Understanding Elder Law and Estate Planning

2021

Sitterley, Vandervoort & Davis Ltd.
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ABOUT THE ATTORNEYS

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Practice Areas: Estate Planning, Wills
Trusts, Elder Law & Medicaid
Probate & Non-Probate
Real Estate, Wealth Transfer
Oil & Gas Pipelines and Leases

Education

After graduating from Lancaster High School in 1985, Craig received a Bachelor of Science in Business from Miami University, *Cum Laude*, in 1989. He then received his Juris Doctorate from The Ohio State University, *With Honors*, in 1992. In 2003, the Ohio State Bar Association Board Certified Mr. Vandervoort as a Specialist in Estate Planning, Trust, and Probate Law. Craig's certification was renewed in 2008, 2013 and 2018. Currently only 162 other Ohio attorneys are recognized by the OSBA with this specialty. In 2009, Craig received his accreditation for the presentation of claims for veterans benefits before the Department of Veterans Affairs.

Experience and Memberships

Since joining the firm in 1992, Craig has counseled families and individuals in estate planning matters. In addition to his extensive probate practice, Craig assists individuals in establishing, funding, and administering trusts and utilizing other non-probate transfer methods. Craig assists seniors in understanding the rules for Medicaid qualification and veteran's benefits. Craig represents landowners, both farmers and developers, in preserving their property for the next generations, as well as with new acquisitions, development and subdivisions of property.

Craig is currently serving as vice chairman of the Fairfield Medical Center Foundation Board, the Past Chairman of the Fairfield County Law Library Resources Board, and serves on the probate committee, real estate committee, and website committee, and was the 2003-2004 President of the Fairfield County Bar Association. Craig was awarded the District 9 Ohio State Bar Foundation Community Service Award for Attorneys 40 and under. Craig served from 1993 to 2000 on the board, and was the 1997-1998 Chairman of the American Red Cross of Fairfield County. Craig is a member of the National Academy of Elder Law Attorneys, NAELA, and is a member of the Ohio chapter of NAELA. Craig is currently serving as a Founding Director and is the Chairman of the Lancaster Public Education Foundation. Craig is a member of the Estate Planning, Trust and Probate Law Section of the Ohio State Bar Association, and a member of the Ohio State Bar Association Disability Law Committee and the Elder Law Committee.

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Practice Areas: Estate Planning, Wills
Trusts, Elder Law & Medicaid
Probate & Non-Probate
Guardianships
Wealth Transfer
Asset Protection
Solar Power Leases

Education

Following his graduation from William V. Fisher Catholic High School in 2007, Joseph earned a Bachelor of Arts in History, *Cum Laude* with departmental honors, from Wittenberg University in 2011. Joseph then received his Master of Arts in International Relations and Security from the University of Liverpool (U.K.) in 2014. Joseph then received his Juris Doctorate, *Summa Cum Laude*, from the Capital University Law School in 2019. While at Capital University Law School, Joseph received the CALI Excellence for the Future award as the highest scoring student in the following courses: Contracts I, Property 1, Legal Research and Writing, Evidence, Real Estate Taxation, Origins of Western Law, and Business Associations II. Additionally, Joseph scored in the 100th Percentile on the February 2019 Ohio Bar Exam.

Experience and Memberships

From 2015-2018, Joseph worked for the Fairfield County Probate Court as the Assistant Chief Deputy Clerk. During his time with the Probate Court, Joseph managed the day-to-day operations of the Probate Clerks' office and was instrumental in assisting the Probate Court update the Court's local rules and forms. During the summer of 2017, Joseph was selected to serve as a Judicial Extern for Chief Justice of the Supreme Court of Ohio.

In 2018, Joseph left the Fairfield County Probate Court and joined Sitterley, Vandervoort & Davis Ltd. as a legal intern before being sworn in as an attorney in 2019. In 2020 Joseph became a principal member of the firm. Joseph also serves clients statewide as a founding member of the firm's solar energy practice (OhioSolarAttorneys.com). Joseph is a member of the Ohio State Bar Association and the Fairfield County Bar Association. Joseph is the Chair of the Fairfield County Guardianship Service Board and a member of the Rotary Club of Lancaster.

