8. PLANNING FOR RETIREMENT AND INCAPACITY

Planning for Retirement

Long before retirement, a person should take steps to:

1. Assure an income stream that is sufficient to maintain the lifestyle to which he/she has become accustomed.

2. Obtain insurance coverage for medical care and establish a reserve fund for catastrophic or long-term illness.

3. Set up a contingency plan for the management of finances in the event of disability or incapacity.

4. Select someone to make decisions regarding medical care in the event of physical or mental incapacity.

Qualified Retirement Plans

Income during retirement generally comes from employment-related retirement plans, personal retirement savings plans, and Social Security benefits. Options such as money purchase plans, profit-sharing plans, employee stock ownership plans, stock bonus plans, and IRS non qualified plans are not covered in this Manual.

Employer Pension Plans

The typical pension plan pays the retiree either a definite monthly payment fixed by contract, or an amount determined at retirement on the basis of contributions from the employer and employee. All employer contributions to the pension fund, within applicable limits, are tax-deferred, as is the income, until distribution to the employee.

Generally, there are three types of pension plans:

1. Defined benefit plan - This plan provides for a definite pension payment for each employee and annual contributions are fixed at whatever amount is necessary to produce that benefit.

2. Target benefit plan - This plan aims for a deferred benefit and calculates the contribution needed to produce that amount, but the benefit is not guaranteed and will be whatever the contributions actually produce.

3. Defined contribution plan - This plan establishes a contribution amount and pays whatever amount is generated by the contributions.

> Annual contributions to defined-contribution plans are limited to the lesser of $45,000 (2007) or 100% of the employee's annual compensation. Defined benefit plans may pay annual benefits not to exceed $180,000 (2007). These amounts are indexed for inflation or 100% of the average of the employee's highest three consecutive years of compensation. The maximum annual benefits are adjusted for cost-of-living increases.*

The individual will usually have three payout options at retirement:

1. Annuity

2. Lump-sum distribution

3. Lump-sum distribution with tax-deferred roll-over

A lump-sum distribution of previously untaxed funds is fully taxable as ordinary income in the year when the distribution is made. Taxation can be reduced or deferred if the recipient utilizes income averaging or transfers the distribution directly into an individual retirement account (IRA) or other qualified pension fund.

Distributions from a qualified pension plan generally must commence no later than April 1 of the calendar year following the calendar year in which the participant attains age 70 ½.

Early distributions (before the participant reaches age 59 ½) from any qualified retirement plan result in an additional 10% income tax. Exceptions are allowed if the employee is disabled or has attained age 55, terminated employment, and has qualified for early retirement under the pension plan.

Individual Retirement Account (IRA)

There are two eligibility requirements for establishing a tax-deductible IRA:

(1) The individual must earn annual compensation equal to the contribution to the IRA, and (2) the individual generally must be under age 70 ½ at the end of the year.

Where the individual's employer maintains a qualified retirement plan, there are limitations on the size of the tax deductible contribution that an employee can make to an IRA.

* Specific contribution or deduction limits used throughout this chapter are subject to change. Pleaserefer to current regulations.

The limitation is as follows:

Year(s)	Individual Contribution Limit	Additional Catch-up Contribution for Age 50+
2008-2011	$5,000	$1,000

The contribution limits for married couples are equal to two times the above limits in each plan year. For example, in 2011, a married couple, both of whom are over age 50, may contribute a total of $12,000.

Couples with a non-working spouse may deduct up to $5,000 in 2011 to each of two separate IRAs (one for the employee, one for the spouse), up to a maximum of $10,000 (plus catch up as above). Contributions may not exceed 100% of the working spouse's income. The IRA deduction is phased out when income reaches a certain amount set by the government each year. A person who does not qualify to deduct the IRA amount may still make non-deductible IRA contributions. Regular contributions, for most people, must be made by the *unextended* due date of the tax return for the year in question excluding extensions. For example; a deductible contribution for 2011 may be made at any time after December 31, 2010, and on or before April 15, 2012.

Contributions may be made to a traditional IRA any time before the participant reaches age 70 ½. IRA funds may be invested in bank CDs, stocks, bonds, money market mutual funds, and certain qualified real estate investment funds. The law prohibits investment of IRA funds in life insurance, collectibles such as coins (exceptions for United States coins used as legal tender), precious metals, stamps, and art.

Distributions from an IRA are taxable as ordinary income when payment is received. Distributions may begin no earlier than the year in which the individual reaches age 59 ½ and no later than the year when the individual reaches 70 ½. The minimum withdrawal schedule is based on the recipient's life expectancy. Early withdrawals are subject to a penalty tax of 10%, in addition to the ordinary income tax.

