ALZHEIMER'S ASSOCIATION, SOUTHFIELD, MICHIGAN
LEGAL AND FINANCIAL CONSIDERATIONS
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"Where do I start?"

I. **QUALITY OF LIFE FOR PERSONS WITH DEMENTIA *and* CAREGIVERS** depends upon:

A. **INFORMATION and RESOURCES**

B. **PLANNING &**

C. **ADVOCACY SKILLS**

II. **ASSESSING AND PLANNING FOR MENTAL INCOMPETENCY**

A. Competency is a continuum. The factors include:

1. Orientation to time, person, place and season
2. Ability to think and to communicate coherently
3. Ability to care for self and to make decisions about self-care
4. Ability to understand and to manage financial matters
5. Short term memory versus long term memory

There are good days and bad days, and this often varies on the time of the day.

Competency also varies depending on the type of decision involved (a medical decision, doing a will, etc.)

B. A spouse or family member does not automatically have authority to step in and make medical and financial decisions on behalf of the impaired person.

C. The County **Probate Court** oversees matters involving competency. The Probate Judge can appoint a surrogate decision maker in the following circumstances:

1. **Guardianship** – the person is incapable of making decisions about care needs;

2. **Conservatorship** – the person is incapable of managing or handling his or her finances

3. The appointed person can be the spouse, a family member, friend or "public administrator." There is a statutory list which gives certain persons priority.

4. The Guardianship need not be established with a Conservatorship (and vice versa). It is often less costly and time consuming to establish them at the same time.

5. General requirements **to establish**:

(a) Filing a **Petition** for Guardianship and/or Petition for Conservatorship with the Probate Court of the County of residence with a court fee;

(b) **Proper Service** of the Petition(s) and Notice of Hearing to the alleged incapacitated individual, immediate family, Patient Advocate, Agent under Durable Power of Attorney and where applicable, to Social Security, VA or other governmental agency providing benefits.

(c) A **visit, notice of rights and report** by an attorney appointed by the Court verifying incapacity and inability to manage finances paid for by the impaired person's assets if capable;

(d) A **hearing and testimony** by the Petitioner before the Probate Judge (impaired person can waive presence, but Petitioner must attend);

(e) **Filing** of Bond (if required);

(f) **Issuance of "Letter of Authority"** as Guardian and /or Conservator.

6. General requirements **during administration**:

(a) **Retitling of assets** into Conservatorship;

(b) **Inventory** of assets in Conservatorship filed within 56 days of Appointment;

(c) Annual **Accounting** of transactions for Conservatorship;

(d) Annual **Report of Guardian** as to status of impaired person and periodic reviews by a Court appointed attorney;

(e) Court hearing to approve sale of real estate.

D. Diagnosis or treatment for long term care does not automatically mean a Guardianship and Conservatorship is necessary.

1. There is a **presumption of competency** for every person until declared "incapacitated" by the Probate Court. The burden is on the person "petitioning" or applying for the Guardianship to demonstrate the impaired person is incompetent.

2. Nursing homes and hospitals often strongly encourage families to establish Guardianships and Conservatorships because they provide the clearest designation of the person in charge, but they **cannot be required** for admission.

3. Guardianship and Conservatorship are generally **items of last resort** – as they involve supplanting an adult's personal freedom on medical and financial decisions.

4. In fact, since 2001 when there is a **valid Patient Advocate Michigan law bars the probate court establishing a Guardianship** unless the Patient Advocate Designation was invalidly executed or is not acting in the best interests of the incapacitated individual.

E. Guardianships and Conservatorships are **powerful authority** because they are backed up by the Probate Court. This is necessary when there are no documents giving such authority and may become necessary when a family is in conflict.

F. But Guardianships and Conservatorships can place **cost and delay** in their establishment and yearly reporting requirements. The hearings, filings and reports are also **public**.

KEY: Guardianship and Conservatorship are items of last resort. They substitute a person's rights involving decisions about their care and finances. When the person is truly incapacitated a Guardianship and Conservatorship may be the only option to handle matters. They provide the backing of the court with medical, placement and financial decisions, which nursing homes and financial institutions can rely on. Yet they often have disadvantages compared to private planning – as loss of time, greater expense and less flexibility.

