2019-2020 Houston Bar Association Elder Law Handbook

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Table of Contents

INCOME

Social Security

What kinds of benefits are available from Social Security?

Social Security pays benefits to an eligible individual when he or she reaches retirement age or becomes disabled. Social Security also pays about 20 other categories of claimants. The most typical categories are disabled workers, surviving spouses, and their minor children.

How do I apply for Social Security?

You can apply for Social Security either online at www.socialsecurity.gov, by calling the Social Security hotline (1.800.772.1213), or in person at your local Social Security office. If you visit the office, you are often given a telephone appointment.

You will need certain information and certified copies of documents in order to apply, such as your Social Security number, your birth certificate, your military discharge papers if you have had military service, and your W-2 form or self-employment tax return for last year. It takes time to process the application, so you should file at least three months prior to the date you intend to retire.

How much will I receive from Social Security when I retire?

By submitting form SSA-7004, called Request for Earnings, Social Security will estimate your retirement check. The benefits that you receive from Social Security depend upon several factors: your age at retirement, your earnings during your lifetime, and the calendar date of your retirement. It is also affected by offsets such as retirement benefits from certain government-related jobs like teaching. The average monthly check in 2019 is $1,461, with a maximum of $2,788. If you applied for delayed retirement at age 70, in 2018, the maximum benefit would be $3,770.

Can my spouse and children receive retirement benefits from my account?

If your spouse has reached retirement age, he or she can receive a benefit on your account. Your minor children (children under 18, or still in high school and under 19) and disabled adult children can also receive a benefit on your account. Those benefits, called auxiliary benefits, usually total one-half of the amount of your own check. Generally, the spouse must be at least 62 and have been married to the primary earner for a year to claim the spousal benefit. However, if the spouse who is less than 65 claims spousal benefit before reaching 65, the amount received will be reduced (permanently) for each month claimed early. The spouse's benefit will be reduced by any amount he or she receives on his or her own work record and possibly by other retirement benefits he or she receives, such as teacher's retirement. Payment of auxiliary benefits does not affect the amount of the retiree's benefit.

Can I claim spousal benefits if I am in a same-sex marriage?

Yes, since June 2015, same sex marriages became legal in all states, and the spouse may claim spousal benefits.

If I am in a common law marriage, may I claim spousal benefits?

Yes, in Texas, you may claim spousal benefits, because Texas law recognizes common law marriages meeting certain criteria.

I'm divorced. Can I get retirement benefits based on my ex-spouse's income?

If you were married to your ex-spouse for at least ten (10) consecutive years and you are currently single, you may claim spousal benefits. However, if you were married to a person, divorced, remarried and divorced, and none of your marriages lasted 10 consecutive years (even though all marriage time is more than 10 years), you do not qualify. If you had more than one marriage that lasted more than 10 consecutive years and, for example, the second spouse died; the now-single spouse may claim from spousal benefits on whichever spousal benefit would be higher.

To apply for benefits on an ex-spouse, you must know either his social security number or his date and place of birth and parents' names.

Are the Social Security benefits I receive taxable?

In some instances, the Social Security benefits of a person will be subject to income tax. The test to determine if your benefits are taxable is somewhat complicated; currently, if a married couple's adjusted gross income combined with 50% of their social security benefits plus any tax-exempt income exceeds $32,000.00, or $25,000.00 for an individual, then the benefits will be taxable. The amount of tax that would be due is even more difficult to calculate and the amount of tax increases for married couples with an adjusted gross income above $44,000.00.

Will my spouse and children be able to collect any benefits after my death?

Yes. Your widow/widower may be entitled to benefits on your earnings record if he or she was married to you for nine months before your death, though there are some exceptions to the nine-month rule. In the case of a divorced former spouse, the marriage must have lasted for 10 consecutive years, and the divorced widow must be unmarried or, if married, must not have remarried prior to age 60. The widow is eligible for benefits at age 60 or over, or at age 50-59 if disabled. The widow may also be entitled to benefits on your record at any age if he/she is caring for your minor child, or disabled adult child, who is receiving benefits on your record. The widow's benefit will be reduced by any benefit he/she is receiving on his/her own earnings record. At your death, your child will be entitled to benefits on your record if he/she is under 18, or up to age 19 and still in high school, or if the adult child became disabled before reaching age 22. Additionally, your surviving spouse and minor children are eligible for a one-time lump sum death benefit of $255.

What type of benefits are available if I become disabled?

Disability benefits apply to workers under age 67.5 and are paid to disabled workers, their minor or disabled adult children, and sometimes their spouses. A disabled worker must prove that he/she has a very severe impairment. Social Security denies most claims at the first and second levels, but about half of all claimants win after a hearing with a Social Security judge. It typically takes one-and-a-half to two years to get to that point. If you are denied at the first or second level, or if you need help with the application, it is advisable to consult an attorney who specializes in Social Security law.

Maximum Federal Supplemental Security Income (SSI) payment amounts increase with the cost-of-living increases that apply to Social Security benefits. The latest such increase, 1.6 percent, is effective January 2020. The monthly maximum federal amounts for 2020 are $783 for an eligible individual, $1,175 for an eligible individual with an eligible spouse, and $392 for an essential person.

What are Supplemental Security Income Benefits?

Supplemental Security Income (SSI) is a monthly cash benefit paid to elderly or disabled adults and/or to disabled children, all of whom must meet strict tests of income and assets. SSI entitles the recipient to Medicaid. The maximum monthly benefit check in 2019 is $771 for a single person and $1,157 for a family.

What are the resource limits for SSI?

SSI allows assets up to $2,000 for a single person or $3,000 for a married couple. Your homestead is exempt from the resource limits, as well as one car per couple. There are also strict limits on income. Social Security may try to treat any cohabiting couple of the opposite sex as a married couple, so the income and resources of the live-in partner must be counted. Cohabitation decisions are mitigable. See the Medicaid section for more on this topic.

How can I appeal a decision of the Social Security Administration?

Most Social Security appeals start with a request for a hearing to the Social Security Office. In these courts, you may bring in witnesses and have an oral hearing. This hearing is your best chance of winning an appeal; the odds are fifty-fifty. If a Social Security judge makes an error, you can then file an appeal with the appeals council and take the denial to federal court. At this level, the appeal is handled through written briefs. At these higher levels, you do not have the opportunity to appear before a federal judge, bring in witnesses, or make an oral argument.

IRAs: Individual Retirement Accounts

What is an IRA?

An IRA is a form of "individual retirement plan," provided by many financial institutions, that offers tax advantages for retirement savings in the United States.

Is there a new law which affects IRA?

Yes, President Trump signed a new law on December 20, 2019, entitled "Setting Every Community Up for Retirement Enhancement Act" which is referred to as the "Secure Act." In general, the Secure Act provides some opportunities for taxpayers to increase their retirement savings by contributing for a longer period of time and delaying the time when they must withdraw funds from the IRA. However, the Secure Act also has significant other changes which are beyond the scope of this Handbook. Beware, it is now important to know (1) when the owner of the IRA died, (i.e., whether before or after 2020), to analyze how long the beneficiary has to withdraw the funds from the IRA; (2) when the owner of the owner of the IRA reaches the age of 70 ½; and (3) who is the intended beneficiary of your IRA. (Tax penalties apply if you make a mistake.)

Who should be your IRA beneficiary?

You must complete a beneficiary designation form in order to make sure that your IRAs are distributed according to your wishes. You may have named a beneficiary when you opened your IRA account, but you should review the beneficiary designation periodically. If you do not name a beneficiary, the default provisions in your IRA Agreement will determine who will receive your IRA on your death. In some cases, these assets could go to someone you don't like, such as an estranged spouse.

IRA beneficiaries are described generally as being (i) a spouse, (ii) a non-spouse human being, and (iii) a non-human being (e.g., an estate or charity). Your IRA beneficiary can be a person, a trust, or a charity. Each designation has particular pros and cons that you need to weigh carefully in order to make sure your wishes are followed. You should also consider the tax effects of your beneficiary designation.

Your spouse as beneficiary

Pro: Your surviving spouse can make a tax-free rollover of your IRA into an IRA in his/her own name. If a spousal IRA rollover is made, (A) distributions from the account will be taxed at your spouse's income tax rate when taken; (B) required minimum distributions will not have to commence until your spouse reaches age 70½; and (C) required minimum distributions will be calculated based on your spouse's life expectancy, plus 10 years, recalculated each year.

If your surviving spouse is too young for an immediate rollover of your IRA (the penalty for early withdrawal will apply if your spouse rolls over your IRA to an IRA in her name and takes any distributions prior to reaching age 59½). Your spouse can remain in the position of being your IRA beneficiary and take discretionary amounts without penalty before age 59½. Your spouse can start taking required minimum distributions from your IRA in the year when you would have reached age 70½, based on your spouse's life expectancy, recalculated each year. Your spouse can do a spousal IRA rollover of your IRA at any time after your death, such as after your spouse reaches age 59½, when the penalty for early withdrawal no longer applies.

Con: Leaving your IRA to your spouse may mean that you and your spouse are not taking advantage of any federal estate tax exemption amount (see Estate and Gift Tax section, above). The portability election may avoid wasting the first spouse's estate tax exemption amount in such a case, while preserving the favorable income tax treatment for the surviving spouse. If you have substantial assets, you should speak with an estate tax professional who can offer suggestions on how to reduce the total tax liability for your family. Another potentially negative consideration when leaving your IRA to your spouse is that your spouse then gets to control where your IRA ends up when your spouse dies. This may be important if you have a blended family.

Beneficiaries other than your spouse

Pro: If you leave your IRA to your children and/or grandchildren in a way that allows separate account treatment, under current law, after your death, distributions from your IRA (which will be divided into separate inherited IRAs, one for each beneficiary) can be stretched over each beneficiary's lifetime, providing your heirs with a lifelong stream of income. In addition, the inherited IRA can continue to grow tax-deferred for many additional years, assuming the transfer of assets is handled properly. All distributions from inherited IRAs are exempt from the 10% premature distribution penalty and, in any given year, the non-spouse beneficiary is allowed to accelerate distributions without penalty.

Con: Non-spouse beneficiaries are not allowed to rollover an inherited IRA into their own IRA. Inherited IRAs are a separate type of IRA from a personally owned IRA. However, as a result of the Pension Protection Act, non-spouse beneficiaries of qualified retirement plans who have unfavorable distribution provisions may roll over a qualified retirement plan to an inherited IRA. Non-spouse beneficiaries must start taking minimum required distributions from their inherited IRA by December 31 of the year following the year of your death.

If an IRA is not passed along correctly, income taxes may be due immediately or over a very short period of time. While non-spouse beneficiaries have the opportunity to defer income taxes on their inherited IRAs for many years, any estate taxes due by your estate on the value of your IRA must be paid in cash no later than nine months following your death. Thus, sometimes amounts have to be withdrawn from IRAs to pay estate taxes, causing immediate income taxes on the withdrawn amount.

