

**CARING FOR THOSE WITH SPECIAL CARE NEEDS:
ESTATE PLANNING FOR THE DISABLED OR AILING SPOUSE**

2007 Solo & Small Firm Conference
Tan-Tar-A Resort, Osage Beach, Missouri

Friday, June 8, 2007
4:00 p.m. - 5:00 p.m.

Robert G. Ingold
Attorney at Law, LLC
2830 E. Rocklyn Road
Springfield, MO 65804
417-877-1600
417-877-1795 (fax)
robertingold@sbcglobal.net

CARING FOR THOSE WITH SPECIAL CARE NEEDS:

ESTATE PLANNING FOR THE DISABLED OR AILING SPOUSE

I. Introduction

The focus of this presentation is on the steps a care-giver spouse should take to ensure that financial resources acquired by the care-giver and the care-giver's spouse are used effectively and efficiently for their lifetime care and available for distribution to their intended beneficiaries. This includes review of existing estate planning documents, evaluation of the mental capacity of the disabled spouse, obtaining legal authority to act on behalf of the disabled spouse, and execution of appropriate legal documents, such as durable powers of attorney, health care directives, last wills and testaments, trusts, and deeds. It also includes consideration of community resources and public assistance benefits which may be available to assist in the care of a disabled spouse.

II. Goals of Estate Planning for the Disabled or Ailing Spouse:

- A. To preserve marital assets for the lifetime care of both the disabled spouse and the care-giver spouse;
- B. To make effective use of both community and public assistance benefits; and
- C. To provide for the distribution of family wealth to intended beneficiaries with the least amount of transfer costs and the maximum amount of privacy upon the death of the surviving spouse.

III. Dealing with Questions Regarding Mental Capacity

- A. "Sound mind" involves:
 - 1. Lucidity;
 - 2. Reasoning power;
 - 3. Awareness of the "natural objects of the testator's bounty";
 - 4. Knowledge of the nature and extent of property; and
 - 5. Freedom from duress or undue influence.
- B. Legal Capacity Questionnaire
- C. Mini Mental State Exam

- IV. Review of Existing Estate Planning Documents
- V. When Guardianship and/or Conservatorship Proceedings Are Necessary
- VI. Development of An Appropriate Estate Plan
 - A. Joint Ownership
 - B. Transfer on Death Plan
 - C. Review of Life Insurance and Retirement Beneficiary Designations
 - D. Living Trust or Will?
 - E. Joint Trust or Separate Trusts for Husband and Wife?
 - F. Spouses as Co-Trustees?
 - G. Revocable Trust or Irrevocable Trust?
 - H. Special Needs Trusts
 - 1. Third Party Beneficiary
 - 2. Self-Settled Trust
 - I. Is the Estate Taxable or Non-Taxable?
 - J. Durable Powers of Attorney for Financial and Medical Decisions
 - 1. Springing vs. Immediate
 - 2. Long-term Care Planning Powers
 - 3. Reference to Health Insurance Portability and Accountability Act (HIPAA)
 - 4. Artificially Supplied Nutrition and Hydration
- VII. Public Assistance Benefits

An understanding of which benefits are or may be received by an individual is critical to the proper planning for a disabled family member. The basic criteria of the six major public assistance programs are discussed below.

The first three programs (Social Security, Medicare, and veterans benefits) are not needs based. All the other major public assistance benefit programs are needs based. In other words, a person does not qualify for the last three programs (SSI, Medicaid, and assisted housing) unless the person meets certain criteria, two of which are low income and minimum assets “available” to the person.

A. Social Security

Social Security may be old-age assistance (retirement benefits), survivor’s benefits, or disability benefits. This program is officially known as Old Age, Survivors, and Disability Insurance. This law is found at 42 U.S.C. §§401, et seq., and 20 C.F.R. pt. 404.

