trustee has the discretion to distribute is counted as a resource even if the trustee does not distribute it. This test is essentially the same under OBRA 93.

The OBRA 93 trust provisions which apply to certain trusts established on or after August 11, 1993 are located at 42 U.S.C. §1396p(d) and are discussed at IHCPPM §2615.75.10. The OBRA 93 provisions apply to any non-testamentary trust funded with the applicant's or applicant's spouse's assets and established after August 10, 1993 by any of the following:

- the applicant or recipient;
- his or her spouse;
- a person, including a court or administrative body, with legal authority to act in place of or on behalf of the applicant or the applicant's spouse;
- a person, including a court or administrative body, acting at the direction or upon the request of the applicant or the

applicant's spouse.

The last provision raises serious questions about trusts established by third parties using funds transferred from the applicant or spouse. If a person transfers funds to a third party and the third party voluntarily establishes a trust benefitting the transferor, then those funds should not count as a resource of the original transferee. But if the original transferor requested the transferee to establish a trust, then the assets in the trust might be determined to still be a countable resource for the original transferor.

Neither the pre-OBRA 93 rules nor the OBRA 93 rules apply to testamentary trusts or to trusts set up by a third party not acting at the direction of the applicant or the applicant's spouse, provided that none of the applicant's or spouse's funds are deposited into the trust.

Prior to state implementation of the federal Deficit Reduction Act of 2005 (DRA), federal Medicaid law contained a bias against trusts: Most transfers of assets to trusts had a 5-year lookback period, whereas there was a 3-year lookback period for non-trust transfers. The DRA leveled the playing field by imposing a 5-year lookback period for ALL transfers preceding an application for benefits, see 42U.S.C. § 1396p(c)(l)(B)(i) (2012), and strict requirements governing the extent to which assets must be made unavailable to the grantor in order to avoid being treated as "countable assets" for purposes of Medicaid eligibility.

To achieve Medicaid asset protection with an irrevocable trust, the grantor cannot be the Trustee, and the grantor cannot have access to principal; the grantor may retain the right to receive income from the trust, but such income will be

countable should the grantor later apply for Medicaid benefits. 42 U.S.C. § 1396p(d)(3)(B)(I) states:

> [I]f there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual....

Conversely, §1396p(d)(3)(B)(ii) states:

> [A]ny portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual....[2]

The foregoing provisions mean that if a trust is established so that neither the corpus nor the income can **under any circumstances** benefit the individual, then the trust corpus will not be treated as an available resource and will be treated as having been transferred when the trust was established or funded. It is this benefit which makes irrevocable trusts a key tool for asset preservation planning purposes. Properly structured, such trusts may be used to place assets beyond the grantor's reach and without adverse effect on the grantor's Medicaid eligibility.

B. Irrevocable Trusts – Pros

Planning with irrevocable trusts can provide many benefits not available with

[2] See also IHCPPM § 2615.75.10.

outright gifting, including:

- Asset protection from future creditors of beneficiaries
- Preservation of the Section 121 exclusion of capital gain upon sale of the grantor's principal residence
- Preservation of step-up of basis upon death of the grantor
- Ability to select whether the grantor or the beneficiaries of the trust will be taxable as to trust income
- Ability to design who will receive the net distributable income generated in the trust
- Ability to make assets in the trust noncountable in regard to the beneficiaries' eligibility for means-based governmental benefits, such as Medicaid and Supplemental Security Income (SSI)
- Ability to specify certain terms and incentives for beneficiaries' use of trust assets
- Ability to decide (through the grantor's other estate planning documents) which beneficiaries will receive what share, if any, of remaining trust assets after the grantor dies
- Ability to determine who will receive any trust assets after the deaths of the initial beneficiaries
- *Possible* avoidance of need to file a federal gift tax return due to asset transfer to the trust

Each of these potential benefits depends on the specific language selected in the design and drafting of the trust; none of them is automatic or inherent in every trust. Thoughtful planning and careful drafting is necessary to take advantage of the benefits available, thus it is important to understand how and why each benefit comes about.

1. Asset Protection from Future Creditors of Beneficiaries

When an asset is gifted directly to a beneficiary, it becomes subject to creditor claims of that beneficiary, which can lead to disastrous results. A central benefit of gifting in trust is to protect the gifted assets from the creditors and predators of the beneficiaries. This is accomplished by means of a spendthrift provision – special provisions in the trust

that make trust assets not subject to attachment, foreclosure, garnishment, or a laundry list of undesirable actions by the creditors of the beneficiaries. The grantor can determine how distributions will be made to beneficiaries from the trust funds, which can ensure the beneficiaries receive what they need while not subjecting the assets to creditor claims.

2. Preservation of Section 121 Exclusion of Capital Gain on Sale of Principal Residence

Section 121 of the Internal Revenue Code (Tax Code) creates an exclusion from capital gains tax of up to $250,000 of capital gain in the taxpayer's principal residence when it is sold if the taxpayer owned and lived in it at least two of the past five years before the sale (only one of the past five years if the homeowner had to move to a nursing home). If there are two qualifying co-owners, they can each exclude $250,000 of gain upon sale in such circumstances. This is a very valuable benefit that has been in the Tax Code since 1997. A trust can preserve this benefit if it is a "complete grantor trust" – a grantor trust as to both income and principal. On the other hand, a residence gifted outright to someone and then sold by the successor would need to qualify for the Section 121 exclusion based on the ownership of the donee to avoid capital gain in excess of the adjusted cost basis of the donor. Seniors have often owned their home for more than 30 years, so a huge amount of appreciation in value has occurred since then.

3. Preservation of Step-Up of Basis

When an appreciated asset is included in a decedent's taxable estate for federal estate tax purposes, it receives step-up (or down) of basis to the date of death value under Section 1014 of the Tax Code. Normally gifted assets pass to gift donees with "pass through basis"; that is, the donees receive the assets with the donor's adjusted cost basis,

rather than the date of gift value of the assets. If, however, something pulls the assets back into the taxable estate of the donor upon the donor's death, the donee will own the asset at that point with the donor's date of death value as his or her basis, rather than the donor's original adjusted cost basis. For highly appreciated assets, such as the donor's home or stocks that he or she owned for a long time, obtaining step-up of basis can be a huge benefit for minimizing or eliminating capital gains tax when the donee later sells the assets. This benefit of step-up in basis can easily be forfeited by outright gifting. However, a provision in an irrevocable trust that pulls the property back into the taxable estate of the grantor upon the death of the grantor can preserve step-up of basis for benefit of the donee. With the amount of assets that can pass free of federal estate tax being well beyond the value of most Medicaid planning clients' estates, estate inclusion and step-up of basis is generally a great benefit to design into the trust, without any actual tax liability. A Limited Power of Appointment retained by the grantor can accomplish this. Other provisions can also cause taxable estate inclusion.

4. Ability to Select Whether Trust Income is Taxable to Grantors or Beneficiaries

This brings us to the topic of "grantor trusts." Grantor trusts are treated by the Tax Code as "owned" by the grantor (also called the grantor) for income tax purposes. As mentioned above, preservation of the Section 121 exclusion of capital gain upon the trustee's sale of the grantor's primary residence that was earlier funded into the trust requires that the trust be a "grantor trust" as to both income and principal. The creation and significance of grantor versus nongrantor trust status takes an entire seminar or article unto itself, so can only be touched upon lightly here. But the choice of whether a trust will be a

grantor or nongrantor trust and how that will be accomplished are key design decisions. For example, it may be important that income generated in the trust not be taxed to the grantor. This requires nongrantor trust status, which necessitates that every trust provision that would cause grantor trust status be avoided in the drafting of the trust. In other examples, however, grantor trust status is important as a goal for tax reasons, or if the grantors are to receive income from the trust. Grantor trust status can be obtained by providing the grantor or a trust protector the authority to add a charity as a beneficiary or the power to substitute trust assets.

5. Ability to Design Who Will Receive Trust Income

Unlike an outright gift, by which the donor gives up the right to receive income generated by the transferred assets, an irrevocable trust can be designed so funding constitutes a completed gift for Medicaid purposes although the grantor reserves the right to receive income from the trust. This is an attractive option for some seniors, although it does result in an inherent downside for Medicaid planning purposes: Any income that the trustee has the power to distribute to the grantor will be counted for Medicaid eligibility purposes, even if the trustee decides not to actually distribute the income to grantor. Some seniors avoid trustee discretion by making distribution of all trust net income to them mandatory, rather than discretionary. In this case, the income would also be counted for Medicaid eligibility purposes as well. Others go the entirely opposite direction by prohibiting the trustee from distributing any income to the grantor, thereby ensuring that trust income will not be part of the grantor's cost of care budget when the grantor is on Medicaid. There are several factors to weigh in such decision-making, but the key point is that use of an irrevocable trust in Medicaid planning gives the client these design choices,

whereas an outright gift does not.

6. Ability to Make Trust Assets Noncountable for Beneficiaries' Medicaid or SSI

It is a sad fact that an outright gift or bequest from a donor, such as a parent, to a disabled donee can result in the donee becoming ineligible for means-based governmental benefits that he or she was eligible for before the gift or bequest, or soon would have become eligible for. In such situations, unless irrevocable trust planning is then done to establish a "self-settled special needs trust," the gifted or bequeathed assets typically get consumed for the donee's care and once they are gone, the donee goes onto the governmental benefits from which the gift or bequest disqualified him or her until consumed. One way of looking at this outcome is that the indirect recipient of the gift or bequest was the governmental benefit program from which the gift disqualified the disabled person for a period of time. This is generally considered poor planning.

Better planning is for the gift or bequest to be made in an irrevocable special needs trust for benefit of the disabled beneficiary, so the gift or bequest will be managed to enhance the living conditions of the disabled beneficiary by paying for things that the governmental benefits do not pay for. If a disabled person becomes entitled to an outright gift or bequest, or an outright gift or bequest recipient later becomes disabled, depending on the age of the disabled person, it may be possible to establish a "self-settled special needs trust" for the disabled beneficiary. Such trusts (funded with assets of the disabled person) must contain a provision stating that upon the death of the disabled beneficiary any remaining trust assets must pay back the state up to the full amount of Medicaid benefits received by the beneficiary, and only after the state is reimbursed may any excess pass to

other beneficiaries such as other relatives. The payback provision requirement is Congress's "quid pro quo" – the balancing deal that makes it fair for the disabled person's otherwise disqualifying assets to be set aside in a Medicaid- and Supplemental Security Income-noncountable trust that is nonetheless able to be consumed by the trustee for benefit of the disabled person to supplement but not replace the governmental benefits.

7. Ability to Specify Terms and Incentives for Beneficiaries' Use of Trust Assets

Many parents or grandparents desire to infuse their planning for their children or grandchildren with positive aspirations. Such goals may be as simple as that the gifts or bequests may only be used for the recipients' education, to finance a career change or buy a home. Or the goals may be more serious, for example, establishing that the intended recipient will only become eligible to receive the gift or bequest if he or she participates in a drug or alcohol rehabilitation program or gives up some other behavior that the donor wants to create an incentive for the donee to abandon. Such planning goals of a client almost always indicate an irrevocable trust with beneficiary incentive provisions as the vehicle to implement the plan. This is completely compatible with Medicaid asset protection planning for seniors at the same time.

8. Ability to Decide Which Beneficiaries Will Inherit Upon Grantor's Death

The retained Limited Power of Appointment referred to above (sometimes called a Special Power of Appointment) preserves for the grantor the power to decide who within a designated class of recipients will receive the benefits of the trust, how much they will receive, and in what way they will receive it. The class of potential recipients can be as broad as everyone in the world except the grantor and his or her creditors, and the grantor's

estate and its creditors. Most often, however, the class of potential appointees consists of the grantor's descendants, certain other relatives or in-laws, and/or certain charities. Such a Limited Power of Appointment (LPOA) can determine whether the trust is a grantor or nongrantor trust, as well, so the specific language of the LPOA must be crafted carefully with regard to the grantor trust rules of the Tax Code. As an aside, a power of appointment is sometimes referred to jokingly as a "power of disappointment" because it truly retains for the grantor or other power holder the power to disinherit someone who acts badly.

9. Ability to Determine Successor Beneficiaries

A major concern in Medicaid asset protection planning and estate planning in general is who will be the successor beneficiaries of anything the client owns. If the gift or bequest passes outright, the recipient has control through lifetime consumption of assets and income or through his or her estate plan, to determine who will receive anything that the initial recipient doesn't use up. Of course, the recipient's creditors or predators also may gain control over the assets and income gifted outright to the initial recipient. If the client would prefer to designate that only blood descendants, or descendants and their spouses, and/or certain charities will receive what is not consumed by the initial recipient, an irrevocable trust is a key instrument to create such a plan. This is true almost regardless of the initial size of the gift or bequest – if a modest amount of funds are left in trust, there may nevertheless be a remainder to pass to a successor beneficiary or even another successor beneficiary. This sounds like a "dynasty trust" and it actually is, even though it is of modest size. The point is that by use of an irrevocable trust, the client has the option to decide who the possible recipients will be, and even to grant limited powers of appointment to the named recipients in order to give them some control as well.

10. Analysis of Need to File a Federal Gift Tax Return for Year of Funding

A goal of many planners in design of irrevocable trusts is to make the initial trust-funding gift(s) "incomplete" for tax purposes. The purpose is generally to prevent the grantor from having to file a federal gift tax return for the year(s) of the funding transaction(s), assuming that the taxpayer makes no other "taxable gifts" in any such year. There is a split of authority with the Internal Revenue Service concerning when transfers to an irrevocable trust are considered "complete," thus requiring the filing of an income tax return. Normally there will not be any gift tax due (the current laws allow an individual to give away $11.58 million in assets during his or her lifetime without paying any tax on the gift) but it is important to follow the rules that do require filing a gift tax return, even if no tax is due. Elder law attorneys need to assist with this analysis.

C. Irrevocable Trusts – Cons

While there are many advantages to using irrevocable trusts, there are significant disadvantages as well, including:

1. Loss of Control

Irrevocable trusts come with a hefty price tag – loss of control by the grantor. The grantor cannot be the trustee of the irrevocable trust and will no longer have access to or benefit from the trust funds. As a result of this loss of control, it is imperative that the grantor have assets which remain outside of the trust in order to meet his or her needs. While many people can live off their income in retirement, non-routine expenses, such as property taxes and home repairs, often require a dip into cash reserves. If the grantor experiences financial difficulty, he or she cannot access trust assets to pay for expenses. The grantor should maintain some assets in his or her

name in order to meet those potential needs.

It is possible for the grantor to receive income from the irrevocable trust, but the effect of an "income only" trust, where the grantor only receives income but cannot benefit from the corpus, is less clear from the language in 42 U.S.C. § 1396p(d)(3)(B). CMS has affirmed that if no portion of the trust corpus can be distributed, the corpus will not be counted as a resource to the individual. As a result, no part of an "income only" trust should be counted as a resource. Instead, the trust corpus will be treated as having been transferred when the trust was established and is subject to the 5-year lookback period which applies to transfers. As noted above, actual payments to the Medicaid recipient will still be counted as income in the Medicaid budgeting process, so some clients may wish to avoid being an income beneficiary.

A note of caution – if funds transferred to an irrevocable trust are needed to meet the grantor's needs and an income right is not retained, funds should not be transferred directly to the grantor from the trust as the grantor is not a beneficiary. Making distributions from the trust directly to the grantor when he or she is not a beneficiary puts the entire corpus of the trust at risk of still being considered a countable resource for Medicaid purposes. An irrevocable trust may be drafted to include distribution provisions to certain lifetime beneficiaries other than the grantor during the grantor's lifetime, typically children. The trustee may make a distribution pursuant to the terms of the trust to a lifetime beneficiary during the grantor's lifetime, and such lifetime beneficiary may then make a distribution directly to the grantor without putting the assets of the trust at risk; however, it is best practice to only place

assets in an irrevocable trust which are unlikely to be needed by the grantor going forward.

2. Inflexible structure

The grantor of an irrevocable trust generally doesn't have any wiggle room compared to a revocable trust. Irrevocable trusts are not alterable or amendable by the grantor after the trust is established. If the grantor wants to change the terms of the trust, he or she cannot do so unilaterally. In certain situations, the grantor may be able to alter the trust by giving a trustee or a trust protector the authority to make changes or by decanting the trust's assets to another trust, but these provisions often need to be included in the trust when it is drafted. Indiana Code §§ 30-4-3-36, 30-4-3-24.4, and 30-4-5-25 allow for modification of an irrevocable trust by nonjudicial settlement agreement, court modification or decanting, but use of these statutes typically requires consent of all beneficiaries.

3. Unforeseen changes

Priorities, goals, finances and family relationships are only a few items on the list of unforeseen changes in life. Grantors don't have the luxury of gazing into a crystal ball to predict exactly how the future will unfold. If an irrevocable trust is established, it generally cannot be changed to align with future circumstances. Careful drafting to include provisions such as a limited power of appointment or trust protector provisions can provide much-needed flexibility in irrevocable trusts, but it is not the broad ability to modify or amend available to the grantor of a revocable trust.

4. Five-Year Lookback

As previously noted, assets transferred to an irrevocable trust are subject to a five-year lookback period under Medicaid rules. This means the assets in the trust will likely not be protected until five years after they are transferred to the trust. It is impossible to know when someone may need care, and the objectives of asset preservation may not be met if someone needs care before the expiration of the lookback period. It is important to advise clients on options for paying for a grantor's long term care costs should the need arise prior to the end of the lookback period.

5. Not a Good Planning Option for Retirement Plans

Many individuals have the bulk of their savings invested in tax deferred retirement funds such as IRAs or 401K plans. Qualified retirement accounts, including 401(k)s, 403(b)s, IRAs, and qualified annuities, are all tax-deferred vehicles governed by income tax laws within the Internal Revenue Code. Pursuant to IRC § 408(d), the transfer of an IRA to a trust is treated as a complete withdrawal of funds from the retirement account, and 100% of the value would be subject to income tax in the year the transfer is made. Attorneys should not advise clients to transfer ownership of retirement plans to trusts as a result of these income tax implications. If an individual's savings are in tax-deferred retirement plans, pre-planning with an irrevocable trust is not an option for these accounts unless the client is advised of the income tax consequences of such action and still chooses to embark on such planning.

D. Revocable Trusts

While this paper is focused on the use of irrevocable trusts, it would be remiss to not briefly cover revocable trusts in the context of Medicaid planning. People often bring

in trust documents for me to review, certain that they already have long term care protections in place. Nine times out of ten, the trust I review is a revocable trust, which does NOT provide asset preservation to the individual creating the trust (the grantor) as the assets in the revocable trust are still available resources for Medicaid purposes. A trust is considered to be revocable if there are any circumstances under which it can be revoked. The corpus or principal of the trust is an available resource. Payments to a third party which are not for the benefit of the grantor are treated as transfers when they are paid to the third party, while payments from the trust to or for the benefit of the Grantor are counted as income to the individual. IHCPPM § 2615.75.10; 42 U.S.C. §1396p(d)(3)(A). In Indiana, property in a revocable trust maintains its underlying nature for Medicaid purposes. If, for example, the trust holds income-producing real estate, the rules that apply to income producing real estate apply even though that real estate is titled to the revocable trust.

While moving assets into a revocable trust may not prevent them from being counted as a resource for Medicaid purposes, it may be beneficial in avoiding estate recovery upon the death of a Medicaid recipient. Assets in a revocable trust avoid probate, making it more difficult for a creditor to file a claim against those assets after a decedent's death. Depending on the name of the trust, it may be difficult for the state to even associate the trust with the deceased Medicaid recipient in order for the state to file a claim. If the revocable trust was established before May 1, 2002, assets in the trust are fully protected from estate recovery under Indiana law[3].

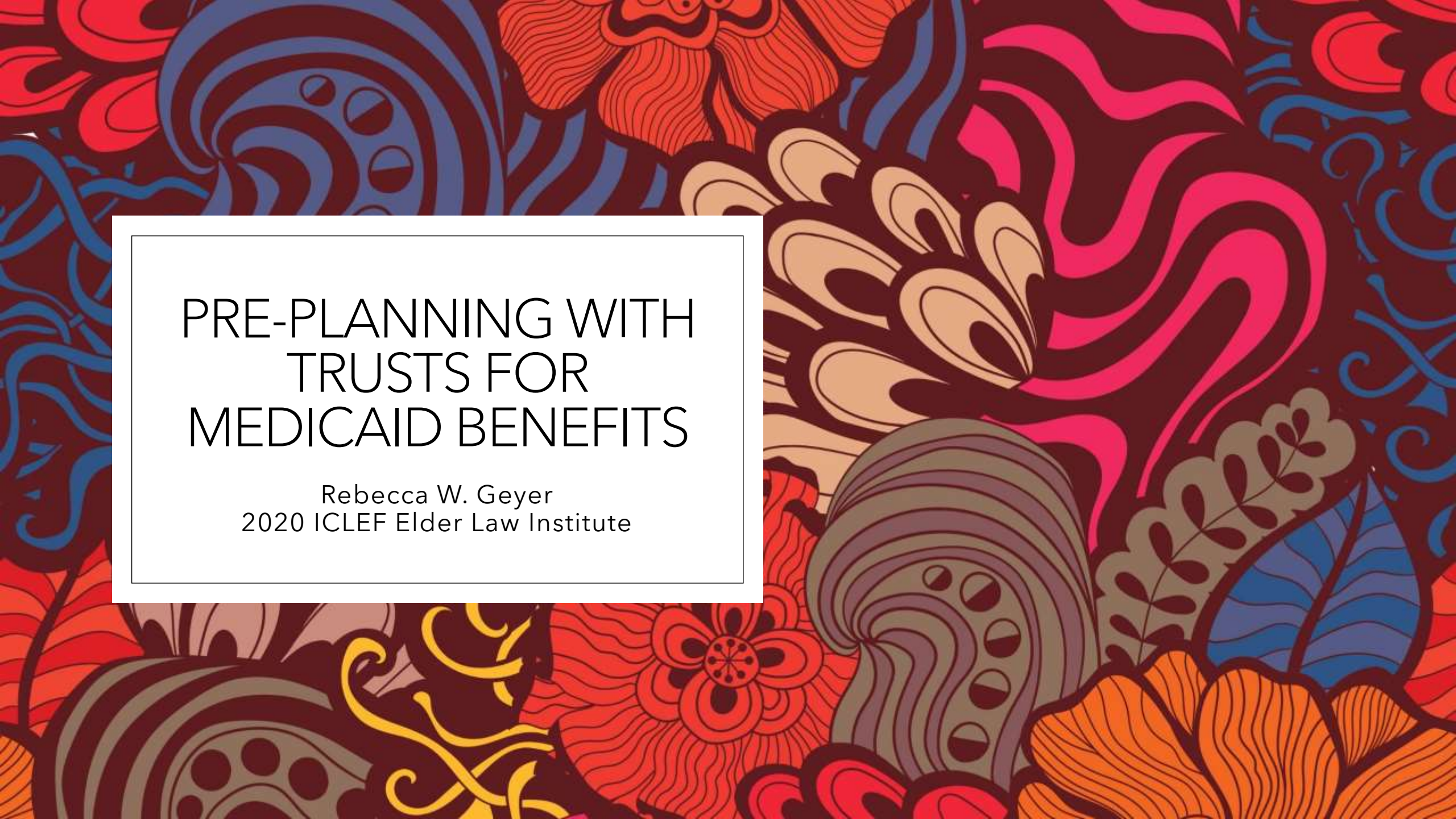
It should also be noted that it is possible for a revocable trust to direct assets to a testamentary trust for the benefit of an individual following the grantor's death, which can

[3] Assets transferred into a revocable trust after May 1, 2002 are still subject to estate recovery under Indiana law.

protect those assets should the trust beneficiary require Medicaid assistance. Assets in a purely discretionary testamentary trust are not considered resources. FSSA may review the trust to make sure that only the third party's funds, not the applicant's, are in the trust. Provided that none of the applicant's funds are in the trust, these trusts will be reviewed by determining the "availability" of the trust. IHCPPM §2615.75.20. If the trustee has the sole discretion to distribute third party funds to an applicant or recipient, the trust is not a resource. Indiana Code §§ 30-4-2.1-14 and 14.5 define what constitutes a "discretionary" trust under Indiana trust law.

E. Conclusion

The above discussion demonstrates that use of irrevocable trusts in Medicaid planning, as in other fields of estate planning, provides many opportunities to create great benefits beyond simply transferring assets. If care is taken to include the desired provisions, an irrevocable trust can greatly enhance the value of the clients' Medicaid planning beyond what can be accomplished through outright gifting, but the disadvantages of irrevocable trust planning must also be discussed with clients to ensure they are comfortable with this approach.



PRE-PLANNING WITH TRUSTS FOR MEDICAID BENEFITS

Rebecca W. Geyer
2020 ICLEF Elder Law Institute

Trusts and Medicaid Rules

- OBRA 93 - assets placed in a trust are either considered as an available resource or are considered to have been transferred under Medicaid law
- Assets are considered as an available resource if there are **any circumstances** under which payment can be made to the individual. Assets counted as a resource are reviewed using the rules that apply to that type of property; we look through the trust and apply the appropriate rule as if the asset were held in the applicant's name.
- If there are **no** circumstances under which the individual could benefit, then the assets are not an available resource and are treated as transferred when the trust was established.

