The Florida Bar Continuing Legal Education Committee and the Elder Law Section

Essentials of Elder Law

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

January 11, 2018

Live and Webcast Presentation
Loews Portofino Bay Hotel
5601 Universal Boulevard
Orlando, FL 32819

Course No. 2589R
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Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at [www.floridabar.org/rules](http://www.floridabar.org/rules).

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
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6. **Will I receive notice advising me that my reporting period is upcoming?**
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7. **What happens if I am late or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

8. **Will I receive any other information about my reporting cycle?**
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9. **Are there any exemptions from CLER?**
   Rule 6-10.3(c) lists all valid exemptions. They are:
   1) Active military service
   2) Undue hardship (upon approval by the BLSE)
   3) Nonresident membership (see rule for details)
   4) Full-time federal judiciary
   5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
   6) Inactive members of The Florida Bar
10. Other than attending approved CLE courses, how may I earn credit hours?
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   1) Lecturing at an approved CLE program
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   4) Teaching (graduate law or law school courses)
   5) University attendance (graduate law or law school courses)

11. How do I submit various activities for credit evaluation?
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12. How are attendance hours posted on my CLER record?
   You must post your credits online by logging in to your member portal at member.floridabar.org.

13. How long does it take for hours to be posted to my CLER record?
   When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

14. How may I find information on programs sponsored by The Florida Bar?
   You may wish to visit our website, www.floridabar.org/cle, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

15. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?
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   ... CLER credit may not be counted for more than one reporting period and may not be carried forward to subsequent reporting periods.

16. Will out-of-state CLE hours count toward CLER?
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17. If I have questions, whom do I call?
   You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

   While online checking your CLER, don’t forget to check your Basic Skills Course Requirement status.
PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT
(Maximum 9.0 hours)

General ............................................. 9.0 hours  Ethics .............................................. 1.0 hour

CERTIFICATION CREDIT
(Maximum 9.0 hours)

Elder Law ............................................................................................................................. 9.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

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The Steering Committee for this course has determined its content to be INTERMEDIATE.
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For a complete list of Member Services visit our web site at www.floridabar.org.
8:20 AM -- 9:00 AM  Ethics: The Implications of Capacity for the Elder Law Attorney
Lawyers often encounter issues of consent and capacity when representing older persons and persons with a disability in executing contracts, estate planning documents and choosing appropriate decision-making options. The presentation will describe some of the practical, legal and ethical issues faced by attorneys representing clients with diminished capacity, including an examination of Rule 4-1.14, Florida Rules Regulating the Florida Bar, 4-1.14, A Client Under A Disability.
Karen P. Campbell, Tallahassee

9:00 AM -- 9:30 AM  Health and Personal Care Planning
Collett P. Small, Pembroke Pines

9:30 AM -- 10:15 AM  Maximizing Social Security Retirement Benefits For You and Your Clients – Inside the Black Box
This program will help you to learn enough about Social Security to be prepared to properly counsel a client about his or her options for claiming (and maximizing!) Social Security retirement benefits as a client approaches age 62, i.e., “early retirement age.” In this workshop you will learn: what benefits are available to retirees, survivors, and dependents and, their eligibility requirements; how a benefit is calculated; the best way to coordinate a benefit claim with a spouse or former spouse; what factors may increase or decrease a retirement benefit; the tax consequence of one benefit claiming scenario over another; and the major strategies that can be used to maximize cumulative lifetime retirement benefits.
Avram Sacks, Skokie, IL

10:15 AM -- 10:40 AM  BREAK

10:40 AM -- 11:30 AM  Public Benefits: Social Security Benefits
Avram Sacks

11:30 AM -- 12:10 PM  Pre-Mortem Real Estate Best Practices: Use of "Lady Bird" Deeds and Powers of Attorney
Melissa Murphy, Orlando

12:10 PM -- 1:20 PM  LUNCH

1:20 PM -- 2:00 PM  From Guardians to Personal Representatives
Cady Huss, Sarasota
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ETHICS: THE IMPLICATIONS OF CAPACITY FOR THE ELDER LAW ATTORNEY

By

Karen P. Campbell
Tallahassee
WHAT AN ELDER LAW ATTORNEY SHOULD UNDERSTAND ABOUT CAPACITY

Karen P. Campbell, Esq.

A 65 year-old woman calls your office to hire you to draft a durable power of attorney for her mother who resides in a nursing home. Parents of a 17-year-old son with an intellectual disability call your office asking you to establish a guardianship over their son so that when he turns 18, the parents can remain involved in his educational decisions. A hospital discharge planner calls your office because they have a patient they believe lacks capacity and who refuses to sign nursing home admission paperwork, thus derailing the hospital’s discharge plan. At least one common thread in all three scenarios is the question of capacity. Concepts surrounding capacity are moving targets, imprecise, hard-to-define, and even harder to implement in an elder law practice. Yet, capacity issues permeate much of the work of an elder law attorney. There are several reasons why elder law attorneys should have a general understanding of the concept of capacity. Among the tasks an attorney may face are:

• Evaluating whether a client has sufficient capacity to engage in an attorney-client relationship.
• Evaluating whether the client possesses the requisite capacity to accomplish the client's objective (such as executing a will).
• Providing representation in guardianship capacity proceedings, either in defending against an incapacity determination or in seeking an incapacity determination.

This outline will:

• Discuss general concepts surrounding capacity,
• Discuss the rules of professional conduct when clients have diminished capacity,
• Discuss legal standards of capacity, and
• Share various tools related to capacity that elder law attorneys can use in their practices.
This outline does not cover other topics related to capacity such as incompetence to proceed in criminal cases, the incapacity of minors, undue influence, coercion or duress.

**General Capacity Concepts.**

The words capacity, or “incapacity,” are terms of art used in Florida as opposed to “competency” or “incompetency” which are still being used in some states. Some states use the terms capacity and competency interchangeably. Both of the terms lean towards looking at capacity as an all or nothing proposition. Either a person is competent/has capacity or he or she is incompetent/lacks capacity. This approach is called “global” capacity. It is better, however, to think of a person having “specific capacities.” This approach recognizes that even people with significant limitations have the functional ability to perform some actions.1 Additionally, there is a growing movement to consider “capacity with supports” which emphasizes a person’s abilities with necessary accommodations. For example, a person may need eyeglasses to operate a motor vehicle. That person would be considered to have the capacity to drive as long as the person is wearing glasses.

What does the term “capacity” mean? Black’s Law Dictionary states “Lawful capacity for an entity in its own name to enter into binding contracts, to sue and be sued.”2 The Oxford Dictionary defines capacity as “a person’s authority under law to engage in a particular undertaking or maintain a particular status.”3 West’s Encyclopedia of American Law defines capacity as, “[t]he ability, capability or fitness to do something; a legal right, power, or competency to perform some act. An ability to comprehend both the nature and consequences of one's acts.”4 Florida’s health care surrogate statute uses the terms “incapacity” and “incompetency” interchangeably and defines the terms as a patient

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who is physically or mentally unable to communicate a willful and knowing health care decision. Florida guardianship law defines an “incapacitated person” as “a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person”.5

Capacity, is not a concept that can be completely understood by considering only statutes and definitions. In an 1996 essay on the topic, Charles Sabatino of the American Bar Association’s Commission on Law and Aging commented, “no matter how articulate, detailed, or comprehensive the legislative definitions or substantive standards, incapacity determinations for all but the most clear cases will depend on a malleable weighing process – that is, the judicial task, ultimately, is to weigh medical variables, social variables, and a constellation of very practical variables relating to the need for state intervention in a unique human situation.”6

Capacity can be described as occurring on a continuum. For example, someone diagnosed with a progressive neurocognitive disorder may initially exhibit diminishing capacity (e.g., a declining ability to analyze stock market choices). Later, this person may become unable to make major medical decisions (e.g., unable to understand the consequences of a major event, like surgery), and even later, may become unable to make any rational decisions. Capacity can also fluctuate over time or can be affected by the situation or context. Incapacity may be temporary, such as someone who is delirious due to an infection or a negative reaction to medication. For example, altered mental status is a common symptom in older adults diagnosed with a urinary tract infection.

Some conditions involving physical disabilities are incorrectly labeled as incapacity. Persons with physical disabilities may lack the physical ability to perform a variety of tasks; however, the physical

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disability probably does not interfere with the person’s mental ability to understand the nature of the decision that needs to be made and the consequences of that decision. For example, a quadriplegic who requires assistance with all activities of daily living (ADLs), may need a caregiver, but should not require a surrogate decision-maker. It should not be assumed that persons with physical disabilities automatically lack capacity.

**Clients with Diminished Capacity**

A threshold question facing elder law practitioners is whether their client possesses the requisite capacity to enter an attorney-client representation and to accomplish the goals of representation. Planning tools such as durable powers of attorney, trusts, wills, and surrogate designations require the maker to have a certain level of capacity. Florida law presumes an adult has full legal capacity until determined otherwise through a legal process. What is an attorney’s responsibility if the attorney believes the client has diminished capacity? How does the judicial process determine that an individual lacks capacity?

Rule 4-1.14, Florida Bar Rule of Professional Conduct instructs attorneys to make a professional judgment call when a client appears to have diminished capacity. The rule expects attorneys to treat each client in the same manner regardless of the client’s functional ability. If a client appears to have diminished capacity and the diminished capacity interferes with representation, then the attorney has to seek help for the client.

When an attorney believes a client cannot act adequately in the client’s own interest, the attorney:

- must try to maintain a normal lawyer-client relationship,
- may seek the appointment of a guardian, or
• take other protective action.

The comment accompanying the rule gives guidelines on the rule’s interpretation, but is not authoritative. The rule’s comment begins with the important point that every client is presumed to be able to understand and make appropriate decisions with regards to the representation. The attorney’s role is to advise and assist the client in making those decisions. However, there may be times when a client’s disability may interfere with comprehension or decision-making. The rule’s comment also recognizes that there are various levels of capacity. A person adjudicated incapacitated with respect to certain rights may still be able to engage meaningfully in an attorney-client relationship depending on the action that needs to be taken. For example, the client may be able to handle routine financial transactions, but be incapable of selling a piece of commercial property. If there is a legal representative (guardian, agent under a durable power of attorney, etc.) involved with the process, the attorney should look to the legal representative for decision-making assistance while maintaining communication with the client when possible. When the client does not have a legal representative, the rule’s comment suggests an attorney may need to act as a “de facto guardian.” This phrase is not defined by the rule and may raise more questions than it answers, such as the scope of decision-making assistance someone else may have over a client and the potential for conflicts of interest.

Another troublesome area is maintaining the integrity of the attorney-client relationship while taking protective action or seeking a legal representative. The attorney may need to disclose sensitive, personal information that could jeopardize client outcomes or the trust between attorney and client. The rule offers some guidance in these areas, but does not adequately address every situation. Consequently, the rule’s comment ends by reminding attorneys to use their best professional judgment when dealing with these issues. The full text of Florida Bar Rule 4-1.14 appears in the Appendix. Notwithstanding the commentary above, a client cannot be forced against his or her will to obtain a declaration of capacity or to seek appointment of a guardian.
Tools for Practitioners

Although practice aids exist to guide an attorney through the delicate process of making judgments about a client’s capacity, one should keep in mind that lawyers are not trained to evaluate capacity. Attorneys are lay persons when it comes to assessing clients for capacity and should exercise caution. At least one Florida case negated an attorney’s use of a “routine competency test” to make the initial judgment call of whether a client possessed capacity to execute a preneed guardian designation. In Koshenina v. Buvens, an attorney used what the court described as a “routine competency test.” Based on the results, the attorney concluded the client had capacity to execute certain documents. Yet, the client failed medical cognitive tests administered by a physician a few weeks before the attorney-client meeting.7 Whenever possible, attorneys should use professional evaluators when a client’s capacity is questioned. Neuropsychologists are trained to administer a battery of tests aimed at detecting clinical and functional incapacity.

The American Bar Association and the American Psychological Association collaborated on a manual for attorneys, a manual for judges and a manual for psychologists on how to assess capacity in older adults.8 The manual for lawyers offers a framework to assist lawyers in evaluating the client’s capacity to enter the attorney-client relationship and to accomplish the goals of representation:

1. Observe and interpret signs of diminished capacity. Focus on abilities. Consider mitigating factors such as illness or reversible conditions.

2. Evaluate the person’s understanding in relation to the specific task at hand. Is testamentary capacity at question? Contractual capacity?

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7 Koshenina v. Buvens, 130 So.2d 276 (Fla. 1st DCA 2014).
3. Consider the degree of risk to the client and the ethical factors set out in the Comment to Rule 1.14. Can the client state the basis for their decision? To what extent does the client’s functioning vacillate? Does the client appreciate the consequences of the decision/action?

4. Weigh the observations and information collected and make a professional judgment.

5. Document the process and the attorney’s conclusions.

The manual provides a worksheet that guides the attorney through this five-step process. A copy of the worksheet is provided at the end of this Outline.

**Legal Standards of Capacity**

The final part of this Outline will review the legal standards for some of the specific tasks that occur frequently in an elder law practice.

1. Preneed Guardian Designation. "whether the ward had the capacity to generally understand the nature of the decision she is making and its implications."\(^9\)

2. Testamentary Capacity. The standard of capacity for executing a will is determined at the moment a will is executed and involves a general understanding of the following:

   - The extent and nature of the testator’s property holdings,
   - Who would be the natural beneficiaries of the testator’s property, and
   - The practical effect of the will as executed.\(^10\)

Note that there are conditions that do not necessarily preclude a finding of testamentary capacity. If the testator is under the influence of drugs, experiencing advanced age, serious illness, memory loss

\(^9\) Koshenina v. Buvens, 130 So.2d 276 (Fla. 1st DCA 2014).
\(^10\) In re Wilmott’s Estate, 66 So.2d. 465 (Fla. 1953).
or even undergoing the dying process are not conditions that necessarily bar someone from having testamentary capacity.\(^{11}\)

3. Capacity and Healthcare Decision-making. The legal standard for providing informed medical consent is that the patient is physically or mentally unable to communicate a willful and knowing health care decision. The process for determining someone incapacitated with respect to health care decision-making is prescribed by Florida Statutes. If a principal’s capacity to make health care decisions or provide informed consent is in question, the attending physician shall evaluate the person’s clinical capacity to provide informed consent (defined in the statute) and, if the attending physician determines the person lacks capacity, the physician must enter that conclusion in the person’s medical record. If the attending physician is unsure, another physician shall evaluate the person’s capacity, and enter his or her conclusion in the patient’s record. The statute explicitly states regardless of the presence of an intellectual disability or psychiatric hospitalization for a mental illness.\(^{12}\) It is important to note that even in the presence of debilitating illnesses or conditions, a presumption of capacity exists.

4. Capacity in Guardianship Proceedings. In guardianship, an attorney must understand the recommendations of an examining committee to know when and how to challenge assertions that are counter to the client’s objectives. An attorney representing a petitioner in a guardianship case must meet the evidentiary standard of clear and convincing evidence to establish incapacity.\(^{13}\) Here as well, the attorney must first clearly understand the legal standard of capacity for a particular task. Sec. 744.3215 of the Florida Statutes lists the civil rights that can be removed from an incapacitated person in a guardianship proceeding. Multi-disciplinary

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\(^{11}\) Id.


\(^{13}\) Sec. 744.331(5)(c), Fla. Stat. (2007). (check to see if this citation is still correct)
examining committees are charged with recommending to the court whether the individual has capacity to exercise a particular civil right. Attorneys should have a general understanding of the assessment tools used by examining committee members. Understanding the legal standards for capacity is also important for attorneys involved in guardianship restoration cases. Courts have held that evidence of improving conditions and the length of time between the filing of the examining committee reports and the incapacity hearing can be factors against a finding of incapacity. 14 The legal standards for the capacity of specific legal tasks vary slightly; however, capacity can generally be summarized into an understanding of the nature of the decision, the consequences of the decision and an ability to communicate the decision in some fashion.

14 Graham v. Dept. of Children and Families, 970 So.2d 438 (Fla. App., 2007).
Recently, four national organizations collaborated to develop an assessment instrument specific to guardianship and specially designed to help lawyers identify and implement guardianship alternatives. This practice aids goes a step further than just helping attorneys identify whether a client has capacity, this framework helps the attorney think through possible approaches or solutions that effectuate the least restrictive principal. The assessment instrument is named PRACTICAL.\textsuperscript{15} The letters stand for a distinct stage in the framework:

\textsuperscript{15} The 4 page PRACTICAL Tool and 22 page PRACTICAL Resource Guide are available for download and copying at the American Bar Association Commission on Law and Aging website, https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html.
P stands for Presume. Presume competence and that guardianship is not needed.

R stands for Reasons. Clearly identify the reasons for concern. Consider whether the individual can meet his or her basic needs, i.e., money management, health care and personal safety.

A stands for Ask. Ask if a triggering concern may be caused by temporary or reversible conditions, such as sensory deficits or medical conditions.

C stands for Community. Ask if community resources or family can address the concern.

T stands for Team. Is there a team available or surrogate appointed that can help.

I stands for identify abilities. Can the person make decisions, explain reasons, have consistency over time and understand consequences of decisions.

C stands for Screen. Screen for and address any identified challenges.

A stands for Appoint. Appoint legal surrogate or supporter, i.e., VA Fiduciary, health care surrogate.

L stands for Limit. Limit any necessary guardianship or order.

An elder law attorney must navigate the murky waters of client diminished capacity with little to no training or guidance. Use the limited resources available. Challenge your own preconceived ideas. Be careful to track your observations and judgments consistently and thoroughly and whenever possible, use professional capacity evaluators.
Capacity Worksheet for Lawyers


Please read and review the handbook prior to using the worksheet.

Client Name: ____________________________ Date of Interview: ____________________________

Attorney: ____________________________ Place of Interview: ____________________________

A. **Observational Signs**

<table>
<thead>
<tr>
<th>Cognitive Functioning</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Short-term Memory Problems</td>
<td>Repeats questions frequently</td>
</tr>
<tr>
<td></td>
<td>Forgets what is discussed within 15-30 min.</td>
</tr>
<tr>
<td></td>
<td>Cannot remember events of past few days</td>
</tr>
<tr>
<td>Language/Communication Problems</td>
<td>Difficulty finding words frequently</td>
</tr>
<tr>
<td></td>
<td>Vague language</td>
</tr>
<tr>
<td></td>
<td>Trouble staying on topic</td>
</tr>
<tr>
<td></td>
<td>Disorganized</td>
</tr>
<tr>
<td></td>
<td>Bizarre statements or reasoning</td>
</tr>
<tr>
<td>Comprehension Problems</td>
<td>Difficulty repeating simple concepts</td>
</tr>
<tr>
<td></td>
<td>Repeated questioning</td>
</tr>
<tr>
<td>Lack of Mental Flexibility</td>
<td>Difficulty comparing alternatives</td>
</tr>
<tr>
<td></td>
<td>Difficulty adjusting to changes</td>
</tr>
<tr>
<td>Calculation/Financial Management Problems</td>
<td>Addition or subtraction that previously would have been easy for the client</td>
</tr>
<tr>
<td></td>
<td>Bill paying difficulty</td>
</tr>
<tr>
<td>Disorientation</td>
<td>Trouble navigating office</td>
</tr>
<tr>
<td></td>
<td>Gets lost coming to office</td>
</tr>
<tr>
<td></td>
<td>Confused about day/time/year/season</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Emotional Functioning</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Emotional Distress</td>
<td>Anxious</td>
</tr>
<tr>
<td></td>
<td>Tearful/distressed</td>
</tr>
<tr>
<td></td>
<td>Excited/pressured/manic</td>
</tr>
<tr>
<td>Emotional Lability</td>
<td>Moves quickly between laughter and tears</td>
</tr>
<tr>
<td></td>
<td>Feelings inconsistent with topic</td>
</tr>
<tr>
<td>Behavioral Functioning</td>
<td>Examples</td>
</tr>
<tr>
<td>------------------------</td>
<td>----------</td>
</tr>
<tr>
<td>Delusions</td>
<td>Feels others out “to get” him/her, spying or organized against him/her Fearful, feels unsafe</td>
</tr>
<tr>
<td>Hallucinations</td>
<td>Appears to hear or talk to things not there Appears to see things not there Misperceives things</td>
</tr>
<tr>
<td>Poor Grooming/Hygiene</td>
<td>Unusually unclean/unkempt in appearance Inappropriately dressed</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other Observations/Notes of Functional Behavior</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Other Observations/Notes on Potential Undue Influence</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Mitigating/Qualifying Factors Affecting Observations</th>
<th>Ways to Address/Accommodate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stress, Grief, Depression, Recent Events affecting stability of client</td>
<td>Ask about recent events, losses Allow some time Refer to a mental health professional</td>
</tr>
<tr>
<td>Medical Factors</td>
<td>Ask about nutrition, medications, hydration Refer to a physician</td>
</tr>
<tr>
<td>Time of Day Variability</td>
<td>Ask if certain times of the day are best Try mid-morning appointment</td>
</tr>
<tr>
<td>Hearing and Vision Loss</td>
<td>Assess ability to read/repeat simple information Adjust seating, lighting Use visual and hearing aids Refer for hearing and vision evaluation</td>
</tr>
<tr>
<td>Educational/Cultural/Ethnic Barriers</td>
<td>Be aware of race and ethnicity, education, long-held values and traditions</td>
</tr>
</tbody>
</table>
**B. RELEVANT LEGAL ELEMENTS** - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

<table>
<thead>
<tr>
<th>General Legal Elements of Capacity for Common Tasks</th>
<th>Notes on Client’s Understanding/Appreciation/Functioning Under Elements</th>
</tr>
</thead>
</table>
| **Testamentary Capacity** - Ability to appreciate the following elements in relation to each other:  
1. Understand the nature of the act of making a will.  
2. Has general understanding of the nature and extent of his/her property.  
3. Has general recognition of those persons who are the natural objects of his/her bounty.  
4. Has/understands a distribution scheme. | |
| **Contractual Capacity**  
The ability to understand the nature and effect of the particular agreement and the business being transacted. | |
| **Donative Capacity**  
An intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one’s bounty. | |
| **Other Legal Tasks Being Evaluated & Capacity Elements:** | |

**C. TASK-SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY**

<table>
<thead>
<tr>
<th>The more serious the concerns about the following factors...</th>
<th>The higher the function needed in the following abilities...</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is decision consistent with client’s known long-term values or commitments?</td>
<td>Can client articulate reasoning leading to this decision?</td>
</tr>
<tr>
<td>Is the decision objectively fair? Will anyone be hurt by the decision?</td>
<td>Is client’s decision consistent over time? Are primary values client articulates consistent over time?</td>
</tr>
<tr>
<td>Is the decision irreversible?</td>
<td>Can client appreciate consequences of his/her decision?</td>
</tr>
</tbody>
</table>
### D. Preliminary Conclusions About Client Capacity

- **Intact** - No or very minimal evidence of diminished capacity
  
  *Action:* Proceed with representation and transaction

- **Mild problems** - Some evidence of diminished capacity
  
  *Action:*
  1. Proceed with representation/transaction, or
  2. Consider medical referral if medical oversight lacking, or
  3. Consider consultation with mental health professional, or
  4. Consider referral for formal clinical assessment to substantiate conclusion, with client consent

- **More than mild problems** - Substantial evidence of diminished capacity
  
  *Action:*
  1. Proceed with representation/transaction with great caution, or
  2. Medical referral if medical oversight lacking, or
  3. Consultation with mental health professional, or
  4. Refer for formal clinical assessment, with client consent

- **Severe problems** - Client lacks capacity to proceed with representation and transaction
  
  *Action:*
  1. Referral to mental health professional to confirm conclusion
  2. Do not proceed with case; or withdraw, after careful consideration of how to protect client’s interests
  3. If an existing client, consider protective action consistent with MRPC 1.14(b)

### Case Notes:
Summarize key observations, application of relevant legal criteria for capacity, conclusions, and actions to be taken:
INTRODUCTION

Health and Personal Care Planning includes giving advice and preparing documents regarding advance medical directives and counselling clients, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices. This process involves a lot of very personal and at times emotional decision making for your client. As drafters of health and personal care planning documents we must keep this in mind. These documents should be as unique as the clients themselves as much as the law will allow. The law provides us with a basic structure to assist in the decision making that is necessary for advising our clients and drafting documents.

PART 1
HEALTH CARE ADVANCE DIRECTIVES

I. DEFINITIONS §765.101

A. **Advance directive**: a witnessed written document or oral statement in which instructions are given by a principal or in which the principal’s desires are expressed concerning any aspect of the principal’s health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.

B. **End-stage condition**: an irreversible condition caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, treatment would be ineffective.
C. **Health care decision:**

1. Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.
2. The decision to apply for private, public, government, or veterans’ benefits to defray the cost of health care.
3. The right of access to all records of the principal reasonably necessary for a health care surrogate to make decisions involving health care and to apply for benefits.
4. The decision to make an anatomical gift

D. **Incapacity or incompetent:** the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

E. **Informed consent:** consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved which enables that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and make a knowing health care decision without coercion or undue influence.

F. **Life-prolonging procedure:** any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

G. **Living will or declaration:**

1. A witnessed written document, voluntarily executed by the principal; or
2. A witnessed oral statement made by the principal expressing instructions concerning life-prolonging procedures.
H. **Persistent vegetative state**: a permanent and irreversible condition of unconsciousness in which there is:
   1. The absence of voluntary action or cognitive behavior of any kind.
   2. An inability to communicate or interact purposefully with the environment.

I. **Proxy**: a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized to make health care decisions for such individual.

J. **Surrogate**: any competent adult expressly designated by a principal to make health care decisions and to receive health information.

K. **Terminal condition**: a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

II. **LEGISLATIVE INTENT §765.102**

A. The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

B. To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

C. The Legislature also recognizes that some competent adults may want to receive immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature
intends that a procedure be established to allow a person to designate a surrogate
to make health care decisions or receive health information, or both, without the
necessity for a determination of incapacity under this chapter.

D. The Legislature recognizes that for some the administration of life-prolonging
medical procedures may result in only a precarious and burdensome existence. In
order to ensure that the rights and intentions of a person may be respected even
after he or she is no longer able to participate actively in decisions concerning
himself or herself, and to encourage communication among such patient, his or
her family, and his or her physician, the Legislature declares that the laws of this
state recognize the right of a competent adult to make an advance directive
instructing his or her physician to provide, withhold, or withdraw life-prolonging
procedures or to designate another to make the health care decision for him or her
in the event that such person should become incapacitated and unable to
personally direct his or her health care.

II. TYPES OF HEALTH CARE ADVANCE DIRECTIVES

A. Health Care Surrogate Designation
B. Medical Powers of Attorney
C. Living Wills (Medical and Life Sustaining Choices)
D. End of Life Decisions (Do Not Resuscitate Order)
E. Anatomical Gifts
F. HIPPA Authorization (Health Insurance Portability and Accountability Act)
G. Designation of Preneed Guardian
H. Physician Order for Life-Sustaining Treatment (POLST)
IV. DESIGNATION OF HEALTH CARE SURROGATE

A healthcare surrogate designation is executed by an individual while they are competent stating their preferences for any treatment decision and appointment of a decision maker, in the event the maker later loses the ability to make these decisions themselves.

A. FORMALITIES OF EXECUTION §765.202

A written document that must be signed by the principal in the presence of two witnesses.

1. The surrogate shall not act as a witness.
2. At least one witness shall be neither the principal’s spouse nor blood relative.
3. A principal may designate a separate surrogate to consent to mental health treatment; however, unless expressly stated court will assume surrogate authorized to make healthcare decisions may also make mental health decisions.
4. Unless the document states a time of termination, the designation shall remain in effect until revoked by the principal.

B. SUGGESTED FORM OF DESIGNATION §765.203

A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

a. My health care surrogate’s authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I initial either or both of the following boxes:
   1. If I initial this box [ ], my health care surrogate’s authority to receive my health information takes effect immediately.
   2. If I initial this [ ], my health care surrogate’s authority to make health care decisions for me takes effect immediately. Pursuant to Section 765.204(3), Florida Statutes, any instructions or health care decisions I make, either verbally or in writing,
while I possess capacity shall supersede any instructions or health care decisions made by my surrogate that are in material conflict with those made by me.

C. CAPACITY OF PRINCIPAL §765.204

1. A principal is presumed to be capable of making health care decisions unless she or he is determined to be incapacitated.
2. If a principal’s capacity to make health care decisions or provide informed consent is in question, the attending physician shall evaluate the principal’s capacity. If the attending physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal’s capacity.
3. The surrogate’s authority shall commence upon a determination that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained capacity.

D. RESPONSIBILITY OF THE SURROGATE §765.205

Unless expressly limited by the principal the surrogate has the following responsibilities:
1. Authority to make all health care decisions for the principal during the principal’s incapacity.
2. Consult expeditiously with health care providers to provide informed consent, and make health care decisions that he or she believes the principal would have made under the circumstances (substituted judgment). If there is no indication of what the principal would have chosen, the surrogate may consider the patient’s best interest in deciding that proposed treatments are to be withheld or withdrawn.
3. Provide written consent whenever consent is required, including a physician’s order not to resuscitate.
4. Be provided access to the appropriate medical records.
5. Apply for public benefits and have access to information regarding the principal’s income and assets and financial records to the extent required to make application.

6. Authorize the release of health information to ensure the continuity of the principal’s health care and may authorize the admission, discharge, or transfer of the principal to or from a healthcare facility.

7. If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate. The surrogate may be directed by the court to report the principal’s health care status to the guardian.

V. MEDICAL POWER OF ATTORNEY §709

A. AGENT MAY ACT EVEN IF PRINCIPAL HAS CAPACITY

A Durable Power of Attorney under Florida Statutes 709, specifically for healthcare may enable the agent to make all health care decisions on behalf of the principal, including, but not limited to those set forth in Florida Statutes Chapter 765, even though the principal may not completely lack capacity.

B. FORMALITIES OF EXECUTION

The Medical Power of Attorney must be signed by two witnesses and a notary.
VI. LIVING WILLS, LIFE –PROLONGING PROCEDURES (MEDICAL AND LIFE SUSTAINING CHOICES)

A. LIVING WILL §765.302

1. A written document which provides directions to provide, withhold, or withdraw life-prolonging procedures in the event the principal has a terminal condition, an end-stage condition, or is in a persistent vegetative state.

2. A living will must be signed by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative.

3. If a person has made a living will but has not designated a surrogate to execute his or her wishes the attending physician may proceed as directed by the principal in the living will.

4. Before proceeding in accordance with the principal’s living will, it must be determined that:
   a. The principal does not have a reasonable medical probability of recovering capacity so that the right could be exercised directly by the principal.
   b. The principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state.
   c. Any limitation or conditions expressed orally or in writing have been carefully considered and satisfied.

B. DETERMINATION OF THE PATIENT’S CONDITION BEFORE WITHHOLDING OR WITHDRAWING LIFE-PROLONGING PROCEDURES §765.306

In determining whether the patient has a terminal condition, has an end-stage condition, or is in a persistent vegetative state or may recover capacity, or whether a medical
condition or limitation referred to in an advance directive exists, the patient’s attending or treating physician and at least one other consulting physician must separately examine the patient. The findings of each such examination must be documented in the patient’s medical record and signed by each examining physician before life-prolonging procedures may be withheld or withdrawn.

VII. DO NOT RESUSCITATE ORDER (DRO) §401.45

A. GENERALLY

1. A Do Not Resuscitate Order (DRO) is a form or patient identification device developed by the Florida Department of Health to identify people who do not wish to be resuscitated in the event of respiratory or cardiac arrest.

2. A copy of the form can be obtained by downloading the form from http://www.floridahealth.gov/licensing-and-regulation/trauma-system/_documents/dnro-form-multi-lingual2004bwyw.pdf In order to be legally valid this form MUST be printed on yellow legal paper prior to being completed. EMS and medical personnel are only required to honor the form if it is printed on canary yellow legal paper.

B. EMERGENCY MEDICAL PERSONNEL REQUIRED TO RESUSCITATE PATIENTS

Pursuant to Fla Stat 401.45, emergency healthcare workers are required to resuscitate a patient if there is no DRO, even if there is a Living Will or other advance directive document which specifically states the patient’s wishes not to be resuscitated.
C. DRO REQUIRED FOR EMERGENCY MEDICAL PERSONNEL TO WITHDRAW OR WITHHOLD RESUSCITATION

1. Resuscitation may be withheld or withdrawn from a patient by an emergency medical technician or paramedic if evidence of a DRO by the patient’s physician is presented.

2. It is important that a patient with a DRO carry a copy in their wallet as well a place a copy in their home in a prominent place such as on the refrigerator where emergency medical personnel can easily locate.

D. FORM AND EXECUTION

1. For a DRO to be valid, it must be on the form adopted by the Florida Department of Health.

2. The form must be signed by the patient’s physician and by the patient or, if the patient is incapacitated, the patient’s health care surrogate, proxy, court-appointed guardian with the authority to make health care decisions, or an agent under a durable power of attorney with the authority to make health care decisions.

3. The court-appointed guardian or attorney-in-fact must have been delegated authority to make health care decisions on behalf of the patient.

E. DISTINCTION FROM LIVING WILL §401.45 (3)(a) & §765.205 (1)(c)

Unlike a living will, a DRO is not prepared by an attorney and an attorney is involved in the execution. Further, a DRO can be executed after incapacity, whereas, a living will can only be executed by the principal while competent. A DRO may be executed subsequent to a determination of incapacity by the patient’s health care surrogate, proxy, court-appointed guardian with the authority to make health care decisions, or an agent under a durable power of attorney with the authority to make health care decisions.
VIII. ANATOMICAL GIFTS

A. PERSONS WHO MAY MAKE AN ANATOMICAL GIFT § 765.512

1. Any person who may make a will may make an anatomical gift of his or her body. An anatomical gift that is not revoked by the donor is irrevocable after the donor’s death.

2. A healthcare surrogate designated, absent actual notice of contrary, by the decedent.

3. If the decedent has not made an anatomical gift or designated a healthcare surrogate, a member of one of the classes of persons listed below, in the order of priority listed and in the absence of actual notice of opposition by a member of a prior class:
   a. The spouse of the decedent;
   b. An adult son or daughter of the decedent;
   c. Either parent of the decedent;
   d. An adult brother or sister of the decedent;
   e. An adult grandchild of the decedent;
   f. A grandparent of the decedent;
   g. A close personal friend, as defined in s. 765.101;
   h. A guardian of the person of the decedent at the time of his or her death; or
   i. A representative ad litem, who shall ascertain that no person of higher priority exists who objects to the gift and that no evidence exists of the decedent’s having made a communication expressing a desire that his or her body or body parts not be donated upon death.
B. MANNER OF MAKING ANATOMICAL GIFTS § 765.514

A person may make an anatomical gift of all or part of his or her body by:

1. Signing an organ and tissue donor card.
2. Registering online with the donor registry.
3. Signifying an intent to donate on his or her driver license or identification.
4. Expressing a wish to donate in a living will or other advance directive.
5. Executing a will that includes a provision indicating the wish to make an anatomical gift.
6. Expressing a wish to donate in a document other than a will signed by the donor in the presence of two witnesses who shall sign the document in the donor’s presence.

IX. HIPAA AUTHORIZATION 45 CFR §164.508

The Health Insurance Portability and Accountability Act (HIPAA), is a Federal law that requires the establishment of standards to protect the privacy of patients’ health care information it is intended to safeguard patient privacy while enhancing individual’s access to their own health information. Penalties for HIPAA violations are subject to civil fines, as well as criminal penalties with possible jail time.

A HIPAA authorization allows a principal to name an individual who can have access to their medical information. A HIPAA authorization permits healthcare providers to share protected medical information with a patient’s health care surrogate or agent under a medical power of attorney who may need it to make an informed medical decision on the patient’s behalf. HIPAA authorization may be included in medical advance directive documents or as a stand-alone document. A stand-alone HIPAA is recommended if the healthcare advance directive document does not take effect until the principal is incapacitated but the principle would still like someone to contact their doctor’s office about a question on a bill, or discuss their medical condition with their doctor if they are hospitalized.
X. DECLARATION OF PRENEED GUARDIAN §744.3045

A. RIGHT TO DESIGNATE PRENEED GUARDIAN

A competent adult may name a preneed guardian by making a written declaration that names such guardian to serve in the event of the declarant’s incapacity. The written declaration must reasonably identify the declarant and preneed guardian and be signed by the declarant in the presence of at least two attesting witnesses present at the same time. The declarant may file the declaration with the clerk of the court. When a petition for incapacity is filed, the clerk shall produce the declaration. The Declaration of Preneed Guardian may also be used to state who the maker does NOT wish to serve in the event a guardianship is needed.

B. PRESUMPTION THAT PRENEED GUARDIAN IS ENTITLED TO SERVE AS GUARDIAN

Production of the declaration in a proceeding for incapacity shall constitute a rebuttable presumption that the preneed guardian is entitled to serve as guardian. The court shall not be bound to appoint the preneed guardian if the preneed guardian is found to be unqualified to serve as guardian. The preneed guardian shall assume the duties of guardian immediately upon an adjudication of incapacity.

XI. POLST PHYSICIAN ORDER FOR LIFE-SUSTAINING TREATMENT

POLST is a form that gives seriously-ill patients more control over their end-of-life care, including medical treatment, extraordinary measures (such as a ventilator or feeding tube) and CPR. This is relatively new and is not yet available in Florida. To date, there are 23 states that have developed and implemented a POLST program.
According to the official National POLST website polst.org, The National POLST Paradigm is an approach to end-of-life planning that helps elicit, document, and honor patient treatment wishes. The POLST Paradigm emphasizes:

1. advance care planning conversations between patients, healthcare professionals, and loved ones;
2. shared decision-making between a patient and his/her health care professional about the treatment the patient would like to receive at the end of his/her life; and
3. ensuring patient wishes are honored.

