ESTATE PLANNING HIGHLIGHTS

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** Certified Elder Law Attorney by the National Elder Law Foundation 2017*

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Courtney Elder Law Associates

Elder Law • Special Needs Planning • Estate Planning

FRASCOGNA COURTNEY, PLLC

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Rick and his wife, Ruthie, have adult twin daughters, one of whom has a disability. Rick has been active in community involvement as a Director of Mustard Seed, Inc., President and Director of the Cerebral Palsy Foundation of Mississippi, Inc., President of the Advisory Board of Hospice Ministries Inc., a director of the Heritage School for children with learning disabilities, member of the Occupational Therapy Council of Advisors for the Mississippi State Department of Health, and a member of the Alzheimer's Association-Middle Mississippi Chapter. He has written articles and has delivered many presentations for lawyers, health-care professionals, churches and community groups on elder law and estate planning subjects and topics of interest to senior adults, caregiver children and spouses, and families with special needs.

TABLE OF CONTENTS

	Page
Ownership and Control of Assets	1
Healthcare and Financial Decision-making	3
Disposition of Assets	6
Tax Basics	8
How to Pay for Long-Term Care	9
Special Needs Planning	12

ESTATE PLANNING HIGHLIGHTS

"Estate planning" includes strategies and personalized documents designed to help you maintain control of your property and affairs for your lifetime, achieve health-care security, and provide support and a legacy to those you love. The following is some general Information you should consider in planning:

Ownership and Control of Assets

1. **Joint ownership.** If you own real property jointly with someone else as "***joint tenants with rights of survivorship***", then your interest in that property will automatically pass to the surviving owner at death. Your joint interest will not pass according to the terms of your will or trust. If you own property with others and the deed does not say as "joint tenants with rights of survivorship", then you are a "***tenant in common***" with the other owners, and your proportionate share of the property will pass under the terms of your will. For bank and financial accounts, the bank documents which established the account determine if it is jointly owned. If the bank documents state that the account is jointly owned "with rights of survivorship", then the surviving joint owner will automatically become the sole owner of the funds at your death. However, if the account documents do not state that there is a right of survivorship and if your name is the primary name on the account, your estate may have to be probated at your death and ownership of the funds will pass to your heirs under state law or as you direct in your will.
   Advantages: (a) The jointly-owned assets will pass automatically to the surviving owner at your death without necessity of probate of your estate or will. (b) The other joint owner will have complete access to jointly-owned bank accounts in the event you become disabled. (c) The surviving joint owner may be entitled to a "stepped-up" tax basis in the assets they acquire by joint ownership at your death, which will result in less capital gains income tax to pay when they later sell the assets.
   Disadvantages: (a) The other joint owner can freely withdraw any jointly-owned financial account funds, leaving you without funds for self-support. (b) Jointly-owned assets may become subject to the judgments, lawsuits and bankruptcy of any joint owner. (c) Full ownership of the assets will pass to the other joint owner at your death, without any legal requirement that s/he share them with other children or family members. (d) Both living joint owners of real property must sign any deed or mortgage, and a power of attorney or conservatorship will be required for a joint owner who becomes mentally incapacitated in order to sell or mortgage the property. (e) If you make your child or other family member a joint owner of your assets in order to apply for Medicaid to

pay for nursing care costs, Medicaid will still count the entire value of the jointly-held assets as your property.

2. **Real Estate Ownership**. Every person who owns a residence or other real property must be aware of the form of ownership. If the deed states that property is conveyed to two or more persons as "joint tenants with rights of survivorship," both owners must sign any documents to deed or mortgage the property and the property will be owned outright by the surviving co-owner if one owner dies. Without the "joint tenants with rights of survivorship" wording, either owner can sell or dispose of her portion without the signature of the other (but not homestead property), and the surviving owner will only continue to own her original share. Also, deeding property outright to another will give that person the same cost basis as the prior owner, which could cause capital gains income tax when the second owner sells the property. (See Section 21 "Capital Gain" below.)
   Also, a property owner may convey land to another and retain for the original owner the right to use and occupy it during that owner's lifetime (a "**life estate**" deed). The land will pass directly to the named recipient (the "remainder owner") at the original owner's death and will not pass through will or probate at the original death. The property is not subject to a Medicaid payback claim at the original owner's death, but both owners must sign in order to sell or mortgage the property. Therefore, joint ownership and life estate deeds may be used in specific circumstances to direct ownership of land and avoid probate. Upon receiving full ownership through one of these deeds at the death of the prior owner, the surviving owner will get a "stepped-up" tax basis on the property that will result in lower capital gains taxes if the property is later sold.