OBRA 93 Provisions

The OBRA 93 provisions apply to any non-testamentary trust funded with the applicant's or applicant's spouse's assets and established after August 10, 1993 by any of the following:

- the applicant or recipient;
- his or her spouse;
- a person, including a court or administrative body, with legal authority to act in place of or on behalf of the applicant or the applicant's spouse;
- a person, including a court or administrative body, acting at the direction or upon the request of the applicant or the applicant's spouse.

Deficit Reduction Act of 2005 (DRA)

- Pre-DRA:

❑5-year lookback period for transfers to trust

❑3-year lookback period for non-trust transfers

- Post-DRA:

❑5-year lookback period for ALL transfers preceding an application for benefits

❑Strict requirements governing the extent to which assets must be made unavailable to the grantor in order to avoid being treated as "countable assets" for purposes of Medicaid eligibility.

Irrevocable Trust Provisions for Asset Protection:

- ❑Grantor cannot be Trustee
- ❑Grantor cannot have access to principal
- ❑Grantor may have a right to receive income from the trust, but such income is countable in Medicaid budgeting
- ❑If the grantor has no access to principal or income under any circumstances, then the trust principal will not be treated as an available resource and will be treated as having been transferred when the trust was established or funded

Irrevocable Trust - Pros

Asset Protection from Future Creditors of Beneficiaries

- ❑Can include spendthrift provision
- ❑Can make distributions to beneficiaries discretionary
- ❑Outright gifting subjects the asset to the recipient's present and future creditor claims

Irrevocable Trust – Pros (cont.)

Preservation of Section 121 Exclusion of Capital Gain on Sale of Principal Residence

- Allows the grantor to maintain the Section 121 exclusion on capital gains from the sale of his/her principal residence
- $250,000 for an individual/$500,000 for a couple
- Important benefit as many grantors live in their residences for decades so there is significant appreciation in the real estate value

Irrevocable Trust – Pros (cont.)

<u>Preservation of Step-Up In Basis</u>

- Gifted assets pass to donees with "pass through basis" rather than the date of gift value of the assets
- Results in capital gains tax if there is a difference between the donor's adjusted cost basis and the value of the asset on the date of sale
- Can get step up in basis by including limited power of appointment (pulls assets back into the donor's estate)

Irrevocable Trust – Pros (cont.)

Ability to Select Whether Income is Taxable to Grantors or Beneficiaries

- Can be treated as owned by the grantor for income tax purposes (power to substitute assets/power to add charitable beneficiaries); can be important if want the Section 121 exclusion
- Can also be treated as non-grantor trust; must avoid all provisions which could cause grantor trust status

Irrevocable Trust – Pros (cont.)

<u>Can Design Who Receives Trust Income</u>

- ❑Grantor? Completed gift for Medicaid purposes, even if grantor reserves the right to receive income
- ❑If grantor retains right to receive income, it is counted in Medicaid liability budgeting even if the income isn't actually distributed to the grantor
- ❑Can also designate certain lifetime beneficiaries to receive income instead; careful attention should be paid to the distribution standard based on who is serving as trustee

Irrevocable Trust – Pros (cont.)

Ability to Make Trust Assets Noncountable for Beneficiaries' Medicaid or SSI

- ❑Outright gifts to individuals receiving government entitlement benefits, such as SSI and Medicaid, can result in a loss of benefits
- ❑Can provide for beneficiary with third party special needs trust provision
- ❑Keeps the recipient from having to create an ABLE account or self-settled special needs trust which would require a payback provision to the state

Irrevocable Trusts – Pros (cont.)

<u>Ability to Specify Terms and Incentives for Beneficiaries' Use of Trust Assets</u>

- ❑Grantor can determine who receives assets, how much each beneficiary receives, and in what way a beneficiary will receive distributions
- ❑Can incentivize things such as education, employment, participation in a drug or alcohol rehabilitation program
- ❑Can tailor trust to the client's specific goals

Irrevocable Trusts – Pros (cont.)

<u>Ability to Decide Which Beneficiaries Will Inherit Upon Grantor's Death</u>

- ❑Inclusion of limited or special power of appointment preserves the grantor's power to decide who receives benefits of the trust, how much they each receive, and how they will each receive it.
- ❑An outright gift does not allow this flexibility
- ❑Class of recipient's can be broad, but cannot include the grantor, the grantor's creditors, the grantor's estate, and the creditors of the grantor's estate

Irrevocable Trust – Pros (cont.)

Ability to Determine Successor Beneficiaries

- Outright gifts result in a loss of control for the grantor in determining who ultimately receives his/her assets; recipient gets to use funds and also subject gifted assets to creditor claims of recipient
- Grantor can determine who receives funds in trust not used by the initial recipient
- Grantor can even grant a limited power of appointment to beneficiaries in order to give them some control as well

Irrevocable Trusts – Pros (cont.)

Can Determine if the Gift to Trust is Complete or Not for Gift Tax Purposes

Incomplete gifts prevent the grantor from having to file a federal gift tax return for the year(s) of the funding transaction(s), assuming that the taxpayer makes no other "taxable gifts" in any such year.

Normally no gift tax is due as a result of the high lifetime gift and estate tax exemption ($11.58 million in 2020).

Irrevocable Trusts - Cons

Loss of Control

- Grantor cannot be Trustee and has no access to principal (may still receive income)
- Recommended that the grantor retain some assets outside of trust
- CAVEAT – MUST EDUCATE TRUSTEES EARLY AND OFTEN ABOUT NOT DISTRIBUTING FUNDS FROM TRUST TO GRANTOR AS GRANTOR IS NOT A BENEFICIARY (can include other lifetime beneficiaries instead)

Irrevocable Trusts – Cons (cont.)

Inflexible Structure

- Grantor cannot make changes to irrevocable trust
- May include provisions allowing modification by Trustee or Trust Protector
- May be able to alter an irrevocable trust through NJSA, decanting or court modification; changes require consent by all beneficiaries typically (present and remainder)

Irrevocable Trusts – Cons (cont.)

Unforeseen Changes

- Life is unpredictable
- Limited mechanisms for altering an irrevocable trust
- Can include limited power of appointment and trust protector provisions, but potential modifications are still not as broad as those available with a revocable trust

Irrevocable Trusts – Cons (cont.)

Five-Year Lookback Period

- Assets will likely not be protected until five years after they are transferred to the trust.
- Grantor may need care before expiration of the lookback period
- Clients need to be advised on options should the grantor need care before the lookback period expires

Irrevocable Trusts – Cons (cont.)

Not a Good Planning Option for Retirement Plans

- Retirement plans often contain the lion's share of someone's savings
- Transfer of the tax-deferred funds to a trust is treated as a complete withdrawal of funds from the retirement account; 100% of the value is subject to income tax in the year the transfer is made

Revocable Trusts

- Assets in revocable trusts are still countable resources if there are any circumstances in which the trust can be revoked
- Payments to third parties not for the benefit of the grantor are treated as transfers
- Property in revocable trusts maintains its underlying nature for Medicaid purposes
- Assets in a revocable trust may avoid estate recovery (May 1, 2002)
- May direct assets to pour into a testamentary trust which could result in the assets being excluded as a resource for the trust beneficiary if trustee has sole discretion to distribute funds to someone other than the grantor

Questions?

Section Sixteen

Medicaid Transfers of Assets

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Section Sixteen

Medicaid Transfers of Assets……..….Blake C. Reed

I. Introduction

Transferring assets to children or other trusted persons is a crucial part of many Medicaid plans. When used properly and strategically, gifting can allow a client to preserve valuable resources to provide for their supplemental care and for the best possible quality of life. However, a misunderstanding or misuse of transfers can result in numerous pitfalls that can cause more harm than good. This article is intended to explain the basics of transfer rules and to offer some strategic planning options that can allow clients to protect some of their resources in the event of a long-term care need.

II. Transfer Penalty Basics

With the passing of the Deficit Reduction Act of 2005 ("DRA"), the rules were amended to make Medicaid planning involving transfers more difficult. Indiana Family and Social Services Administration (FSSA) implemented the rules under the DRA effective November 1, 2009 to provide for a five (5) year lookback, change to the start date of the transfer penalty, and partial month transfer penalties.

Transfers to third parties by either spouse prior to approval for Medicaid are considered when determining eligibility. Elder law attorneys should be mindful of this when discussing gift planning for married couples considering the planning options that may be available under the spousal impoverishment rules. A transfer by the community spouse after the institutionalized spouse has qualified for Medicaid should not result in a penalty for the Medicaid recipient.

Some of the questions that need to be answered when evaluating a potential transfer of resources are as follows:

A. Did a transfer occur?

1. Definition

A transfer of resources is defined in 405 IAC 2-3-1.1(d)(1) as follows:

A transfer of assets includes any cash, liquid asset, or property that is transferred, sold, given away, or otherwise disposed of as follows:

(1) Transfer includes any total or partial divestiture of control or access, including, but not limited to, any of the following:

(A) Converting an asset from individual to joint ownership.

(B) Relinquishing or limiting the applicant's or recipient's right to liquidate or sell the asset.

(C) Disposing of a portion or a partial interest in the asset while retaining an interest.

(D) Transferring the right to receive income or a stream of income, including, but not limited to, income produced by real property.

(E) Renting or leasing real property.

(F) Waiving the right to receive a distribution from a decedent's estate, or failing to take action to receive a distribution that the individual is entitled to receive by law subject to subsection (j).

2. *Converting to Joint Ownership*

By way of clarification on subsection (A) above, adding a joint owner on an applicant's bank account is not considered a transfer of assets by FSSA as long as the applicant retains control of the account. A withdrawal of the funds by the non-applicant joint owner would be considered a transfer subject to penalty. Adding a joint owner to real estate or transferring a remainder interest in real estate with a retained life estate are both considered to be transfers subject to penalty.

B. Did the transfer fall within the lookback period?

If it is determined that a transfer of resources has occurred, then one must determine if this transfer occurred during the five-year lookback period. The lookback period begins on the first date upon which an individual is both in a nursing home (or approved for Home and Community-Based Services through a waiver) and has applied for Medicaid.

The date of the application will be the baseline date for the lookback. Consider whether planning should be done to prepare for the end of the lookback period so that an application can be filed and 3-4 months of retroactive benefits can be obtained.

C. Does a Penalty Result from the Transfer or does an exception apply?

An often misunderstood fact about transfer penalties is that they generally only affect qualification for nursing home services and waiver services. To the extent a Medicaid applicant is not seeking either of these categories of Medicaid, then most other benefits would be uninterrupted by a transfer of resources. However, if the recipient later sought nursing home or waiver services, then a transfer penalty would apply if the applicant entered nursing home care or began receiving waiver services within five (5) years from the date of the gift. IHCPPM 2640.10.05.

There are a number of exceptions to transfer penalties such that even when a transfer has occurred, a penalty does not result. Some examples include:

1. To a Spouse

There is no penalty for transferring resources to a spouse or to a trust for the sole benefit of the spouse 405 IAC 2-3-1.1(k)(2); IHCPPM 2640.10.15. Much of the Medicaid planning done for spouses includes transfers of assets both immediately prior to eligibility and during the 90-day post-eligibility protected period. These transfers are often required to retain eligibility for benefits and to keep the institutionalized spouse below the $2,000 resource limit. It is also important when considering the effect of the community spouse passing away before the institutionalized spouse and what impact that can have on the estate plan (Discussed in more detail in Section IV(E) of this article).

2. To a Disabled Child

There is also no penalty for transferring assets to a disabled child or to a trust for the sole benefit of a disabled child. 405 IAC 2-3-1.1(k)(4); IHCPPM 2640.10.15

3. Home

Pursuant to 405 IAC 2-3-1.1(k)(1), the home can be transferred to another person in limited circumstances without the imposition of a penalty including transfers to the following:

a. Spouse (see above)

b. Blind, disabled, or minor child.

c. Son or daughter of the applicant (not including grandchild or step- child) who:

i.) was residing in the applicant's or recipient's home for a period of at least two (2) years immediately before the date the applicant or recipient becomes an institutionalized individual; and

ii.) has provided care to the applicant or recipient that permitted the applicant or recipient to reside at home rather than in an institution or facility.

d. Sibling who has equity interest in the home and resided in the home at least one (1) year before institutionalization.

4. Household Goods and Personal Effects

Household goods are items of personal property customarily found in the home and used in connection with the maintenance and occupancy of the home. They include (but are not limited to) furniture, appliances, kitchen utensils, linens, and television sets. IHCPPM 2615.30.00. This definition is further expanded upon at 20 CFR 416.1216 to include most clothing, jewelry, and personal effects.

Effective May, 2020, IHCPPM 2640.10.16 was amended to provide that household goods and personal effects can be transferred without penalty. Previously, there was a $2,000.00 equity limit on any such transfer. Transfer of items that are held for their investment value would not be considered personal effects according to FSSA. FSSA has also placed limits on transfer of wedding or engagement rings.

5. Transfers to Certain Trusts

Transfers to a trust for the sole benefit of a spouse or for the sole benefit of a disabled person are not subject to penalty. 405 IAC 2-3.1(k)(5).

Transfers to pooled special needs trusts are exempt. 42 USC 1396p(d)(4)(C). However, certain states have assessed penalties for transfers to a pooled trust by a person over age 65. Indiana, to date, has not applied a transfer penalty to a trust in this instance.

6. De Minimis Gifts

"The office shall not consider in total one thousand two hundred ($1,200.00) per year of contributions made by an individual to a: 1) family member; or 2) nonprofit organization; as an improper transfer" IHCPPM 2640.10.15.10

7. Transfers Exclusively for a Purpose Other Than Qualification for Medicaid

FSSA presumes that a transfer was made to obtain Medicaid eligibility unless a showing can be made by the applicant that the transfer was made exclusively for a purpose other than Medicaid qualification or that there was an intent to transfer the property for fair market value. This exception is set forth in some detail at IHCPPM 2640.10.30.

This can be a difficult burden to overcome but should be used when the gift was clearly not made for Medicaid qualification purposes. It may help to use an affidavit signed by both the donor and donee explaining the circumstances around the gift and reasons the gift was made. It may also help to explain that the gift was not made with guidance from an elder law attorney or anyone else knowledgeable about Medicaid qualification rules.

D. How long is the transfer penalty?

Once it is determined that an uncompensated transfer has occurred, then one must determine the amount of the transfer. Certain transfers will be for no consideration and the full value of the asset will be the uncompensated value. If some compensation was paid, then one must determine fair market value and subtract the compensation from this amount.

1. Compensation by Services

Compensation in the form of services provided to the applicant (i.e. caregiver payments) can be difficult to prove, especially when services have already been provided. IHCPPM 2640.10.20.20 currently states as follows:

> The value of services provided, or agreed to be provided, in exchange for the property is based on the market value of such services and the frequency and duration of the services. In order for services to have adequate consideration, there must have been an agreement at the time the services were provided that compensation was to be paid in return for the services.

Notice that there is only a requirement that there be an agreement, but not that the agreement be in writing. DFR has indicated that it intends to change IHCPPM to now require that any such agreement must be in writing. However, as of the August 21, 2020 manual updates, this change has not been implemented. As a precaution, elder law attorneys should advise clients to put any agreement with a caregiver (or with anyone who provides any services?) in writing to avoid the imposition of a transfer penalty upon application.

2. Start Date

The start date for a transfer penalty can make planning in advance very difficult. When a person is a new applicant for Medicaid, the penalty start date is as follows:

> "…the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (c) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection"
>
> 42 USC 1396p(c)(1)(D)(ii)

If a penalty period is already in place for a new applicant, then the penalty will begin after the previous penalty period ends. "Institutional level of care" is considered to include an approval for waiver services. In other words, the penalty does not begin until the person is in need of nursing home care or waiver services and has met all other Medicaid qualification criteria and been approved for Medicaid. This is a very harsh result for someone who has not received proper advice or has not planned for the cost of their care in the event there is a need within 5-years from the transfer.

For an applicant who has already been approved for Medicaid, the penalty will begin on the first day of the month during which assets have been transferred for less than fair market value. This should be taken into account when assisting with receipt of additional assets after the original approval for Medicaid (i.e. a house sale).

3. Transfer Penalty Length

To determine the transfer penalty length, the amount of the uncompensated transfer should be divided by the applicable penalty divisor (6,681 as of July 1, 2020) at the time of

application. This equates to the number of months (and days) in which an applicant will be ineligible for Medicaid benefits to cover the costs of nursing home care or waiver services, even though an approval for benefits was obtained.

Some factors to consider when determining the transfer penalty length:

- **Partial month penalties** are calculated as provided at IHCPPM 2640.10.35.05 and are rounded to the next whole day. This sets the number of days in which the applicant private-pays for care and the balance of the partial month is paid 100% by Medicaid. There is no patient liability due during a partial month penalty.
- There is **no maximum penalty period**. In other words, if an application is filed and approved and a penalty is assessed for a large gift, this penalty will not end if the application is withdrawn and can extend beyond 5 years if the gift was large enough. Attorneys should always advise clients, in writing, after a large gift is made that no application should be filed within 5 years of the date of the gift.
- **Gifts by either spouse count** but are only apportioned when both spouses have applied for and been approved for Medicaid. Indiana provides little guidance on this in ICHPPM, but historically has grouped any transfers made by the couple, divided those transfers in two, and applied one-half (1/2) of the penalty to each spouse. If one spouse dies, the remaining unserved penalty of the deceased spouse is added to the surviving spouse's penalty.

4. While Transfer Penalty is Running

Once a transfer penalty has been assessed and begins "clocking off", an applicant can choose to either continue to maintain eligibility for benefits throughout the penalty or withdraw from Medicaid. The penalty, however, does not stop when one has withdrawn from Medicaid or if one no longer needs nursing home care or waiver services. Depending on the length of the transfer penalty, an applicant will need to decide if they wish to withdraw from eligibility for Medicaid or continue to maintain eligibility criteria.

With certain clients, it will be much easier to comprehend a withdrawal and reapplication for Medicaid than to maintain eligibility during a transfer penalty. Even though Medicaid will not pay for nursing home room and board or waiver services, the ancillary benefits of receiving certain medical care, a Medicare Part B premium subsidy, or Medicare Part D drug assistance need to be considered when deciding. The client will also need to reapply for benefits at the time of the end of the transfer penalty, which could add more difficulty to planning.

III. Advising Clients about Gifting

A. Powers of Attorney

One of the first questions that we should all ask a client or prospective client is "Do you have a Power of Attorney?" Planning using gifting often hinges upon what legal documents a client has in place, especially when the client is incapacitated at the time of the proposed transfers. Oftentimes, a standard Power of Attorney is not sufficient to allow for complex Medicaid planning.

Many Powers of Attorney include gift transaction authority pursuant to Ind Code 30-5-5-9a(2), which authorizes the attorney-in-fact to do the following (emphasis added):

> Make gifts on behalf of the principal to the principal's spouse, children, and other descendants or the spouse of a child or other descendant, either outright or in trust, for purposes the attorney in fact considers to be in the best interest of the principal, including the minimization of income, estate, inheritance, or gift taxes. The attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than the amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code.

Limiting gift authority to not more than $15,000.00 per year to the attorney-in-fact can make Medicaid planning using transfers more difficult. Included at Exhibit A is an example of a Power of Attorney that incorporates expanded authority with respect to gifting to allow unlimited transfers to the spouse and to others in certain circumstances. This form conditions gifting on the agreement of the living children and as recommended by at attorney in conjunction with a plan to qualify for Medicaid or other governmental benefits. Adding these restrictions may better protect the client from financial exploitation when authorizing expansive gifting authority.

In addition to gift authority, Powers of Attorney could include optional clauses for loaning, purchasing annuities, naming a TOD or POD beneficiary, and paying caregivers or others for services. It is important to waive the conflict of interest that is inherent in the attorney-in-fact acting in this capacity while making gifts or loans to one's self.

Some powers of attorney are springing and require one or more physician's statements before becoming effective. It can be extremely difficult in crisis Medicaid planning to obtain the necessary physician's statement in a timely manner. If the client has 100% trust in the attorney-in-fact, then our recommendation is to authorize that person to act immediately so there is no delay in accessing financial accounts or making necessary transfers.

B. Guardianships

When a client has failed to plan ahead or when the Power of Attorney is insufficient to allow Medicaid planning, then a guardianship may be necessary to do Medicaid planning.

The Indiana Guardianship code authorizes gifting in certain circumstances in the discretion of the trial court. The Indiana guardianship section on transfers of assets at 29-3-9-4.5 states as follows:

> After notice to interested persons and upon authorization of the court, a guardian may, if the protected person has been found by the court to lack testamentary capacity, do any of the following:
>
> (1) Make gifts.
>
> (2) Exercise any power with respect to transfer on death or payable on death transfers that is described in IC 30-5-5-7.5.
>
> (3) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties.
>
> (4) Exercise or release a power of appointment.
>
> (5) Create a revocable or irrevocable trust of all or part of the property of the estate, including a trust that extends beyond the duration of the guardianship.
>
> (6) Revoke or amend a trust that is revocable by the protected person.
>
> (7) Exercise rights to elect options and change beneficiaries under insurance policies, retirement plans, and annuities.
>
> (8) Surrender an insurance policy or annuity for its cash value.
>
> (9) Exercise any right to an elective share in the estate of the protected person's deceased spouse.
>
> (10) Renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos.

C. Risks of Gifting Property

Elder law attorneys should be mindful of the risks and potential disadvantages of gifting property in an attempt to qualify for Medicaid. In our office, we have a handout that we provide to clients when they are considering gift planning. This is included at Exhibit B. We often tell clients that using gift planning too far in advance can often cause more harm than good. Making the client aware of these risks not only allows them to make the best decision but also protects the attorney from liability in the event of a future problem.

IV. Unexpected Transfer Penalties and Other Pitfalls

Simply making a cash gift or deeding real estate are not the only ways to invoke a transfer of assets penalty. The following list includes some of the unexpected actions that can result in a penalty:

A. Funeral Trusts

In the last couple of years, FSSA has begun scrutinizing funeral trusts more closely. Specifically, they are looking for a clause that shows that any excess benefits after the funeral services are provided will be paid to the Medicaid recipient's estate or to the State of Indiana pursuant to IC 12-15-2-17(f). Medicaid has even gone back to older funeral plans on redetermination and required amending the funeral plan to provide for this language. A sample Amendment To Pre-Need Funeral Contract is attached as Exhibit C.

B. Annuities

The transfer rules involving annuities can be complex and are beyond the scope of this paper, but one of the biggest pitfalls that an elder law attorney can face is the requirement to name the State of Indiana as a beneficiary of an annuity.

The rules for transfers involving annuities is set forth at IHCPPM 2640.10.25.10. Annuities purchased on or after November 1, 2009, or annuities where "non-routine" changes were made to the annuity after November 1, 2009 must name the State as remainder beneficiary (after only a spouse or disabled child) as repayment for Medicaid received for either spouse. Failing to properly name the state as a beneficiary is considered a transfer of assets for less than fair market value and will result in a penalty.

After November 1, 2009, IRA annuities and any other annuity that is irrevocable, non-assignable, actuarially sound with no deferral or balloon payment would not count as a resource and would not be subject to a transfer penalty if the State is listed as remainder beneficiary.

C. Promissory Notes

IHCPPM 2640.10.25.30 states as follows:

> Whenever an individual has a promissory note, loan agreement, or mortgage as presumed evidence that a transfer of money was not a gift but was made with the expectation of full repayment, the arrangement will be considered an improper transfer unless all of the following criteria are met:
>
> a) The repayment term is actuarially sound in accordance with the Life Expectancy Table included at the end section 2640.10.25.10,
> b) The agreement provides for payments to be made in equal amounts during the term of the loan, with no deferral of payments and no balloon payments, and
> c) The promissory note, loan, or mortgage prohibits the cancellation of the balance upon the death of the lender.
>
> In the case of a promissory note, loan or mortgage, that does not satisfy the requirements above and is established on or after 11-1-09, the value of such

> contract considered as an improper transfer will be the outstanding balance due as of the date of the individual's application for Medicaid or date of LTC admission, whichever is later. In the case of HCBS, the balance to be used is the amount as of the date of the Cost Comparison Budget approval. When determining if the loan is actuarially sound, refer to the person's age on the Life Expectancy Table as of the date the loan is established. If the loan cannot be repaid within the person's life expectancy, it is not actuarially sound, and is therefore an improper transfer. The interest amount of the loan payments are countable income.

Promissory notes are a useful planning tool to either convert a countable asset into an exempt asset without the imposition of a transfer penalty or to provide an income stream for the applicant to pay for nursing home care during a penalty resulting from transferring other assets.

While there is no requirement to name the State as beneficiary of a promissory note, the Note must contain language prohibiting the cancellation of the balance upon the death of the lender.

D. Contract Sales

A client's Medicaid plan can often be impacted by the decision to sell real estate under a land sale contract. Even if the contract buyer is paying fair market value for the real estate, a transfer of assets can still occur. The requirements for a valid land sale contract mimic those of a promissory note and are contained at IHCPPM 2640.10.25.15. When those are not met, the outstanding balance will be considered a penalizable transfer of resources. One requirement is that payments must be made within the actuarial life expectancy of the Medicaid applicant. FSSA uses the life expectancy tables contained at IHCPPM 2640.10.25.30, which will often require payment in full on the contract much sooner than the contract buyer can afford.

Much like promissory notes, only the interest portion of the contract payment is considered income for the Medicaid applicant. Therefore, a potentially large portion of the payment is not counted toward the applicant's patient liability. This can be a positive result if the applicant has other needs or could result in the applicant having excess resources that need to be spent monthly.

