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Positive Strategies for Aging & Living with Disabilities Winter 2015

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- Medical Assistance
- Elder Care
- Planning for Disability or Incapacity
- Planning for a Disabled Child
- Special Needs Trusts
- Guardianship & Conservatorship
- Estate Planning

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ALERT! Married Couples Reducing Excess Assets

On January 15, 2015, the MN Department of Human Services conceded in a report to the Health and Human Services Committee of the State Legislature that its 2002 law counting a community spouse's annuitized annuity as a resource when determining eligibility for an ill spouse *violates federal Medicaid law*. The report is in response to pressure from AARP–Minnesota and others who sponsored a bill last session to bring Minnesota law into compliance based on the 8th Circuit Court of Appeals decision in *Geston v. Anderson*, reported in our last newsletter. This means that a community spouse should be able to annuitize resources in excess of the community spouse asset allowance and thereafter qualify an ill spouse for Medical Assistance benefits. Left unanswered is whether the legislature will now repeal the law per the recommendations of DHS, and whether our clients must wait until the legislature acts. Also unknown is whether the state must be named as the primary beneficiary of the annuity. Any married couple needing to reduce excess available assets to qualify for MA should call your attorney immediately to determine how this may affect your long term care plan!

Guardianship and End of Life Decision Making

A divided Minnesota Supreme Court has ruled that a court-appointed Guardian has authority to discontinue life support for a ward without prior court approval. The case involved Jeffers Tschumy, a 53-year-old man with no family with a complex medical history. A professional guardian was appointed in 2009, and Mr. Tschumy suffered irreversible brain damage in 2012. The guardian directed removal of life support, but the hospital's ethics committee argued that a court order was required. The Guardian argued that the he had broad power given by the statute to withhold consent to medical treatment. The District Court disagreed, stating the Guardian did not have statutory authority to discontinue life support without prior court approval. In supporting the authority of the guardian, Chief Justice Gildea wrote that when continued medical treatment is no longer necessary or in the ward's best interests because there is no chance to recover, the guardian has not only the ability but the duty to decline continued medical treatment. The dissent argued in favor of judicial oversight, asserting that isolated wards could be vulnerable to the unchecked power of a guardian to make life and death decisions.

Medical Assistance Update — The Numbers

Highlighted below are the basic Medical Assistance figures that change annually in January:

- The monthly personal needs allowance for a Medical Assistance recipient has been increased to **$97** ($90 for veterans and widows and widowers of veterans).
- The minimum monthly income allowance for a community spouse is between $1,967 and **$2,980.50**, depending on the community spouse's qualifying shelter costs.

- The maximum community spouse asset allowance is **$119,220** for applications in 2015. The minimum community spouse asset allowance is **$33,851** for applications in 2015.
- If you are receiving Elderly Waiver services and your gross monthly income (not including your spouse's income) does not exceed **$2,199**, your monthly personal needs allowance will be $970, otherwise it will be **$97** or $730.
- The home equity limit for 2015 has increased to **$552,000**, up from $543,000.

Planning for a Loved One with a Disability

Are you planning on leaving money to a loved one who is living with a disability? A child, grandchild, niece, nephew, or sibling? Have you made that person a beneficiary of your retirement account or of your life insurance policy? What public benefits is that child receiving?

If your loved one is relying on public benefits to meet basic food, shelter, and medical needs, then the heart of your estate plan should be to ensure that the child's public benefits are maintained and the inheritance can be used to provide for those things that the public benefits do not cover — vacations, special therapies, pet care, manicures, special foot care, dance lessons, art lessons, someone to ensure your child is faring well, etc.

The best way to achieve this goal is to establish a third-party supplemental needs trust or a third–party pooled trust sub-account for your loved one and direct all assets (retirement accounts, real property, investments, cash, etc.) to the third party supplemental needs trust either by beneficiary designation or in your will. If the trust is established correctly managed properly by the trustee, your loved one will be able to maintain public benefits and have money for those extras that contribute to quality of life. Upon your loved one's death, any money left in the third party supplemental needs trust can go to your other children or grandchildren, to a charity or wherever you choose.

What happens if you do not use a supplemental needs trust?
If a person relying on public benefits to meet daily needs inherits money outright, he or she will in most cases lose those benefits. If your loved one does not have capacity to manage his or her own money, a conservatorship may have to be established so that the money can be managed for his or her benefit. Then, the inherited money will either be used to pay for basic needs until it is gone, or your loved one may establish a first party special needs trust, but only if they have not reached age 65. Also, any money left in the first party special needs trust upon the person's death must be paid back to the state, up to the amount the state paid for Medicaid benefits.

If you have a loved one living with a disability, contact our office to meet with an attorney to determine if establishing a supplemental needs trust or a pooled trust sub-account is right for you.

