



## **2020 Bench Bar Elder Law Review and Update**

Presented By:

**COLBERT & GREBAS, P.C.**  
CERTIFIED ELDER LAW ATTORNEYS\*

570-299-7909

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

\*Certified Elder Law Attorneys by the National Elder Law Foundation as authorized by the Pennsylvania Supreme Court.

**QUICK REFERENCE NUMBERS**

**AS OF JULY 2020\***

**COLA 1.6%**

**MEDICAL ASSISTANCE**

Average cost of Nursing Home Care in PA	\$ 10,732.83 /month
	\$ 352.86/day
Resident Personal Needs Allowance	\$ 45.00
Income Limit Waiver Program	\$ 2,349.00
Resource Limit (income over \$2,313.00 per month)	\$ 2,400.00
Resource Limit (income under \$2,313.00 per month)	\$ 8,000.00
Minimum Community Spouse Resource Allowance	\$ 25,728.00
Maximum Community Spouse Resource Allowance	\$128,640.00
Minimum Monthly Maintenance Needs Allowance	\$ 2,155.00
Maximum Monthly Maintenance Needs Allowance	\$ 3,216.00
Shelter Standard	\$ 647.00
Utility Monthly Allowance Including Heat	\$ 594.00
Utility Monthly Allowance n/Including Heat	\$ 308.00
Utility Monthly Allowance – Phone only	\$ 33.00
Home Maintenance Allowance	\$ 805.10
Home Equity Limit	\$595,000.00
LIFE Capitated Rate	\$ 4,954.13

**MEDICARE**

Medicare SNF Co-Payment	\$ 170.50
Medicare Part B Premium	\$ 144.60

**SUPPLEMENTAL SECURITY INCOME**

<u>SSI Income</u>	<u>State Supplement</u>	<u>SSI Resources</u>
Individual \$ 783.00	\$22.10	\$2,000.00
Couple \$1,175.00	\$33.30	\$3,000.00

Substantial Gainful Employment Income Limit      \$1,260 for disabled      \$2,110 for Blind

## QUICK REFERENCE NUMBERS

### VA PENSION

	<u>Aid and Attendance</u>	<u>Homebound</u>	<u>Low Income</u>
Veteran	\$1,911.00	\$1,400.00	\$1,146.00
Veteran w/1 Dependent	\$2,266.00	\$1,755.00	\$1,500.00
Surviving Spouse of Veteran	\$1,228.00	\$ 939.00	\$ 768.00

<u>Net Worth Limit</u>	-	\$129,094
<u>Penalty Rate</u>	-	\$2,266.00

### Periods of War

*World War II* December 7, 1941, through December 31, 1946, inclusive. If the veteran was in service on December 31, 1946, continuous service before July 26, 1947, is considered World War II service.

*Korean conflict* June 27, 1950, through January 31, 1955, inclusive.

*Vietnam era* Served in the Republic of Vietnam February 28, 1961 – May 7, 1975  
Otherwise August 5, 1964 – May 7, 1975

*Persian Gulf War* August 2, 1990 through present

\* *Planning Numbers change annually, usually in January and July*



**PLANNING FOR INCAPACITY**  
**LEGAL TOOLS FOR SUBSTITUTE DECISION MAKING**

**Advance Health Care Directives** (20 Pa C.S.A. § 5421 et seq.)

**Generally**

Definitions

Advance Health Care Directive - A Health Care Power of Attorney, Living Will or a written combination of a Health Care Power of Attorney and Living Will.

Attending Physician - The physician who has primary responsibility for the health care of a Principal or patient.

Cardiopulmonary resuscitation - Any of the following procedures:

1. Cardiac compression.
2. Invasive airway technique.
3. Artificial ventilation.
4. Defibrillation.
5. Any other procedure related to those set forth above.

Competent - A condition in which an individual, when provided appropriate medical information, communication supports and technical assistance, is documented by a Health Care Provider to do all of the following:

1. Understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision.
2. Make that health care decision himself.
3. Communicate that health care decision to any other person.

This term is intended to permit individuals to be found competent to make some health care decisions, but incompetent to make others.

DNR - Do not resuscitate.

End-Stage Medical Condition - An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness that will, in the opinion of the Attending Physician to a reasonable degree of medical certainty, result in death, despite the introduction or continuation of medical treatment. Except as specifically set forth in an Advance Health Care

Directive, the term is not intended to preclude treatment of a disease, illness or physical, mental, cognitive or intellectual condition, even if incurable and irreversible and regardless of severity, if both of the following apply:

1. The patient would benefit from the treatment, including palliative care.
2. Such treatment would not merely prolong the process of dying.

Health Care Provider - A person who is licensed, certified or otherwise authorized by the laws of Pennsylvania to administer or provide health care in the ordinary course of business or practice of a profession.

Incompetent - A condition in which an individual despite being provided appropriate medical information, communication supports and technical assistance, is documented by a Health Care Provider to be:

1. Unable to understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision;
2. Unable to make that health care decision himself; or
3. Unable to communicate that health care decision to any other person.

The term is intended to permit individuals to be found incompetent to make some health care decisions, but competent to make others.

Life-sustaining treatment - Any medical procedure or intervention that, when administered to a patient or Principal who has an end-stage medical condition or is permanently unconscious, will serve only to prolong the process of dying or maintain the individual in a state of permanent unconsciousness. In the case of an individual with an Advance Health Care Directive or order, the term includes nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the Advance Health Care Directive or order so specifically provides.

Permanently unconscious - A medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, an irreversible vegetative state or irreversible coma.

Principal - An individual who executes an advance health care directive, designates an individual to act or disqualifies an individual from acting as a Health Care Representative or an individual for whom a Health Care Representative acts in accordance with the laws of Pennsylvania.

### Presumption Not Created

There is no presumption created that an individual who failed to execute an Advance Health Care Directive consents to the use or withholding of Life-Sustaining Treatments.

### Compliance by Health Care Provider

A Health Care Provider who is unable to comply with a Living Will or health care decision of an Agent or Representative must inform the Principal or Agent or Representative and must make every reasonable effort to assist in transferring the Principal to another Health Care Provider who will comply with the Living Will or health care decision of the Agent or Representative.

If transfer is impossible, failure to comply with the Living Will or the decision of the Health Care Agent will not subject the physician or health care provider to civil or criminal liability.

### Protection from Civil and Criminal Liability

A Health Care Provider will not be subject to civil or criminal liability, professional discipline or administrative sanctions for following a Principal's wishes for initiating, continuing, withholding or withdrawal of Life-Sustaining Treatments if acting in accordance with Pennsylvania law.

### Forms

An Advance Health Care Directive may be in the form provided in the Statute or in any other written form that complies with Pennsylvania Law.

### Living Wills

#### Definition

A writing made in accordance with State law that expresses a Principal's wishes and instructions for health care and health care directions when the Principal is determined to be incompetent and has an end-stage medical condition or is permanently unconscious.

#### Execution Requirements

A person of sound mind; and who is at least 18 years of age or married, has graduated from high school or is emancipated may make a Living Will.

The Living Will must be dated and signed by the Principal by signature or mark or by another individual at the direction of the Principal; and

The Living Wills must be witnessed by two (2) individuals who are at least 18 years old.

#### Witnesses

An individual who signs a Living Will at the direction of a Principal may not also witness the Living Will.

A Health Care Provider may not sign a Living Will at the direction of the Principal if such Health Care Provider provides health care services to the Principal.

#### Effect of Living Will

##### When Operative

A Living Will becomes operative when a copy is provided to the Attending Physician; and the Principal is determined by the Attending Physician to be incompetent and to have an end-stage medical condition or to be permanently unconscious.

##### Compliance

When a Living Will becomes operative, the Attending Physician and other Health Care Providers shall act in accordance with its provisions or comply with the transfer of the Principal or patient to a Health Care Provider that will so comply.

##### Invalidity of specific direction

If a specific direction in a Living Will is held to be invalid, the invalidity does not negate other directions in the Living Will that can be affected without the invalid direction.

##### Medical record

Any Health Care Provider to whom a copy of a Living Will is furnished shall make it a part of the medical record of the Principal and, if unwilling to comply with the Living Will, promptly so advise the Principal, or the Principal's Health Care Agent or Representative.

##### Duration

Unless a Living Will states a time of termination, it is valid until revoked by the Principal, notwithstanding the lapse of time since its execution.

## Duty of physician to certify end-stage medical condition

Promptly after a determination that the Principal has an end-stage medical condition or is permanently unconscious, the Attending Physician shall certify in writing that the Principal has an end-stage medical condition or is permanently unconscious.

## Revocation

A Living Will may be revoked at any time by the Principal by communicating the decision to revoke to the Attending Physician, other Health Care Provider or to a witness, regardless of the mental or physical condition of the Principal.

## Statutory Format and Non-Conforming Documents

The format provided by the statute is optional. Pre-existing and out-of-state Living Wills are valid so long as they are not inconsistent with PA law.

## **Health Care Power of Attorney**

### Definitions

Health Care Power of Attorney - A writing made by a Principal designating an individual to make health care decisions for the Principal.

Health Care Agent - An individual designated by a Principal in an Advance Health Care Directive.

### Execution Requirements

A person who is of sound mind and who is at least 18 years of age or married, has graduated from high school or is emancipated may make a Health Care Power of Attorney.

The Health Care Power of Attorney must be dated and signed by the Principal by signature or mark or by another individual at the direction of the Principal; and witnessed by two (2) individuals who are at least 18 years old.

### Witnesses

An individual who signs a Health Care Power of Attorney at the direction of a Principal may not also witness the Health Care Power of Attorney.



A Health Care Provider may not sign a Health Care Power of Attorney at the direction of the Principal if such Health Care Provider provides health care services to the Principal.

#### Required Provisions

The Health Care Power of Attorney must identify the Principal and appoint the Health Care Agent; and declare that the Principal authorizes the Health Care Agent to make health care decisions on behalf of the Principal.