Minor children (persons under age 18) should not be named as direct beneficiaries of IRAs because minors cannot legally own anything. If you wish for your IRA to pass to a minor child, you should name a trusted person as custodian for that minor child under the Uniform Transfers to Minors Act as your IRA beneficiary. Or, even better in many cases, you should create a trust for that minor child in your will or Trust and name the Trustee of that child's trust as the beneficiary of your IRA. When a minor is named directly as the beneficiary of an IRA, the local probate court will appoint someone to handle the IRA for the child as his/her legal guardian. Guardianships can be cumbersome and expensive.

A trust or estate as an IRA beneficiary

Pro: Naming a properly drafted trust as the beneficiary of an IRA allows the IRA assets to be professionally managed according to your wishes. A trust can also ensure that inherited IRA funds are not consumed prematurely by the beneficiary. A trust may protect the inherited IRA and distributions from the IRA from creditors of the beneficiary (including the beneficiary's spouse in a divorce).

Con: The rules for creating a qualified see-through trust that can receive IRA benefits without accelerating the income taxes are very complex and only certain knowledgeable attorneys are capable of creating such trusts.

Naming your estate as the beneficiary of your IRA is not a good idea because an estate doesn't qualify for post-death distributions to the estate beneficiaries based on the beneficiaries' respective life expectancies. In other words, naming your estate as the beneficiary of your IRA will accelerate the income taxes on your IRA and can also result in loss of creditor protection.

Charities as beneficiaries of IRAs

Pro: Leaving IRA assets to a charitable beneficiary is more tax-efficient than leaving IRA assets to a human being since IRAs are not subject to estate taxes or income taxes when received by a qualified charity. Thus, for persons with charitable intent, all or a portion of an IRA is one of the best assets to leave to charity at death.

Con: Assets left to a charity will be totally removed from your family. Further, if only a portion of your IRA will be passing to charity on your death, your beneficiary designation must be carefully structured to ensure that the individual beneficiaries who are also receiving a portion of your IRA still have favorable income tax options for their shares.

Selecting the right beneficiary for your IRA can be complicated. Remember to look at your IRA assets in the context of your entire estate before making any decisions. You should discuss the subjects of beneficiaries, wills, trusts, and other estate planning matters with your estate planning attorney to be sure your decisions are appropriate for your situation.

Trusts

What is a trust?

A trust is created when a property owner (Trustor/Grantor/Settlor) transfers legal title to an asset of any type (which will become the corpus, or body, of the trust) to a person (Trustee) who has the duty to hold and manage the assets for the benefit of one or more individuals (Beneficiaries). The terms and provisions of the trust are contained in a document called a Trust Agreement, or in the property owner's will. The trust relationship imposes fiduciary duties on the Trustee to manage the trust assets for the benefit of the Beneficiaries. (The Trustee must be loyal and fair to the Beneficiaries in handling the trust and its assets and cannot act in his or her own self-interest to the detriment of the Beneficiaries.)

Who can create a trust?

Any person who has legal capacity can create a trust.

Who can be a Trustee?

Any person who has legal capacity or any corporation which has powers to act as a Trustee in Texas can serve as the Trustee of a Texas trust. A trust can have more than one Trustee. Sometimes the Trustor also acts as Trustee. As to who should be Trustee, generally, a trustworthy, prudent person with good judgment should be named if a professional trustee is not appropriate or desirable.

What are the various kinds of trusts?

Trusts can be divided into two major categories based on when and how they are created: (1) testamentary trusts and (2) inter vivos trusts. A testamentary trust is created in a will and comes into being upon the death of the Testator (or at some future time after that). An inter vivos trust is created during the life of the Trustor and the terms of trust are contained in a Trust Agreement (or Trust Declaration). Both testamentary trusts and inter vivos trusts provide for the management of the assets transferred to the trust.

Trusts can also be divided into two major categories based on whether they can be changed or revoked. An irrevocable trust cannot be revoked, amended, or otherwise modified without a court proceeding involving all necessary parties. On the other hand, a revocable trust can be revoked, in whole or in part, and/or amended and modified during its term, by the person who created the trust if he or she retained such power in the trust instrument. All testamentary trusts are irrevocable but inter vivos trusts can be revocable or irrevocable.

Why would I want to create a testamentary trust?

Testamentary trusts are often created to provide for professional management of assets, creditor protection (including divorce protection) for the beneficiary, ultimate control over the disposition of the assets (where more than one person is a beneficiary of the trust), and tax benefits. Providing for assets to pass in trust, rather than outright, may be appropriate for minors, adults suffering from a disability, persons who are spendthrifts, persons at high risk of lawsuits, and/or those perceived by the trust creator to lack management skills and good judgment. Substantial estate tax benefits can be achieved by the use of a bypass or credit shelter trust in the case of a married couple. Trusts are often used when there is a second marriage or blended family, so that the surviving spouse can be supported, and the assets remaining in the trust on the surviving spouse's death can be distributed to the children of the person who created the trust.

Why would I want to create a Living Trust?

Revocable inter vivos trusts, sometimes called Living Trusts, provide for asset management during the lifetime of the Trustor and can provide for the disposition of the assets held in trust after the death of the Trustor. One of the principal advantages of a revocable inter vivos trust is that it may avoid the necessity of a guardianship if the Trustor becomes incapacitated. Such a trust may act as a will substitute for the assets held in trust at the death of the Trustor. The property held in trust passes to the designated beneficiaries at the Trustor's death by the terms of the Trust Agreement and is not part of the probate estate. Revocable inter vivos trusts are also useful if the Trustor owns real property in other states. Once the non-Texas real estate is transferred to the trust, there is no need for a probate proceeding in the state where the real property is located on the death of the Trustor.

Do Living Trusts avoid probate, and is it a good idea to avoid probate?

Living trusts avoid probate on all assets that are transferred to the trust before the death of the Trustor. If an asset is not transferred to the trust before the Trustor's death, however, then the Trustor's will has to be probated for any assets not held in the trust. In Texas, we have a simple probate process that provides for independent administration of decedents' estates. If an independent executor is properly named in a will, the only court involvement in the estate, absent litigation, is to admit the will to probate (i.e., declare it to be valid), officially appoint the independent executor, and approve the Inventory filed by the Executor. Therefore, probate avoidance is not a compelling reason to create a revocable inter vivos trust in Texas.

Do revocable inter vivos trusts save taxes?

The mere creation of a revocable inter vivos trust (living trust) does not have any income or estate tax advantages. It is, however, possible to structure the provisions of the trust that take effect upon the death of the Trustor to take advantage of certain estate planning techniques (e.g., a bypass trust), just as the Trustor could otherwise do in a will.

MEDICARE AND MEDICAID

What is Medicare?

Medicare is a federal health insurance program administered by the Centers for Medicare and Medicaid Services and the Social Security Administration. Medicare is the primary source for health insurance for the elderly population. Individuals who qualify for Social Security or Railroad Retirement benefits become eligible for Medicare at the age of 65, regardless of whether they choose to begin receiving monthly payments from Social Security or Railroad Retirement program. Also, individuals receiving Social Security disability benefits are eligible to receive Medicare twenty-four months after such benefits begin.

Medicare consists of four parts. Part A covers inpatient hospital services, post-hospital extended care services (skilled rehabilitation services), home healthcare, and hospice services. Part B covers physician services and medical equipment. Part C is an optional HMO plan that replaces Parts A and B. Part D became effective on January 1, 2006 and provides prescription drug coverage. Actual benefits covered by Medicare are subject to change each year. Any questions regarding Medicare may be addressed to your local Social Security office. The U.S. Department of Health and Human Services publishes a useful annual Medicare Handbook, available online at www.medicare.org.

What premiums are associated with Medicare Part A and B benefits?

The current Part A premium is $437 per month; however, most individuals are not required to pay this monthly premium. Most individuals receiving Medicare Part B in 2019 pay a premium of $135.50 per month, however, individuals with a higher income may have a higher monthly premium. The Part B premium increases each year and the premium is generally deducted from the individual’s Social Security check each month.

Is there any assistance available for Medicare premiums and co-payments?

Medicare cost-savings programs are offered through the Texas Medicaid program. These programs assist with Part A and B premiums, Medicare deductibles, and co-insurance on Medicare services. Eligibility for these programs depends on an individual’s resources and income.

Do I need to be concerned with the deadlines for registering for Medicare?

Yes, individuals should enroll in Medicare within 3 months of turning 65 or 4 months after turning 65. If they miss that period of enrollment, individuals may enroll from January to March of every year. Beware, if an individual does not enroll in Medicare in the months surrounding the 65th birthday, there is a 10 percent penalty for every 12 month delay—which lasts forever.

How are my Medicare payments made?

Once an individual begins receiving social security benefits, the premium for Medicare is automatically deducted from the social security payment and the net amount is deposited to the recipient’s bank account. However, most individuals will have a “gap” because Medicare begins at 65 whereas the “full retirement age” is either 66 or 67 (and may be pushed back further in the future). During that gap, you will receive a monthly bill and you may make arrangements for the premium to be automatically taken from your bank account or paid on your credit card. However, beware, the process of setting up the auto payment or credit cards takes 2-3 months, so you must pay the bills monthly as they arrive.

What does Medicare pay for inpatient hospital services?

Medicare provides 90 days of inpatient hospital services per spell of illness, as well as a 60-day reserve. Beware, however, that certain periods of "observation" in the hospital (even though they feel like a hospital stay, because you are in a hospital room with lots of attention from the nurses) are covered as Part B claims like visits to your doctor's office. Medicare will cover all costs for the first 60 days, subject to a deductible. In 2019, the hospital stay annual deductible is $1,364. In addition to this deductible, an individual must pay a co-payment of $341 for days 61-90, and a co-payment of $682 for days 91 through 150. This co-payment is usually, but not always, covered by a Medicare Supplement Policy.

After the 150th day, an individual is responsible for all costs.

What does Medicare pay for nursing home care after hospitalization?

Medicare pays up to 100 days of therapy and skilled nursing care in a nursing home, if the stay follows a three-day hospitalization. Medicare does not cover custodial care in a nursing home, meaning that an individual must be receiving rehabilitation services in order to be entitled to the 100 days nursing home stay. Medicare pays the full cost of care for the first 20 days. In 2019, for the 21st through 100th day, there is a co-payment of $170.50 per day. However, this co-payment is usually, but not always, covered by a Medicare Supplement Policy.

What home healthcare services does Medicare cover?

Medicare covers home healthcare services, skilled nursing care, and therapy for homebound individuals, when such services are prescribed by a doctor. Medicare covers skilled nursing care and home health aide services provided up to seven days per week for no more than eight hours per day and 28 hours per week. If you need additional care, Medicare provides up to 35 hours per week on a case-by-case basis. Your doctor must re-certify your care every sixty days.

What hospice care does Medicare cover?

Medicare provides palliative and supportive assistance to individuals who elect hospice coverage and who have been deemed terminal (a life expectancy of 6 months or less) and who elect to waive Medicare treatment coverage. Each Medicare beneficiary is entitled to receive two 90-day periods of hospice care, with an unlimited amount of additional 60-day periods.

What is a Medigap Policy?

A Medigap Policy, also called a Medicare Supplement Policy, is a private health insurance plan used to supplement traditional Medicare benefits. Medigap policies assist with the payment of deductibles and co-payments not covered by traditional Medicare. There are numerous plans available, and the premiums vary depending on the plan selected. It is important to ensure that the plan covers the co-payment for skilled nursing facilities.