E. Waiving the Right to Receive an Estate Distribution

The failure to take action to receive a distribution from an estate or other asset the applicant is entitled to receive is also considered a transfer. In other words, one cannot simply disclaim an inheritance without it being considered a transfer of resources. This often comes up in the context of a community spouse's estate plan when one may not want to leave the estate to a spouse who is receiving or would likely to be receiving Medicaid benefits. 405 IAC 2-3-1.1(j)(4) states:

> In the case of a surviving spouse who fails to take a statutory share of a deceased spouse's estate, no penalty will be imposed if the deceased spouse has made other equivalent arrangements to provide for the spouse's needs. "Other equivalent arrangements" includes, but is not limited to, a trust established for the benefits of the surviving spouse.

Every spousal Medicaid plan should include an update to the community spouse's estate plan to provide for a Supplemental or Special Needs Trust for the benefit of the institutionalized spouse. The assets that become part of such a trust should not count as a resource to the Medicaid recipient if distributions of income and principal are made only in the total discretion of the trustee. In the past, the State has challenged whether a Special Needs Trust is providing "other equivalent arrangements" to avoid the imposition of a transfer penalty and this plan has been upheld on appeal, to date.

An unanswered question appears to be the impact of non-probate transfers on the requirement to provide "other equivalent arrangements" for the surviving spouse. Many attorneys have used payable on death or transfer on death provisions, including designating someone other than the community spouse as beneficiary to avoid this resource being paid to the Medicaid recipient upon the community spouse's death. It seems that FSSA could argue (although to date has not) that an institutionalized spouse's failure to claim their elective share against non-probate transfers falls within the definition of a transfer to the extent the institutionalized spouse could pursue the non-probate assets to satisfy the spousal share (*see* In re: Weitzman 724 N.E. 2nd 1120 (Ind. Ct. App. 2000), Dunnewind v. Cook 697 N.E.2nd 485 (Ind. Ct. App. 1998) and Walker v. Lawson 514 N.E. 2nd 629 (Ind. Ct. App. 1987)). If the clear intent of the non-probate transfers was to limit the assets that the surviving spouse could reach with a timely election against the estate, then it appears non-probate assets could be brought back into the probate estate and the failure of the surviving spouse to do so would result in a transfer penalty.

F. Impact on VA Aid and Attendance Pension Qualification

Clients who meet certain resource and income limits can potentially qualify for a Veteran's Aid and Attendance Pension if they are a wartime veteran or the spouse of a wartime veteran. However, effective October 18, 2018, the VA now penalizes the transfer of assets when attempting to qualify for VA benefits.

The 2020 maximum VA pension countable resource allowance is $129,094.00, which is much higher than Medicaid's resource limit for a single applicant. However, the transfer penalty

can be much harsher because the applicable penalty divisor is only 2,266 in 2020 (which equates to the maximum annual pension rate for a married veteran).

The elder law attorney should consider the potential impact of gift planning on the future eligibility for VA benefits in the event of a need for care, especially assisted living care where Medicaid is often not an option.

V. Practical Use of Transfers in Planning

There are a number of potential benefits to using gifting as a part of a Medicaid application project. Within the rules of Medicaid, certain strategies can be implemented to protect some of the client's resources.

A. Gift/loan and Gift/annuity strategies

One of the most important techniques in Medicaid planning is using a gift/loan or gift/annuity strategy to protect a portion of assets. Generally, this strategy does not involve making gifts until there is a need for nursing home care or waiver services. After a gift is made, in order to pay for the cost of care during the transfer penalty, the applicant can convert a portion of their assets to an exempt resource, such as a promissory note or annuity, that is paid back to the applicant over the course of the transfer penalty.

For example, suppose that a potential Medicaid applicant (Peyton), who has done no prior planning and is not married, has income of $2,000.00 per month and the cost of nursing home care is $7,000.00 per month, leaving a $5,000.00 per month shortfall. Also suppose that Peyton has $50,000.00 of resources remaining that need to be spent. If Peyton gifts $26,724, this

will result in a four (4) month transfer penalty (6681 x 4) where he will need to private-pay for his nursing home room and board. Remember that the transfer penalty would not begin until Peyton's countable resources are below $2,000.00. In order to reduce his resources and to pay for the cost of care during the transfer penalty, Peyton can loan the balance of his funds in exchange for a Medicaid-compliant Promissory Note that is repaid to him in four (4) equal, monthly installments. Peyton would use his regular monthly income along with the monthly promissory note payment to pay for his care during the penalty. Using this technique, Peyton is able to protect roughly one-half (1/2) of his remaining resources.

It is very important that the holder of any gifted or loaned funds be 100% trustworthy and would use those funds for the Medicaid applicant's benefit, if needed. The attorney should explain to the holder of any gift money that those funds need to be preserved and protected for the applicant even though they are no longer the Medicaid applicant's resource. Also, it is very difficult to predict the precise cost of care and some of the gifted funds may be needed to supplement the cost of a nursing home or other expenses. In the example above, Peyton is the client and our ethical duty to our client is to ensure that the plan we recommend will provide for his best interests.

B. 5-year Planning

When one has sufficient time to plan, one option is to make transfers in advance of the 5-year lookback so that they are not considered as a part of the Medicaid application if one is filed in the future. For this to work, the client must be willing to give up ownership and control of the assets.

Transfers to certain Medicaid asset protection trusts can be utilized to protect assets in the event of a need for Medicaid. A trust of this nature can help protect from both the cost of nursing home care and from the potential of an estate recovery against the assets upon the client's death. However, when the income or principal from an irrevocable trust, under any circumstances, no matter how remote, can be used to benefit the Medicaid applicant, then that portion of the income or principal is considered countable to the applicant. If a trust only becomes irrevocable under certain circumstances (i.e. the date upon the client's incapacity), then the transfer will be deemed to have occurred on that date.

Treatment of trusts is addressed at 42 USC 1396p(d)(3)(B) and states as follows:

> (B)In the case of an irrevocable trust—
>
> > (i)if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—
> >
> > > (I)to or for the benefit of the individual, shall be considered income of the individual, and
> > >
> > > (II)for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and
> >
> > (ii)any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

Use of life estates can also be beneficial in 5-year planning. When used properly, an applicant can retain the lifetime rights to use and possession of the property while conveying a

remainder interest to a child or children. The value of the life estate is still considered a resource in the application for Medicaid, but can be made exempt if the property is rented or if the applicant agrees to list the life estate for sale or for rent. Furthermore, a life estate is not subject to a claim from Medicaid estate recovery. However, if the property is ever sold, then sale proceeds must be allocated according to Medicaid's life estate/remainder tables at IHCPPM 2605.25.10.10.

C. Tax Refunds

For some time, it has been permissible to gift a federal tax refund without penalty but this law was not set forth in the program policy manual. On May 1, 2020, a new section was added to IHCPPM at 2630.70.00 and states as follows:

> Federal tax refunds received after December 31, 2009 are disregarded as a resource for a period of 12 months after the month of receipt for all federal means-tested programs including Medicaid. The resource exclusion lasts for 12 months If properly transferred within the 12 month protected period, transfer of the federal tax refund would be allowable and would not incur a transfer penalty for the member.

This exemption can be used to reduce the length of a transfer penalty when a client has received a tax refund during the last twelve (12) months. When liquidating resources in an attempt to qualify for Medicaid, an applicant may want to consider withholding more than necessary from their distribution in an effort to generate a larger tax refund, which could ultimately be used for future care as an exempt resource (for 12 months) or could be gifted.

VI. Fixing Problem Transfers

If the applicant has made a transfer that does not qualify under one of the exceptions, and if the applicant does not have other means to cover the cost of care during the transfer penalty, then it may be necessary to look at other options to obtain Medicaid eligibility.

A. Partial Return of Gifts

One option to cure a problem transfer is to have the property returned in whole or in part. IHCPPM 2640.10.35.15 provides as follows:

> If the transferred property is returned in its entirety, no penalty can be established. If a penalty has already been established, and then the property is returned to the individual, this transaction nullifies the penalty. It has the effect of restoring ownership of the property to the individual back to the month of the transfer. It does not necessarily restore full Medicaid coverage to the individual. The worker must redetermine Medicaid for the months in question by considering the value of the property. When only a portion of the property or its equivalent value is returned, the penalty period is to be reduced proportionately.

Notice that FSSA's position is that a returned gift has the effect of restoring ownership of the property to the individual back to the month of the transfer. This can have a major impact on the start date of a transfer penalty if the applicant would now be ineligible for Medicaid because of the returned funds.

Some elder law attorneys have tested whether returning gifts by paying for the services of the applicant (such as paying the nursing home bill directly from gifted funds) will serve as a partial return of a gift. Medicaid may dispute that this is, in fact, a return of gift. The safer approach when advising clients is to advise the gift recipient to return the funds first to the potential Medicaid applicant and then have the Medicaid applicant pay any expenses. A simple statement in the memo line of a check such as "return of gift" should suffice.

B. Hardship Exception

When a transfer penalty has been assessed, a "hardship exemption" can be granted in certain circumstances. 405 IAC 2-3-24 provides as follows:

> (e) In order to qualify for a hardship exception, the recipient shall supply written documentation proving that the application of transfer of asset rules will deprive the applicant of:
>
> (1) medical care such that the applicant's health would be endangered; or
>
> (2) food, clothing, shelter, or other necessities of life.
>
> (f) An undue hardship shall not exist when:
>
> (1) the imposition of the transfer of assets provisions:
>
> (A) merely cause the applicant inconvenience; or
>
> (B) such imposition might restrict the applicant's lifestyle but not put the applicant at risk of serious deprivation;
>
> (2) an individual is required to the sell an asset in an arms length transaction, which would result in a sale of the asset that is less than the current fair market value;
>
> (3) the undoing of a transfer causes:
>
> (A) adverse tax consequences; or
>
> (B) penalties, interest, or other contract damages; however where such penalties, interest, and contract damages are incurred in a contract between members of the same family (including step- and half- family members) the penalties, interest, and damages shall be considered transfers for inadequate consideration;
>
> (4) applicant claims that:
>
> (A) imposition of the transfer penalty will result in the dissolution of a marriage; or
>
> (B) the only way to avoid the transfer penalty is to dissolve the marriage;
>
> (5) the undoing of a transfer will cause hardship to an individual who is not the applicant.

> This list shall not be exclusive, and the decision to deny an undue hardship exception shall not be limited to situations described in this subsection.

Proving that an undue hardship exists is the burden of the applicant but with proper advocacy, a request can be granted. One element of proof appears to be that the nursing home will discharge the applicant for failure to pay as a result of the transfer penalty. It would be wise to obtain a letter from the facility that the resident will be discharged for failure to pay if the transfer penalty is upheld. It can also be useful to show that there was an unsuccessful attempt to get back gifted assets.

Another aspect of applying for an undue hardship is that the Medicaid recipient must accept the transfer penalty and agree not to file an appeal. 405 IAC 2-3-24(b) states:

> (b) An applicant may file for a hardship exception only if the applicant chooses not to file for an administrative appeal on the merits of their determination. By filing a request for a hardship exception, an applicant:
>
> > (1) admits that a transfer for less than adequate consideration was made and the agency's determination of any penalty was correct;
> >
> > (2) waives the right to file a request for an administrative appeal; and
> >
> > (3) revokes any previously filed administrative appeal.
> >
> > If an applicant simultaneously files an administrative appeal and a hardship exception, the request for the hardship exception will be denied and forwarded to the administrative law judge for consideration.

One will need to decide if they want to accept the transfer penalty determination and waive their right to appeal. The risk of losing the undue hardship exemption request makes this a difficult decision.

VII. Covid-19 and Transfers

Restrictions in place resulting from the pandemic have made planning involving transfers a little different in 2020. HR 6201, Families First Coronavirus Response Act has placed certain conditions on the States if they elect to receive increased Medicaid funding. The Act states, in relevant part, that a State must:

> "provide [that] an individual who is enrolled for benefits under such [Medicaid] plan (or waiver) as of the date of enactment of this section or enrolls in benefits under such plan (or waiver) during the period beginning on such date of enactment and ending on the last day of the month in which the emergency period…ends shall be treated as eligible for such benefits through the end of the month in which such emergency period ends unless the individual requests a voluntary termination of eligibility or the individual ceases to be a resident of the State."
>
> HR 6201 sec. 6008

FSSA has taken the position that it cannot take any adverse action against a Medicaid recipient while these restrictions are in place.

While Medicaid continues to impose transfer penalties on new applications, a transfer penalty cannot be assessed against a transfer of assets of a current applicant until these restrictions have been lifted. It is unclear at this point how this change will affect a gift that is still running when the restrictions are lifted. Will Medicaid have the systems in place to track gifts that were made? Will they attempt to impose the entire penalty prospectively after the pandemic is lifted? Will Medicaid pursue benefit recovery against the applicant who has made a gift? To date, these are unanswered questions.

Since Medicaid is not authorized to take an adverse action with respect to a transfer penalty pursuant to IHCPPM 2232.00.00 and 2236.00.00, it seems clear that no action could be taken to impose a transfer penalty retroactively. However, when advising clients about the consequences of a gift made by a Medicaid recipient during the pandemic, elder law attorneys may want to recommend that the gift recipient hold the funds at least until some of the unanswered questions are resolved.

When properly advised of the risks, current Medicaid recipients may be able to avoid a transfer of assets penalty, at least temporarily. A Medicaid recipient may want to consider making gifts to either remain under resources or as part of a strategic plan to protect assets.

Another change that results from COVID-19 relief is that a Medicaid applicant can gift the 2020 federal stimulus ($1,200.00) without penalty. This exemption should also apply to any future stimulus payments.

Exhibit A

FINANCIAL POWER OF ATTORNEY

I, Blake C. Reed, presently of Bartholomew County, State of Indiana, do hereby appoint my wife, Elizabeth C. Reed, as my attorney-in-fact. If my wife, Elizabeth C. Reed, is unable to serve as my attorney-in-fact, then I appoint my daughter, Courtland E. Reed, as my attorney-in-fact.

My said attorney-in-fact, shall have all of the powers, the legal right, and general authority to perform all of the acts for me on my behalf with respect to all real property transactions; tangible personal property transactions; bond, share, and commodity transactions; retirement plans; banking transactions; business operating transactions; insurance transactions; beneficiary transactions; transfer on death or payable on death transfers; fiduciary transactions; claims and litigation; family maintenance; benefits for military service; records, reports, and statements, including the power to execute on my behalf any power of attorney required by any taxing authority to allow my attorney-in-fact to act on my behalf relating to any tax return or issue; estate transactions; delegating authority; and all other matters as specifically described and referred to in Indiana Code 30-5-5-2 through and including Indiana Code 30-5-5-8 and Indiana Code 30-5-5-10 through and including Indiana Code 30-5-5-15 and Indiana Code 30-5-5-18 and Indiana Code 30-5-5-19, but not including any authority or powers over my health care as described in Indiana Code 30-5-5-16 and Indiana Code 30-5-5-17.

Additionally, my said attorney-in-fact, shall also have all of the following powers and legal rights to perform any or all of the following acts for me and on my behalf:

1. To execute any power of attorney or request on my behalf that is required by any taxing authority, governmental entity, or any other entity that appoints my said attorney-in-fact as my agent to have authority to act on my behalf on any matter, except as to any limitation of authority as may be set forth in this power of attorney. This authority shall include, but not be limited to, executing any Power of Attorney and Declaration of Representative required by the Internal Revenue Service (including Form 2848), any Tax Information Authorization required by the Internal Revenue Service (including Form 8821), any Power of Attorney required by the Indiana Department of Revenue (including Form POA-1), any Appointment of Individual As Claimant's Representative required by the Department of Veteran's Affairs (including VA Form 21-22a), any Authorized Representative form required by the Indiana Family and Social Services Administration (including State Form 53460), and any Power of Attorney required by the U. S. Department of Agriculture (including Form FSA-211).

2. To execute any consent or authorization on my behalf to release and disclose my individually identifiable health information and my medical records, including any information governed by the Health Insurance Portability and Accountability Act of

1996, as the same may be amended, to my attorney-in-fact or to any other person or persons as designated by my attorney-in-fact.

3. To gain access to and exercise control over my digital assets, to access my user accounts with online service providers, to access, retrieve, copy, or store electronic communications sent or received by me, and to perform any acts in connection with the use of electronic records pertaining to my affairs.

4. To apply for and to receive any governmental benefits on my behalf, including but not limited to Medicare, Medicaid, and/or Veteran's benefits, to act on my behalf on any matter relating to any governmental benefit, including but not limited to choosing any provider of Part D Medicare benefits, and to establish any Qualified Income Trust, also known as a "Miller Trust," and to serve as trustee of such trust or to appoint the trustee of such trust.

5. To gift any or all of my property to my spouse, without any limitations, even if my attorney-in-fact is my spouse and acting on my behalf in this regard would be self-dealing and a conflict of interest.

6. To gift any or all of my property to my child and/or to any of my children, without any limitations, except as otherwise provided in this paragraph, only as approved by all of my living children, and only as recommended by an attorney in conjunction with a plan to make me eligible to receive Medicaid or other governmental benefits, and if my attorney-in-fact is the recipient of any such gift or gifts, then there shall be no limitations of any kind as to the amount or value of any gift to my attorney-in-fact even though acting on my behalf in this regard would be self-dealing and a conflict of interest, except as otherwise provided in this paragraph.

7. To loan money to my attorney-in-fact, only as approved by all of my living children, and only as recommended by an attorney in conjunction with a plan to make me eligible to receive Medicaid or other governmental benefits, without any limitations, except as otherwise provided herein, even though acting on my behalf in this regard would be self-dealing and a conflict of interest.

8. To purchase any annuity on my behalf and to designate the beneficiary or beneficiaries of any annuity owned by me, including designating my attorney-in-fact as a beneficiary, only as approved by my spouse or if my spouse is deceased or incompetent, then as approved by all of my living children, and only as recommended by an attorney in conjunction with a plan to make me eligible to receive Medicaid or other governmental benefits.

9. To change and/or designate the beneficiary or the beneficiaries of any of my property, including but not limited to any life insurance policy, annuity, individual retirement account, 401k account, 403b account, retirement savings account plan, any other retirement account, real estate, tangible personal property, stock, account, and

deposit, that I own or have any interest in, including designating my attorney-in-fact as a beneficiary, even though acting on my behalf in this regard would be self-dealing and a conflict of interest, only as approved by my spouse or if my spouse is deceased or incompetent, then as approved by all of my living children.

10. To sell any of my property or any interest therein to my attorney-in-fact, only as approved by all of my living children, even though acting on my behalf in this regard would be self-dealing and a conflict of interest.

11. To pay my attorney-in-fact and any member of my family or any other person for all caregiving and other services provided to me, and to enter into any agreement on my behalf to provide for my future care and to pay compensation for such care, including any agreement with my attorney-in-fact, even though acting on my behalf in this regard would be self-dealing and a conflict of interest.

12. To reasonably compensate my health care representative for all services provided to me or for me and for all time spent attending to my needs and to reimburse my health care representative for all expenses that are incurred attending to my needs, including reimbursement for mileage for all travel attending to my needs.

13. To enter into any agreement on my behalf waiving and relinquishing any of my rights against the estate or property of my spouse, including but not limited to any of my rights to a survivor's allowance and to elect to take against my spouse's Last Will and Testament or trust, even though my spouse may be my attorney-in-fact and acting on my behalf in this regard would constitute self-dealing and a conflict of interest.

Any person appointed as my attorney-in-fact pursuant to this power of attorney shall conclusively be "unable to serve as my attorney-in-fact" as that phrase is used in the first paragraph of this document upon the happening of any of the following events:

1. The person is deceased;
2. The person resigns as my attorney-in-fact;
3. The person is adjudged incapacitated by a court;
4. The person cannot be located upon reasonable inquiry;
5. The person, if designated as my spouse in this power of attorney, legally is no longer my spouse;
6. Any physician who is familiar with the condition of such person certifies in writing that to the best of such physician's knowledge such person is unable to rationally and/or reasonably perform any of the acts that could be performed by such person pursuant to this power of attorney.

My attorney-in-fact is entitled to reimbursement of all reasonable expenses advanced on my behalf and to a reasonable fee for services rendered. My attorney-in-

fact shall, not later than twelve (12) months after the date each service is rendered, notify me in writing of the amount claimed as compensation for rendering such service.

My attorney-in-fact shall keep complete records of all transactions entered into by my attorney-in-fact on my behalf. My attorney-in-fact shall render an accounting if I request an accounting, if requested by a guardian appointed for me, or if requested by the personal representative of my estate after my death.

My attorney-in-fact shall comply with the applicable requirements of Indiana law as set forth in Indiana Code 30-5-1-1 through Indiana Code 30-5-10-4, and as the same may hereafter be amended or recodified.

I hereby reserve the right to revoke this power of attorney; however, **this Power of Attorney is durable and shall continue in full force and effect until I have signed a written revocation, and my attorney-in-fact has actual knowledge of this revocation.**

In the event any protective proceedings for my property are hereafter commenced, I hereby request that the individual then acting as my attorney-in-fact, pursuant to the foregoing provisions of the Financial Power of Attorney, be appointed as guardian of my property to have authority over my property.

Any power of attorney previously executed by me giving the power to anyone to act on my behalf with respect to any of my property or financial affairs is hereby revoked in its entirety.

Any reproduced copy of this signed original power may be made and delivered by my attorney-in-fact, and may be relied upon by anyone to the same extent as though the copy were an originally signed document. Anyone who acts in reliance upon any representation or certificate of my attorney-in-fact, or upon reproduced copy of this power of attorney, shall not be liable to me for permitting my attorney-in-fact to perform any act pursuant to this power of attorney.

Dated this 30th day of October, 2020.

_____

Blake C. Reed

STATE OF INDIANA)
) SS:
COUNTY OF BARTHOLOMEW)

Before me, a Notary Public in and for said County and State personally appeared Blake C. Reed, who acknowledged the execution of the foregoing Power of Attorney.

WITNESS my hand and Notarial Seal, this 30th day of October, 2020.

_____
John Doe, Notary Public

_____
Olivia M. Hunter, Witness

STATE OF INDIANA)
) SS:
COUNTY OF BARTHOLOMEW)

Before me, a Notary Public in and for said County and State personally appeared Olivia M. Hunter, who witnessed the execution of the foregoing Power of Attorney.

WITNESS my hand and Notarial Seal, this 30th day of October, 2020.

_____
John Doe, Notary Public

I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.
John Doe

This instrument was prepared by John Doe, Attorney at Law, Voelz, Reed, & Mount, LLC, 2751 Brentwood Drive, Columbus, Indiana 47203.

Exhibit B

Voelz, Reed, & Mount, LLC

Blake C. Reed
Attorney at Law

Lora R. Mount
Attorney at Law

Michelle L. Findley
Attorney at Law

Fax 812-378-9516

2751 Brentwood Drive
Columbus, IN 47203

812-372-1303

Legal Assistants

Dianna L. Freese
Liza M. Spencer
Katrina M. Alvey
Olivia M. Hunter
Kristen M. Shipley

RISKS AND DISADVANTAGES OF GIFTING YOUR PROPERTY

We are often asked to counsel people about whether their home or other property should be gifted during their lifetime. Before you or your attorney-in-fact decide to make gifts of any of your assets, you must understand the risks and disadvantages.

Some of these risks and disadvantages are as follows:

1. Many folks consider making gifts in order to reduce their assets so that they will protect these assets if they later need Medicaid benefits to pay for their care in their home, an assisted living facility, or a nursing home, and/or to pay prescription drug expenses. Making gifts for this reason can be a huge mistake for many reasons. You should not rely on Medicaid benefits to pay the costs of your future health care expenses. The rules to qualify for Medicaid benefits are likely to change, and the nature and extent of Medicaid benefits are likely to change as well. Historically, there have been periods of time that there have been long waiting lists for folks to receive Medicaid Waiver Services to pay for care while they are at home. Also, most assisted living facilities do not accept Medicaid benefits. In order for Medicaid benefits to pay for care in a nursing home, the nursing home must accept Medicaid benefits as payment, and you must be in a "Medicaid bed." It may be in your best interest to be in a particular assisted living facility or nursing home that does not accept Medicaid or that does not have a "Medicaid bed" available, so it makes sense to keep your assets and not give them away so that your assets will be available to pay for your care.

2. When you gift your property you lose control of your property. The donee (person who receives the gift) becomes the owner of the property. Decisions regarding the property are in the sole control of the donee. This means that the

donee can sell the property, use the property as collateral for a loan, gift the property to someone else, not allow the donor to receive the income from the property, not allow the donor to reside at the property, etc.

3. After you have given your property away, you cannot get it back to pay your living expenses, bills, or health care expenses, unless the donee would agree to give the property back to you or to use the property for your benefit.

4. If the donee becomes involved in a dissolution of marriage proceeding, then the gifted property is a part of the donee's marital estate to be divided by a court. The donee could be required to sell the property, or the donee could lose partial or complete ownership of the property as a part of the division of property ordered by a court.

5. The property could be subject to a tax lien or tax levee if the donee fails to pay income taxes or other taxes.

6. The donee could use the property as collateral for a loan, and if the donee fails to make payments, then the property could be lost to the creditor.

7. The donee may fail to have enough liability insurance. The donee could have an automobile accident or be involved in a negligent or intentional act that could give rise to liability. To the extent the liability is not covered by insurance, the gifted property could be subject to the claims of the donee's creditors.

