McGUIRE WOOD & BISSETTE

Protecting Assets & Quality of Life

Basics of Medicare, Medicaid, and Long-Term Care Planning

May 14, 2020

Andrew D. Atherton & Kathleen R. Rodberg
McGuire, Wood & Bissette, P.A.
Asheville, North Carolina
(828) 254-8800
www.mwblawyers.com

I. Elder Law
   a. Area of law structured around the client—not necessarily a particular area of law. Elder law traditionally includes:
      i. Consumer Protection, Fraud & Abuse
      ii. Undue Influence
         1. Caregivers
         2. Life Partners
         3. Children and lawful heirs
      iii. Guardianship – court intervention and surrogate decision making
      iv. Traditional Estate Planning
         1. Documents to plan for management of property if incapacitated, advance directives for health care, and disposition of property after death
      v. Benefits Planning—unique and complex area of elder law
   b. Elder law and estate planning overlap, but the two are not the same

Our presentation is going to focus on the Elder law areas of iv. Estate and v. Benefits Planning.

II. Estate Planning - the foundation necessary for any benefits plan.
   a. Common documents, each with a different purpose
      i. Health Care Power of Attorney
         1. Appoints a health care agent (and successor agents) to make health decisions if you are unable to make or communicate those decisions
         2. May include elective provisions to authorize an autopsy, consent to donation of organs, direct the disposition of your remains, and donate your body for anatomical study
         3. May include additional provisions, including those related to mental health matters
      ii. Other Medical Advance Directives
         1. Declaration of a Desire for a Natural Death (a/k/a Living Will)
            a. Applies in 3 situations: (1) incurable or irreversible conditions, (2) unconsciousness, or (3) advance dementia or cognitive loss.
         2. Five Wishes
         3. Authorization to Access Protected Health Information (a/k/a HIPAA Authorization)
         4. MOST (Medical Order for Scope of Treatment)
         5. DNR (Do Not Resuscitate)

iii. Durable Power of Attorney
    1. Appoints an agent (and successor agents) for your financial matters
    2. May include broad authority to make gifts or modify beneficiary designations (exercise caution with these provisions to ensure they are used for your benefit)
    3. May authorize compensation
    4. Authority stops at death
iv. Last Will and Testament
    1. Appoints an executor (and successor executors) to dispose of your property according to the terms of your will
    2. May authorize compensation that is less than what is permitted by law
    3. May establish and include trusts
    4. A spouse and after-born children may have certain statutory rights to property, even if omitted from the will
v. Trust
    1. What are they?
        a. A declaration for property to be held by a person for the benefit of another person (usually done with a written document)
    2. Does everyone need a trust?
        a. No, but they are helpful in may circumstances. Trusts avoid probate, provide privacy, can hold unique assets, and safeguard property.
        b. Endless varieties exist—revocable, irrevocable, testamentary, inter vivos, self-settled, third-party, etc.
vi. Digital Asset Authorization
    1. Allows your agent or executor access to usernames, passwords, and digital assets (e.g. photos, music, audio books, etc.)

b. Select Trustworthy Appointees
    i. Protect against exploitation
    ii. What happens if you lose capacity?
    iii. Where should originals be located?
c. Other estate planning methods
    i. Pay-on-death (POD) for bank accounts
    ii. Transfer-on-death (TOD) for securities and investments
    iii. Beneficiary designations for insurance policies, annuity contracts, and retirement accounts/benefits
d. Capacity required to sign estate planning documents

III. Benefits Planning & Long-Term Care
a. Programs Overview
    i. Determine Level of Care and Need
        1. Is the need short-term rehab after a hospitalization? If yes, Medicare will cover the first 20 days after a 3-days hospitalization, and possibly an additional 80 days for a maximum of 100 days in a skilled-nursing facility for rehabilitation
        2. Continued residency must be needed to maintain or improve current abilities through daily rehab, therapy, etc.
        3. If longer-term need past 100 days *or* daily therapy is not needed, look to a long-term program
    ii. SA, PACE, CAP, LTC Medicaid, VA Aid and Attendance
        1. Considerations include level of need, flexibility options, living in the home, availability for the program, etc.
    iii. What facilities accept Medicaid

