

# 2025 Update on Medicaid for Long-Term Care, Elder Law, and Ancillary Matters

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ABOUT

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Elder Law - Trusts & Estates - Medicaid - Asset Protection

**Over 40 Years of Legal Experience**

Anthony B. Ferraro guides his clients and their families through life's three phases: maturing years, senior years, and post-death years. More specifically, Anthony assists clients with **Medicaid Asset Protection Planning for Long-Term Care**, "traditional" estate planning, "senior" estate planning, long-term care planning, special needs planning, guardianships, and estate, probate, and trust administration. Additionally, he advises various fiduciaries such as agents under power of attorney, executors, and trustees to achieve asset protection on the long-term care journey. Anthony's goal for all clients is to provide seamless and dedicated services through his knowledge, experience, and resources.



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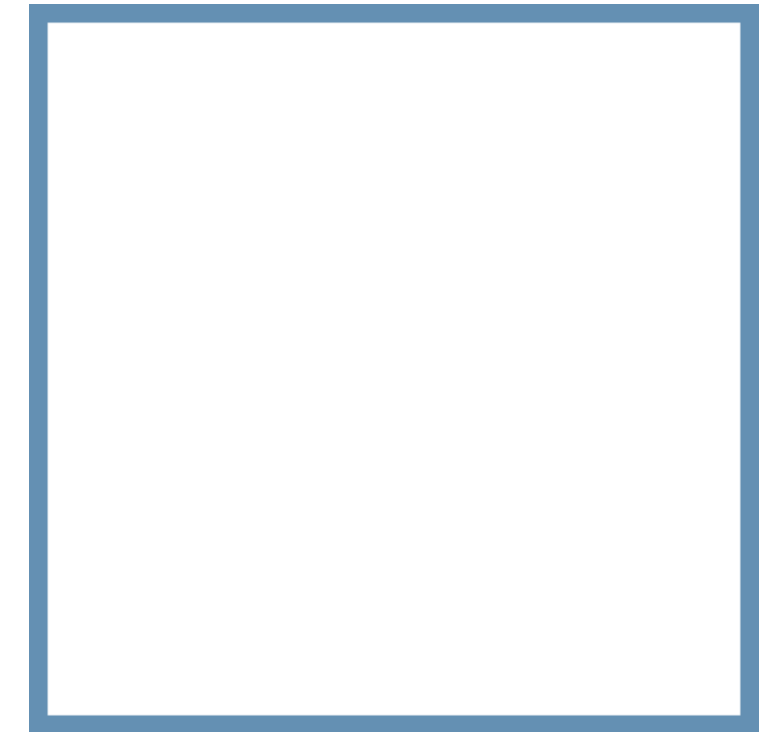
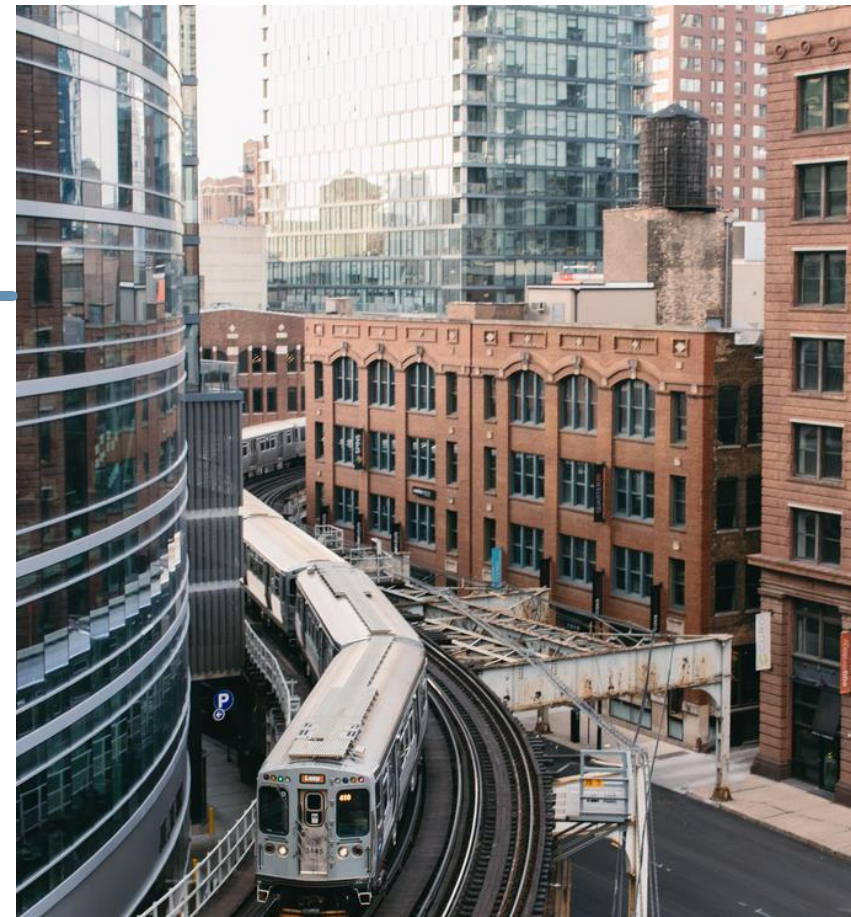
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# Today's Discussion