ESTATE PLANNING

Probate vs. Non-Probate

Probate is the process by which the Probate Court authorizes the transfer of property from a decedent to the beneficiaries named in a Last Will & Testament or to heirs of a person who passed without a Last Will & Testament.

- **Pros of Probate**:
  - The Court ensures that all directives are followed by the appointed executor or administrator.
  - Beneficiaries are provided notice throughout the process.
  - A Last Will & Testament provides a decedent with the opportunity to develop a more comprehensive estate plan than relying solely on the use of beneficiary designation forms for each individual asset.
- **Cons of Probate**:
  - Ohio law provides most estate creditors with a six-month creditor claim period.
  - An attorney's legal fees are generally higher to resolve an estate than if a trust or beneficiary designation forms are utilized for all assets.
  - A separate probate proceeding must be opened in each state where the decedent owned real estate subject to probate.

Three Typical Ways to Plan your Estate	Type	Estimated Associated Costs
1. Wills	Probate	$200-$400 for a Will Probate Average $3,000-$5,500
2. Beneficiary & Joint Designations	Non-probate	$0 at banks $250-350 for a TOD Deed $17 for a TOD Vehicle title
3. Trusts	Non-probate	$2,000-$3,000 for Revocable Package $3,500-$4,500 for Irrevocable Package

1. WILLS:

When comparing Wills to Trusts, Wills have several advantages when used as an individual's primary estate planning document. The most significant advantage is that a Will costs much less than a trust to initially establish. Many people also prefer wills over trusts because they are simple documents that are much easier for many individuals to read and understand.

A Will permits you to:

i. Nominate guardians for minor children
ii. Appoint an executor and waive the requirement of a bond to serve as executor
iii. Designate powers granted to the executor
iv. Designate a plan for property distribution and payment of your funeral
v. Provide alternate beneficiaries in the event a named beneficiary predeceases you

2. BENEFICIARY & JOINT DESIGNATIONS:

Ohio residents have many available methods to name beneficiaries of assets and hold assets jointly with others with the rights of survivorship. When assets properly name beneficiaries, or are jointly owned with rights of survivorship, they are commonly referred to as being "non-probate" because the assets transfer upon death to the surviving named beneficiaries or joint owners by virtue of the beneficiary designations and will not be part of a probate estate.

Examples of Non-Probate property that name beneficiaries are:

- Payable on Death (POD) accounts with banks and financial institutions
- Transfer on Death (TOD) designations on securities, brokerage accounts, motor vehicles,
- Transfer on Death (TOD) affidavits for real estate
- Named beneficiaries on life insurance and retirement accounts
- Joint and Survivor accounts, vehicles titles and deeds (JWRS)

Advantages of Beneficiary and Joint Designations (Non-Probate)

Privacy: Upon the death of an individual, ownership of any assets held by the decedent with any of the above beneficiary designations will pass to the surviving named beneficiary(s) or joint owner(s) without being listed in the public records of the probate court. The beneficiary(s) or joint owner(s) will claim ownership to financial assets by presenting a death certificate to the financial institutions. For beneficiaries to claim ownership of TOD or joint and survivor real estate, an affidavit with attached death certificate must be filed with the county recorder's office. Concerning privacy, beneficiary and joint designations have the clear advantage over wills, and are similar to trusts.

Control of assets for Children: When assets are left to a minor child by beneficiary or joint designations, the only protections available will be similar to using a will. The guardian for the child will control the assets until the child reaches age 18, or if the assets are left to the supervision of an adult as custodian under the Ohio Transfers to Minors Act, the protections can last through the child's 25th birthday. In order to delay the child's control past age 25, a trust will become necessary. Concerning control of assets past the age of 25, trusts have the clear advantage. Great caution should be used before accounts are held jointly with children. Joint assets can be withdrawn by either joint account holder, and can be reached by creditors of either.

Real Estate outside of Ohio: If a second home or other real estate is owned outside of Ohio, a will must be enforced through a separate probate proceeding in the other state unless the real estate is owned in Trust or is otherwise owned joint and survivor or is designated as Transfer on Death (TOD).

Speed of Transfer: As compared to wills and trusts, beneficiary and joint designations provide the quickest and easiest access to assets. Caution should be used however to provide adequately for the payment of final expenses such as funeral arrangements.

