

Elder Law and Special Needs Update/SAEPC 2019

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Alzheimer's Disease

- Over 5 million Americans have Alzheimer's disease
 - By 2050, this number will triple
 - 200,000 people under age 65
- Most expensive disease in the nation
 - Current annual cost of care is \$259 billion
 - Cancer costs \$66 billion annually
 - Cost projected to rise to \$1.1 trillion by 2050
 - Government pays for about 68% of the cost

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Graying of America

- 40 million Americans over age 65
 - 13% of the population
 - 25% of these people will live past age 90
 - 10% will live past age 95
- By 2050, over 65 population expected to increase to 88.5 million
 - 20% of the population
 - Fastest growing segment is age 85 and older
- Quantity of years/quality of life

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Special Needs Planning

- More than 40 million Americans living with a disability
 - Mental
 - Physical
 - 12% of U.S. population
 - As many people as entire state of California
- One in 6 children ages 3 to 17 have one or more developmental disabilities
- One in 59 children have autism

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Estate Tax

- Raises about \$20 billion annually
- .7% of all federal revenue
- Individual income and payroll taxes provide 81% of federal revenue
- 99.8% of all estates pay no federal estate tax
 - Fewer than 2 out of every 1,000 estates
- Approximately 5,000 estate tax returns filed in 2017 reported a tax due

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Medical Expense Deduction

- 7.5% floor for tax years prior to 2013
- 10% for AMT purposes
- ACA increased to 10%
- 2017 Act lowered to 7.5% for all taxpayers for 2017 and 2018
- 10% for 2019 and beyond
- Higher standard deduction
 - Bunching of deductions
 - Seniors/individuals with disabilities

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Elder Law and Special Needs Update

- 2017 Tax Act
 - Medical expense deduction
 - ABLE accounts
 - Qualified disability trusts

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ABLE Act

- Tax-advantaged investment accounts
- Modeled after 529 accounts; §529A
- Favorable treatment for government benefits purposes
 - Account balance, contributions and distributions disregarded for SSI and Medicaid purposes
 - SSI (not Medicaid) is suspended if account balance exceeds \$100K

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ABLE Act

- Disability onset prior to age 26
- Account may be created at any time
- Limit of one account per beneficiary
- Annual contributions capped at \$15,000
- Total account value capped at state 529 limit
- No court oversight; simple compared to SNT

ABLE Act Changes

- DB has income from employment
- Contribution limit for designated beneficiary increased to lesser of
 - Federal poverty level for one person household (\$12,140)
 - DB's compensation for the year
- Not covered by employer's retirement plan
- Does not apply to tax years after 12/31/25

ABLE Act

- Medicaid payback on death
 - Applies to Medicaid only; not SSI
 - 529A(f)
 - Distributed to state upon filing of claim
 - CMS letter September 7, 2017
 - 529A recovery claims not mandated
 - Estate otherwise subject to recovery
 - California, Pennsylvania

ABLE Act Changes

- DB may claim saver's credit for their contributions to ABLE account
- Non-refundable tax credit
 - Reward for contributing to retirement plan
- \$2,000 annual cap
 - \$4,000 if joint return filed
 - Sliding scale based on adjusted gross income
 - No more than 50% of DB contribution

ABLE Act Changes

- Rollover from 529 account now permitted
 - No penalty; no tax
 - Does not qualify for saver's credit
- Rollover amount counts towards \$15,000 annual limitation
- 529 account must be owned by DB of ABLE account or member of DB family
- Planning opportunities
- SNT drafting issues

Elder Law Update

- Medicare
 - Parts A, B, C and D
 - Age 65 and older
 - Social Security Disability/24 months
 - End stage renal disease
 - ALS
 - Medigap policies
- Medicaid
 - Strict income/asset requirements
 - Rules vary by state
- Long-term care insurance

Qualified Disability Trusts

- IRC §642(b)(2)(C)
 - Trust must be an SNT
- Trust gets deduction for personal exemption amount
- 2017 Tax Act eliminates personal exemptions through 2025
- §642(b)(2)(C)(iii)
 - If personal exemption is zero, \$4,150 is exemption amount for QDT
 - Adjusted for inflation

Medicare Part A

- Nursing home coverage
 - Skilled care
 - 3-day hospital stay
 - Observation status
 - Nursing home admission within 30 days
 - Same condition for which you were hospitalized
 - Improvement standard
 - Benefit period
 - Not in receipt of inpatient hospital or Medicare covered SNF care for 60 days in a row