3. **Authorized Signer**. You may put another person on your bank accounts so that they are able to pay your bills (but are not a "***joint owner***" of the account) by having the bank or financial institution list them as "***authorized signer only***" (for checking or money market accounts). The authorized signer can write checks but is not an owner, so his or her creditors cannot attach your account.

4. **Revocable Trust**. A person may choose to own their assets in a ***revocable "living" trust***. The trust document contains similar provisions to a will, but it becomes effective immediately after it is signed. The person setting up the trust is called the grantor, and is also the beneficiary of the trust during his/her lifetime. The grantor appoints himself or another person or financial institution to serve as trustees, and the trustee owns and manages the trust assets and makes payments from the trust in

accordance with the desires of the beneficiary. The grantor may also be the trustee. One or more "successor trustees" should be named to serve if the initial trustee becomes incapacitated or dies. The grantor/beneficiary then transfers some or all of his/her assets to the trustee to manage. If the grantor/beneficiary becomes incapacitated, the successor trustee may take over and manage the assets for the grantor's benefit. At the grantor/beneficiary's death, the trustee will either continue to hold assets for, or will distribute the trust assets to, the persons named as the remainder beneficiaries ("heirs") in the trust document. A revocable living trust affects the assets immediately upon their transfer to the trust, and **no probate** is required to permit the trust to continue after the grantor's death and to permit the trustee to transfer ownership of assets to the remainder beneficiaries. **[Note:** Transfers of property to or from a revocable living trust within five years prior to application for Medicaid assistance for nursing home care may adversely affect eligibility for such assistance, and transferring a residence into such a trust will cause the otherwise exempt residence to be considered a financial asset for Medicaid eligibility purposes.**]**

Health Care and Financial Decision-making

5. **Advance Health-Care Directive**. The Uniform Health-Care Decisions Act of Mississippi (MCA §41-41-201, -209) prescribes the "***Advance Health-Care Directive***" (AHCD) as the instrument by which a person with mental capacity can designate an agent who will be able **to make health-care decisions** for the maker. An adult in Mississippi is entitled to make his own medical treatment and health-care decisions, and maintain the privacy of his own medical information, unless someone else has legal authority to do so. This includes the right to begin, alter and refuse medical treatment. However, one may lose this capacity through illness or injury, and medical providers may refuse to render non-emergency treatment without consent of someone with lawful authority to approve such measures. The AHCD allows you to control how, and by whom, your personal health-care decisions will be made after the onset of any future incapacity.

6. **Health-Care Surrogate**. The Uniform Health-care Decisions Act of Mississippi allows a third party (known as a "***health-care Surrogate***") to make health-care decisions for one who is unable to make such decisions for himself, <u>where no health-care agent or guardian has been appointed</u> for the patient or, if appointed, is not reasonably available. The Surrogate must be, in **order of priority**, the patient's: (i) spouse, unless legally separated; (ii) adult child; (iii) parent; (iv) adult brother or sister; or (v)

an adult who has exhibited special care and concern for patient, who is familiar with patient's personal values, and who is reasonably available to act. A Surrogate must make any health-care decision for the patient in accordance with the patient's individual instructions and other wishes to the extent known to Surrogate ("substituted judgment" test); otherwise, Surrogate will make the decision in accordance with Surrogate's determination of the patient's best interest, taking into consideration Patient's personal values to the extent known to Surrogate. A medical provider may require written evidence of such surrogate status, and our firm has developed and can prepare a written Declaration of Health-Care Surrogate for such situations.

7. **Durable Power of Attorney**. A "***durable power of attorney***" (DPOA) is a written document in which the "principal" appoints another person as the principal's agent (or "Attorney-in-Fact") and gives that agent the authority to carry out the principal's non-medical affairs (banking, insurance, property management, etc.) as directed in the DPOA.