- Medicaid Planning Methods & News
- Guardianships
- Senior Estate Planning
- Long-Term Care Planning Methods & News
- Elder Abuse
- Special Needs Planning
- Powers of Attorney for Property
- Attorney Ethics in Illinois Law Practice
- New Illinois Law Effective in 2025
- Proposed Legislation in 2025

## Medicaid Planning Methods & News

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- Medicaid Asset Protection Planning for community spouses has become more complex
- A well-known strategy has changed. This strategy is called “spousal refusal” . In this strategy a Community Spouse refuses to use their resources for the cost of care of their Institutionalized Spouse, who is receiving Medicaid for long-term care
- In all cases, the Community spouse must still disclose all of their assets
- However, beginning in May 2024, the State of Illinois started collection actions against a Community Spouse who refuses to use their assets on the cost of care of their Institutionalized Spouse.
- State of Illinois is relying on provisions in the Illinois Public Aid Code, 305 ILCS 5/4-4, and provisions in the Illinois Administrative Code at 89 Illinois Admin Code 120.379 (k) which the state believes includes enhanced state collection rights in seeking support payments from the Community Spouse when their Institutionalized Spouse is receiving Medicaid for long term care.
- The state may also bring actions in the circuit court to recover after serving “spousal support orders”.

## Medicaid Planning Methods & News

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- This new challenge is now being litigated
- In the meantime, practitioners are looking at the continued use of, for example, 1) Spenddown strategies, 2) 5-year pre-planning, and 3) Medicaid compliant annuities (purchased by either the community spouse or the institutionalized)
- There are stringent requirements for the usage of Medicaid compliant annuities.
- In light of this new challenge strategy, in smaller net worth cases, well thought out Spenddown strategies can still make sense

## Medicaid Planning Methods & News

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- Drafting a testamentary, supplemental needs trust into the community spouse's will is still worthwhile planning for couples who may require Medicaid for long-term care at a future date
- In April 2024 CMS finalized a rule for streamlining Medicaid eligibility and enrollment, which is done through the "Redetermination" process.
- Regarding Medicaid "estate recovery" many are beginning to doubt the whether there is any significant economic benefit to the government resulting from Medicaid estate recovery. Liens are no longer allowed to be placed on real property by Medicaid In Illinois



## Medicaid Planning Methods & News

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- Regarding the Community Care Program (CCP) in the State of Illinois (a Medicaid waiver program), effective July 16, 2024, legally responsible individuals can now serve as home care aids for recipients.
- Transfer penalties (on uncompensated transfers) still exist for both for the institutionalized spouse and community spouse
- There is post death estate recovery for the CCP program
- There are still “allowable transfers” to certain family members, the community spouse, siblings, caregiving children, disabled persons and to the community spouse.
- Medicaid planning can still result in keeping the family residence in the family, in certain cases.
- Illinois Medicaid still imposes penalty periods for uncompensated transfers
- Illinois Medicaid still has a 5 - year lookback
- It may still be advantageous in many cases, **but not all cases**, to authorize gifting and transfer provisions in the power of attorney for property
- Annual exclusion gifting may not be sufficient for Medicaid asset protection planning purposes



## Medicaid Planning Methods & News

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- If the long-term-care spouse chooses to transfer their resources to the community spouse, such transfer is allowed without penalty only until the first redetermination after initial approval of the Medicaid benefits application
- Arguing the existence of a resulting trust can may be used to remove what is otherwise a countable asset from the asset inventory of an institutionalized person
- Resulting trusts are distinguishable from constructive trusts even though they are both judicially imposed trusts. A constructive trust arises when a wrongdoer party has taken title to property rightfully owned by another.
- When considering a Medicaid oriented 5 -year, irrevocable preplanning trust, be aware of whether not such a trust will result in:1) a step up in tax basis at death of grantor, and 2) qualification for the IRC Section 121 Capital gain exclusion.