2019 Medicare Part A

- Hospital deductible \$1,364
- Hospital co-insurance amounts \$341 per day for days 61-90, \$682 per day for days 91-150 (lifetime reserve)
- Skilled nursing facility co-insurance amount \$170.50 per day for days 21-100
- No premiums for most
 - Paid Medicare taxes for 10 years

Medicare Part B

- Hardship waiver
 - Reduction in income
 - Divorce
- Recent legislation lowered IRMAA MAGI thresholds
 - More people now paying higher premiums
- IRMAA indexing starts in 2020

Medicare Part B

- Health insurance coverage
- \$185 annual deductible
- \$135.50 monthly premium
- IRMAA – higher share of part B costs
 - Income related monthly adjustment amount
- Premiums up to \$460.50/month
- MAGI above \$85,000
 - AGI plus tax-exempt interest
 - Two-year lookback
 - Increase in MAGI due to sale of home, business
 - Not currently indexed for inflation

2019 Medicaid Limits

- Single Individual \$2,000 - \$15,450
- CSRA Maximum \$25,284 - \$126,420
- MMMNA \$2,057.50 - \$3,160.50
- Home equity limit \$585,000 - \$878,000
- Look-back period
- Penalty period
- Estate recovery
 - Non-probate assets

Home and Community Based Services

- Proper start date for penalty period
- 42 USC §1396p(c)(D)(ii)
- In the case of a transfer of asset...the date... on which the individual is eligible for [Medicaid] and would ***otherwise be receiving institutional level care***...but for the application of the penalty period
- CMS letter July 27, 2006
 - ***Is receiving institutional level of care***

HCBS Services

- CMS letter April 17, 2018
- New policy allows penalty period to start when individual would otherwise be receiving HCBS services but for the penalty
- Follows statute and intent of the law

HCBS Services

- Individual cannot begin to receive HCBS services until penalty period has run
- Penalty period does not begin to run until individual starts to receive institutional level of care
- Individual forced to go into an institution to begin penalty period
- Unfairly harms individuals who need HCBS to avoid institutional placement

Yanow v. Medicaid

- Irrevocable trust established in 2009
 - Income only distributions
 - Principal distributions to settlor prohibited
 - Settlor is neither trustee nor remainder beneficiary
 - Settlor has right to occupy house owned by trust
- Any circumstances under which trust principal could be distributed to settlor
 - 42 U.S.C. §1396p(d)(3)(B)(i)

Yanow v. Medicaid

- Medicaid denied eligibility based on trust assets being available
 - Trust provisions considered collectively allow circumstances in which settlor can access principal
 - Trustee has power to determine what part of trust property is income and what part is principal
 - Power to convert trust income to principal
- Court held trust assets not available
 - Trustee's authority constrained by state law

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A.M. v. Medicaid

- Penalty period imposed by Medicaid
 - Distributions to beneficiaries occurred during five-year look-back period
- Court holds no penalty period
 - Trust was unavailable resource
 - Trustee inadvertently distributed some capital gains to settlor
 - Does not render entire principal available
 - Breach of fiduciary duty by trustee

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A.M. v. Medicaid

- Irrevocable trust created in 2005
- Income only to settlor
- House contributed to trust and then sold
 - Settlor retained life estate
 - Life estate contributed to trust in 2010
- No principal distributions to settlor but allowed for beneficiaries
- Distributions to beneficiaries in 2013/2014
- Medicaid application filed in 2017

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Testamentary Trusts

- Support trusts are available since beneficiary can compel distribution
 - Beneficiary has legal right to obtain the funds
- SNT trustee has unfettered discretion to withhold trust property
- Intent of settlor controls whether settlor intended to create support trust or SNT
 - How to determine intent

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Testamentary Trusts

- Amount in trust
 - Small amount less likely to be support trust
- HEMS standard v. wholly discretionary
- Pot trust
 - Trust for each beneficiary indicates support intent
- Consider other resources
- Shall v. may
- Sole discretion v. absolute discretion

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Mandatory Arbitration

- CMS announcement December 9, 2016
 - No longer enforcing arbitration ban
- CMS eliminates prohibition on binding pre-dispute mandatory arbitration June 8, 2017
 - Increased transparency re: arbitration provisions
 - Arbitration agreements must be in plain language
 - Signed agreement as condition of admission is permitted

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Nursing Home Admissions

- Nursing Home Reform Act
- Third party guaranty
- Security deposit
- Mandatory pre-dispute arbitration
 - CMS prohibition September 28, 2016
 - November 7, 2016 district court preliminary injunction
 - Enjoins CMS from enforcing arbitration ban