A. ***Durable***. The DPOA will only be effective after the principal's incapacity ("durable") if the document contains a statement to the effect that "This General Power of Attorney shall not be affected by the subsequent disability or incompetence of the Principal or the passage of time."

B. ***General or Limited***. The DPOA may give the Attorney-in-Fact powers over all the principal's affairs and property that the principal would have (a "general" DPOA), or it may be limited to certain powers, such as the power to sell real property or create a trust for the principal (a "limited" DPOA). And Mississippi law requires that someone other than the principal's spouse must be named as the agent to sell the principal's residence property.

C. ***Immediate or "Springing"***. It may allow the Attorney-in-Fact to act as soon as the principal has signed the document (an "immediate" power) or it may state that the Attorney-in-Fact may only exercise the powers after some future event, such as a doctor's written statement that the principal has become incapacitated (a "springing" power). An immediate DPOA does not limit the principal's right to continue to make such decisions or control her property and affairs as long as she has capacity to do so.

D. ***Personalized***. A DPOA should be customized for the principal's personal circumstances, and is best done by an experienced elder law attorney who understands these issues. A power of attorney that lacks important statements of intended powers or that unduly restricts certain types of powers will hamper the actions of the agent when it becomes necessary to use it.

E. ***Designation of conservator***. Mississippi law states that a court-appointed conservator for the principal may revoke the principal's power of attorney and that the agent under the power of attorney is subject to the conservator's authority. The law also states that the principal may designate in the power of attorney the person(s) who are to be appointed as conservator if a conservator is required; and the court must abide by this designation unless obviously not in the principal's best interest.

8. **Conservatorship**. If an adult has no health-care or financial power of attorney and is unable to manage her own affairs, a family member may seek to be appointed as her "***conservator.***" The conservatorship statutes refer to the person with incapacity as the "**ward**." If a person is "incapable of managing his own estate" due to "advanced age, physical incapacity or mental weakness," a petition may be filed in the Chancery Court to appoint a conservator of the financial estate, the person, or both. The petition must include written certificates of at least two licensed physicians (or one physician and one psychologist) stating that, in their opinion, she is unable to manage her own affairs and is in need of a conservator. The petition is filed, a copy of the petition must be personally served on the ward and at least one spouse or next of kin or caretaker, and a court hearing may be set not less than 5 days later.

Once appointed, the conservator must file petitions for court permission to move the person or property of the ward to another county, move the person and property of the ward out of state, or make purchases from the ward's funds. The conservator must usually post an insurance bond and must file annual accountings.

The **legal standard** for appointment of a conservator is the **inability to manage** his property or person due to "advanced age, physical incapacity or mental weakness." The Mississippi case of *Harvey v. Meador*, 459 So.2d 288 (Miss. 1984) established several legal propositions pertaining to conservatorship: (i) advanced age or physical incapacity alone does not necessarily justify appointment of a conservator; (ii) mere lack of good business judgment, not amounting to some degree of wasted or dissipated property, is not sufficient basis for appointment of a conservator; and (iii) the test of "management competency" is met by assessing factors including ability to manage, improvident disposition, dissipation of property, susceptibility to undue influence or deception by others, and similar factors. In the 2003 case of *In Re Conservator for Demoville*, 856 So.2d 607, rehearing denied, cert denied 866 So.2d 473 (Miss. 2003), the court ruled that if at least one of the factors of the "management competency test" is established, appointment of a

conservator may be justified. In *Demoville*, the court refused to appoint as conservator the daughter of a woman with severe dementia, where the daughter had transferred large sums of money from the mother's funds to her own benefit. The court held that a person with such a conflict of interest with the incapacitated person cannot serve as conservator.

Disposition of Assets

9. **Gifts**. Some people want to make gifts of money or property to children or others. There may be advantages or disadvantages of outright gifts of assets to others. ***Advantages***: (a) the gifted asset is removed from the estate for estate tax or future Medicaid purposes; (b) the giver ensures that the asset goes to the intended recipient, and the giver can watch her enjoy it; (c) no gift tax return or tax owed if the giver gives less than $15,000 per person per year. ***Disadvantages***: (a) the gifted assets are no longer available for the care and support of the giver; (b) may create an obligation to file gift tax return if over $15,000 per person per year ($30,000 per person from a married couple); (c) gifts within five (5) years prior to Medicaid application may delay qualification; (d) gifted assets become subject to debts and liabilities ("creditors and predators") of the recipient and may be lost or spent foolishly.