#### Optional Provisions

A Health Care Power of Attorney may, but need not:

Describe any limitations that the Principal imposes upon the authority of the Health Care Agent;

Indicate the intent of the Principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment;

Indicate whether the Principal wants tube feeding or any other artificial or invasive form of nutrition or hydration;

Disqualify an individual from acting as a Health Care Representative, prohibit the appointment of a Health Care Representative or provide for an order of priority of appointment of a Health Care Representative;

Nominate a guardian of the person of the Principal;

Contain other provisions as the Principal may specify regarding the implementation of health care decisions and related actions by the Health Care Agent or Health Care Representative; and

Request that the Health Care Agent or Health Care Representative exercise his sole and absolute discretion to consult the Principal's relative, cleric or physician should the Health Care Agent or Health Care Representative be uncertain of the Principal's wishes or best interests.

## Effect of Health Care Power of Attorney

### When Operative

Unless otherwise specified in the Health Care Power of Attorney, a Health Care Power of Attorney becomes operative when:

A copy is provided to the Attending Physician; and

The Attending Physician determines that the Principal is incompetent.

### When Inoperative

Unless otherwise specified in the Health Care Power of Attorney, a Health Care Power of Attorney becomes inoperative during such time as, in the determination of the Attending Physician, the Principal is competent.

## Invalidity of Specific Direction

If a specific direction in the Health Care Power of Attorney is held to be invalid, the invalidity does not negate other directions in the Health Care Power of Attorney that can be affected without the invalid direction.

## Duration

Unless the Health Care Power of Attorney states a time of termination, it is valid until revoked by the Principal or the Principal's guardian of the person, notwithstanding the lapse of time since its execution.

## Court approval unnecessary

A health care decision made by a Health Care Agent for a Principal is effective without court approval.

## Appointment of Health Care Agents

Multiple and successor Health Care Agents are permitted.

Unless related to the Principal by blood, marriage or adoption, a Health Care Agent of the Principal may not be any of the following:

The Principal's Attending Physician or other Health Care Provider.

An owner, operator or employee of a Health Care Provider in which the Principal is receiving care.

#### Authority of Health Care Agent

The health care Agent is authorized to make any health care decisions and to exercise any right and power regarding the Principal's care, custody and health care treatments that the Principal could have made and exercised. This authority may extend beyond the Principal's death for the purposes of making anatomical gifts, disposing of the remains, and consenting to autopsies.

#### Responsibilities of the Agent

Consult with Health Care Providers

Base decisions on the following:

In accordance with the Agent's understanding and interpretation of the Principal's instructions.

If no instructions, then in conformity with the Agent's assessment of the Principal's preferences and values, including religious and moral beliefs.

In the absence of such knowledge, then in accordance with the Agent's assessment of the Principal's best interests.

#### Countermand, Amendment, and Revocation

Countermand

The Principal need not be of sound mind to countermand any decision made by the Agent that would withhold or withdraw Life-Sustaining Treatments but must be of sound mind to countermand medical decisions.

Amendment

The Principal may amend the Health Care Power of Attorney at any time, but must be of sound mind and must be in writing.

## Revocation

The Principal must be of sound mind to revoke a Health Care Power of Attorney, but does not need to be in writing.

## Duties of Attending Physician and Health Care Provider

### Duty to Certify End-Stage Medical Condition

Promptly, after a determination that a Principal has an end-stage medical condition or is permanently unconscious, the Attending Physician shall certify in writing that the Principal has an end-stage medical condition or is permanently unconscious.

### Communication of Health Care Decision

Whenever possible before implementing a health care decision made by a Health Care Representative or Health Care Agent, an Attending Physician or Health Care Provider shall promptly communicate to the Principal the decision and the identity of the person making the decision.

### Compliance with Decisions of Health Care Agent and Health Care Representative

Health care necessary to preserve life shall be provided to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if the individual is competent and objects to such care or a Health Care Agent objects on behalf of the Principal if authorized to do so by the Health Care Power of Attorney or Living Will. In every other case, an Attending Physician or Health Care Provider shall comply with a health care decision made by a Health Care Agent or Health Care Representative to the same extent as if made by the Principal.

### Medical Record

An Attending Physician or Health Care Provider who is given a Health Care Power of Attorney shall arrange for the Health Care Power of Attorney or a copy to be placed in the medical record of the Principal.

An Attending Physician or Health Care Provider to whom an amendment or revocation of a Health Care Power of Attorney is communicated shall promptly enter the information in the medical record of the Principal and maintain a copy if one is furnished.

## Record of Determination

An Attending Physician who determines that a Principal is or has become incompetent or makes a determination that affects the authority of an Agent shall enter the determination in the medical record of the Principal and, if possible, promptly inform the Principal and any Health Care Agent of the determination.

## **Health Care Representative**

### Definition

Health Care Representative is an individual appointed by the Principal or designated by Statute to have the authority to make health care decisions on behalf of an incapacitated person. The authority and decision-making process of a Health Care Representative is the same as provided for a Health Care Power of Attorney.

### When may a Health Care Representative make decisions

The Attending Physician has determined that the individual is incompetent, and

The individual is at least 18 years old, has graduated high school, has married or is an emancipated minor, and

The individual does not have a Health Care Power of Attorney or the Agent is unavailable, and

No Guardian has been appointed.

### Designation of Health Care Representative

By statute in the following order: As determined by the individual or by default (in order)

Spouse (and Adult Children if not children of the spouse)

Adult Children

Parent

Adult Sibling

Adult Grandchild

An adult with knowledge of the individual's preferences.

A Health Care Provider may not serve as Health Care Representative unless related to the incapacitated person by blood or marriage.

### Authority of Health Care Representative

The Health Care Agent is authorized to make any health care decisions and to exercise any right and power regarding the Principal's care, custody and health care treatments that the Principal could have made and exercised.

### Resolution of Disagreements

If more than one person within a class assumes authority to act as Health Care Representative, then a majority within the class is needed to make a decision. If no majority exists, then the disagreement must be resolved within class or court action will be required.

### Countermand

The Principal need not be of sound mind to countermand any decision made by the Health Care Representative that would withhold or withdraw Life-Sustaining Treatments but must be of sound mind to countermand medical decisions.

### Written Declaration

The Health Care Provider may require the proposed Health Care Representative to provide a written declaration that states facts and circumstances sufficient to establish authority.

### **Financial Power of Attorney (20 Pa. C.S.A. § 5601 et seq.)**

#### Purpose

To ensure that the client's values are respected and intentions and financial goals will be met by the person of the client's choosing a time when the client is unable to make his or her own financial and legal decisions.

#### Definitions

Financial Power of Attorney – a very powerful document that allows an individual to appoint an agent to manage his/her financial and legal affairs.

Principal – the individual who is granting the power of attorney to another.

Agent – a person designated by a Principal in a Power of Attorney to act on behalf of that Principal.

Good Faith– honesty in fact.

Durable Power of Attorney– a Power of Attorney conferring authority in writing to an agent that is exercisable notwithstanding the Principal’s subsequent disability or incapacity.

“Springing” Power of Attorney– a Power of Attorney may provide that the Agent’s authority does not become operative until a specified time or contingency has occurred, including the disability or incapacity of the Principal.

### Legal Capacity

Client must have adequate legal capacity at time of signing. Capacity is presumed, but the Pennsylvania Power of Attorney statute does not provide a definition of capacity. PA case law seems to support a more lenient, general understanding standard.

Does the Principal understand the nature of the authority?

Does the Principal understand the assets subject to the power?

Does the Principal understand the Notice provisions?

### Execution Requirements

The Power of Attorney must be dated and signed by the Principal by signature or mark. It may be executed by another person at the specific direction of the Principal if the Principal is unable to sign.

The Principal’s signature or mark or the signature of another signing on behalf of the Principal must be notarized and witnessed by two (2) adult individuals (18 years of age or older).

Notary Public – the Agent may not serve as Notary or the person acknowledging the signature.

Witnesses – the following individuals may not serve as witnesses:

The person signing the Power of Attorney on behalf of the Principal;

The Agent appointed under the Power of Attorney;

The Notary Public; or

The person authorized by law to take acknowledgements.

Notice Page – The Notice page must appear at the beginning of the Power of Attorney document in capital letters. The Notice must be signed by the Principal.

Agent's Acknowledgement Page - The Agent designated under the Power of Attorney will not have the authority to act on the Agent's behalf unless the Agent executes an acknowledgement, which acknowledgement is affixed to the Power of Attorney document.

The execution, Notice, and acknowledgement requirements do not apply to the following powers:

A power contained in an instrument used in a commercial transaction which authorizes an agency relationship.

A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a loan or other credit transaction.

A power exclusively granted to facilitate transfer of stock, bonds and other assets.

A power contained in the governing document for a corporation, partnership or limited liability company or other legal entity by which a director, partner or member authorizes others to do other things on behalf of the entity or a proxy or other delegation to exercise voting rights or management rights with respect to a legal entity.

A warrant of attorney conferring authority to confess judgment.

A power given to a dealer as defined by the act of December 22, 1983 (P.L.306, No.84), known as the Board of Vehicles Act, when using the power in conjunction with a sale, purchase or transfer of a vehicle as authorized by 75 Pa. C.S. § 1119 (relating to application for certificate of title by agent).

A power created on a form prescribed by a Commonwealth agency, political subdivision or an authority or instrumentality of the Commonwealth or a political subdivision.

A power of attorney that provides for health or mental health care decision making only.

#### Agent's Duties

Agent's Mandatory Duties - An Agent appointed under a Power of Attorney must act as follows:

In accordance with the Principal's reasonable expectations to the extent known by the Agent, and if not known, then in the Principal's best interest;  
In good faith;

Only within the scope of the authority granted to the Agent under the Power of Attorney.



Agent's Waivable Duties– unless otherwise provided in the Power of Attorney, an Agent shall have the following duties:

Act loyally for the Principal's benefit.

Keep the Agent's funds separate from the Principal's funds unless:

The funds were not kept separate as of the date of the execution of this Power of Attorney; or

The funds are comingled after the date of the execution of the Power of Attorney and the Principal's spouse is the Agent.

Act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the Principal's best interest.

Act with the care, competence and diligence ordinarily exercised by agents in similar circumstances.