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Kindred Nursing Centers v. Clark

- Power of attorney
- Arbitration agreement
 - All claims resolved through binding arbitration
 - Lawsuit alleging substandard care
 - Nursing home moved to dismiss
- Trial court denied motion
- Kentucky appellate court affirmed
- Kentucky supreme court affirmed
- Does POA give agent authority to enter into arbitration agreement on behalf of principal

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Kindred Nursing Centers v. Clark

- State courts held POA does not give agent authority to enter into binding arbitration since it was not specifically stated in POA
- Trial by jury “sacred” in Kentucky
- Supreme Court reverses
 - Violation of Federal Arbitration Act
 - Can’t single out arbitration agreements for disfavored treatment
 - POA need not expressly so provide

CCRC

- Contracts
 - One-time entrance fee (partially or entirely refundable)
 - Substantial
 - What does CCRC do with this money
 - All-inclusive
 - Monthly rent
 - Unlimited access to health care for life
 - Some are less expensive up front
 - Pay for health care services as needed at market rates
 - Month to month rental with no entrance fee

CCRC

- Very little government regulation
- Review financial information
- Due diligence
 - Occupancy rate
 - Rate increases
 - Debt rating
 - Cash flow/profitability
 - Capital improvements; renovations
 - Reserves
 - Composition of board of directors
 - Residents

Pooled Trusts

- 42 USC §1396p(d)(4)(C)
- Penalty period for transfers to trust by those 65 and older
- 19 states allow transfer without penalty
- 10 states impose penalty but allow for ability to show fair market value
- 21 states impose penalty period

Colorado State Dept. of Health

- 65 year-old pooled trust settlor
- Penalty period assessed by Medicaid
 - Rebuttable presumption
- Fair consideration/future care needs met
- Intent to receive fair consideration
- Court reverses Medicaid decision
 - No penalty period

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Guardianship of Timothy A. Robbins

- Car accident; catastrophic injuries
- Full-time nursing home care needed
- \$17M settlement
- SNT requested
- Trial court held a hearing
- No objections filed
- Trial court disagreed with policy behind SNTs
 - Allowed \$1M in SNT

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Richardson v. Hamilton

- Over age 64 person deposited money into pooled trust
- Penalty period assessed
- Many areas of Medicaid law are labyrinthine rendering them “almost unintelligible to the uninitiated.” Justice Scalia
- Exempt asset v. penalty period
- Assets of pooled trusts are exempt
- Transfers to pooled trusts by persons 65 and older are penalized

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Guardianship of Timothy A. Robbins

- “legal fiction of impoverishment that I’m having trouble buying into when we have \$12 million sitting here.”
- Shift considerable expense to the taxpayer
- The settlement is enough to cover his future needs
- SNT is for the benefit of the guardian and Timothy’s descendants

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Guardianship of Timothy A. Robbins

- Appellate court reverses
 - Entire amount placed into SNT
 - Public policy behind allowing people to have public benefits and additional source of financial support
 - Trial court must follow the law despite personal opinions

POMS Changes

- Updates SSA policy
- Effective April 30, 2018
- Sole benefit rule
- Family caregivers
- Third party travel expenses

POMS

- Program Operations Manual System
- Primary source of information used by SSA employees
- Given great deference
- Not regulations
- Similar to revenue rulings

POMS Changes

- Sole benefit
 - Primary benefit of beneficiary
 - Collateral benefit to others is permissible
 - House; others can live in it
 - TV; others can watch it
 - Hot tub; others can use it

POMS Changes

- Third party caregiver
 - May be a family member, non-family member or professional entity
 - Same rules apply
 - No need for certification or medical training
 - Companion care is a valid expense
 - Reasonableness of compensation
 - Incidental expenses such as admission tickets to events that beneficiary can only attend with assistance

POMS Changes

- Statement from trustee is acceptable that accompaniment is necessary to permit beneficiary to travel
 - Medical letter not necessary
 - Must provide services or assistance
 - Ok for parents to accompany beneficiary
 - Can't pay for whole family
 - Lack of affordability not relevant

POMS Changes

- Third party travel expenses
 - Visit beneficiary to oversee living arrangements
 - Ensure safety or medical well-being
 - Could be family member or someone else
 - Accompany beneficiary and provide assistance necessary due to beneficiary's medical condition, disability or age
 - Transportation, lodging, food
 - Does not include spending money, souvenirs, new clothes for companion