1. Medicaid=Long-term care skilled nursing facility

iv. Special Assistance=Assisted living facility/Adult care home

b. Eligibility
   i. Need – Medical
      1. Assisted living vs. Skilled nursing
   ii. Income - LTC Medicaid vs. SA, allowance for spouse or personal needs
      1. SA: $1,248 for basic SA, $1,580.50 for special care unit, if less than SSI rate must apply for SSI
      2. Medicaid: Less than the cost of care (easier if less than cost of Medicaid rate)
      3. Monthly Maintenance Needs Allowance:
         a. Base: $2,113.75
         b. Shelter Standard: $634.13
         c. Standard Utility Allowance: $434
      4. Personal Needs Allowance
         a. SA: $46
         b. Medicaid: $30
   iii. Assets - Married vs. single, what counts and what doesn't count
      1. Countability
         a. SA: Just applicant
         b. Medicaid: Applicant + Spouse (prenuptial agreements, etc. do not impact countability of assets)
      2. Gifts/Transfers for less than fair market value
         a. 3-year lookback for SA/5-year lookback period for Medicaid
         b. Capital Gain considerations
         c. $2,000 monthly divisor for SA penalties
         d. $6,810 monthly divisor for Medicaid penalties
         e. Does not include transfers to a spouse, to a disabled child, or possibly a home to a caretaker child
         f. Can try to establish that transfer was for another purpose or was for fair market value
      3. Community Spouse Resource Allowance
         a. 50% of countable assets with a minimum and a cap
         b. Minimum: $25,728
         c. Maximum: $128,640
      4. Excluded Assets
         a. Some life insurance policies and annuities
         b. Some promissory notes
         c. Home with an equity cap of $595,000
         d. Most valuable car
   iv. Irrevocable Trusts
      1. Medicaid implication
         a. Be wary of a lookback period
      2. Third party trusts
         a. For the benefit of disabled child or family member
         b. No lookback issues for the recipient, but possibly for donor
      3. Self-Settled Trusts
         a. If disabled and under 65, can do a pooled or self-settled trust with no lookback period
      4. For Married Couples
         a. Testamentary special needs trusts
         b. Cannot disinherit a spouse

v. Estate Recovery – North Carolina Division of Health Benefits keeps track of the amount of benefits paid out for an individual and will make a claim against the individual's estate at death to recover the cost of benefits provided. There are options for waiver or deferral of recovery. Recovery can only be made against an estate with assets.

*** Disclaimer**: Long term care Medicaid and special assistance rules are frequently changed and sometimes without notice. Please do not implement any of these strategies without consulting with an experienced elder law attorney.

Andrew D. Atherton (aatherton@mwblawyers.com) is a is a shareholder at McGuire, Wood & Bissette, P.A., where he represents families with navigating the complexities of government programs like Veterans benefits, Medicare, Medicaid and Supplemental Security Income (SSI). Andrew uses his 18 years of elder law experience, advanced knowledge gained from his service as chair of the bar association's Elder and Special Needs Law Section, personal demeanor, and compassion to provide families with comfort and clear direction when planning for end of life. Andrew earned his law degree from Northern Kentucky University in 2000. He is licensed to practice law in Kentucky and North Carolina. He is the current legislative co-chair of the North Carolina Bar Association Elder and Special Needs Law Section and a past chair of the Elder and Special Needs Law Section, a member of the Kentucky Bar Association, North Carolina State Bar, Estate Planning & Fiduciary Section and National Academy of Elder Law Attorneys (NAELA). Andrew is a frequent instructor in the areas of Elder Law, Special Needs Trusts, Trusts, Powers of Attorney, Guardianship, Medicaid and the ABLE Act. Andrew serves on the board of directors for Eliada Homes and MemoryCare.