What is Medicare Part D?

Medicare Part D became effective January 1, 2006 to assist with the payment of prescription drugs. In 2019, the standard Part D coverage includes:

- An annual deductible of $415,
- An initial coverage limit of $3,820, and
- An out-of-pocket threshold of $5,100.

Many individuals with several prescription drugs reach a coverage gap after meeting the initial coverage limit, but they have not reached the out-of-pocket threshold. This is commonly referred to as the "donut-hole." In 2019, these individuals will be entitled to a 75% discount on brand-name prescription drugs while they remain in the coverage gap.

Failure to enroll in a Part D plan upon first becoming eligible or having a lapse of coverage for at least 63 days could result in a penalty added onto an individual’s Part D premium. The amount of the penalty is 1% of the premium for all months during which coverage could have been maintained.

What is Medicaid?

Medicaid provides health insurance and long-term care benefits to eligible applicants. The Texas Health and Human Services Commission is the government agency responsible for administering the Medicaid program in Texas. Medicaid provides long-term care services both in an institutional setting (i.e. nursing home) as well as in an individual’s home as an alternative to nursing home placement. Since Medicare does not provide for long-term custodial care, Medicaid often becomes the only option for paying long-term care if an individual does not have the funds available to private pay or does not have a long-term care insurance policy.

How do you qualify for Medicaid?

Medicaid is a means-tested program, meaning that an individual must meet certain categorical and financial requirements to be eligible. To qualify for Medicaid, an individual must either be a citizen or qualified permanent resident. The individual must also be a resident of Texas. The individual must be over the age of 65, blind, or disabled. Moreover, the individual must have a medical necessity for nursing home care, meaning that the individual needs licensed nursing care.

To be eligible for Medicaid, an individual must have no more than $2,313 per month in income in 2019. A couple, both of whom are applying for Medicaid, can have no more than $4,626 in 2019. If only one spouse is applying for Medicaid, the spouse applying for benefits can have no more than $2,313. These numbers are adjusted each year. If an individual or married couple are over the income cap, a Qualified Income Trust, also known as a Miller Trust, can be established to qualify for Medicaid.

An individual can have no more than $2,000 in countable resources. A married couple, both of whom are applying for Medicaid, can have no more than $3,160.50 in countable resources. If only one spouse is applying for Medicaid and the other spouse is living at home, a protected resource amount is a minimum of $25,284 and a maximum of $126,420 in 2019.

The spousal protected resource amount is the amount that the couple may keep and still become Medicaid eligible. The spousal protected resource amount may be increased, even above the maximum, in special circumstances. Certain assets, such as the home, a vehicle, burial plots, and pre-need funeral contracts, may be excluded from countable resources and will not count toward the $2,000 resource limit. Although many nursing homes provide assistance with Medicaid applications, an elder law attorney may have suggestions for protecting your assets.

Is it legal to make gifts to spend down resources for Medicaid nursing home care?

The Medicaid program assesses a penalty for all transfers that have occurred within sixty months (five years) of applying for Medicaid benefits. Transfers include charitable donations, tithing, gifts to children, and sales of property for less than fair market value. All transfers for less than fair market value that have occurred within five years must be reported to the Medicaid caseworker. During the penalty period, an individual will not be able to receive Medicaid long term care services until the period has expired.

The penalty period is calculated by adding all the transfers that have occurred within the last five years and dividing that number by the average daily nursing home rate, which is established by the State. As of September 1, 2019, the average daily rate in Texas is $213.71.

Is a nursing home stay required to receive Medicaid benefits?

Some Medicaid programs offer home-based care as a more cost-effective alternative to nursing home placement. Such programs offer caregiving and other services within the patient's home. However, eligibility for such programs is subject to a lengthy wait (or interest) list for the program. These programs are known as STAR+PLUS Waiver Program.

Does Medicaid take your home when you go on Medicaid?

Pursuant to a federal mandate, Texas created the Medicaid Estate Recovery Program (MERP) to recover funds from an individual who received

Medicaid services. Estate recovery applies to individuals who apply for and receive Medicaid services after March 1, 2005. Under MERP, when a Medicaid recipient dies, the state becomes a creditor of the recipient's estate. MERP will not attempt to recover from a surviving spouse, disabled child, minor child under the age of 21, or an unmarried child who has lived in the home of the Medicaid recipient for the year prior to the Medicaid recipient's death.

Is there any way to protect my home from the MERP?

MERP only recovers through the probate courts. A Life Estate Deed (or Ladybird Deed) and a Transfer on Death Deed convey property outside of probate, allowing for you to avoid incurring court costs. Also, these deeds exclude real property from Medicaid estate recovery. Life Estate Deeds and Transfer on Death Deeds allow you to retain ownership of your home until you die. The form for the Transfer on Death Deed is located at TexasLawHelp.org/form/transfer-death-deed. You must also record the deed in the county where your property is located.

HOUSING

Residential Services and Placement

What types of residential services and placement alternatives exist for seniors?

A wide variety of residential services and placement alternatives exist for seniors within the Houston area. They include senior centers, adult day care, in-home services, retirement centers, Alzheimer's centers, assisted living, personal care homes, independent living, and nursing homes.

What are senior centers?

Senior centers, also known as recreation centers and congregate meal sites, offer daily programs (Monday through Friday) for senior citizens, which generally include a hot noon meal and a variety of social and health maintenance services such as information and referral, recreational activities, and exercise programs.

There are over 80 senior centers in Harris County, most of which are at least partially government funded. Members of the Houston Bar Association's Elder Law Committee are available to visit senior centers and speak on topics of interest as requested. Call 713.759.1133 to schedule a presentation.

What is adult day care?

Adult day care facilities offer a safe environment for adults who need supervision during daytime hours, Monday through Friday, but who do not need institutionalization. Private pay services typically include a noon meal, recreational activities, exercise programs, social activities, and health maintenance programs. They are ideal for seniors who reside with family members who work during the day.

What are in-home services?

In-home services are designed to allow the senior to remain in his or her own home while receiving necessary services. Examples of such services are: primary family and home care which may include assistance with bathing, dressing, eating, cleaning the house, and doing laundry; home delivered meals; nursing services, including medication administration, injections, tube feedings, catheter care, and skin care; physical therapy; occupational therapy; speech therapy; medical social work; emergency response services; and telephone visitors. Several in-home service agencies exist in the Houston area including some with programs for low-income seniors.

What are retirement centers?

Retirement centers generally offer independent living for retirees. Most are apartment complexes or towers which rent exclusively to seniors. The range of services offered by retirement centers varies tremendously, but may include complete meals; laundry; housekeeping; social, recreational, and cultural activities; day trips; transportation; exercise facilities; libraries;

beauty/barber shops; and religious programs. Some retirement centers offer subsidized rent for qualified individuals.

What is independent living?

Independent living (also known as Senior Apartments, Retirement Communities, or Congregate Living) is ideal for individuals who do not require personal or medical care. These private pay facilities are a place for seniors to be with others who share similar interests and generally include apartment-style residences with the benefit of a general dining room, where full meals are offered along with beauty shops, libraries, transportation services, and organized recreational activities. Many recreational activities are planned by the community including field trips, shopping excursions, and on-premises projects. Most facilities offer optional meal plans for residents and the majority of apartments are equipped with a small kitchen so the resident may prepare his or her own meals.

What is assisted living?

Assisted living is a special program offered by some retirement centers to seniors who may not need 24-hour supervision but may need some assistance with activities of daily living. Meals are provided along with such services as administration of medication, assistance with bathing, group activities, and routine outings.

What are personal care homes?

Personal care homes are generally private residences where a limited number of seniors or disabled individuals reside. These facilities have 24-hour care providers who prepare meals, dispense medication, and assist the residents with bathing, dressing, personal grooming, and eating. Funding for low income residents of such facilities is available through various programs of the Texas Health and Human Services and the Harris Center for Mental Health and IDD in Harris County. You should request to see the home’s state license and local health and fire inspections. Personal care homes are an alternative to nursing home placement with a less institutionalized feeling.

What are nursing homes?

Nursing homes are the most familiar type of residential placement facility for seniors who require skilled nursing care and continuous supervision, but their residents have much less independence than other types of facilities. They offer the most sophisticated level of nursing care, short of hospitalization. Nursing homes are licensed and monitored by the Texas Department of Health. Funding is available for eligible nursing home residents through Medicare and Medicaid.

How should I choose which type of facility is best for me or my loved one?

The most important consideration should be allowing the senior the greatest independence, commensurate with his or her mental and physical abilities, in addition to the usual factors to be considered such as cost, location, atmosphere, and violations of licensing requirements.

What are my Nursing Home Rights?

A resident of a nursing home has additional rights granted to them. Prior to residing in a nursing home, the admission agreement should be reviewed closely. The resident should be given a copy of Resident's Rights. These rights include, but are not limited to, the right to appropriate care, treatment, and services without any physical abuse; and the home is required to have an individual plan of care for each resident to describe how the home will meet the resident's needs. This plan should cover nursing, rehabilitation, social services, dietary, and recreational services. A resident should have the right to choose his/her own doctor, participate in the planning of care, the right to refuse treatment, and to be informed about their condition. The meals should be varied and may include bedtime snacks. If assistance is needed to eat, the staff should help. The home should offer activities. The resident has the right to visitors, the right to vote, the right to privacy when examined, and the right to receive their mail unopened. A nursing home must give 30 days' notice before removing a resident for non-payment.

Subsidized Housing

What is subsidized housing?

If you are healthy but on limited funds, you may consider applying for subsidized housing, public housing, or a subsidy from your landlord. There are many types of subsidized housing, including apartments operated by the Houston Housing Authority, which are not dependent on Congressional appropriations for the number of "slots" that will be available for residents.

What types of housing subsidies exist?

There are a number of publicly and privately subsidized apartments and homes. Some of these types of subsidized housing, including the Low-Rent Public Housing Program and the Housing Choice Voucher Program, depend on Congressional appropriations. The U.S. Department of Housing and Urban Development maintains a comprehensive list of subsidized housing. Organizations such as the United Way Information and Referral Service maintain lists of subsidized housing provided by private and religious charities. Subsidized housing is also available in the Medical Center area for those who need temporary housing because they are receiving medical treatment. For information, contact your physician or social worker.

How do I apply for subsidized housing?

It is necessary to have your name placed on a waiting list for most subsidized housing, since the demand is so great. To apply for subsidized housing, call the Houston Housing Authority to find out if a housing program's waiting list is open and ask for an application. Persons with complaints about subsidized housing have the right to a hearing, except in housing developments operated by some private charities.

Homesteads

What is a residential homestead?

A residential homestead is the real property and improvements which, when occupied and maintained as a home by a family or single adult, are protected from foreclosure for the payment of debts except for debts secured by liens for (1) purchase money, (2) taxes on the property or an IRS tax lien, (3) work and material used in constructing improvements on the property if contracted for in writing before the work is done or the material is furnished, (4) home equity loans, or (5) reverse mortgages and partition liens.

What is an urban homestead?

An urban homestead may consist of a lot or contiguous lots, not exceeding 10 acres, in a city, town, or village.

What is a rural homestead?