As a result of these conversations, patient treatment wishes may be documented on a POLST Form, which translates the shared decisions into actionable medical orders. The POLST Form assures patients that health care professionals will provide only the treatments that patients themselves wish to receive, and not the treatments they wish to avoid. The POLST Paradigm is not for everyone. The POLST Paradigm is intended for patients with serious illness or frailty, for whom a health care professional would not be surprised if they died within one year. For these patients, their current health status indicates the need for standing medical orders.

A health care professional determines if a patient is appropriate for a POLST conversation. For healthy patients, an advance directive is an appropriate tool for making future end-of-life treatment wishes known.
PART 2
ABSENCE OF ADVANCE DIRECTIVES

I. THE PROXY §765.401

A. WHEN IS A PROXY REQUIRED

If an incapacitated or developmentally disabled person has not executed an advance directive, or has not designated a surrogate to execute an advance directive, or if the designated or alternate surrogate is unable or unwilling to act, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

1. The judicially appointed guardian or guardian advocate;
2. The patient’s spouse;
3. An adult child of the patient, if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
4. A parent of the patient;
5. The adult sibling of the patient or, if patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
6. An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and is familiar with the patient’s activities, health, and religious or moral beliefs; or
7. A close friend of the patient.
B. DECISIONS BY THE PROXY TO WITHHOLD OR WITHDRAW LIFE-PROLONGING PROCEDURES

A proxy’s decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient’s best interest. If a proxy is a clinical social worker, then decisions to withhold or withdraw life-prolonging procedures will be reviewed by the facility’s bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the patient record.

1. GENERALLY

   a. Before exercising the incapacitated patient’s rights to select or decline health care, the proxy must comply with the provisions of FL Statues 765.205, which governs responsibilities of a surrogate, as well as, FL Statute 765.305, which lays out the procedures in the absence of a living will.

   b. Any health care decision made by the proxy must be based on the proxy’s informed consent and on the decision the proxy reasonably believes the patient would have made under the circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient’s best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

   c. Decision making Standards: substituted judgment standard vs. the best interest standard.
II. PROCEDURE IN THE ABSENCE OF A LIVING WILL §765.305

A. In the absence of a living will, the decision to withhold or withdraw life-prolonging procedures may be made by a health care surrogate, unless the designation limits the surrogate’s authority to consent to the withholding or withdrawal of life-prolonging procedures.

B. Before exercising the patient’s right to forego treatment, the surrogate must be satisfied that:
   1. The patient does not have a reasonable medical probability of recovering capacity so that the right could be exercised by the patient.
   2. The patient has an end-stage condition, is in a persistent vegetative state, or the patient’s physical condition is terminal.

III. PATIENTS IN A PERSISTENT VEGETATIVE STATE WITH NO ADVANCE DIRECTIVE, AND NO AVAILABLE PROXY §765.404

A. For persons in a persistent vegetative state, who have no advance directive and for whom there is no evidence indicating what the person would have wanted under such conditions, and for whom, after a reasonably diligent inquiry, no family or friends are available or willing to serve as a proxy to make health care decisions for them, life-prolonging procedures may be withheld or withdrawn under the following conditions:
   1. The person has a judicially appointed guardian representing his or her best interest with authority to consent to medical treatment; and
   2. The guardian and the person’s attending physician, in consultation with the medical ethics committee, conclude that the condition is permanent and that there is no reasonable medical probability for recovery and that withholding or withdrawing life-prolonging procedures is in the best interest of the patient.
PART 3
AMENDMENT OR REVOCATION

I. AMENDMENT OR REVOCATION OF DESIGNATION OF HEALTH CARE SURROGATE OR LIVING WILL §765.104

A. BY THE PRINCIPAL

A designation of a surrogate or a living will may be amended or revoked at any time by a competent principal:

1. By means of a signed, dated writing;
2. By means of the physical cancellation or destruction of the document by the principal or by another in the principal’s presence and at the principal’s direction;
3. By means of an oral expression of intent to amend or revoke; or
4. By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

B. EFFECT OF DISSOLUTION OF MARRIAGE

Unless otherwise provided in the document or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal’s former spouse as a surrogate.

C. WHEN AMENDMENT OR REVOCATION TAKES EFFECT

An amendment or revocation will be effective when it is communicated to the surrogate, health care provider, or health care facility. No civil or criminal liability shall be imposed upon any person for a failure to act upon an amendment or revocation unless that person has actual knowledge of such amendment or revocation.
II. REVOCATION OF A PROXY §765.104

Any patient for whom a medical proxy has been recognized and for whom any previous legal disability that precluded the patient’s ability to consent is removed may amend or revoke the recognition of the proxy and any uncompleted decision made by that proxy. The amendment or revocation takes effect when it is communicated to the proxy, the health care provider, or the health care facility in writing or, if communicated orally, in the presence of a third person.

III. REVOCATION OF A MEDICAL POWER OF ATTORNEY §709.2110

Note that the mere execution of a new power of attorney does not revoke a power of attorney previously executed by the principal. Principal must express the revocation of the previously executed document in the newly executed power of attorney; however, it may give notice of revocation to an agent of the revoked power of attorney.

IV. DONOR AMENDMENT OR REVOCATION OF ANATOMICAL GIFTS §765.516

A donor may amend the terms of or revoke an anatomical gift by:

1. The execution and delivery to the donee of a signed statement witnessed by at least two adults, at least one of whom is a disinterested witness.
2. An oral statement that is made in the presence of two persons, one of whom is not a family member, and communicated to the donor’s family or attorney or to the donee. An oral statement is effective only if the procurement organization, transplant hospital, physician, or technician has actual notice of the oral amendment or revocation before an incision is made to the decedent’s body or an invasive procedure to prepare the recipient has begun.
3. A statement made during a terminal illness or injury addressed to an attending physician, who must communicate the revocation of the gift to the procurement organization.
4. A signed document found on or about the donor’s person.
5. Removing his or her name from the donor registry.
6. A later-executed document of gift which amends or revokes a previous anatomical gift or portion of an anatomical gift, either expressly or by inconsistency.

7. By the destruction or cancellation of the document of gift or the destruction or cancellation of that portion of the document of gift used to make the gift with the intent to revoke the gift.

8. Any anatomical gift made by a will may also be amended or revoked in the manner provided for the amendment or revocation of wills.

PART 4
EFFECT OF GUARDIANSHIP ON ADVANCE DIRECTIVES AND HEALTH CARE DECISIONS

I. HEALTH CARE ADVANCE DIRECTIVE §744.3115 and §765.205(3)

If, after the appointment of a surrogate, the court appoints a guardian, the surrogate shall continue to make health care decisions, unless the court has modified or revoked the authority of the surrogate. The surrogate may be directed by the court to report the principal’s health care status to the guardian.

II. MEDICAL POWER OF ATTORNEY §709.2109 (c)

Typically, if a guardianship proceeding has begun after a Power of Attorney was signed by the principal, the authority of the agent is automatically suspended until the petition is dismissed, withdrawn or otherwise acted upon. However, the power to make health care decisions is not suspended unless the court specifically suspends this power.

III. END OF LIFE DECISIONS §765.404

A court appointed guardian may make end of life decisions for a ward if the right to make medical decisions has been delegated to the guardian.
IV. DO NOT RESUSCITATE ORDER §401.45

A guardian who has been delegated the right to make medical decisions may sign a DNR Order for a ward.

PART 5 §765.112

RECOGNITION OF ADVANCE DIRECTIVES EXECUTED IN ANOTHER STATE

An advance directive executed in another state in compliance with the law of that state or of Florida is considered validly executed for the purposes of Florida statutes 756.
## PART 6
### COMPARISON CHART

<table>
<thead>
<tr>
<th>Who Appoints agent</th>
<th>Health Care Surrogate Designation</th>
<th>Health Care Proxy</th>
<th>Medical Power of Attorney</th>
<th>Living Will</th>
<th>HIPAA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal</td>
<td>Principal</td>
<td>Statutory default 765.401(1)</td>
<td>Principal</td>
<td>Principal</td>
<td>Principal</td>
</tr>
<tr>
<td>Substituted judgment if known, if no indication then best interest standard applies</td>
<td>Substituted judgment if known, if no indication then best interest standard applies</td>
<td>Same as surrogate <strong>BUT</strong> decisions re life-prolonging procedures require clear and convincing evidence that the decision made is what patient would have chosen</td>
<td>Substituted judgment if known, if no indication then best interest standard applies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Types of medical decisions/ Authority of Agent</td>
<td>The agent makes medical decisions for the principal when the principal is unable to make decisions for themselves</td>
<td>The surrogate makes medical decisions for the principal when the principal is unable to make decisions for themselves</td>
<td>The agent may make medical decisions for the principal whether principal is unable to make decisions for themselves (incapacity is not required)</td>
<td>Only applies to situation where the principal is either in a persistent vegetative state, end stage condition or has a terminal condition</td>
<td>Access to medical records</td>
</tr>
</tbody>
</table>

2.22
### DESIGNATION OF HEALTH CARE SURROGATE

**I. DESIGNATION OF HEALTH CARE SURROGATE: §765.203**

A written designation of a health care surrogate may but need not be in the following form:

**DESIGNATION OF HEALTH CARE SURROGATE**

<table>
<thead>
<tr>
<th>Name: (Last) (First) (Middle Initial)</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:</td>
</tr>
<tr>
<td>Name:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Zip Code:</td>
</tr>
<tr>
<td>Phone:</td>
</tr>
<tr>
<td>If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:</td>
</tr>
<tr>
<td>Name:</td>
</tr>
<tr>
<td>Address:</td>
</tr>
<tr>
<td>Zip Code:</td>
</tr>
<tr>
<td>Phone:</td>
</tr>
<tr>
<td>I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.</td>
</tr>
<tr>
<td>Additional instructions (optional):</td>
</tr>
</tbody>
</table>

__I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.__

| Name: |
| Name: |
| Signed: |
| Date: |
| Witnesses: 1. |
| 2. |
III. LIVING WILL §765.303

Suggested form of a living will.
A living will may, but need not, be in the following form:

```
Living Will

Declaration made this _day_ of, _(year)_ I, _name_, willfully and voluntarily make known my desire that my dying
not be artificially prolonged under the circumstances set forth below, and I do hereby declare that, if at any time I am
incapacitated and

_(initial)_ I have a terminal condition
or _(initial)_ I have an end-stage condition
or _(initial)_ I am in a persistent vegetative state

and if my attending or treating physician and another consulting physician have determined that there is no
reasonable medical probability of my recovery from such condition, I direct that life-prolonging procedures be
withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process
of dying, and that I be permitted to die naturally with only the administration of medication or the performance of
any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

It is my intention that this declaration be honored by my family and physician as the final expression of my legal
right to refuse medical or surgical treatment and to accept the consequences for such refusal.

In the event that I have been determined to be unable to provide express and informed consent regarding the
withholding, withdrawal, or continuation of life-prolonging procedures, I wish to designate, as my surrogate to carry
out the provisions of this declaration:

Name:
Address:
Zip code:
Phone:

I understand the full import of this declaration, and I am emotionally and mentally competent to make this
declaration.

Additional Instructions (optional): ____________________________________________________________

(Signed)
Witness
Address
Phone
Witness
Address
Phone
```
III. UNIFORM DONOR CARD §765.514

The following form of written document is sufficient for any person to make an anatomical gift:

**UNIFORM DONOR CARD**

The undersigned hereby makes this anatomical gift, if medically acceptable, to take effect on death. The words and marks below indicate my desires:

I give:

(a) any needed organs, tissues, or eyes;
(b) only the following organs, tissues, or eyes

[Specify the organs, tissues, or eyes]

for the purpose of transplantation, therapy, medical research, or education;

(c) my body for anatomical study if needed. Limitations or special wishes, if any:

(If applicable, list specific donee; this must be arranged in advance with the donee.)

Signed by the donor and the following witnesses in the presence of each other:

(Signature of donor) (Date of birth of donor)
(Date signed) (City and State)
(Witness) (Witness)
(Address) (Address)
IV. STATE OF FLORIDA DO NOT RESUSCITATE ORDER

State of Florida
DO NOT RESUSCITATE ORDER
(please use ink)

Patient's Full Legal Name: ___________________________ Date: ___________________________
(Print or Type Name)

PATIENT'S STATEMENT
Based upon informed consent, I, the undersigned, hereby direct that CPR be withheld or withdrawn.
(If not signed by patient, check applicable box):

☐ Surrogate  ☐ Proxy (both as defined in Chapter 765, F.S.)
☐ Court appointed guardian  ☐ Durable power of attorney (pursuant to Chapter 709, F.S.)

(Applicable Signature) (Print or Type Name)

PHYSICIAN'S STATEMENT
I, the undersigned, a physician licensed pursuant to Chapter 458 or 459, F.S., am the physician of the patient named above. I hereby direct the withholding or withdrawing of cardiopulmonary resuscitation (artificial ventilation, cardiac compression, endotracheal intubation and defibrillation) from the patient in the event of the patient's cardiac or respiratory arrest.

(_____) __________
(Signature of Physician) (Date) Telephone Number (Emergency)

(Print or Type Name) (Physician's Medical License Number)

D1 Form 1296, Revised December 2004

-------------------

PHYSICIAN'S STATEMENT
I, the undersigned, a physician licensed pursuant to Chapter 458 or 459, F.S., am the physician of the patient named above. I hereby direct the withholding or withdrawing of cardiopulmonary resuscitation (artificial ventilation, cardiac compression, endotracheal intubation and defibrillation) from the patient in the event of the patient's cardiac or respiratory arrest.

(_____) __________
(Signature of Physician) (Date) Telephone Number (Emergency)

(Print or Type Name) (Physician's Medical License Number)

D1 Form 1296, Revised December 2004

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STATE OF FLORIDA
DO NOT RESUSCITATE ORDER
MAXIMIZING SOCIAL SECURITY RETIREMENT BENEFITS FOR YOU AND YOUR CLIENTS – INSIDE THE BLACK BOX

By

Avram Sacks
Skokie, IL
Maximizing Social Security Retirement Benefits For You and Your Clients — Inside the Black Box

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773–206–0276

Elder Law Annual Update & Hot Topics – Fundamentals in Elder Law
The Florida Bar Elder Law Section
Orlando, Florida
January 11-13, 2018

*Member: National Academy of Elder Law Attorneys
National Organization of Social Security Claimants Representatives

A TALE OF TWO COUPLES

Bob & Carol
Ted & Alice

All will reach age 62 in November 2018
Each person had high average lifetime earnings ($81,958)
All in good health with kids grown
Each couple has net worth between $500,000 and $5M

When should each couple claim retirement benefits?

A TALE OF TWO COUPLES

Under Bipartisan Budget Act of 2015

<table>
<thead>
<tr>
<th>BOB</th>
<th>CAROL</th>
<th>TED</th>
<th>ALICE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Lifetime Earnings:</td>
<td>$81,958</td>
<td>$81,958</td>
<td>$81,958</td>
</tr>
<tr>
<td>PIA (age 62):</td>
<td>$2,444</td>
<td>$2,444</td>
<td>$2,444</td>
</tr>
<tr>
<td>Benefit:</td>
<td>$1,802</td>
<td>$1,802</td>
<td>$1,802</td>
</tr>
<tr>
<td>(RIB)</td>
<td>$1,802</td>
<td>$1,802</td>
<td>$1,802</td>
</tr>
<tr>
<td>(widow’s – at age 85)</td>
<td>$3,548</td>
<td>$3,548</td>
<td>$3,548</td>
</tr>
<tr>
<td>$3,548 (2041 $)</td>
<td>$3,548 (2041 $)</td>
<td>$3,548 (2041 $)</td>
<td>$3,548 (2041 $)</td>
</tr>
<tr>
<td>Life Expectancy at age 62:</td>
<td>SSA: 81.97</td>
<td>SSA: 84.78</td>
<td>ALS: 85</td>
</tr>
<tr>
<td>$5,702 (2041 $)</td>
<td>$5,702 (2041 $)</td>
<td>$5,702 (2041 $)</td>
<td></td>
</tr>
<tr>
<td>Total cumulative benefit (present value):</td>
<td>$498,237</td>
<td>$495,671</td>
<td>$498,237</td>
</tr>
<tr>
<td>RIB:</td>
<td>$447,431</td>
<td>$447,431</td>
<td>$447,431</td>
</tr>
<tr>
<td>Widow’s — $ 26,303</td>
<td>$ 26,303</td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL:</td>
<td>$991,371</td>
<td>$991,371</td>
<td>$991,371</td>
</tr>
</tbody>
</table>
A TALE OF TWO COUPLES
(Under Bipartisan Budget Act of 2015)

BOB AND CAROL
• Each files at age 62 and 1 month; receives benefit of $1,802

TED
• File a standard application for benefits at age 69. The approximate benefit on his own earnings record would be $3,548.

ALICE
• At age 70 file a petition to resume payment of benefits on her own record. The approximate benefit will be $3,880.

Bob and Carol
(earliest)
Total: $991,371

Ted and Alice
(optimal)
Total: $1,142,635
GOALS
- Determine what Social Security benefits are available to a retiree and his/her family
- Understand the four factors to consider when determining if one should retire early, at full retirement age, or later
- Understand impact on benefits if working after retirement
- Understand impact of 2015 amendments to Soc Sec Act
- Understand how to best maximize household benefits
  - Dual income households
  - Individuals with pensions based on non-covered employment
  - Widows
  - Divorcees
  - Household with Disabled Adult Child

Roadmap for Today's Presentation:
- Introduction
- What is Required to Claim a Retirement Benefit?
- When is Retirement?
- Early Retirement vs Late Retirement
- Factors That Increase or Reduce Benefits
Roadmap for Today's Presentation:

- Types of Benefits
- Impact of Benefit Taxation
- Benefit Claiming Strategies to Maximize Benefits
  - Impact of Bi-partisan Budget Act of 2015
- Future of Social Security
- Abbreviations and Glossary

Social Security Benefit Distribution November 2017

- Retirement Benefits 74.0%
- Survivor Benefits 9.5%
- Disability Benefits 17.0%

Sources of Income for Individuals Age 65 and Over

- Social Security 33.2%
- Earnings 32.2%
- Pensions 20.9%
- Asset Income 9.7%
- Other (including public assistance) 4.0%

Source: Social Security Administration, Office of Policy, Income of the Aged Chartbook, 2014, p. 16
Sources of Income for Individuals Age 65 and Over

<table>
<thead>
<tr>
<th>Income Source</th>
<th>Percentage</th>
<th>Low Quintile</th>
<th>High Quintile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Security</td>
<td>80.7%</td>
<td>15.4%</td>
<td>15.4%</td>
</tr>
<tr>
<td>Pensions</td>
<td>3.0%</td>
<td>22.3%</td>
<td>22.3%</td>
</tr>
<tr>
<td>Asset Income</td>
<td>1.8%</td>
<td>14.0%</td>
<td>14.0%</td>
</tr>
<tr>
<td>Earnings</td>
<td>3.0%</td>
<td>45.2%</td>
<td>45.2%</td>
</tr>
<tr>
<td>Public Assistance</td>
<td>9.5%</td>
<td>0.1%</td>
<td>0.1%</td>
</tr>
<tr>
<td>Other</td>
<td>2.0%</td>
<td>3.0%</td>
<td>3.0%</td>
</tr>
</tbody>
</table>

Source: Social Security Administration, Office of Policy, Income of the Aged Chartbook, 2014, p. 17

NOTE: The quintile limits for aged units for 2014 are $13,499, $23,592, $39,298, and $72,129.

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RETIREMENT BENEFITS
Eligibility Requirements

- **Attainment of age 62** - for Social Security purposes, an individual attains a given age on the first moment of the day before the anniversary of his or her birth [20 CFR §404.2(c)(4)]
- **Fully insured** (40 quarters insures for life ["permanently insured"]) - Must be earned through "covered" employment
  - Excluded: work for which FICA/SECA not paid
  - State/local government employment (some)
  - School districts (some)
- **Special rule for Disability Insured Status** - (20 quarters of coverage during 40-quarter period ending with quarter the disability began)
  - If under age 31: earned quarters for half the period from 21 through quarter in which disability begins (6 quarter minimum)
  - Provision not applicable where disability due to blindness

SSA §§216(l), 216(i)(3); 223(c)(1); 20 CFR §§404.110, 404.130

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RETIREMENT BENEFITS
Eligibility Requirements

Submission of application
- Online [https://secure.ssa.gov/iCLM/rib]
- Paper (Form SSA-1-F6)
- Application not required if worker is entitled to
disability insurance benefits for the month before the
month in which he or she reaches full retirement age
(SSA §202(a)(3))

QUESTION FOR REVIEW:
What is “covered” employment?

How many quarters of coverage needed to be insured
for life?

If disabled or dead before age 62, how many quarters
are needed to be insured?

“Early” retirement vs “full” retirement

- Retirement age is increasing! (65 ➔ 67)
  - 1983 amendments specified 22 yr period for increase
  - 2 mo. increments to age 66, then 11 years at age 66,
  then 2 mo. increments to age 67 by 2022 (SSA
  §216(l))
- Impact? “Actuarial reduction” (SSA §202(q)(1))
  - (\(\frac{5}{12}\) of 1% x no. of months prior to age 66 up to 36 mos.)
  + (\(\frac{5}{12}\) of 1% x no. of additional months)
  If retirement benefit starts at age 62, PIA is reduced:
  - Age 62 prior to 2000: 20%
  - Age 62 2005–2016: 25%
  - Age 62 2022 and beyond: 30%
If birth date is...
Then full retirement age is...

1/2/38-1/1/39 (age 62 in 2000) 65 years and 2 months
1/2/39-1/1/40 (age 62 in 2001) 65 years and 4 months
1/2/40-1/1/41 (age 62 in 2002) 65 years and 6 months
1/2/41-1/1/42 (age 62 in 2003) 65 years and 8 months
1/2/42-1/1/43 (age 62 in 2004) 65 years and 10 months
1/2/43-1/1/55 (age 62 in 2005-2016) 66 years
1/2/55-1/1/56 (age 62 in 2017) 66 years and 2 months
1/2/56-1/1/57 (age 62 in 2018) 66 years and 4 months
1/2/57-1/1/58 (age 62 in 2019) 66 years and 6 months
1/2/58-1/1/59 (age 62 in 2020) 66 years and 8 months
1/2/59-1/1/60 (age 62 in 2021) 66 years and 10 months
1/2/60 and later (age 62 in 2022 and beyond) 67 years

Factors to consider:
• Benefit amount
  - Age at retirement
    • Actuarial reduction
    • Delayed Retirement Credit
  - Working after retirement
    • Retirement Test
    • Recomputations
  - Windfall Elimination Provision (WEP) and Government Pension Offset (GPO)
• Relative Health — Life Expectancy
• Desire to achieve goals outside of work

Factors to consider (cont.):
• Income Needs — Replacement of Pre-Retirement Income
  - How much is needed to maintain standard of living?
    • No longer pay Social Security Taxes
    • Lower income taxes
    • No longer need to save for retirement
    • Mortgages likely to be paid off
    • Work related expenses no longer necessary
    • People need 60%—75% of pre-retirement earnings to maintain lifestyle (see "replacement rates")
QUESTION FOR REVIEW:
What are the four primary factors to consider when advising a client on when to retire:

- Benefit Amount
- Life Expectancy (health)
- Goals Beyond Work
- Income Needs

What is the Retirement Benefit Amount?

- Based on lifetime earnings
- Include only 35 years of highest earnings
- Earnings indexed to reflect increases in national average wages during career
- Progressive formula allows workers with lower lifetime earnings relative to national averages to have greater share of pre-retirement earnings replaced
- Earnings above contribution and benefit base excluded from calculation

($118,500 in 2015; $118,500 in 2016; $127,200 in 2017)

BENEFIT COMPUTATION

Three Steps:

1. Index each year’s earnings to reflect value of money close to retirement
2. Add the 35 highest earning years of indexed wages and divide by the total number of months (420) = AIME (Average Indexed Monthly Earnings) (20 CFR §404.211)
3. Convert AIME to PIA (Primary Insurance Amount) (20 CFR §404.212)

See in general: 20 CFR §§404.201— 404.213
BENEFIT COMPUTATION

Step 1: Index earnings

Actual earnings for given year \times \text{Average of total wages in 2nd year prior to year worker reaches age 62} \times \text{National average earnings for given year}

Example: Age 62 in 2016
Earnings of $15,000 in 1980
Indexing year = 2014
Average wages in 2014 = $46,481.52
Indexed earnings for 1980 = $15,000 \times \frac{46,481.52}{12,513.46}

This is done for each year of worker’s earnings.
National Average Wage Table: http://www.ssa.gov/OACT/COLA/AWI.html

Step 2: Calculate AIME

\[ \frac{35 \text{ highest earning years}}{\text{total number of months (420)}} = \text{AIME (Average Indexed Monthly Earnings)} \]

Step 3: Convert AIME to PIA

\[ \text{PIA} = \text{Primary Insurance Amount} \]

Converts a higher proportion of lower portions of AIME to a benefit

Enables workers with lower lifetime earnings to have a benefit that replaces a higher proportion of pre-retirement earnings

The PIA is the sum of 3 separate percentages of portions of average indexed monthly earnings

Multiplyer for each point:
First – 90%
Second – 32%
Third – 15%

Weighted formula:
\[ \text{PIA} = 90\% \text{ of first } \$X \text{ of AIME, plus } 32\% \text{ of any AIME above } \$X \text{ to } \$Y, \text{ plus } 15\% \text{ of any AIME above } \$Y \]
BENEFIT COMPUTATION

PIA Formula for 2017 (2018)
a) 90% of the first $885 ($896) of his/her average indexed monthly earnings, plus
b) 32% of his or her average indexed monthly earnings over ($856)-$885 and through $5,336 ($5,399), plus
c) 15% of his or her average indexed monthly earnings over $5,336 ($5,399)

- “X” and “Y” (bend points) increase each year based on rise in national average wages

Example of conversion of AIME to PIA:
- Assume AIME of $6000 for individual reaching age 62 in 2017
- Must use 2017 bend points of $885 and $5,336
a) $885 * .90 = $796.50 
b) ($5,336 - $885) * .32 = 1424.32 
c) ($6,000 - $5,336) * .15 = 99.60
TOTAL = $2,320.42

This is then rounded by law to the lowest multiple of $0.10, to yield $2,320.40
**REPLACEMENT RATES**

Impact of Weighted Formula

- Individuals with lower lifetime earnings receive a higher proportion of their pre-retirement earnings as a benefit — "replacement rates"

| Career Average Indexed Earnings (x 35) | $12,806 | $23,051 | $51,224 | $81,958 | $125,538 |
| Replacement Rate | 80% | 58% | 43% | 36% | 29% |
| 2018 Primary Insurance Amount (PIA) | $855.80 | $1,118.90 | $1,842.40 | $2,444.70 | $2,969.50 |


---

**BENEFIT COMPUTATION and REPLACEMENT RATES**

**QUESTIONS FOR REVIEW:**

What are the three steps for benefit computation?

- Index annual earnings
- Calculate AIME (sum highest 35 years and divide by 420)
- Convert AIME to PIA via benefit formula

How does the benefit formula benefit workers with lower lifetime wages?

---

**BENEFIT REDUCTION**

**Actuarial Reduction — 20 CFR §404.410**

- "OLD AGE" BENEFIT (RIB) for insured worker
  - \((\frac{1}{4} \times \text{no. months prior to age 66 up to 36 mos.}) + (\frac{1}{12} \times \text{1% x no. of additional months})\)

If retirement benefit starts at age 62, PIA is reduced:

- Age 62 attained prior to 2000: 20%
- Age 62 attained 2000 – 2016: 25%
- Age 62 attained 2022 and beyond: 30%
• “OLD AGE” BENEFIT (RIB) for insured worker (cont.)
  • “Break even” point
    – Total number of months required to reach point at which cumulative full benefit equals cumulative reduced benefit
    – Reached in about 17 - 19 years (62 vs. FRA)

• SPOUSAL BENEFIT (incl. divorced spouses)
  – 50% of worker’s unreduced PIA
  – (½% of 1% x no. months prior to age 66 up to 36 mos.) + (½% of 1% x no. of additional months)

  If retirement benefit starts at age 62, PIA is reduced (unless minor or DAC is “in care”):
  – Age 62 attained prior to 2000: 25%
  – Age 62 attained 2005 – 2016: 30%
  – Age 62 attained 2022 and beyond: 35%

• WIDOW’S BENEFIT (incl. divorced widows)  See POMS §RS 00615.301
  – 100% of the largest of:
    • Death PIA
    • “Windexed” PIA
    • Deemed Life PIA (death of insured after FRA, prior to filing claim for benefits) (includes DRCs and any RR recomputations  §404.114(a)(3),  §417.200(d))
**BENEFIT REDUCTION**

**Actuarial Reduction — 20 CFR §404.410**

- **WIDOW’S BENEFIT** (incl. divorced widows) (cont.)
  - **Windexing:** Widow’s Indexing Original Benefit
    - See POMS §RS 00615.301
    - **Windexing:** Widow’s Indexing Original Benefit
      - Worker dies prior to age 62, AND
      - Widow(er)’s first eligibility (age 50 or higher if disabled; age 60 if not disabled) is AFTER death of worker
      - Benefit = the higher of either
        1. PIA of Deceased at time of death, OR
        2. PIA based on earlier of year widow reaches age 60 or year deceased would have attained age 62

- **Actuarial reduction formula for widows:**
  - no. of months prior to FRA for widow \( \times 0.285 \)
  - divided by no. of months from age 60 to FRA
  - thus, 28.5% reduction at age 60; 18.99% at 62

- **“RIB LIM”** (RS 00615.320)
  - Applies if deceased worker was entitled to reduced RIB or DIB
  - Widow(er)’s benefit is limited to larger of:
    1. 82.5% of worker’s death PIA or
    2. the reduced RIB or DIB to which the worker would have been entitled had the worker lived.
    (i.e.: reduction can’t be greater than 17.5% on account of deceased spouse’s early claiming)
  - Limit applies when WIB, after adjustment for fam max and actuarial reduction is more than BOTH
    82.5% of worker’s death PIA or DIB if s/he were alive
REVIEW:

Full Retirement Age (FRA) – currently 66, increasing to 67
Benefits reduced if claimed prior to FRA

Maximum reduction at 62:
- 25% for one’s own benefit
- 30% for a spousal benefit
- 19% for a widow’s benefit (28.5% at age 60)

This benefit can also be reduced if the deceased claimed prior to his/her FRA, but by no more than 17.5%.

BENEFIT REDUCTION

Actuarial Reduction — 20 CFR §404.410

• Retirement Benefits
  • PIA
  • Social Security Disability
  • Survivor’s Benefits
  • Spousal Benefits
  • Windfall Elimination Provision (WEP)
  • Government Pension Offset

• Benefits Computation
  • Actuarial Reduction
  • Maximum Family Benefits

• Maximum Family Benefits
  • Statutory formula based on PIA:
    - As with PIA formula, uses “bend points” to multiply different portions of PIA by various percentage factors:
      - Assume bend points a, b, c
      - MFB = 150% * a + 272% * (b - a) + 134% * (c - b) + 175% * (PIA - c)
    - Bend points in 2018: $1,144; $1,651; $2,154
      - in 2017: $1,131; $1,633; $2,130

• Not applicable to benefits of divorced spouse or of surviving divorced spouse [20 CFR §404.403(a)(3)]

• WEP = Windfall Elimination Provision
• GPO = Government Pension Offset
• Reduces Social Security benefit when beneficiary receives pension based on “non-covered employment”
• WEP reduces the benefit worker receives based on worker’s earnings record
• GPO reduces benefit worker receives on spouse’s earnings record
• Does not reduce benefit if benefit based on spouse’s earnings record and it is that spouse who is receiving the pension based on non-covered employment

Two incomes:
Public schools (pension) (non-covered employment)
Tutoring & Consulting (“covered” employment; FICA paid)

WEP applies to worker’s RIB
GPO applies to any spousal benefit received by this worker

Will not have benefits reduced by WEP or GPO; spousal benefit is reduced as it is based on WEP PIA

• Applies if worker has less than 30 years of “covered” earnings
• If less than 22 years of covered earnings, reduces benefit by lesser of ½ of pension amount or ½ of the first “bend point” in PIA formula
• Example:
  – Current (2018) bend point is $895
  – Assume pension = $2500/mo
  – Reduction is $448
Applies to workers who first became eligible after 1985 for a monthly pension based on noncovered employment and who attained age 62 after 1985 (includes FECA payments, i.e., Federal WC, in lieu of Civil Service annuity; excludes Federal Thrift Savings Plan payments).

Multiplier in PIA formula changes from 90% to 40% if less than 21 years of covered employment with "substantial" earnings.

Eliminates “windfall” accruing to those with little Social Security coverage and longer careers in noncovered employment.

Resulting reduction cannot be > ½ amount of non-covered pension up to a maximum of the difference between the first PIA bend point multiplied by the regular factor of 90% and the first PIA bend point as multiplied by the reduced factor of 40%.

Example: In 2018, first PIA bend point is $895. Therefore, the maximum reduction is (90% x $895) – (40% x $895) = .5 x $895 = $447.50

Exception: 30 years of “covered” employment; reduced reduction if 21–29 years of covered employment.

Applies to spouse, divorced spouse, surviving spouse or surviving divorced spouse who receives any public pension based on his or her own noncovered employment with a governmental agency.

Reduction = 2/3 of the government pension.
BENEFIT REDUCTION
Government Pension Offset (GPO)

- Ensures that recipients of a government pension based on their own noncovered earnings receive no more in combined pension/Social Security benefits than spouses receiving SS benefits both on their own and their spouse’s records.

- Does not apply if an employee worked exclusively in employment that is covered under Social Security for at least the last five years of their employment.

BENEFIT REDUCTION
WEP and GPO

QUESTIONS FOR REVIEW:

What types of pensions are based on non-covered employment?
- State and local government
- Some school districts
- Foreign employers

What is the WEP and to whom does it apply?

What is the GPO and to whom does it apply?

BENEFIT INCREASE

- Delayed Retirement Credit
  - 1/3 x 1% mo., from FRA to age 70
  - 20 CFR §404.313

- Automatic Cost-of-Living Increases
  - Annually announced in October, prior to year
  - Effective with December benefit, payable in January
  - 20 CFR §404.270 et seq.

- Recomputation — annually if retiree continues to work
  - 20 CFR §§404.280 – 404.288
### BENEFIT INCREASE

<table>
<thead>
<tr>
<th>Year of Birth</th>
<th>Normal Retirement Age (NRA)</th>
<th>Credit for each year of delayed retirement after NRA (percent)</th>
<th>Benefit, as a percentage of PIA, beginning at age--</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>62  63  64  65  66  67  70</td>
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<tr>
<td>1924</td>
<td>65</td>
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<td>65</td>
<td></td>
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<td>1933-34</td>
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<td>1935-36</td>
<td>65</td>
<td></td>
<td>6  6 1/2 7  8  9  11</td>
</tr>
<tr>
<td>1937</td>
<td>65, 2 mo.</td>
<td></td>
<td>6  6 1/2 7  8  9  11</td>
</tr>
<tr>
<td>1938</td>
<td>65, 4 mo.</td>
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<td>7  7 1/2 8  9  10  12</td>
</tr>
<tr>
<td>1940</td>
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<td></td>
<td>7  7 1/2 8  9  10  12</td>
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<tr>
<td>1941</td>
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<td></td>
<td>7  7 1/2 8  9  10  12</td>
</tr>
<tr>
<td>1942</td>
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<tr>
<td>1943-54</td>
<td>66</td>
<td></td>
<td>8  8 1/2 9  10  11  13</td>
</tr>
<tr>
<td>1955</td>
<td>66, 2 mo.</td>
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<tr>
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</tr>
<tr>
<td>1957</td>
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</tr>
<tr>
<td>1958</td>
<td>66, 8 mo.</td>
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</tr>
<tr>
<td>1959</td>
<td>66, 10 mo.</td>
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<td>8  8 1/2 9  10  11  13</td>
</tr>
<tr>
<td>1960 and later</td>
<td>67</td>
<td></td>
<td>9  9 1/2 10 11 12 14</td>
</tr>
</tbody>
</table>

Note: Persons born on January 1 of any year should refer to the previous year of birth.

Source: 20 CFR §404.313; http://www.socialsecurity.gov/OACT/ProgData/ar_drc.html

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### BENEFIT INCREASE

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</tr>
<tr>
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<td>65, 8 mo.</td>
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<td>7  7 1/2 8  9  10  12</td>
</tr>
<tr>
<td>1942</td>
<td>65, 10 mo.</td>
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### WORKING AFTER RETIREMENT

Benefits Reduced for Beneficiaries who work and are < FRA

Two Tests:

1. **Annual Earnings Test**
   - Reductions if income exceed certain thresholds

2. **Foreign Work Test**
   - Reductions (no benefits) if work outside the US exceeds 45 hours/month
WORKING AFTER RETIREMENT

Annual Earnings Test

- Retirement test
  - Reduces benefit payable to:
    - a working beneficiary who is under full retirement age
    - auxiliaries (but not divorced spouse)
  - Dependents' benefits also subject to reductions based on their own earnings
  - Test no longer applies at full retirement age
  - Caution: Annual reporting requirement
    - Income tax returns; W-2s accepted as "report"
    - 20 CFR §404.452
    - See 20 CFR §404.415

Two tests — two thresholds:

A. Prior to year in which full retirement age is attained:
   - Excess earnings = ½ earnings over a lower threshold

B. During year full retirement age is attained:
   1. If employed: prior to month FRA is attained
   2. If self-employed, monthly pro rata share of annual earnings prior to month FRA is attained
   - Excess earnings = 1/3 of earnings over a higher threshold

- Thresholds: 2017 2018
  - Prior to yr FRA is attained: $16,920 ($1,410/mo.) $17,040 ($1,420/mo.)
  - Yr. in which FRA is attained: $44,880 ($3,740/mo.) $45,360 ($3,780/mo.)