The ABLE Act: Congress Enacts Important Legislation for Disabled Individuals

On December 19, 2014, President Obama signed the ABLE Act, which will allow people with disabilities to open ABLE accounts where they can save up to $100,000 without risking eligibility for SSI and medical assistance. These accounts are modeled after 529 college savings plans where interest earned on savings will be tax free. They are an alternative to special needs trusts and supplemental needs trusts in some circumstances — but in what circumstances we cannot say. This is because the federal government needs to adopt regulations and Minnesota needs to create ABLE accounts before we know how, exactly, they will look in Minnesota. Here are some important facts about the ABLE accounts:

- They are available only for individuals with a disabling condition that occurred before age 26.
- Each person may open only one ABLE account and that account is limited to $100,000 if the person is on SSI (but states can set different maximum amounts).
- Only the current gift tax exclusion amount (currently $14,000) may be deposited in an ABLE account annually.
- ABLE accounts in Minnesota may be funded only after the Minnesota Legislature puts regulations in place authorizing financial institutions to make the accounts available.
- Funds accrued in the accounts can be used to pay for "qualified disability expenses" — not yet defined but

thought to mean expenses such as education, health care, transportation, housing, employment training and support, etc.

- If the funds are used for qualified disability expenses, there is no tax on the earnings.
- Any money left in the account at the death of the beneficiary will be used to pay back the State for any medical assistance benefits paid on the individual's behalf. This is true even if the money funding the account is from someone other than the individual.

We will know by the end of the legislative session whether or not ABLE accounts will be available in Minnesota. Stay tuned for our summer newsletter!

Veterans' Access to Care Bill Signed

President Obama traveled to Fort Belvoir, Virginia to sign a reform bill giving the Department of Veterans Affairs the necessary resources to improve access and quality of care for the men and women who have served our country in uniform. In remarks before the bill signing, President Obama addressed the misconduct that has taken place at some VA facilities across the country:

> *"We've already taken the first steps to change the way the VA does business. We've held people accountable for misconduct. Some have already been relieved of their duties, and investigations are ongoing. We've reached out to more than 215,000 veterans so far to make sure that we're getting them off wait lists and into clinics both inside and outside the VA system.*
>
> *We're moving ahead with urgent reforms, including stronger management and leadership and oversight. And we're instituting a critical culture of accountability — rebuilding our leadership team, starting at the top with Secretary McDonald. And one of his first acts is that he's directed all VA health care facilities to hold town halls to hear directly from the veterans that they serve to make sure that we're hearing honest assessments about what's going on."*

The VA reform bill — officially the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014 — passed Congress with overwhelming bipartisan support, and will expand survivor benefits and educational opportunities and improve care for victims of sexual assault and veterans struggling with traumatic brain injuries. But the main focus of the new law is to ensure that veterans have access to the care they've earned.

"We're moving ahead with urgent reforms, including stronger management and leadership and oversight."

– President Barack Obama

Another Blow to DHS' Position on Life Estates

As we reported in our last newsletter, we successfully appealed DHS's policy of counting the value of a non-homestead life estate held by a community spouse when determining Medical Assistance eligibility in 2013. Despite this outcome on appeal, DHS continued to impose the policy in other counties. In August of 2014, we initiated another appeal in Renville County on the same issue — an institutionalized spouse's Medical Assistance eligibility was denied because his spouse owned a non-saleable life estate in farmland. In a decision released just before the end of 2014, the Chief Human Services Judge agreed that the state may not treat a life estate as countable when held by a community spouse when it would not be counted if held by an institutionalized spouse.

While we are encouraged by this decision, the state has asked for reconsideration to overturn this favorable result. We will keep you informed of further developments in our next newsletter, but if you have questions about planning with a life estate in the interim, please contact your attorney.

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INSIDE

REVIEW OF YOUR SITUATION

If you have questions or concerns about any of the information presented in this newsletter or would like to consult with us about how the changes might affect your own circumstances, please call our office to set up an appointment with Cathryn Reher, Laurie Hanson, Laura Zdychnec or Mary Frances Price. We will be happy to meet with you to answer any questions you may have and to help you re-evaluate your particular circumstances.

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New Nursing Facility Level of Care Criteria May Affect Your Eligibility!

Over the past few years, we have reported on the impending implementation of stricter criteria for admission to a nursing home or receipt of Medical Assistance under a home and community-based waiver program (such as EW, CADI or AC). The new Nursing Facility Level of Care (NFLOC) criteria went into effect on January 1st, 2015. Implementation was delayed a full year pending development of the state's Essential Community Supports (ECS) program to help people in transition who do not meet the new NFLOC requirements. Eligibility for ECS, as with waivered programs, will require a face-to-face assessment completed by the county of residence.

Many of you may have already received a notice from DHS that your next reassessment will be under the new NFLOC criteria. Be aware that you must be provided at least 30 days notice of any changes in your eligibility due to a NFLOC determination. If you have questions about how the new criteria may impact you, or if you receive a notice of change in your program eligibility, please contact your attorney.