A rural homestead may consist of not more than 200 acres of land for a family and not more than 100 acres of land for a single adult that is not located in a city, town, or village.

What is a business homestead?

Urban homesteads may be business homesteads if used both as a residential homestead and as a place of business to provide for a family or single adult. A business homestead may consist of a lot or contiguous lots not exceeding 10 acres. An urban residential homestead and a business homestead must be located within the same contiguous land.

How can I obtain an over 65 or homestead exemption for real property taxes on my residential homestead?

Individuals age 65 or older or disabled residence homestead owners qualify for a $10,000 homestead exemption for school district taxes, in addition to the $25,000 exemption for all homeowners. If the owner qualifies for both the $10,000 exemption for age 65 or older homeowners and the $10,000 exemption for disabled homeowners, the owner must choose one or the other for school district taxes. The owner cannot receive both exemptions. Any taxing unit may offer an additional homestead exemption amount of at least $3,000 for taxpayers age 65 or older or disabled. There may be other exemptions and tax ceilings from the taxing authorities available for persons over the age of 65. Additionally, disabled veterans may qualify for the 100 percent disabled veteran homestead exemption. You can obtain an application for an over 65 exemption and homestead exemptions from your local tax appraisal district.

Can ad valorem taxes be paid in installments?

Yes. Those that qualify for the over 65 homestead exemption may qualify to pay their ad valorem taxes in installments. Additionally, surviving spouses of disabled veterans may also qualify to pay their ad valorem taxes in installments.

Can I defer payment of real property taxes on my residential homestead?

A Texas resident over the age of 65 can defer the payment of real property taxes on a residential homestead until the property loses its homestead character. During the deferral period, taxes are still due, interest on the taxes accrue, and a tax lien may be imposed on the property, but the tax lien cannot be enforced, and a penalty may not be imposed. Senior citizens may transfer current property tax freezes to other homesteads if they move within the taxing unit. You can obtain an application for an over 65 tax deferrals from your local tax appraisal district.

How can property lose its homestead character?

Property loses its homestead character when the homestead claimant dies without any of his or her family members continuing to occupy the property, or when the homestead is abandoned. Abandonment of a homestead occurs when the homestead claimant has a present, definite, and permanent intent to cease use of the property as a homestead, for example, when it is sold or when the homestead claimant designates another homestead.

How can I avoid the payment of capital gains taxes upon the sale of my residence?

If you owned and lived in the place for two of the five years before the sale, then up to $250,000 of profit is tax-free if you are single. If you are married and file a joint return, the tax-free amount doubles to $500,000. The law lets you exclude this otherwise taxable profit from your taxable income.

How does home equity law work and what do I need to know?

Home equity law allows the homeowner to borrow money pledging their home as collateral. Homeowners can borrow for any reason and use their homes to secure the debt. The law has various requirements to protect the homeowner such as: the total of all loan balances against your home may not be more than 80% of the fair market value on your home; the lien may be foreclosed upon only with a court order; fees to make the loan may not exceed three percent of the loan amount; the loan may close only at the office of the lender, a title company or an attorney; and the loan may not close until twelve days after you submit a written application for credit. If you do not repay the loan, the lender may foreclose and sell your home. Caution should be used in getting these loans. Seniors should carefully consider the consequences of borrowing against their homes. Do not be pressured by other members of your family or friends in pledging your home for risky business ventures or other endeavors.

How do reverse mortgages work?

With a reverse mortgage, a homeowner receives a lump sum or regular payments based on the equity of his or her home. Usually these are used to provide income for retirement. Reverse mortgages should be looked at closely. The points, fees, and interest rates can be excessive. Loan programs vary widely, so shopping around is critical. A home equity loan is usually a better method for providing additional retirement income. Alternatively, it may be better to sell the home and move to a less expensive home.

INCAPACITY

Planning for Incapacity

What does the term "incapacitated" mean?

A person is incapacitated if, because of a physical or mental condition, the person is substantially unable to provide food, clothing, or shelter for himself or herself, to care for his or her physical health, or to manage his or her financial affairs. Merely advanced age or hospitalization does not automatically mean that a person is incapacitated.

How can I provide in advance for the management of my financial affairs if I become incapacitated?

As you grow older and the possibility of becoming incapacitated increases, it is wise to consider choosing a trusted friend or family member who will have the legal authority to manage your financial affairs without incurring the expense of a guardianship. This is done by executing a Statutory Durable Power of Attorney. A Statutory Durable Power of Attorney is a legal document in which one person (called a principal) appoints another person (called the attorney-in-fact) to manage the principal's financial affairs.

As an alternative to a Statutory Durable Power of Attorney, you could sign a Supported Decision Making Agreement. This gives the agent the ability to be involved in the conversations, request documents from schools, banks, and doctors, and work with you on these decisions, but it does not give them the ability to make decisions on your behalf. A Supported Decision Making Agreement does not replace the need for a Statutory

Durable Power of Attorney once you are incapacitated, but it may be a useful tool before you are incapacitated.

Who will make medical decisions for me if I become incapacitated?

By executing a Medical Power of Attorney, you can appoint one or more persons whose judgment you trust to make your medical and healthcare decisions if you are unable to do so yourself. You can give your agent complete authority to make medical decisions or you can limit his or her authority. Without a Medical Power of Attorney, an adult surrogate can consent to medical treatment on your behalf if you become incapacitated or comatose. The adult surrogate, in the following order of priority, is: your spouse, your adult child, your parents, an individual identified to act on your behalf before incapacity, your nearest living relative, or clergy.

Can any person receive my protected medical records and information?

You may authorize any person to receive your medical information by executing a HIPAA Authorization form. This form authorizes your healthcare provider to disclose your medical information to anyone you designate.

What is a Living will?

A living will is a common name for a document entitled “Directive to Physicians and Family or Surrogates.” A Directive allows you to direct that life-sustaining procedures such as use of a respirator be withheld or withdrawn if, in the judgment of your physician, you are suffering with a terminal condition from which you are expected to die within six months, or you are suffering from an irreversible condition such that you cannot care for or make decisions for yourself and you are expected to die without life-sustaining treatment.

Why do hospitals always ask whether patients have a Medical Power of Attorney or a Directive to Physicians and Family or Surrogates?

Federal law requires hospitals and nursing homes to ask whether incoming patients have advance directives. If the patient doesn't have them, the hospital or nursing home is required to advise about the availability of such documents under local law. The inquiry is meant for the benefit of the patient, and while advance directives are a good idea, they are not required to receive treatment.

What is the difference between a Medical Power of Attorney and a Directive to Physicians and Family or Surrogates?

A Directive to Physicians and Family or Surrogates has very limited application. It only applies to the decision to withhold or withdraw life support when death is imminent. A Medical Power of Attorney covers all medical treatment decisions.

Can I designate in advance who I wish to serve as my guardian if a guardianship of my person or my estate should become necessary?

Yes. As long as you are not incapacitated, you can execute a Declaration of Guardian in the event of later incapacity or need of a guardian. You can designate a guardian of your person and of your estate in this form. Additionally, you can disqualify a particular person or persons from serving as your guardian. The Courts are not required[SB1] to appoint the guardians you prefer, but the Court may not appoint any person who you have declared that you do not want.

The designation can be revoked or changed any time before you become incapacitated.

When should I plan for incapacity?

The sooner the better. If you become incapacitated without advance planning, it may become necessary for surrogates to make medical decisions for you, as discussed above, or for a guardianship of your person and/or estate to be established as discussed in the next section.

Guardianship

How is a guardianship initiated?

Any interested person may file an application with the proper court requesting that a guardian be appointed for a person believed to be incapacitated. There are many alternatives to guardianships and supports and services available, which should be explored before filing an application for guardianship.

For purposes of guardianship, what is an incapacitated person?

When a person is unable to provide food, clothing, or shelter for himself or herself, to care for his/her physical needs, or to manage his or her own financial affairs due to a mental or physical condition, the court may find that he or she is incapacitated and needs a guardianship. A minor, anyone under 18 years of age, is legally incapacitated.

Are there varying levels of incapacity?

Yes. The doctor treating the person who is incapacitated must specifically set out in his or her letter to the court the mental or physical basis for the incapacity and the extent of incapacity. He or she does so by answering questions concerning that person's ability to drive, vote, enter into a contract, manage money, and other acts.

Are there alternatives to a guardianship?

Yes. You may consider signing a Supported Decision Making Agreement allowing another individual to assist you with gathering information, talking to banks, doctors, and others, and being available in making the decisions. However an individual named in a Supported Decision Making Agreement cannot make a decision on your behalf. A way to grant additional authority is to use a Durable Power of Attorney for financial needs and a Medical Power of Attorney for health care needs. These documents are discussed in the section on Incapacity.

If a guardian is appointed, can a person retain certain rights and powers?

Yes. A judge may appoint a guardian for an incapacitated person but limit the guardian's powers so that all rights and powers except those granted to the guardian are retained by the incapacitated person.

What types of guardians are there?

Generally, there is a guardian of the person and a guardian of the estate. The guardian of the person has the duty and power to provide the incapacitated person with clothing, food, medical care, and shelter. The guardian of the estate has the duty and power to manage the incapacitated person's financial affairs. One person can fill both positions. And, you may have a guardian of the person only or a guardian of the estate only; you do not have to have both.

Who may serve as guardian?

The court will appoint a guardian for an incapacitated adult person in the following order of priority:

1. The incapacitated person's spouse;
2. The person's nearest of kin;
3. An eligible person who is best qualified to serve.

Who cannot serve as guardian?

A person may not be appointed guardian if the person is a minor, a notoriously bad person, an incapacitated person, a person who is a party to a lawsuit affecting the incapacitated person (with some exceptions), a person who owes the incapacitated person money unless it is repaid, a person with adverse claims to the incapacitated person or his property, an inexperienced or uneducated person, a person the court finds unsuitable, a person eliminated in a person's designation of guardian, or a non-resident without a resident agent. A potential guardian must provide criminal history records from the Department of Public Safety or the Federal Bureau of Investigation to the County Clerk.

Also, a person may not serve as your guardian if you have completed the proper paperwork naming a person or persons who you do not want to be your guardian. This is typically done in a document called the Declaration of Guardian in the Event of Need.

Is an alleged incapacitated person represented by an attorney?

Yes. When a guardianship is filed, the court appoints the attorney ad litem to represent the interests of the alleged incapacitated person. The person may also retain his or her own attorney with certain exceptions.

What are the costs involved in a guardianship?

The costs of handling a guardianship include attorney's fees, filing fees, attorney ad litem fees, and bond premiums to be paid out of the incapacitated person's estate. If the incapacitated person's estate is insufficient to pay for the cost of the proceeding, such costs may be paid by the county treasury.

What rights does the incapacitated person have?

The incapacitated person has the right to receive a copy of the application for guardianship, a Bill of Rights, and other documents filed with the County Clerk. He or she is also entitled to be at the hearing to determine whether he or she is incapacitated, demand a jury trial, and request that the hearing be closed to the public. An incapacitated person retains all legal and civil rights and powers, except those designated by the court's order appointing a guardian.

How soon can a guardianship hearing be held?

The soonest date to schedule a hearing is the Monday following the expiration of 10 days after the alleged incapacitated person and certain interested individuals have been personally served with the application for guardianship.