# Medicaid Planning Methods & News

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2025 numbers of interest published by HFS include:

- CSRA will increase from \$129,084 to \$135,648
- CSMNA will change from \$3,853.50 to \$3,948
- Resource allowance for a couple where both spouses are in the facility is \$17,500
- Resource allowance for an individual, having no spouse is \$17,500
- Monthly Personal Needs allowance to \$60 in a skilled nursing facility resident (SNF)
- Monthly Personal Needs allowance is \$120 for a supportive living resident (SLF)
- Home-equity limits: minimum \$730,000, maximum \$1,097,000
- Numbers may increase every year based on the federal poverty level.



## Medicaid planning Methods and News

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- Caregiver Contracts may become more popular but remember to draft for:
- Scope of work
- Number of hours
- Frequency of services
- Terms of the compensation
- Rate of pay
- Beginning date and end date
- Employee /employer relationship or independent contractor ?
- Whatever your conclusions are about this, the IRS may differ
- Must you issue W-9, W-2, 1099 for future tax reporting?

# Guardianship Update

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- Topical Issues:
- Marriage of a ward in the guardianship process.
- Recently enacted Supported Decision-Making statute in the State of Illinois.
- Supported decision-making v. Limited Guardianships? Can you accomplish the same objectives with carefully drafted limited guardianship petitions?
- Limited guardianships still require court involvement.
- Supported decision-making is contractual in nature .

# Senior Estate Planning Update

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- Illinois law and the law of other states still have implications for the traditional wills and trusts of married couples when one of the spouses enters a long-term care facility on Medicaid
- POLST in the estate planning document package?
- Create authorization for digital access in the estate planning documents for all fiduciaries (executor, successor trustee, agent under power of attorney for property) to enable access to crypto, online storage, digital files, bank accounts
- “Document Locator Forms” (these forms exist) for securing the location of permanent file type documents such as prenups, Social Security cards, marriage licenses and divorce decrees, birth certificates
- Consider creating a “Letter of Instruction” for estate fiduciaries and beneficiaries especially regarding mandatory ongoing bill paying requirements, upkeep of long-term care insurance policies, and other ongoing financial obligations
- Keep cell phones after death to maintain digital access?

# Long-Term Care Planning Methods & News

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- Topical issues:
- Does the Medicaid program for long-term care services have a built-in bias towards institutional care?
- Departure from institutional care with the numerous Medicaid waiver programs that have been established throughout different states.
- For individuals with Alzheimer's and Dementia Related Diseases (ADRD) the waiver programs and the conventional Medicaid nursing home placement may be inadequate
- New concept: **Medicaid funded "Memory Care Programs"**. These promote the use of residential care settings over institutional skilled nursing facility settings for that part of the population that consists of persons who suffer from Alzheimer and Dementia Related Diseases (ADRD).

## Long-Term Care Planning Methods & News

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- Need more residential care settings. Operational costs may be less costly than skilled nursing facility settings
- The recently enacted nursing home staffing mandate has resulted in litigation including a suit filed in October, 2024 in the US District Court. This litigation was joined by numerous nursing facilities throughout the United States
- Medical providers fear the staffing mandate will force nursing homes out of business, increase the cost of care for families, and remove access to senior care altogether in certain less populated regions
- The nursing home staffing mandate advances hourly requirements for specific nursing roles and mandates that 3.48 hours of daily nursing care per patient be delivered starting in 2026



## Long-Term Care Planning Methods & News

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- **Mandatory arbitration clauses in residency contracts**
- There are Illinois appellate cases regarding the propriety of mandatory arbitration clauses in nursing home contracts
- Clients who contract for nursing home services may automatically sign these contracts whether there are arbitration provisions in the nursing home contract or not.
- Many clients do not understand the implications of arbitration clauses and the forfeiture of certain rights such as a jury trial or bench trial.
- There are: 1) federal statutes ( federal Nursing Home Reform Act), 2) Illinois statutes (the Illinois Nursing Home Care Act), and 3) the general rules of contract that impact the enforceability of these arbitration clauses in the nursing home context
- The Illinois Supreme Court most recently dealt with the issue of enforceability of arbitration clauses in nursing home contracts in the Clanton v. Oak Brook Healthcare Center, LTD. case, a 2023 decision. In this case the Illinois Supreme Court affirmed the judgment of the appellate court, affirming the denial of the nursing facility /defendant's motion to compel arbitration