Lower costs: Even for estates planned entirely through beneficiary and joint designations, most families will seek legal assistance to answer their questions and to guide and assist them in the settlement process. Affidavits for joint owners and TOD beneficiaries will be necessary. Overall, the costs of estates planned entirely with beneficiary and joint designations require the least settlement expense.

Disadvantages of Beneficiary and Joint Designations

These designations can unexpectedly disinherit grandchildren: When an asset is divided among multiple beneficiaries, it is important to clarify what happens to the share of a beneficiary who dies before the owner of the asset. Many non-probate designations such as joint & survivor, POD, and TOD only divide the asset among the named beneficiaries who are living at the death of the asset owner. Each non-probate designation must be carefully analyzed to determine if the asset will be divided according to the intentions of the asset owner in the event of the prior death of a named beneficiary. For example, most parents divide their estate equally among their children and expect that a share of any child who predeceases them will be divided among that beneficiary's own children. Many non-probate designations unfortunately result in grandchildren being unintentionally disinherited if their parent dies before their grandparent. It is for this reason that non-probate designations are not recommended in most circumstances where there is more than one named beneficiary.

There are no protections for beneficiaries receiving public assistance: Beneficiary designations typically distribute to beneficiaries upon formal presentation of a death certificate and any other required accompanying forms. This does not allow for a delayed distribution over a period of time, which may threaten a recipient's public assistance eligibility if it is asset-based, such as Medicaid or SSI.

Exposure to Creditors: Just because an asset may transfer to beneficiaries free from probate does not necessarily limit its exposure to liens, mortgages, or government debts, such as tax liens or Medicaid recovery on real estate or vehicles. The Attorney General may pursue beneficiaries of such assets. There are some exceptions to this rule, including surviving spouses and disabled children. A knowledgeable Elder Law Attorney should be consulted immediately if a family receives notice of a Medicaid claim from the Attorney General.

No Protection from Estate Taxes: It is a common misunderstanding that if an asset is non-probate, then it avoids estate tax. Almost all assets owned at death, both probate and non-probate, are included as a part of the decedent's gross taxable estate.

Impact ability to pay funeral bill: If a person dies and has named beneficiaries and Joint owners on all of their assets, then the person who paid or is obligated to pay the funeral bill has no legal recourse to be reimbursed for the funeral bill and must rely on the decedent's non-probate beneficiaries to voluntarily contribute towards the funeral expenses.

3. TRUSTS:

Trusts are legal arrangements that usually establish directions regarding the future management and beneficiaries of specific property and assets. The person creating the trust is called the settlor or grantor. The trust document names the initial trustee and alternate trustees who are directed to carry out the instructions contained in the trust. The initial trustee may be the settlor.

Trusts may be used to:

- i. Avoid the Probate Court and often decrease the amount of estate settlement paperwork (as compared to a will in probate)
- ii. Care for a surviving spouse
- iii. Care for minor children until they reach an age established by the trust document.
- iv. Care for children and family members with disabilities and special needs
- v. Preserve assets for persons who are financially irresponsible
- vi. Provide for management and investment of assets
- vii. Minimize estate taxes for married couples with assets over $11,580,000.

Types of Trusts:

- i. Revocable (also called Living and Inter Vivos) Trusts
  1. May be amended
  2. Does NOT protect assets from the costs of long-term care
  3. Settlor(s) may also be Trustee(s)
  4. Settlor(s) may withdraw assets
- ii. Irrevocable (also called Medicaid-Qualified) Trusts
  1. Cannot be amended except by Court order
  2. Can protect assets against the costs of long-term care
     - a. Long-term plan: Fund and wait five (5) years; or
     - b. Crisis plan: use in collaboration with an annuity for immediate protection
  3. Settlor(s) may NOT be Trustee(s) if Medicaid involved
  4. Settlor(s) may not withdraw assets without exposing them to long-term care costs

Advantages of Trusts

- i. Privacy: The terms of a trust, and the description and value of most assets in a trust, are not recorded in public courthouse records and can only be viewed by those persons permitted by the trust document, or as required by the Ohio Trust Code, such as the trustee and the beneficiaries. A copy of a will and the list and values of the decedent's probate assets (called the inventory) are recorded at the courthouse and can be viewed by the public, and are increasingly becoming available over the internet. Concerning privacy, Trusts have the clear advantage over Wills.