Foreign Work Test

- Applies to:
  - Any beneficiary who engages in non-covered work > 45 hours
  - Dependent benefits based on earnings record of anyone who engages in non-covered work for > 45 hours
  - Remuneration for any month prior to month NH reaches full retirement age (FRA)

- Exceptions:
  - Divorced spouse for at least two years.
  - Auxiliary benefits when a deported NH works

- Results in loss of benefits for month
WORKING AFTER RETIREMENT
Foreign Work Test or Annual Earnings Test?

- Employment
  - US Employer
  - Foreign Employer
- Self Employment
  - U.S. Citizen/Res. Alien
  - AET
  - Foreign Work Test (FWT)
  - AET
- Non-resident
  - Foreign Work Test (FWT)
- Alien outside the U.S.
  - FWT
  - FWT
  - FWT

*unless on US vessel or aircraft and employment contract entered into in U.S., or service in Armed Forces

POMS §§RS 02605.001, 02605.020

WORKING AFTER RETIREMENT
Annual Earnings Test

- Table of annual thresholds:
  - 1975–1999:
    - http://www.ssa.gov/OACT/COLA/rteahistory.html
  - 2000–2018:

- Law sources
  - SSA: §203(b), (f) [42 USC §403(b), (f)]
  - Codified regulations: 20 CFR §§404.415; 404.428—404.447
  - POMS §§RS 02505.240B

QUESTIONS FOR REVIEW:

What is the difference between a PIA amount and a benefit amount?

A PIA is the unreduced benefit determined at age 62 (or upon disability or death), increased only by COLAs and recomputations due to earnings after age 62.

The benefit may be the PIA, however, the benefit may also be less than or greater than the PIA due to various factors that can reduce or increase the benefit amounts.
### DEPENDENT’S AND SURVIVORS BENEFITS

<table>
<thead>
<tr>
<th>Type of Benefits</th>
<th>Percentage of Wage Earner’s PIA Payable as a Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Husband’s or Wife’s Benefits</td>
<td>50%</td>
</tr>
<tr>
<td>Divorced Spouse</td>
<td>50%</td>
</tr>
<tr>
<td>Child’s Insurance Benefits (living wage earner)</td>
<td>50%</td>
</tr>
<tr>
<td>Child’s Insurance Benefits (deceased wage earner)</td>
<td>75%</td>
</tr>
<tr>
<td>Widow’s Benefits</td>
<td>100%</td>
</tr>
<tr>
<td>Widow’s Benefits for Surviving Divorced Spouse</td>
<td>100%</td>
</tr>
<tr>
<td>Widow’s Benefits for Disabled Surviving Spouse and Disabled Surviving Divorced Spouse</td>
<td>71.5% (if at age 50–60)</td>
</tr>
<tr>
<td>Mother’s or Father’s Benefits</td>
<td>75%</td>
</tr>
<tr>
<td>Mother’s or Father’s Benefits for a Surviving Divorced Spouse</td>
<td>75%</td>
</tr>
<tr>
<td>Parent’s Benefits</td>
<td>82.5%</td>
</tr>
<tr>
<td>Parent’s Benefits (where more than one parent is entitled to a benefit)</td>
<td>75%</td>
</tr>
</tbody>
</table>

#### Husband’s or Wife’s Benefits (cont.)

- Not entitled on own account or is entitled but PIA is less than ½ of PIA of insured spouse
- Who is a spouse [SSA §216(b), (f)]
  - Parent of the insured’s child, or
  - Married to insured for at least one year prior to application, or
  - Entitled to benefit, as follows, in month prior to marriage: spousal, widow(er)’s, parents, or child’s benefit

#### Husband’s or Wife’s Benefits

- Spouse or divorced spouse of individual "entitled" to retirement or disability benefits
  - "Entitled" means individual is eligible for a benefit AND has applied for it.
- Age 62 or child of number holder (NH) (under 16, unless child is disabled) in care [20 CFR §§404.348, 404.349; POMS §RS 0130.001-.050]

- NOTE: If child is "in care" there is
  - No actuarial reduction, and
  - Benefits available prior to age 62
### DEPENDENT’S AND SURVIVORS BENEFITS

- **Husband’s or Wife’s Benefits (cont.)**
  - Divorced spouse [20 CFR §§404.331, 404.340]
    - Married for at least 10 years prior to finalization of divorce;
    - “Ex” must be “entitled” (filed for benefits), if not, then “ex” must be at least 62, and divorced at least for two years.
    - Not married, unless remarried to another person who is entitled to widow(er)’s, mother’s, father’s, CDB, divorced spouse’s or parent’s benefits, or to number holder [POMS RS §00202.045]
    - At least 62 (Benefits are NOT payable to a divorced spouse under age 62 based on having an entitled child of NH in care – POMS §RS 00202.010A.1)

### DEPENDENT’S AND SURVIVORS BENEFITS

- **Mother’s or Father’s Benefits**
  - Surviving spouse or surviving divorced spouse
    - Each of the following must be met:
      - Has in care, at time of filing, child of insured entitled to child’s insurance benefits (CIB), under age 16 or disabled
      - Is not married
      - Is not entitled to widow’s or widower’s benefits or RIB > full mother’s or father’s benefit

---

### DEPENDENT’S AND SURVIVORS BENEFITS

- **Husband’s or Wife’s Benefits (cont.)**
  - Divorced spouse (cont.)
    - Not entitled to benefit on own account that is larger
    - Payment does not reduce benefits of others receiving benefits on same account
  - Deemed spouse [20 CFR §404.346]
    - Good faith
    - Marriage valid but for legal impediment

---

### DEPENDENT’S AND SURVIVORS BENEFITS

- **Husband’s or Wife’s Benefits (cont.)**
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    - Not entitled to benefit on own account that is larger
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    - “Ex” must be “entitled” (filed for benefits), if not, then “ex” must be at least 62, and divorced at least for two years.
    - Not married, unless remarried to another person who is entitled to widow(er)’s, mother’s, father’s, CDB, divorced spouse’s or parent’s benefits, or to number holder [POMS RS §00202.045]
    - At least 62 (Benefits are NOT payable to a divorced spouse under age 62 based on having an entitled child of NH in care – POMS §RS 00202.010A.1)
• Mother’s or Father’s Benefits (cont.)

[SSA §202(g); 20 CFR §§404.339, 404.430]

– Applicant need not be age 60 or older
– Also payable to surviving divorced spouse
– Benefit terminates when
  • Child attains age 16, unless disabled
  • Beneficiary dies, becomes entitled to widow’s or widower’s benefits, becomes entitled to old-age benefit ≥ ¾ of PIA of deceased person’s PIA, or
  • There is no child entitled to child’s benefits
  • Beneficiary remarries, unless remarriage is to another person already receiving benefits

• Widow’s/Widower’s Benefits

[SSA §§202(e), (f); 20 CFR §404.335]

– One of the following must be met [SSA §216(c); (g)]:
  • Mother or father of insured’s child
  • Legally adopted the insured’s child while married to insured and child was under 18
  • Was married to insured at time both of them legally adopted a child under 18
  • Married to the insured for at least 9 months prior to day of insured’s death unless death was accidental or in line of duty or insured and spouse were previously married and requirement would have been met had worker died on date of divorce, or worker and spouse would have been married but for fact that worker was unable to divorce a prior spouse who was in mental institution

– Must be at least age 60 (age 50 if disabled) and single, unless remarried after reaching age 60 or after age 50 if disabled [20 CFR §404.335(e)]

– No benefit if remarriage before age 60!!!

– Available to surviving divorced spouse

[20 CFR §404.336]

• Married to insured for at least 10 years prior to divorce
• Mother’s/Father’s benefit paid if larger [20 CFR §§404.339, 404.410]
DEPENDENT’S AND SURVIVORS BENEFITS

• Child’s Benefits
  [SSA §202(d)(1); 20 CFR §404.350; POMS §§RS 00203.000, et seq.]
  – Child of individual entitled to retirement or disability benefits, or deceased individual fully or currently insured
  – Unmarried
  – Under age 18, or
  • Under 19 and full-time student
  • 18 or older and has disability that began prior to age 22 (Disabled Adult Child — “DAC”)

DEPENDENT’S AND SURVIVORS BENEFITS

• Child’s Benefits (cont.)
  [SSA §202(d)(1); 20 CFR §404.350; POMS §§RS 00203.000, et seq.]
  – Dependency requirement
    • At time of application, at time of death, at time insured became disabled, at time insured became entitled to benefits
    • Dependency is deemed except as follows, in which case insured must be living with or contributing ½ support:
      – Legally adopted child by someone other than insured; adoptee cannot have cut off inheritance rights;
      – Stepchild
      – Grandchild / stepgrandchild

DEPENDENT’S AND SURVIVORS BENEFITS

• Parent’s Benefits
  [Sec §203(h); 20 CFR §§404.370–404.374]
  – Dependent parent of worker who dies fully insured
  – Parent age 62 or greater
  – Parent receives at least ½ support from worker
  – Parent did not marry after worker’s death
  – Benefit = 82.5% of PIA (one parent)
  = 75% of PIA (two parents, per parent)
  – Includes step- and adoptive parents if parent status attained prior to worker attaining age 16
QUESTIONS FOR REVIEW:

In relationship to a PIA, how much is a spousal benefit?

What is the earliest age at which a spousal benefit may be claimed?

What is the difference between a Mother’s or Father’s benefit and widow(er)’s benefit?

Who can receive a children’s benefit?

True or False:

- A spousal benefit can be claimed even if the other spouse has not yet claimed a Social Security benefit.
- A widow(er)’s benefit may be first claimed at age 60.
- If a widow(er) is disabled, the benefit may be first paid at age 55.

Disability Benefits

- "Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." [SSA §223(d)(1); 20 CFR §404.1505]

- It’s not the underlying medical impairment that is required to last 12 months, it’s the inability to engage in SGA by reason of the impairment.

- Medicare eligible after 24 months of benefits

- Benefit = 100% of PIA

- Converts to RIB at Full Retirement Age (FRA)

Disability Benefits

- Five step-determination process
    - 2017: $1,170 / 1,950/mo. 2018: $1,180 / $1,970/mo.
  - Is impairment severe? [20 CFR §404.1520]
  - Does claimant “meet” or “equal” one of the impairments listed in 20 CFR Part 404, Subpart P, Appendix 1? [20 CFR §404.1525]
  - Does claimant have residual functional capacity to engage in past relevant work? [20 CFR §§404.1545–1546]
  - If unable to perform past relevant work, is claimant able to perform work for which there are a significant number of jobs, nationally? [20 CFR §§404.1545–1546]

- Four-step administrative appeals process:
  - Initial reconsideration, hearing, Appeals Council
DISABILITY BENEFITS

Title II SSI
Earned income limit:
Disability standard:
Payment source:
Payment amount:
Retroactivity:
Waiting period:

Same for both
SGA amount
More liberal rules to encourage work
Same for both
Title II trust fund
General revenue
Congressional limits (2018) ($750/single; $1,125/couple)
12 months prior Only from 1st of month to date of app. after mo. all reqs. met
Five months 1st of month after month all requirements are met

• Retirement Benefits
  – Eligibility
  – Requirements
  – Early vs. full retirement
  – Amount payable
• Benefit Computation
• Replacement Rates
• Benefit Reduction
  – Actuarial reduction
  – Maximum Family Benefits
  – Windfall Elimination Provision (WEP)
  – Government Pension Offset
• Benefit Increase
• Working after Retirement
• Dependent’s and Survivor’s Benefits
  – Spousal
  – Widow(er)’s
  – Children’s
  – Parents’
• Disability Benefits
• Taxation of Benefits
• Benefit Claiming Strategies
• Attorney Fees
• Future of Social Security

1. DIB followed by reduced RIB
   [POMS § DI 52101.001]
   – Prior DIB does not affect RIB reduction
   – Disability Freeze applies

2. Simultaneous RIB and DIB
   (DIB then simultaneous reduced RIB)
   Background re DIB and WC/PDB:
   [POMS DI 52101.001]
   – DIB may be reduced for WC/PDB
   – Applies when total SSA benefits + WC/PDB paid to worker + auxiliaries >
     a. 80% of worker’s average current earnings, or
     b. total family benefits payable to the worker and any auxiliaries in
     the first possible month of entitlement

   • increased indexing factor, bend points at 62 vs disability onset date
   • automatically receives higher benefit
   • If auxiliaries entitled, total family benefit may be higher
     due to “table” maximum vs disability maximum
     - Disability maximum = smaller of:
       - 85% of worker’s AIME (or 100% of PIA, if larger), or
       - 150% of PIA
     - Table maximum = MFB formula at slide 36
       MFB = (150%*a) + (272%*[b-a]) + (134%*(c-b)) + (175%*(PIA-c))
### DISABILITY BENEFITS (DIB AND RIB)

#### 2. Simultaneous RIB and DIB
(DIB then simultaneous reduced RIB) (cont.)

- WC/PDB offset ends at age 65
- Special rules re PDB at POMS §DI 52135.001
- Illinois PDB at POMS §DI 521325.080
- Need to determine if the PDB is a pension, in which case, WEP may apply

#### 3. Simultaneous RIB and DIB
(Reduced RIB then simultaneous DIB)

- DIB will not cause RIB entitlement to terminate
- DIB reduced by no. months of reduced RIB
  - If DIB terminates, then RIB resumes w/o considering intervening DIB (reduction factor adjustment to eliminate months of DIB entitlement occurs at FRA)
  - Months of DIB entitlement excluded from RIB reduction factor at FRA
  - Beneficiary may switch several times between DIB and RIB prior to FRA. Each time there is a switch the original reduction factors apply.

Example: A beneficiary elects reduced RIB at age 62. His FRA is 66 so his RIB reduction factor (RF) is 48. After 6 months he becomes entitled to DIB. His DIB is reduced by 6 RF because RIB was paid for 6 months. After 6 months he becomes entitled to a worker's compensation benefit that will offset his DIB, so he elects to receive reduced RIB again. Even though he is now age 63, the RIB will still be reduced by the original 48 RF. After 6 more months the worker's compensation ends so he elects DIB again. The DIB this time will still be reduced for 6 RF because a total of 6 months of reduced RIB were paid prior to the first DIB month of entitlement.
TAXATION OF BENEFITS

- IRC §86
- Two-tier system. Depending upon income, benefits are either:
  - Tax free
  - 50% includible in gross income
  - 85% includible in gross income
- Must determine if “provisional income” exceeds certain thresholds
  - “Provisional income” = Modified AGI (adjusted gross income + tax-exempt interest + foreign earned income exclusion + adoption benefits + U.S. possessions source income) + 50% of SS benefits

- 50% includible if:
  - Provisional income exceeds:
    - $32,000 for married filing jointly
    - $25,000 for singles
    - 0 for married filing separately, unless couple lived apart for the entire year
- 85% includible if:
  - Provisional income exceeds:
    - $44,000 for married filing jointly
    - $34,000 for singles
    - 0 for married filing separately unless the couple lives apart for the entire year

TAXATION OF BENEFITS

- 100%
- 80%
- 60%
- 40%
- 20%
- 0%
- Married Filing Jointly
- Single Threshold
- Base Amount = 50% of Social Security Benefit

TAXATION OF BENEFITS

- Retirement Benefits
  - Eligibility Requirements
  - Early vs. full retirement
  - Amount payable
- Benefit Computation
- Replacement Rates
- Benefit Reduction
  - Actuarial reduction
  - Maximum Family Benefits
  - Windfall Elimination Provision (WEP)
  - Government Pension Offset
- Benefit Increase
- Working after Retirement
- Dependent’s and Survivor’s Benefits
  - Spousal
  - Widow(er)’s
  - Children’s
  - Parents’
- Disability Benefits
- Taxation of Benefits
- Benefit Claiming Strategies
- Attorney Fees
- Future of Social Security
**TAXATION OF BENEFITS**

**CASE STUDY OF TAX IMPACT**

- Early claiming results in a lower proportion of monthly income needs provided by Social Security.
- Social Security is not fully taxable, only half is included in “provisional income.”
- If higher proportion of monthly income is from Social Security, provisional income declines.
- Thus, over time, tax liability is increased if higher proportion of monthly income derives from non-Social Security income.

**Assume:** $6,000/mo income need

PIA = $3,500

**Case 1 – claim at 66**

Annual income = $72,000

IRA income = 12 * $2,500 = $30,000

Provisional income = $21,000 + $30,000 = $51,000

$51,000 > upper threshold of $44,000, thus

- **Amt subj to tax = lesser of (1) 85% * $42,000 or (2) 85% of excess over higher threshold + lesser of (a) ½ of SS benefits rcvd or (b) ½ difference between the two applicable thresholds**

(1) .85 * $42,000 = $37,500

(2) .85 (Prov inc – upper threshold) + lesser of (a) ½ of SS benefits (½ * $42,000 = $21,000) or (b) ½ ($44,000 - $32,000 = $6,000)

.85 * ($51,000 - $44,000) = $6,000

$6,000 + $21,000 = $27,000

(2) < (1) therefore $27,000 is taxable benefit amount (~ 28%)
Assume: $6,000/mo income need
PIA = $3,500

Case 2 – claim at 62

Annual income = $72,000
Soc. Sec income = 12 * (.75 * $3,500) = 12 * $2,625 = $31,500
IRA income = $72,000 - $31,500 = $40,500
Provisional income = $15,750 + $40,500 = $56,250

$56,250 > upper threshold of $44,000, thus

Amt subj to tax = lesser of (1) 85% * $31,500 or (2) 85% of excess over higher threshold + lesser of (a) ½ of SS benefits rcvd or ½ difference between the two applicable thresholds

(1) .85 * $31,500 = $26,775
(2) .85 (Prov.inc – upper threshold) + lesser of

(a) ½ of SS benefits (½ * $31,500 = $15,750) or
(b) ½ ($44,000 - $32,000 = $6,000)

.85 * ($56,250 - $44,000) = $10,612.50 + $6,000 = $16,412.50

(2) < (1) therefore $16,412 is taxable benefit amount (~52%)

So, what is taxable amount for $72,000/yr income?

Case 1: Soc. Sec $11,950
IRA $30,000
$44,950 taxable income

Case 2: Soc. Sec. $16,412.50
IRA $40,500
$56,912.50 taxable income

Over 20 years, an additional $239,250 is taxable
TAXATION OF BENEFITS

CASE STUDY OF TAX IMPACT – TYPICAL CASE

- Clients 62 and 60
- His age 62 Benefit: $1,875/month
- Her age 62 Benefit: $1,125/month
- Starting Retirement With $850,000 in IRA Assets
  - 6% annual return and 3% inflation
  - Needing $70,000 per year in inflation adjusted after-tax income
  - Living to 85 and 90

CASE STUDY OF TAX IMPACT – WHAT’S AT STAKE

Strategy Comparison

<table>
<thead>
<tr>
<th>Strategy</th>
<th>$191,692</th>
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<td>Suggested - $1,018,857</td>
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<tr>
<td>Earliest - $827,165</td>
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CASE STUDY OF TAX IMPACT – CASHFLOW FOR EARLY RETIREMENT

Cashflow Early

<table>
<thead>
<tr>
<th>Year</th>
<th>Early Social Security</th>
<th>Early 401k Withdrawal</th>
<th>Total Income Need</th>
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<tr>
<td>2013</td>
<td>$10,000</td>
<td>$15,000</td>
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<td>$100,000</td>
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</tbody>
</table>
TAXATION OF BENEFITS

CASE STUDY OF TAX IMPACT – CASHFLOW FOR OPTIMIZED STRATEGY

Cashflow Optimized

TAXATION OF BENEFITS

COMPARING IRA BALANCES

Early IRA Balance  Optimized IRA Balance

TAXATION OF BENEFITS

FEDERAL TAX COMPARISON

Early Federal Tax  Optimized Federal Tax
TAXATION OF BENEFITS

CASE STUDY OF TAX IMPACT – CONCLUSIONS

• $191,000 of additional Social Security Value
• 8 years of Additional Portfolio Longevity
• Roughly $40,000 less in taxes - even with additional years of Portfolio Longevity

BENEFIT CLAIMING STRATEGIES

for Dual Income Families

Need to Determine Anticipated Benefits
Verify Earnings Record for accuracy
Annually mailed Social Security Statements
Create account at www.ssa.gov/myaccount
  – estimates retirement, disability, survivor’s benefits
  – shows lifetime earnings record in covered work
  – shows Soc. Sec. and Medicare taxes paid
  – need e-mail AND U.S. mailing addresses
  – must be 18

Use intake questionnaire to identify factors impacting benefit amounts
• Eligibility for pensions based on non-covered employment and eligibility for exceptions to GPO and WEP rules
• Children eligible for children’s benefits
• Eligibility for benefits on record of prior spouse
• Prior receipt of benefits
• Applicability of disability freeze
• Retirement goals (monthly income need; desired benefit start date; employment after retirement)
• Factors that may reduce life expectancy

BENEFIT CLAIMING STRATEGIES (cont.)
BENEFIT CLAIMING STRATEGIES for Dual Income Families

The "combo plate" of benefits
Worker's benefit
Spousal benefit (50% of worker's benefit at 66)
Widow's benefit (100% of worker's benefit at 66)

Maximizing the plate of benefits involves strategizing the optimal time at which to claim these benefits.

Life expectancy at 62: 82 (m) 84 8 mos (f)

Why Maximize? Currently, 37% of fully insured claim at age 62, an additional 23% claim between age 62 and full retirement age. Although 34% claim at FRA, only 6% claim after FRA, and only half in that group wait until 70.

Review of Key Rules:

1. Early Retirement (retirement prior to FRA) will reduce
   a. the worker's benefit (SSA §202(q)(1); Reg. §404.410(a)]
   b. the spousal benefit (SSA §202(q)(1); Reg. §404.410(b)]
   c. the widow's benefit (SSA §202(q)(1); Reg. §404.410(c)]

2. The spousal benefit reaches its maximum at FRA (DRC's – delayed retirement benefits do NOT increase the spousal benefit) [Reg. §404.313(e)(2)]

3. Spousal benefit is not reduced for early retirement of insured worker, however, widow's benefit is reduced (but by no more than 17½%). [Reg. §404.333; §404.338(c)]

4. DRC’s WILL increase benefits of widow(er) and surviving divorced spouse [Reg. §404.313(e)(1); §404.338(b)]

5. Deeming rule:
   Treats benefit claim as claim for all benefits to which one is entitled.
   Applicability changed by Balanced Budget Act of 2015 (BBA 2015), §831(a)

OLD RULE — applies to anyone born on or before 1/1/54, i.e. age 62 by 12/31/2015
NEW RULE — applies to anyone born after 1/1/54
Review of Key Rules (cont.):

5. Deeming rule (cont.):

When claiming a benefit prior to FRA (at any age under new rule), a claimant BORN AFTER 1/1/1954 is deemed to have filed for all the benefits to which one is entitled. Thus, a claim for a spousal benefit is ALSO a claim for a worker’s benefit on one’s own account.

— DOES NOT APPLY TO WIDOW(ER)’S BENEFITS  

[20 CFR § 404.623(b)(1)]

— Does not apply if applicant also entitled to disability benefits in the first month of entitlement to husband’s or wife’s benefits, but rule will apply when

- Disability ends, if prior to FRA (old rule)
- Disability ends or at FRA, whichever is first (new rule)

---

8. At FRA: no more earnings test
deeming rule (no. 4) no longer applicable, BUT ONLY IF born prior to 1/2/1954

9. A worker must be eligible for benefits for an entire month in order to be paid for that month. Thus, most workers attaining age 62 will not receive a benefit for the month in which they reach age 62. (20 CFR §404.415)
Review of Key Rules (cont.):

10. An individual attains a given age on the day before the applicable birthday. Thus only individuals born on the 2nd day of a month will be at age 62 throughout the entire month. Thus, all others who claim at age 62 will have a slightly smaller reduction period, 47, rather than 48 months. For them the reduction will be slightly smaller than 25%. [20 CFR §404.2(c)(4)].

Operation of Deeming Rule:

• Case 1 (cont.): Spousal benefit > RIB
  Rule: (SSA §202(k)(3); POMS RS 00615.250)

  1. Subtract raw old age benefit from raw spousal benefit to determine "spousal excess."
     In this case: $1000 − $800 = $200

  2. Then reduce each benefit, separately, and add together for total amount of benefit.
     Reduction of Old-Age benefit: $800 − (25% * $800) = $600
     Spousal excess reduction: $200 − (30% * $200) = $140

  3. Benefit payable = $600 + $140 = $740
Operation of Deeming Rule:

- **Case 2**: RIB > Spousal Benefit

Assume PIA of W is 1000, PIA of H = $1600

W applies at 62 for RIB. H has already applied

\( \frac{1}{2} \text{ of } \text{PIA}_W \) < PIA of H

Benefit received = PIA of W

Actuarial reduction: at age 62, RIB = PIA of W - 25%PIA = $750
Six Strategies:

1. **Claim and Suspend (cont.) — now obsolete**
   - BBA 2015 eliminated “claim and suspend”
   - When is elimination effective?
   - To whom does elimination apply?
   - BBA 2015 effective April 30, 2016 – 180th day following Nov. 2, 2015 enactment
   - Thus, all requests for suspension had to have been submitted prior to 4/30/16
   - Only benefits at full retirement age may be suspended (20 CFR §404.313)
   - Therefore, one might say worker must be at FRA in April 2016 but….

2. **Claim Now, Claim more later**
   - Married worker at FRA claims spousal benefit (= ½ of spouse’s PIA) (only if born on or before 1/1/1954)
   - This worker will claim higher personal benefit, with DRCs, later

3. **Do Over**
   - Change claiming decision / withdrawal of application
   - Must repay all benefits
   - Tax paid on benefits may be reclaimed
   - 20 CFR §404.640

4. **Stop N Go**
   - Individual who started benefits, may stop
   - Permits accumulation of DRCs after FRA, but on reduced amount
   - 20 CFR §404.313
5. Widow or widower strategy  
Start with reduced benefit on one record; switch later to full benefit on other record (no deemed filing here!)

6. Triple Dip  
Start with RIB on own record  
When spouse retires, get 50% spousal benefit (born on or before 1/1/1954), if spousal benefit is higher  
When spouse dies, get widow’s benefit

Impact of Bipartisan Budget Act of 2015 — Review
Publ 114-74, Nov. 2, 2015  
Affects: deeming; file and suspend; lump sum payout  
1. Deeming – old rule applied only to FRA  
   old rule applies if 62 by end of 2015  
   new rule applies at any age  
2. File and Suspend – if benefit suspended, no payment of benefits to auxiliaries (spousal; child)

3. File and suspend (cont.)  
   Effective 4/30/2016 – needed to have filed and suspended by 4/29/2016 for old rule to apply  
   Age 66 by April 2016 or, perhaps August 2016  
   Thus, born on or before May 1, 1950, or perhaps on or before Sept. 1, 1950  
3. Lump sums  
   Prior to BBA 2015 could reinstate suspended claim as of any month and thus get suspended benefits paid as lump sum and forego DRAs.
**Impact of Bipartisan Budget Act of 2015 (cont.)**

3. Lump sums (cont.)

New law bars payment of retroactive benefits “for any month during the period in which the suspension is in effect”

Defines “retroactive payments” per SSA §202(j)(4)(B)(ii):

"'retroactive benefits' means benefits to which an individual becomes entitled for a month prior to the month in which application for such benefits is filed"

Bars retroactive payment of suspended benefits as lump sum — see EM-16007, Feb 18, 2016

**REVIEW**

- File and suspend is now dead. Had to have been exercised by April 29, 2016 – impacts DACs as well as spouses
- Individuals born on or before January 1, 1954 (age 62 before 2016) can still file restricted application for spousal benefits only
- Individuals reaching age 62 in 2016 and beyond cannot restrict application to spousal benefits only

**Caution:**

Claiming retirement benefits prior to FRA will result in reduced benefit.

Once a benefit is actuarially reduced, it is reduced forever.

For those born on or before 1/1/1954: Cannot claim spousal benefit prior to FRA with expectation of switch to own benefit later on. For this group, deeming provision bars this strategy only if benefit claimed prior to FRA.
BENEFIT CLAIMING STRATEGIES
for Dual Income Families

Helpful POMS Provisions:

In general: SSA POMS §§00615.000, et seq.

RS 00615.010 Chart on Reduced Benefits -- summarizes the method of reduction for different kinds of entitlement

RS 00615.020 Dual Entitlement Overview

Assumed factors for strategy comparisons:

Life Expectancy at 62:

Need to show cumulative benefit through life expectancy

Men: 19.97 yrs (82 yrs)

85 (H in good health w/ access to good health care)

Women: 22.78 yrs (83 yrs, 8 mos)

90 (W in good health w/ access to good health care)

Source: http://www.ssa.gov/OACT/STATS/table4c6.html

COLAs: 2.60%

(2017 Annual Report of the Trustees, Federal OASDI Trust Funds, Table V.C.1)

RRR – Real Rate of Return: currently TIPS rate is 0.75%

[as of Jan. 4, 2018]

Real Rate of Return:

RRR = Assumes one expects to earn over inflation from an investment of similar quality to Social Security.

Good indicator: long-term TIPS rate as reported daily by the Treasury department

TIPS = Treasury inflation-protected securities; face value increases are guaranteed according to inflation only changes in Consumer Price Index (CPI) monitored by the U.S. federal government, less risky than corporate bonds; adjusts in the same manner as annual adjustments to Social Security benefits.

If long-term TIPS rate is 1.0%, RRR is 1.0. The sum of the TIPS rate + inflation rate (annual COLA) is a conservative estimate of the nominal return one would expect to achieve in an investment of similar quality to Social Security.

Note: The higher the RRR, the sooner the calculations slant to early claiming, because one could theoretically invest the payments at a higher rate than that which would be obtained by delaying benefits.

Source for TIPS rate: http://www.federalreserve.gov/releases/h15/update/
A. Single Individual

B. Couple – Single Income

C. Couple – Dual Income
   1. Older worker w/ higher earnings
   2. Younger worker w/ higher earnings
   3. Both spouses same age with high incomes (Bob, Carol, Ted, Alice)

D. Couple with disabled child

Examples how claiming decisions make a difference:
Assumptions for all cases:
- Life expectancy for H = 85, for W = 90
- COLA: 2.60%
- Real Rate of Return: 1.4%
- Desired m. inc: $5,000

Note: In 2016 for age 62: average PIA $1,735 (average benefit = $1,308)
max PIA = $2,687 (max benefit = $2,102)
(Amounts shown reflect cumulative benefit through life expectancy)

A. Single Individual

Obvious gain or loss apparent from actuarial reduction formula:
\[ RIB = PIA - (PIA \times \left[\frac{5}{9} \times 1\% \times \text{no. months prior to age 66 up to 36 mos} \right] + \left[\frac{5}{12} \times 1\% \times \text{no. months additional} \right]) \]
Result yields percentage of PIA
- 62: 75%
- 64: 90%
- 66: 100%
- 68: 116%
- 70: 132%

B. Couple with single income

MAX

MINNIE

DOB: Nov. 4, 1954

DOB: March 5, 1955

Average Lifetime Earnings:
- Maximum for Max $126,000 (in 2016$)
- $0

PIA (at 66)
- $2,705 (in 2016$)
- $0

Both in good health, no minor children.

Minnie never worked. She has no covered earnings and no pension from uncovered earnings.

Max will continue to work until age 66

When should Max claim a Social Security benefit?
BENEFIT CLAIMING STRATEGIES
Case Studies

B. Couple: Single income — Mo. budget need: $5,000 (cont.)

MAX

MINNIE

Earliest retirement (both): $2,077 (62.1) $  983 (spousal at 62.1)
Total Cumulative Benefit: $811,142 (Break even at age 78, 78)

FRA (66; 66y 2m) retirement (both): $3,052 $1,566 (spousal)
Total Cumulative Benefit: $999,152 (Break even: 78, 78 / 84, 84)

Age 70 retirement (both): $4,465 $1,735 (spousal at 70)
Total Cumulative Benefit: $887,901  (Break even: 94, 94)

NOTE:
Cumulative benefit amounts are present value amounts.
Individual benefit amounts are stated in “current” or nominal dollars.

The break-even chart shows the range of death age combinations for which a given strategy is advantageous, as well as the point (i.e., the break-even point) at which one strategy becomes advantageous over another strategy.
BENEFIT CLAIMING STRATEGIES
Case Studies

B. Couple: Single income — Mo. budget need: $5,000 (cont.)

EARLIEST CLAIMING
(sing. income)
(H claim at 62.1)
W claim at 62.1)

CLAIM AT FRA
(sing. income)
(H claim at 66.1)
W claim at 66.2)

LATE CLAIMING
(sing. income)
(Both claim at 70)

OPTIMAL CLAIMING
(sing. income)
(H: Claim at 67
W: Claim at 66.8)

C1. Couple: Dual income (older spouse is higher wage earner) — Mo. budget need: $5,000

MAX SARA
DOB: Nov. 4, 1954 March 5, 1955
Average Lifetime Earnings:
(Maximum for Max) $138,080 ~$76,900
PIA (at FRA [66, 66y2m]) $2,755 (2016$) $2,021 (2016$)

Age 62 retirement (both): $2,077 (RIB) $1,546 (RIB)
$4,100 (widow's at 84, 8)
Total Cumulative Benefit: $938,638 (Break even: 79, 79)

FRA (at FRA [66, 66y2m]) $2,755 (2016$) $2,021 (2016$)

Age 70 retirement (both): $4,465 (RIB) $3,326 (RIB)
$6,560 (widow's at 84, 8)
Total Cumulative Benefit: $1,067,125
C1. Couple: Dual income — Mo. budget need: $5,000 (cont.)

LATE CLAIMING
Dual income
(Both claim at 70)

OPTIMAL CLAIMING
Dual income
(H: Claim at 70
W: Claim at 68)

C2. Couple: Dual income (younger spouse is higher wage earner) — Mo. budget need: $5,000

SAUL MAXINE
DOB: Nov. 4, 1954  March 5, 1955
Average Lifetime Earnings: (Maximum for Maxine) $ 73,245 $145,170
PIA (at 66) $    1,977 (2016$) $    2,817 (2016$)

Age 62 retirement (both):    $1,490 (RIB) $2,101 (RIB)
$3,694 (her own benefit at H's death due to her higher PIA )
Total Cumulative Benefit:   $ 915,536 (Break even: 79, 79)

FRA (66; 66y 2m) retirement (both): $2,190 $3,121 (RIB)
$4,953 (her own benefit at H's death due to her higher PIA )
Total Cumulative Benefit:  $1,002,913 (Break even: 83, 83)

Age 70 retirement (both): $3,204 (RIB) $4,519 (RIB)
$6,472 (her own benefit at H's death due to her higher PIA )
Total Cumulative Benefit: $1,049,936

C2. Couple: Dual income (younger spouse is higher wage earner) — Mo. budget need: $5,000 (cont.)

Optimal claiming:  $2,674 (RIB at 68)                  $4,519 (RIB at 70)
$6,472 (her own benefit)
Total Cumulative Benefit: $1,053,755  (Break even 83, 83)

Optimal
Both at FRA (66; 66y 2m)
Both at 70
Both at 62
C2. Couple: Dual income — Mo. budget need: $5,000 (cont.)

**EARLIEST CLAIMING**
Dual income
(Both claim at 62)

**CLAIM AT FRA**
Dual income
(H at 66; W at 66y 2m)

**LATE CLAIMING**
Dual income
(Both claim at 70)

**OPTIMAL CLAIMING**
Dual income
(W: Claim at 70; H: Claim at 69)
**BENEFIT CLAIMING STRATEGIES**

**Case Studies**

C3. Couple: Dual income (Bob & Carol, etc. example from presentation start– both spouses w/same high income) — Mo. budget need: $5,000

<table>
<thead>
<tr>
<th></th>
<th>BOB</th>
<th>CAROL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>DOB: Nov. 10, 1954</td>
<td>Nov. 15, 1954</td>
</tr>
<tr>
<td>Avr. Lifetime Earnings:</td>
<td>$76,299</td>
<td>$76,299</td>
</tr>
<tr>
<td>PIA (at 66)</td>
<td>$ 2,302 (2016$)</td>
<td>$ 2,302 (2016$)</td>
</tr>
</tbody>
</table>

**Age 62 retirement (both):**

- $1,736 (RIB)
- $3,426 (widow's at 85)

**Total Cumulative Benefit:** $896,137 (Break even: 79, 79)

**FRA full retirement (both):**

- $2,550 (RIB)
- $4,152 (widow's at 85)

**Total Cumulative Benefit:** $691,670 (Break even: 79, 83 / 83, 83)

**Age 70 retirement (both):**

- $3,730 (RIB)
- $5,481 (widow's at 85)

**Total Cumulative Benefit:** $1,012,277 (Break even: 87, 87)

**Optimal claiming:**

- $3,114 (RIB at 68)
- $3,730 (RIB at 70)
- $5,478 (widow's at 85)

**Total Cumulative Benefit:** $1,016,729 (Break even 83, 83 / 86, 86)

---

**Benefit Claiming Strategies**

- Retirement Benefits
  - Eligibility
  - Requirements
    - Early vs. full retirement
    - Amount payable
  - Computation
  - Replacement Rates
  - Reduction
    - Actuarial
    - Maximum Family Benefits
    - Windfall Elimination Provision (WEP)
    - Government Pension Offset
  - Increase
    - Working after retirement
  - Dependent’s and Survivor’s Benefits
    - Spousal
    - Widow(er)’s
    - Children’s
    - Parents’
  - Disability Benefits
  - Taxation of Benefits
  - Attorney Fees
  - Future of Social Security
EARLIEST CLAIMING
Dual income
(Both claim at 62)

OPTIMAL CLAIMING
Dual income
(H: claim RIB at 68
W: claim RIB at 70)

Who should claim what and when?
Early claim means reduced benefits
Early claim means benefits to child and unreduced spousal to other spouse
Should mom claim first, or should dad?

