TOP 10 ELDER LAW TIPS THAT CONFLICT WITH GENERAL PRACTICE

CLE Credit: 1.0
Thursday, June 20, 2013
8:30 a.m. - 9:30 a.m.
Jones Room
Galt House Hotel
Louisville, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.
# TABLE OF CONTENTS

The Presenters .......................................................................................................................... i

Top 10 Elder Law Tips that Conflict with General Practice ................................................. 1

PowerPoint Slides .................................................................................................................... 7
BERNARD M. FALLER is an attorney with Kentucky ElderLaw, PLLC, in Louisville, where he practices elder law by assisting older clients, their children and other family members with nursing home, Medicaid, asset preservation, asset distribution, mental capacity, probate, guardianship, and other issues. He received his B.E.E. from the Rensselaer Polytechnic Institute, M.S.E.E. from New York University, and J.D. from the Louis D. Brandeis School of Law at the University of Louisville. Mr. Faller is an adjunct professor of law at the Brandeis School of Law where he teaches Elder Law. He is also the immediate past President of the Kentucky Bar Association's Elder Law Committee and co-author of the Kentucky Practice Series, Volume 23 “Elder Law.” Mr. Faller is a member of the Kentucky and Indiana Bar Associations.

KELLY GANNOTT is an attorney with Kentucky ElderLaw, PLLC, in Louisville, where she practices elder law by assisting older clients, their children and other family members with nursing home, Medicaid, asset preservation, asset distribution, mental capacity, probate, guardianship, and other issues. She received her B.A., summa cum laude, from Murray State University and J.D., cum laude, from the Louis D. Brandeis School of Law at the University of Louisville. Before joining Kentucky ElderLaw, Ms. Gannott was employed by the Kentucky Department of Public Advocacy, Mapother & Mapother, PSC, Schiller Osbourn Barnes & Maloney, PLLC, and Bluegrass Senior Law, PLLC. She is a member of the Kentucky, Indiana and West Virginia Bar Associations.
Estate Planning is based primarily on federal gift and tax law, regulation and case law. Medicaid is governed by an unrelated set of federal law, federal regulation, state law, state regulation, state discretion in some matters and occasionally case law. Veterans' Benefits are governed by an entirely different set of federal laws and regulations, and wide areas of discretion. Actual adherence to laws and regulations varies greatly. We are focused today primarily on differences in the law and major regulations.

Our Top Ten list has twelve items. So sue us.

I. GIFT TAX EXCLUSION

I wish I had a dollar for every estate planning attorney, accountant, financial planner, barber, hairdresser, neighbor and know-it-all brother-in-law who said it is OK to gift $13,000 per year per person (some people still use the number $10,000; the actual number for 2013 is $14,000). It is OK to gift $14,000 or $14,000,000, or any amount to anyone at any time for any reason. There are no gifting restrictions in the United States. But there may be reporting issues, tax issues and entitlement program eligibility issues.

The federal government taxes gifts based upon an accumulated lifetime total. The $14,000 is a de minimis amount, and annual gifts below this amount per person need not be reported and do not count against the lifetime total of potentially taxable gifts. Medicaid views all gifts as being made for the purpose of obtaining Medicaid eligibility. Therefore, while of no interest to the IRS, these $14,000 or so annual gifts are all prohibited transfers for Medicaid eligibility purposes. All gifts within the prior five years are at issue and there is a legal requirement to report them at the time of a Medicaid application.

For VA eligibility purposes for programs such as Aid and Attendance, the VA currently has no gifting penalties. There is a proposal circulating in Congress to institute a three-year look-back rule, but neither branch of Congress has voted the bill out of committee and it is not at all clear that this change will occur any time soon.

Charitable gifts are exempt from federal gift tax limitations but nothing in Medicaid law exempts them. However, caseworkers do not focus on small gifts to churches or well-known charities.

II. REVOCABLE LIVING TRUSTS (RLT)

Medicaid defines resources as all real and personal property that an individual owns or has the right, authority or power to convert to cash. The first word in Revocable Trust is revocable. Therefore, the grantor has the power to convert ALL assets in an RLT to cash; hence all assets in every RLT are countable. RLTs are of no value in a Medicaid asset preservation plan.
RLTs are also of no value when looking to reduce assets in a VA eligibility situation. The VA also counts these assets as if the grantor owned them outright.