1. Social Security Disability. Title II of the Social Security Act, 42 U.S.C. §401 et seq.; 20 C.F.R. Part 404. “SSD” is an “insurance” program, not a “welfare” program. There are no income or asset limits. The essential criterion is the individual’s inability to engage in gainful employment. 42 U.S.C. §§416(i)-(1), 423(d)(1)(A), 423(d)(2)(A); 20 C.F.R. §404.1501-404.1599. However, a disabled person who was not himself or herself a worker can only receive benefits if he or she is the child or spouse of a deceased, disabled, or retired worker. 42 U.S.C. §402(d); 20 C.F.R. §404.350

a. The SSD benefit depends on the worker’s past earnings record. In 2006, the maximum (full retirement) benefit is \$2,053/month; 50 percent of that amount for the eligible spouse, minor, or disabled child of a retired or disabled worker; and up to 75 percent of that amount for the eligible spouse, minor, or disabled child of a deceased worker.

b. In 2006, an individual may earn approximately \$860/month (if blind \$1,450/month) without losing SSD. However, the eligibility rules are technical. See 20 C.F.R. §404.1592

c. Unlike most other government programs, the receipt of a personal injury award or an inheritance does not normally affect SSD eligibility.

2. *Federal “Supplemental Security Income” (“SSI”).* Title XVI of the Social Security Act, 42 U.S.C. §1381 et seq.; 20 C.F.R. Part 416. Unlike SSD, SSI is a welfare program. The benefit maximum in 2006 for an individual is \$603/month and one-third less for a minor living with another person or living at home or for others living and sharing cooking facilities with another person. The maximum benefit in 2006 for a couple is \$904/month.

a. *Income Limits For Eligibility*

(1) In general, income offsets SSI dollar for dollar. “Income” includes cash (including inheritances and gifts over \$20 per month” and in-kind assistance for food or shelter (normally imputed to be one-third the total benefits in a family context). 42 U.S.C. §1382a(a)(2),(b)(3)(A).

(2) The first \$65/month of earned income, and one-half of all additional earned income, is “disregarded,” i.e., is not counted as income. Additional amounts earned pursuant to an “approved self-support plan” may also be disregarded.

(3) Income received by a trust for the benefit of an SSI recipient may be counted unless the trust prohibits, or makes completely discretionary, its use for “food and shelter.”

b. *Asset Limits For Eligibility.* Currently these limits are \$2,000 for an individual and \$3,000 for a couple living in the community. Not counted: a home, a car, a burial plot, and an irrevocable funeral contract. 42 U.S.C. §1382b(a), 20 C.F.R. §416.12212 et seq.

c. *Effect Of Transfers On Eligibility:* See 42 U.S.C. §1382b; 20 C.F.R. §416.1246. Transfer penalties (similar but not identical to those applicable to institutionalized Medicaid benefits) apply.

B. Medicare

Medicare is a health insurance program that provides for hospitalization, most doctor’s charges, some skilled nursing home care, and some home care. The law is found at Title XVIII of the Social Security Act, which is codified at 42 U.S.C. §§ 1395, et seq., and 42 C.F.R. pts. 405-424. It is administered by the Centers for Medicare and Medicaid Services (CMS, formerly known as the Health Care Financing Administration (HCFA)).

The Medicare program provides federally funded insurance subject to deductibles and co-payments. In 2006, “Part B” coverage requires payment of an \$88.50 premium per month. Medicare is available to disabled individuals after 24 months of receipt of SSD benefits. 42 U.S.C. §426(b) (Title II). Unfortunately, often only inferior “Medigap” or Medicare supplemental health insurance policies are available to disabled individuals (until age 65, when there is a brief opportunity to purchase coverage without regard to medical condition or disability). The “Qualified Medicare Beneficiary” program helps needy individuals with income in excess of Medicaid limits to pay Part B Premiums and, in some cases, deductibles.

C. Veterans Benefits

Veterans Benefits may be administered by the Veterans Administration or one of the branches of the United States military. Eligibility to receive such benefits is usually not dependent on the person’s financial condition, but there are exceptions.

D. Supplemental Security Income

SSI is a federal program administered by the Social Security Administration. The law is found at 42 U.S.C. §§ 1381, et seq., and 20 C.F.R. pt. 416. The Social Security Administration also has an

operations manual to guide its caseworkers. It is called the Program Operations Manual System (POMS), available at <http://policy.ssa.gov/poms.nsf/aboutpoms>.

E. Medicaid

Medicaid is a welfare program that is a partnership between the United States federal government and the states. The federal law is found at Title XIX of the Social Security Act, 42 U.S.C. § 1396 and 42 C.F.R. pts. 430, 431, and 435. Each state will also have its own statutes and regulations dealing with its Medicaid program. The Missouri law is found at §§ 208.010, et seq., RSMo 2000 and Supp. 2001, and 13 C.S.R. §§ 40-2.010, et seq. The federal agency administering the Medicaid law is the CMS, formerly known as the HCFA. In Missouri, the Division of Social Services, through the Family Support Division (FSD), formerly known as the Division of Family Services, administers the Medicaid program. FSD has an operations manual to guide its employees. It is referred to as the Income Maintenance Manual.