• Retirement Benefits
  – Eligibility
  – Requirements
  – Early vs. full retirement
  – Amount payable
• Benefit Computation
• Replacement Rates
• Benefit Reduction
  – Actuarial reduction
  – Maximum Family Benefits
  – Windfall Elimination Provision (WEP)
  – Government Pension Offset
• Benefit Increase
• Working after Retirement
• Dependent's and Survivor's Benefits
  – Spousal
  – Widow(er)'s
  – Children's
  – Parents'
• Disability Benefits
• Taxation of Benefits
• Benefit Claiming Strategies
• Attorney Fees
• Future of Social Security

D. Couple: Dual income with Disabled Adult Child “Larry”

Who should claim what and when?
Early claim means reduced benefits
Early claim means benefits to child and unreduced spousal to other spouse
Should mom claim first, or should dad?

Who should claim what and when?
Early claim means reduced benefits
Early claim means benefits to child and unreduced spousal to other spouse
Should mom claim first, or should dad?

Who should claim what and when?
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Who should claim what and when?
Early claim means reduced benefits
Early claim means benefits to child and unreduced spousal to other spouse
Should mom claim first, or should dad?

Who should claim what and when?
Early claim means reduced benefits
Early claim means benefits to child and unreduced spousal to other spouse
Should mom claim first, or should dad?
**BENEFIT CLAIMING STRATEGIES**
**Case Studies**

D. Couple: Dual income with Disabled Adult Child “Larry”

**Optimal strategy:**
- Dec 2020 – Wilma files for retirement at age 64 and 8 mos.
- Dec 2020 – Fred files for child-in-care spouse benefits at age 66
  - Deeming provision does not apply!
- Dec 2020 – Wilma files for CDB for Larry
- Nov 2024 – Fred files for retirement at age 70
- Nov 2024 – Fred files for CDB for Larry
- Dec 2039 – Wilma files for WIB at age 83 and 8 mos
- Dec 2039 – Wilma files for surviving child benefits for Larry

**What-If Strategy:**
- Nov 2020 – Fred files for RIB at age 66
- Nov 2020 – Fred files for CDB for Larry
- Nov 2020 – Wilma files for child-in-care spouse benefits at age 64 and 7 mos
- Aug 2022 – Wilma files for RIB at age 66 and 4 mos
- Dec 2039 – Wilma files for widow’s benefits at age 83 and 8 mos
- Dec 2039 – Wilma files for surviving child benefits for Larry
C. Observations re: “simple” dual income cases:

- Lower earning spouse files restricted application for spousal benefits at FRA if born on or before 1/1/1954
- If higher earning spouse is younger, these principles may apply
- Early claiming indicated if life expectancy is short
- It’s not always certain that both should wait until age 70 to claim full benefit, as shown by Bob & Carol example

**BENEFIT CLAIMING STRATEGIES**

**Case Studies**

- Retirement Benefits
  - Eligibility
  - Requirements
  - Early vs. full retirement
  - Amount payable
- Benefit Computation
- Replacement Rates
- Benefit Reduction
  - Actuarial reduction
  - Maximum Family Benefits
  - Windfall Elimination Provision (WEP)
  - Government Pension Offset
- Benefit Increase
- Working after Retirement
- Dependent’s and Survivor’s Benefits
  - Spousal
  - Widow(er)’s
  - Children’s
  - Parents’
- Disability Benefits
- Taxation of Benefits
- Benefit Claiming Strategies
- Attorney Fees
- Future of Social Security

**Retirement Planning**

**Assessment of Funding Adequacy**

- Fully Funded Clients:
  - Less concerned about income adequacy
  - More concerned about maximizing benefits and break-even analysis
- Marginally Funded and Underfunded Clients:
  - Delay Social Security and continue working
  - Defers Social Security and depletes other assets
  - Pro-deferral — Each month of deferral is like buying an additional inflation-adjusted life annuity
    - Snowballing effect on delaying benefits due to actuarial increases and COLA increases
    - Reverse “tax torpedo” due to inclusion of smaller portion of SS benefits in provisional income subject to tax
  - Pro-early claiming — Loss of liquidity due to consumption of retirement assets earlier
    - Concerned with leaving assets to heirs
  - Research shows that the cost of financing income during the “bridge period” with a fixed annuity is less expensive than beginning SS early and liquidating other assets to finance the income difference. — Mahaney and Carlson, 2008, *Rethinking Social Security Claiming in a 401(k) World, in Recalibrating Retirement (pending and saving), Ameriks and Mitchell, Ch.7.

**Assessment of Funding Adequacy (cont.)**

- Marginally Funded and Underfunded Clients (cont.):
  - Pro-deferral — Less money is paid for investment expenses since assets are consumed earlier
  - Pro-early claiming — Loss of liquidity due to consumption of retirement assets earlier
    - Concerned with leaving assets to heirs

Research shows that the cost of financing income during the “bridge period” with a fixed annuity is less expensive than beginning SS early and liquidating other assets to finance the income difference. — Mahaney and Carlson, 2008, *Rethinking Social Security Claiming in a 401(k) World, in Recalibrating Retirement (pending and saving), Ameriks and Mitchell, Ch.7.
Retirement Planning
Assessment of Funding Adequacy (cont.)

Four mutually exclusive possibilities at age 62:

1. Retire at 62 and claim benefits
2. Continue working and claim benefits (need to consider retirement test)
3. Retire and defer claiming at least until FRA and possibly to age 70. Live off of other assets
4. Continue working and defer benefits

Factors to consider in claiming decision:

4 Primary factors:
   - Income needs
   - Goals outside of work
   - Life expectancy (health)
   - Benefit amount

Subfactors:
   - Ability to continue working
   - Income resources outside of Social Security

Subfactors (cont.):
   - Personal risk tolerance/degree of investment savvy
   - Financial reliance on Social Security
   - Availability of other SS benefits (i.e., disability, widow’s)
   - Ability to boost SS income by working past the age of 62
   - Age disparity between spouses (if wife is much younger than husband, and likely to be widow for long time, H’s claiming age more critical)
Factors to consider in claiming decision:

Subfactors (cont.):

- Earnings disparity between spouses – higher earning spouse should defer collecting benefits for as long as possible; s/he can collect spousal benefit based on other spouse’s earnings when that spouse reaches FRA
- Work in non-covered employment – sharply reduced SS benefits may curtail use of strategies
- Divorce – can claim on ex-spouse’s earnings, even if ex hasn’t filed
- Widow(er)

Subfactors (cont.):

- Taxation of benefits:
  - 70% pay no tax
  - 15% taxed on 85% of benefits regardless of strategy;
  - Remainder in the middle are subject to the “tax torpedo.” Deferral of claim reduces taxes.

What should a good benefit claiming program include?

1. Annual entry of earnings for both spouses, or if relevant, for one or more ex-spouses
2. Entry of future earnings
3. Monthly cash flow
4. Treatment of pensions based on non-covered earnings
5. Life expectancy for each spouse
6. Rates for COLA increase, national average wage increase, real rates of return (aka discount rate)
7. Alternate scenarios
8. Children’s benefits for both minor children and DACs
9. RIB-LIM
10. Prior or current receipt of disability benefits
What should a good benefit claiming program include?

11. Windwiring
12. Analysis for all benefit combinations (there are 4560 between 62 and 70)
13. Should handle combined family max (none do, as yet)
14. Should account for no child-in-care benefits if DAC lives independently (no program is yet set up for this)
15. Remarried widow

Websites claiming to provide benefit analysis

BE CAREFUL!!!!

Social Security Choices
http://www.socialsecuritychoices.com/index.php
William Dowd, undergrad in Economics
Jeffrey B. Miller, PhD, UPenn, worked at Soc. Sec.
Russell F. Settle, PhD, U Wis,
Ellis H. Wilson, undergrad in comp. sci.

T Rowe Price Benefits Calculator:
http://individual.troweprice.com/public/Retail/Retirement/
Social-Security-Tool?van=socialsecurity

Retirement Revised:
Mark Miller, journalist
Links to benefit calculators
http://retirementrevised.com/social-security-finding-your-
best-filing-strategy/

SSAnalyze from Bedrock Capital Management
http://www.bedrockcapital.com/ssanalyze/

AARP
http://www.aarp.org/work/social-security/social-security-
benefits-calculator/html
 critique by Larry Kotlikoff at
http://www.pbs.org/newshour/making-sense/boomers-
beware-are-online-soci/

Social Security Income Planner – JASUBA LLC
https://www.ssincomeplanner.com/index.jsp

Social Security Optimizer (Quicken)
https://www.quickenso.com/Portal/
BENEFIT CLAIMING STRATEGIES

Websites claiming to provide benefit analysis: (cont.)

- Horsesmouth http://public.horsesmouth.com/Products.aspx
- Elaine Floyd, CFP

Social Security Solutions:
- http://socialsecuritysolutions.com/
- William Meyer – financial planner
- William Reichenstein, CFA, PhD

Maximize My Social Security
- http://www.maximizemysocialsecurity.com/
- Economic Security Planning, Inc.
- ESPlannerPRO – http://www.esplanner.com/
- Laurence Kotlikoff, PhD, economist

Social Security Timing
- https://www.socialsecuritytiming.com/
- Joe Elsasser, CFP, RHU, REBC

ATTORNEY FEES

- Approval required
  - By SSA for work before Administration [SSA §206(a)]
  - By court for work before court [SSA §206(b)]
  - Failure to obtain approval is a misdemeanor punishable by a fine up to $500 and/or imprisonment up to one year [SSA §206(a)(5)] and loss of right to practice before the SSA [20 CFR 404.1740(c)(2), 404.1745(b), 404.1745(b) & (c).

- Two Mechanisms for Fee Approval
  - “Fee Agreement” [SSA §§206(a)(2), 1631(d)(2)(b); POMS §GN 03940.000, et seq.]
  - Fee Petition [SSA §§206(a)(1) and (4), 1631(d); 20 CFR §§404.1720, 404.1725, 416.1520, 416.1525; POMS §GN 03930.000, et seq.]

ATTORNEY FEES

- Fee Agreement
  - Limit of 25% of past due benefits for fees paid directly out of past due benefit by the Social Security Administration to attorney
  - Automatic fee approval for fees amounting to 25% of total award, up to max. of $6,000 (74 FR 6080 (2009))
  - Available only where back benefit is involved
  - Discourages appeals of partially favorable decisions
  - Must submit
    - Copy of fee agreement prior to first favorable decision
    - SSA-1055, Identifying Information for Possible Direct Payment of Authorized Fees
    - SSA-1056, Appointment of Representative
    - SSA-1059, Request for Representative’s Direct Payment Information
ATTORNEY FEES

- Fee Petition
  - Cumbersome
  - Prone to delays
  - May use hourly rates
  - Not limited to 25% of back benefits
  - Required where back benefits not involved (overpayment cases, CDRs)
  - Per HALLEX I-1-2-12 B, required if:
    - More than one representative appointed in firm and not all signed single fee agreement
    - Representative terminated by claimant prior to conclusion of case
    - Representative died prior to conclusion of case
    - Claimant found incompetent and legal guardian appointed by court who did not sign fee agreement
    - More than one representative appointed from two or more firms

- Retirement Benefits
  - Eligibility
  - Requirements
  - Early vs. full retirement
  - Amount payable

- Benefit Computation
- Replacement Rates
- Benefit Reduction
  - Actuarial reduction
  - Maximum Family Benefits
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  - Government Pension Offset

- Benefit Increase
- Working after Retirement
- Dependent’s and Survivor’s Benefits
  - Spousal
  - Widow(er)’s
  - Children’s
  - Parents’

- Disability Benefits
- Taxation of Benefits
- Benefit Claiming Strategies

  - Payment to prevailing party against United States unless
    - Position of U.S. was substantially justified
    - Special circumstances render award unjust
  - Hourly rate set by statute, may be adjusted for inflation
    - $125/hr + rise in cost of living from March 29, 1996.
      (http://data.bls.gov/)
      - Fees belong to the client
      - EAJA award belongs to client
      - Allows offset of any federal debt that claimant may owe the federal government
      - Fee contract should specify assignment of any EAJA award to attorney

- Use fee
  - 6.3% assessment on any certified fee paid by SSA from past-due benefits
  - Cap of $91 in 2015 (triggered by fee of $1,444.44)
  - Cap subject to COLA adjustment beginning Dec 2006

- Direct payment to non-attorney representative
  - Non-attorney representatives must meet requirements set forth in SSA §206(e)
  - See also 20 CFR 404.1717 and http://www.ssa.gov/representation, and https://secure.cpshr.us/ssa/About.asp

- Beware of client who has federal, alimony or child support debt
THE FUTURE OF SOCIAL SECURITY - Solvency
Will there be any left for me?

We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.

This law, too, represents a cornerstone in a structure intended to lessen the force of possible future depressions. It will act as a protection to future Administrations against the necessity of going deeply into debt to furnish relief to the needy.

—President Franklin Delano Roosevelt, statement on signing the Social Security Act, August 14, 1935.

PROGRAM GOALS

1. Presumptive Need
2. Floor of Protection to maintain standard of living
3. Balance between individual equity and social adequacy (benefits paid will provide for all contributors a certain standard of living); reflected in benefit formula
4. Earnings related benefits
5. Self-supporting contributory basis (no general revenue appropriations or subsidies)
6. Universal coverage

1937 – 60% of workers covered (Sylvester Schieber)
1950s – 90% (Sylvester Schieber)
2013 – 94% (SSA Fact Sheet Dec 31, 2013)

PROGRAM GOALS
Poverty Reduction

Poverty Rate in Elderly

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1939</td>
<td>78%</td>
</tr>
<tr>
<td>1959</td>
<td>35%</td>
</tr>
<tr>
<td>2006</td>
<td>9%</td>
</tr>
<tr>
<td>2010</td>
<td>9%</td>
</tr>
</tbody>
</table>

2008 CRS: 44% would be poor if Social Security did not exist.

Sources:
- Income of the Population 55 or older, 2012 Table 11, p. 31, Social Security Administration, April 2014.
- http://www.agingandsecurity.org/pdf/docs/facts/chart_house_people0.html
SOLVENCY RESTORATION PROPOSALS

SSA Actuaries score proposals’ impact on long-term insolvency.
See: http://www.ssa.gov/oact/solvency/index.html

CONCLUSION
PRE-MORTEM REAL ESTATE
BEST PRACTICES: USE OF
“LADY BIRD” DEEDS AND
POWERS OF ATTORNEY

By

Melissa Murphy
Orlando
OVERVIEW

• Client goals
  o Who is your client?
• Solution options
• Factors to consider

POWERS OF ATTORNEY

• READ THE STATUTE! Sec. 709.2101 et seq
• Types of POAS
  o General – Durable
  o General – Non-durable
  o Limited
  o Outside scope of presentation
  o Springing *
  o Military *
* Outside scope of presentation
GENERAL POA’s – DURABLE AND NON-DURABLE
• General POA
  o Most common
  o Typically executed without a specific transaction in mind
• Powers: typically very broad; cover many types of transactions;
  Unlimited duration; take effect upon execution; remain effective until revoked
• General provisions which do not identify the specific authority granted (“to do all acts which the principal can do”) do not grant any authority to the agent

GENERAL POA’s – continued
• Should list powers and transactions the agent is authorized to undertake
• To be effective for real property transactions in Florida, powers must be specific.
  o Powers need to include the authority to sell, convey, mortgage, encumber, lease, etc.

GENERAL POA’s – continued
• Durable vs. non-durable – Durable POAs survive the subsequent incapacity of the principal
• Sec. 709.2104, F.S. “This Durable Power of Attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida statutes” or similar words that show the principal’s intent that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity.
LIMITED POA’s
• These are usually transaction-specific.
• Have a specific list of actions that are authorized
• Example of terms:
  o Sell, mortgage or rent a home on a one time basis
  o Complete a sale; particular contract
  o Only in effect for a short period of time
  o Often has an expiration date

BEST PRACTICES FOR PREPARATION AND EXECUTION
• Clear identification of the parties
  o Principal
  o Agent
• Don’t overlook the obvious
  o Name variations of the Principal
  o Age of principal and agent
• Multiple Agents
• Alternate Agent

EXECUTION
• Are witnesses required?
• BEFORE OCTOBER 1, 2011:
  o POAs had to be executed with same formalities of instrument being executed by agent (except Military POA)
  o Durable POA and POA used to convey real property required two witnesses
  o No witnesses were needed for a POA used to execute a mortgage on non-homestead property
EXECUTION

- POA executed in Florida on or after October 1, 2011
  - Must be signed by principal
  - Must have two witnesses and
  - Must be acknowledged by a notary public
    (or as otherwise provided for in F.S. Sec. 695.03)

TERMINATION OF POA

- For full list, see F.S. Sec. 709.2019
- Death:
  - All POAs terminate upon death of principal.
  - Also terminate upon death or incapacity of agent.
    (unless a successor or alternate agent is identified)
- Incapacity:
  - Non-durable POAs terminate upon incapacity of principal.
    Durable POAs generally survive incapacity of principal
  - Suspended upon filing of a petition to determine incapacity or appointment of a guardian for principal
    - “Family Rule” may apply to avoid immediate suspension
  - Incapacity of agent may also cause POA to lapse, unless alternate or successor agent is identified in POA
- Formal revocation of POA by principal in writing

TITLE INSURERS CARE ABOUT

- Why is use of a POA necessary?
  - Original POA should be presented for recording
    (Get multiple copies executed.)
  - A copy is acceptable (per statute)
TITLE INSURERS CARE ABOUT – continued
• In addition to recording POA, for purpose of insuring title, an affidavit from attorney-in-fact will need to be recorded
• Affidavit needs to include:
  o Principal is not dead or incapacitated (for non-durable POA);
  o Principal is not dead, and no proceeding to determine incapacity or establish guardianship of principal has been filed (for durable POA);
  o Principal has not filed for bankruptcy
  o Form of signature of the Principal by the Agent
  o Vesting name on deed vs name of Principal on POA

CONFLICTS OF INTEREST
• Is agent interested party or benefiting from transaction?
• Does POA specifically allow for such gifts or self-dealing?
• Principal ratification

ENHANCED LIFE ESTATE DEEDS
• BASICS
  o “Life Tenant”
  o “Remainderman”
• Rights/Responsibilities of Life Tenant
• Rights/Responsibilities of Remaindermen
• Why is a simple life estate not enough?
ENHANCED LIFE ESTATE DEEDS – continued

• “REGULAR” LIFE ESTATE DEED
  o “John Seller, Grantor, to Melissa Murphy, as to a life estate, with the remainder to Sam Jones, Grantees
  o “Melissa Murphy, Grantor, to Sam Jones, subject to a life estate in Melissa Murphy”
  o “Melissa Murphy, Grantor, to Sam Jones, reserving a life estate unto Grantor.”

ENHANCED LIFE ESTATE DEED - continued

• Sam Jones and Melinda Jones, husband and wife, grantors, to Sam Jones and Melinda Jones, as to a life estate, without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage, lease or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remainderman, and with full power and authority to retain any and all proceeds generated thereby, and upon the death of the last life tenant, the remainder, if any, to Douglas Jones and Jennifer Jones, as grantees.

• Don’t forget: who is your client?

ENHANCED LIFE ESTATE DEEDS – continued

• WHAT DO TITLE INSURERS CARE ABOUT?
  o Language creating enhanced life estate
  o Homestead issues
  o Conveyances after death of life tenant
  o Judgements against remaindermen
ENHANCED LIFE ESTATE DEEDS - continued

- Language:
  - Plainly stated intent as to powers retained
    - E.g., Power to “sell and convey” does not include the power to “gift” the property
  - Common scenario: Does the life tenant clearly have the power to divest the original remaindermen and convey the remainder interest to a new party?
    - Plainly stated intent to allow should be included in original deed reserving the enhanced life estate powers.
    - Plainly stated intent to divest original remaindermen and convey to a new party should be in the divesting deed

ENHANCED LIFE ESTATE DEEDS – continued

- Homestead issues:
  - Standard life estate (no enhanced powers)
    - Vesting has occurred. There is no “devise” that takes place at death of life tenant
  - Enhanced life estate
    - Because of reserved powers, vesting does not occur until the death of the life tenant
    - Must determine whether the vesting that occurs at life tenant’s death violates the constitutional restrictions on devise of homestead
      - Surviving spouse or minor child?

ENHANCED LIFE ESTATE DEEDS – continued

- Conveyances out of enhanced life estate:
  - During lifetime of life tenant
    - Sale to third party, bona fide purchaser for full value without joinder of remaindermen is OK
    - Retained power to sell without joinder of remainder must have been plainly stated
    - If homestead, spouse must join
  - After death of life tenant
    - Did a divestment of original remaindermen occur during lifetime of life tenant?
      - If not, record death certificate of life tenant and get deed from remaindermen.
      - If yes, then investigation necessary to determine risk of litigation, etc.
ENHANCED LIFE ESTATE DEEDS - continued

• Judgments against life tenant:
  o During lifetime of life tenant, these must be resolved before a sale
  o After death of life tenant, judgments no longer an issue

• Judgments against remaindermen:
  o During lifetime of life tenant – discuss with title insurance underwriting attorney
  o After death of life tenant, judgments properly perfected will attach
INSURING TITLE OUT OF ENHANCED LIFE ESTATES

BY BENJAMIN T. JEPSON, FUND UNDERWRITING COUNSEL

Enhanced life estate deeds, also known as “Lady Bird deeds,” continue to be a popular tool in estate planning. These enhanced life estate deeds also continue to create debate among real estate practitioners about their effect on title. The purpose of this article is to discuss some of the main issues that can arise while creating and insuring title out of enhanced life estates.

What Is an Enhanced Life Estate?

Many practitioners are familiar with standard life estate deeds where the grantor conveys property to another person and retains a life estate for themselves, giving the life tenant full use of the property during their lifetime. In an enhanced life estate, the life tenant also retains additional powers, including the power to “sell, convey, and mortgage” the subject property without the joinder or consent of the remaindermen. The concept of an enhanced life estate was originally proposed by Jerome Ira Solkoff in “Life Estate Deeds: Four Variations on a Theme,” The Elder Law Report, Vol. VII, No. 3 (Oct. 1995), as a means of avoiding some of the common problems associated with a standard life estate deed. While there is no statutorily required language to create an enhanced life estate, The Fund has consistently insured conveyances of fee simple interests to bona fide purchasers for value by the life tenant when a property is conveyed to, or retained by, the life tenant for life:

without any liability for waste, and with full power and authority in said life tenant to sell, convey, mortgage, lease, or otherwise manage and dispose of the property described herein, in fee simple, with or without consideration, without joinder of the remaindermen, and with full power and authority to retain any and all proceeds generated thereby with the remainder to another person.

Underwriting Issues

When insuring title out of an enhanced life estate, issues typically stem from one of the following:

1. The language used to create the enhanced life estate;
2. The Constitutional restrictions on the devise of homestead;
3. Conveyances or mortgages out of an enhanced life estate after the death of the life tenant; and
4. Judgments against the remaindermen.

Creation of the enhanced life estate. The first thing to examine when insuring title out of an en-
Enhanced life estate is the powers actually retained by the life tenant. The language used when drafting an enhanced life estate deed can go a long way in determining what actions of the life tenant will be insurable. As discussed above, an enhanced life estate is established when the deed creating the estate includes specifically delineated powers retained by the life tenant. Powers retained by the life tenant may be interpreted by the courts in a manner similar to the way courts have interpreted the powers contained in powers of attorney (POA). See “Enhanced Life Estates - An Underwriting Update,” 34 Fund Concept 149 (Nov. 2002). When interpreting the powers of an agent under a POA, the court in Bloom v. Weiser, 348 So.2d 651 (Fla. 3d DCA 1977) held that the authority granted in a POA must be “plainly stated.” Therefore, the powers retained by a life tenant should be plainly stated before they can be relied upon for the purposes of insuring title.

While the language referenced above is sufficient to create an enhanced life estate, it may not grant clear authority for the life tenant to do anything they wish with the subject property. Just as it has been held in regards to a POA, the power “to sell and convey” in an enhanced life estate is not the same as the power “to gift.” See TN 4.02.03. The power of the life tenant is strictly limited to those powers “plainly stated” in the vesting deed. For the purpose of insuring title, the Fund Underwriting Department will look to the language used in creating an enhanced life estate as a starting point to determine whether or not the transaction is insurable.

The most common underwriting issue that arises from the retained powers of the life tenant is whether or not the life tenant has the power to divest the remaindermen of their interest and “convey” the remainder interest to a new person without joinder of the prior remaindermen; the so-called “fickle life tenant” problem. If the life tenant would like to retain the power to divest the remaindermen of their interest, it is imperative the life tenant expressly reserve such power in the deed creating the enhanced life estate for it to be relied upon for the purposes of insuring title. It is also recommended that the divesting deed “plainly state” that the purpose of the conveyance is to divest the remaindermen of their interest and establish the remainder interest in a new party. Transaction specific underwriting authorization will depend largely on the facts of each transaction to be insured. However, plainly stating that the power has been retained by the life tenant and the purpose of the divesting deed are certainly factors that the Underwriting Department will consider.

Homestead. Homestead issues must be considered in every transaction and enhanced life estates are no different. Art. X, Sec. 4(c), Fla. Const., restricts the devise of homestead property where the decedent is survived by a spouse or minor child. An enhanced life estate deed differs from a standard life estate deed in one major way; in an enhanced life estate deed, the life tenant retains the ability to divest the remaindermen of their interest in the property until the moment of their death. As such, the transfer to the remaindermen is not complete until the life tenant has died. Therefore, the enhanced life estate essentially becomes a substitute will for the life tenant and, upon the death of the life tenant, the “devise” of homestead property to the remaindermen may run afoul of the Constitutional restrictions on the devise of homestead property.

Due to these Constitutional concerns, The Fund will not insure title from an enhanced life estate after the death of the life tenant until any homestead issues have been resolved. These situations are treated similarly to cases like Aronson v. Aronson, 81 So.3d 515 (Fla. 3d DCA 2012), where the court invalidated the disposition of homestead property through a revocable trust after the death of the settlor. Much like in Aronson situations, The Fund will consider insuring title in cases where there are homestead issues if an affidavit listing all of the heirs of the deceased life tenant and deeds from the remaindermen and all of the heirs of the deceased life tenant are obtained. Fund Members should contact Fund Underwriting Counsel to discuss the facts of their case.

Conveyances and mortgages out of an enhanced life estate. Requirements for insuring a conveyance or mortgage out of an enhanced life estate depend largely on whether the transaction occurs during the lifetime or after the death of the life tenant.

During the lifetime of the life tenant, The Fund may insure a sale or mortgage from the life tenant, without joinder of the remaindermen, to a third-party, bona fide purchaser for full value and consideration or to a third-party lender. This is true whether or not the life tenant has attempted to divest the remaindermen of
their interest. For the purpose of insuring title, as long as the life tenant retained the power to “sell, convey, and mortgage” the subject property without the joinder of the remaindermen during their lifetime, the life tenant should not lose the power to convey or mortgage the fee simple title to a third party. When insuring a sale or mortgage of the fee by a life tenant of an enhanced life estate, Fund Members must collect information regarding the date of divestment of any remaindermen and signs of potential risk of litigation. It is recommended that the deed or mortgage from the life tenant to the third party state that “the entire fee simple interest” is being conveyed or encumbered, as the case may be.

The analysis for insuring a transaction after the death of the life tenant may involve additional risk. If there has been no change to the title since the enhanced life estate deed vested title in the life tenant and the remaindermen, The Fund will insure either a conveyance or mortgage of property that was not the homestead property of the life tenant from the remaindermen, upon the recording of a death certificate for the life tenant. When a conveyance or mortgage of fee simple title is to be insured from the last remainderman of record after the death of a “fickle life tenant” who has divested previous remaindermen, Fund Members must collect information regarding the date of divestment of the remaindermen and signs of potential risk of litigation, as previously discussed. Additionally, Fund Members must verify the life tenant retained the power to revoke the remainder interest in the deed creating the enhanced life estate; and that there is clear indication of record that it was the life tenant’s intent to revoke the remainder interest. The goal is to establish facts that will show the risk of divested remaindermen claiming an interest in the subject property is sufficiently mitigated.

In all situations involving the sale or mortgage of fee simple interest and “fickle life tenants” Fund Members must contact The Fund Underwriting Department to discuss insuring requirements and whether a deed from divested remaindermen will be required for insuring.

Judgments. Judgments against the life tenant that have been properly perfected as liens on the property must be resolved. The same can be said about judgments perfected against the remaindermen where the life tenant is deceased; but what about judgments against the remaindermen of enhanced life estates during the lifetime of the life tenant? In situations where the judgment is relatively small, has been of record for more than one year and the creditor is not considered “aggressive,” The Fund will generally insure a transaction from the life tenant without a release or satisfaction of a judgment against the remaindermen during the lifetime of the life tenant. For examples of the types of judgments and creditors that are considered aggressive see TN 16.04.08(A)(1). Fund Members should consult with Fund Underwriting Counsel concerning the necessity of release of judgments against remaindermen related to enhanced life estates for insuring subsequent transactions.

Conclusion

While title can be insured for many conveyances or mortgages out of enhanced life estates, the facts surrounding the specific transaction are important and must be seriously considered. Fund Members must examine the factors discussed above to determine if there are any issues that may affect the specific transaction’s insurability. If there are any questions, Fund Members are encouraged to discuss them with Fund Underwriting Counsel.

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4.11
EVALUATING POWERS OF ATTORNEY FOR USE IN INSURING REAL PROPERTY TRANSACTIONS

BY CHARLES NOSTRA, FUND UNDERWRITING COUNSEL

Fund Underwriting Counsel regularly assist Fund Members with evaluating powers of attorney (POA) for use in the real estate transactions Fund Members are proposing to insure. Fund Members are not required to obtain underwriting approval in order to insure a transaction in which a POA is used; nor are Fund Members required to submit the particular POA to Fund Underwriting Counsel for approval prior to use, so long as the POA meets statutory requirements. This article is designed to assist Fund Members in reviewing POAs for use in insuring transactions. Detailed guidelines for reliance upon POAs for insuring are discussed in TN Ch. 4, Agency.

General Considerations

The Fund recommends and encourages Fund Members to have parties to a transaction execute all documents personally. Real estate transactions are typically not “spur of the moment;” therefore, all parties should know weeks in advance that certain documents will need to be executed. Even if the seller is out of the state or country, with e-mail and overnight delivery services, original documents can be received by Fund Members prior to a scheduled closing.

When a POA is presented the day before or the day of closing, Fund Members are often caught off guard. Was the principal suddenly taken ill, had an accident, or had to leave the state unexpectedly?

Fund Members should always inquire why the principal is not able to personally execute the closing documents. Is the principal truly not able to execute or just does not want to attend the closing? If the principal is able to execute the documents personally, it is recommended Fund Members have them do so. The use of a POA as a convenience should be avoided.

Types of Powers of Attorney

Fund Members typically encounter several types of POAs. A brief description of some of the more common types follows:

General Powers of Attorney. General POAs are the most common and are typically executed without a specific transaction in mind. The powers are typically broad and cover many types of transactions. There is typically a list of powers and transactions the agent is authorized to undertake, including real estate transactions. The list may be detailed or merely broad categories of powers. To be effective

(Continues on page 44)
for real property transactions in Florida, the powers must be specific, as discussed below. General POAs typically have an unlimited duration and remain effective until revoked.

**Limited (Transaction Specific) Powers of Attorney.** A limited power of attorney allows the agent to perform specific acts identified in the document. They are typically prepared with a specific transaction or set of transactions in mind and are narrowly drafted for that purpose, e.g. sale, mortgage, or lease of property based on a particular contract or for some other, narrow, specific purpose. The agent’s appointment and the POA itself typically terminate at the completion of the specific transaction. These transaction-specific POAs typically identify the real property by address or legal description and also identify the transaction the agent is authorized to undertake.

**Springing Powers of Attorney.** A springing POA typically becomes effective at a future date or event. After Oct. 1, 2011, except for military POAs, “springing” or contingent POAs are generally not acceptable for insuring purposes. See TN 4.02.09 for a more detailed discussion, or seek the advice of Fund Underwriting Counsel.

**Military Powers of Attorney.** Military POAs can be any of the above type; however, their execution is governed by federal law, including 10 U.S.C., Sec. 1044b. These POAs are generally exempt from state laws with respect to execution requirements, such as witnesses. However, for insuring purposes, the military POA must still be recorded. See TN 4.02.01(B)(4) and “Insuring Title Based on Military Powers of Attorney,” 37 Fund Concept 33 (Mar. 2005) for more detailed discussions of these POAs.

**Aspects of a Power of Attorney that Require Evaluation for Insuring:**

**Parties**

The power of attorney must identify the principal and the agent.

The principal’s name must be the same as in any title documents previously recorded in the Official Records and the present documents. Any variations in name must be investigated.

A good, quick check is to compare the name and signature of the principal in the power of attorney presented against any name and signature of the principal found in the records search.

The agent must be specifically identified and at least 18 years of age.

If more than one agent is identified, the POA must indicate if they can act alone or must act together. Some POAs may also identify alternate agents if the primary is unable to act.

**Execution**

**Pre-Oct. 1, 2011.** Fund Members may be presented with a POA that was executed prior to Oct. 1, 2011 when the Florida Power of Attorney Act, Sec. 709.2101, et. seq. (2011 Act), became effective. POAs properly executed before Oct. 1, 2011 may still be valid for certain transactions, but Fund Members should consult with Fund Underwriting Counsel before insuring as these situations are limited. Generally, POAs executed prior to Oct. 1, 2011 were required to be executed with the same formalities of the instrument being executed by the agent (with the exception of military POAs as discussed above). For example, POAs used for the sale of real property required two witnesses; whereas no witnesses were needed for a POA used to execute a mortgage. Durable POAs and POAs used to mortgage non-homestead property required two witnesses regardless of the date of execution of the POA. Finally, any act performed by the agent prior to Oct. 1, 2011 remains valid. See TN 4.02.01

**Oct. 1, 2011 and thereafter.** For POAs executed in Florida on Oct. 1, 2011 and thereafter, the document must be signed by the principal, have two witnesses, and be acknowledged by a notary public or as otherwise provided in Sec. 695.03, F.S. Also, the conduct of the agent after Oct. 1, 2011, regardless of the date of the POA, must follow the requirements of the 2011 Act.

**Out-of-State Executions.** POAs executed in other states may be acceptable if they are properly executed according to the laws of that state. See Sec. 709.2106(3), F.S. Fund Members unfamiliar with the requirements in the particular state (if the POA is not executed to Florida standards) may request an opinion of an attorney licensed to practice law in that state regarding the execution and validity of the POA. See TN 4.02.01(B)(2).
There is an exception to out-of-state executions for homestead property. If the property to be conveyed or mortgaged is the homestead of the principal pursuant to Sec. 689.111, F.S., the POA must have two witnesses and be acknowledged pursuant to Sec. 695.03, F.S., regardless of where executed. See also TN 16.02.06 for a discussion of additional homestead requirements.

Power Granted to the Agent

Agents may only undertake those powers specifically granted in the POA. A broad, general statement in the POA that the agent “may do all things the principal could do in person” is not acceptable. Sec. 709.2201(1), F.S., and TN 4.02.03.

The broad term “real estate transactions” without the POA including a detailed and specific list of what is included in that category is likewise not sufficient. For real property transactions, the powers must include the authority to sell, convey, mortgage, encumber, lease, etc., as necessary to effectuate the proposed insured transaction.

It is common for POAs originating from states other than Florida to list broad categories or refer to a particular statute or law for a definition of powers granted. It is typically necessary for Fund Members to verify the authority pursuant to the law under which the POA was executed or request an opinion letter from an attorney licensed in that jurisdiction to interpret the statutes and provide the necessary definitions or powers found in that state’s laws.

Conflict of Interest

If the agent is an interested party or is benefiting from the transaction, Fund Members should decline to insure the transaction unless the POA specifically allows for such gifts or self-dealing. See TN 4.01.01 for a full discussion and additional insuring requirements.

Termination or Suspension of Powers of Attorney

The following events are some of the more common reasons for a POA to be suspended or terminated. For a full list of events that suspend or terminate a POA see Sec. 709.2019, F.S.

1. **Death.** All POAs terminate upon the death of the principal. POAs also terminate upon the death or incapacity of the agent (unless a successor or alternate agent is identified).

2. **Incapacity.** General non-durable POAs terminate upon the incapacity of the principal while durable POAs generally survive incapacity of the principal. Durable POAs will typically be titled as such or contain a statement of durability similar to the following:

   *This POA will survive and not be terminated by the subsequent incapacity of the principal, except as provided by law.*

   However, even durable POAs are suspended upon the filing of a petition to determine incapacity or appointment of a guardian for the principal. In limited circumstances they may continue to be used by certain family members, such as a parent, spouse, child, or grandchild. Consult with Fund Underwriting Counsel in such situations.

   The incapacity of the agent may also cause the POA to lapse unless an alternate or successor agent is identified in the POA.

3. **Formal revocation.** Formal revocation of the POA by the principal in writing.

4. **Time.** Expiration of time (as may be set forth in the POA).

5. **Divorce.** If the principal is married to the agent, upon the filing of an action to dissolve or annul the marriage, the POA is suspended.

6. **Acts Completed.** Specific or limited POAs terminate upon a date, or are transaction specific and automatically terminate once the identified transaction has been completed.

Recording the Power of Attorney and Affidavit

Sec. 695.01(1), F.S., requires that for the protection of creditors and other certain purchasers for value, the POA must be recorded.

In addition to recording the POA, for purposes of insuring title, Fund Members must record an affidavit from the agent that attests to the following knowledge of the agent: that the principal is not deceased or incapacitated (for non-durable POAs); that the principal has not filed for bankrupt-
Fund Members have access to several affidavit forms for use with POAs in the Affidavit Practice Manual.

Execution of Documents by Agent under a Power of Attorney

Title Note 4.02.02 contains a discussion of the acceptable forms for signature by the agent, but the preferred signature block for insuring purposes is:

Peter Principal, by Allen Agent, his attorney-in-fact.

The name of the principal may be written, printed, or typed. The notary acknowledgment must identify the agent as the person appearing before the notary.

The acknowledgment may simply state the agent appeared before the notary, but the better practice is to show the agent, as attorney-in-fact for the principal, appeared before the notary.