- ii. Control of assets for Children: When assets are left to a minor child in a Will, the guardian for the child will control the assets until the child reaches age 18. A Will can delay the child's control of the assets until age 25, if the assets are left to the supervision

of an adult as custodian under the Ohio Transfers to Minors Act. In order to delay the child's control past age 25, a trust will become necessary. Concerning control of assets past the age of 25, Trusts have the clear advantage over Wills.

iii. Real Estate outside of Ohio: If a second home or other real estate is located outside of Ohio, a trust may prevent a separate probate proceeding in the other state.

iv. Speed of Transfer: Distributions according to a Will may be made as early as three (3) months after a Will is filed and copies of the Will are formally given to the next of kin and beneficiaries. While there is no similar waiting period applicable to trusts, it is not necessarily prudent for an executor or trustee to distribute assets without carefully determining if all of the necessary debts are paid, all of the beneficiaries have reviewed and approved the final accounting, and without fulfilling all of the income tax and estate tax requirements. Challenges to a trust may be available for as long as two years.

v. Lower Costs: There is a common misconception that the use of trusts clearly saves estate planning expenses. In order to compare the costs of utilizing a Will versus a trust you must consider all components of cost.
    1. Drafting Costs: The drafting of a Will generally costs much less than the drafting of a Trust. There may be additional costs associated in transferring assets into a trust after it is established.
    2. Executor v. Trustee Fees: Executors are entitled to fees, which are set by statute, while trustees are entitled to similar fees. However, family members who serve as executors/trustees often decline to charge for their services, especially if they are also beneficiaries.
    3. Appraisal Costs: At death, values of assets will need to be established whether or not assets are in a trust. For real estate this will often require an appraiser.
    4. Legal Fees: Whether an estate is settled by probating a Will or through trust administration, most families will seek legal assistance to answer their questions and to guide and assist them in the settlement process. Much of the legal assistance that is provided will be similar for trust or probate estate such as the documentation necessary to properly report to beneficiaries and the documents necessary to transfer real estate. One advantage of the trust is the elimination of the filings and procedures of the Probate Court. We estimate that families who have properly utilized a trust for all assets will experience an average decrease in the cost of legal assistance of 25%-50% over the costs of an estate settled through the probate process. While this may be a modest savings for the smallest estates, a 25%-50% savings becomes very significant for the larger estates.

vi. Special Needs Trusts: When properly drafted, trusts can provide additional support for family members with disabilities and other special needs.

vii. Trusts used for protecting assets when there are second marriages: Two of the common planning scenarios for second marriages:

1. Couples who have children together and either accumulate assets together, or purchase life insurance, can use trusts to protect a portion of those assets for the children if one of the spouses dies, and then the survivor re-marries.
2. Trusts are also used when there are second marriages with his kids, her kids and/or kids together. In the event one of the spouses dies, the trusts can be used to provide limited rights to the survivor, such as the right to continue living in a home, but preserve the value of that home for the children when the second spouse dies or moves out. If you have assets and are considering getting re-married, a trust does not provide protection of assets in the event of divorce. For protection of assets from divorce you should seek legal advice on establishing an ante-nuptial (pre-nuptial) agreement prior to the marriage.

IMPORTANT TRUST NOTE

Trusts may require periodic assistance. Properly maintaining your trust requires lifetime attention, and may slightly complicate dealings with property. For example:

- Whenever new financial accounts are established or real estate is purchased, careful attention is required to ensure that the new assets are acquired in the name of the current trustee, or the trustee is properly designated as the beneficiary.
- Whenever trust real estate is sold, a trust document called a memorandum of trust is required to be filed prior to the deed.
- Trust documents may also need to be amended to reflect beneficiary changes or additions, changing family circumstances, or special provisions regarding specific assets.

It is therefore critical that you establish your trust with an Ohio attorney experienced in trusts who will be available to assist you and your family or beneficiary.