8. If the donee dies, then the property is subject to being distributed as a part of the donee's estate. This distribution will result in other people owning and being in control of the property.

9. Your gift may destroy your estate plan. If you have several children and if you decide to gift your property to one (1) of your children or only some of them, then there is no guarantee that the donee(s) will share the gift with your other children so that your property is distributed equally to all of your children.

10. The donee receives the same tax basis for the property that the donor had. For example, if the donor made a gift of real estate and if the donor purchased the real estate many years ago for a small amount of money, then the purchase price plus the expenses paid for capital improvements such as building a house, room addition, or garage becomes the donee's basis for capital gain taxes that are assessed when the property is sold. For example, if real estate was purchased in 1950 for $15,000.00 and if this real estate was gifted, then the donee has a tax basis of

$15,000.00 plus improvements. When the donee sells the property for $100,000.00, this results in a capital gain of $85,000.00. Capital gain taxes will apply to long term capital gains, unless the taxpayer has a small amount of taxable income. There is a $250,000.00 exclusion of capital gain ($500,000.00 per couple) that is not taxed involving the sale of someone's personal residence. If the home is given away, then this exclusion could be lost when the property is later sold by the donee(s). Also, if you die owning real estate, then the basis of the property is increased to the fair market value of the property as of the date of your death. This will result in having no capital gain tax or less capital gain tax when the property is later sold.

11. If you gift more than the annual gift tax exclusion amount to any one person who is not your spouse, then you are required to file a Federal Gift Tax Return to report the gift to the Internal Revenue Service. Gifts in excess of the annual exclusion amount will reduce your credit for Federal estate taxes after you die. The 2020 annual exclusion amount is $15,000.00 per person each calendar year. There is also a lifetime exemption from gift taxation which is a total of $11,580,000.00 during 2020. Federal estate taxes are only assessed against very large estates, and this tax will not affect most people. For example, if you die in 2020, then the credit for Federal estate taxes allows $11,580,000 to be distributed Federal estate tax free to your heirs. Consequently, for most folks who make gifts in excess of the annual exclusion amount, this only requires the filing of a Federal gift tax return, but does not result in Federal gift tax or any Federal estate tax consequences.

12. Gifts that exceed a <u>total</u> of $1,200.00 during a calendar year can cause periods of ineligibility to receive Medicaid benefits. There is a requirement to report all gifts made by a Medicaid applicant within five (5) years prior to the date of the Medicaid application, unless the gift was made to the person's spouse. The total gift amounts during the five (5) year lookback are divided by the Medicaid penalty divisor, which is $6,681 for Medicaid applications filed on or after July 1, 2020, to determine the number of months of disqualification from receiving Medicaid as a result of the gift.

For example, if you give a total of $100,000.00 of money or value of property to your children (or to anyone other than your spouse) that exceed a total of $1,200.00 per year within five (5) years before applying for Medicaid, then this gift will make you ineligible to receive Medicaid for 14.97 months <u>after you are in a nursing home and otherwise eligible to receive Medicaid benefits pursuant to an approved application for Medicaid.</u> Since you would have very meager assets in order to qualify for Medicaid, then who will pay for your care during the time you are not eligible for Medicaid? There may be much better ways to protect your assets and qualify for Medicaid, and you should consult with us <u>before</u> you decide to make

any gifts to anyone other than your spouse (that total more than $1,200 during a calendar year).

There can be other risks and problems involved in gifting your money and property. You need to decide whether the benefits outweigh the risks and disadvantages before you decide to gift any of your property or assets.

In conclusion, we generally recommend that our clients not give away their home or other assets so that our client's property is always available to pay for the best care. However, we do recommend that our clients consider whether they should sign a financial power of attorney that permits gifting and certain other transactions that could be accomplished by their spouse, child, or other trustworthy person in conjunction with a Medicaid qualification plan that we, as your elder law attorneys, could recommend as being in your best interests if you later have a serious health failure.

Blake C. Reed
Attorney at Law

Lora R. Mount
Attorney at Law

Michelle L. Findley
Attorney at Law

Exhibit C

AMENDMENT TO PRE-NEED FUNERAL CONTRACT

The undersigned, _____(Medicaid Recipient) and _____ Funeral Home & Crematory, having entered into a certain pre-need funeral contract dated _____, 20___, hereby amend said contract as follows:

Any remaining amounts after delivery of all services and merchandise to _____ under the contract, shall be paid to the State of Indiana as reimbursement for Medicaid assistance provided to _____, pursuant to Indiana Code Section 12-15-2-17.

The aforesaid contract is hereby retroactively amended to _____, 20___.

Dated this ____ day of _____, 20___.

_____
[Medicaid Applicant]

_____
_____ Home & Crematory,
_____, Columbus, IN 47201

Medicaid Transfers of Assets

PRESENTED BY: BLAKE C. REED, ATTORNEY AT LAW

VOELZ, REED, & MOUNT, LLC

What is a Transfer?

- Did a transfer occur within the lookback period?
  - Selling or assigning for less than fair market value
  - Converting an asset to joint ownership
  - Forgoing the right to receive an asset (disclaiming or failing to elect a statutory share)
  - Relinquishing a right to liquidate an asset (converting to irrevocable)
  - Others including promissory notes, annuities, contract sales and funeral trusts

What is a Transfer?

- Does a penalty result or is there an exception
  - Penalties only affect qualification for nursing home or waiver services
  - Examples of transfers not subject to penalty
    - Spouse
    - Disabled Child
    - Home in certain circumstances
    - Household Goods and Personal Effects
    - Certain Trusts
    - De Minimis gifts
    - Tax Refunds
    - Transfer exclusively for a purpose other than Medicaid

What is a Transfer?

- Unexpected Transfer Penalties
  - Annuities
    - Requirement to name the State as beneficiary
  - Promissory Notes
    - Must be actuarially sound
    - Provide for payments to be made in equal amounts during the loan with no deferral or balloon payments
    - Must prohibit the cancellation of the balance upon the death of the lender
  - Funeral Trusts
    - Excess benefits clause

What is a Transfer?

- Unexpected Transfer Penalties (cont.)
  - Contract Sales
    - Must be paid back within the applicant's actuarial life expectancy
  - Waiving the right to receive an estate distribution
    - Failing to take a statutory share
    - "other equivalent arrangements"
    - Impact of non-probate transfers

How to Calculate the Penalty

- Must first determine uncompensated value of the transfer
- To determine length of the penalty, the amount of uncompensated transfer is divided by the applicable penalty divisor (6,681 effective July 1, 2020)
  - All transfers within the lookback are added together
  - Partial month penalties
  - No maximum penalty period
  - Gifts by either spouse count

How to Calculate the Penalty

- The penalty period only begins to run when the client is “otherwise eligible for Medicaid” based on an approved application for care
  - Must be receiving institutional level of care (either nursing home or waiver services)
  - Must be under resource standard and income standard (Miller Trust funded, if applicable)
  - Application filed and approved

How to Calculate the Penalty

- Example
  - Peyton enters the nursing home on October 15, 2020 and has made gifts within the lookback period of $50,000.00 and no exception applies.
  - Upon reducing his other assets below the resource limit and being approved for Medicaid, a transfer penalty of 7.48 months will be imposed.
    - Still approved for Medicaid and still receiving other benefits
    - Penalty will run even if he goes home or withdraws from Medicaid
  - How will Peyton pay for his care during the penalty?

How to Calculate the Penalty

- Example 2
  - Suppose Peyton enters the nursing home on October 15, 2020 and has made no prior gifts within the lookback period and has $50,000 of remaining assets
  - Cost of care is $7,000 per month and his income is $2,000
  - If Peyton gifts $26,724 to his son, a four-month penalty will result
  - To reduce his resources and to pay for cost of care, Peyton can loan the balance of his funds in exchange for a Medicaid-compliant Promissory Note that is repaid to him in four equal, monthly installments.

Practical Use of Transfers in Planning

- Using exempt resources to meet care needs during a penalty
  - Cover the cost of care during a transfer penalty using a Medicaid-compliant annuity or promissory note
  - After determining the shortfall between cost of care and the applicant's monthly income, the payments under the note or annuity can be used to cover the difference
  - Let the penalty run while the client has other means to cover some of the cost of care (additional examples: long-term care insurance payments, income from rental property)

Practical Use of Transfers in Planning

- 5-year planning
  - Outright gift(s) and wait
  - Asset protection trusts and LLCs
  - Life Estates

Advising Clients About Gifting

- Powers of Attorney
  - Waiver of Conflicts of interest
  - Immediately effective?
  - What authority is included
- Guardianships
  - Seeking court approval for Medicaid planning
- Risks and Disadvantages of Gifting

Fixing Problem Transfers

- Partial Return of Gift
  - Has effect of restoring ownership back to the month of the transfer
  - Reducing the penalty by paying expenses

- Hardship Exception
  - When to apply and what to allege
  - Effect on appeal rights

COVID-19 and Transfers

- Restrictions on taking adverse action
  - Effect on gifting post-eligibility
  - What are consequences of gifts made during pandemic?

- Gift of Federal Stimulus

Voelz, Reed, & Mount, LLC

knowledge • experience • solutions

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www.voelzlaw.com

Estate Planning

Disability Planning

Estate & Trust Settlement

Elder Law

Long Term Care Asset Protection Planning

Medicaid Qualification Planning

VA Aid & Attendance Pension Benefits Planning

Section Seventeen

Supported Decision-Making & Other Guardianship Alternatives

Nicholas R. Parker
Indiana Legal Services, Inc.
Indianapolis, Indiana

Section Seventeen

Supported Decision-Making & Other Guardianship Alternatives……. Nicholas R. Parker

PowerPoint Presentation

Supported Decision-Making

& Other Guardianship Alternatives

NICK PARKER – INDIANA LEGAL SERVICES

Objectives of this Presentation

- Identify less-restrictive alternatives to guardianship
- Specifically learn about supported decision-making agreements (SDMA) as a guardianship alternative
- Determine appropriate level of support for a person in need

The following slides are presented as legal information on alternatives to guardianship, including a law passed in Indiana in 2019. It should not be relied upon as a basis for any legal advice. Please consult an attorney for all legal questions about analysis of the law.

The term “protected person” is used throughout the presentation as a catch-all term for an individual with an intellectual/developmental disability or a person who otherwise may need a guardianship or support.

If subjected to a guardianship, a protected person is deemed an “incapacitated adult” or “ward.” These terms are not preferred by the presenter.

Guardianship – A Legal Way to Make Decisions

- Indiana Code allows for a guardian of the person and estate
  - Person = medical decisions, daily decisions, planning
  - Estate = financial decisions

- Together, these forms of guardianship allow for one person to supplant the decisions of another person in most areas of life
  - Includes marriage, dating, social interactions, how to spend money, etc.

Why Alternatives?

- Guardianship is appropriate in certain situations
- However, for a large amount of people, a guardianship provides ***too much power to another person*** to make ***too many decisions*** on their behalf
- Drawing "the line" at the least-restrictive supports will help protect someone's ability to make decisions if they can

The Jamie Beck Case

- Jamie was found by APS wandering the streets near Richmond. Her father had died and she had no informal or formal caretaker.
- A guardianship was set up for Jamie.

The Jamie Beck Case

- It was quickly discovered that Jamie did not actually rely upon her guardian as much as originally assumed.
- She obtained employment by herself, navigated herself on public transportation, and had independent goals for herself.
- Jamie's guardian was an advocate for guardianship alternatives, so he helped explore other options for Jamie.

The Jamie Beck Case

- Jamie became the first person in Indiana to have a guardianship "limited" to a less-restrictive alternative, Supported Decision-Making.
- What made this case unique is that her guardianship was "lowered" to another form of support that was less-restrictive.

- Jamie had a guardian willing to discuss alternatives… this is not the case for most protected people in Indiana.

What is a less-restrictive alternative?

See I.C. 29-3-1-7.8(b)

Supported Decision-Making Agreement (SDMA)

Power of Attorney (POA)

Healthcare Power of Attorney (HCPOA)

Healthcare Representative

Rep. Payee (Social Security)

"Appropriate technological assistance"

Not limited to these supports!

Spectrum of Assistance

Least restrictive **Most restrictive**

What is a Supported Decision-Making Agreement?

- SDMAs are a specific type of document that serves as a life-planning contract for a protected person.
- Written in language the person understands. Not limited in scope by much.
- The idea is that the SDMA can be created outside of a court and stop the need for declaring someone incapacitated.
  - By not including the court in the process, it will be easier to remove/revoke/change.
  - An "incapacity declaration" can limit someone's life choices.

Key Points on SDM

See I.C. 29-3-14-1.

SDMA should work to help a protected person "make, communicate, and effectuate life decisions."

The directives in the SDMA should work "without impeding the self-determination of the adult."

Key Points on SDM

See I.C. 29-3-14-2 and 29-3-14-3.

There can be as many supporters as the protected person wants, as long as the supporter is 18 years old and has voluntarily agreed to assist.

Key Points on SDM

See I.C. 29-3-14-4(a)(1)-(2).

Protected person must enter into the agreement voluntarily (without coercion or undue influence).

Must understand the nature and effect of agreement.

Key Points on SDM

See I.C. 29-3-14-4(a)(c)

The existence of an SDMA cannot be used as evidence that the person is "incapacitated" in the future (if someone tries to get guardianship).

Key Points on SDM

See I.C. 29-3-14-4(b)

The protected person can revoke it at any time, even if they don't have a plan in place to "independently manage" their affairs.

Structure of an SDMA

See I.C. 29-3-1-7 *et al.*

1. Declarations Page of Protected Person
2. Actual Support Contract
3. Notarized Signature of Protected Person
4. Consent and Signature of Each Supporter

Declaration of Protected Person

See I.C. 29-3-1-7 *et al.*

- At least 18 years old
- No coercion/undue influence
- Understand nature and effect of document
- Revocation must be in writing
- Supporters not generally liable for helping
- Retaining authority to make decisions on my own
- Presumption of validity

What is actually IN the document?

… It depends on the person!

ILS uses the following categories of support:

- Healthcare/Medical
- Housing/Life Skills
- Interpersonal
- Finances/Money
- Self-Care/Daily Decisions
- Other Decisions

Ideas for the SDMA

- Talking to Doctors
- Talking to Other Medical
- Housing / Landlords
- Education
- Job / Career
- Budget and Planning
- Family Events
- Communication
- Plans for Other Support (Will / Estate Planning)
- Knowing Accounts & Access to Accounts

What can (likely) NOT be in the SDMA?

Probably cannot include anything that bypasses a power of the court, especially in probate matters.

Nothing criminal in nature or otherwise illegal.

There is not much case law on what can and cannot be in the SDMA.

Consent and Signature of Supporters

See I.C. 29-3-1-7 *et al.*

- Unlike a POA, the supporter must actually sign a consent
- If the supporter doesn't act within the scope of the document, they could be held liable in court
- If supporter does not sign, the document is NOT complete

Difference between POA and SDMA

Power of Attorney

- 3rd party is given decision-making power over a certain part of the protected person's life (i.e. healthcare or finances).
- The amount of power is pretty broad.
- No liability or roles discussed specifically for a team of supporters.
- Not great for "family feuds."

Supported Decision-Making

- 3rd party helps in all decision-making situations ONLY IF the protected party agrees to the help being granted.
- The authority granted is very specific.
- Protected person maintains all final decision-making power. It can be removed very easily.
- Accommodates a large amount of supporters.

SUPPLANT vs. SUPPORT

SDMA & Guardianship

See I.C. 29-3-9-6(c)

Biennial (once every two year) guardianship reports to the court must address whether a guardianship is still appropriate, or whether a less-restrictive alternative is available.

SDMA & Guardianship

Intention – people who are under guardianship that should not be can have it "moved" to a different kind of support.

Guardianship Petitions

- A petition for guardianship must now show:
  - Less-restrictive alternatives that were considered or implemented;
  - The reasons why a less-restrictive alternative was not considered or implemented; and
  - The reason a less-restrictive alternative is insufficient to meet the needs of the protected person

- *See I.C. 29-3-5-1(a)(11) (2019).*

Deciding the Level of Support

T.H.I.N.K.

- Talk to the person!
- Have all options on the table.
- Incapacity declaration?
- Never assume
- Know the process involved

Talk to the Protected Person

- People-first language and mentality
- Include only people they are most comfortable with
- Speak in terms that place them at the center of the decision
  - Example – "would you trust this person to help you with financial planning?"
  - Never speak "down" to someone
- Learn about what is most important to the person and find a way to incorporate that into the final decision – no matter what support is decided upon

Have All Options on the Table

- Don't push one option over another
- Be clear that guardianship requires going to court
- Also be clear that some options might not be available to them
- The best option might be no option at all…
- If someone is already helping in a particular area, acknowledge it
  - Example: someone is already serving as Representative Payee

Incapacity – A Loaded Conversation

- Get permission to speak to the person's doctor about capacity
- Only medical professionals and judges can declare someone incapacitated
  - Everything else is just an opinion… including lawyers
- If someone has been declared incapacitated by a doctor, it might affect their ability to enter into another document
  - POA and SDMA both have a standard that requires some capacity
  - To allow someone to enter into a POA or SDMA without capacity opens it up to being attacked in the probate court

Never Assume!

- Talk to the person! Find the answers!
- Many people assume things about the elderly in particular
  - Example: elderly couple makes thousands of masks on Etsy to help with COVID-19
  - Don't assume that someone might not want to start a business!

Know the Process

- SDMA and Power of Attorney can be drafted pretty quickly

- Guardianship requires going to court
  - This can be a long process, but is especially long with COVID-19
  - Do not assume an "emergency" guardianship will go faster
  - Do not assume a guardianship will go as quickly as you think it will
  - Be prepared for people to "challenge" the guardianship

The Future of Less-Restrictive Alternatives

- More authority for court to mandate less-restrictive alternatives to be considered
- More widespread use and acceptance of SDMA documents

Questions/Comments?

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(317) 829-1919

Section Eighteen

Unfair, Abusive, Exploitative and Deceptive Practices Toward Senior Consumers

Tamara L. Weaver
Deputy Attorney General
Indiana Attorney General's Office
Indianapolis, Indiana

Section Eighteen

Unfair, Abusive, Exploitative and Deceptive Practices Toward Senior Consumers

Tamara Weaver

Deputy Attorney General

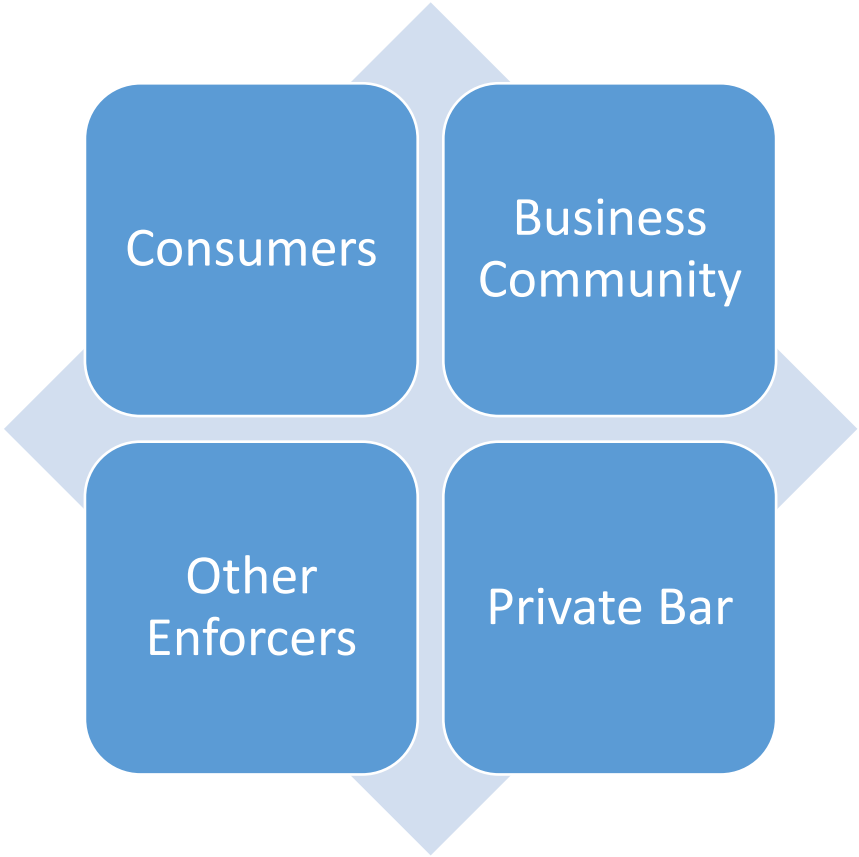
Consumer Protection Division

Overview

- Role and Authority of the Attorney General
- Indiana Deceptive Consumer Sales Act
- Indiana Senior Consumer Protection Act
- Practicalities
- Investigations and Enforcement
  - Civil Investigative Demands
  - Remedies

Role of the Attorney General in Consumer Protection

Attorneys General bear unique responsibilities in protecting consumers from scams and misrepresentations



Consumer Protection Division

1. Consumer Mediation
2. Licensing
3. Consumer Litigation
4. Homeowner Protection
5. Data Privacy

   1. Deceptive, Abusive, Unfair
   2. Home Improvement Fraud
   3. Senior Consumer Protection
   4. Anti-trust
   5. Nonprofits
   6. Charitable Trusts
   7. Institutional Funds

Consumer Protection Division

IndianaConsumer.com

- Charities & Donors
- Consumer Protection
- Do Not Call
- Do Not Fax
- Robocalls
- File a Complaint
- Gasoline Prices
- Homeowner Protection
- Identity Theft and Security Breaches
- Licensing
- Non-Profit
- Prescription Medication
- Recalled Products
- Senior Center

Consumer Protection Division

Attorneys general protect citizens from unfair, misleading, and deceptive acts and practices. Learn more at:

www.consumerresources.org

- AUTO
- CHARITIES
- COMMUNICATIONS
- CONSUMER MARKETPLACE
- DO NOT CALL
- EDUCATION
- FINANCES & MONEY
- HEALTHCARE
- HOME
- INTERNET & PRIVACY
- MILITARY/VETERANS
- TRAVEL
- MISCELLANEOUS
- COMMON SCAMS
- AG LAWSUITS & SETTLEMENTS

Consumer Protection Division

IN-CASE.org

Statutes and Caselaw

IC §24-5-0.5

- Indiana Deceptive Consumer Sales Act

IC §24-4.6-6

- Indiana Senior Consumer Protection Act

Deceptive Consumer Sales Act

Abusive

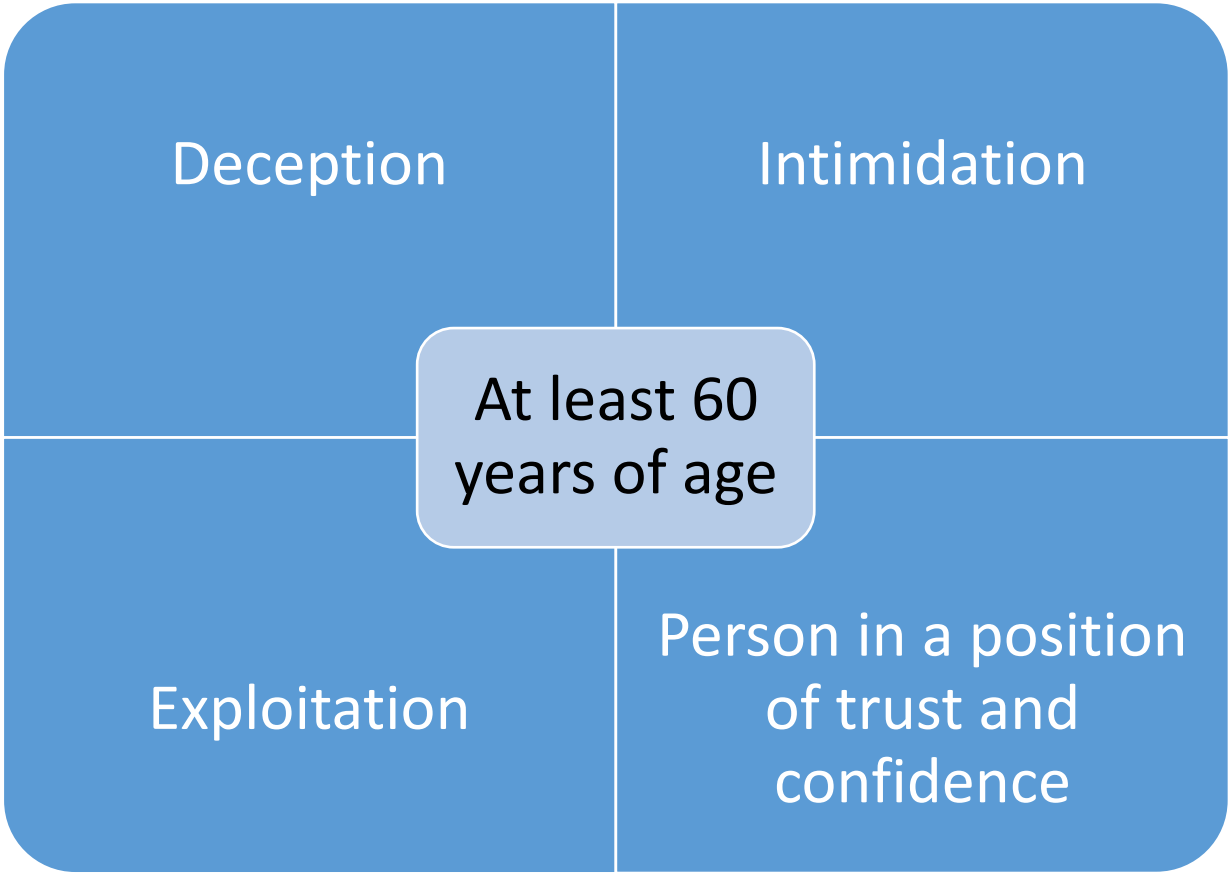
Deceptive

Personal, familial, charitable, agricultural, or household

Unfair

Misrepresentations

Senior Consumer Protection Act



Practicalities of Attorney General Involvement

Complaint

- Online Complaint Form
- Printable Complaint form
- Cannot take complaint over the phone

Intake Process

- Mediator Assigned
- Attorney Review

Investigation?