III. FAMILY HOME IN A REVOCABLE TRUST

Family homes are normally an exempt resource in a Medicaid eligibility situation if there is a Community Spouse, i.e., a spouse not himself in a nursing home. All assets in an RLT are countable resources, but Medicaid takes the position that if the family home is in an RLT, it is not owned by the applicant or spouse and thus is not eligible for the spousal exemption. So the exempt family home suddenly becomes a countable resource because it is in an RLT. It is hard to justify this posture and few other states follow this route. Even worse, if the Trustee transfers the family home only to the community spouse, and that spouse gifts the home to an adult child after Medicaid eligibility has been approved, Medicaid will attribute the gift to the institutionalized spouse and terminate benefits. Therefore, any house in an RLT should be returned to both spouses first. It may then be transferred to the healthy Community Spouse without fear of running into a later problem related to the trust.

Medicaid eligibility rules permit the transfer of a home to an adult disabled child or a caregiver child, with no transfer penalty. Again, all assets in a revocable trust are countable assets as if the grantor owned them personally. Transferring a home that is in a revocable trust to a disabled or caregiver child fails, because trusts do not have children. The home must first be transferred into the names of the parents and then to the child.

IV. IRREVOCABLE TRUSTS

Irrevocable Trusts are an inflexible tool that may be used for Medicaid asset preservation purposes, but do so with caution. Transfers into an irrevocable trust are considered gifts and subject to a five-year look-back for Medicaid eligibility purposes. A Medicaid application should never be filed within this five-year window. These trusts are very tricky. Read the rules in 42 U.S.C §1396p and 907 KAR 1:650 (4)(g). The trust must clearly state that the grantor or spouse may not receive any of the corpus under any circumstances. The common right given to trustees to permit invasion for the health, maintenance or welfare of the grantor, is FATAL. Medicaid would count the entire corpus as an available resource regardless of how many years have elapsed since the trust was funded.

V. FAMILY LIMITED PARTNERSHIPS (FLP)

An FLP is a useful estate planning tool for managing a business or real estate. It is also one method of re-titling assets to limit control and marketability. An asset that is difficult to transfer and over which the owner has less than full control is, at least theoretically, less valuable than it was when owned individually or through an LLC or partnership. The IRS recognizes this situation and permits a reduction in value for gift tax and estate tax purposes.

Medicaid does not have a mechanism to even address a FLP. It is likely that no one will understand what it is and just value the entity and then multiply by the percentage of ownership or control, whichever number works out better for them.
In addition, the creation of the FLP may generate a gift if the FLP was created within the prior five years. Valid users of FLPs generally do not interact with the Medicaid system. Using a FLP for Medicaid asset preservation purposes is poor use of time and resources and is likely to have a miserable outcome.

The VA does not have a position on FLPs as far as we know. VA asset requirements are quite low and seem incompatible with FLPs.

VI. GUARDIANSHIPS AND REAL PROPERTY

In Kentucky, only a jury can remove a person’s legal rights. Doctors, judges, children or state social workers have no power to declare an individual legally incompetent. At the beginning of the guardianship legal process, the person against whom the guardianship is filed is known as the Respondent. If a jury finds the person incompetent, he is then called a Ward.

To sell a Ward’s real property requires court approval. The court is concerned that fair market value (FMV) is obtained. The first step is to find a buyer and get a sales contract. Next, petition the court for a hearing. This triggers a thirty-day wait, which may be waived by consent of all parties. At the hearing, the judge, GAL and prosecutor will all review the contract, an appraisal you have provided, the PVA statement and any other supporting material. For example, if this is the first offer in the two years the property has been on the market, tell the judge that. If the judge is satisfied that FMV or best reasonable offer is on the table, the judge will sign an Order approving the sale.

This triggers a thirty-day waiting period where anyone may object. There is no way to waive this thirty-day hold. Explain to the buyer at the beginning of the process that it will take sixty-ninety days to close. If this is not acceptable, you do not have a buyer.