ESTATE PLANNING COMPARISON CHART

	Simple Will	Non-Probate	Individual Trust	Joint Trust
Single, No children	Yes	Not Recommended*	Yes	N/A
Single, One adult child	Yes	Yes	Yes	N/A
Single Minor Child(ren) Multiple Children	Yes	Not Recommended*	Yes	N/A
Married No Children	Yes	Yes	Yes Reasons A, B	Yes
Married One Adult Child No Step Children	Yes	Yes	Yes Reasons A, B, C, D	Yes
Married Multiple Children No Step Children	Yes	Not Recommended*	Yes Reasons A, B, C, D	Yes
Married Step Child(ren)	Yes	Not Recommended*	Yes Reasons A, B, C, D	Not Recommended

* When an asset is divided among multiple beneficiaries, it is important to clarify what happens to the share of a beneficiary who dies before the owner of the asset. Many non-probate designations such as Joint and Survivor, POD, and TOD only divide the asset among the named beneficiaries who are living at the death of the asset owner, and will not automatically pass to the children of a beneficiary who may predecease. It is for this reason that non-probate designations are not recommended in most circumstances where there is more than one named beneficiary.

Reason A: Federal Estate Tax Planning

Reason B: Limit access of principal by surviving spouse upon remarriage

Reason C: Preserve and control assets until child(ren) or grandchild(ren) reach certain ages

Reason D: Joint/POD/TOD accounts may properly plan for the death of the first spouse, but lack the ability to plan for the second death or simultaneous death of parents. The Trust provides more certainty because it provides for assets to pass to contingent beneficiaries in the event the primary beneficiary dies.

TAX BENEFITS

Trusts originally developed a reputation for helping to reduce estate taxes when they were properly drafted for married couples who had combined estates large enough to be subject to estate taxes. Trusts can also help to reduce estate taxes when they are properly drafted to hold life insurance policies and qualify as charitable trusts. Whether you or your family will realize any estate tax savings depends on:

(1) whether you are married and if so, your combined net worth;

(2) whether your trust is drafted specifically to irrevocably hold life insurance or qualify as a charitable trust; and

(3) will greatly depend upon what year you die or your spouse dies.

To successfully plan to minimize estate taxes, you need to consult a knowledgeable attorney who can analyze your specific estate planning needs.

HISTORY OF OHIO ESTATE TAXES

Year	Amount free from Ohio Estate Tax	Highest Tax Rate
1987-2000	$25,000	7.00%
2001	$200,000	7.00%
2002-2012	$338,000	7.00%
2013-present	Repealed	N/A

HISTORY OF FEDERAL ESTATE TAXES

Year	Amount free from Federal Estate Tax	Highest Tax Rate
1987-1997	$600,000	55%
1998	$625,000	55%
1999	$650,000	55%
2000-2001	$675,000	55%
2002-2003	$1,000,000	50%/49%
2004-2005	$1,500,000	48%/47%
2006-2008	$2,000,000	46%/45%
2009	$3,500,000	45%
2010-2011	$5,000,000	35%
2012	$5,120,000	35%
2013	$5,250,000	40%
2014	$5,340,000	40%
2015	$5,430,000	40%
2016	$5,450,000	40%
2017	$5,490,000	40%
2018	$11,180,000	40%
2019	$11,400,000	40%
2020	$11,580,000	40%
2021	$11,700,000	40%

The FEDERAL Estate is indexed for inflation through 2025.

- **Caution**: without further legislation from Congress, on 1/1/2026, the Federal Estate Exemption will be reduced by 50% to approximately $6,000,000.

GIFTING

Three important things to know about Gifting:

1. The Gift Tax Annual Exclusion amount for 2021 is $15,000 per person per year;
   The Gift Tax Exclusion for Lifetime Transfers is currently set at $11,700,000.

2. Gifting an asset with a low-cost basis during lifetime may result in capital gains tax of 15-20% of any gains for a beneficiary if/when they sell said asset during their lifetime. This tax may be avoided if the asset passes to the beneficiaries at death, rather than as a lifetime gift.

3. While there is an exemption from tax within the annual and lifetime exemptions, there is NOT an exemption from potential Medicaid restricted periods if an applicant transfers any asset for less than fair market value less during the five (5) year look back period.