IndianaConsumer.com

FILE A COMPLAINT

Practicalities of Attorney General Involvement

Consumer Complaint → Letter to Consumer → Letter to Respondent → Consumer Response to Respondent

- A **consumer transaction** must have occurred before our office can investigate.
- If you have documents to support your claim, it is important that you send **copies** of them to us.

- Our office will contact you by **mail** or **email**.
- You may be referred to **another agency**.

Investigations and Enforcement

Triggering activities

Process

Remedies

Investigations and Enforcement

Triggering activities

- Consumer complaint
- Public source
- Enforcer
- Attorney

Investigations and Enforcement

Civil Investigative Demands

IC § 4-6-3-3

Process

If the attorney general has reasonable cause to believe that a person may be in possession, custody, or control of documentary material, or may have knowledge of a fact that is relevant to an investigation conducted to determine if a person is or has been engaged in a violation of…[statutes enforced by the Attorney General]

- Documents
- Interrogatories
- Deposition

Investigations and Enforcement

Remedies

Deceptive Consumer Sales Act

- Injunction
- Damages
- Penalties
- Attorney's Fees

Senior Consumer Protection Act

- Injunction
- Damages
- Penalties
- Attorney's Fees

Contact Info:

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Section Nineteen

How COVID-19 Will Affect the Practice of Elder Law Remote Notarization and Document Signing

Panel

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Section Nineteen

How COVID-19 Will Affect the Practice of Elder Law Remote Notarization and Document Signing…… Mark W. Holwager
Jennifer L. VanderVeen
Kim J. Brand
Claire E. Lewis

Mark W. Holwager

Jennifer L. VanderVeen

PowerPoint Presentation

Kim Brand

WTF! – Data Safety & Security in a Virtually Promiscuous World

This new ransomware is targeting Windows and Linux PCs with a ‘unique” attack.

How COVID-19 Will Affect the Practice of Elder Law

Remote Notarization and Document Signing

Fall, 2020

Mark Welsh Holwager

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Biography

Mark Welsh Holwager
Mark focuses his law practice on long term care funding solutions, estate and trust planning and administration, and real estate matters at Holwager & Holwager, Attorneys at Law, P.C. in Beech Grove, IN where he serves as one of the firm principals, along with his father, William J. Holwager. Mark graduated from the Indiana University McKinney School of Law in Indianapolis in December of 2013 and was sworn-in to the Indiana State Bar and the United States District Court for the Southern District of Indiana in May of 2014. He presently serves as the Chair of the Elder Law Section of the Indiana State Bar Association, and is also a member of the Indianapolis Bar Association.

In 2020, Mark was recognized as an Indiana Super Lawyers Rising Star and in the past has been a member of the Board of Directors for the Indiana Chapter of the National Academy of Elder Law Attorneys (NAELA). Mark lives on Indy's southside with his wife, Laralyn and their son, Edward.

Acknowledgements

To the dedicated activists within the Probate Trust and Real Property Section of the Indiana State Bar Association, your contributions to our statewide legal process, and each other, are invaluable. Special thanks is also appropriate to Jeff Dible for his ever gracious, capable, and ongoing work to improve sound estate planning and probate practices in Indiana. **Thank you!**

In recognition of the wonderful support I receive at home and 'at the office' I further extend my heartfelt appreciation to my wife, Laralyn, my father, Bill, and as always, to J.E.Holwager, The Founder.

DISCLAIMER
This article is not presented as legal advice. While every effort has been made to insure the accuracy of the material presented, the author expressly disclaims any and all responsibility or liability arising out of reliance upon the material presented herein and/or at any corresponding live presentation on this material. The law is a complex issue and you should consult your own attorney for advice on legal matters. Receipt of this material does not create an attorney-client relationship and is not an agreement that my firm will represent you in your particular legal matter.

For the indefinite future, changes brought about by the Coronavirus will continue to affect the nature and extent of social interaction and business practices. Despite deeply traditional formalities, the legal processes is not immune from Covid, and must adapt quickly to bring about channels for solving new problems arising from the virus, while contemporaneously confronting impossibilities in maintaining strict adherence to time honored practices such as in-person requirements for the witnessing and/or notarization of documentation, signed and sealed with pen, paper, and the occasional raised embossment. Thankfully, many technological advancements stand at the ready to benefit the elder law practitioner, and their client. Implementing these tools, one is likely to discover not only greater versatility in document execution, but also increased efficiency, security, and transparency in the overall document production process.

Where We Started

Electronic Wills, Trusts, & Powers of Attorney in Indiana

Modification of Indiana's statutes to allow for creation of an electronic will, trust, and/or power of attorney was first sought in 2017 by LegalZoom proponents. Balancing the demand for increased virtual estate planning with the protection of long standing protocols for legitimate document creation, execution, maintenance, and administration, meant involving Indiana practitioners to skillfully consider these nuances. Led by attorney Jeff Dible, a 2017-2018 task force worked tirelessly to stall enactment of LegalZoom's hastily proposed language and bring about 2018's HEA 1303 which consisted of three new chapters of the Indiana Code building a well vetted framework for electronically signed Wills, Trusts and Powers of Attorney, which appear at:

- Indiana Code 29-1-21 - Electronically Signed Wills
- Indiana Code 30-4-1.5 - Electronically Signed Trusts
- Indiana Code 30-5-11 - Electronically Signed Powers of Attorney

These statutes provide the legal basis for creation of the corresponding estate planning documents in an electronic format, and contemporaneously maintain formalities for each document's execution. Specifically, consider the following parameters for a traditional (non-digital) document execution vis-á-vis its electronic counterpart. IC 29-1-5-3 pertaining to a 'traditional' (non-digital) Will requires the testator to sign or acknowledge their signature already made on the instrument and

that two disinterested witnesses thereto sign in the presence of the testator and each other[1]. As to an electronic Will, IC 29-1-21-4 provides:

> *(a) To be valid as a will under this article, an electronic will must be executed by the electronic signature of the testator and attested to by the electronic signatures of at least two (2) witnesses in the following manner:*
>
> *(1) The testator and the attesting witnesses must be in each other's **actual presence** when the electronic signatures are made in or on the electronic will. The testator and witnesses must **directly observe one another** as the electronic will is being signed by the parties.*
>
> . . .
>
> *(4) The testator must:*
>
> *(A) electronically sign the electronic will in the **actual presence** of the attesting witnesses; or*
>
> *(B) direct another adult individual who is not an attesting witness to sign the electronic will on the testator's behalf in the **actual presence** of the testator and the attesting witnesses.*
>
> *(5) The attesting witnesses must electronically sign the electronic will in the **actual presence** of:*
>
> *(A) the testator; and*
>
> *(B) one another;*
>
> *after the testator has electronically signed the electronic will.*[2]

While the pen and paper are usurped, the 'pomp and circumstance' of an execution event requiring actual presence of the testator and both disinterested witnesses to a Last Will and Testament remain intact.

Inasmuch as traditional (non-digital)[3] trust instruments do not require the formality of witnessing or notarization in their execution, it is not surprising that there is no such requirement in the electronic counterpart found at IC 30-4-1.5-4 which states:

> *Any of the following persons may create a valid inter vivos trust by electronically signing an electronic trust instrument, with no witness requirement or acknowledgment before any notary public, if the electronic trust instrument sufficiently states the terms of the trust in compliance with IC 30-4-2-1(b):*

---

1 Omitted from this requirement are nuncupative wills. See also IC 29-1-5-4.

2 IC 29-1-21-4 ***(emphasis added)***

3 "Paper"

(1) A settlor.
(2) An agent of a settlor who is an attorney in fact.
(3) A person who holds a power of appointment that is exercisable by appointing money or property to the trustee of a trust.
(4) An adult who:
(A) is not a trustee named in the electronic trust instrument; and
(B) electronically signs the electronic trust instrument:
(i) at the settlor's direction; and
(ii) in the direct physical presence of the settlor.

While unrequired, many drafters choose to include witness and/or notarization parameters to their trust documents. Further, many drafters also prepare Certification of Trust instruments and include on the same witness and/or notarization formalities. In the event these additional execution parameters are to remain intact on an electronic document, the practitioner must carefully identify and adhere to the prevailing requirements for actual, versus virtual, presence, and/or actual versus remote notarization, which will be further detailed herein.

In the case of an electronic Power of Attorney, Indiana Code 30-5-11-4 provides, "A principal, or person acting at the principal's direction, may, in the presence of a notary, create a valid power of attorney by electronically signing an electronic power of attorney." When compared with the parameters above for the execution of an electronic will, the multiple references to 'actual presence' and 'direct observation' are noticeably absent. However, this is an unfair comparison given the differences in the execution parameters of these documents in their 'traditional' (non-digital) format. Accordingly, an observation of IC 30-5-4-1 must ensue. "To be valid, a power of attorney must meet the following conditions: (1) Be in writing. (2) Name an attorney in fact. (3) Give the attorney in fact the power to act on behalf of the principal. (4) Be signed by the principal or at the principal's direction in the presence of a notary public.[4]"

Noting that the statutes each require a notary public's presence (as opposed to a subsequent affirmation of the signature at a later point to the notary public), one must now turn their attention to what is to be inferred or required by 'presence' and might a 'virtual presence' be sufficient? At

[4] IC 30-5-4-1

the very least, 2018 and prior drafting has left the door open for “video chat” notarization.

Where We Are

Part 1 - Expanding Options for Notarization

Differentiating between:

- the foundations laid for the execution of digital estate planning documents in Indiana,
- our present (albeit temporary) allowance of remote appearances, and witnessing, and
- the future expansion of remote online notarization (RON) and remote witnessing,

requires an understanding of the intricacies within and between ‘electronic’ versus ‘remote.’ This distinction was thoughtfully examined by Attorney Jeff Dible in January of 2018 when detailing to the Indiana State Bar Association’s Probate Trust & Real Property Section listserve the difference in an electronic signature and a remote signature:

> *“Electronic signature" has been a broadly-defined term of art in Indiana law [see I.C. § 26-2-8-102(10) since 2000, when Indiana enacted UETA as I.C. 26-2-8. Wills, codicils and testamentary trusts were not subject to UETA because of a statutory exclusion in § 26-2-8-103(b)(1), and if House Bill 1303 passes, electronic wills and codicils will continue to be exempted from Indiana UETA because they will be governed / validated by new chapter 21 of the Probate Code.*
>
> *House Bill 1303 adopts the same definition of "electronic signature" that we find in UETA.*
>
> *"Electronic signature" is intentionally defined broadly enough to cover many types of electronic signature, ranging from the typing of "s / Jane Doe" to signing with one's finger on a touch-sensitive screen, to other kinds of electronic signing, and finally – at the "extreme" or most-secure end of the spectrum, to various types of digital signatures that incorporate document integrity or data security features, which effectively "bind up" the signature(s) as integral part of the electronic record, so that any tampering with the rest of the electronic record after signing – such as changing or substituting a sentence, a paragraph or page – will be detectable, either by displaying a "flag" or error message or causing the electronic record to fail to decrypt and display its contents.*
>
> *"Remote signature" is not a term used in House Bill 1303. Neither is the term*

"remote witnessing." The concept of remote witnessing [is] where the witnesses to the signature of a testator on a Will are made by the witnesses while they are at some location physically separate from the testator, and where the witnesses are interacting with the testator using some sort of two-way audio-video technology...

A few years from now, if the available technology and best practices for "remote witnessing" evolve to the point where individuals and their attorneys acquire higher confidence in the efficacy of remote witnessing as not promoting or fostering the generation of bogus or invalid wills through impersonation, fraud, undue influence, duress, etc., the General Assembly could amend I.C. 29-1-21 to permit remote witnessing, either generally or only if particular safeguards are used.[5]

In hindsight, Attorney Dible's remarks possess a prophetic aura. As frequently occurs, necessity has not only fostered the growth of remote interaction, but also the implementation of some temporary tools to facilitate document execution in these present times of Covid social distancing.

March 31, 2020, brought about the filing of Orders from the Indiana Supreme Court in Case Numbers 20S-MS-236[6] and 20S-MS-237[7]. Both Orders offer enhanced digital opportunities for the execution formalities presently in place as to traditional and digital estate planning documents, detailed in the prior section. While these Orders are welcomed by the "techie" crowd, they are first and foremost imperative as we seek to balance the legitimacy of document execution through important formalities with the need to incorporate social distancing during the health crisis. The first Order suspends "any actual or implied requirement that

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[5] Dible, J. Electronic - Wills/Notary Legislation, January 30, 2018, Indiana State Bar Association - Probate Trust & Real Property PTRP Listserve

[6] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-MS-236, March 31, 2020. https://www.in.gov/judiciary/files/order-other-2020-20S-ms-236.pdf

[7] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-MS-237, March 31, 2020. https://www.in.gov/judiciary/files/order-other-2020-20S-ms-237.pdf

notaries, court reporters, and other persons qualified to administer an oath in the State of Indiana, must be in the presence of a witness for purposes of administering an oath for depositions and other legal testimony, so long as the notary or other qualified person can both see and hear the witness via audio-video communications equipment for purposes of readily identifying the witness[8]." Most commentators caution restraint in the exercise of this Order arguing the application is limited to notarization of documentation subsequently subject to future Court filing. For the estate planner, when long standing and traditional parameters regarding notarization, including their ambiguities as to the definition of "presence" are examined in conjunction with the effect of this Order and the recently enacted remote online notarization legislation, the following results are produced:

Four Potential Methods for Notarization of a Document:

- **Traditional execution in-person, on-paper -** This process is the historic in-person appearance by the affiant and notary wherein the document execution (or in some cases the affirmation of the previously executed document) occurs using pen, paper, and a notary seal.

- **In-person electronic notarization (IPEN) -** The Indiana Secretary of State's Indiana Notary Public Guide provides that electronic notarization is:

  a notarial act involving an electronic record where the signer or person for whom the notarial act is performed appears in the notary's physical presence. Indiana law permits you to perform electronic notarizations with the signer physically present but does not prescribe as many rules for how to perform them like it does for remote notarization. Unlike remote notarizations, you are not required to receive additional authorization other than being an active notary public before you perform electronic notarizations. Notaries who perform electronic notarizations are not required to keep a recording of these notarizations (because audiovisual communication is not used) or enter them in an electronic journal

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[8] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-MS-236, March 31, 2020. https://www.in.gov/judiciary/files/order-other-2020-20S-ms-236.pdf

(although the Secretary of State strongly recommends that you do). Also, unlike remote notarizations, you identify the signer or individual for whom the electronic notarization is performed using the same methods as for paper notarizations discussed in an earlier section of this Guide.

Despite these differences, an electronic notarization and remote notarization have many things in common, which include:

- *The documents or records are electronic and electronic signatures are used to sign them.*
- *A technology system is used for signing electronic records just like a remote notarization, but without the audiovisual communication.*
- *The notary must be physically located in Indiana when performing an electronic notarization.*
- *The notary must use an electronic notary seal.*
- *The notary must use a digital certificate to render the electronically notarized record tamper-evident after completing, electronically signing, and affixing an electronic notary seal to the electronic notarial certificate for the notarial act.*[9]*"*

The key feature to distinguishing the first two notarization options is whether the document is a hard copy (traditional) or a digital copy (IPEN). In both instances, the signers are within the physical presence of each other.

In the remaining two notarization types, the affiant is physically separate from the notary (although perhaps still in each others'virtual presence'). These final two actions are again differentiated by the characteristic of the document. Paper (paper video chat notarization) or electronic (Remote Online Notarization).

- **Paper video chat notarization -** This type of notarization combines a traditional hard copy and wet signature execution with a virtual presence. In other words, neither the affiant's execution nor the notarization are completed digitally. Electronic aspects of this transaction may include however the circulation of an image of the physically signed document between the affiant and the notary through e-mail or fax. Proceeding in this manner, the presence requirement is

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[9] https://inbiz.in.gov/Assets/NotaryGuide.pdf, p.37

deemed to be met through the parties viewing of, and communication with, each other by a digital session through platforms such as Zoom, Skype, FaceTime, etc. It is worth commenting that although the chosen audio-video platform may have distinguishable security features and the channel of viewing / communication is two-way, these are the end of the similarities between a video chat notarization and a RON. Specifically, and as later discussed, a RON has several additional layers of security in contrast to a video chat notarization, and even a traditional notarization. It is also important to note that this form of notarization likely exists on account of the absence of a statutory definition of presence.

- **Remote online notarization (RON) -** This operation entails both the electronic notarization of the document and 'presence' of the notary and affiant by way of real time, two-way, audio-video communications. Remote online notarizations require both an additional application / credentialing process for the Notary with the Indiana Secretary of State, and the selection of a Remote Technology Vendor authorized by the state in order to supply the requisite technology for the audio-video communication, recording, and identify verification. The Secretary of State enumerates the qualifications of a remote notary as:
  - *You must hold a current Indiana notary public commission with at least 90 days remaining on your current notary commission term.*
  - *You must meet the continuing education requirements for a notary commission.*
  - *You must complete the remote notary application. All applications must be submitted online at https://inbiz.in.gov/certification/notary#verticalTab5.*
  - *You must complete the remote notarization course and achieve a passing score on the remote notary examination.*
  - *You must be able to competently operate the software provided by your remote technology vendor.*
  - *Pay a nonrefundable fee of $100*[10].

Presently, most Vendors approved by the State of Indiana are geared towards application in a Title Company setting and/or for third party notaries. It is anticipated that, with time, this technology will also develop a market with the estate planning practitioner who simply wants to offer remote online notarization to clients for estate planning and/or other non-real estate closing

[10] https://inbiz.in.gov/Assets/NotaryGuide.pdf, p.30

transactions, nevertheless requiring a notarization.

Where We Are

Part 2 - Expanding Options for Remote Witnessing

The Indiana Supreme Court's March 31, 2020 Order applicable to the execution of Wills and Codicils provides:

To the extent Indiana Code article chapter 29-1-5 or chapter 29-1-21 requires attesting witnesses and/or testators to sign those documents in the actual presence of one another, the Court deems permissible substantial compliance with those provisions to include simultaneous or contemporaneous remote appearance by audio-video communication technology, provided:

1. *The remote witnesses and remote testator can positively identify one another and the parties are able to see the execution of the document; and*
2. *The document being executed:*
   a. *specifically references this Order preceding the attestation or self-proving clause;*
   b. *describes, within an attestation or self-proving clause incorporated into the document, the methods used for remote appearance and for securing signatures by specifying the technology platform and electronic processes used within an attestation or self-proving clause incorporated into the document; and c. contains a statement, preceding the attestation or self-proving clause, which acknowledges or confirms that the document shall be re-ratified or re-executed in compliance with regular statutory witness procedures within 90 days after the health emergency expires…"*[11].

In this fashion, the execution of a Last Will and Testament might occur substantially as follows:

- The Attorney prepares the Last Will and Testament to the specifications of the client and thereafter transmits the documentation to the client in the desired hard copy or electronic format.

- At the appointment time, the Attorney and client, along with the appropriate parties as witnesses, meet virtually through an online platform such as Zoom, Skype, FaceTime, or the like. (All parties may be separate and possess their own connection to the virtual meeting, or two or more parties may, but need not, be physically together.)

- For the execution, the Testator signs by a pen on paper or through the corresponding electronic process while being viewed by the two disinterested

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[11] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-MS-237, March 31, 2020. https://www.in.gov/judiciary/files/order-other-2020-20S-ms-237.pdf

witnesses either virtually or in the physical presence of one another, and/or the testator.

- Following the execution by the Testator, each witness in succession and in the presence (physical or virtual) of each other and the Testator, will thereafter sign with pen on paper, or in the prescribed manner of the agreed upon digital format.

- Once all parties have signed or affixed their electronic signature / credential to the document, the execution is completed and storage of the paper document or electronic instrument must be determined.

In the case of a traditional paper based execution, the parties will need to forward their respective counterparts to the custodian, such that the Testator, or their designee, possesses a fully executed copy of all of the hard copy counterparts. This is the obvious benefit of the electronic copy, as each party, or just those individuals so identified in the electronic software, will receive a complete version of the electronic instrument immediately following its execution.

The 90 day Supreme Court provision requiring a Will or Codicil executed under 20S-MS-237 be "re-ratified or re-executed in compliance with a regular statutory witness procedures within 90 days after the health emergency expires." has been subsequently updated such that the public health emergency be considered for purposes of the Order as extending to 12:01 a.m. on January 1, 2021[12]. Accordingly, unless further action is taken by the Court or the Legislature, the document executed pursuant to the Order will require ratification (re-ratification) or re-signing within 90 days of January 1, 2020. The most cautious route for the practitioner in this respect is to have his / or her client simply sign a new Last Will and Testament prior to the end of the first quarter of 2021 in conformity with the statutorily prescribed parameters for in-person execution and witnessing in either a digital or hard copy format.

While the ramifications of a failure to re-execute a document are not yet fully known, Testators who have died or become incapacitated, prior to a ratification or re-execution and the end of the 90 day period, have sufficient legal protection for the validity of the Will executed in conformity with the Supreme Court's pandemic Order, inasmuch as the law cannot require the impossibility of re-execution in the case of a subsequently deceased or incapacitated Testator. Moreover, attorney Jeff Dible opines that Wills executed electronically may also survive a failure

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[12] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-CB-123, May 29, 2020
https://www.in.gov/judiciary/files/order-other-2020-20S-CB-123k.pdf

to ratify / re-execute as a result of Indiana Code 29-1-21-1 which provides[13]:

> *The purpose of this chapter is to provide rules for the valid execution, attestation, self-proving, and probate of wills that are prepared and signed electronically. This chapter shall be applied fairly and flexibly so that a testator whose identity can be verified, who has testamentary capacity, and who is acting free from duress and undue influence may execute a valid electronic will consistent with the testator's intent. If an electronic will is properly and electronically signed by the testator and by the witnesses and is maintained as an electronic record or as a complete converted copy in compliance with this chapter, all the normal presumptions that apply to a traditional paper will that is validly signed and executed apply to an electronic will.*

Where We are

Part 3 - Indiana Supreme Court Orders on Tolling

Governor Holcomb declared the Coronavirus a public health emergency on March 6, 2020. Thereafter Indiana Supreme Court issued its first Coronavirus related order on March 16, 2020 under Case Number 20S-CB-00123, identifying the need to implement Statewide continuity of operations plans and directing trial courts to examine and report on their needs for relief through the Indiana Supreme Court pursuant to Indiana's Administrative Rule 17[14]. A flurry of Petitions seeking Administrative Rule 17 Emergency Relief accumulated with the Supreme Court from across the State of Indiana which, over the course of several months and extensions, have resulted in the tolling of statutes of limitation. Subsequently on March 23, 2020 the Court, on its own Motion, declared the existence of an emergency in the Indiana Supreme Court and Clerk of Courts ordering relief including the tolling of statutes of limitation through April 6, 2020 to the extent relief was not already provided by an Order or an Administrative Rule 17 Petition. On May 13, 2020 the Supreme Court issued an Order extending the relief granted through May 30, 2020 and finally on May 29, 2020 authorized "the tolling, through August 14, 2020, of all laws, rules, and procedures setting time limits for speedy trials in criminal and juvenile proceedings; public health and mental health matters; all judgements, support, and other

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[13] Dible, J. Electronic - Indiana Supreme Court Emergency Orders Promulgated Yesterday April 1, 2020, Indiana State Bar Association - Probate Trust & Real Property PTRP Listserve

[14] See the Indiana Court Rules - Administrative Rules (including Rule 17) online at: https://www.in.gov/judiciary/rules/admin/

orders; and in all other civil and criminal matters before Indiana Trial Courts"[15].

The effect of these Judicial actions are especially relevant to the probate practitioner who frequently encounters statutes of limitation vis-a-vis creditor and/or beneficiary rights and responsibilities in the wind-up of a decedent's final affairs. While the scope and effect of these Orders will require additional tailoring and interpretation by Indiana's Executive, Judiciary, and Legislative branches, it is presently believed by this author, and several commentators in the probate, trust, and real property field of the Indiana State Bar, that the most logical and conservative approach of these Orders effectively extend both the nine month bar on the filing of a creditor claim in a probate matter set out under Indiana Code 29-1-14-1 and the five month time frame with which an estate must be opened to require the sale of real property to pay creditor claims as set out under Indiana Code 29-1-7-15.1 from March 16, 2020 to August 14, 2020. While these specific provisions are anticipated by this author to have a substantial impact on the probate, trust, and real property and Elder Law Bar sections, their reference herein is not in any way intended to limit the scope and/or additional effect of the Judicial Orders[16].