POMS Changes

- Pre-paid debit cards (True Link)
 - Restricted debit card
- If done properly, not income or resource for SSI purposes
- Greater independence for beneficiaries
- New POMS recognize these cards as legitimate; used to be gray area
- Trustee is account owner and administrator
- Trust beneficiary is card holder

Long-Term Care Insurance

- Covers the cost of long-term care
 - Pays for custodial care
- Rigorous physical and cognitive exam
- Benefits based on daily rate
- Inflation rider
- Elimination period
- Partnership policies
- Increasing prices
 - Genworth recent 58% price increase

Deductibility of LTCI Premiums

- Age 40 or less \$420
- Over 40-50 \$790
- Over 50-60 \$1,580
- Over 60-70 \$4,220
- Over age 70 \$5,270
- State tax credit or deduction
- 10% medical expense threshold

Long-Term Care Insurance

- Good way to stay out of a nursing home
- 52% of claims are for home care
- 20% of claims for assisted living
- 28% of claims for nursing home
- Women accounted for over two-thirds of new claims in 2017
 - Women own 58% of LTC policies
 - Gender-based pricing

Tax Treatment of Benefits

- Benefits received under a qualified LTC policy are not considered taxable income
- Tax-free cap of \$370/day applies to indemnity policies



Waskul v. MetLife

- LTCI purchased in 1996
 - \$511,000 maximum lifetime benefit
 - Premiums paid for more than 19 years
 - Guaranteed renewable
 - Pay premiums; policy cannot be canceled
- Son designated as lapse designee in 2003
- Dad diagnosed as cognitively impaired August 8, 2015

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Short-Term Care Insurance

- Coverage for one year or less
- No elimination period
- Declined for LTCI
- Less expensive than LTCI
- Easier underwriting than LTCI
- Over age 80
- Pricing is not gender-based
- You have LTCI and want to cover the elimination period

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Waskul v. MetLife

- Policy terminated November 11, 2015
 - Phone conversation with dad
 - No notice given to son
 - 2015 unused premium not refunded
- February 1, 2016 dad failed to pay premium
 - Son not notified, despite lapse designee
- May 2017 claim filed
 - Son informed contract had been terminated and could not be reinstated
- Insurance co. motion to dismiss denied

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Elder Abuse

- Crime of the 21st century
- Underreported crime
 - Approximately 1 in 15 cases are reported
- Affects 1 in 10 people over age 60
 - Costs seniors more than \$3 billion annually
- Difficult cases to prosecute
 - Victim often reluctant to testify
 - Not many cases make it to trial; plea bargain

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Elder Abuse

- Two-thirds of elder abuse committed by family members
- Internet and phone scams
 - IRS
 - Lottery winner
 - Grandparent scams
 - Facebook connections to see family

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Elder Abuse Prevention

- Revocable trust
- Clear instructions to agent under POA
- Appoint a monitor
- Require two signatures
- Bifurcate responsibilities
- Caregiver background checks
 - Work with agency
- Communication among advisors
 - Multi-disciplinary approach

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Elder Abuse Prevention

- Senior Safe Act
 - Enacted on May 24, 2018
 - Would make reporting suspicions easier
 - Provide immunity to investment advisors, bankers and others who act in good faith to report elder abuse and financial exploitation to a regulatory or law-enforcement agency
 - Does not require disclosure
 - To qualify for immunity, employees must receive training; balance privacy interests

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Elder Abuse Prevention

- Role of attorneys
 - Model rule 1.14
 - Attorney/client privilege
 - If you are complacent, are you complicit
 - Permission in retainer agreement to speak to others/APS
- Outside services
 - Eversafe
 - Monitor bank and investment accounts for unusual activity
 - Silverbills
 - Bill-paying service for seniors

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Elder Abuse

- New FINRA rules
 - Requires brokers to ask clients for trusted person to contact if financial exploitation is suspected
 - Client does not have to provide; broker must ask
 - Confidential information is not disclosed
 - Safe harbor rule allows for 15-day hold on disbursements if abuse or exploitation is suspected while firm conducts an investigation
 - Can be extended by 10 days if necessary
 - No guidance on what should be done
 - Financial advisor in good position to spot abuse

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Thank You!

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Elder Abuse and Estate Planning

- Trusted contact person could be the abuser
 - Could be alerted to more accounts
- Should clients identify trusted contact persons
 - Ask clients and their advisor if they have a TCP
 - Incorporate into estate planning documents
 - Conflict if TCP is different from DPOA agent
 - Should lawyer be contacted if broker suspects abuse or if TCP is changed
 - Sign of exploitation
 - Change EP documents to avoid conflict

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