VII. DEDUCTING THE COST OF LONG-TERM CARE

IRC §§213(a), (d) and 7702B provide an income tax deduction for medical expenses that include "qualified long-term services." The primary purpose of nursing home care is medical care. Therefore, 100 percent of nursing home services are tax-deductible as medical care on Schedule A. The net effect is that nursing home residents rarely have any income tax due. For most residents, tax withholding should be stopped.

Qualified plans such as IRAs are exempt resources for Medicaid eligibility purposes. Most nursing home residents should spend non-qualified assets first so the children can inherit the IRAs. But, if a person has sufficient wealth that Medicaid will never be needed, it might make more sense to spend IRA money first. The money is taxable but there is an equal Schedule A offset. At death, more of the inheritance will be received income tax-free.

Dealing with Assisted Living (AL) care is trickier. An AL resident must be "chronically ill" before any of the cost is deductible. Chronically ill means that within the prior twelve months, a licensed health care practitioner has certified that the resident is unable to perform at least two out of the six activities of daily
living (ADLs) OR he requires substantial supervision to protect his health and safety due to severe cognitive decline. The ADLs are eating, bathing, dressing, toileting, continence and transferring.

The family needs to get a statement from any licensed health care professional stating the above. A "licensed health care professional" is defined under §7702B(c)(4) as any physician, registered professional nurse or licensed social worker. They need not work for the facility. The last step is that a plan of care must be prepared by the facility, which most automatically prepare for every resident. The medical portion of the plan of care is deductible. Judgment is often involved as the medical portion may not be clearly stated.

In a recent Tax Court case, Estate of Baral v. C.I.R., 137 T.C. 1 (U.S. Tax Ct. 2011), the court stated that payments made for twenty-four-hour care of a person with dementia are deductible as medical expenses even though the personnel providing the care are not medical personnel.

VIII. LIFE ESTATES

A retained life estate is an exempt resource for Medicaid eligibility purposes, but the value of the life estate at the moment before death is subject to estate recovery. Medicaid has its own life estate table, which is less favorable to the individual or estate than the IRS table.

For VA purposes, retention of a life estate causes the entire value of the property to count as an asset of the applicant. So the holder of a life estate is unlikely to be eligible for Aid & Attendance given the low asset threshold used by the VA in this area. There is no published asset threshold, but a good guide is $20,000 for a single veteran or $80,000 for a couple.

IX. ADDING NAMES TO BANK ACCOUNTS & DEEDS

Adding a name to a bank account does not create a gift. It will be assumed that all the money in the account belongs to the Medicaid applicant, usually the parent. This is almost always true. If the money in the account has always been the child’s, something we see in accounts that were set up decades ago, provide an affidavit that the funds belong to the child. Include a statement as to the ongoing source of all recent deposits and then take Mom’s name off the account. If the bank balks, close the account and have the child open a new account. If an account requires two signatures, Medicaid will view each party as owning half.

The VA treats adding a name to a bank account as a gift (no penalty at this time) and divides the account by the number of account holders.

Adding a name to a deed is treated as a transfer of resources as soon as the deed is signed. Recording the deed is not required, but prudent. Medicaid once viewed the recording date as the date of transfer, but they have backed off from that position.
X. QUALIFIED INCOME TRUSTS (QITS) AND TAX IDENTIFICATION NUMBERS (EINS)

A QIT, often called a "Miller Trust," is needed for Medicaid eligibility if the resident’s gross income exceeds $2,130/month. A QIT is an irrevocable trust and some banks demand an EIN. This creates problems later when the IRS starts looking for tax returns. But under an IRS guideline, QITs do not require a separate EIN. Use the Social Security number of the resident. See: I.R.M. 21.7.13.5.8.3 (no EIN needed for a "Miller type trust"). http://www.irs.gov/irm/part21/irm_21-007-013r-cont02.html

XI. ESTATE DISCLAIMERS

For Medicaid purposes, a resource includes everything you have the right to own. The right to an inheritance matures at the moment of death. Therefore, disclaiming an inheritance is a prohibited transfer for Medicaid eligibility purposes. Remember, we are dealing with state Medicaid regulation and not federal tax law. Look for situations where older people are leaving assets to siblings. Consider replacing the sibling with her children or other heirs. Changes to Wills made prior to death remove the inappropriate inheritance problem, as other than a spouse, no one has a legal claim to be mentioned in a Will.