Where We Are Going

While those who remain entrenched against the evolution of electronic document creation, maintenance and execution have lost the battle, they have many Indiana practitioners to credit with the creation of a digital document creation and maintenance system that operates simultaneously and without infringement against the tried and true methods of pen, paper, and the well worn notary crimper. Looking forward, Indiana must soon face the expiration of the expanded digital execution parameters afforded by the Indiana Supreme Court. With that clock's exhaustion looming, our state, and more importantly, our capable Probate, Trust, and Real Property leaders will undoubtedly attempt to secure and expand the capabilities of remote notarization and witnessing in the estate planning realm. This author is confident that these steps

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[15] Rush, Loretta H., Chief Justice, Indiana Supreme Court - Case No. 20S-CB-123, May 29, 2020 https://www.in.gov/judiciary/files/order-other-2020-20S-CB-123k.pdf

[16] See also Indiana Supreme Court Rule 17 COVID Orders by county online at: https://www.in.gov/judiciary/5578.htm and general Orders online at: https://www.in.gov/judiciary/3679.htm

will be undertaken with a commitment to exercise the same great care expended toward enactment of electronic estate planning and that success in this endeavor will afford the estate planner and its client greater document execution flexibility and document security. Therefore we must recognize and draw upon our legal colleagues as problem solvers and advocates advancing with the tenacity akin to Hoosiers. After all, we are IN this Together.

PREPARING YOUR PRACTICE FOR REMOTE WORK AND REMOTE CLIENT MEETINGS

Jennifer L. VanderVeen, CELA

NAELA
National Academy of Elder Law Attorneys

LET'S START WITH YOU

- Technology
  - Hardware
  - Software
- Security
- Working without distractions

NAELA
National Academy of Elder Law Attorneys

TECHNOLOGY

- Don't cheap out
  - Phone
  - Headset
  - Tablet/laptop
  - Wifi
  - Office servers
- Test runs
  - Make sure you're comfortable
  - Make sure you can operate it all

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SOFTWARE

- Cloud based practice management
- Cloud based productivity (Microsoft 365)
- Remote Desktop access
- Conferencing software
- Office/team communication

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VIDEO CONFERENCING

- Making a good impression
- Screen sharing/Whiteboard
- Mute your notifications

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SECURITY

- When in doubt, get professional advice
- Train/test staff (KnowBe4)
- Password managers
- Two factor authentication

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YOUR REMOTE WORK ENVIRONMENT

- Keep to a regular schedule
- Have an area designated as your "office"
- Keep work materials secured and organized
- Train your family members
- Keep in contact with the outside world

NAELA
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NOW, FOR YOUR STAFF

- Getting buy in from staff
- Keeping up morale
- How do I know they're working?
- Technology policies

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STAFF MORALE

- Flexibility in schedule
- Help with childcare

NAELA
National Academy of Elder Law Attorneys

COMMUNICATION/TASK TRACKING

- Collaboration platforms
  - Microsoft Teams
  - Slack
- Can track tasks and projects
- Communication/chat
  - Virtual happy hour
- Videoconference staff meetings

NAELA
National Academy of Elder Law Attorneys

FINALLY, YOUR CLIENTS . . .

- Video Conference Meetings
- Conference Calls
  - What Works best for you?
- But how do I get documents?
  - Teaching your clients about scanning apps
  - Adobe Scan, Microsoft Office Lens, Scannable
- And how do I sign documents??

NAELA
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OTHER RESOURCES IN THE NAELA KNOWLEDGEBASE

- Developing Written Policies for Law Office Technology, May 17, 2018, Shirley Whitenack
- Using Technology To Connect With Clients, May 10, 2019, Audrey Ehrhardt
- What are Client Portals- Why are Attorneys Flocking to Them, May 17, 2018, Darla Jackson

NAELA
National Academy of Elder Law Attorneys

Free Lunch & Learn – at your office*

(*You pay for lunch!)

Kim Brand

Author of *The Indiana Lawyer* "Start Page" Column

Professor

"Foundations of Legal Informatics"

Indiana University School of Informatics & Computing

"The most important technology decision you can make is to put someone in charge of data security."

I invite you to learn from my one hour lunchtime presentation, *in your office*, that can help you protect your firm's data, your clients' information and your reputation.

I will present data safety practices anyone can understand: *WTF!*

- **Assess your Data Safety *Worries***
- **Analyze the Digital *Threats***
- **Account for the *Financial !mpact!***

Call or TXT 317-917-2000 anytime to schedule your lunch!

(Marion & Surrounding Counties)

W T F !

Data Safety & Security in a Virtually Promiscuous World

Kim Brand and Seth Wilson, Esq

Worries – there are only two –

DENIAL	Somehow you are denied access to your information processing systems and/or data. This could be as simple as a lost password or files which were encrypted by ransomware.
COMPROMISE	Your data has been lost or stolen and could be made available to third parties. This could be as simple as losing a thumb drive or laptop with sensitive files or a hacker stealing your files and posting them on Wikileaks.

Threats – there are only three –

ACTS OF GOD	Lightning strikes and shuts down the power in your building or shuts down your Internet. A backhoe digs up the fiberoptic cable carrying Internet to your office. A hard drive fails, and you lose all your data. Water leaks from the refrigerator upstairs destroys your server.
ACTS OF VIOLENCE	Someone breaks into your office and steals your PCs, server and backup media. A hacker gets remote access to your PC by guessing your password. You click on a pop-up message and download software that encrypts your hard drive and all the files on your server.
ACTS OF STUPIDITY	You forget your password. You keep your password on a post-it note. You use your first name for your password. You never make a backup or you never test your backup. You don't protect your backup media. You don't update your software. You lose track of who has access to sensitive data.

Financial Impacts! – there are lots of these –

Loss of productivity	You need to re-enter, find and/or recover data, time wasted dealing with compliance issues. Lack of information may lead to bad decisions.
Loss of reputation	Diminishes your brand value, income, consumer trust.
Loss of money	Damages resulting from compromised data leads to fines, reimbursements and fees. The cost of rebuilding PCs, hard drives, restoring backups, virus removal, re-installing software, locating license keys and reconfiguring complex systems may take weeks of expensive consultants' billable time.

Line up your Defenses

#1 Put someone in charge of Data Safety/Security & IT Productivity! Designate an ER Go To!

#2 Document IT services – Ask: "*What would we do without one or more of these?*"

Hardware: PCs, Servers, Wireless, Infrastructure (router, switches, cabling,) PBX + phones, copier/scanner

Software: Licenses, support subscriptions, media archive/download

Cloudware: File sharing (Dropbox, Box, One Drive, Google Drive, etc.) Website, Email, Internet, Voice

Logins & passwords (internal & external services)

Encryption, Decryption keys – Escrow agents?

Service provider info:

- Business and Tech support details, hours of operation
- Emergency contacts
- Warranty provisions, Service Level Agreements (SLA,) downtime reimbursements

#3 Establish policies / expectations / standards

RPO: Recovery Point Objective / RTO: Recovery Time Objective

Passwords: change cycle/complexity/reuse, sharing

Mobile data: laptops, smart phones (especially email,) flash drives, etc.

File server backups: Local, Offsite, Multiple generations; Disaster Recovery

VIPC (Very Important PC) backups

Remote access: RDP, VPN, LogMeIn, Go-to-my-PC, TeamViewer, etc.

Antivirus / Anti Malware

Acceptable Use Policy / Employee Manual / PC Skills/Threat Assessment Training

#4 Remain aware of IT requirements, duties, obligations, regulations, liabilities, code of Prof Resp.

Engage with consultants and experts regularly

Stay up-to-date on best practices and take advantage of IT related CLEs

Maintain appropriate insurance coverage

Consider redundant services like Internet, backup power.

#5 Audits / Drills / Updates / Training / Continuous Improvement

"If you aren't certain that your backup is working then you must assume it isn't."

Update all h/w & s/w systems per the manufacturer's recommended update cycles.

Perform this simple backup audit at least quarterly

- Create a file
- Wait a while
- Delete it
- Wait a while
- Recover it
- Take note of success/drama – fix it.

Ask:

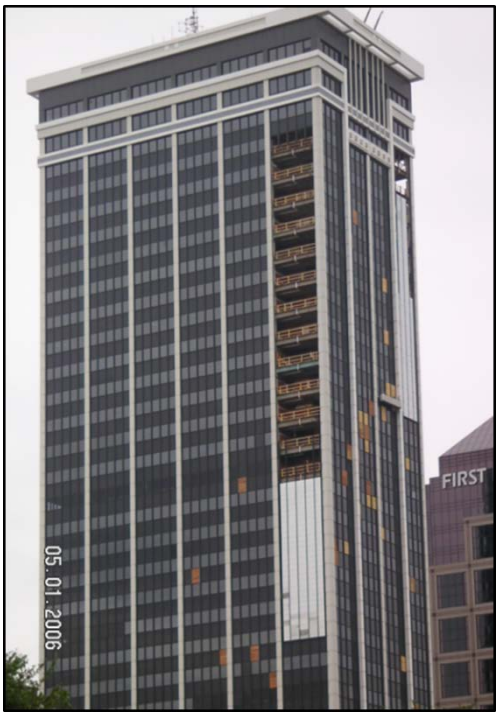
- What programs/services are important?
- Where does it store its data? Or: Who is responsible for the service?
- What happens when it breaks?

Third party audits

Team Training (training each other/sharing what you know) & professional training

'Take a minute' Productivity Tips Sharing weekly

Regular Firm data safety and security policy reviews by firm leadership



WHAT IS YOUR BACKUP PLAN?

For more info download this archive:
https://goo.gl/3pm3Fx

MUST READ: What's new in Windows 10 version 20H2

This new ransomware is targeting Windows and Linux PCs with a 'unique' attack

Researchers detail the unusual workings of Tycoon ransomware - which appears to be designed to stay under the radar as much as possible.

By Danny Palmer | June 4, 2020 -- 15:00 GMT (08:00 PDT) | Topic: Security

A newly uncovered form of ransomware (https://www.zdnet.com/article/ransomware-an-executive-guide-to-one-of-the-biggest-menaces-on-the-web/)is going after Windows and Linux systems in what appears to be a targeted campaign.

Named Tycoon after references in the code, this ransomware has been active since

hidden on compromised networks.

MORE ON PRIVACY

Microsoft to apply California's privacy law for all US users (https://www.zdnet.com/article/microsoft-to-apply-californias-privacy-law-for-all-us-users/)

Mind-reading technology: The security and privacy threats ahead (https://www.zdnet.com/article/mind-reading-technology-the-security-privacy-and-inequality-threats-we-will-face/)

How to replace each Google service with a more privacy-friendly alternative (https://www.zdnet.com/article/goodbye-google-why-and-how-to-take-back-your-privacy/)

Cyber security 101: Protect your privacy from hackers, spies, and the government (https://www.zdnet.com/article/online-security-101-how-to-protect-your-privacy-from-hackers-spies-and-the-government/)

The main targets of Tycoon are organisations in the education and software industries.

SEE: A winning strategy for cybersecurity (http://www.zdnet.com/topic/a-winning-strategy-for-cybersecurity/?ftag=CMG-01-10aaa1b) **(ZDNet special report) | Download the report as a PDF** (https://www.techrepublic.com/resource-library/whitepapers/a-winning-strategy-for-cybersecurity-free-pdf/?ftag=CMG-01-10aaa1b) **(TechRepublic)**

Tycoon has been uncovered and detailed (https://blogs.blackberry.com/en/2020/06/threat-spotlight-tycoon-ransomware-targets-education-and-software-sectors) by researchers at BlackBerry working with security analysts at KPMG. It's an unusual form of ransomware because it's written in Java, deployed as a trojanised Java Runtime Environment and is compiled in a Java image file (Jimage) to hide the malicious intentions.

"These are both unique methods. Java is very seldom used to write endpoint malware

because it requires the Java Runtime Environment to be able to run the code. Image files are rarely used for malware attacks," Eric Milam, VP for research and intelligence at BlackBerry, told ZDNet.

"Attackers are shifting towards uncommon programming languages and obscure data

However, the first stage of Tycoon ransomware attacks is less uncommon, with the initial intrusion coming via insecure internet-facing RDP servers. This is a common attack vector for malware campaigns and it often exploits servers with weak or previously compromised passwords (https://www.zdnet.com/article/dark-web-vendors-are-selling-remote-access-to-corporate-pcs-for-as-little-as-3/).

Once inside the network, the attackers maintain persistence by using Image File Execution Options (IFEO) injection settings that more often provide developers with the ability to

debug software. The attackers also use privileges to disable anti-malware software using ProcessHacker in order to stop removal of their attack.

"Ransomware can be implemented in high-level languages such as Java with no obfuscation and executed in unexpected ways," said Milam.

extensions including .redrum, .grinch and .thanos – and the attackers demand a ransom in exchange for the decryption key. The attackers ask for payment in bitcoin (https://www.zdnet.com/article/how-bitcoin-helped-fuel-an-explosion-in-ransomware-attacks/) and claim the price depends on how quickly the victim gets in touch via email.

The fact the campaign is still ongoing suggests that those behind it are finding success extorting payments from victims (https://www.zdnet.com/article/ransomware-why-paying-the-crooks-can-actually-cost-you-more-in-the-long-run/).So far, researchers have only seen Tycoon targeting Windows in the wild, but shell scripts in the ransomware's Java modules contain both Windows and Linux variants, suggesting that the attackers have also developed a build which targets Linux.

Researchers suggest that Tycoon could potentially be linked to another form of ransomware, Dharma (https://www.zdnet.com/article/this-ransomware-sneakily-infects-victims-by-disguising-itself-with-anti-virus-software/) – also known as Crysis – due to similarities in the email addresses, names of encrypted files and the text of the ransom note.

And while Tycoon does have some unique means of executing an infection, like other forms of ransomware, it's possible to prevent it from getting that far.

SEE: Cybersecurity: Do these ten things to keep your networks secure from hackers (https://www.zdnet.com/article/cybersecurity-do-these-ten-things-to-keep-your-networks-secure-from-hackers-hospitals-told/)

As RDP is a common means of compromise, organisations can ensure that the only ports facing outward to the internet are those that require it as an absolute necessity.

Organisations should also make sure that accounts that do need access to these ports aren't using default credentials or weak passwords that can easily be guessed as a means

of breaking in.

Applying security patches (https://www.zdnet.com/article/cybersecurity-how-to-get-your-software-patching-strategy-right-and-keep-the-hackers-at-bay/) when they're released can also prevent many ransomware attacks, as it stops criminals exploiting known vulnerabilities. Organisations

a-data-backup-system/?ftag=CMG-01-10aaa1b) – and that the backup is reliable – so that if the worst happens, the network can be restored without giving into the demands of cyber criminals.

MORE ON CYBERSECURITY

- **Ransomware gangs are changing targets again. That could make them even more of a threat** (https://www.zdnet.com/article/ransomware-gangs-are-changing-targets-again-that-could-make-them-even-more-of-a-threat/)
- **How ransomware attackers are doubling their extortion tactics** (https://www.techrepublic.com/article/how-ransomware-attackers-are-doubling-their-extortion-tactics/?ftag=CMG-01-10aaa1b) **TechRepublic**
- **Ransomware is now the biggest online menace you need to worry about - here's why** **(https://www.zdnet.com/article/ransomware-is-now-the-biggest-online-menace-you-need-to-worry-about/)**
- **Ransomware froze more cities in 2019 as hackers got smarter** (https://www.cnet.com/news/ransomware-devastated-cities-in-2019-officials-hope-to-stop-a-repeat-in-2020/?ftag=CMG-01-10aaa1b) **CNET**
- **30 years of ransomware: How one bizarre attack laid the foundations for the malware taking over the world** (https://www.zdnet.com/article/30-years-of-ransomware-how-one-bizarre-attack-laid-the-foundations-for-the-malware-taking-over-the-world/)

Section Twenty

OLOTBP
(Your clients and fog in the valley)

2020 Elder Law Institute™

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Section Twenty

OLOTBP
(Your clients and fog in the valley).....Douglas D. Germann, Sr.

The Capitol Limited

Last October, I was in the observation car of The Capitol Limited passenger train as it came around

1

The Capitol Limited...

the mountain. For a few ticks of the clock, I was witness.

2

The Capitol Limited...

The early sun just caught the tops of the forest on the distant side.

3

The Capitol Limited...

There below were the brilliant white tops of the fog, covering the valley...

4

The Capitol Limited...

...except for two towers and a single steeple.

5

The Capitol Limited...

I wondered
what life
went on below that fog....

6

The Capitol Limited...

Why do I yet recall this moment? What does it say about me?

7

The Capitol Limited

If you ever had such a passing moment, what does it say about you?

8

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9

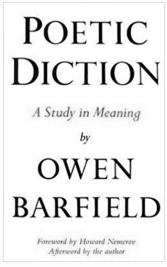
OLOTBP

Old Lawyers
Ought to be
Poets

A. 1. Why Poetry?

A felt change of
consciousness

A. 1. Felt Change...



A. 1. a. Felt Change...

Poetry ought to change how we think, and how we see the world.

Old Lawyers Ought to be Poets

13

A. 1. a. Felt Change...

The reader ought experience a “felt change of consciousness.”

Old Lawyers Ought to be Poets

14

A. 1. b. Felt Change...

What?

Old Lawyers Ought to be Poets

15

A. 1. b. Felt Change...

"Thlee-piecee bamboo, two-piecee puff-puff, walk along inside, no-can-see."

16

A. 1. b. Felt Change...

What do you suppose?

17

A. 1. b. Felt Change...

This is Pidgin ("Business") English for a three masted steamer with two funnels.

18

A. 1. b. Says Owen Barfield:

"Now when I read [these words], I am for a moment transported

19

A. 1. b. Says Owen Barfield:

"into a totally different kind of consciousness. I see the steamer not through my eyes....

20

A. 1. b. Says Owen Barfield:

"His experience, his meaning, is quite different from mine,

21

A. 1. b. Says Owen Barfield:

"for it is the product of quite different concepts....

22

A. 1. b. Says Owen Barfield:

"for a moment, I shed Western civilization like an old garment and

23

A. 1. b. Says Owen Barfield:

"behold my steamer in a new and strange light."

24

A. 1. b. Felt Change...

We behold our world in a new and strange light.

25

A. 1. c. Felt Change...

An office of poetry. What Old Lawyers ought to strive to achieve.

26

A. 1. d. Meredith Willson's fun

Another example:

Pick a little, talk a little,
pick a little, talk a little
Cheep cheep cheep...

27

A. 1. d. Meredith Willson's fun

You will ever have this refrain in your ears....

28

A. 1. d. Meredith Willson's fun

This too is a felt change of consciousness

We see the world, newly, strangely

29

A. 1. e. 11th Generation Grandchildren

Another example:

- My special focus

My poetry has to elicit a felt change of consciousness

30

A. 1. e. 11th Generation Grandchildren

in the recipient, the grandchild, or it will do them no good.

31

A. 1. e. 11th Generation Grandchildren

They have to be hit between the eyes,
they have to earn it, too.

32

A. 1. e. 11th Generation Grandchildren

So how can that stay fresh and potent and alive for 300 years?

33

A. 1. e. 11th Generation Grandchildren

Said another way, a Felt Change of Consciousness…

34

A. 1. e. 11th Generation Grandchildren

…which jerks your head around to see something for the first time…again

35

A. 1. f. What have you…

…written recently that recorded or evoked a felt change of consciousness in you?

36

A. 1. f. What have you...

... seen you'd missed before?

What looked differently from before?

37

A. 1. f. What have you...

Pondered?

38

A. 1. f. Did you…

…Honor this thing aborning by writing it down?

39

A. 1. g. Not so much

...A How as a Why

...A Why as a direction:

40

A. 1. g. A direction:

Snapping heads

Toward seeing ourselves larger

41

A. 1. g. Walt Whitman...

...contained multitudes;

you release them

42

A. 1. g. What could...

...you make that mean?
In your life?
For good?

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Old Lawyers
Ought to be
Poets

A. 2. Again, why poetry?

You have work to do...

A. 2. a. Two journal entries

February 24, 2020: A client is dying in her sleep. She has been

46

A. 2. a. February 24, 2020

sedated to the point that she will not—cannot—be conscious of her dying.

47

A. 2. a. February 24, 2020

Is that what you meant? Actively prevented from doing the work of dying?

48

A. 2. b. February 29, 2020

Minutes ago she died
in her sleep
medically enforced

49

A. 2. b. February 29, 2020

so was she able
to complete?
family is left to live
choices past

50

A. 2. b. February 29, 2020

memories sweet
and sour

51

A. 2. b. February 29, 2020

anthems for
dyings to come

52

A. 2. c. Pinched!

Well now. It must have pinched deeply in my innards, to have me writing two entries!

53

A. 2. c. Pinched!

Such a pinch is a signal to look, perchance to change.

54

A. 2. c. Pinched!

This is gouging with the pen —more painful than a scalpel! And messier.

55

A. 2. d. 35 or so

...Poems and glimpses I wrote in response to her dying to figure out...

56

A. 2. d. To ask myself

...what I could have done differently,

...why this was so disturbing to me...

57

A. 2. d. To ask myself

...why this event had me
over so many weeks
so engaged.

58

A. 2. d. But

...I won't do that.

59

A. 2. e. This work is called...

...Reflection
and its tougher task cousin,
Reflexivity

60

A. 2. f. What might I do?

Go visit Deborah at the nursing home. Speak to her about things she wanted to do, like…

Old Lawyers Ought to be Poets

61

A. 2. f. What might I do?

…go see Broadway plays. Ask what she would like to do if…

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62

A. 2. f. What might I do?

…death were denied her this time around.

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63

A. 2. g. Will I?

Will I do these things next time?
Hard to say

64

A. 2. g. Will I?

But if I did not so
Exercise my imagination
I could not

65

A. 2. h. And that's the point:

Reflection is the province of age,
and the bright light of Old Lawyer Poetry.

66

A. 2. h. Reflection

...is difficult work
...a most rewarding thing to do
...now.

67

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Ought to be
Poets

68

B. 1. Why old?

Responsibility

69

B. 1. a. Let's take that train

...higher into the mountains, higher into the clear skies above the daily fog, and see what new...

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70

B. 1. a. Let's take that train

...things we can see, maybe even what we can see anew:

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71

B. 1. a. Let's take that train

Maybe not time, but we know life passes.

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72

B. 1. a. ...passes...

...We see it in our clients as their health passes from them.

73

B. 1. a. ...passes...

...We see it in our children's youth passing before we notice.

74

B. 1. b. What are the duties...

...of Older Lawyers—to help a family in fog?

75

B. 1. b. ...a family in fog...

You have the gift of having seen this long-term care thing in many guises and

Old Lawyers Ought to be Poets

76

B. 1. b. ...a family in fog...

appearances. You can see long view over their case, over their needs, and the

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77

B. 1. b. ...a family in fog...

outlines of where this will come out the other side.

Old Lawyers Ought to be Poets

78

B. 1. c. Your challenge—

—you older one—is more and deeper: You recognize the fog they are in, and

79

B. 1. d. the fog they are in

how it can keep them feeling lost and confined. So you have a gift to share:

80

B. 1. d. ...a gift to share...

...that this is fog in the valley, it is frightening to everyone, even us sometimes, that the fog

81

B. 1. d. ...that the fog...

will lift, even if we don't quite know when and how it might burn off as the day goes on.

82

B. 1. d. ...burn off...

This is the gift of reflection.

83

B. 1. e. Others looking to you:

...How are you going to help young lawyers
if you don't invest in reflecting, and deeply?

84

B. 1. f. The fun parts...

...of being an Old Lawyer?

85

B. 1. f. Explorers

Old Lawyers ought to be explorers
Why? Because we are less attached

86

B. 1. f. Explorers

to raising family, making a name
Because we'd be good at exploring

87

B. 1. f. Explorers

Old lawyers ought to be
poets
Because we'd be good at it
less attached

B. 1. f. Explorers

seeing wider and farther
having, no, being
compassion

B. 1. f. Explorers

able to see
the special in the ordinary
the business of living
in the catastrophe of the day

B. 1. f. Explorers

Let us guess that our business
is to live through this
catastrophe
maybe to envision some other
side

91

B. 1. f. Explorers

some other possibility
something lifting up
woven and lasting

92

B. 1. g. Let us recall this point:

...Reflection is the
province of age,
and the bright light
of Old Lawyer Poetry.

93

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Old Lawyers
Ought to be
Poets

Old Lawyers Ought to be Poets

94

B. 2. Again, why old?

Do the difficult thing

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95

B. 2. a. Help us through [COVID] times

Like a hot air balloon moved by the breezes are we in covid-time. We

Old Lawyers Ought to be Poets

96

B. 2. a. COVID times

know which way the wind is blowing at ground level and a bit higher; we know the afternoon thermals

97

B. 2. a. COVID times

can lift us if we look for them; we can loosely control altitude (attitude);

98

B. 2. a. COVID times

and we can see what we might see, whether it is what we wanted to see or not.

99

B. 2. a. A lovely metaphor…

…but what's it mean? How do we look into the future?

100

B. 2. a. To start:

…from here. What trends do we see, how are the people around us reacting to covid? What are they

101

B. 2. a. What are they...

…doing in response? Covid, like much of life, is likely to be a ratchet: no going back.

102

B. 2. a. Ratchet:

For instance, we have learned some things about distance working, and will not forget those. We have

103

B. 2. a. Ratchet:

learned some things about caring for one another, seeing “their” world a bit clearer, and so “ours.”

104

B. 2. a. Ratchet:

We have seen some things about our denial, our anger, our unwillingness to work through cabin fever.