# Elder Abuse Update

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- Consider contacting Adult Protective Services (APS) for intervention and investigation in suspected abuse cases (APS is part of the Illinois Department On Aging)
- There is mandatory reporting in Illinois for certain persons. There is new Illinois legislation pending to also include broker-dealers as mandatory reporters.
- Attorneys are exempted from mandatory reporting based on attorney-client privilege issues
- There is momentum to upgrade felony levels for charges regarding financial exploitation of the elderly
- Look warning signs of abuse in connection with powers of attorney for property
- Advise clients of the possibility that they can unknowingly nominate a rogue agent.
- Consider nominating professional, corporate agents under power of attorney?
- Consider drafting solutions (i.e., checks and balances) to minimize abuse of powers of attorney for property and financial exploitation

## Special Needs Planning Update

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- In 2024 the asset limit for individuals institutionalized in long-term care was raised from \$2,000 and \$17,500 for individuals and couples. This along with personal items, household furnishings and automobiles create a higher non-countable asset limit for individuals. The individual income limit is up from \$30 to \$60 per month. The recent increase to \$17,500 the individual resource allowance now means that someone receiving Medicaid long-term care in nursing home or supportive living facility can own a maximum of \$17,500 in assets. This can provide for more and might be helpful to this person during their remaining life
- However, the asset limit for SSI remains at \$2,000 for an individual, and \$3000 for a couple. The SSI federal benefit rate \$967 for an individual and \$1,450 for a couple.
- In September 2024 there was an increase in certain SSI limits. For example, in-kind support and maintenance (ISM) which represents a deduction to SSI because it is considered unearned income, will no longer be deducted from their available SSI which starts at \$967, single and \$1450, couple. The deduction for ISM is a dollar-for-dollar reduction to SSI payments up to a maximum of one third, i.e., \$322 less a \$20 disregard.) There is also some lenience in connection with rental subsidy expansions.

# Special Needs Planning Update

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- ABLE Accounts
- Do not forget ABLE accounts which can hold up to \$100,000 for disabled individuals.
- Medicaid Payback feature exists (if the account owner uses Medicaid).
- For that reason, is a 3rd party SNT better?
- ABLE's can be created by the disabled individual themselves or friends and family.
- The annual contribution is \$18,000 in 2024 which is equal to the annual gift tax exclusion.
- One coming ABLE change: the required age of prior disability onset may be raised from 26 years of age to 46 years of age beginning January 1, 2026. This means that the door will open for disabled veterans to take advantage of ABLE accounts.



# Veteran Benefits Update

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- **Aid and Attendance**
- A veteran's benefit (a special monthly pension) that should not be overlooked.
- It is available for a veteran or their spouse, but the veteran must not have a net worth of more than \$159,240 in 2025. Veterans can also have a house up to two acre lots. Plus, the house will be exempt even if the applicant is currently living in a nursing home, which is quite different from Medicaid.
- To qualify for the benefit the veteran is also be able to deduct from income medical expenses from their income consisting of Medicare, Medigap and long-term care insurance premiums, over-the-counter medications, long-term care costs such as nursing home fees, the cost of an in-home attendant who provides some medical or nursing services and the cost of an assisted living facility.
- There is a 3-year lookback to determine whether asset transfers should be penalized rather than a 5-year lookback as the cases in Medicaid.
- The Aid and Attendance benefit is \$28,300 a year for a single veteran and \$33,548 for a veteran with one dependent, and \$18,187 for a single surviving spouse, and \$21,696 for a surviving spouse with one dependent.

## Powers of Attorney for Property Update

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- The POA for Property statute that was signed into law on August 9, 2024, became effective January 1, 2025, is still being discussed
- The statute deals with unreasonable reasons to deny a POA
- Also defined are reasonable reasons to deny a POA
- The Coffman decision, decided by the Illinois Supreme Court and issued on November 30, 2023, presents additional issues in connection with powers of attorney
- The recent Coffman decision held that a power of attorney for property held by a “substantial beneficiary” under a will creates a fiduciary relationship with the testator for purposes of the presumption of undue influence. This is still being widely discussed in the trust/estate community.