10. **Designated Beneficiaries**. Life insurance policies, retirement plans, annuities, etc. will pass directly to the person(s) designated as ***beneficiary*** of those benefits, <u>not</u> under the terms of your will or trust. Likewise, you may name children or others as "***payable on death***" **(POD)** beneficiaries of bank accounts or as "***transfer on death***" **(TOD)** beneficiaries of investment company accounts. At your death, the account will be paid directly to the named beneficiary(ies) and <u>not</u> through a will or probate.

11. **Inheritance Law and Your "Estate"**. If you have <u>no</u> will or living trust, at death your estate will pass to your surviving spouse and children in equal shares. If you have no surviving spouse or children, your assets will go to your next of kin under inheritance law. Your "***estate***" is all money, real property and personal property which you own in <u>your name alone</u> and your interest as a tenant in common with others.

12. **Last Will and Testament**. A ***will*** ("last will and testament") does not affect assets until the will-maker's death, and a will can be revoked, destroyed or amended at any time prior to the maker's death. A will <u>must</u> be probated in court in order to transfer the estate assets, free of the deceased person's debts, to those named in the will. The legal term for

someone who makes a will is "testator."

13. **Debts**. If you leave real property which is mortgaged to someone in your will or trust, the property will generally pass to them with the mortgage debt attached to it. If you wish to leave real property free and clear of the mortgage debt, you may include a provision in your will or trust that the mortgage is to be paid from other assets of your estate.

14. **Probate**. Probate is the process where the Executor named in a will (or Administrator of an estate where there is no will) hires a lawyer to file the original will with the court clerk of the county where the testator (deceased person) resided. A petition to open the probate is filed and the Executor is given a document called "Letters Testamentary" which authorizes him/her to collect all the testator's assets, pay any creditors who file claims with the court, and ultimately distribute all remaining assets to those people or charities named in the will. The Executor is then relieved from his/her responsibilities. In simple estates, probate will take at least four months after the Testator's death. This is because it will usually take a month or so to obtain a death certificate and have the petition for probate filed. A notice is then published in the newspaper giving creditors 90 days from the date of the notice to file any claims. Only after this 90-day period has expired can the estate be closed. A similar process is used to probate the estate of a person who dies without a will. A properly drafted will can prevent the filing of personal assets information in the probate case, thereby keeping such information private.

15. **Renunciation**. If a person leaves his/her surviving spouse less assets than the spouse would have received without a will, the surviving spouse may be able to ***renounce*** (challenge) the will's provisions and receive an equal share with any surviving children. A will or living trust can provide that children or other relatives will receive any amount or no amount of the estate.

16. **Guardian**. For parents of young children or incapacitated adult children, an important function of a will or trust is the designation of the person(s) who will serve as the child's ***guardian*** after the parents' deaths. Guardianships for healthy minors terminate when the child reaches the age of adulthood (21) or becomes married and/or self-supporting.

17. **Testamentary Trust**. A will may create a ***trust*** to hold and administer money or property for one or more beneficiaries of the will after the willmaker's death, such as disabled children or adults or heirs with debts

and liabilities or poor money management skills. The will can state that money or assets for an heir can be transferred to the designated trustee to be managed and disbursed as instructed in the trust. The creator of the trust can thereby direct the management and payout of the trust assets to the beneficiary after the creator's death.

18. **Executor**. A will must name an ***executor***, who is the person responsible for filing the will for probate. It is recommended to name one or more successor executors who would serve in case the first named executor becomes unable or unwilling to do so.

19. **Specific Gifts**. A testator may designate in the will that certain items of personal property (jewelry, tools, firearms, gifts or amounts of money, etc.) shall pass to certain named individuals. These are called "***specific bequests***."