105

B. 2. a. How will these...

...affect what we do in the after covid times?

106

B. 2. a. The work we need...

...to undertake—difficult, to-bleed-for work—like to help along the

107

B. 2. a. ...charged conversation...

...about reparations, or the conversation about re-imagining mental health

108

B. 2. a. ...mental health…

emergencies and when we
call in an ear
and when a gun

109

B. 2. a. ...or to help along...

...the conversation about life after our current divisions. To keep it civil, to keep our country together.

110

B. 2. a. We are in the rapids

...our work is to keep our canoe upright so we can reach the calmer waters ahead.

111

B. 2. b. What is...

...your hard work?
...your work in the world?
...a bigger view of that?
...Bigger still?

OLOTBP

Old Lawyers
Ought to be
Poets

Meredith Willson Limited

So back to the train station, heading home. Maybe we'll see the fog...

...see the fog...

again, maybe the clear skies above. We take a different train this time:

115

Meredith Willson Limited

Meredith Willson Limited
watch your step
You slow down while the train speeds up

116

Meredith Willson Limited

The world floats by your easy chair
OLOTBP
What's poetry got to do with it?

117

Meredith Willson Limited

Poetry?
Poetry?
Poetry?
Poetry
doesn't know the territory!

118

Meredith Willson Limited

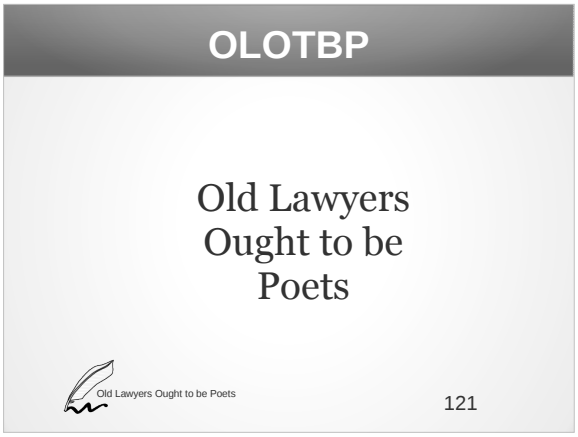
Ahh but poetry
is the territ'ry!
Yessssir, yesssssir,
poetry is the territ'ry!

119

Meredith Wilson Limited

We've sssseen,
we've sssssssseen
poetry is the territ'ry

120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Poets
Old Lawyers Ought to be Poets
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OLOTBP APPENDIX

Reflexive example, in the raw

1. I set before you death and life. Choose. Choose well, for you choose for the generations.
2. What do my poems say about me? “Complete” I wrote, so completing is important to me. “Medically enforced:” I do not want to be forced. “Family left to live/choices past:” regret is to me a large burden. But is it to the family? Did they think they were being kind? Did they not know their choices? Was I afraid to set before them their choices? Afraid for what? For losing my client or my engagement, or the fees earned but not yet billed? Do I really care about my clients, did I care for this client? “Anthems:” what songs, why such a strong word? “Dyings to come:” I was thinking long term. My own death, the death of members of this family, the niece, the niece’s husband who would be next in line, the son of them who would come a little later: what could they learn from this event and how it was handled? What did I learn of myself? That I want my dying to be a lesson to those coming along behind. What lesson? I cannot know.

   But am I going deep enough in this exploration? Is there pain in me, regret, joy, relief, avoidance? Pain and regret in not standing up more strongly for my client.

   Then again, it was my client who chose this. She dove into her depression, or did she? She said, I am told, “I just want to go home and die.” This days after she told me she did not want a DNR. Then she curled up, became uncommunicative, slept much.

   The real exercise here is to excise myself: cut myself open, look at my stranger parts.

   I do feel like there is avoidance, or maybe there really is nothing else here.

   “Sedated to the point:” I clearly want to be conscious, I value that. “Not being able to do the work of dying:” I think there is work, and I want to be present to do mine. That I value. “Cannot:” again a rant against being forced.

   The two poems do express an uncommon way of looking at the common phrase “dying in one’s sleep.” So a felt change in consciousness.
3. Don’t die with the TV on.

4. Conflict of principles, goods
5. What good is more time?
6. Often it is this lawyer in the fog
   first the course of study
   devise the special testing questions

   What was my role in this tragedy?
   Was it a tragedy? For whom?
   What did I fear?
   Why did I hold back?
   Did I uphold my values?

   Values come easily to pen
   but will I?
   and did I?

   Wrestle with that angel
   though I know he prevails
   and I may get only a new name
   yet I want to be aware and there

   Maybe there will be
   a recognizable me
   on the other side
   or maybe something larger something smaller
7. Deborah, who is dying, says:

   I know I told you Mister Lawyer
   Just last week I will not sign a DNR
   My life is a tiny subsidized apartment
   Stuffed with fancy clothes
   I have not worn and never will again
   And Nancy pays my many bills
   Even though I grouch at her
   This is my life and I'll live it to the end!

The doctors wanted me to sign
I am dying they say
Any action would be futile
What do they know of life, my life?

Yes, I've been in pain for 20 years
But that is controlled with a pill or two
And my depression is my friend
I hold her close

Now I'm in a godawful nursing home
This is my life and I'll die it to the end!

A. Counselor writes:

You confuse me Deborah
For just last week you told me
You refused to sign the DNR
And now you've taken to your sleep
Will not speak, will not eat

B. Nancy, her niece, writes:

And writing and calling is all I can do
From distant California and yet
No one answers, no one tells me a thing
Though I be Deborah's only relative
And attorney-in-fact

C. Deborah:

Let me sleep
Take me home
I want to die

D. Counselor:

I called and faxed the doctor
As you asked, Nan
But why her change of heart?

E. Nancy:

Comfort, comfort is the thing
Give her comfort
Relieve her pain
The nursing home said they could
Do hospice just as good

F. Counselor:

My friend from hospice tells me
I consulted her about Deborah
"It's not the same, it's more than morphine:
Will a Catholic nursing home
Respect her Jewishness
Or swab her mouth, or moisten her lips
Or read to her?"

G. Nancy:

Comfort, comfort
Make sure there's no pain

H. Counselor:

This nursing home will not let in
An outside hospice

You could have a service visit every day
Read to Deborah, moisten her lips

I. Nancy:

I will hire them
But no reading the New Testament!

J. Counselor:

Deborah is my client
Though Nancy is paying my bills
And is the one with whom
I communicate most

That's enough reflecting
on who and what and where
Now to go reflexive
And Filet the beast
To see what's really inside

8. What do Deborah and Nan ask of me?
9. I value peace above conflict
—above pushing my point of view
10. What is really good for Deborah?
11. I do want to write the story from Deborah's perspective. Maybe playfully do it as film noir. One site says it is "a film marked by a mood of pessimism, fatalism, and menace." That might actually fit, and add in what I usually consider the basics: a lonely office at dark of night. Deborah is the P.I., nursing a gin and not so much tonic, when in walks this man who turns out to be a counselor at law.
12. A rap across my knuckles
Yet training wheels for the next times:
What little I did in the face of
What I did not do and
The way her dying was deadened

13. The evidence is in; it says I believe:
    That to suggest a call to make
    Gets us further down the path
    Than shouting "Justice for the Dying!"
    That I do not know anyone's final best
    And that I feel disappointed in myself
    To not have gotten it all

14. The work is to prune myself and fertilize the row I tend.

15. The cross exam is
    Who are you?
    Whom did you become?
    Why? Why again?
    Why not?

16. What did I assume?
    What did I, do I, seek to assimilate?
    What is my role as lawyer, counselor, human?

17. What was lost or absent? What drove me to reinspect this event?

18. Not to beat upon my back
    But to fan some embers

19. There is something missing there, clearly: I do not understand why this tugs my sleeve. A better death? That might be the start of it, that it is not the death I would have. It was not the death she expressed to me, refusing a dnr. Then she slipped into a funk. The funk could have been fear of the unknown, about what death was about. Did she know in her depths that death was certain, this time? It does not seem to have been a simple going on strike against a nursing home.

20. Did they deny her her pain meds? Was the order for the pain meds and depression meds lost? Could this be a source of the funk?

21. I was feeling no pain when he walked in. I recognized him immediately, called him by name. Though I knew he was my lawyer, I did not see the need. What is this? The Jews send around a lawyer like the Catholics call in a priest? Well it actually was a pleasant conversation.

    A. I am odd. Born a Jew, I pissed them all off, have not gone in years. I refuse to be normal. I refuse the DNR the doctors want. I don't wish for anything, not that I will tell anyone.

B. This thing hit me unawares. Liver cancer. Have been taking Norco for a half dozen years, and plenty of it. It limits the back pain I have had that no one could figure out, and that used to send me to my bed for days. I had nothing but misery.

C. I was looking forward to going back to my apartment, small as it is and crammed with fancy clothes I no longer wear. But now they have brought me to this nursing home. I do not like it, not a bit. What I do not like most is what it signifies: I really am dying. And soon. This shows me they do not think I will be able to take care of myself in my apartment. Not even Nan. This is the end.

D. I have the janitor from the apartment building who always visited me, treated me like his mother or his aunt. Nice man, but we are not related. He was here just now to visit me.

E. There are two women who visit me once in a while, but do they offer to go shopping with me, or go to a movie with me? Never! I'd like to see Hamilton and other Broadway shows.

F. No, it is Nan who has been wonderful to me. And she lives so far away. She is having her medical issues just now. We cannot communicate on the phone—I cannot hear her. I heard the lawyer ok, but we were face to face and I had to make him speak up a few times. We canceled my order for hearing aids—what's the use? But I cannot hear the nurses who come and go and do not face me when they talk.

G. I do not want to be here. I do not want to die. The thought of death scares me.

H. How does that feel, for what do I wish, the lawyer asks. I don't know. I am kind of empty. I am tired. Just let me sleep if you won't let me go home. I just want to go home and die.

22. Well the hearing thing I had forgotten. And this gives me some possible ways to interpret her going to sleep. But they still enforced it. Was this Nan's doing, or the nursing home's? What way might I have intervened in that?

23. I see in the notes that I did speak of terminal sedation, did make referrals to other caring people with whom to talk. Nan was frustrated with not being here, not being able to be heard, not being able to communicate with Deborah. She was willing to let Deborah just sleep her end away.

24. So it really seems to me that the one who decided was Deborah. Except there was no one who would stand up to her, push her. Should I have gone to visit? Was it too late, was she already asleep, when I found out?

25. Since I told Nan about terminal sedation, and since all the impetus seemed to be from Deborah, then what could I have done, if I had gone to visit Deborah? Maybe she would not have heard me, or pretended not to hear me. Maybe she would have rejected what I said. Maybe Ninevah might have repented.
26. What might I have done? Go to visit Deborah at the nursing home. Speak to her about things she wanted to do, like go see Broadway plays. Ask her what she would like to do, if she did not die, if death were denied her this time around. That looks promising.
27. Ask a question. Give her something to work on her.
28. For Deborah: Life themes—which questions?
29. Exploring what uniform I wore and
    What new hat I can try on next time
    That is the adventure in this story
30. Deborah gave up on life
    Giving up on life and its possibilities
    Is a failure of imagination
31. Will I do these things next time?
    Hard to say
    But if I did not so
    Exercise my imagination
    I could not
32. What animal would Deborah be? Nancy? Flower? Furniture? Season? Food? Form of transport? What does that say of me?

Prime	***Deborah***	***Nancy***
Animal	hibernating bear	scaredy cat, submissive beagle
Flower	rose losing petals	trumpet vine
Furniture	overstuffed sofa	stiff back chair
Season	winter snows	early summer
Food	squash soup	pop corn
Transport	dump truck, wheel barrow	ambulance
Say of me?	giving in is not as good as being present	hyper activity is not as good as hearing

33. What was the effect of suggesting terminal sedation?
34. Did I learn anything? Don't know. It tells me my point of view: Deborah was giving in, giving up, lacking imagination; Nan was frantic, able sometimes to carry it further. I was unable to do things except through them, so I could not push, only entice. And we got some place: we got daily visitors; we got some attention to Deborah's angle on her world and setting.
35. She stopped eating
    Was she obstinate
    Or living dying's natural process?

Tips for your poetry

1. I don't know what you should write about: ask your writing fingers. Write for six minutes without letting the pen leave the paper, without thinking what you are writing.
2. Spoonerisms https://www.mentalfloss.com/article/24330/quick-10-10-spoonerisms-and-other-twists-tongue
3. Haibun
4. Cinquain
5. Haiku does not require 5-7-5 syllables. It is more some word of nature, with a twist in the last line.
6. Start with a list. Lists transmogrify easily to poetry. What things make you happy? For what are you grateful? What puzzles you?
7. Play with words, make up new words. Put words in an unaccustomed order.

Things to ponder

1. Imagination grows by exercise, and contrary to common belief, is more powerful in the mature than in the young. Somerset Maugham, *The Summing Up*
2. The purpose of poetry is not to see larger
   The purpose is not to uncover your psyche
   The purpose is to see what you can see
3. What are your playful oughts?
   Playful otter be

4. A poet might see: longer, funnier, sillier, serious-er, missed things, missing things, a way to go missing, inside another, inside the poet, inside out, backwards, unknowns, more, less, blindly, sounds, colors, fragrances, feelings, hot, cold, wet, emotions, uplift, down-draft, playful, old, young, unborn, ancestor-y, you, unseen poems, profound contraries, imaginary beings, imaginary non-beings, a rainbow stream in the air filled with rainbow trout, someone who has died, someone who has not yet died, a dream, a lake, a woods, a hole, a cloud, a circle, a life, the poet's life, a client's life, something beautiful, something struggling, something growing, something ugly, someone oppressed, someone hurting, someone helping, someone lost, someone the poet can help, someone the poet ought not help,
5. "Think of one more thing not to do." Harrison Owen
6. The time has come the walrus says to *write* of many things: of shoes, and ships, and sealing wax, of cabbages, and kings.
7. You could be poet enough.
8. It's not so much
   we've lost our ways of touching one another
   It's not so much
   we'll one day go back
   It's not so much
   we'll find our ways
   as we have a chance to wonder
   about compassion
   empathy
   our treatment of the "other"
   about wondering
9. It occurred to me that what people are seeing in the masks is a symbol of their own grief. Indeed the country's leaders went visibly through some stages: denial, bargaining, rushing to get through it, depression. And so there are folks in the stopping place of anger. We could meet them. With what would you be met?
10. My purpose is to ask us to think bigger, and that requires we use our imaginations—together. Together here is a scary word.
11. Curiosity is our pen.
12. This is poetry, drawing word pictures, using song-like, dream-like idiom. You can play with descriptions and be writing poetry this afternoon.

"You can play" is the real thing I am espousing with you this afternoon. You can see new things when you play. You can say new things and these can make you see new things.

And in this some of the wisdom of age.

13. Playful poetry expands our very *nature*
no longer who I was a moment ago
now human

14. There will be a tension between those days we want to live wholly, holy, fully, enjoyingly, ly, Lee

and those days we want to keep score, get something done, earn money, get something, arrive, Clive

and maybe it signifies we need both kinds of days or only that both kinds have a place in every life or that we do best to accept the days that come upon us, so…. flow, Flo

15. Poems have no goal
nor end and only a
delicious ongoingness

16. If you can enter
the mystery of the poem
you share its strength

17. 'Aren't you going to bed *yet*, Mum? Are you *still* working?'

'No, I'm not working. I'm just writing.' Gillie Bolton with Russell Delderfield, *Reflective Practice: Writing and Professional Development*, chapter 9

18. People rise to expectations
Prime among them you

Section Twenty-One

COMMONLY FACED ETHICS

FOR THE ELDER LAW PRACTITIONER

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ELDER LAW INSTITUTE

October 2, 2020

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Section Twenty-One

Commonly Faced Ethics for the Elder Law Practitioner……Elizabeth A. Homes
Jeslynn C. Smith

A. INTRODUCTION

"Ethics is knowing the difference between what you have a right to do and what is right to do." Potter Stewart.

Every attorney who practices law should strive to do the right thing all of the time. As of late, we, as practitioners, have faced more challenges in practicing law. It is good to puzzle through hypothetical ethical challenges so that when we are presented with a real life one, we know how to serve our clients to the best of our ability.

B. WHO IS YOUR CLIENT?

This has been a question I have heard in numerous seminars. Before you tune out of our presentation, please don't forget that this can be a complicated question and an ethical challenge can present itself before you know it.

When a person calls on the telephone and you answer it, are they a client? According to Indiana Rules of Professional Conduct Rule 1.18, "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."

In the area of estate planning and elder law, the person who is calling sometimes may not end up being the actual client. It is important to discern who the client will be as soon as possible. For example, on more than one occasion an adult child or well-intended loved one will call on behalf of someone else who may need your assistance with a legal matter.

According to Rule 1.18, stated above, it would seem that even the adult child or well-intended loved one could be seen as a prospective client. At the beginning of your meeting, establish with the adult child or loved one who you will be representing. The family is usually seeking your counsel concerning Mom/Dad or both. Clearly outline to the family you will be representing the parents' interests.

C. WHAT IS THE DUTY TO A PROSPECTIVE CLIENT?

Comment 1 under Rule 1.18, says "Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients."

The answer to what, if any, duty is given or owed to a potential client would seem to be that it depends. IT DEPENDS! In law school, it was emphasized that this is often the answer when you do not have all of the facts at hand. As a law student, the authors would laugh at this and still do as practitioners but that does not make this answer any less true.

When the person calls to set up an appointment with the lawyer's office, what is communicated by the attorney and/or the attorney's staff? What is the expectation of the person that the lawyer will be meeting with during this consultation? Often times, the lawyer needs to know information prior to being able to decide whether they will be able to help the potential client.

Rule 1.18 (b) indicates that, "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

It would seem at a minimum that confidentiality would apply to any and all information and discussions that the potential client may have with the attorney.

Example: The author had a case recently where the father wanted to have a special needs estate plan done. He had an adult son who he was already Guardian over and wanted to put the proper Special Needs Estate plan in place. As attorney and client continued to work through this case, the

father had two (2) very vocal adult sons who thought that they knew what was best for their father and brother who had special needs. These adult sons would call and email the Attorney's office numerous times to share that their father wanted. There was a lot of concern on the author's behalf that the father was being pushed in one direction that may not have been in the father's best interest or in alignment with his wishes. In this situation, the author insisted that the father come in to meet with the attorney one on one several times to confirm that the father's wishes are being followed and heard. Opinionated loved ones, at times, can mean well, but it is important as practitioners that we do not lose sight of who the client is through the representation.

Example: Community Spouse comes in to discuss Medicaid planning for husband, Institutionalized Spouse, who has been placed in a nursing home. This is a second marriage situation with children for both from their prior marriage. There is no prenuptial agreement, and couple has been married for 15 years. Community Spouse is healthy and still working at 60 years old. Institutionalized Spouse has dementia, and has shown signs of this for the last 2 years. Institutionalized Spouse had to quit his job. Also, the Institutionalized Spouse's children do not get along with Community Spouse. Community Spouse expresses to you the concern that the children will try to take all of the couples' funds and leave her with nothing to live off of. Who is your client?

Example: Sometimes when a child turns eighteen (18) years and the parents want to have something in place so that the child can get help, a power of attorney can be a good topic of discussion. Every attorney tends to practice a little differently. This author will not draft a power of attorney for anyone without having met them in person or zoom first. That adult child knows that the author is their attorney and they are the client. If this is established and they want their parent and/or loved one to be in the room with them the author generally allows it if the client is

allowed to make their own decisions independent of what the parent or loved one may want. It can be a rather delicate situation to maneuver through.

The three (3) examples above are some recent examples. In an effort to define who the client is from the start; the authors will draft a written fee agreement and make sure that the client understands who the relationship is between for the matter at hand. It can also be helpful to define the scope of work that the attorney is agreeing or not agreeing to do in some cases.

In *Walker v. Lawson*, 526 N.E. 2d 968 (Ind. 1988), the Indiana Supreme Court stated, "We agree with the Court of Appeals that an action will lie by a beneficiary under a will against the attorney who drafted the will on the basis that the beneficiary is a known party."

In the spring of 1980, Sybille Willard, the decedent in this case, learned that she had cancer and approached Lawson for legal advice as of the disposition of her estate. At the time, she was married to Thomas Willard, a second, childless spouse. Sybille's two sons were by her first husband. The bulk of her estate consisted of a single-family residence located in Marion County, Indiana, which she had obtained by the use of life insurance proceeds received upon the death of her first husband. She indicated to Lawson that she wished to leave her entire estate to her two minor sons. It is alleged the Lawson failed to advise Sybille that Thomas could elect to take against the will and receive a statutory share of one-third of the net personal estate of Sybille plus a life estate in one-third of her real estate. Sybille had not come to Lawson to establish a trust to facilitate the handling of her affairs but had come for the stated purpose of depriving her husband of any interest in her estate. Lawson denies the allegation that he failed to properly advise Sybille. A will was prepared leaving everything to her two (2) sons. Following the probation of the will, Lawson prepared a document for Thomas where he elected to take against the will and receive his statutory share under Indiana code 29-1-3-1. The Appellant in this case is one of her two (2) children who

was not happy with stepfather electing against his mother's will. Appellant claims that it was improper for Lawson to prepare the document used by Thomas to make his election against the will. The Court of Appeals indicated that in drafting the document, Lawson was in no way invalidating the will he had drafted. It was immaterial whether it was drafted by Lawson or someone else. The Court of Appeals ruled that Lawson committed no actionable wrong in preparing the document.

Based upon the *Walker v. Lawson* case, it seems to emphasize that the attorney needs to get to know the client pretty well to make sure that their wishes are addressed.

But as practitioners, what duty do we have when the client doesn't hire you for the work? Not only does the prospective client ethical rule still apply, but the ethical Indiana Rules of Professional Conduct 1.4 Communication applies to this situation.

> Rule 1.4. Communication
> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

You should always make sure that you clearly communicate with the client that a representation relationship has not been established. Provided is an example of a did not retain letter.

D. WHAT DO YOU DO WHEN A CLIENT COMES BACK TO YOU FOR MORE HELP?

It is not uncommon for any one of the practitioners listening to this presentation to represent a married couple when assisting with estate planning.

Hypothetical: Robert and Robin Fechtman retain you to have their estate plan drafted. The representation agreement is signed which defines the scope of work. You will be assisting them with Power of Attorneys documents, Wills and a Family Trust for their children. In the fee agreement, you include the stand joint representation clause which states as follows:

> "In the event that Attorney is representing husband and wife, each of them is considered a client of the Attorney. Principles of legal ethics permit joint representation, but only under circumstances of full disclosure and agreement by all involved. Accordingly, matters that one spouse might discuss with Attorney must be disclosed to the other spouse. Anything either spouse discusses with Attorney is still privileged from disclosure to third parties, except as otherwise indicated in this Agreement. Each Client hereby expressly consents to joint representation, despite the possibility of conflict. Attorney may withdraw from representing one or both spouses if there is an actual conflict between the interests of each Client, provided the withdrawal is permitted under the Rules of Professional Conduct."

You gently tell your new clients that this provision means that they are not allowed to get divorced. Once they stop laughing and looking at each other awkwardly, you explain to Robert and Robin that this provision actually means two (2) things. They cannot have secrets with regard to your representation of them throughout this estate planning process. You share that Robert cannot call your office and tell you that he wants to leave some of his estate to the Crazy Colored Sock Association and does not want Robin to know. You also share that it means that they have to get along since you will be representing them together. They say they understand and you proceed with representing them. You finish the representation and all went well. Ten (10) years go by and Robin calls you. She shared with you that Robert's jokes have stopped being funny and she is in the process of divorcing him. She says that she wants her estate plan to be updated.

Can you assist her with updating her estate plan?

A) Yes, no problem! Carry on!

B) No, you thought Robert's jokes were funny and the implication that she does not think he is funny offends you so much that you cannot fathom the idea of representing her.

C) Yes, but you need to reach out to Robert and have the appropriate conflict waiver signed first.

Answer: C, Indiana Rules of Professional Development Rule 1.9 says, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Since you represented them jointly, you are required to present a waiver for both parties to sign. If one of the parties refuse to sign, then you will not be able to represent one of them. When you represented them jointly confidential information was likely shared from both parties. If you are going to represent them as individuals, you will need to make sure that each of them recognizes your knowledge of the confidential information. You will also need to make sure that they both recognize you will not be sharing any information back and forth between parties. The last thing you need as a practitioner is more unnecessary drama.

E. HOW DO YOU WORK WITH CLIENTS WHO HAVE DIMINISHED CAPACITY?

The process of making capacity determinations has been characterized as the "black hole of legal ethics." [1]

[1] Sandusky, supra n. 229, at 479 (alluding to the fact that the Model Rules have not provided lawyers with a working definition of capacity); see Peter Margulies, Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, 62 Fordham L. Rev. 1073, 1082 (Mar. 1994) (introducing

Indiana Rule of Professional Conduct 1.14 (a) emphasizes that "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

What does capacity mean? According to U.S. Legal, it refers to the ability to make a rational decision based upon all relevant facts and considerations. This definition leaves much to be desired. What is rational to one person may not be rational to another.

According to Indiana Code 29-3-1-7.5, an "incapacitated person" means an individual who (1) cannot be located upon reasonable inquiry; (2) is unable (A) to manage in whole or in part the individual's property; (B) to provide self-care; or (C) both; because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or (3) has a developmental disability (as defined in IC 12-7-2-61).