Often a POA is presented the day of closing, after the documents have been prepared in advance, so the notary acknowledgment may indicate the principal appeared in person. Fund Members should always review the documents to be recorded to ensure the proper signature block and notary acknowledgment is used.

Finally, an agent may not execute the seller’s closing affidavit unless the agent has personal knowledge of the facts therein. Pursuant to Sec. 709.2201(3)(b), F.S., agents are prohibited from making “any affidavit as to the personal knowledge of the principal.”
FROM GUARDIANS TO PERSONAL REPRESENTATIVES

By

Cady Huss
St. Petersburg
Fiduciary Representation –  
From Guardians to Personal Representatives  

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I. **Introduction**: This outline is intended to provide an overview of all the fiduciary duties and responsibilities of Agents, Guardians, Trustees, and Personal Representatives. A greater understanding of these duties can prevent fiduciary litigation and ensure proper administration for wards, principals, and beneficiaries. Please see the statutes and case law cited in the materials for additional details regarding these topics.

II. **Agents under Durable Power of Attorney** – Ch. 709

a. Key players: Principal, Agent

b. Authority: Power of Attorney document which can give the Agent as much or as little authority as the principal desires.

   i. Fla. Stat. § 709.2201(1): Except as provided in this section or other applicable law, an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.

   ii. Fla. Stat § 709.2201(6): An act performed by an agent pursuant to a power of attorney 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.

   iii. **AN AGENT IS A FIDUCIARY.** Fla. Stat. § 709.2114.

      i. Mandatory Duties in 709.2114(1) notwithstanding the provisions in the power of attorney, an agent who has accepted appointment must act only within the scope of authority granted in the power of attorney.

      ii. (a) In exercising that authority, the agent:

         1. May not act contrary to the principal’s reasonable expectations actually known by the agent;
         2. Must act in good faith;
         3. May not act in a manner that is contrary to the principal’s best interest, except as provided in paragraph (2)(d) and s. 709.2202; and
         4. Must attempt to preserve the principal’s estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal’s best interest based on all relevant factors…

      iii. (b) May not delegate authority to a third person except as authorized under s. 518.1112 or this part or by executing a power of attorney on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purposes;

      iv. (c) Must keep a record of all receipts, disbursements, and transactions made on behalf of the principal; and
v. (d) Must create and maintain an accurate inventory each time the agent accesses the principal’s safe deposit box, if the power of attorney authorizes the agent to access the box.

vi. **Default Duties in 709.21114(2):** Except as otherwise provided in the power of attorney, an agent who has accepted appointment shall:

1. (a) Act loyally for the sole benefit of the principal;
2. (b) 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;
3. (c) Act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances; and
4. (d) Cooperate with a person who has authority to make health care decisions for the principal in order to carry out the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal’s best interest.

vii. Keep in mind that there are additional restrictions on an Agent unless the Principal has specifically initialed by the enumerated authority pursuant to Fla. Stat. § 709.2201. Even if the Principal authorized the Agent to engage in the specific activities (for example, the creation of an inter vivos trust), the Agent must still exercise that authority consistent with the fiduciary duties identified in Fla. Stat. § 709.2114.

d. **Agent’s Liability.**

i. Agent’s Liability. Fla. Stat. § 709.2117: An agent who violates this part is liable to the principal or the principal’s successors in interest for the amount required to: (1) Restore the value of the principal’s property to what it would have been had the violation not occurred; and (2) Reimburse the principal or the principal’s successors in interest for the attorney’s fees and costs paid from the principal’s funds on the agent’s behalf in defense of the agent’s actions.

1. Some of the duties outlined in Section 709.2114 require the Agent’s actual knowledge. For example, in order for the Agent to be liable for breaching his or her fiduciary duty to preserve the principal’s estate plan, the Agent must have actual knowledge of the estate plan.

2. Fees!

ii. Co-Agent Liability. Fla. Stat. § 709.2111(4): An agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent, including a predecessor agent, must take any action reasonably appropriate in the circumstances to safeguard the principal’s best interests. If the agent in good faith believes that the principal is not incapacitated, giving notice to the principal is a sufficient action. An agent who fails to take action as required by this subsection is liable to the principal for the principal’s reasonably foreseeable damages that could have been avoided if the agent had taken such action.

iii. Chapter 415 – Adult Protective Services Act also provides liability for an Agent under a POA.
1. Fla. Stat § 415.102(8)(a): “Exploitation” means a person who: 1. Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or 2. Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

2. (b) “Exploitation” may include, but is not limited to:
   1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
   2. Unauthorized taking of personal assets;
   3. Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
   4. Intentional or negligent failure to effectively use a vulnerable adult’s income and assets for the necessities required for that person’s support and maintenance.

3. Chapter 415 further provides both civil and criminal penalties for the exploitation of a vulnerable adult. Civil penalties include both actual and punitive damages and criminal penalties can include second degree misdemeanor charge subject to imprisonment. See Fla. Stat. §§ 415.111(1) and 415.1111

iv. Exoneration? Fla. Stat. § 709.115 allows for a POA to provide that an agent is not liable for any acts or decisions made by the agent in good faith except to the extent the provision: (1) Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal or (2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

e. Case Law
   i. Santa Rosa Investor’s Inc. v. Wilson, 171 So. 3d 826 (Fla. 1st DCA 2015). Joyce Carter as attorney-in-fact for her sister, Betty Wilson, signed an Arbitration Agreement on behalf of her sister after she was admitted to a nursing home. Joyce later sued the nursing home alleging negligence and violations under the nursing home statutes. The nursing home responded by filing a motion to abate and to compel arbitration pursuant to the arbitration agreement. The Court looked to Betty’s 2007 Durable Power of Attorney that gave Joyce the authority to sue for “liquidated or liquidated” damages on behalf of her sister. The nursing home contended this was a
typo and the DPOA should have read “liquidated or unliquidated” damages. Joyce contended she only had authority to sue for liquidated damages and as a result could not have bound Betty to an arbitration agreement when the relief requested was unliquidated damages. The First District found the DPOA ambiguous and remanded for factual findings regarding the parties’ intent.

ii. Kotsch v. Kosch, 608 So.2d 879 (Fla. 2d DCA 1992). The father created a DPOA in 1987 that named his son as his agent. At the time, the father was 85 years old and in good health. His wife of 45 years had died ten years before and he had been “keeping company” with a woman named Margaret for nine years. The son felt that Margaret was attempting to alienate and influence his father so acting under the DPOA, the son created an irrevocable trust and funded it with $700,000 of his father’s assets. The trust named the son as trustee and named the father as the grantor and initial beneficiary. The son’s children were additional beneficiaries and were given 5x5 powers. Upon the father’s death, 70% of the trust assets passed to the son and 30% to the son’s children. The father sued for a declaration that the trust was void. The Second District noted that DPOAs are strictly construed and here, the implied and expressed intent was to provide for the father’s maintenance and care. The DPOA did not authorize the son to create any other beneficial interests in the father’s property. The transfer of assets to the irrevocable trust was a breach of the son’s fiduciary duties as agent and the trust was declared void.

III. Guardians – Chapter 744
   a. Key players: Guardian, Ward, Court
   b. Authority: Letters of Guardianship, Fla. Stat. § 744.345
   c. Powers and Duties of Guardian. Fla. Stat. § 744.361(1): The guardian of an incapacitated person is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. The guardian of a minor shall exercise the powers of a plenary guardian.
      i. Duties of all Guardians include:
         1. The guardian shall act within the scope of the authority granted by the court and as provided by law.
         2. The guardian shall act in good faith.
         3. A guardian may not act in a manner that is contrary to the ward’s best interests under the circumstances.
         4. A guardian who has special skills or expertise, or is appointed in reliance upon the guardian’s representation that the guardian has special skills or expertise, shall use those special skills or expertise when acting on behalf of the ward.
         5. The guardian shall file an initial guardianship report in accordance with s. 744.362.
         6. The guardian shall file a guardianship report annually in accordance with s. 744.367.
         7. The guardian of the person shall implement the guardianship plan.
8. When two or more guardians have been appointed, the guardians shall consult with each other.

9. The guardian shall observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another.

10. The guardian, if authorized by the court, shall take possession of all of the ward’s property and of the rents, income, issues, and profits from it, whether accruing before or after the guardian’s appointment, and of the proceeds arising from the sale, lease, or mortgage of the property or of any part. All of the property and the rents, income, issues, and profits from it are assets in the hands of the guardian for the payment of debts, taxes, claims, charges, and expenses of the guardianship and for the care, support, maintenance, and education of the ward or the ward’s dependents, as provided for under the terms of the guardianship plan or by law.

ii. Duties of Guardians of the property:
1. Protect and preserve the property and invest it prudently as provided in chapter 518, apply it as provided in s. 744.397, and keep clear, distinct, and accurate records of the administration of the ward’s property.
2. Perform all other duties required of him or her by law.
3. At the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to it.

iii. Duties of Guardians of the person:
1. Consider the expressed desires of the ward as known by the guardian when making decisions that affect the ward.
2. Allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward.
3. Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease.
4. Assist the ward in developing or regaining capacity, if medically possible.
5. Notify the court if the guardian believes that the ward has regained capacity and that one or more of the rights that have been removed should be restored to the ward.
6. To the extent applicable, make provision for the medical, mental, rehabilitative, or personal care services for the welfare of the ward.
7. To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision.
8. Evaluate the ward’s medical and health care options, financial resources, and desires when making residential decisions that are best suited for the current needs of the ward.
9. Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services.

10. When not inconsistent with the person’s goals, needs, and preferences, acquire an understanding of the available residential options and give priority to home and other community-based services and settings.

iv. **Duties of Professional Guardian:**

1. Conduct quarterly meetings with ward to assess ward’s appearance and condition, appropriateness of living situation, need for any additional services, and the nature and extent of visitation and communication with ward’s family and friends.

2. Professional guardians also must register and meet the requirements of Fla. Stats. § 744.2002 and § 744.2003.

v. Note there are additional duties of public guardians outlined in Fla. Stat. § 744.2007 but they are vested with all the powers and duties of guardians noted above.

d. **Guardian’s Liability**

i. **Conflicts of Interest.** Fla. Stat. § 744.446 (1): It is essential to the proper conduct and management of a guardianship that the guardian be independent and impartial. The fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. The guardian may not incur any obligation on behalf of the guardianship which conflicts with the proper discharge of the guardian’s duties.

1. Fla. Stat. § 744.446 (2) Unless prior approval is obtained by court order, or unless such relationship existed prior to appointment of the guardian and is disclosed to the court in the petition for appointment of guardian, a guardian may not:

   a. (a) Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;

   b. (b) Acquire an ownership, possessory, security, or other pecuniary interest adverse to the ward;

   c. (c) Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was validly made by the ward prior to adjudication of incapacity of the ward; and

   d. (d) Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity of which the guardian or the guardian’s spouse or any of the guardian’s lineal descendants, or collateral kindred, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.
ii. Surcharge. Fla. Stat. § 744.446 (3): Any activity prohibited by this section is voidable during the term of the guardianship or by the personal representative of the ward’s estate, and the guardian is subject to removal and to imposition of personal liability through a proceeding for surcharge, in addition to any other remedies otherwise available.

iii. Removal. Fla. Stat. § 744.474 outlines the reasons for removal of a guardian. Those include, among others, the failure to discharge his or her duties, development of a conflict of interest, and the abuse of his or her powers.

iv. Contempt. Fla. Stat. § 744.571 allows the court to hold the guardian in contempt if he or she has failed to file a true, complete, and final accounting or to turn over all assets to the successor or the ward.

v. Guardian ad Litem may be appointed if there is a conflict or an action is brought by the guardian against the ward or vice versa. Fla. Stat. § 744.391.

vi. Exploitation. Fla. Stat. § 744.359: (1) A guardian may not abuse, neglect, or exploit a ward. (2) A guardian has committed exploitation when the guardian:
   1. (a) Commits fraud in obtaining appointment as a guardian;
   2. (b) Abuses his or her powers; or
   3. (c) Wastes, embezzles, or intentionally mismanages the assets of the ward.

vii. Fla. Stat. § 744.359 is interpreted in conformity with Section 825.103 which is the criminal statute for exploitation of an elderly person. Like Agents, Guardians may be subject to criminal penalties, including imprisonment, if they engage in elder exploitation.

viii. Fees! Guardians and the attorney representing the guardian are entitled to reasonable fees for their services but they are very tricky. They require court approval, are sometimes reduced, and have their own procedure outlined in Fla. Stat. § 744.108. In litigation against a Guardian, he or she may be prohibited from receiving fees if there has been a breach of fiduciary duties. See In re Guardianship of Lawrence v. Norris, 563 So. 2d 195 (Fla. 1st DCA 1990). An attorney representing a ward in a breach of fiduciary duty action may be able to recover fees for services rendered to the ward, i.e. for their successful surcharge/breach action under the same statute.

a. Case Law
   i. Reed v. Long, 111 So. 3d 237 (Fla. 4th DCA 2013). Michelle Reed, as guardian of her mother’s person, brought a surcharge action against Robert Long, the ward’s husband and guardian of the property. Robert pursued a loss of consortium claim related to the ward’s medical malpractice action and was awarded proceeds on his claim. Michelle alleged that Robert was not her mother’s legal husband at the time because
the mother never divorced her first husband prior to marrying Robert. She asserted that any loss of consortium award would belong to her mother because the marriage was void and Robert should have known that when he pursued the loss of consortium claim. The Court reviewed the elements of a surcharge for breach of fiduciary duty claim and noted that Michelle needed to show both (1) the existence of a fiduciary duty and (2) that the breach of that duty was the proximate cause of damages to the ward. The Fourth District could not determine from the record whether there was a valid breach of fiduciary duty claim by Robert and therefore reversed and remanded for further review.

ii. *Meyer v. Watras*, 223 So. 3d 1010 (Fla. 4th DCA 2017). Guardianship counsel received $154,468 in attorney’s fees and costs from the guardianship for legal services performed between May 2013 and December 2014. On August 27, 2015, the Court granted their request to withdraw. The attorneys later filed three petitions requesting additional fees and costs totaling $104,719. The trial court held an evidentiary hearing and took note that the attorneys were requesting over $250,000 in attorney’s fees for two years’ worth of work representing a guardianship valued at approximately $400,000. The trial court denied one petition and awarded less than $40,000 in fees on the attorney’s three petitions. The 4th District reversed on two of the three orders and held that they lacked sufficient factual findings concerning the reasonable hourly rate and number of hours on which the ward of attorney’s fees were based. The Court did find that the trial court had considered the nine factors in Section 744.108(2) when determining whether the attorney’s fees were excessive.

IV. **Trustees** – Chapter 736

a. Key Players: Trustee, Beneficiaries
b. Authority: The governing instrument and the Florida Trust Code
c. Fiduciary Duties:
   i. Good Faith. Fla. Stat. § 736.0801: Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this code.
      1. This includes the duty to avoid any conflict between the personal interests of the trustee and those of the beneficiaries (no “self-dealing,” no commingling of assets of the trustee and beneficiaries, etc.).
   iii. Duty of Impartiality. Fla. Stat. § 736.0803: If a trust has two or more beneficiaries, the trustee shall act impartially in administering the trust property, giving due regard to the beneficiaries’ respective interest.
   iv. Prudent Administration. Fla. Stat. §736.0804: A trustee shall administer the trust as a prudent person would, by considering the purposes, terms,
distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

v. Control and Protect. Fla. Stat. § 736.0809: A trustee shall take reasonable steps to take control of and protect the trust property.

   1. A trustee shall keep trust property separate from the trustee’s own property.
   2. Except as otherwise provided in subsection (4), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.
   3. If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

vii. Enforce and defend claims. Fla. Stat. § 736.0811: A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

viii. Collect trust property. Fla. Stat. § 736.0812: A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and, except as provided in s. 736.08125, to redress a breach of trust known to the trustee to have been committed by a former trustee.


x. Use special skills. Fla. Stat. § 736.0806: A trustee who has special skills or expertise, or is named trustee in relation on the trustee’s representation that the trustee has special skills or expertise, shall use those special skills or expertise.


xiii. File a Notice of Trust and pay the expenses of administration and obligations of the deceased settlor’s estate when administering the deceased settlor’s revocable trust. Fla. Stat. § 736.05055 and § 736.0503.

d. Liability:
      1. The Court has numerous options when addressing a breach of trust. It can compel the trustee to perform the trustee’s duties, enjoin the trustee, compel the trustee to redress a breach by paying money or restoring property, order the trustee to account, appoint a special fiduciary, suspend the trustee, remove the trustee, reduce or deny compensation to the trustee, void an act of the trustee, or impose any other appropriate relief.
ii. Damages: Fla. Stat. § 736.1002(1): A trustee liable for breach of trust is liable for the greater of (a) The amount required to restore the value of the trust property and trust distributions to what they would have been if the breach had not occurred, including lost income, capital gain, or appreciation that would have resulted from proper administration; or (b) the profit the trustee made by reason of the breach.

iii. Removal: One of the grounds for removal of Trustee is for a “serious breach of trust.” Fla. Stat. § 736.0706.

iv. Co-Trustees: Fla. Stat. § 736.0703(7): Except as otherwise provided in subsection (9), each cotrustee shall exercise reasonable care to: (a) Prevent a cotrustee from committing a breach of trust. (b) Compel a cotrustee to redress a breach of trust.

1. (9): If the terms of a trust provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a cotrustee.

v. Fees! Fla. Stat. § 736.1004 allows for attorney’s fees and costs as in chancery actions in all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise trustee’s powers.

e. Case Law

i. Kritchman v. Wolk, 152 So. 3d 628 (Fla. 3d DCA 2014). This case involved the trust of Lola Krtichman. During her life, she served as Co-Trustee with Wells Fargo. Pursuant to Article I.A. of the Trust, Lola had the authority to direct the trustees to make principal distributions. Pursuant to that direction, Lola directed Wells Fargo to pay Hunter’s tuition for seven years, including his high school education and undergraduate education at Yale University for his freshman and sophomore years. In 2010, Lola wrote a letter to Wells Fargo directing that they continue to make payments for Hunter’s junior and senior years. Later that year, Lola passed away and her son took over as Co-Trustee and as PR of her estate. The son countermanded his mother’s written instructions to Wells Fargo
and Hunter’s remaining expenses at Yale went unpaid by the Trust. The trial court granted final judgment in favor of Hunter on his breach of trust claim and awarded his unpaid tuition, room and board. The Third District reviewed and affirmed and held that Wells Fargo’s failure to carry out the terms of the trust violated its duties to administer the trust in good faith, to act impartially, and to prudently administer the trust.

ii. McCormick v. Cox, 118 So. 3d 980 (Fla. 3d DCA 2013). An attorney, Arthur McCormick, prepared the last will and testament as well as a revocable family trust for his friend of many years, Robert Cox. Under the terms of the trust, McCormick became the trustee when the Grantor died. The Cox Trust owned only one asset – a 100 acre piece of property that operated as a nine-hole golf course. In early 2002, McCormick arranged for an appraisal of the property and reported a fair market value, as an operating golf course, of $2.5 million. That value was included on the federal estate tax return filed on behalf of the decedent. While the appraiser’s report stated that the highest and best use of the property was for residential development, there was no evidence that McCormick made any effort to ascertain the market value of the property if developed in accordance with its best use. In May 2002, it became apparent that the Town of Lynnfield was interested in developing the property and they ultimately purchased it in 2005 for $12 million. In addition to the failure to adequately appraise the property, McCormick did not provide a trust accounting until April 2005 and even then used the outdated value of the golf course. The beneficiaries filed suit on several counts including breach of fiduciary duties and surcharge. The trial court ultimately awarded the beneficiaries $5.3 million in damages and the Third District affirmed in all respects.

V. **Personal Representatives** – Chapter 733

a. Key Players: Beneficiaries, Creditors, Personal Representative, Court

b. Authority: Last Will and Testament and Letters of Administration

c. Fiduciary Duties:

i. Expeditiously Settle and Distribute the Estate. Fla. Stat. § 733.603: A personal representative shall proceed expeditiously with the settlement and distribution of a decedent’s estate and, except as otherwise specified by this code or ordered by the court, shall do so without adjudication, order, or direction of the court. A personal representative may invoke the jurisdiction of the court to resolve questions concerning the estate or its administration.

ii. Prepare inventories and accountings. Fla. Stat. § 733.604: Unless an inventory has been previously filed, a personal representative shall file a verified inventory of property of the estate, listing it with reasonable detail and including for each listed item its estimated fair market value at the date of the decedent’s death.
1. PR also has a duty to amend the inventory if the values on the initial inventory were erroneous or misleading. See Fla. Stat. § 733.604(2).

iii. Review and inventory the contents of the decedent’s safe-deposit box. Fla. Stat. § 733.6065.

iv. Take possession of the estate and take all steps reasonably necessary for the management, protection, and preservation of the estate. Fla. Stat. § 733.607.

v. Notify and address creditors of the estate. Fla. Stat. § 733.701

vi. *Personal Representative’s Duties are the same as a Trustee of an express trust.* Fla. Stat. § 733.609

d. Liability:

i. Breach of Fiduciary Duty. Fla. Stat. § 733.609: A personal representative’s fiduciary duty is the same as the fiduciary duty of a trustee of an express trust, and a personal representative is liable to interested persons for damage or loss resulting from the breach of this duty.

ii. Administrator ad Litem. Fla. Stat. § 733.308 allows for the appointment of an administrator ad litem when the estate must be represented and the personal representative is unable to do so.

iii. Removal. Fla. Stat. § 733.504 provides removal as a remedy when the PR holds or acquires a conflict or adverse interests against the estate that will or may interfere with the administration of the estate as a whole.

iv. Co-PRs. Fla. Stat. § 733.615: Where action by a majority of the joint personal representatives appointed is authorized, a joint personal representative who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise, and a dissenting joint personal representative is not liable for the consequences of an action in which the dissenting personal representative joins at the direction of the majority of the joint personal representatives, if the dissent is expressed in writing to the other joint personal representatives at or before the time of the action.

v. Fees! Fla. Stat. § 733.609: In all actions for breach of fiduciary duty or challenging the exercise of or failure to exercise a personal representative’s powers, the court shall award taxable costs as in chancery actions, including attorney’s fees.

vi. Exculpation? Fla. Stat. § 733.620: A term of a will relieving a personal representative of liability to a beneficiary for breach of fiduciary duty is unenforceable to the extent that the term: (a) Relieves the personal representative of liability for breach of fiduciary duty committed in bad faith or with reckless indifference to the purposes of the will or the interests of interested persons; or (b) Was inserted into the will as the result of an abuse by the personal representative of a fiduciary or confidential relationship with the testator.

e. Case Law
i. *In re Estate of Lamb*, 763 So. 2d 363 (Fla. 4th DCA 1998). The decedent, Walker Lamb, was the sole owner of a home that he left to his third wife, Eleanor Lamb. The personal representatives of the estate, the decedent’s sons from a prior marriage, refused to convey the home to the widow based on the grounds that she allegedly breached the pre-nuptial agreement with their dad. The trial court ultimately ruled in the widow’s favor and the personal representatives sought reimbursement for the real estate taxes paid during the several years of litigation. The widow claimed that but for the delays by the PRs, she would have sold the home and voided the real estate tax liability, which ultimately totaled in excess of $30,000. The trial court held an evidentiary hearing and determined that the actions taken by the personal representatives were in bad faith and constituted a breach of fiduciary duties. The trial court concluded a surcharge would have been appropriate in that situation and the PRs were not entitled to reimbursement as a result. The Fourth DCA affirmed.

ii. *Kravitz v. Levy*, 973 So.2d 1274 (Fla. 4th DCA 2008). A beneficiary filed suit against the Personal Representative of his uncle’s estate for breach of fiduciary duties, among other things. After investigation, he alleged that the PR transferred estate property on three different occasions and failed to account for the proceeds from those transfers. He also alleged that the PR failed to account for proceeds received from rental property income and failed to account for the satisfaction or other disposition of mortgages owned by the estate. Essentially, the PR had failed to consult with the beneficiary in anyway during the estate administration. The defendants filed a motion to dismiss based on the statute of limitations and the trial court granted their motion. The Fourth District reversed and held that a claim may be brought against a personal representative in his individual capacity for breach of fiduciary duty to the estate even after discharge when the claim involves wrongfully withheld assets of which the beneficiary had no notice. Further, because there was no evidence the PR was ever discharged in this case, the Court noted that the PR continues to act in his or her representative capacity and continues to manage the property of the estate for the benefit of the devisees until discharge.
TRUST ADMINISTRATION: WHAT ELDER LAW ATTORNEYS NEED TO KNOW

By

Darby Jones
St. Petersburg
THREE LEGAL DUTIES FRAMING TRUST ADMINISTRATION: DUTY OF LOYALTY

- Loyalty is at the heart of the fiduciary relationship.
- A trustee must operate without conflict and act in Beneficiary’s best interest.
- A trustee must perform duties with trust and confidence.
DUTY TO PROTECT ASSETS

- What does “protect” really mean?
- Act prudently: Prudent Investor Rule. This is more about a trustee’s conduct than the appropriateness of the particular investment.
- Diversification.
- A trustee must take into account the purposes and terms of the trust, the distribution requirements and other relevant circumstances.
- Possibly gross negligence if a trustee diversifies and reinvests without inquiry into the beneficiary’s needs for income or support.

DUTY OF CONFIDENTIALITY

- Possibly the hardest duty of them all.
- Open and clear communication is a good indicator that the trustee is acting in good faith and is a good defense.
- Be careful to whom you communicate and how.

DRAFTING FOR SMOOTH ADMINISTRATION

- “Avoiding Probate” should not wag the estate planning dog.
- Spend time discussing who should be the trustee…responsibilities, duties.
- Blended family? Watch out.
- Avoid serving as the named fiduciary.
- Always have successors in mind.
- Do not draft Joint Trusts
AND YET MORE SMOOTH ADMINISTRATION....

- Successor language. Read it. Make sense?
- Compensation
- Lifestyle issues (beyond HEMS)
- Discretionary authority
- Drug and behavior modification language
- Termination language
- Definition of “Trustee”
  - Corporate, Independent, Professional, Individual, etc.

EVEN MORE SMOOTHNESS.....

- Help your Trustee understand who the Qualified Beneficiaries are.
- Use Designated Representatives!!!
- Help your Trustee manage the “sole benefit rule.”
- Prepare a trust summary and trust memo for your Trustee. (sample trust memo enclosed)
- Mandatory Duties
- Include the proposed fiduciary if possible.

HOT SPOTS FOR YOUR TRUSTEE

- Careful drafting is needed for unusual or specialty assets in a trust:
  - Real Estate
  - Businesses
  - Animals
  - Farms
- Draft to avoid common litigation issues:
  - Fees or compensation
  - Calculation of distributions
  - Discretionary decision making
  - Competent investment management
WHAT IS A “PROFESSIONAL FIDUCIARY?”

• It is not the “practice of law.”
• Licensed?  Regulated?
• Hourly? Percentage?
• Experience?
• What kind of insurance?
• Bonding?
• Employees?
• Difference between a Corporate Trustee and a Professional Trustee?

POSSIBLE TRENDS?

• Trust Protectors?
  • Use sparingly and limit scope.
• Delegation of Investment Authority?
  • For some trustees this may be required, if that trustee lacks the necessary skill or experience.
• Directed Trusts?
  • May be the answer to the concentration or lack of diversification problem, or with handling special assets.
• Voluntary Guardianships?
  • May help when you have a “battle of the POAs”.
• Limited Power of Attorneys?
  • Use sparingly, and carefully. But sometimes can be helpful in avoiding a Guardianship.

TIPS AND IDEAS

• Have the Fiduciary Account to someone, even an Agent in a POA should account. i.e. Fiduciary shall provide attorney with all invoices and annual accountings, summary, or records.
• Include the proposed fiduciary in the drafting process, if possible.
• Incorporate “lifestyle” protection into your documents (both POAs and Trusts).
SAMPLE TRUST MEMO

- Date Name as Trustee:
- Drafting Attorney:
- Attorney for Trustee:
- 60 Day Letter:
- Date: 
- Recipients:
- Text Summary:
- Title:
- Purpose of Trust:
- Term of Trust:
- Distribution Requirements:
- Ascertainable standard:
- Trustee’s discretion: (what standard, what page and paragraph)
- Trust Protector:
- Designated Representative:

SAMPLE TRUST MEMO, CONT.

- Beneficiaries (address, DOB, SSN, contact #)
  - Current:
  - Specific Distributions:
  - Contingent, per combined agreement:
  - Other:
- Annual Accounting:
  - Qualified Beneficiaries (address, DOB, SSN, contact #): per combined agreement:
- Investment Management:
  - Corpus of Trust:
  - Investment Account: (where)
  - Real Estate:
  - Investment Management:
  - Life expectancy of beneficiary (buffer of 5 or 10 years)
  - Any targeted remainder value (reserve generally 1/3)
  - Expected rate of return
  - Reasonable distribution rate (PV: current value, FV: reserve), N (years), 1%=...

SECTION 415.1034 FLORIDA STATUTES

- Mandatory reporting of abuse, neglect and exploitation
- ANY PERSON who knows or has reasonable cause to suspect that a vulnerable adult is being abused, neglected, or exploited SHALL immediately report it to Florida Abuse Hotline (1-800-96ABUSE)
When you need someone to trust!
"Proudly serving the fiduciary needs of families"
MANAGING SOMEONE ELSE’S MONEY

Help for trustees under a revocable living trust in Florida
About the Consumer Financial Protection Bureau

The Consumer Financial Protection Bureau, or CFPB, is focused on making markets for consumer financial products and services work for consumers—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products. We empower consumers to take more control over their financial lives.

The CFPB’s Office for Older Americans is the only federal office dedicated to the financial health of Americans age 62 and over. Along with other agencies, the Office works to support sound financial decision-making and to prevent financial exploitation of older adults. To help people (including family members) with legal authority to handle an older person’s money, the Office contracted and worked closely with the American Bar Association Commission on Law and Aging (ABA Commission) and state professionals to prepare this guide.*

Though the guide was developed by the ABA Commission, it is not intended to provide legal advice or serve as a substitute for your own legal counsel. If you have questions or concerns, we recommend that you seek the guidance of an appropriate legal professional.

*Florida professionals who worked on this guide are Kathy Grunewald, Sarah Halsell, Shannon Miller, and Anne Swerlick.
What’s inside

About the Consumer Financial Protection Bureau

Why read this guide?
What is a fiduciary?
Revocable living trust questions and answers

Four basic duties of a fiduciary
Duty 1 | Act only in Rose’s best interest
Duty 2 | Manage the money and property in the trust carefully
Duty 3 | Keep the trust property separate
Duty 4 | Keep good records

More things you should know
What if there are other fiduciaries?
Government benefits require special fiduciaries
More than one beneficiary?
How can you avoid problems with family or friends?
What should you know about working with professionals?

Watch out for financial exploitation
Look for these common signs of financial exploitation
What can you do if Rose has been exploited?

Be on guard for consumer scams
How can you protect Rose from scams?
What can you do if Rose has been scammed?

Where to go for help
Local and state agencies
Federal agencies
For legal help
For accounting help
Why read this guide?

Like many people, you may never have been a trustee under a revocable living trust before. That’s why we created *Managing someone else’s money: Help for trustees under a revocable living trust in Florida*. This guide will help you understand what you can and cannot do in your role as a **trustee**. In that role, you are a **fiduciary**. For this guide, a fiduciary is anyone named to manage money or property for someone else. You’ll find brief tips to help you avoid problems and resources for finding more information.

This guide is for family and friends serving as a trustee, not for professionals or organizations. The guide does not give you legal advice. Talk to a lawyer if you have questions about your duties.

If you want to learn about *making a revocable living trust*, this guide is not designed for you. Talk to a lawyer or read other guides from The Florida Bar, [www.floridabar.org](http://www.floridabar.org), or others.

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**Let’s start with a scenario about how you might have become a trustee**

Your family member or friend is worried that she will get sick and will not be able to pay her bills or make other decisions about her savings and her house. For this guide, we will call her Rose. Rose has signed a legal document called a **living trust**. In it, she names you as her **trustee**.

When she set up the trust, she should have transferred ownership of some or all her money and property from her name to the name of the trust. As her trustee, you now have the power to make decisions for Rose’s benefit about the money and property in the trust.

The law gives you a lot of responsibility. You are now a **fiduciary** with **fiduciary duties**.
What is a fiduciary?

Since you have been named to manage money or property for someone else, you are a fiduciary. The law requires you to manage the money and property in the trust for Rose’s benefit, not yours. It does not matter if you are managing a lot of money or a little. It does not matter if you are family or not.

The role of a fiduciary carries with it legal responsibilities. When you act as a fiduciary for Rose, you have four basic duties that you must keep in mind:

1. Act only in Rose’s best interest.
2. Manage the money and property in the trust carefully.
3. Keep the trust property separate from yours.
4. Keep good records.

As a fiduciary, you must be trustworthy, honest, and act in good faith. If you do not meet these standards, you could be removed as a fiduciary, sued, or you might have to repay money. It is even possible that the police or sheriff could investigate you and you could go to jail. That’s why it’s always important to remember: It’s not your money!

Revocable living trust questions and answers

What is a revocable living trust?

A revocable living trust is a legal document. Rose made a revocable living trust to give you legal authority to make decisions about her money or property in the trust if she cannot make decisions herself because she is sick or injured. She also made the revocable living trust to say who will get her money or property after she dies. In the rest of this guide we use “living trust” or “trust” as shorthand for “revocable living trust.”

Different types of fiduciaries exist

In your role as trustee, you may act as or deal with other types of fiduciaries. These may include:

- Agents under a power of attorney—someone names an agent to manage their money and property in case they are not able to do it.
- Representative payees or, for veterans, VA fiduciaries—a government agency names them to manage government money that is paid to someone.
- Guardians of the property—a court names them to manage money and property for someone who needs help.

Other guides explaining the duties of these fiduciaries are at: [www.consumerfinance.gov/managing-someone-elses-money](http://www.consumerfinance.gov/managing-someone-elses-money).
There are three roles under a revocable living trust.

- The person who makes the trust may be called the **grantor, settlor, or trustor**.

- The person who makes decisions about the money or property in the revocable living trust is called the **trustee**. A trustee can be an individual or a financial institution. If there is more than one, they are **co-trustees**. A **successor trustee** may also be named and acts only if a trustee can no longer fulfill that role. Rose can name herself as trustee and you as co-trustee immediately, or you may be a successor trustee who can act when she can no longer make decisions.

- A person who receives money or property from the revocable living trust is called a **beneficiary**. Rose may be the only beneficiary while she is alive, or she may name co-beneficiaries who receive some money or property from the revocable living trust before she dies. The people who receive money or benefits from the revocable living trust after Rose dies are called residuary beneficiaries.

**When does a trustee’s authority begin?**

A trustee’s authority begins only when the trust says that authority begins. For example, the trust might specify that that you can make decisions about the money and property only after Rose has lost the capacity to manage her property on her own.

**What property does a trustee manage?**

The trustee has authority only over property actually transferred to the revocable living trust. A living trust is ineffective unless Rose puts her money or property into it. To transfer money or property into the trust, Florida law requires Rose to change ownership of her money or property from her name to the name of the revocable living trust (for example, the “Rose Roe Living Trust”); or to the name of the trustee who is clearly identified as trustee. As trustee, you will have the legal authority to spend and invest the money and property in the revocable living trust for the benefit of Rose and any other beneficiaries as the trust directs. You do not have legal authority over any money or property that is not in the trust.
Can a revocable living trust be changed or revoked?
As long as Rose still can make her own decisions and the terms of the trust allow her to do so, she can change or end (revoke) the revocable living trust. Revocable trusts typically become irrevocable when certain events identified in the trust happen, such as when Rose becomes incapacitated or dies.

When do your responsibilities end?
Your authority and responsibilities end if:

- Rose names a new trustee
- Rose revokes the trust
- The terms of the trust say it ends at a given point in time, or
- A court removes you as trustee.

What if you think a change in the trust was a result of fraud or abuse?
If you think Rose does not understand the decision to take away your authority or end the trust, then talk to a lawyer, contact adult protective services, or call the police or sheriff.

 Aren’t there other types of trusts?
Yes. Other types of trusts exist and people have different reasons for making trusts. This guide only covers living trusts.

Living trusts most likely have family or a friend as a trustee. Other types of trusts often have professional trustees, such as a lawyer or bank trust officer.
Four basic duties of a fiduciary

Duty 1 | Act only in Rose’s best interest

Because you are dealing with the trust’s money and property, your duty is to make decisions that are best for Rose and any co-beneficiaries. This means you must ignore your own interests and needs, or the interests and needs of other people.

To help act in Rose’s best interest, follow these guidelines:

- **Read the living trust document and do what it says.** Your authority is limited to what the document and Florida law allow. Florida law spells out several powers every trustee has unless limited by the trust document: for example the power to purchase or sell trust property and the power to hire professional advisors. A Florida trustee also has some duties that cannot be changed by the terms of a trust, such as duties to disclose trust information to beneficiaries. Talk to a lawyer if there is anything you don’t understand. Follow Rose’s directions in the trust document even if you have the best intentions in wanting to do something different.

- **Understand when your duty as trustee becomes effective.** The living trust may say that you become a trustee or a co-trustee right away or only when Rose can no longer make her own decisions. Check to see if the document says how you will know when Rose can no longer make her own decisions. If you are still unsure, get legal advice.

- **Avoid conflicts of interest.** A conflict of interest happens if you make a decision about Rose’s money or property in the trust that might benefit you or someone else at Rose’s expense. As a fiduciary, you have a strict duty to avoid conflicts of interest. If you are uncertain about whether a conflict of interest exists, seek legal advice.
Don’t borrow, loan, or give the trust’s money to yourself or others. Even if the trust document allows gifts or loans, consider whether the trust can afford the gifts or loans, and whether they are in line with what Rose would have wanted. A lawyer can advise you on any effects on Rose’s taxes or on her plans to give away her property when she dies.

Avoid changing Rose’s plans for giving away her money or property when she dies. There may be rare situations in which changing Rose’s plans would be in her best interest. But you should get legal advice to make sure that the trust document or state law allows that.