Keep a record of all receipts, disbursements and transactions made on the Principal's behalf. The Agent shall not be required to disclose such receipts, disbursements, and transactions unless ordered by a court, or requested by the Principal or a fiduciary acting on the Principal's behalf, a government agency having authority to protect the welfare of the Principal, or the Principal's personal representative or successor in interest after the Principal's death.

Cooperate with any person who has authority to make health care decisions for the Principal to carry out my reasonable expectations to the extent actually known by my Agent and, otherwise, act in the Principal's best interest.

Attempt to preserve the Principal's estate plan, to the extent actually known by the Agent, if preserving the Principal's estate plan is consistent with the Principal's best interest based on all relevant factors, including:

The value and nature of the Principal's property.

the Principal's foreseeable obligations and need for maintenance.

Minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes.



Eligibility for a benefit, program, or assistance under a statute or regulation.

### Non-Liability of Agent

The statute provides certain protections from liability for the Agent under the following circumstances:

To a beneficiary of the Principal's estate plan for failure to preserve the plan if the Agent acted in good faith.

An Agent that acts with care, competence, and diligence for the best interest of the Principal shall not be liable solely because the Agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the Principal. If an Agent is selected by the Principal because of special skills or expertise possessed by the Agent or in reliance on the Agent's representation that the Agent has special skills or expertise, the special skills or expertise must be considered in determining whether the Agent has acted with care, competence, and diligence under the circumstances.

Absent a breach of duty to the Principal, an Agent shall not be liable if the value of the Principal's property declines.

An Agent that exercises authority to delegate to another person the authority granted by the Principal or that engages another person on behalf of the Principal shall not be liable for an act, error of judgment, or default of that person if the Agent exercises care, competence, and diligence in selecting and monitoring the person.

### Specific Grant of Authority

Generally, the following powers must be specifically authorized in the Power of Attorney for the Agent to have such authority:

To create, amend, revoke, or terminate an inter vivos trust unless the trust is created for the Principal's benefit or additions to an existing trust are made for the Principal's benefit pursuant to 20 Pa. C.S.A. §§ 5602 (2) and (3). The Agent may, pursuant to 20 Pa. C.S.A. §5602 (7) withdraw and receive income and principle of a trust.

To make a gift. Furthermore, unless the Power of Attorney otherwise provides, the power "to make a gift" is interpreted as the power to make limited gifts pursuant to 20 Pa. C.S.A. § 5603 (a.1), which provides that limited gifting limits the Agent to gifts under the

Federal Gift Tax annual exclusion and which are determined to be consistent with the Principal's objectives, or in the Principal's best interest if actual objectives are unknown.

To create or change rights of survivorship.

To create or change a beneficiary designation on an insurance policy, annuity, or retirement plan (see also 20 Pa. C.S.A §5603(p) and (q).

To delegate authority granted under the power of attorney.

To waive the Principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan.

To exercise fiduciary powers that the Principal has authority to delegate.

To disclaim property, including a power of appointment.

Further Limitation on Grant of Authority - As relates to the specific grant of authority to make a gift or change survivorship or beneficiary designations, or disclaim property, an Agent may not create in the Agent an interest in the Principal's property unless the Agent is an ancestor, spouse, or descendant of the Principal or unless the Power of Attorney otherwise provides.

Similar or overlapping subjects - the broadest authority controls.

Agent's authority over property includes after-acquired property and property is located out-of-state.

An Agent's act on behalf of the Principal has the same effect and inures to the benefit of and binds the Principal and the Principal's successors in interest as if the Principal had performed the act.

General Grant of Authority - Subject to the above, the Power of Attorney may grant the Agent with authority to do all acts that a Principal is authorized to perform, and, in such case, the Agent shall be authorized to exercise all of the powers that may be incorporated by reference pursuant to 20 Pa. C.S.A. § 5602(a), as defined in 20 Pa. C.S.A. §5603.

#### Appointment of Agent and Successor Agent

The Power of Attorney may name any number of Agents who may act jointly or independently and may provide for any number of successor Agents.

### Copy of Power of Attorney

An originally executed Power of Attorney may be filed with the clerk of the Orphan's Court or recorded with the Recorder of Deeds. A certified copy may be issued upon request and shall have the same validity and effect as the original. Except for the purpose of filing or recording the Power of Attorney, a photocopy or electronically transmitted copy of an originally executed Power of Attorney has the same effect as the original.

### Revocation

Death of the Principal revokes the Power of Attorney. However, the agency is not terminated until the Agent has actual knowledge of the death of the Principal. As such, actions taken by the Agent may be binding even after the death of the Principal.

If the Power of Attorney is not durable, the disability or incapacity of the Principal will revoke the Power of Attorney but not until the Agent has knowledge of the disability or incapacity.

Filing a complaint in divorce will revoke a spouse's agency, unless the Power of Attorney indicates that the agency was intended to survive divorce.

Agent's Affidavit - An Agent's affidavit verifying that the Agent does not have actual knowledge of the termination or revocation of the Power of Attorney is conclusive proof that the Power of Attorney has not been terminated or revoked.

### Third Party Immunity

A third party who accepts a Power of Attorney in good faith is not liable if any of the required signatures are not genuine.

A third party who accepts a Power of Attorney in good faith, and without actual knowledge that the Power of Attorney and/or Agent's authority is void, invalid, or terminated and that the Agent is exceeding or improperly exercising the Agent's authority, shall not be liable for relying on the Power of Attorney.

The third party may request any of the following before accepting the Power of Attorney:

The Agent's certification, under penalty of perjury, of any factual matter concerning the Principal, Agent, or Power of Attorney or an affidavit that the Power of Attorney has not terminated or been revoked.

An English translation of a foreign language Power of Attorney.



An attorney's opinion that the Agent is acting within the scope of the authority granted by the Power of Attorney if the third party provides in writing or other record the reason for the request.

An employer is immune if the employee would be immune.

### Third Party Liability

A third party who fails to either make a request under §§ 5606 and 5608 above or accept the Power of Attorney may be liable for any pecuniary harm of the Principal related to the refusal. A Court may order the acceptance of the Power of Attorney.

The third party must make the request within seven (7) business days from presentation of the Power of Attorney to the Third Party. The third party must then accept the Power of Attorney within five (5) business days of receipt of the Agent's certification or affidavit, translation, or attorney's opinion.

The third party may not require a different form of the Power of Attorney.

### Compensation and Reimbursement

Unless otherwise specified in the Power of Attorney, the Agent is entitled to reasonable compensation and reimbursement for expenses.

### Out of State Power of Attorney

An out of state Power of Attorney will be valid in Pennsylvania provided that the Power of Attorney complied with the laws of the out of state jurisdiction or the requirements for a military Power of Attorney.

### Guardianship (20 Pa. C.S.A. § 5501 et seq.)

A Guardianship is the legal tool of last resort for decision-making and management of the financial and personal affairs of an incapacitated person. Guardianship involves a court proceeding whereby an individual is adjudged to be incapacitated and another person is appointed by the Court to act as guardian for that individual. The guardian may be authorized, acting under court supervision, to act for the incapacitated person in making property management or personal and health care decisions, or both. In Pennsylvania, the guardianship may be either Plenary (total) or Limited. Persons dealing with the guardian must see a copy of the guardianship order, signed by the Court, in order to determine the extent of the guardian's authority to act on behalf of the incapacitated person.

## Types of Guardianships (20 Pa. C.S.A § 5512.1)

### Limited v. Plenary

Under a limited guardianship, the guardian has only those powers specifically granted to him or her in the guardianship decree. All other powers are kept by the incapacitated person. By contrast, a plenary guardianship is a total guardianship and can only be ordered if the individual is found to be totally incapacitated.

### Guardian of the Person

Guardianship of a person can be either plenary or limited. It allows the guardian to make decisions regarding the incapacitated person's health, safety, and physical well-being.

### Guardian of the Estate

Guardianship of the estate can also be plenary or limited. It is granted upon a finding that the incapacitated person is in need of guardianship services regarding the management of his or her financial affairs.

## Meaning and Effect of Incapacity Determination

### Meaning of Incapacitated Person (20 Pa. C.S.A. § 5501)

An adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he or she is partially or totally unable to manage his or her own financial resources or to meet essential requirements for physical health and safety.

### Effect of Incapacity Determination (20 Pa. C.S.A § 5524)

A totally incapacitated person shall be incapable of making any contract or gift or any instrument in writing.

## **PLANNING FOR DEATH**

### **Last Will and Testament** (20 Pa. C.S.A. § 2501 et sec.)

#### **Purpose**

The basic legal document to provide important instructions regarding how property should be distributed after the client's death, who will care for the client's children and other loved ones, who will be in charge of finalizing the client's affairs, and much more. The Will helps assure that individually owned assets will be distributed pursuant to the client's wishes in the right amounts and at the right times. The Will can serve as a vehicle to reduce or eliminate death taxes that will be levied against the client's estate, to avoid family conflicts, and to provide for religious, educational, or other charitable causes. A Will provides the opportunity to give the executor flexibility in dealing with the estate, eliminates the need for filing costly bonds and minimize other costs that can diminish the amount received by the client's heirs.

#### **Executor**

A Will provides the opportunity to select an executor. The executor is the person who will be in charge of finalizing the client's affairs and administering the estate. The executor has many responsibilities such as marshaling assets and debts and protecting them until they are distributed to the beneficiaries. In addition, the executor sees to it that all debts, expenses, and taxes are paid and that other legal requirements are followed, and that the estate is managed and distributed in accordance with the instructions provided in the Will.

Serving as executor can be complicated. The executor may need to obtain appraisals, process claims, register stocks and bonds, pursue lawsuits, prepare information for the beneficiaries, prepare tax returns, and so on. Careful thought should be given to the person the client chooses as executor. Ideally the executor should be knowledgeable in business and financial matters, patient, and fair-minded. The client should name a co-executor, or an alternate executor, in case the original choice cannot serve. The client may name a bank or other professional as executor.

#### **Execution**

Who may make a Will (20 Pa. C.S.A. § 2501)

Any person age 18 years or older and who is of sound mind may make a Will.

Form

A Will must be in writing (20 Pa. C.S.A. § 2502)  
Execution Requirements (20 Pa. C.S.A. § 2502)

The Will shall be signed by the testator at the end of the document.

Writing found after the signature will not invalidate the Will.