What happens at the hearing?

The person who filed the application must prove the incapacity through testimony and medical evidence. The alleged incapacitated person has a right to bring his or her own witnesses to court and also the right to speak to the judge. The alleged incapacitated person may also request a jury trial. The judge or jury will determine if the person is incapacitated.

Upon appointment, how does a guardian qualify?

The guardian must file an oath and post a bond in the amount set by the court to insure proper performance of his or her duties.

Does the guardian have reporting requirements to the court?

Yes. The guardian of the estate must file an inventory within 30 days of qualifying. The inventory must list all assets of the incapacitated person coming into the guardian's hands and all debts owed to the estate. The guardian of the estate must file an investment plan within 180 days of qualification. The guardian of the estate must file an annual account to report all receipts and disbursements. The guardian of the person must file an annual report on the location, condition, and well-being of the incapacitated person.

What if there is an immediate need for the appointment of a guardian?

A temporary guardian can be appointed if an alleged incapacitated person or his or her property is in imminent danger.

Does the person for whom a temporary guardian has been appointed have any rights?

That person retains all rights and powers not granted to the temporary guardian and is entitled to be served with a copy of the temporary guardianship application. The court must appoint an attorney to represent the alleged incapacitated person at the time the application is filed. The court must hold a hearing no later than 10 days after the date of filing the temporary guardianship, unless the hearing is postponed, to determine whether there is a need for a temporary guardianship.

What is the length of a temporary guardianship?

Generally, a temporary guardianship may not exceed 60 days. However, if there is a contest or challenge to a permanent guardianship application, the court may appoint a person to serve as temporary guardian until the contest is resolved. This is usually limited to nine months.

Mental Health Commitments

What is considered mental illness?

The Texas Mental Health Code defines mental illness as an illness, disease, or condition that:

- Substantially impairs the person's thought, perception of reality, emotional process, or judgment; or
- Grossly impairs behavior as demonstrated by recent disturbed behavior.

On what grounds can a person seek a mental health warrant for involuntary commitment?

An adult must believe that the person evidences mental illness; that the person evidences a substantial risk of serious harm to himself or others; a specific description of the risk of harm; that the applicant believes that the risk of harm is imminent unless the person is immediately restrained; and that the applicant's beliefs are derived from specific recent behavior, overt acts, attempts, or threats.

Who may seek a mental health commitment?

Anyone 18 years of age or older with personal knowledge of the person's recent disturbed behavior can sign the affidavit necessary for commitment. The affidavit should be completed and filed at Harris County Psychiatric Center. A peace officer, without a warrant, may take a person into custody if the officer believes that a person has a mental illness and there is a substantial risk of serious harm to the person or to others.

Can an individual plan for what happens to them if there is a mental health commitment?

Yes. An individual can have Powers of Attorney as described in the Incapacity section in place if it should be necessary. Also, an individual with known mental health issues may execute a Declaration for Mental Health Treatment. This allows the person to identify the best treatment methods, drugs, and doctors that they prefer.

What happens after the affidavit is completed?

A judge reviews the application and affidavit. If it appears to indicate mental illness and harm to self and others, the judge signs an order for emergency detention, which is delivered to the constable's office. This order gives the constable the authority to detain the person.

What happens when a person is detained by the constables?

The constables will take the person to the mental health hospital where treatment has been arranged. A doctor must examine the person and complete a Certificate of Medical Examination within 48 hours, or if the 48-hour period ends on a Saturday, Sunday or legal holiday, by 4 pm of the following business day.

What happens after the doctor's examination?

Based on the doctor's recommendation in the Certificate, either the person is released or an Order for Protective Custody (OPC), which is the basis for a hospital to hold a patient until the court hearing, is issued.

What hearings are a person entitled to while under an order for protective custody?

The first hearing is a probable cause hearing which must be held within 72 hours of the date of the Order for Protective Custody. The second hearing is a commitment hearing to be held usually within 7 to 10 days of the date of the Order for Protective Custody.

Does a person who has been detained on an Order for Protective Custody have a right to an attorney?

Yes. An attorney is automatically appointed to represent him or her, although he or she still has the right to hire his or her own attorney. The judge shall appoint an attorney to represent a proposed patient within 24 hours after the time an application for court-ordered mental health services is filed if the proposed patient does not have an attorney.

What is a probable cause hearing?

A probable cause hearing is held before a judge or magistrate. The purpose is to determine whether or not a person should be held at the facility until the final hearing. The evidence presented generally consists of the Certificate of Medical Examination and the affidavit of the person who applied for the commitment and perhaps personal testimony from the patient.

What is a commitment hearing?

A commitment hearing is held before a judge or jury to determine if the person should be committed to a mental health facility for up to 90 days. A second doctor must have examined the patient and completed a second Certificate of Medical Examination prior to the hearing. Both a doctor and either the person who executed the affidavit or someone else who has personal knowledge of the patient’s recent behavior must be present and testify at the hearing.

What happens after the final hearing?

A person is either released from the mental health facility or committed to outpatient treatment or committed for up to 90 days in a mental health facility. Rarely are patients held the entire 90 days before being discharged by the treating physician.

ELDER ABUSE

Some crimes committed against elderly people are easy to recognize, like robbery or physical abuse. But elderly individuals, just like everyone else, often fail to recognize crimes of fraud because of the deceit and trickery used to commit them. Often elderly individuals targeted for fraud become not just victims, but actually are drawn into participating in the crime, exposing themselves to criminal punishment or civil liability. On the other hand, elderly individuals navigating complex government programs or insurance issues may commit crimes not because they intend to do wrong, but from lack of knowledge. While not all of these circumstances can be set out in detail here, the following are a few frequently encountered situations.

Common Scams

Sadly, there are clever criminals who have no remorse about taking advantage of the elderly and naïve. By way of example, there are several scams you may encounter. For more on scams and how to combat them, see the Consumer Law portion of this handbook.

"Free" Medical Devices

The elderly person receives a robocall from someone claiming to be with Medicare and stating that the person is now entitled to a free life alert, scooter, or knee brace. Of course, Medicare never calls people to advise of "free" medical devices. If the elderly person gives the caller his Medicare number, the criminal will process a claim against Medicare and receive payment. The elderly person probably will not receive any medical device, but if he does, it will be of inferior quality. If, years later, the elderly actually requires a knee brace or scooter, the claim may be denied, because he has already received that same device.

“Gramma Scam”

The elderly person receives a call from someone with a desperate voice claiming, “Gramma/Grampa, I have been arrested. I need help.” Of course, the elderly person often responds by saying the grandchild’s name and asking whether it is that child. The crook then has the grandchild’s name and can call back pretending to be a police officer asking the grandmother to wire transfer funds to secure the release of the grandchild.

Fake IRS

The IRS will never call you. Any calls claiming that you owe taxes to the Internal Revenue Service are a fraud.

Medicare/Medicaid Fraud

This crime often starts as a phone or in-person solicitation, by an apparently trustworthy individual, presenting themselves as a doctor, nurse, clinician, or even a representative of Medicare. The senior is offered “free” medical devices, supplies, or services, often scooters, braces, or in-home treatment. If the elderly person does not actually have a medical need for what is offered, or if the offer involves inferior products or services, or if, in fact, no products or services are ever provided, the elderly person has been used in fraud. Because the fraudster will use the elderly individual’s Medicare or Medicaid number to obtain payment, the elderly individual later may face greater difficulty in accessing services when needed. In the worst case, the elderly individual becomes part of the fraud when encouraged to “recruit” his or her friends and family and receives payment in return. The tell-tale signs for this type of fraud are the initial, unrequested solicitation and the providing of the service or products by someone who is not the elderly person’s usual doctor. The best ways to avoid this type of fraud: never give out a Medicare/Medicaid number over the phone to someone you don’t know, and always check with your physician before signing up for any “free” services or products offered by companies or individuals you haven’t dealt with before.

Fake Romance

Criminals target the lonely or elderly through romance scams. The hacker will create an online persona to target victim often by impersonating a sympathetic person like a deployed soldier or a disabled person. Contact is initially made through a social media platform, but the scammer will immediately try to move communications to text, email, etc. before their account is shut down. These are professional con men (and women) who will spend months cultivating a relationship before asking for money. The request for money can come in various forms such as requesting gift cards or credit for online shopping, asking for help with bills,suggesting an "investment opportunity" because someone withdrew at the last minute, or a loan to help the con artist deal with an issue involving jail or being stranded overseas.

Whether by phone, through email, or on social media, people trick others into sending them money. The lonely are targeted by offers of love, and the elderly often are targeted by persons claiming to be one of their loved ones or someone trying to help one of their loved ones in trouble. The hallmarks of this type of scam are the sense of urgency, and the request for an immediate transmission of funds to an account. If the elderly person believes the scam initially, there is often a request for information, including bank account numbers, credit card numbers, or identifying information that can then be used for further fraud. If an elderly individual falls victim to this type of crime, the local District Attorney's office is the best resource for immediate assistance.

Social Security Fraud

It is a crime for a family member (other than a spouse receiving survivor's benefits) to keep receiving Social Security benefits once a loved one has died. Often an elderly individual will have cared for another elderly family member and will need the money. It is still a crime, and any effort to continue to receive the payments, such as signing documents to make it seem the deceased is still alive or signing the deceased's name to obtain funds, can result in federal criminal prosecution. The convicted individual can be sent to prison, but at the least, anyone who participates in such

Social Security fraud will face having their own benefits reduced or entirely eliminated until the fraud amounts are repaid. If you suspect that an elderly individual is receiving Social Security payments illegally, it is important to talk to an attorney who can help explain the situation to the elderly individual and set in motion a plan to terminate the receipt of payments and work out a repayment plan with the Social Security Administration.

Responding to Fraud

If you or someone you know has fallen for a financial scam, call the AARP's Fraud Watch Network Helpline at 1.877.908.3360 any time Monday through Friday, from 7:00 a.m. to 11:00 p.m. The helpline can offer tips on avoiding scams, guidance on how to navigate out of scams, and referrals to emotional and legal support for victims of scams. The helpline is free and is available to AARP members and non-members.

Internet Safety

How to Protect Yourself Online

You are being watched. Every time you get on the internet using your computer, tablet, phone, etc. you will be watched by someone. Website cookies track what you do. Social media platforms collect and sell data about you to advertisers. Criminals use these same methods to find the best way to separate you from your money. In 2018, there was an estimated $9B in online fraud, but there are ways to protect yourself. Routinely clean your device and web browsers. More than three-fourths of successful attacks are on mobile devices. Beware of unfamiliar emails with links to photos or websites. Rather than clicking on a link, open a new page and type in the link address to make sure you go to the right website. The people doing these scams are professional con artists who just want the money without a care of what happens to anyone else. Make fraud harder by protecting yourself.

Watching for "Phishing"

Phishing is the fraudulent attempt to obtain sensitive information such as usernames, passwords, credit card details, or other personal information by disguising an electronic communication as trustworthy. Phishing can look like an innocuous or legitimate email message involving a delivery, account information, fraudulent sales invoice, etc. Phishing can also come as a Tweet or Facebook post. Twitter recently shut down several accounts with popular pictures that contained instructions for bots. Users were inadvertently downloading bots that could control their computer or mobile device.