Be cautious in paying yourself for the time you spend acting as Rose’s trustee. If the trust does not specify your compensation, Florida law permits “compensation that is reasonable under the circumstances.” If the trust spells out how much you are to be compensated, you can follow the trust’s instructions, but you or any beneficiary could seek court review if you feel the compensation is too low or high. In all cases, you need to show that your fee is reasonable. Carefully document how much time you spend and what you do, and follow state rules regarding trustee’s fees.

Duty 2 | Manage the money and property in the trust carefully

As Rose’s trustee, you might pay bills, oversee bank accounts, and pay for things she needs. You might also make investments, pay taxes, collect rent or unpaid debts, get insurance if needed, and do other things written in the living trust or required by state law.

You have a duty to manage the money and property in the trust very carefully. Use good judgment and common sense. As a fiduciary, you must be even more careful with the trust’s money than you might be with your own!
Follow these guidelines to help you make careful decisions:

- **List the trust’s money, property, and debts.** You need to know what Rose’s trust owns and owes to make careful decisions. Your list might include:
  - Checking and savings accounts;
  - Cash;
  - Pension, retirement, annuity, rental, public benefit, or other income;
  - Real estate;
  - Cars and other vehicles;
  - Insurance policies;
  - Stocks and bonds;
  - Jewelry, furniture, and any other items of value;
  - Unpaid credit card bills and other outstanding loans.

Florida law requires you to share the list of trust assets with beneficiaries. The trust document may also require you to share the list with certain others.

- **Protect the trust’s property.** Keep the trust’s money and property safe. You may need to put valuable items in safe deposit boxes, change locks on property, and make sure her home or other property is insured. Make sure bank accounts earn interest if possible and have low or no fees. Review bank and other financial statements promptly. If the trust has real estate, keep it in good condition.

- **Invest carefully.** Talk to a financial professional or lawyer about safe and legal ways to invest the trust’s assets. The Securities and Exchange Commission (SEC) provides tips on choosing a financial professional at [www.sec.gov/investor/alerts/ib_top_tips.pdf](http://www.sec.gov/investor/alerts/ib_top_tips.pdf). Discuss choices and goals for investing based on Rose’s needs and values.

- **Pay bills and taxes on time.**

- **Cancel any insurance policies that Rose does not need.**

- **Collect debts.** Find out if anyone owes the trust money, and try to collect it.
Can Rose get any benefits?

Find out if Rose is eligible for any financial or health care benefits from an employer or a government. These benefits might include pensions, disability, Social Security, Medicare, Medicaid, Veterans benefits, housing assistance, or food stamps (now known as Supplemental Nutrition Assistance Program or SNAP). Use the National Council on Aging benefits check-up at: www.BenefitsCheckUp.org.

Help her apply for those benefits. The Area Agency on Aging where Rose lives can help you find information. Find the local Area Agency on Aging through the Department of Elder Affairs at http://elderaffairs.state.fl.us/index.php.

Medicaid is complicated

Get legal advice and be very careful about decisions that may affect Rose’s eligibility for Medicaid. The Medicaid program provides medical assistance and long-term care to low-income people. For information, visit www.myflfamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid.

Duty 3 | Keep the trust property separate

Never mix money or property in Rose’s trust with your own or someone else’s. Mixing money or property makes it unclear who owns what. Confused records can get you in trouble with Rose’s family and also with government agencies such as adult protective services and the police or sheriff.

Follow these guidelines:

- **Separate means separate.** Never deposit the trust’s money into your own or someone else’s bank account or investment account.

- **Never hold title to the trust’s money and property in your own name.** Every document should show the owner of the assets as either the Rose Roe Living Trust or your name as trustee of the Rose Roe Living Trust. This is so other people can see right away that the money and property belongs to the trust and not to you.

- **Know how to sign as trustee.** Sign all checks and other documents relating to the trust’s money or property to show that you are Rose’s trustee. For example, you might sign “John Doe, as trustee for the Rose Roe Living Trust.” Never just sign “Rose Roe.”
Pay Rose’s expenses from the trust funds, not yours. Spending your money and then paying yourself back makes it hard to keep good records. If you really need to use your money, keep receipts for the expense and maintain a good record of why, what, and when you paid yourself back.

Duty 4 | Keep good records

You must keep true and complete records of the money and property in Rose’s living trust. Florida law requires trustees to give accountings to beneficiaries when the person who made the trust becomes incapacitated and annually thereafter.

An accounting is a report that identifies the trust assets and their value and shows all financial transactions during the reporting period.

Practice good recordkeeping habits:

- **Keep a detailed list of everything the trust receives and spends.** Records should include amount of checks written or deposited, dates, reasons, names of people or companies involved, and other important information.

- **Keep receipts and notes, even for small expenses.** For example, write “$50, groceries, ABC Grocery Store, May 2” in your records, soon after you spend the money.

- **Avoid paying in cash.** Try not to pay Rose’s expenses with cash. Also, try not to use an ATM card to withdraw cash or write checks to “Cash.” If you need to use cash, be sure to keep receipts and notes.

- **Getting paid?** If you are being paid as trustee, be sure you are charging a reasonable fee. Keep detailed records, as you go along, of what work you did, how much time it took, when you did it, and why you did it.
More things you should know

What if there are other fiduciaries?

Co-trustees

Rose may have named herself as co-trustee with you. Or she may have named someone else to act as co-trustee with you. The living trust document should say whether you and any co-trustees can make decisions alone or must agree on decisions, either unanimously or by majority rule. If no instruction is given, Florida law allows decisions by majority rule.

Either way, you must coordinate with any co-trustee and share information about decisions. Even if you and a co-trustee don’t agree on all decisions, you cannot let a co-trustee do something that harms Rose. You are still responsible for her and must act in her best interest.

Successor trustees

Rose may have named a successor trustee to act for her if you are not able to be the trustee. A successor trustee has no authority if you are still willing and able to act as trustee.

Other types of fiduciaries

Other fiduciaries may have authority to make decisions for Rose. For example, she may have a guardian of the property, a representative payee who handles Social Security benefits, or a VA fiduciary who handles veterans benefits. It is important to work with these other fiduciaries, and keep them informed.
Government benefits require special fiduciaries

As trustee, you cannot manage Rose’s government benefits such as Social Security or Veterans benefits, unless:

1. Her benefits are paid directly into her trust, or
2. You have been appointed by the government agency as, for example, a representative payee or VA Fiduciary to handle these benefits. For more information, contact the government agency.

More than one beneficiary?

If Rose named more than one beneficiary of her living trust, then you have fiduciary duties to each beneficiary. The living trust document should say what your duties are to the beneficiaries. Florida law requires the trustee to act impartially but give “due regard to the beneficiaries’ respective interests.”

You must always be impartial when you carry out your duties as Rose’s trustee. You cannot show any bias toward any one beneficiary. Because each beneficiary’s needs are different, you do not have to treat everyone the same. But you must act in each beneficiary’s best interest in an unbiased way.

Talk to a lawyer about what your duties are if Rose’s trust has named more than one beneficiary.

How can you avoid problems with family or friends?

Family or friends may not agree with your decisions about money and property in Rose’s trust. To help reduce any friction, follow the four duties described above and the guidelines we’ve given you.

Sharing information with certain beneficiaries is required by Florida law. Sharing information with other family or friends may help to avoid conflict, but only if permitted by the terms of the trust. It may be easier to deal with questions about a decision when it happens than to deal with suspicion and anger that may build over a long time. In the end, you have to make the final decisions. Some family or friends may be so difficult that it is better not to share information with them, unless required. Use your best judgment.

If family or friends don’t agree with your decisions, try to get someone to help sort it out—for example, a family counselor or mediator. See Where to go for help on page 22 of this guide.
What should you know about working with professionals?

In managing the trust’s affairs, you may need help from professionals such as lawyers, brokers, financial advisors, accountants, real estate agents, appraisers, psychologists, social workers, doctors, nurses, or care managers. You can pay them with money from the trust.

If you need help from any professionals, remember these tips:

- **Check on the professional’s qualifications.** Many professionals must be licensed or registered by a government agency. Check credentials with the government agency. Make sure the license or registration is current and the professional is in good standing. Check the person’s complaint history.

- **Interview the professional thoroughly and ask questions.**

- **Review contracts carefully before signing.** Before hiring any professionals, get their proposed plan of work and expected fee.

- **Make your own decisions based on facts and advice.** Listen to their advice, but remember you are the decision-maker.
Watch out for financial exploitation

Family, friends, neighbors, caregivers, fiduciaries, business people, and others may try to take advantage of Rose. They may take her money without permission, neglect to repay money they owe, charge her too much for services, or just not do things she has paid them to do. If any of these happen, it may be examples of financial exploitation or financial abuse. As Rose’s trustee, you should help protect her and know the signs of financial exploitation for five important reasons:

1. Rose may still control some of her funds and could be exploited;
2. Even if Rose does not control any of her funds, she still may be exploited;
3. Rose may have been exploited already, and you may still be able to do something about that;
4. People may try to take advantage of you as Rose’s trustee; and
5. Knowing what to look for will help you avoid doing things you should not do, protecting you from claims that you have exploited Rose.

Look for these common signs of financial exploitation

- You think some money or property is missing.
- Rose says that some money or property is missing.
- You notice sudden changes in Rose’s spending or savings. For example, she:
  - Takes out lots of money from the bank without explanation;
  - Tries to wire large amounts of money;
  - Uses the ATM a lot;
  - Is not able to pay bills that are usually paid;
  - Buys things or services that don’t seem necessary;
  - Puts names on bank or other accounts that you do not recognize or that she is unwilling or unable to explain;
What can you do if Rose has been exploited?

- Call the emergency 911 number if Rose is in immediate danger.
- Call the Florida Abuse Hotline at 1-800-962-2873 to make a report to Adult Protective Services (APS). Florida law requires you to make a report to APS if you suspect that Rose has been exploited. The role of APS is to investigate reports and to provide or arrange for services to victims.
- If you think that Rose has been or will be the victim of a crime, call the local police or sheriff.
- Alert Rose’s bank or credit card company.
- Call the local State Attorney or the Florida Attorney General.
- Call the Long-Term Care Ombudsman Program or the Medicaid Fraud Control Unit if Rose is in a nursing home or assisted living.
- Consider talking to a lawyer about protecting Rose from more exploitation or getting back money or property taken from her.
- Each agency or professional has a different role, so you may need to call more than one. For more information, see Where to go for help on page 22 of this guide.
Be on guard for consumer scams

As Rose’s trustee, you should be alert to protect her money from consumer scams as well as financial exploitation. Criminals and con artists have many scams and change them all the time. They often seek unsuspecting people who have access to money. Learn to spot consumer scams against Rose—and against you as her trustee.

How can you protect Rose from scams?

Consumer scams happen on the phone; through the mail, e-mail, or the Internet; and they occur in person, at home, or at a business. Here are some tips:

- **Help Rose put her number on the National Do Not Call Registry.** Go to [www.donotcall.gov](http://www.donotcall.gov) or call 1-888-382-1222.

- **Don’t share numbers or passwords for Rose’s accounts, credit cards, or Social Security,** unless you know whom you’re dealing with and why they need the information.

- **After hearing a sales pitch, take time to compare prices.** Ask for information in writing and read it carefully.

- **Too good to be true?** Ask yourself why someone is trying so hard to give you a “great deal.” If it sounds too good to be true, it probably is.

- **Watch out for deals that are only “good today” and that pressure you to act quickly.** Be suspicious if you are not given enough time to read a contract or get legal advice before signing. Also watch out if you are told that you need to pay the seller quickly, for example by wiring the money or sending it by courier.

- **Never pay up front for a promised prize.** Suspect a scam if you are required to pay fees or taxes to receive a prize or other financial windfall.
What can you do if Rose has been scammed?

If you suspect a scam, get help. Contact a local, state, or federal agency, depending on the type of scam. You may also need to talk to a lawyer.

Local agencies to call are Adult Protective Services, the Long-Term Care Ombudsman Program, the Area Agency on Aging, the police or sheriff, or the Better Business Bureau.

State agencies to call are the Florida Office of the Attorney General or the Florida Department of Agriculture and Consumer Services.

Call a federal agency if scammers are in other states or countries. Federal agencies are the Consumer Financial Protection Bureau, the FBI, the Federal Trade Commission, or the U.S. Postal Inspection Service.

Each of these agencies and professionals has a different role so you may need to call more than one.

For more information, see Where to go for help on page 22 of this guide.

Watch for signs Rose already has been scammed. For example, does she receive a lot of mail or e-mail for sweepstakes? Has she paid people you don't know, especially in other states or countries? Has she taken a lot of money out of the bank while she was with someone she recently met? Does she have a hard time explaining how she spent that money? Is she suddenly unable to pay for food, medicine, or utilities?
### Common consumer scams

<table>
<thead>
<tr>
<th>SCAM TYPES</th>
<th>DESCRIPTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relative in need</td>
<td>Someone who pretends to be a family member or friend calls or e-mails you to say they are in trouble and need you to wire money right away.</td>
</tr>
<tr>
<td>Charity appeals</td>
<td>You get a call or letter from someone asking for money for a fake charity—either the charity does not exist or the charity did not call or write to you.</td>
</tr>
<tr>
<td>Lottery or sweepstakes</td>
<td>You get a call or e-mail that you have a chance to win a lot of money through a foreign country’s sweepstakes or lottery. The caller will offer tips about how to win if you pay a fee or buy something. Or the caller or e-mail says you already have won and you must give your bank account information or pay a fee to collect your winnings.</td>
</tr>
<tr>
<td>Home improvement</td>
<td>Scammers take money for repairs and then they never return to do the work or they do bad work. Sometimes they break something to create more work or they say that things need work when they don’t.</td>
</tr>
<tr>
<td>Free lunch</td>
<td>Scammers invite you to a free lunch and seminar, and then pressure you to give them information about your money, and to invest the money with them. They offer you “tips” or “guaranteed returns.”</td>
</tr>
<tr>
<td>Free trip</td>
<td>Scammers say you’ve won a free trip but they ask for a credit card number or advance cash to hold the reservation.</td>
</tr>
<tr>
<td>Government money</td>
<td>You get a call or letter that seems to be from a government agency. Scammers say that if you give a credit card number or send a money order, you can apply for government help with housing, home repairs, utilities, or taxes.</td>
</tr>
<tr>
<td>Drug plans</td>
<td>Scammers pretend they are with Medicare prescription drug plans, and try to sell Medicare discount drug cards that are not valid. Companies with Medicare drug plans are not allowed to send unsolicited mail, emails, or phone calls.</td>
</tr>
<tr>
<td>Identity theft</td>
<td>Scammers steal personal information—such as a name, date of birth, Social Security number, account number, and mother’s maiden name—and use the information to open credit cards or get a mortgage in someone else’s name.</td>
</tr>
<tr>
<td>Fake “official” mail</td>
<td>Scammers send letters or e-mails that look like they are from a legitimate bank, business, or agency to try to get your personal information or bank account number.</td>
</tr>
</tbody>
</table>
The resources below are for Florida. For information on other states, see the national version of this guide at www.consumerfinance.gov/managing-someone-elses-money.

### Local and state agencies

**Adult Protective Services**
Adult Protective Services (APS) receives and investigates reports of suspected elder or adult abuse, neglect, or exploitation. To make a report, contact the Florida Abuse Hotline:

1-800-96-ABUSE (1-800-962-2873)
TDD: 1-800-453-5145
FAX: 1-800-914-0004

www.myflfamilies.com/service-programs/adult-protective-services/report-abuse

**Aging and Disability Resources**
State and local agencies can provide information about aging and disability services and whether there are any support groups for fiduciaries or caregivers. The Department of Elder Affairs administers programs and services for elders across the state of Florida through 11 Area Agencies on Aging. These agencies operate Aging and Disability Resource Centers (ADRCs). The ADRCs provide information and assistance about state and federal benefits, as well as available local programs and services.

1-800-96-ELDER (1-800-963-5337)
www.elderaffairs.state.fl.us/doea/arc.php

### Attorney General
The Florida Office of the Attorney General can take action against consumer fraud.

1-866-966-7226 (toll-free in Florida)
www.myfloridalegal.com

### Better Business Bureau
The Better Business Bureau can help consumers with complaints against businesses.

BBB of Central Florida, Inc.
www.centralflorida.bbb.org
info@centralflorida.bbb.org
Phone: 1-407-621-3300
Fax: 1-407-786-2625

BBB of Northeast Florida and The Southeast Atlantic
http://www.bbb.org/north-east-florida/
info@bbbnefl.org
Phone: 1-904-721-2288
Fax: 1-904-721-7373

BBB of Northwest Florida
www.nwfl.bbb.org
info@nwfl.bbb.org
Phone: 1-850-429-0002
Fax: 1-850-429-0006

BBB of Southeast Florida & the Caribbean (office located in West Palm Beach)
www.Seflorida.bbb.org
info@wpbbb.com
Phone: 1-561-842-1918
Fax: 1-561-845-7234
BBB of Southeast Florida & the Caribbean (office located in Miami Lakes)
www.bbbsotheastflorida.org
mayling@wpbbb.com
Phone: 1-305-827-5363
Fax: 1-305-827-5850
BBB of Southeast Florida & the Caribbean (office located in Stuart)
www.bbbsotheastflorida.org
info@wpbbb.com
Phone: 1-772-223-1492
Fax: 1-772-463-2439

BBB of West Florida
www.westflorida.bbb.org
info@bbbwestflorida.org
Phone: 1-727-535-5522
Fax: 1-727-539-6301

Guardianship Association
The Florida State Guardianship Association provides education and opportunities for networking.
1-800-718-0207
http://www.floridaguardians.com

Long-Term Care Ombudsman Program
Long-term care ombudsmen identify, investigate, and resolve complaints about long-term care. The Florida Long-Term Care Ombudsman Program is the statewide office.
1-888-831-0404
http://ombudsman.myflorida.com

This webpage has a list of local long-term care ombudsman programs:

Mediators
Find a listing of local mediators on the website of the national Association for Conflict Resolution. Mediation can help resolve disputes and may sometimes be an alternative to legal action.
www.acrnet.org (Click on “Membership,” then “Membership Directory,” then “Search”)

Medicaid/Medical Assistance
In Florida the Department of Children and Families enrolls participants in Medicaid.
1-866-762-2237
www.myffamilies.com/service-programs/access-florida-food-medical-assistance-cash/medicaid

Medicaid Fraud Control Unit
The Medicaid Fraud Control Unit, in the Florida Office of the Attorney General, investigates and prosecutes abuse and fraud by health care providers.
1-866-966-7226
www.myfloridalegal.com/pages.nsf/Main/ebc480598bbf32d885256cc6005b54d1

Police or Sheriff
Find a law enforcement agency by checking the local directory or visiting:
www.fdle.state.fl.us/Content/getdoc/8f07d091-0e0e-4633-856a-c1ed9211dc0e/Criminal-Justice-Agency-Links.aspx
Federal agencies

Numerous federal agencies play a role in combatting fraud and abuse and educating consumers. Contact them for more information.

Consumer Financial Protection Bureau
1-855-411-CFPB (1-855-411-2372)
www.consumerfinance.gov

Do Not Call Registry
1-888-382-1222
www.donotcall.gov

Federal Bureau of Investigation
www.fbi.gov/scams-safety

Federal Trade Commission
1-877-FTC-HELP (1-877-382-4357)
www.consumer.ftc.gov

Financial Fraud Enforcement Task Force
www.stopfraud.gov

Postal Inspection Service
1-877-876-2455
https://postalinspectors.uspis.gov/

Social Security Administration
1-800-772-1213
www.socialsecurity.gov/payee

Department of Veterans Affairs
1-888-407-0144
www.benefits.va.gov/fiduciary

For legal help

Free legal services for people over age 60
Find local programs that provide free legal representation to people over age 60 by contacting the Florida Senior Legal Helpline. The Helpline provides free legal advice and brief services by telephone to eligible Florida residents age 60 and older, for civil (not criminal) legal problems. The Helpline also helps seniors find legal providers in their communities and makes referrals to state and local regulatory agencies.

1-800-96-ELDER (1-800-963-5337)

Free legal services for low-income people
Find local programs that provide free legal help to low-income people through FloridaLawHelp.org, a website administered by Florida Legal Services. The website also includes general resources and self-help forms on a broad range of civil legal issues.

www.FloridaLawHelp.org

Free legal services for people with disabilities
Florida’s program that provides free legal help for people with disabilities is Disability Rights Florida.

www.disabilityrightsflorida.org

Fee-for-service lawyers
This is a web page sponsored by the American Bar Association. It provides information about how to find a lawyer in each state. It also has information about legal resources available in each state, how to check whether a lawyer is licensed, and what to do if you have problems with a lawyer.

www.findlegalhelp.org
The Florida Bar web page has information about finding a lawyer, legal resources available, what to do if you have problems with a lawyer, and tips for consumers. The Florida Bar also has a Lawyer Referral Service. Its lawyers charge clients $25 for the first half-hour office consultation. The Lawyer Referral Service also has an Elderly Referral Panel, which provides a free 30-minute office consultation to eligible persons. The Lawyer Referral Service is available Monday through Friday, 8:00 a.m. until 5:30 p.m.

The Florida Bar: 1-850-561-5600
Lawyer Referral Service: 1-800-342-8011
www.floridabar.org/tfb/flabarwe.nsf/b23386eb703b092d85257012005dbfef/280f5600978c20a68525788500624182

For accounting help

Accountants
Find a local certified public accountant on the website of the American Institute of CPAs.
www.aicpa.org/ForThePublic/FindACPA/Pages/FindACPA.aspx
GUARDIANSHIP

By

Steven Hitchcock
Clearwater
THE FLORIDA BAR ELDER LAW SECTION

2018 ESSENTIALS OF ELDER LAW

Essentials of Guardianship

Steven E. Hitchcock, Esq. LL.M.
Board Certified in Elder Law
LL.M. in Elder Law

Hitchcock Law Group
Clearwater, Florida
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I. Overview

The purpose of this presentation is to provide essential information regarding incapacity proceedings as well as guardianship proceedings with an emphasis on the various types of guardianship and guardians, the authority of, and duties of guardians. Types of guardianships will be discussed, as well as the role of the guardian, the power and duties of guardians, the relationship between guardians and their attorneys, the Court, and Office of Public and Professional Guardians of the Department of Elder Affairs.

In Florida, the legislature intended to make guardianship a solution of last resort. Florida Statute Section 744 et.al. addresses Guardianship, with the Florida Probate Rules controlling the process. The Florida Rules of Civil Procedure are not applicable in Guardianship proceedings except as identified in the Florida Probate Rules, or unless the Civil rules are invoked by a declaration of adversarial proceeding under the Probate Rules. Therefore, Guardianship proceedings are non-adversarial proceedings under the Florida probate rules unless the proceeding is declared adversarial either automatically by rule based upon the type of pleading filed or by declaration of a party. Florida Statutes Section 744.1012 requires that the least restrictive form of guardianship be utilized in order to assist persons who are only partially incapable of caring for their needs. The statute also requires that every person be able to participate, as much as possible, in all decisions that affect that person. It further mandates that the rights of incapacitated persons be protected and that their financial resources be well managed. All this is to be accomplished through a form of assistance that least interferes with the capacity of a person to act in his or her own behalf.

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1 My sincere thanks to Sr. Enrique Zamora, Esq. for providing me the template for preparation of these materials.

2 It is beyond the scope of this presentation to completely prepare an attorney for practice in the area of Guardianships. Reading chapter 744 in its entirety and the other statutory sections referenced within Chapter 744 is a good start.
II. Incapacity Proceedings

The incapacity and guardianship process commences with the filing of a petition to determine incapacity. In Florida such petition can be filed by any adult person. The person who is the subject of a petition to determine incapacity is known as the Alleged Incapacitated Person (AIP).

As soon as a petition to determine incapacity is filed, (within 5 days) the court appoints an examining committee and an attorney to represent the AIP. The petition must be served on and read to the AIP, notice and copies must also be given to the attorney for the AIP and served on all next of kin identified in the petition. Next of kin is defined as the person or persons who would be the heirs at law of the AIP. There is no need for the AIP to file an answer in a guardianship proceeding as the petition is deemed to be denied.

The attorney who is appointed to represent the AIP is not a guardian ad litem or an agent of the Court. Florida Statutes, Section 744.102(1) clearly defines the duties of an attorney for an AIP. It states that such an attorney represents the alleged incapacitated person and during such representation the attorney shall represent the expressed wishes of the AIP to the extent it is consistent with the rules regulating The Florida Bar. Look especially at Rule 4-1.14. This means that the attorney who is appointed to represent an Alleged Incapacitated Person must represent the AIP like a non-allegedly incapacitated in any legal proceedings. After all, the purpose of these proceedings is to determine whether or not a number of important civil rights should be taken away from the Alleged Incapacitated Person. The specific rights in question are discussed later.

A. The Examining Committee
The examining committee is a panel of medical or psychiatric practitioners who are tasked with examining the AIP and file a report with the Court giving an opinion as to the AIP’s capacity to exercise their civil rights. The examining committee consists of three members. One member must be a physician or psychiatrist. Each member must examine the AIP and the examination shall consist of three parts: (1) a physical examination, (2) a mental examination, and (3) a functional assessment of the person. The committee’s report must contain a diagnosis, a prognosis, and a recommended course of action for the AIP. The examining committee also must consult the AIP’s attending physician. If the majority of the examining committee finds that there is no need for a guardianship, the petition to determine incapacity shall be dismissed. If the petition is filed in bad faith, the court may impose costs and attorney’s fees on the Petitioner.

B. The Adjudicatory Hearing

Upon appointment of the examining committee, the court sets the date upon which the petition will be heard. The adjudicatory hearing must be conducted at least 10 days, which time period may be waived, but no more than 30 days, after the filing of the last filed report of the examining committee members, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process. The AIP has an absolute right to attend the hearing and must be present unless his or her presence is waived by the court appointed attorney. The AIP has also the absolute right to refuse to testify during the hearing. This hearing is open or closed to the public as determined by the AIP and his or her attorney, and if closed, only the petitioner and his or her attorney, and the AIP and his or her attorney have the right to be present.
Witnesses are allowed in the hearing to testify, but otherwise are excluded. When making a determination of incapacity, the reports of the examining committee should be an essential element, but not necessarily the only element, used in making the capacity and guardianship decision. Although the statutes, and in reality the Courts, give a lot of preference and deference to the reports of the examining committee, the examining committee are witnesses, and the examining committee reports are recognized a potentially being subject to a hearsay objection. The petitioner and the alleged incapacitated person may object to the introduction into evidence of all or any portion of the examining committee members’ reports by filing and serving a written objection on the other party no later than 5 days before the adjudicatory hearing. The objection must state the basis upon which the challenge to admissibility is made. If an objection is timely filed and served, the court shall apply the rules of evidence in determining the reports’ admissibility. For good cause shown, the court may extend the time to file and serve the written objection. Again, if a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition. My experience is that the Court will not allow the only testimony presented at an incapacity hearing to be that of the examining committee, there must be testimony from a person with personal knowledge of the AIP, be it a lay person or a medical professional, to testify and give factual information related to the AIP. This does not need to be the petitioner, but can be another witness.

The court must find by clear and convincing evidence that the AIP is incapacitated. If the AIP is found to be incapacitated, whether plenary or limited, the court must then consider alternatives to guardianship that meet the needs of the AIP, before the appointment of a guardian, discussed
III. Appointment of a guardian

Immediately following the petition to determine incapacity, the issue of lesser restrictive alternatives to Guardianship must be addressed by the Court. If less restrictive alternatives that meet the needs of the AIP exist, those preclude the appointment of a guardian and might forestall the appointment of any guardian. Less restrictive alternative include, but are not limited to, agents acting under a valid designation of Health Care Surrogate, Durable Power of Attorney, Trustee of a Trust containing the assets of the AIP, and lesser restrictive forms of guardianship, such as Guardian Advocacy (discussed later). If none exist that meet the needs of the AIP or only address some of the needs of the AIP, the petition to appoint a guardian is then heard by the Court. The appointment of a qualified guardian is very important and is one of the rights of the incapacitated person. (Refer to Florida Statutes Section 744.3215) Therefore, a qualified guardian must be trained to understand his/her powers and duties.

A. Less restrictive alternatives to a Guardianship.

Prior to the appointment of a guardian, the court must determine whether the ward prior to incapacity, executed a valid advance directive in accordance to Chapter 765 of the Florida Statutes, of a valid Durable Power of Attorney under Chapter 709, Florida Statutes. If a valid advance directive exists, the court must specify in the order appointing guardian and letters of guardianship what authority, if any, the guardian shall exercise over the health care surrogate. If the court is going to consider modifying or revoking the authority of the surrogate, notice must be given to that surrogate prior to the hearing. A Durable Power of Attorney that was executed
prior to the AIP’s incapacity will also be analyzed to determine if it will have continued effect or if it will be terminated in favor of a guardian. If any person initiates judicial proceedings to determine the principal’s incapacity or for the appointment of a guardian advocate, the authority granted under the power of attorney is suspended until the petition is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney. However, if the agent named in the power of attorney is the principal’s parent, spouse, child, or grandchild, the authority under the power of attorney is not suspended unless a verified motion in accordance with s. 744.3203 is also filed. Therefore, it is important to ascertain whether an AIP has executed a health care surrogate designation or durable power of attorney, and who the agent is, prior to the filing of a petition to determine incapacity. The existence of this document might obviate the need for a guardianship, or you might need take extra steps to protect the AIP in the event the agent is a bad actor, exploiter etc.

B. Who may be appointed guardian of a ward

Once the alleged incapacitated person is found to be incapacitated, he/she becomes a ward. As previously stated a ward is entitled to have a qualified and competent guardian. The guardian must be at least 18 years of age and if the person applying is not a resident of the state of Florida, he or she must be a blood relative, legally adopted child, or the spouse of the ward. Disqualified persons include those who have been convicted of a felony, who are themselves incapacitated, who have abused or neglected an elderly person, members of the examining committee who examined the AIP, or a person who provides services to the ward or is a creditor of the ward or employee of an entity that provide services to the ward. Even if a person is technically qualified under the statutes, the Court has the final decision as to who is
and is not qualified to serve and the court may refuse to appoint someone or who is “otherwise unsuitable to perform the duties of a guardian” and also the court may not appoint a guardian in any other circumstance in which a conflict of interest may occur.

C. Preference in appointment of a guardian

The court has the option to appoint any person who is qualified to act as a guardian. However, Florida Statutes Section 744.312 requires the court to give preference to any person who is related by blood or marriage to the ward.

The court is also obligated to consider the wishes of the incapacitated person as to who shall be appointed guardian. This requirement can be troublesome to the court, as the incapacitated person might wish to have a guardian who is not appropriate for the ward. The statutes require that the court considers the preference of the incapacitated person. However, the court is not required to appoint the person requested by the incapacitated person.

D. Requirements to be appointed guardian of an incapacitated person.

In addition to the filing of a specific petition for appointment of guardian, very prospective guardian must complete an application for appointment as guardian. Also, that person must undergo a credit and criminal investigation. This requirement may be waived by the court if the person is not a professional guardian. However, all professional guardians must submit to a credit and criminal investigation. Additional requirements of profession guardian are discussed below.

Each ward is entitled to a qualified guardian. In order to ensure that this requirement is met, each guardian must complete certain educational requirements. A family
guardian must undergo a minimum of 8 hours of instruction and training covering the legal duties of responsibilities of the guardian, the rights of the ward, the availability of local resources to aid the ward, and the preparation of the annual plans and annual guardianship reports which will include a financial accounting of the ward’s property, unless waived by the Court.

A professional guardian must take a 40 hours course and pass a competency exam in order to qualify to be appointed guardian of more than two wards that are not related to the guardian. Further a professional guardian who has served as an emergency temporary guardian for this AIP may not be appointed as the permanent guardian unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian. The court may waive the limitations of this paragraph if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify waiving the limitations. Also, the court may not give preference to the appointment of a person based solely on the fact that such person was appointed by the court to serve as an emergency temporary guardian.

The court may require the guardian who has authority over the assets of the ward to post a bond to secure the value of the assets of the ward. The cost of this bond is a valid expense of the guardianship and is paid from the assets of the ward. Many courts require that the assets of the ward be placed in a restricted depository. This precludes the necessity of bonding of the wards assets, however there needs to be a specific court order for the utilization of the ward’s assets, or the assets cannot leave the depository account.

IV The rights of the ward
There are three categories of civil rights specifically addressed in Chapter 744 that are at issue in a guardianship proceeding. There are 1) rights that retained by all wards and can never be revoked, 2) rights that may be revoked by the court, but not delegated to a guardian, and 3) rights that maybe revoked by the court and delegated to a guardian.

A. Rights retained by an incapacitated person

It is important for a guardian to be aware that even in a plenary, or total, guardianship the ward retains a number of rights which cannot be taken away from the ward. These rights include the following:

a. To have an annual review of the guardianship report and plan.
b. To have continuing review of the needs for restrictions on his or her rights.
c. To be restored to capacity at the earliest possible time.
d. To be treated humanely, with dignity and respect, and to be protected against abuse, neglect and exploitation.
e. To have a qualified guardian.
f. To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he/she expressed or demonstrated his/her preference prior to the determination of his/her incapacity or as he/she currently expresses his/her preference insofar as such request is reasonable.
g. To be properly educated.
h. To receive prudent financial management for his/her property and to be informed of how his/her property is being managed, if he/she has lost the right to manage property.
i. To receive necessary services and rehabilitation.
j. To be free from discrimination because of his/her incapacity.
k. To have access to the courts.
l. To counsel.
m. To receive visitors and communicate with others.
n. To notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice.
o. To privacy.
B. Rights that may be taken away from the ward

There are the certain rights enumerated in Florida Statutes Section 744.3215 that can be taken away from the ward, but not delegated to a guardian. These rights include the following:

A. The right to marry
B. The right to vote
C. The right to personally apply for government benefits
D. The right to have a driver’s license
E. The right to travel
F. The right to seek or retain employment

C. Rights that may be delegated to a guardian

Certain rights may be revoked from the ward and delegated to a guardian on behalf of a ward. If a guardian is delegated all the rights allowed to be delegated, the guardian is known as a plenary guardian. If the ward retains any of these rights, then the guardian is known as a limited guardian. The rights that might be delegated to a guardian include the following:

A. To contract
B. To sue and defend lawsuits
C. To apply for government benefits
D. To manage property or to make any gift or disposition of property
E. To determine his or her residence
F. To consent to medical and mental health treatments
G. To make decisions about the social environment and other social aspects of the ward’s life

Guardians should review this list of rights that are retained by the incapacitated person on a regular basis to make sure that these retained rights are strictly respected by the guardian. There are certain procedures which require specific court approval. A guardian may not, without
specific court authority, commit a ward to a mental facility unless pursuant to a Baker Act proceeding or commit a ward to a drug or alcohol treatment facility unless pursuant to a Marchman Act proceeding. In addition, the guardian may not consent to sterilization or abortion on behalf of the ward or the use of experimental drugs, or participation by the ward in a biomedical or behavioral experiment without specific court approval. Finally, the guardian may not initiate a petition for dissolution of marriage for a ward or consent to the termination of the ward’s parental rights.

In the event that the guardian believes that it is in the best interest of the ward to pursue any of the above described actions, the guardian must seek specific court approval pursuant to Florida Statutes Section 744.3725. Note that a statutory change was made in 2017 amending Chapter 744.3725 and removing the requirement that a spouse consent to a guardian’s petition for dissolution of marriage.
V. Types of guardianship

A. Plenary vs. limited

As previously stated a person who has all of his/her rights removed will have a plenary guardian appointed. If any of the removable or delegable rights are retained by the ward, then a limited guardian is appointed. In addition, the duties of a guardian may be divided into two parts: The duties dealing with the person of a ward and the duties dealing with the property of a ward. Therefore, the court may appoint a guardian of the person of a ward who will be given the rights that has to do with the person, such as the right to consent to medical and mental health treatment, to make decisions about the ward’s social environment and other social aspects of the ward’s life or to determine the ward’s residence. A guardian of the property will be appointed to handle some or all other rights dealing with the property. These rights include the right to contract, the right to suit and defend lawsuits, to apply for government benefits, to manage property, or to make gifts or disposition of property.

B. Emergency Temporary Guardians

A court may appoint an emergency temporary guardian, prior to the appointment of a guardian and after a petition for determination of incapacity has been filed pursuant to Florida Statutes Section 744.3031. In order for the court to appoint an emergency temporary guardian, there must be a finding that there appears to be imminent danger that the physical, mental health, or safety of the person will be seriously impaired or the person’s property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The court must specify the powers and duties of the emergency temporary guardian in its order. In addition, even in the absence of a petition to appoint emergency temporary guardian, the court
has the discretion to appoint such a guardian sua sponte if it feels that it is necessary and the requirements stated above are met. Notice of filing of the petition for appointment of an emergency temporary guardian and a hearing on the petition must be served on the alleged incapacitated person and on the alleged incapacitated person’s attorney at least 24 hours before the hearing on the petition is commenced, unless the petitioner demonstrates that substantial harm to the alleged incapacitated person would occur if the 24-hour notice is given.

The authority of an emergency temporary guardian only lasts 90 days. The court has the authority to extend the authority of an emergency temporary guardian for an additional 90 days, if the condition that created the emergency still exists.

C. Standby Guardians

A standby guardian of the person and property of a minor may be appointed by a court pursuant to Florida Statutes Section 744.304. Before such an appointment can be made a petition and consent by both parents, natural or adopted, if living must be filed.

In addition, upon the petition of the currently serving guardian, a standby guardian of the person and property of an incapacitated person may be appointed by the court. In this case, a standby guardian shall be empowered to assume the duties of his/her office immediately on the death, removal, resignation or adjudication of incapacity of a guardian for an adult. A standby guardian once appointed must submit to a credit and criminal investigation. Be aware that this statute applies to both minors and adult wards.