Kathleen R. Rodberg (krodberg@mwblawyers.com) is a member of McGuire Wood & Bissette, P.A. in Asheville. Kathleen is a board-certified specialist in elder law through the North Carolina Bar and a Certified Elder Law Attorney (CELA) through the National Elder Law Foundation. Her principal areas of practice are trusts, estates, and elder law. Kathleen uses her specialized knowledge to develop creative and successful solutions for her clients. She is the current Vice Chair and incoming Chair of the North Carolina Bar Association's Elder & Special Needs Law Section and serves on the elder law specialty committee for the North Carolina State Bar. Kathleen frequently gives presentations on topics like recent developments in elder law, special needs trust taxation, and probate matters. Kathleen also serves in her community as Board Chair of the Henderson County Council on Aging as Secretary for the Western Carolina Medical Society, and as a board member for Aston Park Health Care Center. She received her B.A. from the University of North Carolina at Chapel Hill in 2009 and her J.D. from Wake Forest University School of Law in 2012.

HANDOUTS

McGUIRE WOOD & BISSETTE LAW FIRM

SMART LEGAL

ESTATE PLANNING & INCAPACITY

FREQUENTLY ASKED QUESTIONS
ESTATE PLANNING

Q. WHAT IS ESTATE PLANNING?

A: The term "estate planning" is merely the process of working with professionals, like attorneys, to develop documents that plan for surrogate decision making during incapacity and the transfer of assets upon death. This process is applicable to nearly every person and can save a great deal of hassle for your family members and loved ones in the future.

OUR SERVICES INCLUDE:

- Preparing financial and health care powers of attorney, trusts, and last wills and testaments
- Probate avoidance
- Tax planning
- Estate and trust administration
- Trust modifications

Contact Us

48 Patton Avenue
Asheville, NC 28801
828.254.8800
www.mwblawyers.com

ANDREW ATHERTON
aatherton@mwblawyers.com

RICHARD KORT
rkort@mwblawyers.com

HARRIS LIVINGSTAIN
hlivingstain@mwblawyers.com

DORIS LOOMIS
dloomis@mwblawyers.com

KATHLEEN RODBERG
krodberg@mwblawyers.com

SARAH THORNBURG
sthornburg@mwblawyers.com

Q. WHAT HAPPENS IF I DIE WITHOUT A WILL?

A. There is a great deal of confusion about what happens with assets if you die without creating a will. Many people believe that if they are married, then all of their assets will automatically pass to their spouse at death. However, this is not necessarily the case. For example, in North Carolina, if a person dies married, with no children, but survived by 1 parent, then the deceased person's surviving spouse and surviving parent would share in the probate estate. Creating your own last will and testament ensures that your wishes are followed.

Q. MY SPOUSE AND I EACH HAVE CHILDREN FROM A PRIOR MARRIAGE. DO WE NEED TO TAKE ANY EXTRA STEPS?

A. Absolutely! Each couple chooses to handle this situation in different ways. Some may choose to combine assets and leave all assets equally to all children. Others may choose to keep the assets separate, to the extent feasible, with the intent that the money may be used for the care of the surviving spouse, but that after both spouses pass away that the children only inherit his or her parent's assets. With little to no planning, some individuals leave all of their assets to their spouse not realizing that the surviving spouse's last will and testament will likely control the ultimate distribution of those assets, which may or may not include the predeceased spouse's children from a prior marriage.

Q. SHOULD I PUT MY CHILD'S NAME ON MY BANK ACCOUNT TO HELP PAY BILLS WHEN I CAN'T?

A. This is a question that elderly clients, in particular, ask regularly. The answer depends on the particular circumstance. However, in most cases the answer is "no." The reason is that instead of just adding their child as a signor on the account or as an agent acting under a financial power of attorney, many clients actually add the child as a co-owner *with right of survivorship*. This means that upon the parent's death, that child will inherit 100% of that account regardless of what the last will and testament says. This result may be okay if there is only one child, but is problematic with multiple children. The joint ownership designation controls distribution at the death of one co-owner. Thus, many folks unintentionally end up disinheriting their other children. Instead, the child should be added as only a signor or as an agent acting under a financial power of attorney.