G. There are a variety of legal or informal methods which may bridge care decisions without a Guardianship:

1. **Family Consent / Informal Agreements**—Allows respect and dialogue for the persons closest to the patient without cumbersome formalities, especially when other advance directives are missing. Quite often the actual operation of hospitals and hospice systems where the closest relatives agree with the treating physician or nurse on the course of action for an incapacitated patient or patient with diminished capacity. Formally recognized only under limited circumstances with the Michigan Dignified Death Act of 1996, see below

   Weaknesses:
   (1) Patient's wishes may become subject to disagreements, conflicts of interest and inadvertent omission of relevant persons.
   (2) No clear priority established for the patient's decision maker.
   (3) Has become more difficult with issues with the HIPAA privacy laws since 2003, especially with stricter fines on hospitals and medical providers in 2009.
   (4) Michigan banned assisted suicide in 1998. Fears have existed even by doctors for liabilities with deaths from chronic illnesses. In 2001 "end of life" care laws in Michigan released doctors and medical providers from fear of accusation for death from chronic illnesses like Alzheimer's

2. **Medical Durable Power of Attorney** (since 1991 in Michigan) – a document a person signs while mentally alert which appoints another person (called a "Patient Advocate") with the right to make medical decisions, including the refusal or withdrawal of life support. Only effective when the impaired person is incapable of making or communicating decisions. Hospitals and nursing homes must ask about this document upon admission. Fully revocable. Can name multiple backup persons.

   NEW powers for most Patient Advocate Designation forms, often missing:

   Expansion of terminal illness to include "chronic illnesses" which will cause death (effective 2001) – allows decisions to terminate life support for chronic illnesses when actual timing of death cannot be pinpointed by hospice. Addresses fear of accusation of crime of assisted suicide. Necessary for neurological illnesses as Alzheimer's Disease, Parkinson's Disease, Lou Gehrig's Disease (ALS).

   Anatomical Gift Authority, research and autopsy powers (effective 2003) -- this written power allows the Patient Advocate to coordinate organ donation, research or even an autopsy <u>after</u> death without needing a probate court order.

   HIPAA authority (effective March 2003) – gives written authority for the Patient Advocate to access private medical records and speak with doctors/nurses.

   Out-patient and hospital mental health treatment powers (Kevin's Law , effective January 2005) – this express power allows decisions by a Patient Advocate for mental health treatment, even involuntary hospitalization up to 30 days. Prior to 2006 only a Guardian was respected in the mental health arena.

   Distinguished from a Living Will – the medical document used in a number of states besides Michigan. This document does not appoint a person, but rather gives written instructions alone.. Alone this document is Insufficient under Michigan law, but it does serve as helpful guidance to the Patient Advocate.

3. **Separate HIPAA Release** – Since March 2003 federal law under HIPAA bars communications even with spouses and family unless there is written permission. A separate HIPAA release allows access to otherwise "protected health information" by family members listed in the release. This document should be separate from the Medical Durable Power of Attorney, because it may become necessary even when the patient is speaking for herself.

4. **Do Not Resuscitate Order ("DNR")** -- An order requesting not to initiate medical interventions in the event of an impending or actual cardiac arrest (when the heart stops beating and breathing ceases). Stops CPR and other medical procedures performed in an attempt to re-start the heart (eg.

defibrillation, medications and artificial ventilation). Extended from hospital-like settings to the home by the Michigan Do-Not-Resuscitate Act of 1996.

5. **Organ Donation Registry ("Michigan Gift of Life"/"Have a Heart" on Driver's License)** — Allows for a central registry to insure wishes about anatomical gifts are honored, especially when an individual dies suddenly and the Medical Durable Power of Attorney is not on file with the hospital where death occurs. Helpful when the Medical Durable Power of Attorney or driver's license registration cannot be found. "The Gift of Life Registry" in Michigan was established by the First Person Consent legislation passed in Summer 2003 (discussed below).

6. **Safe Return / Notification** – through Alzheimer's Association.

7. **Lifeline Registration**—Emergency notification system in the home. Offers registration of Advance Directive documents for their subscribers. Provides fax forwarding of documents including allergies, current medications, medical conditions and contact persons to the specific institutions in a time of emergency. See www.lifelinesys.com or call 1-800-543-3546. Usual enrollment fee of $75.00, often waived with coupon

8. **Geriatric Plan of Care** -- A geriatric care manager's interview of the client's preference and development of a letter of intent about care can forestall a probate battle about placement and care—especially when nasty or intermeddling children are expected to fight over the issues of care and costs. It is an essential step for safe handling of care in the non-medical setting (as the home). It addresses interventions by Adult Protective Services to demonstrate safe care conditions.

H. There are a variety of legal or informal methods which may bridge care decisions without a Conservatorship:

1. **Financial Durable Power of Attorney** – a document a person signs while mentally alert which appoints another person with the right to handle finances, real estate, stocks, etc. Can only handle assets during lifetime. Can be "springing" (effective only upon disability) or immediately effective. Fully revocable. Can name multiple backup persons.