Signature by Mark

A testator who is unable to sign his or her name, may execute the Will by mark.  
Such signature by mark must be witnessed by two (2) witnesses.

Signature by Another

A testator may expressly direct another person to sign his or her Will on behalf of the testator so long as the testator declares the Will to be the testator's in the presence of two (2) witnesses who sign the Will.

Revocation of Will (20 Pa. C.S.A § 2505)

A Will may only be revoked by the following methods

By another written Will or Codicil;

By another writing validly executed and expressly revoking the Will; or

By the destruction of the Will by the testator or at the direction of the testator.

Modification of Will by Circumstances (20 Pa. C.S.A. § 2507)

A Will is modified upon the occurrence of any of the following circumstances:

Divorce after making Will

Marriage after making Will

Birth or adoption of child after making Will

Slaying of testator by beneficiary



## Mental Capacity

To have the requisite mental capacity to execute a Will, the testator must:

Have an intelligent knowledge regarding the natural objects of his bounty;

understand the general composition of his estate; and

know what he desires done with the estate. (see, In re Brantlinger Will, 418 Pa. 236)

Testamentary capacity is presumed and clear and convincing evidence is required of the Will contestant to set aside a Will that has been subscribed by two (2) witnesses. (see, In re Masciantonio Will, 392 Pa. 362)

## **Intestate Succession** (20 Pa. C.S.A. § 2101 et sec.)

All or any part of an estate that does not pass pursuant to a decedent's Will or other means shall pass pursuant to the Intestate Succession laws of Pennsylvania.

### Share of Surviving Spouse (20 Pa. C.S.A. § 2102)

The surviving spouse of the decedent shall inherit the entire intestate estate unless the decedent was also survived by issue or parents.

The surviving spouse of the decedent shall be entitled to the first \$30,000 of the estate (reduced by any amounts received under the Will) and one-half of the remaining estate if the decedent was survived by parents, but no surviving issue. The surviving parent(s) of the decedent shall be entitled to the remaining one-half of the estate.

The surviving spouse of the decedent shall be entitled to the first \$30,000 of the estate (reduced by any amounts received under the Will) and one-half of the remaining estate if the decedent was survived by issue all of whom are issue of the surviving spouse. The surviving issue of the decedent shall be entitled to the remaining one-half of the estate.

The surviving spouse of the decedent shall be entitled to one-half of the intestate estate if the decedent was survived by issue one or more of whom are not the issue of the surviving spouse. Such surviving issue of the decedent shall be entitled to the remaining one-half of the estate.

Intestate Distribution when there is no Surviving Spouse (20 Pa. C.S.A § 2103)

The Intestate Estate shall pass in the following order when there is no surviving spouse of the decedent:

Issue of the decedent, per stirpes (see also 20 Pa. C.S.A § 2104(1))

Parent(s) of the decedent

Siblings of decedent or their issue, per stirpes (see also 20 Pa. C.S.A § 2104(1))

Grandparents, per stirpes

Uncles, aunts, their children and grandchildren

Commonwealth

## COMMON FORMS OF OWNERSHIP, LEGAL ISSUES & FINANCIAL PRODUCTS

### Common Forms of Ownership

#### Tenancy in Common

A tenancy in common is a manner in which people can be co-owners of property. Both real property (e.g. real estate) and personal property (e.g. a bank account or mutual fund account) may be owned in this manner. It is the ownership of an asset by two or more individuals together, but without the rights of survivorship that are found in a joint tenancy. Thus, on the death of one co-owner, his or her interest will not pass to the surviving owner or owners, but will instead pass according to his or her will or, if there is no will, by the law of intestate succession. During life, both owners own a portion of the asset. The proportion of ownership does not need to be 50/50. If other than 50/50, this will likely be noted on the instrument of title.

#### Joint Tenancy With Right of Survivorship

Joint tenancy with right of survivorship is a form of ownership by two or more individuals together. It differs from *tenancy in common* in that the surviving joint tenant immediately becomes the owner of the whole property upon the death of the other joint tenant. This is called a "**right of survivorship.**" Each co-owner owns an equal portion of the property, unless the Multiple Party Account Act applies (see below). On account statements this ownership status will often be abbreviated - for example as *JTWROS* or *JT TEN*.

State law controls the creation of a joint tenancy in both real and personal property (real property is land and attachments to the land; personal property is generally all other types of property). For transfers to two or more persons who are not husband and wife, the deed or conveyance must expressly state an intention to create a joint tenancy by noting that the property will be held as joint tenants with rights of survivorship. For transfers of personal property, such as stock certificates, the simple letters "JTWROS" may be used to designate a joint tenancy.

A joint tenancy can be created in almost any type of property. Different types of jointly held property have different characteristics. Either joint tenant of a bank account usually may withdraw the whole amount on deposit, depending upon the way the account agreement is written. The signatures of all joint tenants are generally required in order to transfer or sell bonds and corporate stocks. All joint tenants, and their spouses, must sign deeds and contracts to transfer or sell real estate.

### Tenancy By the Entireties

Where there is joint tenancy between spouses, it is generally known as *tenants by the entirety*. Ownership as tenants by the entirety has some characteristics different from other joint tenancies, such as the inability of one joint tenant to sever the ownership and differences in tax treatment. If a document of title shows the owners as being spouses, and does not state how they hold title (e.g. tenancy by the entirety, joint tenants with right of survivorship, or tenants in common) Pennsylvania law presumes that they own the property in tenancy by the entirety. On account statements this ownership status will often be abbreviated - for example as *TEN/ENT*.

### Life Estate

Ownership Interest in real or personal property may be divided based upon time. One person may have the right to possession and use of the property for a period of time, after which another person becomes owner of the property. For example, parents will frequently give real estate to their children, but the parents will retain the right to the use and enjoyment of the property during their lifetimes. In this situation, the parents are referred to as the “life tenants” and are said to have a “life estate.” The children would be called the “remaindermen” and would be said to own a “remainder interest” in the property.

The deed or other document creating the life estate and remainder interests should specify the interests of the parties. The “Grantor - Grantee” clause at the beginning of the deed cannot necessarily be relied upon to determine whether a life estate has been retained or created. It may be necessary to read through the entire deed. When property that is subject to a life estate is sold, the proceeds of the sale should be divided between the life tenants and the remaindermen, based upon the life expectancy of the life tenants. The IRS publishes actuarial tables that can be used to make this division.

A life tenant is entitled to possession and enjoyment of the property as long as the estate endures. This means that he or she is entitled to any rents from the rental of the property; he or she may convey, lease or otherwise dispose of his or her interest; and he or she is responsible for ordinary repairs and maintenance of the property.

### Partnerships

A *partnership* is an association of two or more persons to carry on as co-owners of a business for profit. The courts of Pennsylvania have long held that co-ownership of a business and the sharing of its profits are indispensable requirements of a partnership. Partnership assets are owned, and profits are distributed, in accordance with the agreement of the parties. This agreement may or may not be in writing.

A Partner may be either a “**general partner**” - which means the partner can exercise control over the business, and is personally liable for the debts of the business; or a “**limited partner**” - which means the partner shares in the profits of the business, but does not exercise control over it and is not liable for its debts. In the past, limited partnership interests have been sold by brokerage firms. The limited partnership interests may be difficult or impossible to liquidate.

### **Other Ownership Issues**

#### Agent v. Co-Ownership

When two names are listed on a bank, mutual fund, or other account, this does not necessarily mean that both parties are co-owners. Often parents will place a child’s name on an account so that the child has the ability to access that account in the event of the incapacity of the parent. In such cases, the account may be set up as a co-ownership account, or the child may be named on the account solely as agent (also called “attorney in fact” or “Power of Attorney” or “POA”) for the parent. The account should designate this relationship by some words showing that the child’s name is on the account in the capacity of agent, rather than owner. If the child is merely an agent, the child has no ownership interest in the account.

#### Multiple Party Accounts

A joint account may be subject to Pennsylvania’s Multiple-Party Account Act (Chapter 63 of Title 20 of the Pennsylvania Code). This law states that a joint checking account, savings account, or certificate of deposit belongs to the parties in proportion to the net contributions by each to the sum on deposit (unless there is convincing evidence that the parties had a different intention). This act clearly applies to bank accounts. Pennsylvania law is not clear, however, as to whether an account with a brokerage firm that is held in joint names is governed by the Multiple-Party Account Act.

#### Custodial Accounts

Custodial Accounts are accounts owned by a “minor,” but controlled by another person as custodian for the minor. These accounts are usually designated as either UTMA (Uniform Transfers to Minor’s Act) accounts or UGMA (Uniform Gift to Minor’s Act) accounts. In Pennsylvania, a “minor” for purposes of these accounts can be anyone who is under age 25, if so indicated. Custodial Accounts are owned by the minor, not by the custodian.

## In Trust For Accounts

An “In Trust For” (ITF) account is a deposit account with a financial institution in the name of one party as trustee for one or more beneficiaries, where there is no separate trust agreement. The Multiple-Party Account Act specifies that this type of “Trust” account belongs to the Trustee, not the beneficiary, if the account can be revoked by the Trustee.

## Payable On Death/Transferable on Death

POD (Payable on Death) and TOD (Transfer on Death) accounts are merely beneficiary designations. They are similar to a beneficiary designation on a life insurance policy. They are revocable by the owner. Creating a TOD or POD on an account does not affect the ownership of the account. The individual creating the account retains full ownership.

## Safe Deposit Boxes

Safe deposit boxes may be jointly rented. This type of registration must be specifically noted in the rental agreement with the bank. However, even though a safe deposit box may be rented in joint names that alone does not mean that all of the assets contained in the box are also jointly owned. It is therefore necessary to gather further information on the particular items that are contained in the safe deposit box and check titles to determine ownership.

## **Annuities**

### What is an Annuity?

Annuities are very complicated financial products, and the provisions of different contracts will vary. Unfortunately, it is often quite difficult to get accurate information regarding an annuity contract from the Issuer.

An annuity is typically an agreement between an individual and an insurance company. The individual pays a sum of money to the insurance company. In return, the insurance company agrees to provide payments to the investor over a stated period of time. The insurance company may agree to invest the sum paid by the individual for a time and accumulate the earnings before beginning to make its payments.