Q. IS A WILL MADE IN ANOTHER STATE VALID IN NORTH CAROLINA?

A. Generally, any estate planning document that was valid in another state at the time it was signed will remain valid in North Carolina. However, there may be some additional requirements that out-of-state documents must face before being acknowledged in North Carolina. It is a good idea to have a local attorney review out-of-state documents to ensure that you know what those additional requirements are and determine whether new North Carolina documents are needed.

Q. WHAT IS A TRUST?

A. A trust is a legal entity that holds property for the benefit of particular people or organizations. Some examples of frequently used trust arrangements are: (1) revocable trusts for probate avoidance, (2) trusts established to support a surviving spouse (particularly for second marriages where there are children from a prior marriage), and (3) special needs trusts for disabled beneficiaries. Trusts are highly customizable to accommodate your particular wishes and goals.

Q. CAN'T I JUST PREPARE MY DOCUMENTS ONLINE AND SIGN THEM?

A. As technology becomes more advanced, it can be tempting to cut costs by preparing these documents yourself. As you may have guessed, most estate planning attorneys would advise against the "DIY" option. However, it is important to understand why. Visiting an attorney for estate planning matters is not simply about getting documents in place that are signed—it is about getting the correct documents in place, ensuring those documents express your wishes, and spotting potential issues before a problem arises and developing solutions. Taking the DIY approach to save a few hundred dollars may result in tens of thousands being spent by your estate and beneficiaries on legal fees after your passing.

Q. WHO MAKES HEALTHCARE & FINANCIAL DECISIONS FOR INCOMPETENT INDIVIDUALS?

A. If a person becomes incompetent or unable to communicate health care decisions, then the default decisionmaker depends on how much planning was done in advance. North Carolina General Statute §90-21.13 provides the following order: (1) a health care agent under a valid health care power of attorney *unless* a guardian has been appointed and the court has suspended the health care agent's authority; (2) court-appointed guardian; (3) an attorney-in-fact with the power to make health care decisions; (4) spouse; (5) majority of patient's reasonably available adult parents and children; (6) majority of the patient's reasonably available adult siblings; and, (7) individual with an established relationship with the patient who is acting in good faith and can reasonably convey the patient's wishes.

However, for financial decisions, North Carolina does not provide a default framework. Instead, family members and loved ones would have to go to court in order to seek the appointment of a guardian to make financial decisions. This guardian (known as a general guardian or a guardian of the estate) remains supervised by the court for the duration of the guardianship. Furthermore, most guardianship documents, including financial information, are public record.

Q. WHO SHOULD I NAME AS MY FINANCIAL OR HEALTH CARE AGENT?

A. Although this question may appear simple at first, it can quickly become complicated. Do you name the child who lives closest? The oldest? To aid in this decision, select the person who is most likely to make decisions for you as you would make yourself. This factor should be paramount above other considerations, as the designated individual will have a great deal of responsibilities to you. Discussing the options with your attorney can help you select the child who is most appropriate to serve in each role. You may designate the same agent for both health care and financial decisions, or you can name different people for each. It is also possible to name multiple people together as your agent.

Q. WHAT ARE AN ATTORNEY-IN-FACT'S RESPONSIBILITIES?

A. The person you designate to manage your financial affairs under a general durable power of attorney is known as your "agent" or "attorney-in-fact," though is commonly referred to as your "power of attorney." Your agent is generally responsible for managing your assets, paying bills, filing taxes, representing your financial interests in any court proceedings, etc. This is a great deal of responsibility. Ideally, you should discuss this role with the individual designated before he or she needs to assume these responsibilities. In addition, at least 1 backup agent should be named if your primary agent is unable to serve.

McGUIRE WOOD & BISSETTE LAW FIRM

SMART LEGAL

ELDER & SPECIAL NEEDS LAW

FREQUENTLY ASKED QUESTIONS
PAYING FOR LONG-TERM CARE

Q. WHAT IS ELDER LAW?

A. Elder Law is a unique practice area that encompasses and overlaps with various other fields of law. It is unique in that it is the only area of law whose focus is built not around a specific subject matter, but around the myriad of issues facing elderly and disabled such as Medicare matters, Medicaid planning and application, preservation of assets, tax planning, preparation of estate planning documents and powers of attorney in the event of disability, and guardianships.