Compromised Emails

When an email account is compromised, hackers infiltrate and watch your email. They learn your patterns so that they know when to send an illicit email authorizing or requesting a money transfer through an invoice scam. Many times, the hacker is taking an actual invoice the person expects to pay but changes the routing information to an account someone in the U.S. has opened on behalf of the hacker. In Texas and most states, opening a bank account for another, receiving money for another, and similar methods can be a felony. Typically, these transfers are not discovered until after the money is withdrawn and unable to be recovered. Another example of email compromise involves real estate transactions. Hackers will compromise the email of a real estate agent, title company officer, or similar persons. Nothing happens until the last week when it gets crazy and stressful. Criminals take advantage by changing an email to divert the funds. ALWAYS verify a check or wire before submitting it.

Types of Abuse

Abuse can often come from loved ones and caretakers, who exploit the victim's trust. Abuse also tends to occur in cycles over prolonged periods of time. While friends, family and hired help offer great companionship and resources, those who commit abuse are not entitled to the elderly person's time or attention. If you or someone you know may be a victim of abuse, it is important to intervene as soon as possible to stop that abuse.

Physical

Physical abuse is defined as one person inflicting on another enough force to cause unnecessary pain or injury, even if the reason is to "help" the victim. Examples of this behavior include: Slapping and/or shoving, threaten with a weapon, inappropriate restraint, withholding appropriate attention (neglect), not providing adequate nutrition, and inappropriate use of medication.

Signs of physical abuse may include: Caregiver indifference or lack of affection toward the elder, bruises, pressure marks, broken bones, unexplained injuries, physical pain or soreness, injury that has not been card for properly, and lack of medical aids such as glasses, walkers, hearing aids, medications, or basic hygiene.

Emotional

Emotional abuse is any type of coercive or threatening behavior that sets up an imbalance of power. Examples include: Humiliation, name calling, social isolation, silent treatment, trivializing needs, preventing elder from seeing or speaking to others, and controlling behavior.

Signs of emotional abuse may include: The victim being emotionally upset or agitated, extremely withdrawn, non-communicative or responsive, unusual behavior usually attributed to dementia such as sucking, biting, rocking, etc.

Sexual

Sexual abuse is any unwanted sexualized behavior, including acts the elder is unable to understand or to communicate. Examples include: Unwanted touching, improper and non-consensual exhibition (exposing oneself), all types of sexual assault or misconduct (rape, sodomy, coerced nudity, etc.).

Signs of sexual abuse may include: Genital infection or sexually transmitted infections, unexplained vaginal or anal bleeding, sexual behavior that is inappropriate, unusual or aggressive.

Financial

Financial abuse is unauthorized or improper use of the resources of an elder for monetary or personal benefit, profit, or gain. Examples include: Misuse of funds (embezzlement), taking money under false pretenses, denying someone their own funds, forced property transfers, and forgery/fraud.

Signs of financial abuse may include: Signatures on checks that do not match the elder's signature, unusual ATM activity, large or unusual bank withdrawals, missing valuables, adding additional names to bank or credit accounts, unpaid bills, and delinquent utility notices.

Identifying, Preventing and Combating Abuse

What should I do if I suspect someone is abusing or exploiting an elderly friend?

If a person has reasonable cause to believe that an elderly or disabled person has been abused, exploited, or neglected, they have the responsibility to report the facts to the Adult Protective Agency (1.800.252.5400). Your name and the information you report are confidential.

Am I required to report suspected elder abuse?

The law mandates that all suspicion of elder abuse, exploitation, or neglect be reported to the Adult Protective Agency (1.800.252.5400).

What will happen if someone finds out that my grown child is hurting me?

If an individual has been physically abused, the law requires that a report be made to the appropriate law enforcement agency.

What can I do to protect myself from an abusive caregiver or spouse?

You need to file a report with the Adult Protective Agency (1.800.252.5400) and the appropriate law enforcement agency.

TRANSFERRING PROPERTY

Wills

Who needs a will?

Anyone who is 18 years of age or over (or anyone who is less than 18 years of age and married or is a member of the U.S. Armed Forces) who wants to direct the disposition of his or her assets at his or her death needs a will.

How often do I need to change my will?

Any time you wish, or when a significant change occurs in your life, you need to review your will to determine if it still fits your needs. A significant change would be considered a marriage, divorce, birth, death, a move, a change of jobs, or a significant change in health or wealth. This also should include any time there is a change in the federal law regarding estate taxes, which may cause your estate to be taxable.

Where does my property go if I do not have a will?

The State of Texas has laws that determine how your property passes to family members upon your death. Your property will not pass to the state. However, you may want your property to go to certain family members other than those the state requires to inherit your property. If you have children, your surviving spouse or your children may inherit the property depending on the facts in each case. If you have children from a prior relationship, your spouse inherits 50 percent of your property, and the children inherit the other 50%. Some of your property may pass based on how they were originally created – a beneficiary designation form or a payable on death account.

How do I make a will?

You should consult with an attorney to have him or her prepare a will for you. A will should be signed in front of two witnesses who are not related to you and who are not named as beneficiaries in your will. Additionally, there are numerous internet sites that have forms to use to prepare your own will. Be very careful in using such sites as the forms on some sites may not comply with Texas law. Using a form that does not comply with Texas law may complicate your wishes and may incur more legal fees and court costs.

Does a will have to be notarized?

No. However, most wills prepared by attorneys will be self-proving wills. That means that the witnesses and the person making the will swear in front of a notary that the will was signed properly. If a will has this self-proving sworn statement attached, the witnesses will not have to attend the probate hearing after the maker of the will dies.

Can I write my own will?

Although we do not recommend that you write your own will, Texas law does allow it. If you do write your own will, you must handwrite the entire will and date and sign it. You should state whom you want to receive your money and property after your death. You do not need witnesses if the entire will is in your handwriting.

If I am very ill, can I still sign a new will?

Yes, if you understand that you are making a will and know what you own. You need to know who the members of your family or other important people in your life are and what each is to receive after your death. You must understand all this at the time you sign your will.

What should be included in my will?

A will should:

- State what you want to happen to your money and property after your death;
- Appoint an independent executor to serve without bond to handle your affairs;
- Revoke any prior wills; and
- Provide for a guardian of any minor children.

A will cannot be used as a primary method for organ donations or burial instructions because the will may not be reviewed until days after your death. For information about donating organs, go to donatelifetexas.org.

What property is not controlled by my will?

Some property passes outside of your will and is not subject to probate. Non-probate assets may include certain bank and investment accounts, U.S. Savings Bonds, life insurance, and retirement benefits if they have a named beneficiary other than your estate. Also property that is identified as payable on death or property that is established with a Transfer on Death Deed, Lady Bird Deed, or Life Estate Deed will automatically transfer outside of probate if the next named beneficiary is alive.

How can I change or cancel my will?

- By making a new will that states it is revoking all prior wills;
- By destroying your will; or
- By signing a codicil, or amendment, to your will. A codicil is a document that makes changes to your will but does not cancel your entire will. A codicil has to be signed just as a will is signed.

Why does it matter whether property is classified as separate or community?

Your will disposes of your separate property and the one-half of the community property you own with your spouse. Your will does not dispose of your spouse’s separate property or your spouse’s one-half interest in the community property.

What is community property?

Community property is all property acquired by a husband or a wife during marriage unless acquired by gift, inheritance, or a personal injury settlement. Income from separate property is also community property. It does not matter who earned the money or whose name appears on the account. Community property is owned one-half by each spouse.

What is separate property?

Separate property is any property acquired before the marriage and any property acquired by gift, inheritance, or personal injury settlement during the marriage.

What can I do to make sure my pets will be cared for when I die or become disabled?

You can create a pet trust to be sure your pet receives proper care after you die or in the event of disability. In your will, you give your pet and enough money or other property to a trusted person or bank (the trustee) who is under a duty to make arrangements for the proper care of your pet. The trustee will deliver the pet to your designated caregiver and then use the property you transferred to the trust to pay for your pet's expenses. You may create a pet trust either while you are still alive or upon your death by including the trust provisions in your will.

Transferring Real Property and Vehicles: TODDs

How can I transfer real property when I die?

There are three methods that you can transfer real property. You can designate real property in your will or it can be captured by a general clause in the will, the property can transfer as though there is no will via the intestate laws of Texas, or you can file a deed in advance of your death that will transfer the property at your death. Unlike a will, deeds must be filed before death in the real property records to be effective.

What deeds can transfer real property when I die?

The statutory deed is a Transfer on Death Deed (TODD). This deed must be filed before your death to be effective. It can be set up three different ways -- It can direct your share of the property to your spouse if he/she survives you, or to others if your spouse does not; it can direct your share of the property to primary beneficiaries and then to alternate beneficiaries if the primary beneficiaries are no longer alive; or it can transfer to primary beneficiaries only. TODD transfers are specifically exempt from Medicare Estate Recovery Program (MERP).

You can also have a Ladybird Deed or Enhanced Life Estate Deed in which you retain a life estate for yourself and designate who will receive the property when you die. This type of deed also exempts your homestead from MERP.

Can I change my mind after recording a Ladybird or a Transfer on Death Deed?

Both of these deeds give you complete ownership of your home until you die. You may revoke Ladybird and Transfer on Death Deeds at any time or record a new deed changing the beneficiary designation of your real property.

Bank Accounts and Safe Deposit Boxes

How do bank accounts pass after my death?

This depends on what you stated on your original signature card when you opened the account. Some types of bank accounts pass under the terms of your will, and some accounts override the terms of your will. The following is a list of common accounts that banks offer and how each passes after death:

1. Multiple-Party Account Without Right of Survivorship — This account is established in two (or more) names. Each person on the account has an ownership interest in the account equal to the amount each contributed. The bank may pay any sum in the account to a name on the account at any

time. Your rights in the account pass under the terms of your will to your heirs. In other words, your heirs will inherit the amount you owned in the account at the time of your death.

2. Multiple-Party Account with Right of Survivorship — This account is established in two (or more) names and functions in the same way as the above account. The only difference is that the survivors of the account inherits whatever is left in the account. This type of account overrides your will.

3. Payable on Death Account (POD) — This account will belong to the person establishing the account (the "Depositor') if that person is alive. However, when the Depositor dies, the property will pass to the beneficiary named when the account was established. This type of account overrides your will, and the account is not subject to the probate process.

4. Convenience Account — This account is established in two (or more) names, the Depositor and the Co-signer(s). The Co-signer(s) may write checks for the convenience of the Depositor if that person is alive. However, at the Depositor's death, the money does not pass to the Co-signer(s). Instead, it will pass to the beneficiaries named in the Depositor's will. The bank may pay funds in the account to the Co-signor(s) before the bank receives notice of the Depositor's death.

5. Trust Account — A trust account is an account in the name of one person as trustee for another person, who is the beneficiary. The account is created through the account deposit agreement of a financial institution and is not for trusts created under a will or trust agreement. During the trustee's life the property belongs to the trustee. During this time, the beneficiary has no rights to the account. At the trustee's death, the money passes to the beneficiary.

If a husband and wife put their wills in a safe deposit box, and one spouse dies, can the survivor get the will out of the safe deposit box?