A Quick Lesson on Gifting

Each calendar year, an individual may give up to $15,000 to as many people as they wish. Just write a check. You may do so again the following calendar year. So long as you do not exceed $15,000 to any one individual there are no gift tax reporting requirements. If you choose to give $65,000 to your sister, then you have to file a gift tax return. On the return, $15,000 will be excluded, but you report the lifetime gift of $50,000 that was over the exclusion amount. There is no gift tax to pay now, but you have utilized $50,000 of your lifetime exclusion amount of $11,580,000. At your death, the amount you can pass through your estate is also reduced by $50,000. Therefore, if a 2020 estate pays federal estate tax on any amounts over $11,580,000, you can only leave $11,530,000 tax free after the lifetime gift of $50,000.

Gift tax is paid at the time of a lifetime gift only if lifetime gifts (over the $15,000 annual exclusion each year) exceed the gift tax free level for the year of death. Also, you may pay an unlimited amount of qualifying education and medical expenses on behalf of an individual. The beneficiary does not have to be related to you. You must, however, pay it directly to the medical provider or educational organization. You cannot reimburse the individual. The $15,000 annual exclusion increases based on cost of living in $1,000 multiples. **Please remember that the tax exclusion does NOT protect a donor from the Medicaid look back period.**

Power of Attorneys and Advance Directives

We believe every adult should consider these additional Estate Planning documents:

Power of Attorney*

A power of attorney (POA) permits you to designate an adult who can assist you with all of your financial affairs in the event you become unable to manage them yourself. Powers of Attorney are often referred to "Durable POAs" if the terms of the POA provide that the POA remains in effect even if the person executing the POA becomes incompetent. In the event that you were to become incompetent and had a valid POA, the significant court costs and legal expenses of appointing and maintaining a guardian over your assets and financial affairs would be avoided.

Health Care Power of Attorney

A health care power of attorney (HCPOA) permits you to designate an adult who can assist you with all of your medical affairs in the event you become unable to manage them yourself. In the event that you were to be unable to manage your medical affairs, and had a valid HCPOA, the significant court costs and legal expenses of appointing and maintaining a guardian over your medical affairs would be avoided.

Living Will Declaration

A living will permits an individual to instruct their doctors not to artificially prolong their dying in the event they have been determined to be permanently unconscious or terminal. If such a declaration is consistent with your wishes, then a living will may be appropriate for you.

IMPORTANT LAW CHANGES IN 2012 AND 2014

In 2012 and 2014, Ohio implemented significant changes to its Power of Attorney statutes. The goals of the changes were to both modernize and help standardize POAs, and to help address and prevent financial Elder Abuse. If your existing POA was drafted prior to March of 2012, or it was not drafted to incorporate the significant law updates and exoneration clauses, you should have it reviewed by an attorney familiar with the law to ensure it will be accepted by your financial institution.

GUARDIANSHIPS

In the absence of an authorized agent under a Power of Attorney, if a person becomes unable to manage his/her affairs, including taking medical care of himself or herself, a Probate Court may appoint a suitable Guardian for that person, upon finding said Ward is legally incompetent. The Guardianship may be over the Person, the Finances, or both. The appointed Guardian is subject to the authority of the Court for financial or medical decisions, and must file annual reports and accountings so long as the Guardianship is in effect. This process can be burdensome for the Guardian, who is limited as to compensation for their duties, but is structured to protect the best interests of the Ward.

Many health care workers encourage families to pursue a Guardianship when competency issues arise. It is advisable to first consult an elder law attorney to ensure that Guardianship is the best option from a legal standpoint, since Guardianships are often a lifetime obligation, and may limit some of the asset protection options one may have if there is a risk that long term care expenses may arise.

Guardianships may involve the following:

- Background check of the Guardian
- Educational requirements of Guardian if not a family member
- Notice to the Ward
- Bond or Waiver of Bond
- Annual Reports
- Annual Accounting
- Authority to Expend Funds
- Quarterly visits in person
- Limits on Guardian discretion
- Limits on asset protection
- Filing and legal fees

Types of Guardianships

- Guardian of the Person
- Guardian of the Estate
- Emergency Guardian
- Limited Guardianship
- Conservatorship (not technically a guardianship, but similar under specific circumstances)

ASSET PROTECTION AND LONG-TERM CARE PLANNING

Common Misconceptions

There are several misconceptions about Medicaid and asset protection. While the majority of people currently do not need long-term care beyond the 100 days of coverage that their Medicare may provide, those that do are usually informed that they need to impoverish themselves before they are eligible. These individuals are also led to believe that they are limited to spending down their assets by paying for their long-term care in order to become eligible. With the assistance of an Elder Law attorney, an individual can strategically structure their assets in order to maximize protection for the individual's benefit. Individuals can consider maximizing/improving exempt assets; they can purchase an annuity for a healthy spouse; they can combine a gift to an irrevocable trust with an annuity; and/or they can protect certain gifts to third parties in specific exempt circumstances.