Tax Basics

20. **Gift Tax**. Some people worry about creating an income tax burden if they give money or property to children or others. A gift is **not** taxable income to the recipient. Also, "**gift tax**" is always paid by the giver, never by the recipient. There is a lifetime gift tax exemption of $11.2 million. Therefore, no gift tax would be payable on the gift if the *giver's* total estate is valued at $11.2 million or less. (**Note**: This may be different in states other than Mississippi, such as Tennessee, which may have state gift taxes.)

21. **Capital Gain Tax**. Everyone is familiar with income taxes that are paid on wages, self-employment earnings, rent income and other forms of income. However, there is another type of income tax that can result from the gifting of property. "**Capital gain**" income can result when appreciated investments or real property is sold and the appreciation value is received. Here is an example: Harry bought his home for $75,000 and later added a pool and barn for $25,000. His purchase price ($75,000) plus amount of his capital improvements ($25,000), or total of $100,000 is called his tax "basis." His property is now worth $150,000. The amount of appreciation he receives when he sells the property is $50,000 ($150,000 sale price minus $100,000 basis). This is called his "capital gain." Capital gain income is taxable at the capital gains tax rate, which is lower than regular income tax rates (usually 15% for most people). However, Harry will not owe the capital gains tax on his $50,000 gain because of an income tax exemption known as the "Section 121 exclusion." This provision exempts up to $250,000 ($500,000 for a

married couple) of capital gain realized by an individual upon sale of *his/her principal residence* from taxation IF the seller lived in that property for at least two of the five years prior to the sale. Problem: If Harry deeds the home to his daughter when he moves to assisted living, he deeds to her his basis along with it. Therefore, when she sells the property three years later (without having lived in it for at least two years), she must pay the capital gains tax on the full $50,000 appreciation she receives. Solution: Harry could have sold the property, avoided paying any capital gains tax due to the Section 121 exclusion, and given his daughter all $150,000 without any income or gift tax payable by either. Or, Harry can make provision for his daughter to obtain title to the property at his death, which would wipe out the capital gain for her.

22. **Estate Tax**. The Tax Relief Act of 2010 ("Act") increased the **estate tax** exemption to **$11.2 million** for individuals ($22.4 million for couples) in 2018. The Act also makes any unused portion of the estate tax exemption in the estate of the first spouse to die "portable" – that is, the surviving spouse can elect to add that unused exemption to his/her $11.2 million exemption. The "net taxable estate" is the gross estate value, less mortgage debts, probate costs, charitable bequests and the value of all property left to a surviving spouse. A person's "***gross estate***" will consist of the value of all real and personal property, investments and money accounts owned solely by that person, plus the value of that person's proportionate share of property owned jointly with another, plus the face value of all life insurance policies insuring that person's life **if** he/she owns the policy (that is, has the right to cancel or change the beneficiary), even though the death proceeds may be payable to another as the designated beneficiary.

How to Pay for Long Term Care

23. "How do we pay for long-term care for Mom?" We hear this often. Here are some ways:

A. Private pay. Health care services such as sitters often must be paid for from personal income or savings of the ill person or other family members, unless covered by one of the following methods.

B. Long-term care insurance. A long-term care insurance policy may provide that it pays for at-home care, assisted living facility and/or skilled nursing home expenses.

C. Medicare. Medicare may pay for at-home or out-patient therapies

and rehabilitation following an illness or injury. The supervising doctor will usually trigger these services to achieve the patient's full recovery. Contrary to traditional thought, there is no requirement that the patient be "improving" and not "plateaued" in order to continue to receive Medicare payment for such therapies, so long as it is clear the patient would lose function without those services. This was settled in the *Jimmo v. Sebelius* case.

Contrary to popular belief, Medicare only pays part of the first 100 days of nursing home care for qualified nursing home residents, and only the first 20 days in full. Medicare will pay the next eighty days (days 21-100) in the nursing home, but the resident must pay a daily copay during that period ($167.50 per day in 2018). Such Medicare coverage requires that the individual be admitted to a nursing home within thirty (30) days after a hospital stay of at least three (3) days for Medicare-covered in-patient care (not merely "observation status").