XII. PROBATE ESTATE V. EXPANDED PROBATE ESTATE

When a Medicaid recipient dies, the State has the right to recover the benefits paid from the probate estate, and in Kentucky, the expanded probate estate. The expanded probate estate is defined in 907 KAR 1:585 (1)(b):

(b) All real and personal property or other assets in which the deceased recipient had legal title or interest at the time of death, to the extent of the recipient’s interest, whether the asset was conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common survivorship, life estate, living trust or other arrangement. (Emphasis added.)

The state will try to recover money from any joint property in which the deceased resident had an interest at time of death or any life estate owned at the moment before death. Federal law defines expanded probate estate and gives states the option to use this definition in estate recovery matters. Kentucky elected this option in September, 2003. Litigation in other states has upheld the government’s position.

There is no estate recovery if there is a surviving spouse, minor child, disabled adult child or the estate has less than $10,000. This is not a $10,000 exemption. If the estate is worth $11,000, estate recovery is entitled to all of it.
TOP TEN ELDER LAW TIPS THAT CONFLICT WITH GENERAL PRACTICE
Bernard Faller and Kelly Gannott

Topics
• Annual Gift Tax Exclusion
• Charitable Gifts
• Revocable Trusts
• Irrevocable Trusts
• Family Limited Partnerships
• Inheritance Disclaimers
• Guardianships and Real Property
• Medical Care and Tax deductibility
• Life Estates
• Family Home in a Revocable Trust
• Adding Names to a Deed
• Adding Names to a Bank Account
• QITs and EIN numbers
• Probate Estate vs. Expanded Estate

Annual Gift Tax Exclusion
• Contrary to popular belief, anyone may gift unlimited amounts of money to any individual at any time
• There may be federal gift tax consequences
• There may be state Medicaid eligibility consequences, and
• One day there may be VA eligibility issues

Annual Federal Gift Tax Exclusion
• For federal gift and estate tax purposes, all annual gifts to an individual above a de minimis amount ($14,000 in 2013) must be REPORTED via form 709
• Exceptions - gifts between spouses, tuition or medical expenses, and (surprise) gifts to political organizations
Medicaid Eligibility Gift Exclusion

• Other than transfers between spouses, the disabled child exception, and the caregiver child exception, there are NO Medicaid gift exclusions. They all count.
• The $14,000 exclusion for federal reporting purposes does not apply to state Medicaid eligibility, but is currently OK for VA eligibility purposes.
• There are some narrowly defined exceptions to this rule, but for estate planning purposes, no $14,000 gifts if a nursing home is on the five-year horizon (unless the person is wealthy).

Charitable Gifts

• There is nothing in the Medicaid regulations permitting charitable gifts.
• The regulation prohibits "transfers for less than fair market value made for the purpose of obtaining Medicaid eligibility."
• As a practical matter, Medicaid views every transfer as having been made for purposes of Medicaid eligibility.
• But, they ignore tithing and small donations to churches, especially if the caseworker is of the same denomination (just kidding - sort of).

Revocable Trusts

• 907 KAR 1:645 states:
• (13) "Resources" mean cash money and other personal property or real property that:
• (a) An individual:
• 1. Owns; and
• 2. Has the right, authority, or power to convert to cash.
Revocable Trusts

• The first word in Revocable Trust is?
• Since the trust can be revoked, the grantor has the right to convert the asset to cash
• Bottom line - all assets in a revocable trust are countable resources - forever
• A Revocable Trust is worthless as a Medicaid asset protection tool
• Revocable Trust assets are also countable for VA eligibility purposes

Irrevocable Trust

• Irrevocable Trust rules are found at 42 USC 1396p(d)(3)(B) and 907 KAR 1:650 (4)(g)
• (g) If payment from a revocable or irrevocable trust may be made under any circumstance, (to the grantor or spouse) the amount of the full payment that could be made shall be considered as a resource including amounts that may be disbursed in the distant future.