When the author has met with Clients who have seemed to be in a diminished state, she generally takes her time easing into discussions with potential clients. Oftentimes, people can fake

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the contextual capacity model, which incorporates the following six factors, to resolve the black hole dilemma: "(1) ability to articulate reasoning behind decision; (2) variability of state of mind; (3) appreciation of consequences of decision; (4) irreversibility of decision; (5) substantive fairness of transaction; (6) consistency with lifetime commitments." Id. at 1085.); see also James D. Gallagher & Cara M. Kearney, Current Development 2002–2003 Representing a Client With Diminished Capacity: Where the Law Stands and Where It Needs to Go, 16 Geo. J. Leg. Ethics 597 (Summer 2003) (noting the failure of the ABA to differentiate what characteristics encompass "diminished capacity" as opposed to "seriously diminished capacity," thus creating a dilemma for an attorney making the judgment of whether a client's capacity is so seriously diminished as to warrant a violation of attorney-client confidentiality norms. Id. at 601.).

as though they understand what the attorney is talking about by nodding or just audibly agreeing with everything that is being said.

Guardianship Example: The author has been retained to represent an incapacitated person in a guardianship in some cases. More often than not, the author will represent the petitioner but occasionally will represent the incapacitated person if appropriate. In one case, in particular, the family lived out of state and the lady who had diminishing capacity insisted that she wanted to stay in Indiana. She had moved to Indiana some years ago and was used to the environment. She also had dementia and a big move may have provided a big setback when it came to her current mental status which was already on the downhill slide. A colleague and fellow attorney decided to step in and serve as her guardian. The colleague could not represent the alleged incapacitated person and himself as potential guardian. This author was called to visit this lady and represent her.

The author's first goal was to meet with the alleged incapacitated person and listen to her. She seemed to be very vocal about what she wanted and did not want. Apparently, years ago, she had lived in New York and there were times that she thought that she was still in New York. When the Guardianship Hearing occurred, the alleged incapacitated person had moments where she was aware of what she wanted and then other moments where she thought that she was in New York. All parties involved in this case were very patient and allowed her to speak her mind. In the author's opinion, this is the most humane way to handle such delicate matters. Additionally, if any other person were in this situation, they would likely want to be treated with as much dignity and respect as possible. Comment 2 to Rule 1.14 states, "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." It is important to treat any client with respect as much as is possible.

Estate Planning Example: Recently, the author met with a client who was allegedly dying from a terminal illness. The word allegedly is being used here because as of the date of this paper, the person is still alive. In any event, when the attorney visited the client, the gentleman would nod and agree to everything being said. When the attorney stopped and asked the client if he understood what was being said and asked for the client to explain what was going on, it became apparent that the pace of the meeting was going to need to be slowed down tremendously to make sure that everything was being understood. Sometimes, slowing down the pace in a meeting is an important part of estate planning and elder law.

Often times, legal professionals or loved ones want the work done in a hurry and completed overnight. The author would propose that this is not often the best course of action for someone that may need an additional meeting to absorb the needed information. The meeting with the gentleman that was just nodding went on for a couple hours but in the end the client felt best served and was grateful to understand what service was being provided.

F. IS IT TRUE THAT TRUSTEES HAVE MORE FUN?

The author has the continued privilege of serving as Trustee of Special Needs Trusts for several beneficiaries who have disabilities. Many times, when the author serves as Trustee, she assists with administering these trusts in a way that allows the beneficiary who has received a settlement to preserve those funds and maintain their eligibility for their means-tested public benefits such as Medicaid and Supplemental Security Income (SSI). Serving as Trustee is not always the easiest role.

Recently, the author was contacted by a bank and retained to advise them as to how to administer a special needs trust. The author agreed to assist the bank. Shortly after this agreement, the beneficiary decided that they did not want the bank to serve as trustee any longer. The author

was contacted by a colleague and asked if the author could represent the beneficiary of the trust to transition the trust away from the bank and to this other colleague.

The initial question that the author had to address was whether she could actually transition from consulting with the bank to the beneficiary. During the limited time that the author consulted with the bank, the sole intention was to advise the bank about what public benefits may be available for the beneficiary. There was no moment of having any adverse action against the beneficiary. The bank consented to this author representing the beneficiary after this was openly discussed. The author would strongly encourage all colleagues to be as open and transparent, whenever possible, to discern whether you have a conflict with future representation.

G. OTHER COMMON APPLICABLE RULES FOR ELDER LAW SOLO PRACTITIONERS

As solo practitioners, we are continuously forging relationships with our colleagues to provide the best services possible to our clients. Elder law practitioners should look to beneficial resources for their practice. One beneficial resource available to us is our National Academy of Elder Law Attorneys ("NAELA"). NAELA is a great resource to help guide us through our area of practice. NAELA has even established their own Aspirational Standards for their members. A copy of these standards is provided at the end of the authors' materials.

A review of the standards will show you that a discussion of the rules outlined in this presentation are discussed. However, NAELA Aspirational Standards are expanded upon and given more weight towards common elder law situations. This is just one of the many reasons NAELA is great resource for elder law practitioners.

H. CONCLUSION

"Being good is good business." Anita Roddick.

I hope that you have enjoyed this ethical hour. Please remember that every day we practice law we learn new things. There are many challenges we face as practitioners. This hour was hopefully a small guide to help you in your practice. Never be afraid to learn and strive to make sure that your clients are best served.

“Success is not final, failure is not fatal: it is the courage to continue that counts.” Winston Churchill

EXHIBIT A

LAW OFFICE OF
ELIZABETH A. HOMES
LLC

WAIVER OF CONFLICT

This waiver of conflict is entered into between *CLIENT1, *CLIENT2 and Elizabeth A. Homes of Law Office of Elizabeth A. Homes LLC this *DATE.

WHEREAS, Elizabeth A. Homes of Law Office of Elizabeth A. Homes LLC represented *CLIENT1 and *CLIENT2 jointly when initially developing their Estate Plan in *YEAR.

*CLIENT1 and *CLIENT2 are no longer married and would each like to have updates made to their individual estate planning documents.
Elizabeth A. Homes and Law Office of Elizabeth A. Homes LLC would be pleased to represent each Client on an individual basis, subject to the following understandings.

This Waiver of Conflict is designed to identify and gain a fully informed waiver of any conflict that may arise out of the representation of *CLIENT1 and *CLIENT2 in updating their individual estate planning documents due to the prior representation of *CLIENT1 and *CLIENT2 together, or from the continued representation of the other Client.

WHEREAS, *CLIENT1 and *CLIENT2 (the “Client” individually or the “Clients” together) now wish Elizabeth A. Homes and Law Office Elizabeth A.

Homes LLC (the “Attorney”) to represent both *CLIENT1 and *CLIENT2 for making updates to their individual Special Needs Estate Planning documents separately.

THEREFORE, *CLIENT1 and *CLIENT2 both agree to the following:

1. The Parties agree and understand that the Attorney has access to confidential information of both *CLIENT1 and *CLIENT2.
2. The Parties agree and understand that Attorney shall not share confidential information obtained in meetings or through correspondence from either Client with the other, without their expressed written consent.
3. The Clients agree and understand that a conflict of interest may arise as a result of the Attorney’s representation of one or of both of the Clients which materially limits or prevents the Attorney from representing one or both Clients.
4. That in the event that a conflict does arise between the Clients that makes the continued representation of both clients inappropriate in the professional opinion of Attorney, the Attorney will withdraw her representation for both Clients, and each Client will be required to seek independent representation.
5. That each Client represents that they are aware of the relevant circumstances and the material and reasonably foreseeable ways that the conflict could have adverse effects on the Client’s interests and have been given the opportunity to seek independent legal advice or have chosen not to do so.

6. *CLIENT1 hereby gives his informed consent and waives any and all conflicts of interest which now exist, or which may arise as a result of the Attorney's representation of *CLIENT2.
7. *CLIENT2 hereby gives her informed consent and waives any and all conflicts of interest which now exist, or which may arise as a result of the Attorney's representation of *CLIENT1.

_____	_____
*CLIENT1 CLIENT	*CLIENT2 CLIENT
_____	_____
DATE	DATE

_____
Elizabeth A. Homes
ATTORNEY

_____
DATE

Lindsay M.L. Koler, Attorney
lkoler@kolerlawoffice.com
Jeslynn C. Smith, Attorney
jsmith@kolerlawoffice.com

September 28, 2020

[client]
[address]
[city, state zip]

Re: Estate Planning

Dear [client]:

Thank you for choosing the Koler Law Office to assist with your Estate Planning. It was my pleasure to work with you. This letter serves to confirm that an attorney – client relationship between you and Koler Law Office has not been formed. I encourage you to consider moving forward with the process even if you choose to use another reputable law firm.

I invite you to call me personally at any time when you decide to take the next step and begin designing your estate plan with us.

Your file is saved on our server, so that we are ready to assist you in the future. It was a pleasure meeting with you. Please do not hesitate to contact me at any time if I can be of further assistance to you.

Sincerely,

Lindsay M.L. Koler or Jeslynn C. Smith

1028 West Cook Road, Ste F, Fort Wayne, Indiana 46825 – office 260-449-9621 - fax 260-818-2137

Lindsay M.L. Koler
lkoler@kolerlawoffice.com
Jeslynn C. Smith
jsmith@kolerlawoffice.com

September 28, 2020

[Client Name]
c/o [POA]
[Address1]
[Address2]

SENT VIA EMAIL:

Re: Did Not Retain

Dear [Client Name]:

Thank you for choosing the Koler Law Office. It was a pleasure to assist you with a Medicaid Assessment on April 14, 2020. It is our understanding you have decided not to proceed with Medicaid planning at this time. We look forward to assisting you with Medicaid planning whenever you are ready to get started.

We will close your file at this time, but please do not hesitate to contact me at any time if I can be of further assistance to you.

Sincerely,

Lindsay M.L. Koler or Jeslynn C. Smith

1028 West Cook Road, Ste F, Fort Wayne, Indiana 46825. Phone (260) 449-9621. Fax (260) 818-2137

Aspirational Standards for the Practice of Elder Law and Special Needs Law

Second Edition, April 24, 2017

Preamble

The National Academy of Elder Law Attorneys (NAELA) was founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with special needs. These Aspirational Standards for the Practice of Elder and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.

Given the dynamic and evolving nature of elder and special needs law, attorneys should and often must represent their clients "holistically," adapting and applying information and insight obtained from a wide range of legal and social disciplines. When assisting clients with planning or the implementation of plans, elder and special needs law attorneys often represent clients who have diminished or lack of capacity. Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "Who is the client?" present issues not regularly faced by attorneys in other fields. These Standards are designed to assist attorneys to provide high-quality counsel, advocacy, and guidance to clients in this unique and specialized area.

These Aspirational Standards:

- Assist attorneys to navigate the many difficult ethical issues that often arise when representing elderly individuals and individuals with special needs;
- Raise the level of professionalism in the practice of elder and special needs law; and
- Assist attorneys to effectively meet the needs of their clients.

This second edition of the Aspirational Standards is the product of 3 years of study and deliberation by NAELA's Professionalism and Ethics Committee. While each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules.

These Standards do not define or establish a legal or community standard nor are they intended to be used to support a cause of action, create a presumption of a breach of a legal duty, or form a basis for civil liability. Those matters are governed by the statutes and rules of professional responsibility of the state in which the attorney practices.

Following these Aspirational Standards helps attorneys make the lives of clients better. As Clifton Kruse, NAELA Past President and member of the Professionalism and Ethics Committee at the time the Committee drafted the first edition of the Standards, so aptly said:

[C]lients are hesitant to share without invitation. There is a threshold that we must assure them that we want them to cross. And we do this with questions. And we do it as lawyers. We are the elders' lifeline. … Our licenses make this possible. They give us status and credibility, and after meeting us -— hopefully, trust. The legal answers are comparatively easy — the job we are called in to do is done -— but along the way, the more important, the more valuable service occurs as well. We listen. We invite a monologue. We establish this by our demeanor and by our questions that invite unloading — and in the process we extend the joy that elders' memories bring. And on those days, we earn the accolade — professional — one who serves others. That is our privileged role as lawyers; we can make others' lives, if even for a few moments, better than they were before.

The following are the NAELA Aspirational Standards. If you are a NAELA member or prospective member, you can access the full version with commentary here.

A. Holistic Approach

The elder and special needs law attorney:

1. In applying a holistic approach to legal problems, works to consider the larger context, both other legal consequences as well as the extra-legal context in which the problems exist and must be solved.
2. May consider using nonlegal services to accomplish the goals of the representation when appropriate and the client consents.
3. Encourages the use of family members and other third parties to support the client in the legal representation when appropriate and the client consents.
4. Explains to the client seeking estate planning services how conflicts among family members may develop and, if desired by the client, recommends harmony-enhancing measures consistent with the client's estate planning goals to minimize these conflicts.
5. When conflict between family members or other interested parties arise, evaluates whether nonjudicial conflict resolution is appropriate and encourages noncourt resolution when appropriate.
6. Takes actions to help prevent current and future financial exploitation, abuse, and neglect of the client.

B. Client Identification

The elder and special needs law attorney:

1. Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement on these identifications, and communicates this information to the persons involved.
2. Recognizes the unique challenges of identifying the client when a fiduciary is acting on behalf of a protected individual.

3. Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence.

C. Engagement Agreements and Document Drafting

The elder and special needs law attorney:

1. Uses an engagement agreement, letter, or other writing that will:
    a) Identify the client;
    b) Describe the scope and objectives of the representation;
    c) Disclose potential material conflicts of interest between the attorney and client;
    d) Explain the attorney's obligation of confidentiality;
    e) Confirm, when there are joint clients, that the attorney will share information and confidences between them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree on how to proceed;
    f) Disclose potential material conflicts between joint clients;
    g) Address (and possibly waive) nonmaterial conflicts of interest between joint clients;
    h) Confirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not take timely corrective action;
    i) Set out fee arrangements (hourly, fixed fee, or contingent); and
    j) Explain when and how the attorney-client relationship may end.
2. Drafts documents reflecting the client's intentions and informed choices that:
    a) An attorney-client relationship has been established (except in certain exigent circumstances described in Standard C. Engagement Agreements and Document Drafting, Section 4(a);
    b) The client has sufficient capacity to sign the documents;
    c) The documents reflect the client's intentions and informed choices as opposed to the choices of others; and
    d) If the client is a fiduciary, the fiduciary appears to have authority and the proposed documents either reflect the choices of the protected individual if known or, if not known, are in the protected individual's best interests.
3. Recognizes the unique challenges in drafting documents at the request of a fiduciary.
4. Exercises caution when:
    a) Drafting documents in exigent circumstances for a prospective client before the attorney-client relationship is established;
    b) Drafting documents for a new client at the request of an existing or former client related to the new client;
    c) Drafting a special needs trust for a person with special needs; and
    d) Drafting documents to be signed by nonclients.

5. The elder and special needs law attorney ensures that documents are properly executed.

D. Conflicts of Interest

The elder and special needs law attorney:

1. In the initial meeting when multiple prospective clients are present, ensures that the prospective clients understand whether the representation will be individual, concurrent, or joint.
2. Undertakes joint or concurrent representation, as permitted by relevant state rules of professional conduct and these Aspirational Standards, only after obtaining the consent of the parties and having reviewed with them the advantages and disadvantages of such representation, including the relevant foreseeable conflicts of interest and risks of such representation, in a manner that will be best understood by each person to be represented.
3. Treats family members who are not clients as unrepresented persons and accords them involvement in the client's representation only to the extent that the client consents to their involvement with a signed waiver or, if the client no longer has the capacity to consent, to the extent that their involvement is consistent with the client's wishes and values if known and, if not known, the client's best interests.
4. Accepts payment of client fees by a third party only after:
    a) Determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client;
    b) Securing the client's informed consent to the payment by the third party in writing; and
    c) Ensuring that all the parties understand and agree to the ethical ground rules for third-party payment.
5. Subject to state regulations, may serve as a fiduciary for a client upon the request of a client who has capacity if it is in the client's best interests and if the client gives written informed consent after full disclosure.

E. Confidentiality

The elder and special needs law attorney:

1. Carefully explains to the client and others involved, as early in the representation as possible, the attorney's duty of confidentiality to the client in order to avoid misunderstandings and to ascertain and respect the client's wishes regarding the disclosure of confidential information.
2. Explains how the rules of confidentiality are applied to different forms of representation, including individual representation and joint representation.
3. Establishes as a prerequisite to joint representation a clear understanding and agreement that the attorney will keep no client secrets from any other client in that joint representation.
4. Strictly preserves client confidences, especially in situations that involve frequent contacts with family members, caregivers, or other trusted third parties who are not clients.

5. Ascertains the wishes of the client as to whom, if anyone, the attorney may disclose confidential information and explains the potential consequences of such disclosure.
6. Carefully maintains client confidentiality to the extent possible while also meeting the requirements of laws, regulations, or court orders imposing a duty to disclose.

F. Competent and Diligent Representation

The elder and special needs law attorney:

1. Has a wide range of professional skills unique to the practice of elder and special needs law and continually demonstrates a commitment to addressing the individual needs of each client.
2. Diligently and competently handles all client matters.
3. Regularly pursues continuing professional education and peer collaboration in elder and special needs law and related subjects, including the physical, cognitive, social, and psychological challenges of elderly individuals and individuals with special needs and the skills needed to serve individuals facing those challenges.
4. Adequately trains and supervises legal and nonlegal staff members to ensure that they have the knowledge and skills needed to best serve individuals facing the challenges associated with aging and having special needs.

G. Client Capacity

The elder and special needs law attorney:

1. Continues to respect the right to self-determination and confidentiality of a client with diminished capacity.
2. Develops and uses appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.
3. Adapts the interview environment, timing of meetings, communications, and decision-making process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances.
4. Takes appropriate measures to protect the client when the attorney reasonably believes that the client (a) has diminished capacity; (b) is at risk of substantial physical, financial, or other harm unless action is taken; and (c) cannot adequately act in his or her own interest.
5. Uses appropriate measures to protect the client, including (a) considering the wishes and values of the client if known or, if not known, the client's best interests; (b) minimizing intrusion into the client's decision-making autonomy; (c) respecting the client's family and social connections; and (d) considering a range of supportive actions other than court proceedings and adult protective services.
6. Preserves client confidences to the extent possible by only divulging that information necessary or appropriate for protective action.
7. Seeks guardianship or conservatorship only when no other viable alternatives exist.

H. Communication and Advocacy

The elder and special needs law attorney:

1. Works to minimize barriers to effective communication with clients.
2. Maintains direct communication with the client, whether in person, by telephone, or through correspondence, even when the client chooses to involve others (including an agent under a durable power of attorney).
3. In order to obtain informed consent, advises clients of their options, explaining the possible consequences of each option.
4. Advocates for the courses of action chosen by the client.
5. When developing a plan to secure and pay for long-term supports and services should:
    a) Strive to determine the client's wishes and values in order to achieve the client's objectives concerning living options, health care, loved ones, and property;
    b) Endeavor to preserve and promote the client's dignity, self-determination, and quality of life;
    c) Counsel the client about the full range of long-term services options, risks, consequences, and relevant costs;
    d) Counsel the client in light of the client's needs, personal values, wishes, best interests, and the alternatives available; and
    e) Counsel the client on the estate planning and tax implications of the client's choices for long-term services on his or her property.

I. Marketing and Advertising

The elder and special needs law attorney:

1. Should consider marketing and advertising as an opportunity to educate the public and promote the profession of elder and special needs law.
2. Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, marketing, or advertising activity.
3. Should communicate in a manner that considers the intended audience's potential lack of sophistication or vulnerability to overly aggressive or fear-based marketing communications.
4. Communicates the attorney's education and experience to distinguish the attorney's practice and refrains from suggesting the attorney's superiority to or advantage over other attorneys.
5. Uses endorsements and testimonials in a truthful, nondeceptive, and transparent manner.

J. Nonlegal Services

The elder and special needs law attorney:

1. May consider using nonlegal services to accomplish the goals of the representation with the client's informed written consent and ensures that the client's rights and attorney's ethical duties are maintained.
2. Considers alternative ways to deliver nonlegal services.
3. Discloses in writing and obtains the client's informed written consent to any relationship between the provider of the nonlegal service and the attorney, the attorney's law firm, and the attorney's immediate family members.

4. Maintains appropriate licenses and complies with state bar ethics rules when selling insurance and investment products.

K. Pro Bono Legal Representation and Public Service

The elder and special needs law attorney:

1. Recognizes the need for pro bono legal representation, provides pro bono representation to elderly individuals and individuals with special needs who cannot afford to pay, and participates in and supports pro bono referral programs.
2. Financially supports organizations that meet the needs of elderly individuals and individuals with special needs.
3. Participates actively in, and provides ongoing leadership for, efforts to improve the law to meet the changing needs of elderly individuals and individuals with special needs.

About NAELA

Members of the National Academy of Elder Law Attorneys (NAELA) are attorneys who are experienced and trained in working with the legal problems of aging Americans and individuals of all ages with disabilities. Upon joining, NAELA member attorneys agree to adhere to the NAELA Aspirational Standards. Established in 1987, NAELA is a non-profit association that assists lawyers, bar organizations, and others. The mission of the National Academy of Elder Law Attorneys is educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law. NAELA currently has members across the United States, Canada, Australia, and the United Kingdom. For more information, visit NAELA.org, or to locate a NAELA member in your area, please visit NAELA.org/findlawyer.

COMMONLY FACED ETHICS FOR ELDER LAW PRACTITIONERS

ICLEF

Elder Law Institute

October 2, 2020

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MENTAL HEALTH MOMENT

“Ethics is knowing the difference between what you have a right to do and what is right to do.” Potter Stewart

Who is your Client?

- Indiana Rules of Professional Conduct Rule 1.18
  - “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

Duty to Prospective Clients?

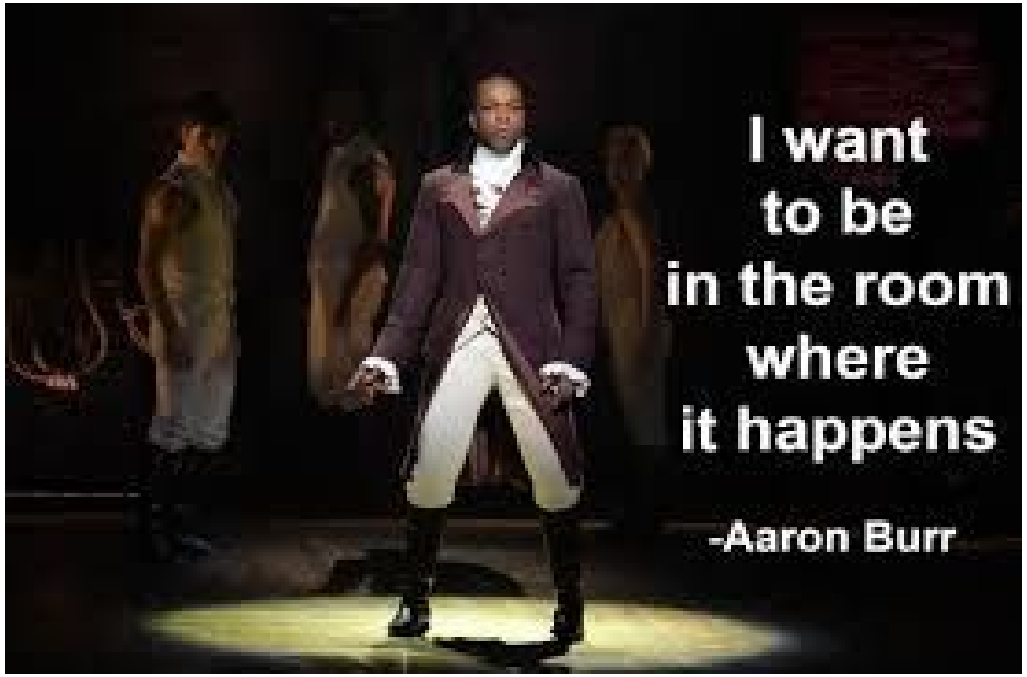
- It Depends!
- When the prospective client calls, what is communicated to the attorney's staff?
- What is the expectation of the person that the lawyer will be meeting with during the initial meeting?

Jeffrey

"Do whatever my sons want!"

"Dad wants his estate plan to read as follows."

Estate Plan



May I have some more?

Bob and Robin Fechtman

Robin Fechtman: Ethics Question

Can you assist her with updating her estate plan?

A) Yes, no problem! Carry on!

B) No, you thought Robert's jokes were funny and the implication that she does not think he is funny offends you so much that you cannot fathom the idea of representing her.

C) Yes, but you need to reach out to Robert and have the appropriate conflict waiver signed first.

Proceed with Caution

- Answer: C
- Indiana Rules of Professional Development Rule 1.9 says, “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

Handling Clients with Diminished Capacity

- Indiana Rule of Professional Conduct 1.14(a)
  - When a client's capacity to make adequately considered decisions in connection with a representative is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

Rebecca

“I am in New York and need to go back home with my family.”

“I don’t want to subscribe to whatever club you are trying to get me to join.”

LISTEN!

- Comment 2 to Rule 1.14 states, “The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect.” It is important to treat any client with respect as much as is possible.

Being Good is Good Business.
Anita Roddick

“Success is not final, failure is not fatal: it is the courage to continue that counts.”
Winston Churchill

THANK YOU!

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KOLER
LAW OFFICE

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