# Attorney Ethics in Illinois Law Practice Update

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- **Diminished Capacity Issues:**
- **Carey Case**: 1st Appellate District on December 18, 2024, 2024 IL App (1st) 231323.
- The holding was that while there is no general duty for an attorney to assess the client's mental capacity, this could change once the attorney (or the litigating parties) are on notice of the client's disability.
- The Carey court reiterated that an individual is presumed to possess testamentary capacity until the contrary is proved. The Appellate court indicated that the plaintiffs in this case incorrectly began with the opposite perspective, namely, that the attorney must make a finding of competence before embarking on representation of the client. The Carey court said this turns the presumption of competence on its head, making competence something that needs to be firmly established, instead of, something that needs to be rebutted.

## Attorney Ethics in Illinois Law Practice - Update

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- **Diminished Capacity Issues:**
- The Appellate Court also indicated that they could not find that IRPC 1.14 stands for such a proposition. The plaintiff tried to argue that such an affirmative duty to determine a client's competence is supported by public policy, but the Appellate Court said they disagreed.
- Related to this, is the issue of identifying who is the client in new representations where third parties are paying the fee. Reference is made to IRPC 1.8 (f) that indicates that a lawyer shall not accept compensation for representing a client from one other than the client, unless: 1) the client gives informed consent (presumably this means in writing), 2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and 3) information relating to representation of a client is protected as required by Rule 1.6.

## New Illinois Laws Effective in 2025

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- New Illinois power of attorney act regarding when it is reasonable or unreasonable to honor a power of attorney for property
- A new law requires HFS to develop and maintain a comprehensive informational guide (that is available digitally) that explains the Medicaid five-year lookback. It must explain how this affects eligibility for Medicaid – long-term care coverage on or after July 1, 2025
- The Illinois General Assembly created some operating rules for the Long-term Care Facility Advisory Board
- There is a new law that requires the Department on Aging to assist with caregiver support services in compliance with federal Medicaid waiver requirements





## Legislation Proposed in 2025

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- The initial filing date for new legislation in the current legislative session was February 7<sup>th</sup>, 2025
- Legislation is being reintroduced dealing with the marriage of a ward.
- Legislation is being reintroduced dealing a requirement that court may adjudge a person to be a person with a disability, but only if it is been demonstrated by clear and can vary convincing evidence that the person is a person with a disability and the person cannot be supported through a **less restrictive** supported decision-making agreement.
- Legislation is being reintroduced dealing with whether not in a petition for guardianship, if there is no legally recognized relationship to the alleged person with a disability, that the court should decide whether to appoint: 1) the public guardian as a temporary and permanent guardian, or 2) whether somebody else in the family should be considered first.



## Legislation Proposed in 2025

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- Legislation dealing with requirement that the resident of an Assisted Living facility must receive an assessment, conducted upon the identification of a significant change in the person's condition attributable to conditions that include a diagnosis of Alzheimer's Disease or Related Dementia (ADRD). Requires the resident and the resident's representative be given a copy of the most recent assessment, supplemental assessment, and service plan. These requirements must be met to terminate residency.
- Several bills offering tax credits, both at the Illinois and federal level regarding expanding in-home caregiving
- End-of-life options regarding medical aid in dying
- Virtuous Trusts
- Changes to small estate affidavit and summary administration
- Special Deposits Act
- Uniform Voidable Transactions
- More bills than the above that could be discussed



## Miscellaneous Discussions of Topical Items

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- Other Topical issues :
- Transparency in nursing home ownership
- Adequate staffing for skilled nursing facilities and Assisted Living Facilities.
- Methods of filling staffing levels.
- Security in senior living
- Will the new administration in DC curtail Medicaid eligibility?
- What will reductions, if any, in federal Medicaid spending be based on:
- block grants,
- per capita caps,
- reducing the 50% Federal match (forcing the states to cover more of the Medicaid cost),
- terminating the Federal match of 90% for Medicaid expansion enrollees, and /or
- adding Medicaid work requirements for certain Medicaid recipients?

## Miscellaneous Discussions of Topical Items

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- Massachusetts case dealing with the concept of spousal refusal and indicated that the Medicaid applicant must establish a “complete marital breakdown” to be exempt from reporting spousal income and assets.
- Tennessee court holding that a woman failed to rebut the presumption of revocation when attempting to admit a copy of a missing will to probate
- Nursing home industry would like the current administration to rescind the recent staffing mandate
- Legislation enhancing veterans’ access to home and community-based services
- Congress may be proposing, in 2025, a caregiver Federal tax credit for family caregivers.
- Are there issues when transitioning from Medicare Advantage to regular Medicare?
- Issue: Will Medigap policies cover the additional costs when transferring from Medicare Advantage?





# THANK YOU!



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