If the insurance company begins to make its payments immediately, this is called an *immediate annuity*. If the insurance company agrees to accumulate earnings for a time before it begins to make payments, this is called a *deferred annuity*.

## Parties to an Annuity

### Issuer

The **Issuer** is the insurance company that agrees to make payments over some period of time.

### Owner

The **Owner** is the person who pays the sum of money to the Issuer. The Owner usually has a variety of rights in regard to the annuity including the right to surrender the contract for the cash value of an annuity that has a cash value. So, in general, the cash value of an annuity should be attributed to the owner.

### Annuitant

The **Annuitant** is often called the “measuring life” for an annuity. Often annuity payments will begin when the annuitant reaches a certain age, or may continue for the life of the annuitant. Under some annuity contracts, the annuitant may be entitled to receive income payments under the contract, while under other annuities, the owner is the person who receives the income payments. The owner and the annuitant may be the same person, or different people. The annuitant generally would not be entitled to receive the cash value of the contract, unless he or she was also the owner.

### Beneficiary

The **Beneficiary** is the person who is entitled to receive any payments that remain due under the contract following the death of the annuitant or owner. The beneficiary generally would not be entitled to receive the cash value of the contract, unless he or she was also the owner.

## Types of Annuities

There are many different types of annuities. Below are some common examples of annuities.

### Fixed Immediate

A Fixed Annuity is an annuity contract that promises to pay regular income in exchange for a lump-sum premium. Immediate annuities convert cash sums into guaranteed income streams over a predefined period of time. The time period may be fixed, such as ten

years, or contingent, based on a person's life span. An important characteristic of any immediate annuity is that once you pay the premium, you cannot get it back (except in certain cases as a death benefit). It is generally a fee for a service, which means that there is no cash value to be attributed to the Owner.

#### Variable Immediate

Similar to the fixed immediate annuity, except that instead of guaranteed payments, the contract promises payments based upon the performance of mutual fund-like investment portfolios that you select. The income stream may rise or fall over time and all the risk is with the owner. As before, the contribution to the contract is a fee that cannot be withdrawn. Since the annuity is paying out income, it will need to be counted as income, but a portion of the payments being made by the annuity may be a return of principal (what the owner originally paid), not earnings.

#### Fixed Deferred

This is a completely different arrangement than the immediate annuity. Rather than paying a fee for a stream of income, a deferred annuity allows the owner to invest unlimited sums while deferring taxes on gains until withdrawal. Investments in deferred annuities are treated just like non-deductible IRA contributions except that there is no limit to the amount or timing of the contributions. In spite of the name, the fixed variety earns interest from the insurance company that may vary over time. With a Fixed Deferred Annuity there should be a cash value that will be attributed to the Owner.

#### Variable Deferred

This is a deferred annuity that allows the owner to direct the balance into mutual fund-like investment portfolios that may fluctuate in value from time to time. Often, these contracts offer an investment option that allows them to behave much like their fixed counterparts.

#### Equity Indexed

A hybrid of variable and fixed deferred annuity contracts. There are many variations on this concept, but basically, they offer a guaranteed minimum interest rate with additional returns credited when the S&P 500 performs particularly well.

Deferred annuities can be converted to immediate annuities (this is called *annuitizing*) allowing the balance in the account to be converted to a guaranteed stream of income. Annuitizing converts a deferred annuity into an immediate annuity by effectively



purchasing an immediate annuity with the deferred annuity balance. Marketers often tout this privilege as a unique benefit of deferred annuities. The truth is that any sum of money can be converted to a guaranteed stream of income at any time by simply purchasing an immediate annuity contract when it is needed. If it is fully **annuitized**, an annuity will generally not have any cash value that can be attributed to the Owner.

On the other hand, the deferred annuity operates more like an IRA than an insurance policy. Money may be contributed, after taxes, over time, to a deferred annuity contract and later some or all of the available balance may be withdrawn. While money is invested in a deferred annuity, the growth accumulates tax-deferred. When the money is withdrawn, taxes on the earnings must be paid (which must be withdrawn before the principal) as ordinary income. With the deferred annuity, the owner generally retains control of the principal, subject to the terms of the contract. The deferred annuity can also be useful *in certain circumstances*.

#### Single Premium Immediate Annuity

A single premium immediate lifetime annuity is a contract with an insurance company whereby the purchaser pays a sum of money up front (known as a premium), and the insurance company promises to pay a certain amount of money periodically (monthly, for instance) for the rest of the purchaser's life. For some annuities, the payout is a fixed amount each period — making for a single premium immediate *fixed* annuity.

### Life Insurance

Life Insurance falls into two major categories. *Term Insurance* is pure insurance, providing life insurance coverage for a specified term. The other variety, typically known as *Whole Life Insurance*, is a combination of life insurance and savings.

#### Issuer

The **Issuer** is the insurance company that agrees to make payments of the death benefit, if death occurs during the period of coverage, and to make other payments as required by the policy.

#### Owner

The **Owner** (sometimes called the “policyholder”) is the person who owns the policy. The Owner is usually the person who pays the premium, but this is not always the case. The Owner usually has a variety of rights with regard to the insurance policy such as the right to name the beneficiary and the right to surrender the contract for the cash value of a

policy that has a cash value. So, in general, the cash value of an insurance policy should be attributed to the owner.

#### Insured

The ***Insured*** is the person whose death will cause the death benefit to be payable to the beneficiary. The owner and the Insured may or may not be the same person. The Insured generally would not be entitled to receive the cash value of the policy, unless he or she is also the owner.

#### Beneficiary

The ***Beneficiary*** is the person who is entitled to receive the death benefit upon the death of the Insured. The beneficiary usually would not have any right to the cash value of the contract, unless he or she is also the owner.

### Types of Life Insurance

#### Term Insurance

When someone has a term policy, insurance coverage is provided for that term in return for the premium. If the insured dies during that term, the beneficiary will be paid as specified in the policy. If the insured lives through the term, generally no payments are made. Term insurance is often provided as a retirement benefit by the employer of the consumer. Term insurance usually has no cash value.

#### Whole Life

A whole life insurance policy has two components: a term (or death benefit) and a cash value (or investment) component. Typically, the policyholder already owns the cash (investment) component and usually can demand it at any time. Thus, the cash value of a life insurance policy is an asset that needs to be included in the assets of the owner of the policy. There are a number of variants of Whole Life Insurance including, Universal Life and Variable Life. A “paid up” policy merely means that, based upon estimates, the policy appears to have adequate cash value so that its expected income and growth will be sufficient to pay for the term component of the insurance and the death benefit will remain constant even if no additional premiums are paid.

## Universal Life

This type of insurance is similar to a whole life policy. However, it allows for a greater degree of flexibility because the premiums and the death benefit can be more easily changed.

## Variable Life

With a variable life policy, the death benefit and cash value are invested in stocks, bonds, or other investments.

## **IRAs and Other Retirement Plans**

### Qualified Retirement Plans

There are many different types of retirement plans. Examples include various types of IRAs (Individual Retirement Accounts), 401(k)s, 403(b)s, and profit sharing (Keough) plans. A common characteristic of these plans is that the owner is not charged on the earnings generated by the investments held in the plan until those earnings are withdrawn. With some plans, (e.g. the Roth IRA) the owner is never taxed on the earnings.

The SECURE Act, which went into effect on January 1, 2020, has made some significant changes to Qualified Retirement Plans, as follows:

Elimination of “Stretch” Distributions – A beneficiary of a Qualified Retirement Plan may no longer take distribution from the plan over life expectancy, unless the beneficiary falls into an exception, but must now take distribution within 10 years of the date of death of the plan participant.

The exceptions are:

The surviving spouse of the plan participant

The minor child of the plan participant during the beneficiary’s minority

A chronically ill beneficiary

A beneficiary who is not more than 10 years younger than the plan participant.

Required Minimum Distributions - The age for mandatory Required Minimum distributions was increased from age 70 ½ to age 72.

Contributions to plans – A plan participant who has earned income may now continue to contribute to a plan past age 70 ½.

Early withdrawals from a plan up to \$5,000 are permitted without penalty for the birth or adoption of a child.

### Mutual Funds

When you invest in a mutual fund, you contribute to a large pool of money that a mutual fund manager uses to buy other investments, such as stocks and bonds.

### College Savings Plans

College savings plans include 529 plans, qualified state tuition programs, prepaid tuition contracts, and educational savings accounts. These are all means by which families invest to meet the educational needs of their children and grandchildren. Each type of plan has different ownership and tax characteristics. The Original Contributor/Owner of the plan may be able to cancel the account and receive a distribution from the account.

### **Trusts**

The term *trust* describes the holding of property by a trustee (which may be one or more persons or a corporate trust company or bank) in accordance with the provisions of a written trust instrument for the benefit of one or more persons called beneficiaries. A person may be both a trustee and a beneficiary of the same trust.

### Testamentary v. Inter Vivos

A trust created by your will is called a *testamentary trust* and the trust provisions are contained in your will. This type of trust does not take effect until after your death.

On the other hand, if you create a trust during your lifetime, you are described as the trust's grantor or settlor and the trust is called a *living or inter vivos trust*, and the trust provisions are contained in the trust agreement or declaration.

### Revocable

A trust created during your lifetime that can be altered or revoked.

### Irrevocable

An Irrevocable Trust may not be revoked by its creator, the settlor. While the settlor has no access to the principal, income can often be paid out to the settlor. This income will normally be taxable to the settlor.

## Special Needs

Special Needs Trusts can be set up by a person's will (testamentary) or created during lifetime (inter vivos). A testamentary Special Needs Trust created for the benefit of the decedent's spouse can be used to protect marital assets from being lost to the cost of long-term care. Sometimes, different types of special needs trusts are set up during the lifetime of younger incapacitated individuals. Assets can then be transferred to the trust. This would enable the individual to qualify for certain government benefits. Upon the death of the incapacitated individual, the assets remaining in the trust would be used to pay back the government for care provided.

## **PLANNING FOR LONG-TERM CARE**

### **What Is Long-term Care And Where Is It Provided?**

According to author Thomas Day, "long-term care refers to a broad range of supportive medical, personal and social services needed by people who are unable to meet their basic needs for an extended period of time." Long-term care may be provided in a number of settings.