   Necessary powers for chronic illnesses as dementia, especially when there is a concern of need for Medicaid or VA assistance:

   (a) **Caregiver contract powers** – to hire and fire caregivers, compensate family caregivers

   (b) **Specific gift authority** – barred without specific written powers, necessary under Medicaid and Michigan law, especially to shelter the house with spouse, child, sibling or finances with a person with disability.

   (c) **Specific authority to establish and transfer assets to a protective trust or annuity**.

2. **Joint Ownership** – Placing another person's name on the asset, as bank accounts, stock, bonds, real estate. Allows access to cash assets, but more complicated for stock, bonds and real estate.

   (a) **Advantage:** simple, easy, little up front cost;

   (b) **Problem:** become partners with joint owner's creditors and decisions;

   (c) **Worse yet:**

      1) Potential Medicaid penalties.

      2) Extra capital gains taxes, potential gift taxes and conflict over inheritance.

3) Most litigated issue about property in probate court.

3. **Revocable Living Trust** – this document allows a "trustee" manage the assets, generally avoids the need for a Conservator during lifetime and avoids probate at death.

   (a) It's a "Living" Trust because it's effective while the person is alive; unlike the "Testamentary" Trust which is part of a will and effective only at death.

   (b) Spouse, child, friend, relative or bank can be named as Trustee, Co-Trustee or Successor Trustee to handle assets.

   (c) Private, more flexibility. Bridges management of assets during life and after death.

   (d) Can provide special provisions for management of assets for disabled spouse, minor children.

   (e) There are a variety of types of Trusts. The irrevocable or unchangeable trusts can cause Medicaid problems.

III. POST DEATH PLANNING

A. Wills and The Probate Court.

1. The probate court also is in charge of the transfer of a person's property after their death, either by Will or "intestacy."

2. An "intestate" estate is a probate without the guidance of a will; it distributes assets to closest family members only, by statutory formula.

3. A "Last Will and Testament" is a document that guides the Court on the distribution of the assets of the deceased. It is effective only at death and must be admitted to probate court at the death of the Executor or maker of the Will.

4. The Court ensures that the funeral, medical expenses and other creditors are paid. After publishing notice for four months and payment of creditors and expenses, the assets are distributed and the Estate closed.

5. Can provide for a trust within the will called a "Testamentary Trust." This enables the assets to be managed for family members over time, rather than distributed straight to them. This is especially advantageous to prevent disqualification from Medicaid for a family member. A probate can either be supervised by the court or be independent (less expensive, but less protections).

B. Trust

1. A trust is a document that instructs the Trustee (or successor) on managing and distributing assets after the death of the Trustmaker.

2. To the extent that all assets are titled within the trust, the trust can avoid probate at death altogether.

3. The main value of a trust is to protect beneficiaries against creditors or predators on the assets. A trust can protect assets for everyone except the creator (grantor).

   Certain trusts are allowed by Congress to protect assets for a spouse or for a disabled child when Medicaid and government benefits are necessary. Examples of such trusts are:

   Testamentary Trust for a Spouse: protects assets for a spouse in a nursing home which would otherwise be lost to medical costs.

Trust for the Spouse in the Community: protects assets for the healthy spouse beyond other spousal allowances when Medicaid is necessary.

Special Needs Trust: protects assets for a person with a disability who needs government benefits. Supplements, but does not replace the government benefits. There are three types of special needs trusts, which can be discussed in a separate course outline.

4. All Trusts become irrevocable or unchangeable at the death or incapacity of the Trustmaker, except certain Joint Trusts, which first become irrevocable at the death or incapacity of both Trustmakers.

C. Four methods of paying for long term care costs besides out of pocket (private pay):

1. Medicare
2. Medicaid
3. Veteran's Administration Benefits
4. Long Term Care Insurance

D. **Medicare**

1. Federal program for hospital and doctor care for persons 65 or older or certain disabled persons under 65. It rarely covers an Alzheimer's patient.

2. Requires three-day hospitalization and need for skilled nursing or rehabilitative services. Must be capable of improving in therapy.

3. Pays for limited skilled therapy and skilled nursing services at home;

4. Pays for skilled nursing and rehabilitative care only, 100 days maximum (co-payment after 20 days).

E. **Medicaid Programs – "MI Choice" Program and Nursing Home Medicaid**

1. State administered AID program that pays for long term care. Has asset and income limits to qualify.

2. Certain assets are "countable," other assets are "exempt."

   Exempt assets are the house, one personal car, personal belongings as furniture, clothing, jewelry, certain forms of funeral and burial planning.

3. Different rules apply for single persons versus married couples and type of Medicaid.

   (a) Single person

      1) Countable assets < $2,000.

      2) Income < cost of nursing care for nursing home Medicaid.