Irrevocable Trust

• Assets placed inside an Irrevocable Trust are considered a transfer for less than fair market value and subject to the five year look back rule
• In addition, if the trustee has ANY discretion to use the corpus for the benefit of the grantor, the entire corpus is an available resource regardless of how many years has expired
• Same for income, but this may be OK if the grantor needs the income
Family Home in a Revocable Trust

- If there is a Community Spouse (living spouse not also in a nursing home), one home of any value is exempt as a personal residence
- In KY (and nowhere else) Medicaid has taken the position that a home in a revocable trust is not exempt since neither spouse owns the home

Family Limited Partnerships (FLP)

- An FLP is a wealth transfer device with a general partner and limited partners
- Limited partners lack control and marketability
- This impairment yields favorable (reduced) valuations for gift and estate tax purposes
- However, Medicaid rules are not linked to IRS regulations except when it is convenient for the Cabinet to make that argument

Family Limited Partnerships (FLP)

- Medicaid will not allow a discount for a FLP interest
- At best, they will value the assets within the FLP based upon FMV and percentage of ownership
- More likely, they will just deny eligibility because they will not know what to do with the asset
- Or, the application will just sit for years because “they are working on it”
- Bottom line - no FLPs for Medicaid applicants or those with nursing home care on the horizon
Adding Names to a Bank Account

• Surprise - no problem

• Adding a name, such as an adult child, to a bank account is **disregarded as a gift** for Medicaid eligibility purposes

• However, if that person uses any of that money, then a gift will have been made at that time

• There is a rebuttable presumption that the Medicaid applicant owns all of the funds in every account that includes his or her name

Adding Names to a Bank Account

• However, for **VA purposes**, adding a name to a bank account reduces the **countable resource** proportionately

• Example: Mom has $30,000 in her checking account. She adds her two daughters onto the account

• For VA purposes (not Medicaid), mom has $10,000 in countable resources

Adding Names to a Deed

• No cigar - adding names to a deed is a transfer of resources as soon as the deed is signed and delivered

• **This is just the opposite of adding a name to a bank account**

• Adding a name to a deed is a gift and starts the five-year clock running

• Some offices use the date the notary signed; others use the date it was recorded

• Be very wary of unrecorded deeds sitting in the lawyer’s desk for years or decades
Probate Estate vs.
Expanded Probate Estate

• This is an Estate Recovery issue
• When a Medicaid recipient dies, the State has the right to recover the benefits paid from the probate estate, and in Kentucky, the expanded probate estate

Expanded Probate Estate

• 907 KAR 1:585 (1)(b)
• (b) All real and personal property or other assets in which the deceased recipient had legal title or interest at the time of death, to the extent of the recipient’s interest, whether the asset was conveyed to a survivor, heir or assign of the deceased recipient through joint tenancy, tenancy in common survivorship, life estate, living trust or other arrangement.

Estate Disclaimers

• Remember, a resource is everything you own and everything you have a right to own
• Your right of inheritance matured at the moment of death
• Disclaiming an inheritance is a Medicaid transfer of resources for less than fair market value (gift)
• The VA does not have an estate recovery process, so this is not a VA issue
Estate Disclaimers

• Don’t leave assets to people (or spouses) in a nursing home or who are likely to end up there
• Leave assets to the next generation
• Most common scenarios
  – Naming siblings in a Will
  – Not naming a beneficiary on a life insurance policy or IRA so that it becomes part of the probate estate

Who Is Exempt?

• **Surviving spouse** – No estate recovery
• **Minor child** – No estate recovery
• **Disabled child of any age** – No estate recovery
• **Assets under $10,000** – No estate recovery
• **Note** – The $50,500 exemption for the home ended in 2003

Estate Recovery – Life Insurance

• Kentucky claims a right to recover from life insurance beneficiaries. I am not aware of them pressing this matter to the extent of litigation. Medicaid’s position seems to violate KRS 304.14-300, Exemptions of Proceeds, Life Insurance.
• **IRAs are exempt assets.** At death, they generally pass by beneficiary designation. Medicaid is not doing estate recovery against IRAs.
Estate Recovery - Real World

• KY has shifted the administration of the Estate Recovery operation to various contract organizations over the past six years
• In 2010 it was moved from Atlanta back to Frankfort and was totally non-functional for nine months
• It is now in low gear - it mails letters
• Staff is friendly, returns calls, answers emails
• It appears to have no ability to go to court
• It will file a claim in probate court, in about 1 percent of cases