OUR SERVICES INCLUDE:

- Planning & applying for Long-Term Care Medicaid Benefits
- Preparing powers of attorney and estate planning documents
- Guardianships
- Creating and administering special needs trusts for disabled loved ones
- Protecting assets for a surviving spouse or disabled child

Contact Us

48 Patton Avenue
Asheville, NC 28801
828.254.8800
www.mwblawyers.com

ANDREW ATHERTON
aatherton@mwblawyers.com

KATHLEEN RODBERG
krodberg@mwblawyers.com

Q. WHAT LONG-TERM CARE DOES MEDICARE COVER?

A. Medicare may cover a maximum of 100 days in a skilled nursing facility after a 3-day inpatient hospitalization. The first 20 days may be 100% covered by Medicaid, but the remaining 80 days have a coinsurance of $176 per day in 2020 if approved. Medicare will not pay room and board in an assisted living facility.

Q. HOW DO I PAY AFTER THE MEDICARE 100 DAY CAP?

A. After Medicare has paid its maximum benefit, continued payment options include:

1. Private out-of-pocket payment (from Genworth's 2017 Cost of Care Survey)
   ~$7,969/month for semi-private room
   ~$8,730/month for private room
2. Private long-term care insurance
3. Long-Term Care Medicaid

Q. WHAT ARE THE BASIC LONG-TERM CARE MEDICAID REQUIREMENTS?

A. An applicant must satisfy three basic tests to qualify for Long-Term Care Medicaid:

1. **MEDICAL NEED:** The applicant must be either (1) 65 years of age or older, (2) blind, or (3) disabled *and* in need of long-term care, as certified by a physician.
2. **INCOME REQUIREMENT:** The income rules can become complicated, but generally the applicant's income less allowable deductions must be lower than the cost of the nursing facility. Long-Term Care Medicaid recipients are provided a $30/month personal needs allowance.
3. **COUNTABLE RESOURCE/ASSET REQUIREMENT:** The countable resources for an applicant can be the most complicated aspect of the Medicaid program to understand. Please review our general overview of the requirements on the next page.

Q. WHAT ARE THE LONG-TERM CARE MEDICAID RESOURCE REQUIREMENTS?

A. Generally, the person applying to receive Medicaid can have no more than $2,000 of countable assets. It is important to note that not all assets are countable. Examples of non-countable assets include:

- The applicant's principal residence and contiguous property, subject to a maximum equity value of $595,000;
- Household furnishings and other possessions such as jewelry;
- Your most valuable vehicle if used for the transport of the applicant or for a spouse;
- Certain burial arrangements such as prepaid funeral plans or insurance policies;
- Life insurance with no cash value or term life insurance policies;
- Certain non-homeplace real property if owned with a non-spouse as tenants-in-common;
- Assets held in specific kinds of trusts (revocable/living trusts owned by the applicant or spouse are COUNTABLE); and
- Certain types of annuities that must meet strict requirements (sometimes called Medicaid annuities).

Q. ARE THERE SPOUSAL PROTECTIONS FOR LONG-TERM CARE MEDICAID?

A. If the applicant is married, then the spouse still living at home (a/k/a the community spouse) who does not need benefits is subject to certain protections. For resources, the community spouse is provided with an allowance of the assets that the community spouse can keep in his or her name without impacting the applicant's benefits. In general terms, the countable assets on the "snapshot date" are divided in half—the community spouse can keep one half and the other half must be either (1) spent down, or (2) protected using Medicaid planning techniques. This community spouse resource allowance has a minimum amount of $25,728 and a cap of $128,640. For example, if a married couple had $500,000 of countable assets, ½ of that amount is $250,000. This exceeds the cap of $128,640. Thus, the community spouse is only be able to keep $128,640 of countable assets in his or her individual name. In addition to resource protection, certain community spouses with low income may be provided an allowance from the applicant's income to pay for household expenses.