#### **Nursing Home**

Nursing homes provide the highest level of care to individuals in need of total care or hands-on assistance with their activities of daily living (ADLs). Nursing homes are capable of providing skilled as well as intermediate levels of care to their residents.

#### **Assisted Living (personal care homes and assisted living facilities)**

Individuals who can no longer reside safely at home, but who do not yet require a nursing-home-level of care, may reside in assisted living or personal care homes. These individuals will typically receive prepared meals, reminders to take their medication, housekeeping services, and some assistance with their ADLs.

#### **Home Health and Community Based Services**

In some instances, even though an individual may be in need of a nursing home or assisted living level-of-care, he or she may decide to remain home with help from family members and programs such as adult day care, caregiver respite, home health assistance, PA Department of Aging Options and Waiver programs, and the LIFE program, etc.

## **PAYING FOR LONG-TERM CARE**

#### **Medicare**

Medicare provides only a limited benefit for those who require nursing home care. The individual must have been hospitalized for at least a 3-day period within 30 days of entering the nursing home. During the first 20 days following the admission of a qualified individual, Medicare will cover 100% of the cost of care. From day 21 through day 100, Medicare may pay a portion of the nursing home costs, provided that the individual is in need of "skilled care". Skilled care typically includes physical therapy, occupational therapy, wound care, intravenous treatments, etc. During this time, the resident is responsible for the co-payment. Medicare supplemental insurance often covers the cost of the co-payment.

## Private Pay

Once the Medicare benefit has been exhausted, nursing home residents are required to pay privately for their care.

## Long-Term Care Insurance

Long-term care insurance is yet another way in which an individual could pay for the cost of long-term nursing care. It should be noted that most long-term care insurance policies will cover not only the cost of a nursing facility and assisted living facility, but also home health and community based services allowing an individual to remain at home despite the need for long-term care. The amount of long-term care insurance that the individual should purchase will depend on the size of the estate and his/her individual goals concerning long-term care.

Because long-term care insurance can be very complicated and at times cost prohibitive, the individual must understand the Medical Assistance rules and determine in advance how much long-term care insurance coverage will be needed based on his/her assets, income, and objectives. The elder law practitioner does not usually sell long-term care insurance policies, but can be instrumental in helping the client understand what coverage is appropriate for that particular client based on the client's goals, family circumstances, assets, and income. The key components to a long-term care insurance policy are the daily benefit rate, lifetime maximum, exclusion period, interest increase rider, and coverage.

## Veteran's Pension Benefits (38 USC § 1501 et sec)

The Veteran's Administration provides a pension benefit that can help, although typically not completely cover, pay for long-term care expenses at home, in an assisted living or personal care facility, or in a nursing home.

### Types of Non-Service Connected Pension Benefits

#### Improved Pension

Base Pension available to Veteran or Widow(er) who has insufficient income to meet living expenses

#### Housebound Benefits

Designed for Veteran or Widow(er) who is disabled and substantially confined to home

## Aid & Attendance Benefits

Designed for Veteran or Widow(er) who resides in an Assisted Living facility or Nursing Home and requires the regular aid and attendance of another person.

### Eligibility Requirements

The Veteran must have served at least 90 days active military service, at least one of which was during wartime;

The Veteran's Discharge must have been other than dishonorable;

The Veteran must have limited income that does not provide adequate maintenance.

all income is countable unless excluded

countable income cannot exceed Maximum Annual Pension Rate (MAPR) set by VA for each category

countable income can be reduced by Un-reimbursed Medical Expenses (UMEs) such as:

Medicare/Insurance Premiums

Home care costs

Assisted Living/Nursing Home costs

The Veteran must have limited net worth that does not provide adequate maintenance.

Net Worth of Veteran and Veteran's Spouse taken into consideration

Home, contents of home, and one automobile not counted

The Veteran must be permanently and totally disabled at the time of application, which disability must not be due to the willful misconduct of the Veteran.

NOTE: A Veteran age 65 years or older is presumed to be permanently and totally disabled.



Transfer Penalty – a transfer penalty period will be instituted based on a 36-month look-back period and calculated by dividing the fair market value of the transfer by the appropriate Aid and Attendance amount based on the status of the applicant.

### Medical Assistance

Medical Assistance, also known as Medicaid, is a combined federal and state program designed to cover the costs of health care services for the needy. Unlike Medicare, Medical Assistance is not an entitlement. Eligibility for Medical Assistance is based on very strict financial guidelines. For eligible individuals, Medical Assistance may cover the cost of nursing home care and certain home and community-based services under the Medicaid Waiver programs. Medical Assistance does not currently pay for care in assisted living facilities or personal care homes.

In Pennsylvania, the Medical Assistance program is administered on a state-wide level by the Department of Human Services (DHS), and locally by the Department's County Assistance Offices.

### **Medical Assistance Financial Eligibility**

In order to determine eligibility for Medical Assistance, applicants are required to disclose their financial resources to the County Assistance Office. The resources are categorized as either "Exempt" or "Non-Exempt".

### Exempt Resources

The ownership of exempt resources will not prevent an applicant from qualifying for Medical Assistance benefits.

#### Primary Residence (55 Pa. Code § 178.62)

Real property used as the primary residence is exempt so long as the applicant expresses intent to return there to live, regardless of whether it is realistic to do so. If the applicant is widowed or single, the residence will not be considered exempt if the applicant has greater equity in the property than permitted by the rules. This cap on home equity does not apply to married applicants.

Caveat: Although the residence is exempt during lifetime, it may be subject to Medical Assistance Estate Recovery upon the owner's death.

#### Burial Plots (55 Pa. Code § 178.71)

The burial plots of the applicant and his or her immediate family are exempt

Burial Accounts (55 Pa. Code §§ 178.73 & 178.72)

Revocable - A revocable burial reserve valued at \$1,500 or less is exempt.

Irrevocable – An irrevocable burial reserve, in a reasonable amount, is exempt.

One motor vehicle (55 Pa. Code § 178.67)

One motor vehicle, regardless of its value, is exempt.

Household goods and personal effects (55 Pa. Code § 178.66)

Certain Life Insurance (55 Pa. Code §§ 178.69 & 178.70)

Term and group policies – Term and group life insurance policies are typically exempt because they accumulate no cash value.

Whole life – Cash value life insurance owned by the applicant, up to a maximum face value of \$1,500 for each insured is exempt. If the total face value exceeds \$1,500, only the first \$1,000 of cash surrender value is considered exempt.

Property Essential to Self-Support (55 Pa. Code § 178.64)

Real or personal property used in a trade or business, which is essential to self-support is exempt, regardless of its value.

IRA or qualified retirement plan of Community Spouse

The pension fund, IRA, 401K, 403B, and other deferred compensation plans owned by the applicant's spouse (community spouse) are exempt.

Medicaid Approved Annuities

Certain irrevocable immediate annuities owned by the applicant or the community spouse may be considered exempt, provided that they meet criteria established by the Deficit Reduction Act (DRA) as set forth in the Department of Human Services' annuity Operations Memorandum.

### DRA Annuity Requirements (42 U.S.C. 1396p)

The annuity must be irrevocable and non-assignable.

It must be actuarially sound.

It must make equal installment payments with no deferral or balloon payment.

It must name DHS as remainder beneficiary for at least the total amount of Medical Assistance paid on behalf of the applicant.

If applicant has no spouse or minor or disabled child, then DHS must be named as beneficiary in the 1<sup>st</sup> position

If applicant has a spouse or minor or disabled child, then DHS is named as beneficiary in the 2<sup>nd</sup> position.

### Non-Exempt Resources (55 Pa. Code § 178.2)

Non-exempt resources must be reduced to the appropriate level before an applicant will qualify for Medical Assistance benefits. An applicant will be entitled to retain \$8,000 or \$2,400 in Non-Exempt resources, depending on the applicant's gross monthly income.

Non-Exempt resources include, but are not limited to:

Cash on hand.

Bank and credit union accounts, including vacation and Christmas clubs, checking and savings accounts, savings certificates of deposit (CDs), money market funds, and patient accounts established and handled by a nursing care facility.

Stocks, bonds, mutual funds.

Trust accounts to the extent that they are legally available to the client.

Individual Retirement Accounts (IRAs), 401Ks, 403Bs, Keogh funds owned by the applicant.

Most types of annuities.

Lump sum payments such as, but not limited to, tax or rent rebates, insurance benefits, and inheritances.

Additional motor vehicles, boats, ATVs, Snowmobiles, etc.

Additional real estate.

Any property owned by a Revocable Living Trust (RLT)

#### Resource Calculation

The amount of resources that an individual will be required to spend on care, without further planning, before Medical Assistance will be available to the individual is determined as follows:

$$\begin{array}{r} \textit{Total Non-Exempt Assets} \\ - \textit{Assets individual May Retain (\$2,400 or \$8,000 depending on income)} \\ \hline \textit{Spend Down Amount} \end{array}$$

#### Treatment of Income

Once an applicant qualifies for nursing home Medical Assistance, his or her income is owed to the nursing facility as the patient-pay liability, subject to the following exceptions:

Personal Needs Allowance – A recipient of Medical Assistance is permitted to retain \$45.00 each month as a personal needs allowance.

Supplemental Health Insurance Premiums – A recipient of Medical Assistance may continue to pay the premiums for his or her Medicare Supplemental Insurance policy from his or her monthly income.

Spousal Maintenance Allowance – Where a recipient of Medical Assistance is married, he or she is permitted to supplement the income of the community spouse where necessary.

Home Maintenance Allowance – a certified short-term stay (6 months or less) Resident may retain an additional amount of income for a period of 6 months to maintain

The amount of income that an individual will be required to spend on care once qualifying for Medical Assistance benefits is determined as follows:

$$\begin{array}{r} \textit{Total Gross Income} \\ \textit{Personal Needs Allowance (Currently \$45.00 month)} \\ \textit{Health Insurance Premium} \\ \textit{Monthly Maintenance Needs Allowance (if applicable)} \\ - \textit{Home Maintenance Allowance (if applicable)} \\ \hline \textit{Resident Pay liability} \end{array}$$

### **Spousal Impoverishment Rules**

The standards for determining Medicaid eligibility for married applicants are found in the “spousal impoverishment” provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA). The MCCA established minimum income and asset allowances for the community spouse.