Yes. If a safe deposit box is held in the name of two or more persons jointly, any one of the persons is entitled to access to the box and shall be permitted to remove the contents at any time. The death of one holder of a jointly held safe deposit box does not affect the right of any other holder to have access to and remove the contents from the safe deposit box.

If I have a safe deposit box in my name only, who can get into the safe deposit box after my death?

The bank should allow the following persons to examine the safe deposit box, without a court order:

- The surviving spouse;
- The parents of the decedent;
- Any adult children or grandchildren of the decedent; and
- A person named as executor of the decedent's estate who presents a copy of a document that appears to be the will of the box holder.

If the safe deposit box is in my name only and I die, what items can the individuals entitled to examine the box remove?

The bank may deliver the will to the clerk of the court that handles probate matters or to the person named as executor. Any life insurance policies can be given to the beneficiaries named in the policies and the deed to a burial plot may be given to the person examining the box. No other items can be removed from the box until court authority is obtained.

If I have a safe deposit box in my name only, who can get into the safe deposit box if I become mentally incapacitated?

Only a court-appointed guardian of the mentally incapacitated box owner is allowed access to the box.

Estate and Gift Tax Issues

How do I avoid paying estate taxes?

If your estate has a value that is less than the applicable estate tax exclusion amount at the time of your death, no estate taxes will be due upon your death, assuming you have not made taxable gifts during life that used up some of your exemption.

In determining the size of your estate, all assets in which you own an interest (i.e., both probate and non-probate assets) must be considered and valued at fair market value. The IRS has rules regarding what constitutes "fair market value" but, basically, it's what an independent person would pay to buy the asset. Note that the IRS doesn't care what method of transfer you use to transfer your assets to your beneficiaries when you die. Thus, even if you set up a trust to avoid probate, that does not avoid federal estate taxes.

Therefore, in addition to the assets passing under your will (if any), your estate for federal estate tax purposes includes the proceeds of life insurance on your life passing to a beneficiary by beneficiary designation, assets held in your living trust (if any), assets held in multi-party accounts that pass directly to named beneficiaries, and qualified retirement plans, IRAs, and annuities being distributed to designated beneficiaries upon your death. Since Texas is a community property state, only one-half of the community property is included in the estate of the first spouse to die. Of course, a deceased person's separate property is also included in his/her estate.

If you are married and your estate is larger than the exemption amount at the time of your death, you can defer estate taxes by leaving your estate either directly to or in a qualified Marital Trust for your spouse (special rules apply if your spouse is not a U.S. citizen). In that case, the estate tax will be deferred until your spouse dies, due to the marital deduction. However, the assets you give to your spouse (whether outright or in a Marital Trust), plus your spouse's own assets, will be included in your spouse's estate at the time of your spouse's death (if not spent by your spouse during life) and could result in estate taxes becoming payable when your spouse dies.

Note that married couples do not automatically get two exemptions from the federal estate tax. Married couples having a combined estate larger than one estate tax exemption amount (i.e., greater than $22.8 million in 2019) must do something to obtain two exemptions from the federal estate tax. Two exemptions, not one, will be needed to avoid estate taxes on the surviving spouse's death if the surviving spouse's estate exceeds the $11.4 million exemption amount in 2019.

As a result of ATRA, married couples now have two ways to obtain two exemptions from the estate tax. The traditional way is still available: to create a credit shelter trust or bypass trust on the first spouse's death. This trust would be funded on the first spouse's death with assets owned by that spouse having a total value not exceeding that spouse's remaining estate tax exemption amount. Usually, a bypass trust is primarily for the benefit of the surviving spouse, but it can also be for the benefit of children and grandchildren while the surviving spouse is living. By naming the surviving spouse as Trustee of the bypass trust, the surviving spouse can control the trust and its assets. The surviving spouse can use the income and (usually, also) the principal of the trust for his/her health, support, and maintenance. If permitted, distributions can also be made to children and grandchildren from the trust for their health, support, maintenance, and education. Upon the surviving spouse's death, the remaining trust assets pass free of estate taxes (no matter what those trust assets are worth at that time) to children or other persons designated by the spouse who created the trust (i.e., designated by the first spouse to die). Thus, creating a bypass trust also allows the first spouse to die to control where his/her assets end up when the second spouse dies.

A second method for a married couple to obtain two exemptions from the estate tax is for the Executor of the first spouse's estate to file a Form 706, US Estate (and GST) Tax Return ("federal estate tax return"), to make the portability election. By filing a federal estate tax return, the unused estate tax exemption amount of the first spouse to die (called the "DSUE Amount") can be transported to the surviving spouse, resulting in the surviving spouse having two exemptions from the estate tax, not just one, to shelter assets in the surviving spouse's estate from estate taxes upon his/her death. The portability election can be made both for assets passing outright to the surviving spouse and for assets passing into a Marital Trust for the surviving spouse. Otherwise a 40 percent federal estate tax will apply to the amount passing on the surviving spouse's death that exceeds one estate tax exemption amount (i.e., the inflation-adjusted $11.4 million exemption in 2019).

If I give away my assets prior to my death, will I avoid the federal estate tax?

The short answer is No, because we have a unified transfer tax system comprised of the estate tax (applicable to transfers made at death) and the gift tax (applicable to transfers made during life). Under current law, the lifetime gift tax exemption amount is $11,400,000 for 2019. If you make any transfers to or for the benefit of someone during your life for less than full value, those transfers are gifts under the gift tax rules. If the value of all gifts made to a particular person in one calendar year is less than the annual gift tax exclusion amount (currently $15,000 per recipient per year), then it's a tax-free gift. Or, if you pay someone else's medical bills directly to the healthcare provider or tuition directly to the school, then it's a tax-free gift. Gifts made to a spouse who is a U.S. citizen, whether made outright or in a qualified Marital Trust, are not immediately subject to gift tax because of the marital deduction. Transfer taxes on assets transferred to a U.S. citizen spouse will not be due until the spouse transfers the assets (either during his/her lifetime or upon his/her death). Lifetime transfers, which do not qualify for an exclusion from the gift tax or the marital deduction, are treated as taxable gifts and must be reported to the Internal Revenue Service in a Form 709, U.S. Gift (and GST) Tax Return (gift tax return).

Basically, then, the value of all gifts made to each person in one year is calculated, and if the total amount given to any one person exceeds $15,000 (or if that gift does not qualify for the $15,000 annual exclusion), then the person who made the gift(s) (the donor) must file a gift tax return to report those gifts, which are technically referred to as taxable gifts, whether taxable or not subject to the gift tax. The term, taxable gift, primarily means that the donor must report the gift to the IRS in a gift tax return. Taxable gifts do not result in gift taxes having to be paid until the donor has made taxable gifts that exceed, in the aggregate, the $11.4 million lifetime gift tax exemption amount, indexed for inflation. Note also that, on the death of a person who made any taxable gifts during life, less estate tax exemption will be available to his/her estate to apply to transfers that person is making at death because taxable gifts made during a person's lifetime count towards any exemption.

Does a beneficiary of my estate or of a gift I make have to pay the estate or gift tax?

The applicable transfer tax (estate or gift tax) is assessed against the person making the transfer (a decedent's estate or the donor of a lifetime gift). No gift tax is actually due until the total of all lifetime gifts exceeds the applicable exclusion amount ($11,090,000 for 2019). A person making a taxable gift must timely file a gift tax return and pay any gift tax due. In some cases, the gift tax is apportioned to (charged against and recovered from) the recipient/beneficiary, but that is rare. The executor of a decedent's estate must timely file the federal estate tax return (for estates over the applicable exemption amount) and pay the federal estate tax due, if any. Federal estate taxes are due nine months after the decedent's death.

What will my income tax basis (or cost basis) be in the assets I receive by gift or inheritance?

Under current law, a person who receives a lifetime gift of a capital asset (an after-tax, investment-type asset, such as real estate, stocks, bonds, and mutual funds) takes a carryover basis (i.e., maintains the same income tax basis that the donor of the gift had in the asset), while a person who receives an asset pursuant to a will or by inheritance upon the decedent's death receives a new tax basis equal to the fair market value of the asset on the decedent's date of death (or on the alternate valuation date, six months after the date of death, if that applies). Because the value of a capital asset owned by the decedent is frequently higher on his date of death than its original cost basis, this revaluation is often referred to as a step up in basis (but a step down in basis is possible, too). When a married person dies, both halves of the community property receive an adjustment to income tax basis on the first spouse's death. If proper estate planning is done, this is usually a tax-free step up in income tax basis. Income tax basis is important because, when a capital asset is sold, the capital gain or loss is determined by subtracting the taxpayer's income tax basis in the asset from the sales price.

Does the State of Texas have an estate tax?

Currently, the State of Texas does not impose any type of estate tax or inheritance tax on estates of persons who die while domiciled in Texas or on estates of persons domiciled in other states who die owning real property (including minerals) in Texas. Texas also does not have a state gift tax.

AFTER DEATH

Losing a Loved One

What should I do if I lose a loved one?

You may be overwhelmed with grief right now. You may leave the administrative matters for a later day. But there are notifications and legal steps that should not be postponed.

- Make funeral and burial arrangements.
- Obtain several copies of the death certificate. The funeral home will order the death certificates for you. They will arrive in approximately 2-3 weeks. If additional copies are needed, and the loved one died locally, you may contact your area Bureau of Vital Statistics office; this would be the Harris County Clerk, 713.274.8686.
- Gather relevant documents, such as the will; trusts; stock, bank account, brokerage, and annuity statements; and insurance policies.
- Contact the Social Security Administration (if the deceased was an eligible recipient). Some funeral homes will do this for you. However, if the loved one's death creates benefits for you, it is better for you to contact the Social Security Administration directly to discuss those details.

- Notify any life insurance companies of the death.
- Contact the trustee of any trust and/or the attorney who prepared it.
- Contact the executor of the will and/or the attorney who prepared it.
- Call the administrator of the decedent’s pension plan.
- Notify the decedent’s banks, financial institutions, and/or brokerage firms.
- Contact credit card companies.
- Be sure that insurance or Medicare claims have been processed before paying any medical bills.

This list is only a starting place and may not be a complete list for all estates. Despite the push to gather documents and notify people and entities, you may still find that the grief is overwhelming you. It is very important to recognize the grief and take steps to address it. The Children’s Bereavement Center is a wonderful resource for our youth. Jewish Family and Children’s Service, the Family Services Association, Catholic Charities, and Bo’s Place also provide grief counseling for a variety of age groups. While this is not an exhaustive list, it is a start to finding a more positive path.

Burial Provisions

Who has the right and/or obligation to bury a deceased person?

The family of the deceased has the duty to bury or inter as well as the obligation to pay the burial costs, unless there is a written pre-death directive or a prepaid funeral plan. This directive may be included in a will, and the funeral home can rely on such directive, even though the will has not been admitted to probate. In the absence of a written directive, the surviving spouse has the responsibility and obligation to pay for burial costs. If there is no surviving spouse, the order of priority rests next with the adult children, parents, adult brothers and sisters, heirs at law, a guardian, the county of residence, one performing an inquest, and finally with anyone willing to assume responsibility and liability for the decedent's remains and the costs of burial. When the decedent is indigent, it is necessary to notify the Harris County Community Services, Office of Social Services within 24 hours of death. If this notice requirement is not timely met, the county will not pay any costs of the person's burial.