F. Assisted Housing

An elderly or disabled person may also be participating in any one of a number of assisted housing programs. Most of these are federal programs administered by the Department of Housing and Urban Development. The two primary programs are Section 8 Rental Assistance, 42 U.S.C. § 1437, and the Section 202 Program, 12 U.S.C. §1701q. Other federal assisted housing programs are Section 504 Rural Housing Assistance, Section 502 Rural Mortgage Assistance, and Section 235 Mortgage Assistance. 42 U.S.C. § 9817.

VIII. Community Resources

- A. Area Agencies on Aging
- B. Alzheimer's Association
- C. Hospice
- D. Churches, synagogues, mosques, and affiliated retirement homes

IX. Long Term Care Planning

- A. Four Ways to Pay for Nursing Home Care
 - 1. Medicare
 - 2. Long Term Care Insurance
 - 3. Private Pay

4. Medicaid
- B. Qualifying for Medicaid
1. Non-Countable Assets
 - a. Personal Residence (subject to Medicaid Recovery)
 - b. Automobile
 - c. Pre-paid Funeral Expenses
 - d. Life insurance up to cash value of \$1,500
 2. Division of Assets
 3. Community Spouse Resource Allowance
 4. Minimum Monthly Maintenance Needs Allowance
 5. The Look-Back Period and the Penalty
 6. Why it is important to disinherit a spouse who has qualified for medicaid
- B. Long Term Care Planning Strategies
1. Conversion of Countable Assets to Non-Countable
 2. Purchase of a high value personal residence
 3. Family Limited Partnership
 4. Family Limited Liability Company
 5. Missouri Asset Protection Trust
 6. Personal Care Contracts
 7. Medicaid Qualifying Annuities
 8. Guaranteed Income Annuities
 9. Reverse Mortgages

10. Divorce

X. Housing Options

RECOMMENDED READING AND RESOURCES

Thomas D. Begley, Jr. and Jo-Anne Herina Jeffreys, *Representing the Elderly Client*, A Panel Publication.

Disability Benefits and Understanding the Benefits Booklets, Social Security Administration, 1-800-772-1213, www.socialsecurity.gov

Elder Law, MoBar CLE.

Robert B. Fleming, *Elder Law Answer Book*, Aspen Publishers.

David G. Lupo, *Medicaid – Long Term Care in Missouri: An Update Since OBRA 1993*, *Journal of the Missouri Bar*, July-August 2006.

Medicare Coverage of Durable Medical Equipment and Medicare and Home Health Care Booklets, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244-1850, 1-8—633-4227

Missouri Aging Information Network, www.moaging.com

Missouri's Guide to Home and Community Based Services, Missouri Department of Social Services, Division of Medical Services, PO Box 6500, Jefferson City, MO 65102-6500

Missouri Long-Term Care Ombudsman Program, PO Box 570, Jefferson City, MO 65102, 1-800-309-3282

Need Help Paying for Medicine? Partnership for Prescription Assistance, 1100 15th Street NW, Washington, DC 20005, 1-888-477-2669

Nursing Home Compare, 1-800-MEDICARE, www.medicare.gov (click on Nursing Home Compare), and www.mpcrf.org

Probate Law Resource Guide, The Missouri Bar

Resident Rights, Missouri Department of Health and Senior Services, 1-800-235-5503

Senior Citizens Handbook, Legal Services of Eastern Missouri, Inc., 4232 Forest Park Ave., St. Louis, MO 63108, 1-314-534-4200

Southwest Center for Independent Living, 2864 S. Nettleton Avenue, Springfield, MO 65807, 417-886-1188, www.scil@swcil.org

Southwest Missouri Office on Aging, 1735 S. Fort Ave., Springfield, MO 65807, 417-862-0762, 1-800-497-0822, www.swmoa.com

The ElderLaw Portfolio Series, Aspen Publishers.

What's Being Done About Alzheimer's? National Office: Alzheimer's Association, 225 N. Michigan Avenue, Floor 17, Chicago, IL 60601-7633; Local Chapter: Patty Ingle, Executive Director, Alzheimer's Association, SWMO, 1500 S. Glenstone, Springfield, MO 65804, 1-417-886-2199.