   (b) Married Couple with Spouse at Home

      1) Add all assets owned by either husband and wife.

      2) If less than $21,912.00 +/- then all to spouse in community

      3) If greater than $21,912.00 +/- then ½ of the assets to the spouse at home;

4) If greater than $219,120.00 +/- then the maximum the spouse at home can keep is $109,560.00 +/-.

5) There are different allowance income limits for the different MA programs. There are also allowances for the spouse to keep a portion of the income.

(a) **Medicaid**
* Spousal Income Allowance maximum is $109,560.00
* Spousal Income Allowance minimum is $21,912.00

(b) **MI Choice Program**
* Income 300% SSI (currently $2,022.00).
* $2,000.00 countable assets limit. Special asset rules for community spouse.

4. You apply for Medicaid for the Home, Assisted Living and AFC Home through the Area Agency on Aging for your County. It is called the Medicaid Home and Community-Based Waiver Program or MI Choice.

5. You apply for Nursing Home Medicaid through the local Department of Human Services office in the County where the nursing home is located.

6. You apply for Medicaid for disabled persons through your local Social Security Office. It is called SSI-type Medicaid.

F. Veteran's Administration Pension Benefits

1. Available for veterans, spouses, widow/widowers and dependents
   (a) Veteran with no dependents $985.00 per month
   (b) Veteran with dependents $1,291.00 per month
   (c) Widows/Widowers of Veterans with no dependents $661.00 per month
   (d) Widows/ Widowers of Veterans with dependents $829.00 per month
2. Assists with in-home caregiver, assisted living, AFC home costs primarily
3. Limited nursing home benefits
4. "Housebound" benefits
   (a) Veteran with no dependents $1,204.00
   (b) Veteran with dependents $1,510.00
   (c) Widows/Widowers of Veterans with no dependents $808.00 per month
   (d) Widows/ Widowers of Veterans with dependents $976.00 per month
5. "Aid and Attendance" ("A and A") benefits
   (a) Veteran with no dependent $1,644.00
   (b) Veteran with dependents $1,949.00
   ** Each additional dependent increases the monthly benefit by $168.00**
   (c) If both spouses are Veterans and both need A and A the maximum monthly benefit is $2,540.00
   (d) Widows/Widowers of Veterans with no dependents $1056.00 per month
   (e) Widows/ Widowers of Veterans with dependents $1,224.00 per month
   ** Each additional dependent increases the monthly benefit by $168.00**
6. War time service/honorable discharge (DD214), application and doctor's letter are necessary.
7. Assets less than $80,000.00 qualified medical expenses exceed income.
8. Priority for eligibility based on multiple factors and need.

G. **Long Term Care Insurance**

1. State law: cannot exclude Alzheimer's Disease from coverage

2. But an application is rejected if there is any diagnosis of chronic illness (makes it unavailable once there is a diagnosis of Alzheimer's Disease)

3. Gets more expensive as grow older

4. Must provide option of coverage for both home and nursing home

5. Consider inflation option. Look closely at what triggers coverage and when coverage is triggered.

6. Tax deductibility of premiums

V. THE CONTINUUM OF CARE & THE NURSING HOME ADMISSION PROCESS

A. A common practice if for nursing homes to screen persons on two levels:

1. **Medical and behavioral**: will care be too intensive or difficult?

2. **Financial:** will there be enough assets to private pay for at least six months? (at nearly $4,000 / month)

Have a geriatrician fill out the medical forms, including the "Preadmission Screening (PAS)" form for diagnosis of dementia

Apply to a nursing home with experience in dementia care (separate section, specialists on staff)

B. There are a variety of Assisted Living Centers which provide Alzheimer's care. Assisted living and adult foster care ("AFC") facilities are not regulated like nursing homes and can evict persons much easier. Much less expensive and more home-like than nursing homes. The Governor's Long Term Care Task Force and budget proposals want to expand Medicaid coverage for assisted living and AFC homes in Michigan.

C. Advocate for the Medicare benefit after a hospital stay.

1. Dementia is not always the primary diagnosis and skilled rehabilitative therapy may be possible if the person is capable of improvement

2. Nursing homes prefer Medicare patients hands down – easier to get admitted

D. Warning – Not all nursing homes accept Medicaid. In fact, many discriminate against potential Medicaid recipients by "financial screening."

E. Be careful how you sign – read the fine print. Federal law requires that the contract define clearly the financial responsibility for payment.

F. Establishing Guardianship is helpful, but may not be necessary. The nursing home cannot require you to establish a Guardianship.

Questions? Contact either the Alzheimer's Association at (800) 272-3900 or Author/presenter Jim Lampertius at (248) 538-5480; jlampertius@jpllaw.com