Estate Recovery - Real World

• Kentucky says it is not subject to the six month window to file a claim against an estate
• This has been widely litigated in other states
• Where no notice had been sent to the Agency, the state usually wins these cases
• Where notice has been filed, the results are mixed at best
• Estate recovery claims are best resolved to avoid clouds on titles

Estate Recovery - Real World

• There have been some recent claims that property transferred within three years of death is subject to Estate Recovery
• We do not feel these are valid
• Estate recovery regulations speak of probate assets and expanded estate assets
• There is no claw back provision
• Gifting is an eligibility consideration, not an element of estate recovery
Qualified Income Trust & EIN

• A Qualified Income Trust (QIT) is special type of Irrevocable Trust only used for purposes of Medicaid eligibility
• A QIT is also known as a Miller Trust, named after the Colorado case that created it, Miller v. Ibarra, 746 F.Supp. 19 (D. Colo.1990)
• A QIT is codified at: 42 U.S.C. §1396p(d)(4)(B)

Qualified Income Trust & EIN

• Under the form of Medicaid eligibility used in KY, if an applicant's income exceeds three times the poverty rate, his or her income is too high to become Medicaid eligibly
• The poverty rate in 2013 is $710/month
• Therefore, the income cap is $710 x 3 = $2,130
• Technically, the rules say that if your income exceeds $2,130/month, you can afford to pay the nursing home from your income

Qualified Income Trust & EIN

• If income is paid directly into a QIT, it was never received by the applicant.
• If applicant receives $1,500/month in Social Security and $1,000/month in pension income, depositing either check directly into the QIT brings the applicant's income below $2,130/month
• This makes them income eligible (but not necessarily resource eligible)
Qualified Income Trust & EIN

- Irrevocable Trusts require EIN numbers
- QITs do not require EINs. See: I.R.M. 21.7.13.5.8.3
- Most banks understand this, some do not
- Do not attempt to write your own QIT
- Medicaid tries to deny eligibility by constantly changing how it interprets existing regulations
- Email us for a free QIT misty@kyelderlaw.com

Qualified Income Trust & EIN

- No money should ever accumulate in a QIT
- All income should go directly to the nursing home within days
- Any money left in a QIT at death reverts to the Kentucky Treasury under terms of the trust

Life Estates

- Avoid creating life estates
- Typically, a life estate is created when a parent transfers a home to an adult child, retaining a life estate for themselves
- If there is a concern that child will put mom out on the lawn, do not make the transfer
- Medicaid treats life estates differently than any other agency
Life Estates
• For Medicaid eligibility purposes, a retained life estate is an exempt resource, it doesn’t count
• Do not confuse this with a life estate created in the home of another, which is under different rules
• The life estate problem surfaces during the estate recovery process
• At death, Medicaid will value the life estate in a most unfavorable way, and seek recovery from the remainderman

Life Estates
• Although a common estate planning practice, it is terrible for Medicaid purposes. Medicaid uses their own tables to value life estates. This results in a very high value.
• If mom has gifted her home and retained a life estate (LE), the LE is an exempt resource for Medicaid eligibility purposes
• However, at mom’s death, Medicaid will attempt an estate recovery on the value of the life estate at the moment before mom’s death
• Court challenges in other states have favored Medicaid’s position
• The gifted remainder interest is subject to the normal five-year look-back provision on gifts

Life Estates – SNT – VA
• Life Estates do not work for VA planning
• If mom retains a life estate, the VA will value the entire property as an available asset - a bad result
• Special Needs Trusts (SNT) are also not effective as VA planning tools
Guardianship

- A guardianship is a legal relationship between a capable adult, the Guardian, and a Ward, the person who has been determined to be legally disabled
- Legal disability is determined by a jury
- A doctor, social worker, neighbor or your child have no authority to declare you legally disabled or incompetent

Guardianship Process

- To obtain a guardianship, the Petitioner (often an adult child) files a guardianship application at the District courthouse
- The court will appoint a lawyer called the Guardian Ad Litem (GAL) to protect the Ward’s interests
- Three professionals will examine the Ward (i.e. mom) and file reports. If at least two of the reports say a guardianship is needed, a two hour jury trial will follow. The entire process takes 60-90 days