Must I make specific provisions to donate my body or specific organs following my death?

The Texas Anatomical Gift Act permits anyone over the age of 18, or those under 18 with parental consent, to donate either his or her own body or specific organs. Substantial restrictions have been placed on donations from elderly persons. If you want to make a specific purpose gift to a certain organization, it is important that you check in advance to see if your donation will be accepted. It is important to learn what requirements, if any, must be met before making this gift.

If I die without making an anatomical gift, can one still be made?

The Texas Anatomical Gift Act allows family members to donate a decedent's body or other acceptable organs. This authority to donate rests first with the surviving spouse and then, in order of priority, with the adult children, parents, brothers and sisters, heirs at law, or a guardian. When a family member of the same level of right to consent objects to any gift, it cannot be made without court intervention.

If I desire to be cremated how should this directive be handled?

To be certain that this wish is accomplished, you should make a pre-death written directive. There is a statutory form which can be found in the Texas Health and Safety Code at §711.002(b). If you do not have a written directive, then a surviving spouse, an adult child, a surviving parent, a surviving sibling, or other close relative, in that order, has the authority to give instructions and authorize your burial or cremation. Should any family member object, the matter may go to court. The person you designate should be told about your wishes and given a copy of the directive.

May I obtain information describing burial services and costs?

Federal regulations require that funeral home operators make no misrepresentations of the services required for burial. They must also furnish the prices for all services if a request is made by phone. A written price list of all goods and services must also be furnished before showing a casket. In addition, the cost for immediate burial or for cremation must be provided.

Are there burial services which may not be required?

Texas law does not require that the body be embalmed unless it has not been refrigerated within 24 hours of death, or the death was caused by a reportable contagious disease. Other goods or services that can be eliminated are flowers, police escorts, newspaper articles, and special clothing, if the decedent specifies or the family agrees. A funeral home provider must not represent to a customer that any goods or services may be required when they are not. The funeral home cannot imply that certain services will delay the body’s decomposition. If cremation is chosen, the funeral home may not represent that you need a casket of something other than unfinished wood, cardboard, or canvas material.

Can I make funeral arrangements before I die?

Yes. You may make necessary burial arrangements before they are needed. Several methods are available to set aside the money needed to pay for these services. Many funeral homes provide pre-need burial programs. These programs may be established after the burial services have been selected and may be funded by insurance or annuity payments. The type of plan as well as the services to be provided can be selected at a less stressful time and with more consideration being paid to the costs and needs of the individual.

What type of death benefits are available to my survivors?

If you are a veteran of the military, both your surviving spouse and your children may be entitled to veterans benefits. Specific information can be obtained from your regional veterans affairs office. Veterans benefits can range from as little as $300.00 for burial and $780.00 for a plot to as much as $2,000.00. The family of a veteran may also be entitled to a flag, burial in a national cemetery, transportation of the body to the cemetery, and a headstone or marker. Social Security death benefits of $255.00 may also be available to a surviving spouse, a minor child if there is no surviving spouse, or a surviving parent if there is no surviving spouse or child. An application may only be made by the eligible person to the local Social Security office. The Texas legislature has provided benefits to its citizens under the Texas Criminal Victim's Compensation Act. Specific applications must be completed in a timely manner when a criminal report has been made. The family of a public safety officer who is killed or injured while on duty may seek compensation through a federal government program.

Can funds of the decedent be obtained to pay for funeral and burial expenses?

Yes. The Texas Estates Code has an emergency burial provision. This procedure permits family members and, in some cases, even non-family members to access the decedent's bank accounts, insurance policies, and a last paycheck to pay for funeral and burial expenses up to a total of $5,000.00. These payments must be made directly to the funeral home and are limited solely to funeral and burial costs of the decedent. Also, where access to the decedent's rented residence is being denied by the landlord, there is another procedure permitting a person to gain access to the premises to locate a will, insurance policies, bank accounts, or other sources from which burial funds can be obtained. In Harris County, the County Clerk's office has forms that can be completed to obtain a probate court order requiring that funeral and burial payments be made and to gain access to a rented residence. These procedures can be commenced as soon as the decedent's death is discovered. This procedure cannot be used after the decedent has been dead 90 days. This procedure does not always require the assistance of an attorney. However, the probate court and the staff members are not permitted to provide legal assistance or guidance for completing these forms.

Probate and Estate Administration

What is probate?

Probate is the court procedure by which the court determines if a will is valid. When an attorney proves that a will is valid, the court admits it to probate. However, the term probate is sometimes used to include generally all proceedings related to the administration of estates. Most probate proceedings are initiated by the filing of an application to probate a will or for administration of an estate. Both require hearings in court.

What is the time limit for filing a will for probate?

A will cannot be admitted to probate if it has been more than four years after the date of death.

What does the administration of an estate involve?

The administration of an estate involves (1) gathering the assets of the person who died; (2) paying his or her debts, expenses, and taxes of the estate to the extent there are sufficient assets; and (3) distributing the remaining assets, if any, to those who are entitled to have them under the terms of the will or to the heirs determined under the laws of intestacy.

What is an independent administration?

An independent administration is the administration of an estate without court supervision and without the extra time and expense required to obtain court permission for each administrative decision. Once an executor or administrator is appointed and qualified in an independent administration, the court only requires that he or she provides proper notice to creditors and beneficiaries, and file a sworn inventory, appraisement, and list of claims, or an Affidavit in Lieu of Inventory, within 90 days.

How is an independent administration created?

An independent administration may be created in the will or by the probate court with the permission of the beneficiaries of the estate. To create an independent administration by will, the will must contain language showing the decedent's intent that the administration not be subject to court supervision. Under certain circumstances, the probate court can create an independent administration when all the persons entitled to distribution from the estate agree.

What are executors and administrators?

An executor is the person or institution named in a will to administer the estate. If there is an independent administration, the executor is relatively free of court control in carrying out his or her duties, and the administration of a simple estate may usually be completed in a short period of time. An administrator is the person or institution appointed by the probate court to administer an estate when the deceased person did not have a will, or the original will is lost. An administration is usually much more expensive and time-consuming.

What are Letters Testamentary and Letters of Administration?

Once an executor or administrator has qualified, he or she has authority to act for the estate. Letters Testamentary are issued by the County Clerk's office as evidence of the executor's authority to act on behalf of the estate. Letters of Administration are issued for the same purpose to an administrator appointed by the probate judge.

What is a dependent administration?

A dependent administration is an administration of the estate when the deceased person did not have a will or did not correctly request an independent administration. This may happen when people write their own wills or use a form that they found on the Internet.

With a dependent administration, the court chooses and appoints an administrator and closely supervises and controls the actions of the administrator. In a dependent administration, the administrator must be bonded, file annual and final accounts, and apply for court orders for almost every act performed.

When is a dependent administration necessary?

A dependent administration is necessary when (1) a person dies without a will; (2) the will names no executor; (3) the executor named in the will fails or ceases to qualify after the will is admitted to probate or fails to present the will for probate; or (4) the will does not request an independent administration as explained in the preceding section.

If a person dies without a will, how are the heirs of the estate determined?

If a person dies without a will (intestate), the court determines the heirs and their shares of the estate in an heirship proceeding. In this proceeding, the attorney must present all facts concerning the identity of all heirs at the heirship hearing. The court appoints an attorney ad litem to represent the interests of any unknown heirs, known heirs who cannot be located, and heirs suffering from legal disability.

If a person dies intestate leaving a surviving spouse, what does the surviving spouse inherit?

If the deceased person had no children, his or her surviving spouse inherits all the deceased person's interest in the community property, all the decedent's separate personal property, and one-half (or sometimes all) of the decedent's separate real property.

If the deceased person is survived by children or descendants of children, all of whom were also descendants of the surviving spouse, the surviving spouse would inherit all the community property, one-third of the decedent's separate personal property, and a one-third interest for life in the decedent's separate real property.

If the deceased person is survived by children or descendants and at least one child who was not also a descendant of the surviving spouse, the surviving spouse would inherit none of the deceased person's interest in the community property, one-third of the separate personal property, and a one-third interest for life in the decedent's separate real property.

What are the alternatives to full administration of an estate?

The alternate procedures to a full administration of an estate are:

- Probate of the will as a muniment of title.
- Heirship determination.
- Application for no administration.
- Small estate affidavit.
- Affidavit of heirship.
- Informal family agreements.

What does probating the will as a muniment of title mean?

The will is admitted to probate, but no executor is appointed, even though one is named in the will. The will and the order admitting the will to probate are filed in the county deed records and constitute a chain of title to real property, showing the new ownership in title to the property.

When would a muniment of title proceeding be appropriate?

A court can order the probate of a will as a muniment of title only when there are no unpaid debts, excluding debts secured by liens on real estate, the deceased did not apply for or receive Medicaid benefits on or after March 1, 2005, and there is no need for administration. Although the will must be proved to be a valid will at a probate hearing, no executor will be appointed. The court's order admitting the will to probate is legal authority to all persons (1) owing any money to the deceased; (2) having custody of any property of the deceased; (3) acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate; or (4) purchasing from or otherwise dealing with the estate, for payment or transfer to the persons described in the will as entitled to receive the particular asset, without any administration. After the will has been probated as a muniment of title, the beneficiaries of the estate become the owners of the property.

How can a proceeding for heirship determination be used to avoid a dependent administration?

An order determining heirship when coupled with an order of no necessity for administration constitutes sufficient legal authority to all persons owing money; having custody of property; or acting as transfer agent, of any interest, indebtedness, or property belonging to the estate; and for persons purchasing or otherwise dealing with the estate, for payment or transfer to the heirs as determined in the court's order.

What are the requirements for a Small Estate Affidavit?

The requirements for the collection of a small estate by affidavit are:

- The deceased person did not have a will, and there is no petition for dependent administration pending;
- The value of the entire assets of the estate, excluding homestead and exempt property, is $75,000 or less;
- The deceased person has been dead for at least 30 days;
- Two disinterested witnesses, who are not legal heirs of the deceased person, must file a sworn affidavit concerning heirship.

What is the effect of a Small Estate Affidavit?

People dealing with beneficiaries of assets from the small estate are released to the same extent as if they had dealt with a personal representative of the estate. Beneficiaries can bring an action to force delivery of estate property. The beneficiaries will be liable to creditors or anyone else having a prior right to the property. This procedure does not transfer title to real property, except for a homestead.

What happens if I die owning real property outside of Texas?

Each state has jurisdiction and control over the real property inside its own borders. For that reason, probating an estate in Texas does not give an executor or administrator appointed in Texas any authority over property located in any other state. When a person dies owning real property (including royalties and/or other mineral interests) outside of Texas, the Texas executor or administrator of his or her estate usually needs to open an ancillary administration in order to pass title to the property in that other state to the proper beneficiary and to transact business relating to that property. The expense and difficulty of ancillary administrations varies from state to state; however, a person may avoid this added expense and difficulty by disposing of such real property during life or by placing it in a lifetime trust for the reasons stated in the section on Trusts.