D. Medicaid. A **single** person may be eligible for nursing home Medicaid coverage if his "countable" assets do not exceed $4,000 and his monthly income is less than the private pay rate of the nursing home. Under "spousal impoverishment" rules for **married** applicants, the at-home spouse ("community spouse" or CS) may keep all of his/her own separate income, plus enough of the applicant's income to get the CS's income up to $3,090 per month (the "monthly maintenance needs allowance") if the CS's separate income is less than this amount. The CS may own separate countable assets of up to $123,600 (the "community spouse resource allowance"). Assets may be transferred from the nursing home spouse to the community spouse to achieve these levels. In addition, the applicant (nursing home spouse) may have separate countable assets of up to $4,000. The separate income (Social Security, etc.) of the applicant spouse that is not assigned to the CS as part of the monthly maintenance needs allowance must be paid to the nursing home as the applicant's "share of cost", but the community spouse's income and assets need not be spent for this care.

(1) ***Excluded Assets***. A number of assets are not counted when determining eligibility for Medicaid. These include: the entire value of the residence (unless it is in a revocable living trust); all household furnishings; up to two automobiles, based on use; certain life estate or inherited interests in property; some income producing property that produces at least 6% return on value; property used in trade or business for self-support; certain mineral and timber rights; certain life insurance policies; prepaid or designated funeral contracts and burial plots; and certain IRA, 401K, retirement or annuity accounts in pay-out mode at the approved rate.

(2) ***The "Look-back Rule"***. Many people have heard: "You have to wait 3 years after giving anything away to get Medicaid." The Truth: Medicaid law now requires disclosure of all transfers of money or property made within **five (5) years** prior to Medicaid application (the "look-back period"), whether they were transferred to a trust or otherwise. Medicaid may refuse to pay nursing home benefits for a period of time based on the amounts and dates of such gifts made during the look-back period. (See section (3) Transfer Penalty below.) However, the rules penalizing transfers do not apply to certain transfers.

(3) ***Transfer Penalty***. If assets were given away, without any value in return, to persons other than a spouse or disabled child, and if the giver applies for Medicaid within 60 months after such gift, Medicaid will impose the following penalty on such gifts: Medicaid will refuse to pay the giver's nursing home care for a number of months based on the state average nursing home cost ($5,700 from January 2011 – June 2014, $5,920 July 2014 – June 2015, $6,250 July 2015 – June 2016, $6,405 July 2016 – June 2017, $6,619 July 2017 – June 2018). Under the DRA, the penalty period for gifts does not begin to run until the Medicaid Applicant has entered a nursing home and otherwise qualifies for Medicaid. Therefore, if the applicant gave away $59,200 on December 1, 2014 and goes into a nursing home and applies for Medicaid December 1, 2018, there would be a 10-month ineligibility period ($59,200 divided by $5,920 average cost in December 2014 when transfer was made) before Medicaid will begin. Even though his assets are below the Medicaid eligibility limit ($4,000) when he applies for Medicaid, he must private pay for his nursing home for the additional 10 months of ineligibility.

The law has dramatically changed the Medicaid eligibility rules. Therefore, it is imperative that, if substantial gifts have been made, a Medicaid application must NOT be filed prematurely. Consult an experienced elder law attorney about any gifts and their effect on Medicaid eligibility.

(4) ***Estate Recovery***. Federal law requires that Medicaid must seek to recover reimbursement from the estate of each deceased Medicaid recipient for nursing home services paid by Medicaid after the recipient was 55 years of age. This claim will be waived by Medicaid (a) if there is a surviving spouse; or (b) if there is a surviving dependent who is under the age of twenty-one (21) years or who is blind or disabled; or (c) as provided by federal law and regulation, if it is determined by Medicaid or by court order that there is undue hardship. A 2011 state court case also held that Medicaid has no claim against the Medicaid recipient's homestead property at death IF the Medicaid recipient is survived by a spouse, child or grandchild who would take the residence as an inheritance. *Estate of Darby v. Stinson*, 68 So.3d 702 (Miss.

App. 2011), rehearing den. May 31, 2011, cert. den. Sept. 1, 2011. A 2015 Attorney General's Opinion affirmed that Medicaid will not have a recovery claim against homestead property owned by the Medicaid recipient at his/her death, and such property will descend to that person's surviving spouse, children or grandchildren. *Mississippi AGO No. 2015-304* (Dec. 23, 2015).