Guardianship - Sale of Real Property

- If a Guardian is appointed, the Ward’s Power of Attorney is null and void (in KY, not all states)
- If you want to sell a home where one of the owners or the spouse is under a Guardianship, you need the permission of the Court to sell the home
- The required permission delays the sale by about two months
- Make sure you have a buyer willing to wait
- Applying pressure on the court is a waste of time as there are statutory time frames involved
Guardianship - Sale of Real Property

- The Courts are always suspicious that the Ward (the person under guardianship) is somehow being cheated
- To get Court approval, your Motion to Sell Real Property should include a PVA statement, the report from a certified appraiser and the signed sales contract
- Keep the GAL informed to reduce the chances of a courtroom surprise

Conservatorship

- A Guardianship has two parts, guardian of the person and guardian of the property
- Guardian of the property is also known as a Conservatorship
- The process of obtaining a Conservatorship is identical to obtaining a full guardianship
- It is used when the Ward is unable to handle her finances or protect herself from fraud and theft, but still is capable of making personal decisions

Curator

- A Curatorship is a voluntary Conservatorship
- It is handled by the Probate Court instead of the Guardianship Court
- The person must appear in court and ask that a person or institution be named to handle her finances - the Conservator
- It is used where the person is still competent but there is still risk of financial mismanagement. Either party may terminate the Conservatorship at any time
**Interstate Guardianships**

- Kentucky has adopted the Uniform Guardianship Act, officially known as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA).
- In KY, the new regulations start at KRS 387.810.
- The purpose is to determine jurisdiction when parents visit children, facilitate moving a Ward from one state to another and provide clarity in cases where more than one state may have an interest.

**Deducting Long Term Care**

- IRC §7702B provides an income tax deduction for medical expenses which include "qualified long term services".
- IRC §213(d) does not mention long term care as a medical expense but treasury regulations on this subject refer to these sections.
- Treasury Regulation §1.213-1(e)(1)(v) provides that when medical care is not the principle reason for presence, only the medical care portion is deductible.

**Deducting Long Term Care**

- A Nursing Home's primary purpose is medical care and as such, the entire cost is a tax deductible medical expense.
- This means a nursing home resident paying for her own care will have a tax deductible medical expense of $60,000 - $100,000 per year, plus costs of insurance and medications.
- Therefore, most nursing home residents no longer pay income taxes and should stop all withholding.
Deducting Long Term Care

• Assisted Living facilities do not provide the level of medical care to meet "medical care" definitions
• Therefore, one must dig deeper to determine how much of the monthly cost is tax deductible
• "Personal Care" facilities fall between nursing home and assisted living. Follow assisted living rules for deductibility
• Independent Living facilities are not deductible

Deductibility of Assisted Living

• An Assisted Living (AL) resident must be "chronically ill" before any of the monthly cost is deductible
• Chronically ill means that within the prior 12 months, a licensed health care practitioner has certified that the resident is unable to perform at least two out of six of the activities of daily living (ADL) OR they require substantial supervision to protect their health and safety due to severe cognitive decline

Deductibility of Assisted Living

• Have the family get the necessary statement from the licensed health care professional at least once every twelve months
• This is a threshold requirement and does not make the full cost of the AL facility deductible
Deductibility of Assisted Living

- A "licensed health care professional" is defined under §7702B(c)(4) as any physician, registered professional nurse or licensed social worker
- This person does not need to be an employee of the AL facility
- There must be a personal examination of the resident and a written report must be issued
- A medical examination is not required

Deductibility of Assisted Living

- A "plan of care" must also be prepared
- This is usually done by the AL facility, but if not, the licensed health care professional should draft this document too

Deductibility of Assisted Living

- Medical expenses are deductible when they exceed the following:
  - 2012 7.5% of AGI
  - 2013 10.0% of AGI if the taxpayer is under 65
  - 2016 10.0% of AGI for everyone

- Some of the Assisted Living material is from a NAELA article by Robert C. Anderson, LLM, Taxation
Tax Implications of Caregiver Payments


Payments made for 24-hour care of a person with dementia are deductible as medical expenses even though the personnel providing the care are not medical personnel. A doctor had deemed such assistance necessary due to Mrs. Baral’s dementia.