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| <p>2015 ANNUAL PLANNING NEWSLETTER</p> |
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Dear Clients and Friends:

We hope you enjoy our annual newsletter. If you believe that your friends and relatives would appreciate it as well, please feel free to provide copies to them. Our newsletter is now available on our website at [www.elderlaw.us](http://www.elderlaw.us). If you would prefer to receive an electronic copy of the newsletter, please contact Jayne Weddington at [jweddington@elderlaw.us](mailto:jweddington@elderlaw.us) and indicate your preference for the e-mail version. This newsletter aims to keep clients informed of recent news and updates in the areas of elder law and estate planning.

Please feel free to visit our website [www.elderlaw.us](http://www.elderlaw.us) for updates.

**I. Ohio Supreme Court Case Jeopardizes Exempt Residence for Well Spouse.**

In Estate of *Atkinson*, the Ohio Supreme Court issued a long-awaited decision regarding the Medicaid exempt status of the residence for the well spouse of a nursing home resident. Generally, as long as the community spouse resides in the residence, it is not counted as an asset. In the *Atkinson* case, the couple placed their house in a revocable trust to avoid probate, and therefore, the Court ruled that unless they transfer the house out of the trust prior to placement in a nursing home, it loses its Medicaid exempt status. Three Judges dissented with an opening quote: "This case demonstrates the impenetrable fog that almost all senior citizens venture into when they attempt to protect

their worldly savings from the financial disaster known as assisted living.” This decision makes the fog more dense!

## II. **Other Ohio Decisions Of Interest.**

- A. *Price v. Medicaid Director, Office of Medicaid Assistance* (U.S. Dist. Ct., S.D. Ohio, W. Div., No. 1:13-cv-74, Sept. 1, 2015). A federal district court rules that applicants for an assisted living Medicaid waiver program in Ohio are entitled to retroactive benefits to date of application.

See link: <http://www.justiceinaging.org/wp-content/uploads/2015/09/121-Order-Granting-Summary-Judgment.pdf>

- B. *Wheaton v. McCarthy* (6<sup>th</sup> Cir., No. 14-4023, Sept. 1, 2015). The Sixth Circuit Court of Appeals holds that a state’s definition of “family,” when determining whether a Medicare recipient is eligible for Medicaid benefits to assist with premiums, must include the Medicare recipient’s spouse.

See link: <http://www.ca6.uscourts.gov/opinions.pdf/15a0214p-06.pdf>

*For the full text of these decisions go to our webpage [www.elderlaw.us](http://www.elderlaw.us).*

III. **New VA Regulations Restrict Gift In Aid & Attendance Program.** The proposed regulations will set an asset limit of \$119,220, which is the current amount (in 2015 and 2016) that a Medicaid applicant’s spouse is allowed to retain. But in the case of the VA, this number will include both the applicant’s assets and income. It will be indexed to inflation in the same way that Social Security increases. An applicant’s house will not count as an asset, but there is a two-acre limit on the lot size that can be excluded.

The regulations also establish a three-year look-back provision. Applicants who transfer assets within three years of applying for benefits will be subject to a penalty period that can last as long as ten years. To avoid the penalty, applicants will have to present clear and convincing evidence that the transfer was not made in order to qualify for Aid & Attendance benefits.

Under the new rules, the VA will determine a penalty period in months by dividing the amount transferred by the applicable Maximum Annual Pension Rate (MAPR). The MAPR for surviving spouses is a little more than half the MAPR for veterans, which means the penalty period for a surviving spouse would be almost twice as long as a veteran’s penalty period would be for the same transferred asset.

IV. **New Supreme Court Rules Complicate Guardianships.** Ohio Supreme Court Rules of Superintendence 66.06 to 66.09 have imposed onerous requirements on all existing Guardians and all potential Guardians. In short, they require 6 hours of a “Guardianship Fundamentals Course” within 6 months of appointment, 3 annual hours of education, more meetings, more reports and more fees. If you were appointed before the effective date of the rules (6.1.15), you have until next June to

comply with the education requirements. This affects Guardians over the person, Guardians over the Estate, and of course, Guardians of both.