E. Veteran's Benefits. The VA may pay a monthly benefit to a veteran who: is age 65 or older**,** or permanently and totally disabled not due to his/her own misconduct; was discharged from service under conditions other than dishonorable; served at least 90 days of active military service, one day of which was during a war time period (at least 24 months if you entered active duty after September 7, 1980); and has family "countable income" below a limit set by law. In 2018, the maximum annual **Aid & Attendance** benefit is $21,962 ($1,830 per month) for a veteran with no dependents, and $26,036 ($2,170 per month) for a veteran with one dependent.

Special Needs Planning

24. Special Needs Trusts. The primary purpose of a special needs trust (SNT) is to hold assets for the benefit of a disabled spouse or child who receives Medicaid or SSI benefits in such a way that the trust assets are not counted as assets of the disabled person and do not thereby disqualify him or her for SSI or Medicaid. There are two basic types of SNTs based on who is placing assets in the trust.

(1) ***Third party SNT (or "Estate Planning SNT")***. Parents or grandparents of children with disabilities, or the healthy spouse of a person in a nursing home, may have no will or estate plan, so that at their death the disabled person receives a share of their assets by inheritance. Or, the will or living trust of the parent or spouse may state that at their death, their assets are left to their children, spouse or heirs (including the child or spouse with a disability). Parents of disabled children and spouses of disabled adults who have no will or who merely leave assets through their wills or trusts to their children or spouse will unwittingly disqualify the disabled child or spouse for Medicaid or SSI assistance. The inherited funds will be counted as the resources of the disabled child or spouse by SSI and Medicaid rules. Likewise, ***guardianship*** or ***conservatorship*** funds held for a child or adult are deemed to be resources of that child or adult. It is imperative that families of disabled children or adults take particular care in crafting an estate plan which will provide access to all available resources for the disabled person's future needs and which will not result in disqualification for Medicaid

benefits by accident. A **Special Needs Trust** may be set up by the parents or healthy spouse as part of their estate plan, or by anyone else who wishes to establish a fund that can later receive gifts of money or assets for the disabled beneficiary by lifetime gift(s) or by last will and testament gifts. The assets in this type trust will be used for the disabled beneficiary's needs during his/her lifetime, and the assets remaining in the trust at the death of the beneficiary will be distributed to the persons and in the manner prescribed in the trust (such as to other children or family members, non-profit groups, etc.). This trust can be established in the will of the parent or healthy spouse (or separate from the will) and prevent the disabled child or spouse from losing Medicaid benefits by inheritance. Medicaid will not be entitled to claim any of the funds or assets in this type trust.

(2) ***Self-settled SNT***. A special needs trust created to hold the assets already owned by the disabled beneficiary, or that the beneficiary is entitled to receive through a lawsuit settlement, inheritance or life insurance settlement, is called a **"self-settled"** trust. Federal law states that the assets of a disabled person placed in a properly established irrevocable trust for that person's benefit are not to be counted as assets of the disabled person for Medicaid purposes. Such a self-settled trust may be created (that is, the trust document signed) by the beneficiary, beneficiary's parent, grandparent, legal guardian or a court, or as part of a larger "pooled" trust (holding the assets of more than one disabled person in separate accounts and managed by a non-profit organization). At the beneficiary's death, Medicaid must be first in line to recover from the trust assets the amount Medicaid has paid for the beneficiary's medical care. Any remaining balance in the SNT can be paid to those persons designated by the creator of the trust (the "remainder beneficiaries").

25. **ABLE Account.** Another planning option to prevent loss of SSI or Medicaid benefits is to gift assets to an ABLE account. The 2014 ABLE Act allows an account (similar to a 529 college savings account) to be established for an individual with a disability that began prior to age 26. Up to $15,000 per year may be placed in such an account by anyone, and the account balance up to $100,000 will not be counted for SSI eligibility (or up to $235,000 for Medicaid benefits). Unlike a third-party special needs trust, there is a payback obligation to Medicaid from an ABLE account at the account owner's death.

NOTE: The above is general information only and is not intended as legal advice. Each person's situation is unique and requires assistance from a competent professional. Call us today for information about your bold estate planning needs and other legal issues.

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