D. Voluntary Guardianship
Without adjudication of incapacity, the court shall appoint a guardian of the property of a resident or nonresident person who, though mentally competent, is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment. The petition shall be accompanied by a certificate of a licensed physician specifying that he or she has examined the petitioner and that the petitioner is competent to understand the nature of the guardianship and his or her delegation of authority. Notice of hearing on any petition for appointment and for authority to act shall be given to the petitioner and to any person to whom the petitioner requests that notice be given. Such request may be made in the petition for appointment of guardian or in a subsequent written request for notice signed by the petitioner. If requested in the petition for appointment of a voluntary guardian, the court may direct the guardian to take possession of less than all of the ward’s property and of the rents, income, issues, and profits from it. In such case, the court shall specify in its order the property to be included in the guardianship estate, and the duties and responsibilities of the guardian appointed under this section will extend only to such property. Unless the voluntary guardianship is limited any guardian appointed under this section has the same duties and responsibilities as are provided by law for plenary guardians of the property, generally. A voluntary guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward not more than 90 days before the annual report is filed with the court. The certificate must certify that the ward is competent to understand the nature of the guardianship and of the ward’s authority to delegate powers to the voluntary guardian. A voluntary guardianship may be terminated by the ward by filing a notice with the court that the voluntary guardianship is terminated. A copy of the notice must be served on all interested persons.
E. Minor Guardianship

Minor guardianships are generally involved where the minor comes into possession of assets in excess of $15,000. Amounts less than $15,000 can be managed by the parents of the minor, without the formal appointment, as parents are the natural guardians of their minor children. However, if the minor child owns assets in excess of $15,000 then a guardian of the property of the minor will need to be appointed. Do not confuse the necessity of appointment of a guardian of the property of a minor with the ability of natural guardians to settle claims of minors in court, the value of which is not limited to $15,000, but the appointment of a guardian ad litem to act on behalf of the child may be necessary.

Petitions for the appointment for a guardian of the property of a minor do not require an adjudication of incapacity, minors are incapacitated by age. Guardians of the property of a minor have plenary authority.

F. Guardian Advocacy

A Guardian Advocacy is a type of guardianship specifically created to address the unique issues and assistance needed by persons with a developmental disability. Guardian Advocacies are created under the Developmental Disabilities statute, Chapter 393. As individuals with developmental disabilities frequently lack “decision-making ability” in some, but not all aspects of their lives, this statute allows for the appointment of a guardian advocate to exercise those delegable rights that the individual with a disability lacks the decision-making ability to exercise. There is no determination of incapacity and no examining committee involved in a guardian advocacy, and only those rights which are delegable to a guardian are subject to removal in a
guardian advocacy, however once a guardian advocate is empowered and letters of guardian advocacy issued, the rights, duties and obligations for the guardian advocate are the same as a guardian under chapter 744.

VI. Powers and Duties of a Guardian

Florida statutes specify the powers and duties of a guardian appointed on behalf on an incapacitated person or ward. The guardian of an incapacitated person is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. Among the other specific duties outlined in Chapter 744.362 a guardian shall act within the scope of the authority granted by the court and as provided by law, shall act in good faith, may not act in a manner that is contrary to the ward’s best interests under the circumstances. A guardian who has special skills or expertise, or is appointed in reliance upon the guardian’s representation that the guardian has special skills or expertise, shall use those special skills or expertise when acting on behalf of the ward.

A. Duties of a guardian upon the establishment of a guardianship

Florida Statutes Section 744.362 requires that a guardian shall file with the court an initial guardianship report within 60 days after letters of guardianship are issued. The initial guardianship report consists of a verified inventory and an initial guardianship plan.

B. Preparing a verified inventory.

The guardian is responsible for preparing and filing a verified inventory of the ward’s property within 60 days of the appointment. Sample inventories are available on the sixth judicial circuit court’s website at www.jud6.org, the use of which is mandatory in the sixth
circuit and a sample inventory form is also in the Florida Rules of Probate. The verified inventory must include all the property of the ward, real and personal that has come to the guardian’s possessions or knowledge. It is important to identify all real and personal property, as well as its location. The inventory must include also a description of all other sources of income of the ward, including Social Security benefits and any pensions to which the ward might be entitled. The verified inventory must include a copy of the most current statement of all the ward’s cash assets from all financial institutions. If the ward has a safe deposit box, a guardian must open the safe deposit box in the presence of an employee of the financial institution where the box is located and inventory its contents. The employee of the institution that is witnessing the inventory must sign a copy of the inventory. This copy shall be filed with the court within 10 days after the box is open. Furthermore, nothing should be removed from the safe deposit box without specific court order. Further, guardians include in the inventory the value of any and all trusts of which the ward is a beneficiary.

The guardian must maintain substantiating papers and records sufficient to demonstrate the accuracy of the initial inventory for a period of 3 years after her or his discharge. The substantiating papers are not filed with the court but must be made available for inspection and review at such time and place and before such persons as the court may order. As part of the substantiating papers, the guardian must identify by name, address, and occupation, the witness or witnesses, if any, who were present during the initial inventory of the ward’s personal. If the guardian of the property finds any additional property owned by the ward which was not included in the initial inventory the property shall be inventoried within 30 days after it is discovered. An amended inventory shall be filed within said period of time.
C. Initial guardianship plan

A guardian is required to file an initial guardianship plan which shall include a description of the medical, mental or personal care services to be provided to the ward, as well as social and personal services to be provided for the welfare of the ward. It must include the place and kind of residential setting best suited for the needs of the wards. A description of the health and accident insurance or any other private or government benefits to which the ward is entitled must be included. It is important that the initial guardianship plan for an incapacitated person be based on the recommendations of the examining committee. The proposed initial guardianship plan may not restrict the physical liberty of the ward more than reasonably necessary to protect the ward from serious physical injury illness and to provide adequate medical care and mental health treatment that the ward needs. Unless the ward is found to be totally incapacitated, the initial guardianship plan must contain a statement that the guardian has consulted with the ward and to the extent reasonably possible has honored the ward’s wishes consistent with rights retained by the ward under the plan. It is important that the guardian be aware that Florida Statutes Section 744.361 requires that the guardian of the person implements the guardianship plan. Therefore, preparing the plan is not enough, it must be implemented.

D. Annual guardianship report

The Annual guardianship report of a plenary guardian consists of an annual accounting and an annual guardianship plan. Each guardian of the person must file with the court an annual guardianship plan which updates the condition of the ward. The annual plan looks at the coming year and specifies the current needs of the ward and how those needs are proposed to be met. The plan also requires that the guardian includes a summary of any
professional medical treatment given to the ward during the preceding year. Therefore, the annual guardianship plan covers a period of 2 years, the immediate past year and the upcoming year. The plan must include a summary of the activities during the preceding year which were designed to increase the capacity of the ward as well as a statement of whether the ward can have any rights restored.

The annual guardianship plan must include a report of a physician who examined the ward no more than 90 days before the signing of the applicable reporting period.

E. **Annual Accounting**

Each guardian of the property must file an annual accounting with the court. A sample annual accounting form is available at [www.jud6.org](http://www.jud6.org), which is mandatory for use in the sixth circuit, or is available in the Florida Rules of Probate. Commercial companies also provide guardianship forms that meet with the informational requirements. That annual accounting must include a complete summary of all transactions that affected the property of the ward during the prior year a copy of the annual or year end statement of all the ward’s cash assets from each institution must be attached. Guardians are obligated to obtain a receipt for all expenses and disbursements made on behalf of the ward. These receipts or cancelled checks must be kept for a period of 3 years after the discharge of the guardian. These receipts, cancelled checks and other documents need not be filed with the Court, but have to be made available for inspection and review pursuant to court order. It is important to remember that some banks don’t return cancelled checks anymore, however the guardian must obtain a receipt, canceled check, or other proof of payment for all expenditures and disbursements made on behalf of the ward.
F. Failure to file the guardianship report.

If the guardian fails to file the guardianship report as required, the court must issue an order to the guardian requiring that said report be filed within 15 days of service of the order to show cause as to why the guardian should not be compelled to do so. If after this, a guardian still fails to file the report within the time specified by the court, the court may cite the guardian for contempt or may fine the guardian. This fine may not be paid out of the ward’s property. Removal of the guardian is an option as well. Professional Guardians also need to be careful of running afoul of the mandatory standards of practice for professional guardians, discussed below.

G. Interim judicial review

Florida Statutes Section 744.3715 authorizes any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan, is exceeding his or her authority under the guardianship plan, is acting in a manner contrary to s. 744.361, is denying visitation between the ward and his or her relatives in violation of s. 744.361(13), or is not acting in the best interest of the ward. The petition for review must state the nature of the objection to the guardian’s action or proposed action. Upon the filing of any such petition, the court shall review the petition and act upon it expeditiously. If the petition for review is found to be without merit, the court may assess costs and attorney’s fees against the petitioner.

H. Powers of Guardian Without Court Approval (F.S. 744.444)
A guardian is authorized to exercise certain powers without court approval. These powers include the following:

1. Retain assets owned by the ward.
2. Receive assets from fiduciaries or other sources.
3. Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities.
4. Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons.
5. Execute and deliver in his or her name as guardian any instrument necessary or proper to carry out and give effect to this section.
6. Pay taxes and assessments on the ward’s property.
7. Pay valid encumbrances against the ward’s property in accordance with their terms, but no prepayment may be made without prior court approval.
8. Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial condition of the ward. This subsection does not authorize the guardian of a minor to expend funds for the ward’s living expenses if one or both of the ward’s parents are alive.
9. Elect to dissent from a will under s. 732.2125(2), seek approval to make an election in accordance with s. 732.401, or assert any other right or choice available to a surviving spouse in the administration of a decedent’s estate.
10. Deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent investments. The guardian may redeem or sell such deposits or investments to pay the reasonable living expenses of the ward as provided herein.
11. Pay incidental expenses in the administration of the estate.
12. Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
(13) When reasonably necessary, employ persons, including attorneys, auditors, investment
advisers, care managers, or agents, even if they are associated with the guardian, to advise
or assist the guardian in the performance of his or her duties.

(14) Execute and deliver in his or her name as guardian any instrument that is necessary or
proper to carry out the orders of the court.

(15) Hold a security in the name of a nominee or in other form without disclosure of the
interest of the ward, but the guardian is liable for any act of the nominee in connection
with the security so held.

(16) Pay or reimburse costs incurred and reasonable fees or compensation to persons, including
attorneys, employed by the guardian pursuant to subsection (13) from the assets of the
guardianship estate, subject to obtaining court approval of the annual accounting.

(17) Provide confidential information about a ward that is related to an investigation arising
under part I of chapter 400 to a local or state ombudsman council member conducting
such an investigation. Any such ombudsman shall have a duty to maintain the
confidentiality of such information.

The guardian must understand that the above listed powers of the guardian without court
approval are still subject to a court order in those jurisdictions where the guardian is obligated to
place the funds of the ward in a restricted account. It is clear that even though the guardian, for
example, has the right the pay attorney’s fees, if all the liquid funds of the ward are in a
restricted account, an order must be obtained before the guardian can pay for these fees. Some
jurisdictions require the guardian to obtain a court order to pay any attorney’s fees, prior to
payment, even if the assets are not in restricted depository

I. Powers of Guardians Upon Court Approval (F.S. 744.441)
The guardians are authorized to discharge certain powers upon court approval, as outlined in Florida Statutes 744.441. A list of these powers, which may be discharged upon court approval, are as follows:

1. Perform, compromise, or refuse performance of a ward’s contracts that continue as obligations of the estate, as he or she may determine under the circumstances.

2. Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

3. Make ordinary or extraordinary repairs or alterations in buildings or other structures; demolish any improvements; or raze existing, or erect new, party walls or buildings.

4. Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving consideration; or dedicate easements to public use without consideration.

5. Enter into a lease as lessor or lessee for any purpose, with or without option to purchase or renew, for a term within, or extending beyond, the period of guardianship.

6. Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement.

7. Abandon property when, in the opinion of the guardian, it is valueless or is so encumbered or in such condition that it is of no benefit to the estate.

8. Pay calls, assessments, and other sums chargeable or accruing against, or on account of, securities.

9. Borrow money, with or without security, to be repaid from the property or otherwise and advance money for the protection of the estate.

10. Effect a fair and reasonable compromise with any debtor or obligor or extend, renew, or in any manner modify the terms of any obligation owing to the estate.

11. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties. Before authorizing a guardian to bring an action described in s. 736.0207, the court shall first find that the action appears
to be in the ward’s best interests during the ward’s probable lifetime. There shall be a rebuttable presumption that an action challenging the ward’s revocation of all or part of a trust is not in the ward’s best interests if the revocation relates solely to a devise. This subsection does not preclude a challenge after the ward’s death. If the court denies a request that a guardian be authorized to bring an action described in s. 736.0207, the court shall review the continued need for a guardian and the extent of the need for delegation of the ward’s rights.

(12) Sell, mortgage, or lease any real or personal property of the estate, including homestead property, or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances.

(13) Continue any unincorporated business or venture in which the ward was engaged.

(14) Purchase the entire fee simple title to real estate in this state in which the guardian has no interest, but the purchase may be made only for a home for the ward, to protect the home of the ward or the ward’s interest, or as a home for the ward’s dependent family. If the ward is a married person and the home of the ward or of the dependent family of the ward is owned by the ward and spouse as an estate by the entirety and the home is sold pursuant to the authority of subsection (12), the court may authorize the investment of any part or all of the proceeds from the sale toward the purchase of a fee simple title to real estate in this state for a home for the ward or the dependent family of the ward as an estate by the entirety owned by the ward and spouse. If the guardian is authorized to acquire title to real estate for the ward or dependent family of the ward as an estate by the entirety in accordance with the preceding provisions, the conveyance shall be in the name of the ward and spouse and shall be effective to create an estate by the entirety in the ward and spouse.

(15) Exercise any option contained in any policy of insurance payable to, or inuring to the benefit of, the ward.

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward’s estate.

(17) Make gifts of the ward’s property to members of the ward’s family in estate and income tax planning procedures.
(18) When the ward’s will evinces an objective to obtain a United States estate tax charitable
deduction by use of a split interest trust (as that term is defined in s. 736.1201), but the
maximum charitable deduction otherwise allowable will not be achieved in whole or in
part, execute a codicil on the ward’s behalf amending said will to obtain the maximum
charitable deduction allowable without diminishing the aggregate value of the benefits of
any beneficiary under such will.

(19) Create or amend revocable trusts or create irrevocable trusts of property of the ward’s
estate which may extend beyond the disability or life of the ward in connection with
estate, gift, income, or other tax planning or in connection with estate planning. The court
shall retain oversight of the assets transferred to a trust, unless otherwise ordered by the
court.

(20) Renounce or disclaim any interest by testate or intestate succession or by inter vivos
transfer.

(21) Enter into contracts that are appropriate for, and in the best interest of, the ward.

(22) As to a minor ward, pay expenses of the ward’s support, health, maintenance, and
education, if the ward’s parents, or either of them, are alive.

J. Conflicts of Interest and Prohibited Activities Which Require Court Approval
(F.S. 744.446)

A guardian is allowed to have certain powers only with court approval, unless the
relationships existed prior to the appointment of the guardian. The list is as follows:

(1) It is essential to the proper conduct and management of a guardianship that the guardian be
independent and impartial. The fiduciary relationship which exists between the guardian
and the ward may not be used for the private gain of the guardian other than the
remuneration for fees and expenses provided by law. The guardian may not incur any
obligation on behalf of the guardianship which conflicts with the proper discharge of the
guardian’s duties.

(2) Unless prior approval is obtained by court order, or unless such relationship existed prior to
appointment of the guardian and is disclosed to the court in the petition for appointment of
guardian, a guardian may not:
(a) Have any interest, financial or otherwise, direct or indirect, in any business transaction or activity with the guardianship;
(b) Acquire an ownership, possessory, security, or other pecuniary interest adverse to the ward;
(c) Be designated as a beneficiary on any life insurance policy, pension, or benefit plan of the ward unless such designation was validly made by the ward prior to adjudication of incapacity of the ward; and
(d) Directly or indirectly purchase, rent, lease, or sell any property or services from or to any business entity of which the guardian or the guardian’s spouse or any of the guardian’s lineal descendants, or collateral kindred, is an officer, partner, director, shareholder, or proprietor, or has any financial interest.

(3) Any activity prohibited by this section is voidable during the term of the guardianship or by the personal representative of the ward’s estate, and the guardian is subject to removal and to imposition of personal liability through a proceeding for surcharge, in addition to any other remedies otherwise available.

(4) In the event of a breach by the guardian of the guardian’s fiduciary duty, the court shall take those necessary actions to protect the ward and the ward’s assets.

K. Other Powers & Duties of Guardians (Under Florida Statutes 744.361)

There are other miscellaneous powers and duties of guardians that we will discuss in this section as outlined in Florida Statutes 744.361.

In cases where there is more than one guardian, the guardians are required to consult with each other before taking any action regarding the ward. This is important and creates the need for co-guardians to be in contact with each other. Bear in mind that in the event that there are 3 co-guardians, the decision of 2 co-guardians is sufficient to make any decisions with respect to the ward.
It is also important for the guardians of the property to be aware that it is their duty to protect and preserve the property of the ward as well as the have the duty to invest prudently pursuant to the Prudent Investor Rule. In addition, guardians must account for the ward’s property faithfully. In addition, if the guardian has any special skills or expertise that will help him or her discharge his or her duties as guardian, such guardian is required to use that special skill or expertise for the benefit of the ward. There are certain duties that are specific to the guardian of the property and specially if the guardian happens to be a professional guardian.

It is required that a professional guardian or the professional guardian’s staff must visit a ward at least once per calendar quarter. In addition, during that visit, the person who is visiting the ward shall assess the ward’s physical appearance and condition as well as the appropriateness of the ward’s current living situation. Finally, that person must assess the need of the ward may have for additional services or for the continuation of existing services while taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.

Finally, upon the termination of the guardianship, guardian is required to deliver the property of the ward to the person lawfully entitled to it. Therefore, if the termination is due to the death of the ward, the guardian must deliver the property to the court appointed curator or personal representative. In the event that the ward is restored, then the guardian must return all the property to the ward after restoration.

L. Professional Guardians and Office of Public and Professional Guardians

Professional guardians are guardians who have applied for and received registration with the Office of Public and Professional guardians. These guardians have undergone a 40 hour
training program, passed and exam and background check and are allowed to serve as guardians for more than three wards whom are unrelated to the guardian. There is significant oversight of professional guardians. In 2016, the Florida Legislature passed a reform of the oversight of professional guardians, creating the Office of Public and Professional Guardians (OPPG) from the previous Statewide Public Guardian Office, and mandating that the OPPG promulgate rules and Standards of Practice for Professional Guardians. Chapter 744.20041 describes a seeming “laundry list” of reasons for disciplining a professional guardian, including “Violating any rule governing guardians or guardianships adopted by the Office of Public and Professional Guardians.” In response to the mandate to promulgate the applicable rules entitled the “Standards of Practice”, OPPG completed rulemaking in the summer of 2017. These standards of practice have been adopted and are now in force. A copy of the rule is available on the Florida Administrative Rules website at: https://www.flrules.org/gateway/RuleNo.asp?id=58M-2.009.

VII. The Attorney for the Guardian.

It is important for the guardian to understand the relationship with the guardian’s attorney, in order to properly utilize the services of the attorney.

A. The attorney-client relationship

Florida Statutes require that every guardian be represented by an attorney. It is important for the guardian to realize what type of legal help his/her attorney may provide in a guardianship. The primary responsibility for the attorney is to provide legal advice to the guardian regarding the guardianship. The guardian shall also be aware that, even though the attorney represents the guardian, the attorney for the guardian also has a fiduciary duty toward
the ward. The attorney for the guardian must ascertain that the guardian is acting on the ward’s best interest. Although there is a duty to the ward, Florida Statute 90.5021 provides for a Fiduciary – attorney confidentiality privilege providing: A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.

Regarding reports and accountings, even though the attorney for the guardian may prepare the accounting as well as the annual plan on behalf of the guardian, it is the responsibility of the guardian and not of the attorney to prepare these documents. In addition, whenever an issue arises that the guardian is not sure whether it requires a specific court order, the guardian must consult the attorney. In the event that an order is required, the guardian must ask the attorney to prepare to the petition seeking the authority required in an expedited manner.

B. Attorney’s fees

As part of the relationship between the guardian and the attorney the payment of attorney’s fee must be discussed. The attorney who has rendered services to the ward or to the guardian on the ward’s behalf is entitled to a reasonable fee, as well as reimbursement for costs incurred on behalf of the ward. Even though in some jurisdictions a petition for attorney’s fees is no longer required to be presented to the court before the payment of reasonable attorney fees. It is important that the guardian be aware of what services are being charged and to make sure that the time spent as well the hourly rate are reasonable. In certain counties, such as Pinellas and Pasco, the guardian is still obligated to seek an order of the court prior to paying for attorney’s
fees. All petitions for guardian’s fees or for attorney’s fees and expenses must be accompanied by a detailed description of the services performed. It is also important that a petition for fees include the period covered and the total amount of prior fees and costs paid.
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QUESTIONS??
THANK YOU !!!!!!!
PUBLIC BENEFITS: WHAT AN ELDER LAW ATTORNEY NEEDS TO KNOW ABOUT MEDICAID CRISIS PLANNING

By

Kara Evans
Lutz
ABC’s of MEDICAID:

Medicaid is a joint Federal and State medical assistance program that provides access to health care for people who have limited income and resources. Medicaid also assists the elderly and people with disabilities with the costs of nursing facility care and other medical and long-term care expenses. In Florida, the Agency for Health Care Administration is responsible for Medicaid.

There is a myriad of programs available under the umbrella of Medicaid providing services like:

- Food Stamps (FS)
- Temporary Cash Assistance (TCA)
- Family-Related Medicaid (MFAM)
- SSI-Related Medicaid (MSSI) and State Funded Programs (SFP)
- Child In Care (CIC)
- Refugee Assistance Program (RAP)

Because of our limited time and the fact that this is course is called “Fundamentals in Elder Law” I am going to limit my discussion to the Medicaid programs that affect the elderly. My intent today is to give you an overview of the available programs (the ABC’s) along with a very basic summary of the tools and techniques we use to help our clients qualify for these programs (the 123’s).

Programs Managed by Social Security

1. SSI (Supplemental Security Income). The Supplemental Security Income (SSI) program pays benefits to disabled adults and children who have limited income and
resources. SSI benefits also are payable to people 65 and older without disabilities who meet the financial limits. If your income is less than the Federal Benefit Rate ($750 in 2018) and you have $2000 or less of countable assets you may qualify for SSI. Should you qualify, you will receive a cash payment from the social security administration that will bring your income up to $750. **In Florida, if you receive even one dollar of SSI, then you are automatically eligible for Medicaid without having to complete any further applications.**

2. **Low Income Subsidy (LIS) or Extra Help.** This program helps with drug costs. Anyone who has Medicare can get Medicare prescription drug coverage (part D). People with limited resources and income may be able to get Extra Help to pay the costs associated with Part D. These include monthly premiums, annual deductibles, and prescription co-payments, including assistance when they reach the coverage gap. To qualify for Extra Help in 2017 you may have up to $18,090 in yearly income ($24,360 for a married couple) and up to $13,820 in resources ($27,600 for a married couple). If you qualify then your costs will be no more than $3.35 for each generic drug and $8.35 in for each brand-name covered drug. If you receive Medicare Part D Extra Help, you may pay a lower or no monthly premium, a lower or no initial deductible, have coverage in the Donut Hole or Coverage Gap, and pay very little for your prescription drugs that are covered by your Medicare Part D plan.

**Community Medicaid Programs (for persons age 65 and up or disabled)**

1. **MEDS-AD (Medicaid for the Aged and Disabled).** This program provides assistance for people who are 65 years of age or older or who have a disability, and who have resources below $5,000 for an individual and $6,000 for a couple and whose income at or below 88 percent of the federal poverty level. Those enrolled in the waiver will receive all Medicaid state plan services.

2. **Medically Needy:** The Department of Children and Families determines eligibility for the Medically Needy Program. It may also be referred to as the “Share of Cost” program. The Medically Needy Program assists individuals who would qualify for Medicaid except for having income that is too high. Individuals enrolled in Medically Needy may have a monthly
“share of cost”, which is similar to an insurance deductible. The share of cost is determined by household size and gross monthly income. When there are changes to the household size and income, the share of cost amount may change.

**Programs for People with Medicare**

Medicare has two basic coverages: Part A, which pays for hospitalization costs; and Part B, which pays for physician services, lab and x-ray services, durable medical equipment, and outpatient and other services. Dual eligibles are individuals who are entitled to Medicare Part A and/or Part B and are eligible for some form of Medicaid benefit. Medicare-covered services are paid first by Medicare and then by Medicaid as Medicaid is always the payer of last resort. Medicaid may cover the cost of prescription drugs and other care that Medicare does not cover.

1. **Qualified Medicare Beneficiaries (QMBs) without other Medicaid (QMB Only)**
   - These individuals are entitled to Medicare Part A, have income of 100% Federal poverty level (FPL) or less and resources that do not exceed twice the limit for SSI eligibility, and are not otherwise eligible for full Medicaid. This program helps pay for Part A and/or Part B premiums, deductibles, coinsurance, and copayments.

2. **QMBs with full Medicaid (QMB Plus)**
   - These individuals are entitled to Medicare Part A, have income of 100% FPL or less and resources that do not exceed twice the limit for SSI eligibility, and are eligible for full Medicaid benefits. Medicaid pays their Medicare Part A premiums, if any, Medicare Part B premiums, and, to the extent consistent with the Medicaid State plan, Medicare deductibles and coinsurance, and provides full Medicaid benefits.

3. **Specified Low-Income Medicare Beneficiaries (SLMBs) without other Medicaid (SLMB Only)**
   - These individuals are entitled to Medicare Part A, have income of greater than 100% FPL, but less than 120% FPL and resources that do not exceed twice the limit for SSI eligibility, and are not otherwise eligible for Medicaid. Medicaid pays their Medicare Part B premiums only.

4. **SLMBs with full Medicaid (SLMB Plus)**
   - These individuals are entitled to Medicare Part A, have income of greater than 100% FPL, but less than 120% FPL and
resources that do not in exceed twice the limit for SSI eligibility, and are eligible for full Medicaid benefits. Medicaid pays their Medicare Part B premiums and provides full Medicaid benefits.

5. Qualified Disabled and Working Individuals (QDWIs) – An individual may qualify for QDWI if they meet any of the following:

- You're a working disabled person under 65
- You lost your premium-free Part A when you went back to work
- You aren't getting medical assistance from your state
- You meet the income and resource limits required by your state

These individuals are eligible to purchase Medicare Part A benefits if they have income of 200% FPL or less and resources that do not exceed twice the limit for SSI eligibility, and are not otherwise eligible for Medicaid. Medicaid pays the Medicare Part A premiums only.

6. Qualifying Individuals (1) (QI-1s) – This program must be reapplied for each year with priority given to those who received the benefit the prior year. There is an annual cap on the amount of money available, which may limit the number of individuals in the group. These individuals are entitled to Medicare Part A, have income of at least 120% FPL, but less than 135% FPL, resources that do not exceed twice the limit for SSI eligibility, and are not otherwise eligible for Medicaid. Medicaid pays their Medicare Part B premiums only.

Programs Based on Institutional Policy

Currently nursing home and assisted living facility Medicaid services are offered under the Statewide Medicaid Managed Care – Long-term Care program. Medicaid recipients who qualify and become enrolled in the Statewide Medicaid Managed Care – Long-term Care program will receive long-term care services from a long-term care managed care plan. The long-term care plan will cover long-term care services only and do not cover medications, doctor’s visits or other healthcare related services. Medicaid recipients will also be enrolled in a Managed Medical Assistance program which does cover medications, doctor’s visits and other healthcare related services.
The rules that govern who qualifies for Medicaid are very complex. It is important to understand that the laws are constantly changing and that each state has its own overlay of rules.

**Institutional Care Program for Nursing Home:** For nursing homes, the state picks up the entire cost less the “patient responsibility”. Normally, the patient responsibility amount is the patient’s Social Security, pension, any periodic payments made from an IRA, and the net rent from income producing property. A patient on Medicaid is allowed to keep only $105 per month for their personal needs allowance.

**Assisted Living Facility Waiver Program:** For this program the state pays a stipend to the facility for each patient that qualifies for the program. Currently, the amount of the stipend is around $1,100. The patient must pay whatever the difference is between the Assisted Living Facility private rate and what the state pays. This program has a lengthy waiting list.

**Home and Community Based Services** This program provides some in home help. A specialist from the Department of Elder Affairs CAREs unit will come to the home and evaluate the client and then recommend a level of care to be provided in the home. Home care is fairly limited, and this program also has a lengthy wait list.

**Hospice** The program pays for Hospice services. Your hospice benefit covers care for your terminal illness and related conditions. Medicare will continue to cover medical services unrelated to the terminal illness but will not cover any efforts to cure your terminal illness.

**Technical Requirements for SSI-Related Medicaid Programs:**
The financial requirements for these programs are the same and are reviewed below.

1. At least 65 years of age or disabled.
2. Citizen or an alien who has been admitted as a permanent resident.
3. The Institutionalized Person Must Be a Resident of Florida. Anyone residing in a Medicaid certified nursing home is considered a resident of Florida.
4. Must meet the level of care required for the applicable program. This is verified by the Department of Elder Affairs
5. Monthly *gross* available income under $2,205.00.
6. Assets of less than $2,000 for the institutionalized individual and $120,900.00 for the spouse at home for at least one day during the month you are requesting Medicaid eligibility. Certain assets are not counted toward these limits and they are discussed below.

Once the Medicaid application is approved, the assets of the spouse at home are no longer considered as long as these assets are made unavailable to the institutionalized spouse within 90 days of the approval. It may be necessary to remove the institutional spouse's name from joint assets during this period. However, see 1640.0315 of the ESS Manual which states “Assets Available to Spouse after Approval (MSSI) The following policy applies to ICP, ICP/MEDS, PACE, Institutionalized Hospice Programs, iBudget and Statewide Medicaid Managed Care-Long Term Care and Cystic Fibrosis waivers. Following approval, none of the assets solely owned by the community spouse are included as available to the institutional spouse. The amount of assets allocated to the community spouse which belong to the institutional spouse and are available to the institutional spouse must be transferred to the community spouse. The eligibility specialist must work with the individual to assure that the assets are transferred to the community spouse; however, the assets will not be counted as available to the institutional spouse until the first scheduled complete redetermination is conducted. In no instance should the failure to transfer the assets to the community spouse within the prescribed time limits result in overpayment.”

Exempt or non-countable assets:

1. Homestead (up to $560,000.00 of equity)
   a. If the spouse at home or a dependent disabled child continues to live there, it is excluded.
   b. If the institutionalized spouse intends to return home, it is excluded.

2. Vehicle
   a. One vehicle is excluded regardless of age or value.
   b. Additional vehicle(s) may be excluded if it is seven years old or older unless it is a luxury model, an antique or customized.
   c. A second vehicle may be excluded only if a second car is needed for self-support.

3. Life insurance. Per individual:
a. Only life insurance policies with cash values are considered.
b. If the total face value (also called the death benefit) of the policies are less than or equal to $2,500 per individual, the cash value of the policies is not counted as an asset.
c. If the total face value exceeds $2,500 per individual, the cash value is counted toward the asset limits.

4. Burial funds/prepaid burial contracts
a. The full value of any irrevocable burial contract is excluded as an asset.
b. In addition, there is a $2,500 exclusion per individual for funds specifically designated for burial expenses (revocable burial contracts, bank accounts designated for burial by notation in the title, life insurance policies, etc.)

The Basic Income Rules:
1. The institutionalized spouse's gross monthly income must be below $2,205.00 or he or she will need an Income Trust. If he or she could be eligible for any additional income such as Veterans Administration benefits, you must apply for and elect to receive that income.
2. Once qualified for Medicaid, the individual is allowed to keep $105 each month for personal needs expenses. The rest of the individual's gross income must be paid to the nursing home each month. This amount is called the "patient responsibility."
3. The community spouse may be entitled to receive part of the institutionalized spouse’s income up to $2,030.00 per month, and possibly up to $3,023.00 per month if they can show the need for excess shelter costs. The community spouse shelter costs include:
   - Rent or Mortgage Payment
   - Real Estate Taxes (prorated to a monthly amount)
   - Insurance (prorated to a monthly amount)
   - Maintenance fee (condo, co-op or mandatory homeowners’ association)
   - Utilities (water, sewage, gas and electric)

That is the ABC’s. Let’s talk about the 123’s.

A. Uncompensated Transfers and the Look Back Period:
Federal law requires states to deny any Medicaid eligibility for a period of time when an applicant transfers money or assets prior to applying for or receiving Medicaid benefits. If a transfer occurs during the 60-month period before application (referred to as the “look back period”), the period of ineligibility is determined by dividing the amount of the transfer by the average monthly cost of a stay in a nursing home. Florida has determined that amount to be $8,944.00. So, if I gave away $89,440.00 dollars any time in the past five years, I would be disqualified from receiving Medicaid for 10 months, starting from the date I was otherwise eligible for Medicaid. An uncompensated transfer is one where an individual gives away money or assets and receives nothing in return.

Of course, your client did not come to you three years before mom needed Medicaid and ask, “can she make a gift?” In addition, many clients confuse the Gift Tax rules regarding the gift tax exemption amount with allowable transfers for Medicaid. So what strategies can you employ to assist your client with the uncompensated transfer problem?

i  Give it back. Sometimes clients have moved money because they think it will help them qualify for Medicaid not realizing that just the opposite will happen. If it is possible, returning the funds or assets is an ideal solution. However, typically the scenario is that mom “helped” a child in need.

ii  Check the ESS Manual at 1640.0615 through 1640.0617. The caseworker is instructed to allow the applicant the opportunity to dispute the presumption that the asset was transferred to establish eligibility. Arguments can include showing that you were below the eligibility amount even if you kept the transferred asset. For example: A spouse is allowed $120,900.00 in assets. If the spouse had $115,000.00 in assets and gave a child $30,000 this should not affect the applicant’s eligibility. Other rebuttal points could be that a court ordered the transfer or if the individual was the victim of exploitation. You can also argue that a transfer of asset penalty will cause an undue hardship. To successfully establish undue hardship, the individual or their designated representative or legal representative must claim and demonstrate the Medicaid applicant/recipient would be deprived of medical care to such an extent that their life or health would be endangered, or that the individual would be deprived of food, clothing, shelter or other necessities of life if determined ineligible for Medicaid long-term care services.
Half and loaf and reverse half a loaf strategies. These are gift and wait or gift and cure strategies that involve transferring assets and then waiting out the penalty period or giving part of the transfer back to shorten the penalty period. Half a loaf would involve gifting away approximately half of the assets to be protected and then placing the rest of the assets into an immediate annuity, promissory note or pooled trust so that the applicant can meet the Medicaid eligibility requirements. Then apply for and receive the approval “but for” the imposition of the penalty. Then the assets that had been placed in the immediate annuity, promissory note or pooled trust can be used to pay for care while waiting for the penalty period to expire. Reverse half a loaf is similar but involves giving away all of the assets and then returning them in order to reduce the penalty period. These strategies may be appropriate in states that do not have the planning opportunities available to us in Florida.

Some uncompensated transfers are not subject to a penalty.

- Transfers between spouses whether before, during or after Medicaid eligibility. (be careful here if your client is using spousal refusal because then transfers between spouses made after the refusal will be counted as uncompensated transfers).
- Transfers of a homestead to a spouse, a child under age 21, a blind or permanently disable adult child, a sibling who has an equity interest in the home and was residing in the home for at least one year immediately prior to applicant’s institutionalization; an adult son or daughter who was residing in the home for at least two years immediately before the date the applicant became institutionalized and who provided care to the applicant that delayed institutionalization
- Transfers to the applicant’s blind or disabled child or to a trust established for the sole benefit of a disabled person.
- Transfers of assets, other than homestead or real property, that are exclude due to a bona fide effort to sell.
- Transfers to a d(4)(a), d(4)(b) or d(4)(c) trusts. These are first party SNT’s QITs and pooled trusts.

B. Compensated Transfers

A Compensated Transfer is basically a purchase of an asset or a service. If you receive fair market value for the funds you spend then the transfer will not be penalized. This will include the purchase of a life estate or homestead and Personal Care Contracts.
**Purchasing a Life Estate:** Purchasing a life estate makes sense if the client or their spouse is living with a relative. The DRA mandates that the purchaser live in the property for at least one year prior to Medicaid application. However, a life estate is not counted as an asset and can be freely assigned. You will want to write a contract for the Purchase and Sale of a Life Estate Interest. The contract must be for Fair Market Value so be sure to get a Comparative Market Analysis from a licensed Realtor or an Appraisal. Then multiply the appropriate percentage from the Life Estate and Remainder Interest table set forth in Health Care Financing Administration Transmittal No. 64.

**Purchasing a Homestead:** If there is a community spouse who will live in the homestead this may be a strategy worth pursuing. However, this can be a risky strategy for a single person who may need to enter a nursing home before the required one-year occupation requirement. See ESS Manuel 1640.0538 through 1640.0543.04 regarding replacing the home. However, improving an existing homestead is fine and may be a great way to preserve assets while increasing the value of the exempt property.

**Personal Service Contract:** A Personal Service Contract is considered a transfer for fair market value, not an uncompensated transfer. We all know that a person in a nursing home will not get all of the attention and personal care they may need. The facility may be understaffed, and the staff is often overworked. Someone will be expected to shop for personal necessities, handle financial matters, attend care management meetings, act as a health care advocate, and oversee treatment by health care providers, doctors, therapists and rehabilitation facilities. A child providing services that are in addition to and not duplicative of those supplied by nursing home can be quite a benefit to the parent. Many children provide these services, taking time away from work and other personal or household obligations. They sacrifice their time and employment opportunities to become caregivers. Being compensated for these services is often the only way the child can realistically provide them. A Personal Care Contract also known as a Personal Services Contract is exactly that. It is a contact, a legal agreement, which sets out the responsibilities, duties and obligations that the children will perform. The contract must be for a stated period of time not to exceed the life expectancy of the individual that will be receiving the services. This is a fair market value exchange and the services provided must be commensurate with the compensation agreed to. A good measure for this compensation is to canvas the professionals in your county to see
what you would have to pay court appointed family guardians or home health aides. Using this tool is a great vehicle to ensure that a child is properly compensated for providing the services required to care for their family members.