Five (5) Year Planning

There is currently a five year "look-back" period for Medicaid eligibility that allows the state to review and consider whether an applicant has "gifted/transferred" an asset for less than fair market value during the five years proceeding an application for Medicaid eligibility. Therefore, many people decide to complete asset transfers in advance of needed care, in anticipation of protecting said assets after the five-year period has passed. While it is possible to gift directly to third parties such as children, the assets would then be exposed to the risks associated with the third party(s) such as divorce, disability, death, capital gains taxes, or creditor issues. To avoid those risks, many people choose the protection of an irrevocable trust instead, which not only eliminates those risks, but also offers many tax advantages, such as a step-up in cost basis upon death and the real estate tax homestead deduction if a residence is placed in the trust.

Pros: Protect 100% of assets transferred into the trust after five years
Beneficiaries Avoid Capital Gains tax
Preserve deduction in real estate taxes for residential properties
Limit exposure to risk of divorce, creditors, disability/death of beneficiaries
Avoid probate
Can protect assets, such as real estate, without having to first sell and liquidate the asset

Cons: Must give up control
Must wait five years to completely protect transferred asset
May trigger income taxes for non-qualified assets, such as IRAs, if transferred

While using an irrevocable trust may be considered an aggressive planning method, many consider it a type of insurance policy that caps the amount of time their assets are exposed to the risk of long-term care expenses. It is also helpful in situations where crisis planning would affect a family business such as farming, where the sale of real estate would be undesirable.

Crisis Planning

In the event of a crisis, where long-term care is needed and an individual does not have a five-year period to protect assets exceeding the $2,000 individual limit, the following methods may apply:

Consider Investments in Exempt Assets:

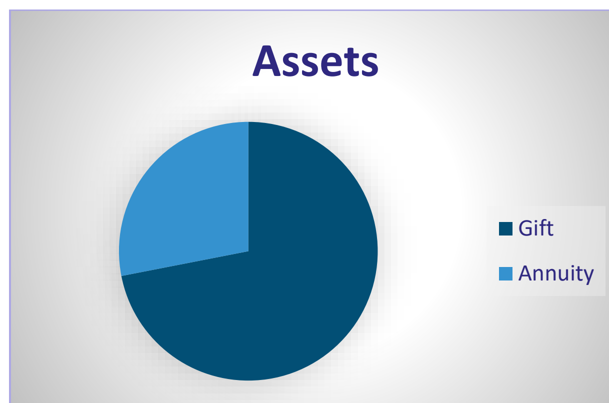
- Residential real estate
- Prepaid funerals and assigned life insurance
- One vehicle – unlimited value
- Fifty Percent (50%) exemption, up to a maximum of $130,380 for a spouse
- Unlimited asset transfers for a disabled child (consider eligibility of said disabled child)
- Legal retainers

Annuity for Healthy Spouse

- Asset transfers to a spouse are exempt from gifting restrictions
- A spouse may have an unlimited income for Medicaid eligibility
- Since Medicaid considers the entirety of a married couple's assets for eligibility, no matter which name they are titled in, half of the assets up to $130,380 are protected for the spouse's benefit; any and all assets above that may be liquidated in order to purchase a Medicaid-compliant annuity for the healthy spouse, based on the life expectancy of the healthy spouse. In Ohio, the "name on the check" rule can save a couple 100% of their assets while qualifying the institutionalized spouse for long-term care Medicaid coverage.