Q. ARE THERE ANY RESTRICTIONS ON TRANSFERS OR GIFTS?

A. As you may have heard, Long-Term Care Medicaid has a 60 month "look-back period." When applying for benefits, the county agency reviews the applicant's (and any spouse's) assets and transactions during the "look-back period" to ensure no assets were given away or transferred for less than fair market value to qualify for Medicaid. Any such gifts or transfers must be disclosed. If assets were given away, then (1) they may be returned to the applicant/spouse without any penalty; (2) the recipient may pay the applicant/spouse fair market value for the received asset; or (3) the applicant may be subject to a "penalty period," where the applicant does not receive Medicaid benefits. The penalty period is calculated based on the value of the uncompensated transfer. As with all Medicaid rules, there are some exceptions to such transfers. For example, gifts between spouses or to qualifying disabled adult children are not penalized.

Q. WHAT IS MEDICAID ESTATE RECOVERY?

A. After a Long-Term Care Medicaid recipient dies, his or her estate may be subject to estate recovery, whereby the State of North Carolina seeks reimbursement for Medicaid benefits paid during the applicant's lifetime. Medicaid estate recovery may reach assets such as a primary residence that was excluded while the applicant was living and other real property owned as tenants-in-common. In some cases, such as where the applicant is survived by a spouse or disabled child, Medicaid estate recovery may be waived or deferred.

Q. ARE THERE PROGRAMS TO PAY FOR ASSISTED LIVING FACILITY COSTS?

A. The State and County Special Assistance Program can provide assistance for low income elderly or disabled individuals who live in adult care homes/rest homes, family care homes, and group homes. Some facilities have a Special Care Unit specifically for individuals with dementia or other cognitive issues. For this program, only the applicant's income and assets are evaluated for eligibility—not the spouse's income and assets. Recipients can have no more than $2,000 of countable assets and there is a 3 year "look-back period" for any sanctionable transfers of assets.

McGUIRE WOOD & BISSETTE LAW FIRM

SMART LEGAL

INCAPACITY & GUARDIANSHIP

FREQUENTLY ASKED QUESTIONS
GUARDIANSHIP OPTIONS IN NC

Q. WHAT IS A GUARDIANSHIP?

A: Guardianship is a legal mechanism by which a guardian (which may be an individual, a corporation, or an agency) is appointed by a court to make decisions on behalf of an adult who has been adjudicated incompetent. Some or all personal and financial decisions may be granted to the guardian as part of his or her authority. For those decisions, the incompetent individual loses the legal capacity to make those decisions and only the guardian may decide.

OUR SERVICES INCLUDE:

- Preparing powers of attorney for competent individuals.
- Special proceedings to implement a guardianship.
- Ongoing guardianship administration and preparation of court filings.
- Qualification and maintenance of means-tested government benefits for disabled individuals.

Contact Us

48 Patton Avenue
Asheville, NC 28801
828.254.8800
www.mwblawyers.com

ANDREW ATHERTON
aatherton@mwblawyers.com

MARY EULER
meuler@mwblawyers.com

KATHLEEN RODBERG
krodberg@mwblawyers.com

Q. WHAT ARE THE DIFFERENT TYPES OF GUARDIANSHIPS IN NORTH CAROLINA?

A. There are 3 types of guardians in North Carolina:

1. Guardian of the Person: A guardian who makes decisions about physical care, housing, and health care.
2. Guardian of the Estate: A guardian appointed to manage financial and legal matters.
3. General Guardian: A guardian of both the Person and Estate.

Q. HOW IS A GUARDIANSHIP IMPLEMENTED?

A. The basic steps to obtain guardianship are as follows:

1. **FILE PETITION:** A petition must be submitted to the Clerk of Superior Court alleging facts supporting the need for a guardianship and providing contact information for the allegedly incompetent individual (a/k/a the "Respondent"), their next-of-kin, and any other interested individual. At this time a guardian ad litem (i.e. representative for the Respondent) will be appointed and a hearing date will be set.

2. **SERVE RESPONDENT AND NEXT OF KIN:** A copy of the court filings must be served to the Respondent and to the next-of-kin/interested parties. The Respondent must be served by the sheriff's office.