**Personal Care Trust:** *Tax implications:* There are some income tax issues associated with a personal services contract. The payment from the client to the service provider is earned income to that service provider. Therefore, the family member providing services should report this on their income tax return and pay income tax on the amount. However, we have the option to create a Personal Care Trust to hold the funds and pay them out as the services are provided. This enables us to spread the income over the term of the contract lessening the tax impact. To keep the lump sum payment from being attributed to the care provider the lump sum might be paid to an independent third party, in this case the Personal Care Trust. The care provider must have a substantial risk of forfeiture of their right to receive the transferred property from the third party, such as a forfeiture caused by the failure to provide the services called for by the contract. The Care Provider cannot have the right to assign the right to receive the property, and they can’t have the right to elect to receive or defer its receipt of the property from the third party. If the third party uses the lump sum to purchase an annuity to provide a convenient method to fund the payments due under the personal care contract, the ownership of the annuity contract must be retained by the third party and not transferred to the Care Provider.

**C. Spenddown Opportunities:**

Some assets are excluded from being counted for Medicaid purposes.

i  Prepaid funeral and burial contracts are excluded. The burial contract must be irrevocable. Since death is inevitable it may be wise to purchase these in advance as the monies will need to be spent someday in any event. Up to $2,500 can be excluded if placed in a bank account designated for burial funds. This is in addition to the burial contract mentioned above. You can be creative with this exemption. The DCF has a form that will allow you to designate where these funds come from.

ii  The money in an IRA account and other retirement funds will be ignored if the individual is receiving regular payments from the fund.

iii  In Florida, homestead property (subject to equity limits but exempt even if the home is in another state) and one car are also excluded from being counted for Medicaid
purposes. It is always a good idea to use funds to make necessary improvements to the homestead prior to applying for Medicaid. If the home needs painting, new appliances, carpet or other repairs, now is the time.

D. Making Countable Assets Not Count

i. DRA Compliant Annuities:
A Medicaid applicant or their community spouse is permitted to purchase an immediate annuity. If the annuity is purchased by the Medicaid applicant, the state must be named as the remainder beneficiary in the first position (basically the primary beneficiary) for at least the total amount of the medical assistance paid on behalf of the annuitant. However, if the annuitant has a spouse or minor or disable child then the state can be named as the contingent beneficiary. The immediate annuity must be irrevocable and non-assignable. It must make payments of both principal and interest in level and equal amounts, with no balloon or deferred payments. It also must be actuarially sound based on the SSA tables in Appendix A-14 of the ESS Manual.

If the annuity is being purchased by the community spouse, the State should be named as the primary beneficiary for the total amount of medical assistance paid on behalf of the institutionalized individual. Again, if the spouse has a minor or disabled adult child then the state can be named as the contingent beneficiary. The annuity must be actuarially sound according to the SSA tables. However, there is no requirement to have the payments level and equal or that the annuity is irrevocable and non-assignable. This opens the door for the community spouse to purchase what is known as a “balloon” annuity. One which pays only a small sum each month until the term of the annuity is up and then a large payment is made. This strategy could be used to minimize the community spouse’s income, so they would be able to receive a larger diversion of income from the institutionalized spouse.

ii. Loans and Promissory Notes
Promissory notes, loans and mortgages signed on or after November 1, 2007 will be considered transfers of assets without fair market compensation to become Medicaid eligible unless the promissory notes, loans, or mortgages meet all of the following criteria:
a. the repayment term is actuarially sound in accordance with the Life Expectancy Tables used by the Social Security Administration (Refer to Appendix A-14).
b. payments must be made in equal amounts during the term of the loan with no deferral and no balloon payments being possible; and
c. debt forgiveness is not allowed.
If the above criteria are not met, for purposes of transfer of assets, the value of the promissory notes, loans or mortgages will be the outstanding balance due as of the date of application for long-term care services.

iii. Income Producing Property

iv.

**Income Producing Property**
An individual can exclude the fair market value of any income producing property he owns that is essential to self-support.

- Some investments are not counted as assets for Medicaid purposes. Income producing property, usually rental property falls into this category. The value of the underlying property is ignored and only the income stream from the rent less any expenses associated with the property, are counted as income. Because all expenses associated with the property can be deducted before the income amount is calculated, we normally hire a property management company to handle all aspects of the property and pay only the net income to the client monthly. The company will escrow property taxes, insurance payments and pay the monthly expenses on your behalf. This relieves your client of any day to day responsibilities of property ownership. Please remember that expenses associated with this property can only be deducted from income associated with this property. Should it be financial burden to keep the homestead, it can be converted to a rental. In this manner, the property will continue to be exempt from being counted as an asset the expenses covered.

- When using income producing property to protect assets, it is important to prepare what is known as an enhanced life estate deed. This deed is not considered a transfer for Medicaid purposes. However, it does prevent the rental property from going through probate after the client’s death. Assets that go through probate will be subject to estate recovery by Medicaid. Therefore, the proper titling of this property is crucial.

- **Existing Rental:**
• If the existing rental property does not yet have all the formalities necessary to meet the requirements discussed, assist your client to do so. Provide them with management and rental agreements. Separate the rental finances from the personal finances.

• **Seasonal Rental:**
  - These can be a little more tricky than regular monthly or yearly rentals in that the expenses are constant while the income is not. Remember, expenses from the property can only be deducted from income associated with that property. Consider using other techniques in combination with a seasonal rental.

• **Farmland:**
  - If the farmland is not producing income yearly it may still be excludable. (some trees cannot be harvested for 50 or more years.)

**E. Income issues:**

1. **Qualified Income Trusts:** If a Medicaid applicant’s income is above the Medicaid limit of $2,205.00 per month an Income Trust (often called a Miller Trust or QIT) will be necessary. This trust must be set up in the month of qualification and properly maintained each month to continue to meet the income limit for the applicable program. This is necessary because Florida is what is known as an “income cap” state and the Federal rule allowing the QIT is the cure. This trust does not protect assets or income. It is set up specifically to lower the countable income of the applicant. The funds placed in this trust are still used in calculating the applicant’s patient responsibility and are only permitted to be used for the applicant’s personal needs allowance (currently $105), the community spouse income allowance granted to the community spouse and the balance, if any, to the nursing home. Any funds left in this account after the death of the Medicaid recipient must be paid to the state.

2. **The Minimum Monthly Maintenance Income Allowance and the Community Spouse Income Allowance.** The Income Cap does not apply to the community spouse who may have an unlimited amount of income. However, many community spouses have little income of their own and have been living off the income of the spouse headed to the nursing home. It is against public policy, not to mention Federal Regulations, to require an individual pay so much of their income to a nursing that their spouse becomes impoverished. (see 42 USC s. 1396r-5(d) and 42 CFR 435.725(a) through (f)). Under the Medicaid spousal
impoverishment provisions, a certain amount of income belonging to the spouse in the institution can be set aside for the community spouse's use. This is called the Community Spouse Income Allowance (CSIA).

The CSIA is calculated by a formula which goes as follows: The state’s minimum monthly maintenance needs allowance (MMMNA), plus, the community spouse’s excess shelter costs, minus, the community spouse’s total gross income. The number is capped by the maximum monthly maintenance needs allowance.

3. **Fair Hearing to Increase the CSIA or the CSRA:** Under ESS Manual section 2640.0122 If either spouse establishes that the community spouse income allowance is inadequate due to exceptional instances of significant financial duress, the hearing officer may establish a higher income allowance (above the established MMMIA) through the fair hearing process. Under 1640.0314.01 If either spouse can verify that the community spouse asset allowance determined by the agency is inadequate to generate income to raise the community spouse's income to the minimum monthly maintenance needs allowance, the asset allowance may be revised through the fair hearing process. However, both these options require a denial of benefits and a fair hearing. The outcome is less than certain.

4. **Petition for Spousal Support Not Connected with the Dissolution of Marriage under FS 61.09** (61.09) Alimony and child support unconnected with dissolution.—If a person having the ability to contribute to the maintenance of his or her spouse and support of his or her minor child fails to do so, the spouse who is not receiving support may apply to the court for alimony and for support for the child without seeking dissolution of marriage, and the court shall enter an order as it deems just and proper.) This technique begins with a detailed budget that then becomes the basis for the Petition and Marital Settlement Agreement. This is a legal proceeding in family court. The family court will take into consideration ALL of a community spouse’s monthly expenses and not just the mortgage taxes and HOA fees. This type of proceeding will require that Institutional spouse be represented by his own attorney. However, court order will the diversion of as much of the IS’s income as is necessary for CS to maintain her or his lifestyle. The ESS Manual states “If there is court ordered support against an institutionalized spouse (for monthly support income for the community spouse), the community spouse's monthly income allowance cannot be less than the amount ordered.” (2640.0119.03) (Consider adding language for a Qualified
Domestic Relations Order QDRO which will allow the CS to roll the IS’s retirement account into CS’s name.

5. Spousal Refusal A community spouse has the right, pursuant to Federal and Florida law to refuse to support an institutionalized spouse. This is only allowed in a few States but if done within the law, the assets and income of the Community Spouse will not be countable for the Medicaid application. First, all assets must be transferred from the IS to the CS. Traditionally, transfers between spouses are not penalized for Medicaid purposes. However, transfers after filing the notice of spousal refusal will cause a problem, so timing is important. Once an application for Medicaid benefits has been made by the Institutionalized spouse, the Community spouse must file a notice of spousal refusal. The Institutionalized spouse then assigns all right of support to the State. This can be done any time before the Medicaid application is filed and only requires a small amount of planning time.

Estate Planning Issues:
When putting together a Medicaid plan for a married couple you ignore their estate plan at your peril. As the planner, you must think through arranging the assets in such a way that the Institutionalized Spouse (the IS) qualifies for Medicaid. You also must think further as to what happens when one of the spouses dies. The first and most obvious thing to do is to review the estate plan. Most married couples’ estate plan leaves all the assets to the surviving spouse. If the community spouse were the first spouse to die, leaving everything to a spouse who needed Nursing Home care or who was residing in a Nursing Home would be a disqualifying event for Medicaid purposes. Client’s often react to this news by deciding to leave everything to the children and disinherit the IS. However, even if your client leaves nothing to their spouse, Florida Law allows a disinherited spouse to claim thirty percent. This is known as the Elective Share. The Department of Children and Families, who administers the Medicaid program in Florida, may require an institutionalized spouse to claim the Elective Share. (I have never seen them do this, but I would hate for my client to be the test case).
Most well spouses do not want to disinherit their sick spouse. Additionally, Medicaid does not pay for everything an institutionalized spouse might need. You can and should set up your client’s estate plan so that the IS and the assets are protected should the Community spouse...
die first. This can be accomplished by having the CS’s estate plan create a Special Needs Trust for the benefit of the IS. However, you must be mindful of 42 USC 1396p(d)(2)(A) which makes this type of trust countable for Medicaid if it is established by a spouse unless it is establish by will. You can create a Last Will and Testament where the beneficiary is a Special Needs Trust that benefits the IS. The client must then ensure that all assets are titled in the well spouses name alone ensuring that all assets go through the will (and of course through probate) to the trust for the IS. But our clients are programed to want a Revocable Trust that avoids probate. The answer then is to set up what can be called a reverse pour over trust. This satisfies your clients desire to avoid probate to the extent possible, allows the assets to be titled in a revocable trust and ensures the SNT will be properly set up. The trust will have two residuary clauses. The first details what happens to the assets should the IS survive the well spouse. This clause will direct all the assets to be paid to the Personal Representative named in the Will to be distributed as the Last Will and Testament directs. This ensures that there is a probate only if the IS survives the well spouse. The second residuary clause details what happens to the assets should the IS have predeceased the well spouse. This clause will distribute the assets directly to the heirs without probate.

These documents will create a properly set up Special Needs Trust that does not count as an asset for Medicaid purposes.

For a single client, be sure to properly use beneficiary designations and enhanced life estate deeds to avoid probate.

**Medicaid Estate Recovery**

Medicaid programs are a social safety net for those who cannot afford the cost of health care. As we discussed, there are strict limits on the assets and income that Medicaid recipients can have. However, there are times when Medicaid planning and exemptions leave assets in a deceased Medicaid recipients estate.

How could that happen?? Well, sometimes there are assets that are discovered after the death of the Medicaid recipient. US savings bonds in a forgotten safe deposit box. A homestead that is left to a nonqualified heir, rental property that was not properly deeded (i.e.; lady bird deed).
Since the beginning of the Medicaid program, states have been able to use estate recovery to offset their costs. But many did not bother. The Omnibus Budget Reconciliation Act of 1993 (OBRA ’93) requires states to have some kind of Medicaid Estate Recovery program.

Highlights of the 1993 Estate Recovery Mandate:
States must pursue recovering costs for medical assistance consisting of:
• Nursing home or other long-term institutional services;
• Home- and community-based services;
• Hospital and prescription drug services provided while the recipient was receiving nursing facility or home- and community-based services; and
• At State option, any other items covered by the Medicaid State Plan.

At a minimum, states must recover from assets that pass through probate (which is governed by state law). At a maximum, states may recover any assets of the deceased recipient. Recovery can only be made from the estates of deceased Medicaid Recipients who were 55 and older when they received Medicaid benefits and where still receiving Medicaid when they died. If your client is discharged from the medical institution and returns home the lien is dissolved.

In Florida Medicaid estate recovery is accomplished by the agency filing a statement of claim against the estate of a deceased Medicaid recipient. This limits the recovery to the non-exempt assets in the probate estate and is a class three claim.

Preventing Medicaid fraud:
Ethically you have an obligation to your clients to assist them in such a manner that they are not committing fraud. How do you do that? KNOW THE RULES. Ask the right questions. Examine the paperwork they bring you. Track the payments and expenditures in the checking accounts, brokerage accounts, etc. ASK ABOUT GIFTS AND TRANSFERS. If you don’t, I assure you that the caseworker will.
INVESTMENT FRAUD BASICS FOR LAWYERS AND THEIR CLIENTS

By

Scott A. Masel
Miami
Be Wary of Unsolicited Offers to Invest

- Investment fraud criminals look for victims on social media sites, chat rooms, and bulletin boards.

- If someone receives an unsolicited message from someone they don’t know containing a "can’t miss" investment, their best move is to pass up the "opportunity."

Common Persuasion Tactics Used by Fraudsters

- Phantom Riches
  - “Making the most of wealth. Working the most, getting the most you wanted can’t have.”

- Source Credibility
  - Trying to build credibility by claiming to be with a reputable firm or to have a special relationship or experience.

- Social Consensus
  - "We all do it. Keep the secret. No one will die of envy."

- Reciprocity
  - "If you do me a favor, I’ll do you a favor."

- Scarcity
  - "Terrifying the sense of urgency by claiming limited supply.

A Few Common Scams

Affinity Fraud

- Affinity frauds target members of identifiable groups, such as the elderly, or religious or ethnic communities. The fraudsters involved in affinity scams are often -- or pretend to be -- members of the group, which may give the appearance of legitimacy to the fraud. These scams frequently involve Ponzi or pyramid schemes.

- Never make an investment based solely on the recommendation of a member of an organization or group to which you belong, especially if the pitch is made online.

- Be sure to check out everything -- no matter how trustworthy the person seems who brings the investment opportunity to your attention. Remember that the person telling you about the investment may have been fooled into believing that the investment is legitimate when it is not.
Common “Red Flags” of Investment Fraud

- It sounds too good to be true: Any investment that sounds too good to be true probably is. Be extremely wary of claims that an investment will make “INCREDIBLE GAINS” or is a “BREAKOUT STOCK PICK” or has “Huge Upside and Almost No Risk.”
- Pressure to buy RIGHT NOW: Don’t be pressured or rushed into buying an investment before you have a chance to think about – and investigate – the “opportunity.”
- Preying on politeness: Guilt the victim into buying because of all the calls or time spent talking. Sometimes angrily haranguing victims.
- Lack of Documentation: Be very skeptical of investments where the promoter will not provide written documentation.

Ask and Check

- Check whether the person soliciting the investment is registered:
  - SEC has a database of investment advisers and their sales personnel (Investment Adviser Public Disclosure or IAPD);
  - FINRA has a database of broker-dealers and their sales personnel (BrokerCheck).
- Check background of broker or investment adviser:
  - Any disciplinary actions;
  - A history of customer complaints;
  - Previous employment.
THE TRAP OF GOOD MONEY & (SOMETIMES) GOOD INTENTIONS

We always look to see who is making money off someone else’s investment, and with the elderly we look especially closely at those in a position of trust or familiarity:

- Relatives
- Friends
- Lawyers & Accountants

Transaction based compensation, a.k.a. COMMISSIONS

HELPFUL STEPS

- Slow down the investor: No harm in checking things out first.
- Web search: Show investor what a simple Google or Bing search can turn up.
- Documents: Ask them to start collecting right away. We will make it easy on you and them to get us the material.
- Names and identifiers: Fraudsters, other victims, witnesses. Help investors understand they are helping us stop a problem if they share this. The sooner we can move the more likely we can save some money and prevent more victims.
- Change Passwords/Privileges: Suggest cutting off access to accounts, websites, trading sites, as soon as possible for anyone but the most trusted people.

Contact Information

[Website links provided]

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VETERANS’ BENEFITS

By

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Veterans Benefits

By: Javier A. Centonzio, J.D., LL.M. (Elder Law)

“Veteran” defined

• For VA purposes a “veteran” is a person who served in the active military service and who was discharged or released under conditions other than dishonorable.

Veterans by the numbers

Overall National Projected Veteran Population as of September 30, 2016:

• 19.9 Million; 9% Female Veterans
  • World War II - 624,000
  • Korean Conflict - 1.4 Million
  • Vietnam - 6.6 Million
  • Gulf War - 7.2 Million
  • Peacetime Only - 4.5 Million

(http://www.va.gov/vetdata/Veteran_Population.asp)

Projected Veteran Population in the State of Florida as of September 30, 2016:

• 1,594,218 Total (3rd behind CA and TX)
  • Wartime - 1,224,198
    • World War II - 91,799
    • Korean Conflict - 168,208
    • Vietnam - 544,291
    • Gulf War - 487,422
    • Peacetime - 370,020
  • Female - 142,193
VA Overview

- Department of Veterans Affairs (VA)
  - Cabinet Level Agency
    - Current Secretary: David Shulkin, M.D.
  - 3 Administrations
    - Veterans Cemetery Administration
    - Veterans Health Administration
      - Providing health care, biomedical research, Community Based Outpatient Clinics, Regional Medical Centers
    - Veterans Benefits Administration
      - Attorney involvement is almost exclusively before this administration - compensation or pension

VA Accreditation

- Accreditation means the authority granted by VA to assist claimants in the preparation, presentation, and prosecution of claims for benefits. 38 C.F.R. § 14.627(a).
- Attorneys must file a VA Form 21A – Application for Accreditation as a Claims Agent or Attorney
- Once accredited, an attorney must complete a qualifying veterans law CLE approved for a minimum of 3 hours during the first year after accreditation.
  - VA requires the completion of follow-up CLE not later than 3 years from the date of the initial accreditation and every 2 years thereafter.

VA Benefits

- The Veterans Benefits Administration administers several different benefit programs such as:
  - Education & Training programs (Montgomery G.I. Bill, Post 9/11 G.I. Bill)
  - VA Home Loan
For purposes of this presentation we will only cover VA Pension and Compensation benefits

VA Pension

- Administered by the Veterans Benefits Administration (VBA)

- Pension benefits are designed to supplement the income of disabled veterans who gave up career opportunities while they served their country during a period of war and, as a result, were unable to accumulate enough resources to support themselves adequately after they became disabled.

- All pension claims are processed by one of three Pension Management Centers (PMC)
  - Philadelphia, PA, Milwaukee, WI, and St. Paul, MN
  - Prior to 2008 all initial claims for pension were handled by Regional Offices
  - VA cites this change as the reason for the backlog in claims

- Basic Eligibility Criteria for Pension
  1. Veteran must be discharged under other than dishonorable conditions
  2. Veterans who enlisted after September 8, 1980, must have completed a minimum period of service, either 24 months of continuous active duty or the “full period for which the veteran was ordered to active duty.” The veteran must also have active service that includes:
     - a total of 90 days during one or more periods of war;
     - 90 or more consecutive days, one of which is during a period of war;
or at least one day of wartime service that results in a discharge for a service-connected disability.

3. Veteran must have limited income and a net worth that does not provide adequate maintenance, (“need test”);

4. Veteran must be permanently and totally disabled at the time of application for pension.

5. The permanent and total disability must not be due to willful misconduct of the veteran.

Veterans who meet the following criteria at the time of application for benefits are deemed “disabled” for purposes of pension eligibility:

- Age 65 or older, OR
- Totally and permanently disabled, OR
- Receiving SSI, OR
- Receiving SSDI, OR
- A patient in a nursing home receiving skilled nursing care

Types of Pension

- Improved Pension, Section 306, Old-Law - $
  - After January 1, 1979, Improved Pension is only program that accepts new applications

- Special Monthly Pension
  - Housebound Benefits - $$
  - Aid & Attendance (A&A) - $$

Periods of Wartime for VA Pension Purposes

- WWII: 12/7/1941 - 12/31/1946
- Persian Gulf War: 8/2/1990 - ??????
• **Veterans Pension Rates**

**Maximum Annual Pension Rate (MAPR)**

- **Improved Pension**
  - No dependents - $13,166 = $1,097.17 per mo.
  - 1 dependent - $17,241 = $1,436.75 per mo.

- **Housebound**
  - No dependents - $16,089 = $1,340.75 per mo.
  - 1 dependent - $20,166 = $1,680.50 per mo.

- **Aid & Attendance**
  - No dependents - $21,962 = $1,830.17 per mo.
  - 1 dependent - $26,036 = $2,169.67 per mo.

• **Improved Death Pension Rates**
  (Surviving Spouse/Child)

**Maximum Annual Pension Rate**

- **Improved Death Pension**
  - No dependent child - $8,830 = $735.83 per mo.
  - 1 dependent child - $11,557 = $963.08 per mo.

- **Housebound**
  - No dependent - $10,792 = $899.33 per mo.
  - 1 dependent - $13,514 = $1,126.17 per mo.

- **Aid & Attendance**
  - No dependent - $14,113 = $1,176.08 per mo.
  - 1 dependent - $16,837 = $1,403.08 per mo.

• **How Pension payments are calculated**

- Veteran or Survivor without deductible expenses
  
  MAPR - Income = Payment

- Veteran or Survivor with deductible expenses
  
  Step 1: Deductible expenses - 5% of MAPR = Expenses
Step 2: Expenses - Income = Total Income

Step 3: Total Income - MAPR = Payment

- What counts as income? - annual income of veteran, plus annual income of veteran’s dependent spouse and annual income of dependent child. 38 U.S.C.S. § 1712(d)

- Unreimbursed Medical Expenses - 38 C.F.R. § 3.272(g) (2016)

*Deductible expenses for the year such as certain unreimbursed medical expenses must exceed 5% of MAPR

Proposed Pension Regulation Changes
(Issued on January 23, 2015)

• Proposed Changes would add to 38 C.F.R. :

  • § 3.274 - would establish a clear net worth limit of $119,220.

  • § 3.275 - Primary residence exempt up to 2 acres; if residence is sold, proceeds must be used to purchase another residence within the calendar year or $ will be considered an asset

  • § 3.276 - Creates 3 year look back period; establishes presumption that absent clear and convincing evidence showing otherwise any asset transfers made during the 36-month look back period were made to establish eligibility for pension; penalty period not to exceed 10 years; penalty begins month after last transfer completed.

  • § 3.278 - Defines and clarifies what VA considers to be a deductible medical expense; defines “activities of daily living” (ADL) and “instrumental activities of daily living” (IADLs); defines custodial care as requiring assistance with 2 or more ADLs OR assistance for a person with mental illness who is unsafe if left alone due to mental disorder; Payments to Independent Living Facilities are generally not considered medical expenses nor are payments for assistance with IADLs; Maximum hourly rate for home health care $32 hour.
Pension Tips

• Make sure your clients who receive SMP (Housebound or A&A) enroll for VA health care.

• Veterans receiving SMP are entitled to cost-free medication if it is ordered by VA physicians.

• VA will provide veterans receiving SMP any needed hospital or outpatient care.

Attorneys Fees and VA Pension

• CANNOT CHARGE FEES for assisting a client with completing and filing applications

• CAN charge fees for:
  • Representing a veteran on appeal after a Notice of Disagreement (NOD) is filed – can charge up to 33% contingent fee of retroactive award if appeal is successful
  • Planning - asset planning, drafting legal documents, reviewing assets to determine eligibility

VA Compensation

• Administered by Veterans Benefits Administration (VBA)

• Veterans are entitled to VA Compensation if:
  • they were discharged or released under conditions other than dishonorable;
  • their disease or injury was incurred or aggravated in the line of duty; and
  • the disability is not a result of their own willful misconduct

• VA Compensation is based on disability and not financial need or income

• It is possible for a veteran who has a well-paying job to receive VA compensation benefits
• Veteran must satisfy 3 criteria to receive compensation for a disability:
  • Must have current disability;
  • In service event/injury; and
  • There must be a medical nexus between event/injury & disability
• VA has a duty to assist veteran with developing claim

**Compensation Rates** (Effective 12/1/17)

• Veteran alone: $136.24 (10%) up to $2,973.86 (100%) monthly

• Once a veteran receives at least a 30% disability rating he or she can receive a higher monthly payment for dependents
  • Without Children:
    • Veteran with Spouse Only: $466.15 (30%) up to $3,139.67 (100%)
  • With Children:
    • Veteran with Spouse and Child: $503.15 (30%) up to $3,261.10 (100%)

• The VA **does not** automatically pay a veteran extra payment for dependents
  • must file VA form 21-686c Declaration of Status of Dependents

• Complete tables of compensation rates can be found at:
  http://www.benefits.va.gov/COMPENSATION/resources_com p 01.asp

**Presumptive Service-Connected Conditions**

• Most common: Vietnam veterans with certain diseases are presumed to have those diseases as a result of exposure to Agent Orange
  • Commonly seen diseases: Prostate cancer, Diabetes Mellitus type II, Ischemic Heart Disease
• Full list of presumptive conditions can be found at 38 C.F.R. §§ 3.307-3.309, 3.311, 3.313(b) (2016)

Secondary Service-Connection

• Available for almost any disability that is the result of another service-connected condition

• Authorized by 38 C.F.R. § 3.310 (2016)
  • Disability must be proximately due to or the result of a service-connected disease or injury
  
• Some examples of possible secondary service connected conditions:
  
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**Total Disability Based on Individual Unemployability (TDIU)**

• Also known as Individual Unemployability

• Veterans whose service-connected disability prevents them from securing and/or maintaining substantially gainful employment will receive compensation at the 100% rating

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  - a combined rating of 70% with one condition rated at 40%;
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• VA cannot take age into consideration

**Special Claims**

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• Automobile Allowance – for eligible veterans to purchase an automobile or adaptive equipment

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  • The veteran can download the application and mail it to the VA
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  • The veteran can use the services of a Veterans Service Officer (VSO)
    • Not all VSOs are created equal – some receive a higher level of training than others
    • If you find a good VSO make sure you develop a professional relationship with him or her because he or she can be an outstanding resource
  • On March 24, 2015, the VA enacted new rules to formalize the claims and appeal process. As a result:
    • VA requires new claims not filed electronically to be submitted using standard forms
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VA Claim Appeals

  • **Most appeals are on compensation claims**

  • Appeal Process once a Rating Decision is issued

    • Begins with filing of Notice of Disagreement (NOD) with Agency of Original Jurisdiction (AOJ) that issued rating decision.

      • Veteran has 365 days to file NOD before rating decision becomes final
      
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    • Decision is reviewed at AOJ by Decision Review Officer
    
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Veteran must file a VA Form 9 Substantive Appeal within 60 days of the Statement of the Case

Substantive Appeal takes the case to the Board of Veterans Appeals (BVA)

- The BVA is still considered part of the VA. Consists of administrative law judges known as Veterans Law Judges.
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- If you are interested in learning more about veterans law and representing a veteran I urge you to research and contact the Veterans Consortium Pro Bono Program, or Stetson’s Veterans Law Institute

- Invest in a Veterans Benefits Manual
  - Written by National Veterans Legal Services Program
  - Published by LexisNexis

Questions?

- Please feel free to contact me with any questions
  - Office: (727) 490-8712
  - Email: jac@wclawfl.com
  - Cell: (913) 706-9340

- The VA website is a great resource: www.va.gov

- Thank you for your time and interest in representing our veterans!
“Veteran” defined

• For VA purposes a “veteran” is a person who served in the active military service and who was discharged or released under conditions other than dishonorable.

Veterans by the numbers

Overall National Projected Veteran Population as of September 30, 2016:

• 19.9 Million; 9% Female Veterans
  – World War II – 624,000
  – Korean Conflict - 1.4 Million
  – Vietnam - 6.6 Million
  – Gulf War - 7.2 Million
  – Peacetime Only - 4.5 Million

Projected Veteran Population in the State of Florida as of September 30, 2016:

- Total 1,594,218 (3rd behind CA and TX)
  - Wartime 1,224,198
    - World War II - 91,799
    - Korean Conflict - 168,208
    - Vietnam – 544,291
    - Gulf War - 487,422
  - Peacetime 370,020
    - Female - 142,193

VA Overview

- Department of Veterans Affairs (VA)
  - Cabinet Level Agency
    - Current Secretary: David Shulkin, M.D.
  - 3 Administrations
    - Veterans Cemetery Administration
    - Veterans Health Administration
      - Providing health care, biomedical research, Community Based Outpatient Clinics, Regional Medical Centers
    - Veterans Benefits Administration
      - Attorney involvement is almost exclusively before this administration
      - Compensation or Pension

VA Accreditation

- Accreditation means the authority granted by VA to assist claimants in the preparation, presentation, and prosecution of claims for benefits. 38 C.F.R. § 14.627(a).
- Attorneys must file VA Form 21A – Application for Accreditation as a Claims Agent or Attorney
- Once accredited, an attorney must complete a qualifying veterans law CLE approved for a minimum of 3 hours during the first year after accreditation.
  - VA requires the completion of follow-up CLE not later than 3 years from the date of the initial accreditation and every 2 years thereafter.
VA Benefits

- The Veterans Benefits Administration administers several different benefit programs such as:
  - Education & Training programs (Montgomery G.I. Bill, Post 9/11 G.I. Bill)
  - VA Home Loan
  - Vocational Rehabilitation & Employment programs
  - Life Insurance

- For purposes of this presentation we will only cover VA Pension and Compensation benefits.

VA Pension

- Administered by the Veterans Benefits Administration (VBA)
- Pension benefits are designed to supplement the income of disabled veterans who gave up career opportunities while they served their country during a period of war and, as a result, were unable to accumulate enough resources to support themselves adequately after they became disabled.
  - All pension claims are processed by one of three Pension Management Centers (PMC)
    - Philadelphia, PA, Milwaukee, WI, and St. Paul, MN
  - Prior to 2008 all initial claims for pension were handled by Regional Offices
  - VA cites this change as the reason for the backlog in claims

Basic Eligibility Criteria for Pension

1. Veteran must be discharged under other than dishonorable conditions
2. Veterans who enlisted after September 8, 1980, must have completed a minimum period of service, either 24 months of continuous active duty or the “full period for which the veteran was ordered to active duty.” The veteran must also have active service that includes:
   - a total of 90 days during one or more periods of war;
   - 90 or more consecutive days, one of which is during a period of war;
   - or at least one day of wartime service that results in a discharge for a service-connected disability.
3. Veteran must have limited income and a net worth that does not provide adequate maintenance, (“need test”);  
4. Veteran must be permanently and totally disabled at the time of application for pension.
5. The permanent and total disability must not be due to willful misconduct of the veteran.
Veterans who meet the following criteria at the time of application for benefits are deemed “disabled” for purposes of pension eligibility:
– Age 65 or older, OR
– Totally and permanently disabled, OR
– Receiving SSI, OR
– Receiving SSDI, OR
– A patient in a nursing home receiving skilled nursing care

Periods of Wartime for VA Pension Purposes
– WWII: 12/7/1941 - 12/31/1946
– Persian Gulf War: 8/2/1990 - ??????

Types of Pension
• Improved Pension, Section 306, Old-Law - $
  – After January 1, 1979, Improved Pension is only program that accepts new applications
• Special Monthly Pension
  – Housebound Benefits - $$$
  – Aid & Attendance (A&A) - $$$
Veterans Pension Rates

Maximum Annual Pension Rate (MAPR)

- **Improved Pension**
  - No dependents - $13,166 = $1,097.17 per mo.
  - 1 dependent - $17,241 = $1,436.75 per mo.

- **Housebound**
  - No dependents - $16,089 = $1,340.75 per mo.
  - 1 dependent - $20,166 = $1,680.50 per mo.

- **Aid & Attendance**
  - No dependents - $21,962 = $1,830.17 per mo.
  - 1 dependent - $26,036 = $2,169.67 per mo.

Improved Death Pension Rates

(Surviving Spouse/Child)

Maximum Annual Pension Rate

- **Improved Death Pension**
  - No dependent child - $8,830 = $735.83 per mo.
  - 1 dependent child - $11,557 = $963.08 per mo.

- **Housebound**
  - No dependent - $10,792 = $899.33 per mo.
  - 1 dependent - $13,514 = $1,126.17 per mo.

- **Aid & Attendance**
  - No dependent - $14,113 = $1,176.08 per mo.
  - 1 dependent - $16,837 = $1,403.08 per mo.

How Pension payments are calculated

- Veteran or Survivor without deductible expenses
  MAPR - Income = Payment

- Veteran or Survivor with deductible expenses
  Step 1: Deductible expenses - 5% of MAPR = Expenses
  Step 2: Expenses - Income = Total Income
  Step 3: Total Income - MAPR = Payment

- What counts as income? - annual income of veteran, plus annual income of veteran’s dependent spouse and annual income of dependent child. 38 U.S.C.S. § 1712(d)

- Unreimbursed Medical Expenses - 38 C.F.R. § 3.272(g) (2016)
  *Deductible expenses for the year such as certain unreimbursed medical expenses must exceed 5% of MAPR
Proposed Pension Regulation Changes
(Issued on January 23, 2015)

- Proposed Changes would add to 38 C.F.R.:
  - § 3.274 - would establish a clear net worth limit of $119,220.
  - § 3.275 - Primary residence exempt up to 2 acres; if residence is sold, proceeds must be used to purchase another residence within the calendar year or will be considered an asset.
  - § 3.276 - Creates 3 year look back period; establishes presumption that absent clear and convincing evidence showing otherwise any asset transfers made during the 36-month look back period were made to establish eligibility for pension; penalty period not to exceed 10 years; penalty begins month after last transfer completed.

- § 3.278 - Defines and clarifies what VA considers to be a deductible medical expense; defines “activities of daily living” (ADL) and “instrumental activities of daily living” (IADLs); defines custodial care as requiring assistance with 2 or more ADLs OR assistance for a person with mental illness who is unsafe if left alone due to mental disorder; Payments to Independent Living Facilities are generally not considered medical expenses nor are payments for assistance with IADLs; Maximum hourly rate for home health care $32 hour.

Pension Tips

- Make sure your clients who receive SMP (Housebound or A&A) enroll for VA health care.
- Veterans receiving SMP are entitled to cost-free medication if it is ordered by VA physicians.
- VA will provide veterans receiving SMP any needed hospital or outpatient care.
Attorneys Fees and VA Pension

- **CANNOT CHARGE FEES** for assisting a client with completing and filing applications
- **CAN charge fees for:**
  - Representing a veteran on appeal after a Notice of Disagreement (NOD) is filed – can charge up to 33% contingent fee of retroactive award if appeal is successful
  - Planning - asset planning, drafting legal documents, reviewing assets to determine eligibility

VA Compensation

- Administered by Veterans Benefits Administration (VBA)
- Veterans are entitled to VA Compensation if:
  1. they were discharged or released under conditions other than dishonorable;
  2. their disease or injury was incurred or aggravated in the line of duty; and
  3. the disability is not a result of their own willful misconduct
- VA Compensation is based on disability and not financial need or income
  - It is possible for a veteran who has a well-paying job to receive VA compensation benefits

- Veteran must satisfy 3 criteria to receive compensation for a disability:
  1. Must have current disability;
  2. In service event/injury; and
  3. There must be a medical nexus between event/injury & disability
- VA has a duty to assist veteran with developing claim
Compensation Rates
(Effective 12/1/17)
- Veteran alone: $136.24 (10%) up to $2,973.86 (100%) monthly
- Once a veteran receives at least a 30% disability rating he or she can receive a higher monthly payment for dependents
  - Without Children:
    - Veteran with Spouse Only: $466.15 (30%) up to $3,139.67 (100%)
  - With Children:
    - Veteran with Spouse and Child: $503.15 (30%) up to $3,261.10 (100%)
- The VA does not automatically pay a veteran extra payment for dependents
  - must file VA form 21-686c Declaration of Status of Dependents
- Complete tables of compensation rates can be found at:
  [http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp](http://www.benefits.va.gov/COMPENSATION/resources_comp01.asp)

Presumptive Service-Connected Conditions
- Most common: Vietnam veterans with certain diseases are presumed to have those diseases as a result of exposure to Agent Orange
  - Commonly seen diseases: Prostate cancer, Diabetes Mellitus type II, Ischemic Heart Disease
- Full list of presumptive conditions can be found at 38 C.F.R. §§ 3.307-3.309, 3.311, 3.313(b) (2016)

Secondary Service-Connection
- Available for almost any disability that is the result of another service-connected condition
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