Gift combined with an Annuity

- Used for unmarried individuals or married couples where both spouses need care
- Based on specific calculations, including monthly income and medical expenses, an individual can "gift" more than half their assets to a third party or an irrevocable trust, and purchase a Medicaid-compliant annuity at the same time in order to cover their private pay expenses during the resulting "restricted period."
- Gifting to an irrevocable trust eliminates the risks involved with said third party experiencing a divorce, disability, death, bankruptcy, or other financial vulnerability.



GRAPH FOR EXAMPLE ONLY

Veteran's Benefits

In October 2018, the Department of Veteran's Affairs significantly changed the eligibility requirements for Aid and Attendance benefits, resulting in requirements similar to Medicaid benefits.

Service: The veteran must have served at least 90 days active duty with a least one day during a wartime period:

World War II	December 7, 1941 – December 31, 1946
Korean War	June 27, 1950 – January 31, 1955
Vietnam Conflict	August 5, 1964 – May 7, 1975 if serving anywhere
	February 28, 1961 – May 7, 1975 if in Vietnam
Persian Gulf	August 2, 1990 - Present

Discharge: Other than dishonorable

Disability: Presumption of disability over age 65; or total disability caused without willful misconduct of claimant

Income: To qualify, "Income for Veterans Affairs Purposes," or IVAP, must be $0 or less each month, based on total income minus unreimbursed medical expenses ("UME").

- Low-income veterans or surviving spouses may qualify for the following:

Veterans with no dependents	$1,160/month
Veteran with one dependent	$1,520/month
Widow(er) with no dependents	$778/month
Healthy veteran, ill spouse	$1,496/month

- Housebound Veteran or surviving spouse considered to be disabled and confined to the home:

Housebound Veteran no dependent	$1,418/month
Housebound Veteran one dependent	$1,778/month
Housebound surviving spouse	$951/month

- Aid and Attendance – needs assistance with ADLs, blind, and/or in a nursing facility:

Veteran with no dependents	$1,936/month
Veteran with one dependent	$2,295/month
Surviving spouse	$1,244/month

Asset Limitations: Net worth must be equal or less than $129,094 for 2018, excluding residential real estate up to two acres, less the amount of mortgaged or encumbered property.

Look Back Period: Thirty-Six (36) month period immediately preceding a VA claim after October 18, 2018. Resulting penalty period may be a maximum of five (5) years, calculated using the maximum pension rate. Penalty period begins the month following the date of the last transfer.

MEDICARE

When comparing Medicare long term care coverage plans, pay close attention to the differences in coverage limitations. Typically, Medicare Plan A covers the first 20 days of hospitalization and long-term care/rehabilitation, so long as it is first triggered by a THREE NIGHT STAY IN A HOSPITAL. Please note that the hospital stay must also be as an admitted patient, NOT just "under observation." After the first 20 days, depending on the plan you have, Medicare will cover an additional 80 days, subject to a co-pay, so long as the medical professionals involved believe the patient can continue to benefit from the care provided.

There is no longer a requirement for the patient's "continued improvement" in order to continue Medicare's coverage during that time period. If, however, medical providers determine an individual is no longer eligible to receive Medicare coverage sooner than 100 days, they must provide written notice three days prior to terminating said coverage. At that point in time, the individual may appeal the finding, may private pay, and/or may apply for Medicaid coverage.

What to Expect

1. Appealing a Medicare termination of coverage: Since the notice is provided only 3 days before termination, you must act quickly if you intend to appeal.

2. Private pay: Depending on the facility and type of care needed, there is a wide range of daily rates between facilities and in-home care. In Fairfield County, you can expect $20/hour to be a competitive rate among home health care providers. For assisted living facilities, the monthly rates can vary between $2,500/month and $7,500/month, depending on the level of care provided. In skilled nursing facilities, the average private pay rate in Ohio is currently around $6,905/month.

3. Medicaid Eligibility: Often, nursing facilities will offer to complete a Medicaid application for a resident. We do not recommend accepting this assistance if there is a possibility that you are not medically and financially eligible, since it may delay your coverage, potentially trigger a penalty period if you have made any gifts or established a Medicaid planning trust in the past 5 years. If you have assets to protect or you have gifted any assets in the past 5 years, please consult with an elder law attorney before submitting an application.

USE THIS PAGE TO TAKE NOTES AND WRITE DOWN QUESTIONS

Feel free to call us to answer any question you have regarding Elder Law and Estate Planning

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