3. **HEARING ON PETITION:** A hearing will be held before the Clerk of Superior Court's office on the filed petition. The petitioner must provide evidence, such as medical records or testimony, as to the need for a guardian and a recommendation on who should serve as guardian. The petitioner does not need to be one of the recommended guardians. The guardian ad litem or counsel for the respondent may then introduce testimony or reports before the court.

4. **ISSUANCE OF ORDER:** After hearing all of the evidence, the court will make a determination as to (1) whether a guardian is needed, (2) any limitations on the guardianship, and (3) who will be appointed to serve as guardian. Those appointed to serve must then file additional paperwork with the court before they begin to act as guardian.

Q. ARE THERE ALTERNATIVES TO GUARDIANSHIPS?

A. Yes! If the only income that the incompetent individual receives comes from the Social Security Administration (SSA), then in lieu of a General Guardian or Guardian of the Estate, a Representative Payee may be approved by SSA to manage those funds.

In addition, it is important to note that a medical diagnosis does not mean that an individual is automatically incompetent to execute legal documents. Many clients contact an attorney after receiving a diagnosis of Alzheimer's or other form of dementia. The attorney will then meet with the client and make a determination as to competency to execute legal documents. In many cases, these individuals are still competent to sign legal documents despite having received a diagnosis that may cause the loss of competency in the future.

Q. WHAT ARE LIMITED GUARDIANSHIPS?

A. Guardianships in North Carolina are not an "all or nothing" situation. Incompetent individuals have a range of abilities and a wide array of needs. As such, a guardianship may be tailored by the court to accommodate a specific individual's circumstances. When such adjustments are made, it results in a "limited guardianship." This structure is meant to help the individual maintain as much independence as possible. Limitations may include allowing the incompetent individual to maintain the right to vote, a set monthly allowance, input on housing options, and determining the extent to which the incompetent individual wishes to participate in religious or social activities.

Q. WHAT ONGOING REPORTS DOES THE COURT REQUIRE?

A. General Guardians or Guardians of the Estate must file an Inventory showing guardianship assets and monthly income sources and amounts. Each year on the anniversary of the guardianship, an Annual Account must be submitted to the court showing all of the receipts and expenditures from guardianship assets. Proof of those transactions must accompany the accounting in the form of bank statements with canceled check images and deposit slips. It is imperative that the guardian keep excellent records so that the court has everything it needs to approve the Account.

For General Guardians or Guardians of the Person, status reports may also be required. Corporations or disinterested public agencies must file an initial status report within 6 months of being appointed and thereafter annually. The court may order an individual guardian to file status reports, which may include information about recent medical visits, options to limit the guardianship, housing arrangements, etc. Although not required in every county, many counties in Western North Carolina now require these status reports from individual guardians—not just public agencies.

Q. HOW WILL THE COURT CHOOSE A GUARDIAN?

A. The court may appoint an individual, a corporation, or a disinterested public agent to serve as Guardian. Generally, the court is looking for someone who will adhere to the laws, put the interests of the incompetent individual above his or her own interests, manage assets prudently, make decisions that ensure the health and well-being of the incompetent individual, and involve that individual in decision-making to the extent possible. In some circumstances—particularly when there is a great deal of discord among family members—a local public agency may be appointed to serve as Guardian of the Person and a local attorney may be appointed to serve as Guardian of the Estate.

Q. WHAT IF THE GUARDIAN IS NO LONGER ABLE TO SERVE IN THAT ROLE?

A. North Carolina recently enacted laws that allow the appointment of a "standby guardian" for incompetent adults. By this method, the current guardian is provided the option to designate or appoint another person to serve as guardian upon the death or incapacity of the current guardian.

Q. CAN THE GUARDIANSHIP BE CHANGED IN THE FUTURE?

A. Absolutely! The court wants to ensure that the guardianship has the least restrictions possible to preserve as much independence for the incompetent adult. This may involve further limiting the guardianship as the individual learns new skills or regains abilities or terminating the guardianship after competency has been restored.