#### Community Spouse Resource Allowance

The protected share of non-exempt resources the Community Spouse is permitted to retain is known as the Community Spouse Resource Allowance (CSRA). In order to calculate the CSRA, a married applicant must report to the CAO all non-exempt resources, whether owned jointly by the couple or individually as of the date of nursing home admission.

The community spouse’s CSRA is generally equal to one half (1/2) of all non-exempt resources owned by the couple on the date of nursing facility admission, subject to a maximum CSRA, and a minimum CSRA.

#### Examples of Spousal Share Calculations:

**Example 1:** On the date the institutionalized spouse is admitted to the nursing facility, the couple has \$100,000 in countable resources. The institutionalized spouse’s income consists of Social Security and a pension totaling \$1,900 per month. The community spouse’s CSRA is calculated to be \$50,000, or one half (1/2) of the couple’s countable resources. In addition, the institutionalized spouse is permitted to retain \$8,000 in countable resources. The institutionalized spouse will qualify for Medicaid benefits when the Couple’s total assets have been reduced to \$58,000 (\$50,000 CSRA + \$8,000 allowance). The couple’s excess resources amount is \$42,000.

**Example 2:** On the date the institutional spouse was first admitted to the nursing facility, the couple had \$300,000 in countable resources. The institutionalized spouse has a fixed monthly

income \$3,000. In this situation, the community spouse is entitled to keep the maximum CSRA of \$128,640 and the institutionalized spouse is permitted to retain \$2,400 in countable resources. The institutionalized spouse will not qualify for Medicaid benefits until the couple's combined assets have been reduced to \$131,040 (\$128,640 CSRA + \$2,400 allowance). This couple is over-resourced by \$168,960.

**Example 3:** This couple has a total of \$30,000 in countable resources as of the date the institutionalized spouse was determined to be medically qualified for the Waiver Program. The institutionalized spouse has a fixed monthly income of \$1,250. In this case, the community spouse will be entitled to keep \$25,728 of the countable resources (minimum CSRA) and the institutionalized spouse may retain \$8,000 for a total of \$33,728. Since this is greater than the amount of the couple's total countable resources, the institutionalized spouse will qualify immediately for Medicaid Waiver benefits, provided that no disqualifying gifts have been made during the 60 months prior to application.

### Community Spouse Monthly Maintenance Needs Allowance

The general rule under MCCA is that marital income is attributed to the individual whose name appears on the check.

The community spouse is entitled to keep all of his or her individual income.

Most of the institutional spouse's income must be used to pay toward the cost of his or her care.

Monthly Maintenance Needs Allowance - All community spouses are entitled to a base amount of income known as the Monthly Maintenance Needs Allowance (MMNA).

If the community spouse's income is insufficient to meet his or her minimum needs, some (or all) of the institutionalized spouse's income may be diverted to the community spouse.

The Community Spouse may be entitled to an increase in the MMNA up to a maximum amount. In order to determine if the community spouse is entitled to an increased MMNA based on shelter expenses, add 1) the community spouse's expenses for rent or mortgage payment, taxes and insurance and 2) the standard allowance for utilities (or the actual utility expenses). From this number, subtract an amount equal to 30% of 150% of the federal poverty level for a family of two. The sum is equal to the amount of excess shelter allowance. If the sum is zero or less, no excess shelter allowance will be authorized. In order to increase his or her MinMMNA, the community spouse is also permitted to seek judicial court ordered support under 42 U.S.C. § 1396r-5(d)(2)(B) or by requesting an administrative fair hearing pursuant to 42 U.S.C. § 1396r-5(d) (5) and 55 Pa. Code § 181.452(d)(2)(ix) so that he or she can show exceptional circumstances resulting in significant financial duress.

If the community spouse's income after the diversion is still insufficient to meet his or her needs after all of the institutionalized spouse's income is diverted to the community spouse, then the community spouse may be entitled to preserve assets in excess of his or her CSRA. The additional protected share amount is the amount that would be needed to purchase a commercial annuity that would generate the shortfall between the MMNA and the couple's income. Note that an annuity does not actually need to be purchased, but the County Assistance Office will require three (3) annuity quotes and the least value will be used to determine the additional protected share.

## **Transfer Penalty Rules**

### Look-Back period

At the time a Medical Assistance application is filed, the applicant must disclose all uncompensated transfers of assets made by the applicant and/or the applicant's spouse during the 5-year look-back period (reporting period).

### Resulting Ineligibility Period

Five Year Look-Back Rule - The uncompensated transfer of assets by an applicant and/or the applicant's spouse made during the 5-year look-back period will result in an ineligibility period for Medical Assistance benefits.

Calculation of Ineligibility Period – The ineligibility period is calculated by dividing the total dollar value of the uncompensated transfer by the State average nursing home daily private pay rate. This calculation will determine how many *days* of Medical Assistance ineligibility will result from the transfer. The ineligibility period may also be calculated by dividing the total value of the uncompensated transfer by the average monthly cost of nursing home care in the Commonwealth, which will provide the number of *months* the applicant is ineligible for Medical Assistance due to asset transfers.

Ineligibility Start Date - For uncompensated transfers of assets made during the 5-year look-back, the ineligibility period for Medical Assistance will not begin until:

The date on which the applicant is medically eligible for long-term care services and

the applicant otherwise financially qualifies for Medical Assistance benefits.

## Exempt Transfers

Certain transfers of assets for less than fair consideration are exempt from the transfer penalty rules discussed above. Therefore, a transfer that falls within the following exceptions will not result in a period of ineligibility for Medical Assistance benefits for long-term care:

**Primary Residence** – A transfer of the primary residence to any of the following individuals will be considered an exempt transfer:

The individual's spouse;

The individual's child who is under age 21 years or blind or disabled;

The individual's sibling who has an equity interest in the residence and has resided in the residence for at least 1 year immediately prior to the individual's nursing home placement; and

The individual's child who resided with the individual in the residence for at least 2 years immediately prior to the individual's nursing home placement and, had it not been for the care provided by the child, the individual would have required placement sooner.

**Assets other than the Primary Residence** – The transfer of assets other than the primary residence in any of the following circumstances will not result in a period of ineligibility:

The individual's spouse or another for the sole benefit of the spouse (either by the nursing home resident or the spouse of the nursing home resident);

The individual's child who is under the age of 21 years or blind or disabled or to a trust with pay-back provisions for the benefit of the blind or disabled child; and

To a Special Needs Trust with pay-back provisions for the benefit if an individual under the age of 65 years who is disable

**Family Caregiver (HCFA 64 § 3258.1)**

While family members can legitimately be paid for care they provide to an individual, it is presumed that services provided for free at the time were intended to be provided without compensation. Therefore, a transfer to compensate a family member for past care services will be considered a transfer without consideration. This presumption can be rebutted with tangible evidence.



## **Act 43 – Family Responsibility Act (23 Pa. C.S.A. §4603)**

Places responsibility to care for and maintain or financially assist an indigent person on the following individuals:

Spouse of an indigent person

Child of an indigent person

Parent of an indigent person

Exceptions – Personal liability will not attach in the following circumstances:

If an individual lacks sufficient financial ability to support the indigent person.

A child may be excused of liability if he or she can prove a 10-year period of abandonment by the parent during the child's minority.

If the indigent person qualifies for Medical Assistance benefits, liability will not be imposed.

Amount – The amount of support owed will be determined by the Court.

Who may petition for the support order?

The indigent person.

Any other person or public body or agency that has an interest in the care and maintenance of the indigent person may also petition the Court.

Consequences of failure to comply with Court Order – failure to comply with a Court order for support may result in a contempt hearing and if it is determined that the individual liable for support has intentionally failed to comply with the order, the Court may hold the individual in contempt of Court and may sentence the individual to up to six (6) months imprisonment.

### **Medical Assistance Estate Recovery Program**

Federal Law requires all states to seek repayment for nursing facility and home and community-based Medicaid benefits provided to individuals who are over the age 55. See 42 U.S.C. § 1396p (b)(1). Pennsylvania's Medical Assistance Estate Recovery program is set forth in the Public Welfare Code at 62 Pa. C.S. § 1412.



The estate recovery program does not create debts owed by the Medical Assistance recipient or his or her family but instead, it creates the possibility that a claim will be levied against the probate estate of the Medicaid recipient.

Assets subject to Estate Recovery - All property which forms part of the deceased Medical Assistance recipient's probate estate is subject to the estate recovery claim. The probate estate of an individual is comprised of all real and personal property of the decedent which is subject to administration by a decedent's personal representative, whether or not the estate is actually administered. See 55 Pa. Code § 258.3(a).

#### Assets not subject to Estate Recovery

Property held by the decedent and another at the time of death as joint tenants with rights of survivorship, or as tenants by the entirety.

Life Estate interests.

Assets placed in trust prior to the death of the decedent, including irrevocable burial reserves, if such assets are not payable to the decedent's estate.

Assets owned by certain types of trusts.

The proceeds from life insurance policies owned by the deceased Medical Assistance recipient, so long as the decedent's estate is not the named beneficiary.

Postponement of Estate Recovery – In certain circumstances, DHS is required to postpone the collection of an estate recovery claim until:

The death of the surviving spouse

The death of a child who is or totally and permanently disabled and

The date on which any surviving child attains the age of 21.

The estate recovery claim will also be postponed until the death of, or property transfer by, or vacating of a home by a sibling with an equity interest in the property.

Exemptions for Undue Hardship – There are 5 general circumstances where individuals who would be affected by estate recovery may request forgiveness of the claim for reasons of undue hardship. Such hardship requests are reviewed by DHS on a case by case basis.

Primary Residence – DHS may be willing to waive the claim upon a finding that an individual lived in the residence with the decedent for at least 2 years prior to the decedent’s receipt of Medical Assistance benefits, the individual has no other residence, and the individual provided care for a period of at least 2 years which allowed the deceased recipient to remain at home.