Link to Power Point: <http://www.elderlaw.us/?p=2594>

For the full text of these rules go to our webpage [www.elderlaw.us](http://www.elderlaw.us).

**V. Attack on Special Needs Trusts.** We are seeing attacks by the Ohio Department of Medicaid (ODM) and the Social Security Administration (SSA) on Special Needs Trusts. These Trusts were authorized by the OBRA Act of 1993 so they should be established law. But ODM and SSA have attacked the drafting, administration and distributions from the trusts for the benefit of the disabled person. If you have a SNT, you should review the language to verify compliance with regulations that are changed by unnamed and irresponsible bureaucrats without notice. These objections by the ODM and SSA are technical in nature and can be remedied. Trusts can be amended and distributions can be made compliant before an audit.

“If you are going to sin, sin against God, not the bureaucracy.

God will forgive you but the bureaucracy won’t.”

– [Hyman G. Rickover](#)

**VI. Legacy Trusts - Popular Planning Tool.** On March 27, 2013, the Ohio Legacy Trust Act became effective. The new legislation, which is part of the Ohio Asset Modernization Act, permits the creation of a Domestic Asset Protection Trust (DAPT). A DAPT is an irrevocable trust that provides significant creditor protection, and greatly enhances the ability of the grantor to control the assets held in trust. Under a DAPT, the person creating this trust, the grantor, has the following powers not typically permitted in an irrevocable trust:

1. The ability to withdraw five percent (5%) of the assets annually;
2. The ability to receive both income and principal of the trust;
3. The ability to veto distributions from the trust;
4. The right to remove and replace the trustee; and
5. The right to use trust property.

Many of our clients are electing to transfer their house and some static financial investments into the trust, rather than purchasing long-term care insurance and/or hybrid life insurance policies with a long term care rider. The terms are a little more restrictive, but it can work.

**VII. IRA/401k/403b Assets Under Attack.** In 2014, the Supreme Court ruled in *Clark ET UX, v. Rameker, Trustee, ET AL*, that an inherited IRA is not exempt under the Bankruptcy Code, and therefore is not a protected asset for debtors filing for bankruptcy. Thus, if a child inherited an IRA and the debtor filed for bankruptcy, the inherited IRA would become part of the bankruptcy estate to pay back creditors.

In Congress, pending legislation would remove the stretch provisions for children requiring them to withdraw monies over five years rather than their lifetimes. By utilizing

an **IRREVOCABLE QUALIFIED STRETCH TRUST**, clients can circumvent the Supreme Court ruling and freeze in present regulations.

**VIII. Conclusion.** We are one of the only firms in central Ohio that specialize exclusively in elder law, estate planning, trust and probate law. Combining over 70 years of experience, we are uniquely qualified to protect your assets and protect your qualified accounts.

**IX. Announcements.**

**A.**Jonathan J. Schlegel, Esq. and Dennis B. Dahlberg Esq. have joined our firm as associates. Welcome Jon and Dennis!

**B.**Christine D. Torbett, Cristin V. Kelly and Shea M. Castricone have joined our firm as legal assistants. Welcome Christine, Cristin and Shea!

**C.**Richard F. Meyer, Esq. was elected Treasurer of the Ohio Chapter of the National Academy of Elder Law Attorneys. Congratulations Dick!

**D.**Laurie E. Ohall, Esq. was recognized as a “Super Lawyer” in Florida. Congratulations Laurie!

**E.**If you send an email to an employee at our firm and the email bounces back to you, please contact Jayne Weddington at (614) 471-0085. We keep our security settings for incoming emails at their highest in order to protect our client files from hackers and viruses.

WILLIAM J. BROWNING IS A CERTIFIED ELDER LAW ATTORNEY BY THE  
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