Income Producing Property – DHS may waive the claim where the property involved produces income for a trade or business. This waiver is available to the spouse, child, parent, sibling, or grandchild of a deceased Medicaid recipient who can show that the property involved is their household’s primary source of income and without such property, the household’s gross income would fall below 250% of the FPL.

Home Maintenance Expenses – DHS may waive or reduce the claim by the amount of necessary and reasonable expenses incurred in the maintenance of the home. This would allow family members who expended their own funds on such expenses to be reimbursed from the decedent’s estate.

Small Estates – DHS will not pursue estate recovery against an estate with a value of \$2,400 or less.

Discretionary Waiver – DHS has the discretion to waive, reduce, or postpone recovery where there are other circumstances of undue hardship.

## PLANNING FOR SPECIAL NEEDS

Estate Planning to protect the financial, medical, and psycho-social well-being of a person with special needs. Special Needs Planning allows us to safeguard the quality of life of the person with special needs by protecting resources and preserving public benefits eligibility.

### **Introduction**

Must be familiar with the benefits available, eligibility requirements, tools (trusts), and tax considerations.

### **Definitions**

PA ABLE – an account that gives certain individuals with qualified disabilities (Eligible Individuals), and their families and friends, a tax-free way to save for disability-related expenses, while maintaining government benefits. Federal and state law authorized the creation of PA ABLE accounts.

Complex Trust – not required to distribute income at least annually and, as such, is a tax paying entity

Deeming – income and resources of a third party may be used against an applicant in calculating income and resource test for Medical Assistance (MA) and Supplemental Security Income (SSI).

Disability – The individual is unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that can be expected to result in death or has lasted or is expected to last for a continuous period of at least 12 months.

Foster Care Independence Act of 1999 – imposed the periods of ineligibility for transfers against SSI benefits.

Grantor Trust Rules – used to define who will be treated as owner of Trust assets for income tax purposes – Grantor includes Trust income on income tax return.

HCFA Transmittal 64 – contains the regulations that interpret the trusts authorized under OBRA 93. OBRA 93 creates the exceptions to the general rule that transfers of an individual's own assets will result in a penalty period of ineligibility.

In-Kind Support and Maintenance (ISM) – food and housing received by an SSI recipient from a third party who pays the provider directly.

Look Back Period – 5 years on transfers for less than fair consideration.

MCCA 1988 (Medicare Catastrophic Coverage Act of 1988) – established the spousal impoverishment rules providing a certain amount of income for the CS and resources to ensure a reasonable quality of life for CS. MMNA and CSRA

Means-Tested – uses income and asset requirements to determine eligibility for benefits.

Non-Means Tested – entitlement programs – income and assets are irrelevant.

OBRA 1993 (Omnibus Budget Reconciliation Act of 1993) – Established certain Trusts as exceptions to the general rule that the transfer of one's own assets are subject to a transfer penalty or become an available resource.

One Third Reduction Rule/Presumed Value Rule – in the SSI context, whenever a third party provides support benefits (ISM, Food and Shelter) to the recipient by paying a vendor or providing the benefits directly to the beneficiary, the monthly income check of the SSI recipient is reduced. Rather than calculate the value of the ISM actually provided, the value is presumed to be 1/3 of the monthly SSI check. Accordingly, the SSI recipient's check is reduced by 1/3 or 1/3 plus \$20 for the month in which support was provided.

POMS (Program Operations Manual System) – set of rules used by SSA in administering SSI Program – but not law.

Self-Settled Trust – beneficiary's own money used to fund SNT

Simple Trust – all income earned in trust is paid out to beneficiary at least annually

Third Party Trust – funds of third party are used to fund SNT

Transfer Penalty – ineligibility for MA and SSI based on transfer of assets

## **Important Statutes**

42 USC §1396p(d) – OBRA 93 established exceptions to the general rule which would otherwise define a self-settled trust as a transfer resulting in a penalty period being assessed.

42 USC §1396p (d)(4)(A) Trust – self-settled trust that must contain a payback provision. Can only be created with funds of an individual under age 65 and by the **individual**, parent, grandparent, guardian, or by court order. P.L.114-255, §5007(a) 12/13/2016 included the individual as a permissible establisher of a self-settled special needs trust.

42 USC §1396p (d)(4)(B) Trust – Miller Trust or Qualified Income Trust – used only in income cap States

42 USC §1396p (d)(4)(C) – Pooled Trust – non-profit organization as Trustee

PA 2016 Act 17 - the Pennsylvania ABLE Act

## **Means vs Non-Means Tested**

Trusts may be used to qualify and maintain eligibility – only applies to means tested programs

Non-Means Tested Programs – income and assets are irrelevant

Medicare

Social Security Disability

Means Tested Programs – must meet income and resource limits

Medicaid – discussed in this session

SSI – discussed below

## **SSI (Supplemental Security Income)**

SSI is a Federal benefit program for the Aged, Blind, or Disabled.

Eligibility is based on:

Categorical – Aged, Blind, Disabled

Residential

Financial

SSI Benefit intended to provide for food and shelter and provides the following

A cash amount – equal to 75% of the federal poverty level to be used for food and shelter

Monthly cash benefit for single person includes a PA benefit amount of \$22.10

Monthly cash benefit for a married couple includes a PA benefit amount of \$33.30

\$1 of SSI will entitle beneficiary to MA coverage

What reduces/eliminates benefit?

Deductions for countable earned or unearned income received

Cash gifts received are income and will reduce benefits \$1 for \$1

Income received by family members in household deemed to recipient

In Kind Support and Maintenance - ISM is assistance paid to a third party for the food and/or shelter needs of the person with special needs. ISM may result in a One-third (1/3) reduction in the SSI benefit of the person with special needs.

Categorical Requirements

Aged – age 65 or older

Blind – 20/200 or less in better eye with corrective lenses

Disabled – standard SSDI definition



The individual must be unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months.

If the individual earns more than the substantial gainful employment income limit, then non-disability is presumed.

### Residence Requirement

Resident of US State, DC, or Northern Mariana Islands

Absence from US for 30 consecutive days disqualifies and then must reside for 30 days in US before eligible again

### Financial Requirements

#### Income

Countable income of no more than the established income limit

First \$20 of income is not counted

Earned income is gross wages or net earnings from self-employment

#### Excluded Earned Income

First \$65 and ½ remaining earned income is excluded

Example - Earns \$565 month, then countable income is  $\$565 - \$65 = \$500$   
 $\div 2 = \$315$  excluded.

First \$10 of infrequent earned income is excluded

Excluded Unearned Income (investment income, annuities, pensions, alimony, support, dividends, life ins proceeds, prizes, gifts, and inheritances)

First \$20 is excluded, then SSI cash benefit is reduced \$1 for \$1.



Example - Annuity pays \$520/month, then countable unearned income is  
 $\$520 - \$20 = \$500$  countable and \$20 excluded.

#### In Kind Support and Maintenance (ISM) – unearned income

Food or Shelter furnished by or paid for directly by someone else would normally fall under unearned income rule, but instead subject to following rules:

One-Third Reduction Rule – applies when SSI beneficiary lives in household with another and does not pay pro-rata share of food and shelter.

SSI benefit reduced by 1/3 of the monthly benefit rate.

Presumed Value Rule – applies when SSI beneficiary does not reside in home of another, but is furnished any food and/or shelter by another

SSI benefit reduced by 1/3 of the monthly benefit rate.

Payment is made to 3<sup>rd</sup> party not to SSI beneficiary, if made to SSI beneficiary directly, then \$1 for \$1 reduction.

#### Deeming of Income

Income of another living in household (spouse, parent if SSI beneficiary is under age 18, after age 18, parent's income is no longer deemed to SSI beneficiary) is counted as if earned by SSI beneficiary.

#### Resource Requirements

##### Resource Limits

\$2,000 if single

\$3,000 if married couple



## Exempt Assets

Primary Principle Residence + land

1 automobile

Household furnishing and personal effects

Burial plot and burial account

Life insurance up to \$1,500 face value

Deeming Rules apply

Transfer Penalties under Foster Care Independence Act of 1999 (DRA has no effect on SSI)

Transfer of assets will result in a penalty period for SSI benefits

FMV of Transfer ÷ Max monthly benefit = penalty period in months

Maximum penalty period is 36 months

Non-institutionalization – SSI recipient cannot receive SSI benefit while living in an institution.

**Planning with Trusts** – any question dealing with SSI and MA is a hint to discuss the use of Trust

### Definition of Trust

A trust is a property interest whereby property is held by an individual (Trustee), subject to a fiduciary duty, to use the property for the benefit of another (beneficiary).

### Purpose

To qualify for or maintain benefits by turning countable income and resources to non-countable. Applies to SSI and MA. Money received directly by recipient is income in month received and a resource thereafter.

## C. Types of Trusts

- a. Self-Settled SNT– OBRA 93 and HCFA Transmittal 64; (d)(4)(A)
  - 1) Funded with beneficiary own money
  - 2) Must have a payback provision
  - 3) Beneficiary must be under age 65. Trust may continue after age 65, but no further contributions to Trust after age 65.
  - 4) Established by **individual**, parent, grandparent, guardian or by Court order
  - 5) Drafted and administered for the benefit of the disabled person
  - 6) Must be irrevocable
  - 7) Distributions to 3<sup>rd</sup> parties who provide non-support benefits to beneficiary does not cause reduction in SSI benefits.
  - 8) If 3<sup>rd</sup> party provides food or shelter then ISM and benefit is reduced
- b. Third Party SNT
  - 1) Funded with money of third party
  - 2) Can be testamentary or stand alone
  - 3) No payback provision required
  - 4) Should be a purely discretionary but add in ISM language for flexibility - can make distributions for food and shelter but will reduce SSI benefit by 1/3. Don't limit to non-support needs.
  - 5) Must be irrevocable

- c. Miller Trust – no assets, income only, used in income cap States, not PA.
- d. Pooled Trust – established and managed by non-profit, beneficiary can be older than 65, but then subject to transfer penalty rules.

IV. Trust Alternatives

- A. Direct transfer to person with special needs
- B. Pa ABLE (Achieving A Better Life) Accounts [www.paable.gov](http://www.paable.gov)



# **2020 Bench Bar Elder Law Review and Update**