Lump-sum distributions from an employer's qualified retirement plan may be rolled over into an IRA. At death, the full value of an IRA is included in the individual's estate and any distribution to beneficiaries continues to be subject to ordinary income tax.

When an individual dies, the beneficiary of an IRA may receive the fund balance in one of the following ways:

1. If the beneficiary is the surviving spouse, that person may treat the IRA as his/her own IRA. This allows deferral of distribution until the year in which the beneficiary reaches age 70 ½.

2. If the decedent had already started to receive periodic payments, the beneficiary has the option to continue the same payment schedule. Regardless of the beneficiary's age, there is no premature withdrawal penalty.

3. The entire balance may be distributed within five years of the IRA owner's death, in lump sum, or by periodic payments.

Roth IRA

Roth IRAs can now be created with an after-tax contribution of up to $5,000 (2011) per year for an employed person and up to an additional $5,000 (2011) per year for a non-working spouse. Catch up provisions for employees 50 years of age and over permit an additional $1,000 per year contribution. After 2008 the limit will be annually indexed in $500 increments, adjusted for the cost-of-living. Withdrawals after age 59 ½ are tax-free. There is no required withdrawal at age 70 ½. Also, additional contributions may be made after age 70 ½. There are limitations on contributions for higher income tax payers and for some tax payers depending on filing status. Consult competent legal or tax counsel. Limitations are also available at http://www.irs.gov/ retirement /participant/article/0,,id=202518,00.html or in IRS Publication 590.

401(k) Plans (commonly known as salary reduction plans)

Section 401(k) of the Internal Revenue Code allows an employee the option of receiving current salary or having the employer make tax-deferred payments to the employee's account. The amount that the employee elects to have the employer pay into the plan is tax-free until withdrawn or distributed.

The law limits employee contributions to a 401(k) and 403(b) plans to $16,500 in 2011. The total annual contribution by the employer and the employee may not exceed the lesser of $49,000 in 2011 or 100% of employee compensation. In 2010 and later years total contributions will be indexed to inflation and can move up in $1,000 increments.

The IRS allows for additional catch-up contributions to 401(k) plans applicable to employees aged 50 and over. In 2011 the catch up contribution is $5,500. This means that in 2011, an employee aged 50 and over before the end of the calendar year can contribute up to $22,000 ($16,500 + $5,500) to their 401k plan on a pre-tax basis.

The rules regarding the distribution and taxation of IRAs also apply to 401(k) plans.

Annuities

Annuities provide a steady stream of fixed income for a long period of time and may be an attractive supplement to pension plans. Commercial annuities may be purchased from an insurance company or other source.

The contract may provide payments for a definite term or for the life of the annuitant. It may call for fixed or variable payments. The fixed annuity pays a steady rate of interest while the variable annuity produces a fluctuating return.

The income taxation of annuity payments is based on the following factors:

1. The portion that represents the return of the annuitant's principal contribution is tax-free.

2. If the transferred asset has associated capital gains, the portion representing the capital gain will be taxed as capital gains for payments received during the period of life expectancy, but as ordinary income if received after this period.

3. The remaining portion is taxed as ordinary income.

Tax-Sheltered Annuities

Employees of public school systems and section 501(c) (3) non-profit organizations may also participate in a Tax-Sheltered Annuity (TSA) program qualified under section 403(b) of the Internal Revenue Code.

Income contributions made by the employer or employee to approved plans (usually annuities or mutual funds held in a custodial account) are not taxed until payments are received by the employee under the annuity contract. Premature distributions are subject to the same rules applicable to defined contribution plans. However, a TSA account can be rolled over to another TSA account or an IRA account, subject to restrictions currently imposed by revenue regulations.

Employees may contribute up to 20% of their annual compensation multiplied by the number of years of employment, under an agreement with their employer. The annual contribution may not exceed the limits defined in section 403(d)(1)(E).

Social Security Benefits

Retirement planning is incomplete without taking into consideration the impact of Social Security benefits. The Social Security Act provides for a broad range of cash and health benefits, including old age (retirement), survivors, and disability insurance benefits (OASDI).

Social Security benefits are based on an individual's fulfillment of the following requirements during his or her working life:

1. The individual must have been an employee or been self-employed. Workers are considered employees when they are under an employer's control in matters such as being hired or suspended, working set hours, or submitting reports. Corporate officers, full-time salespersons, and home workers are ordinarily considered employees. Independent contractors and business partners, on the other hand, are not employees.

2. The individual's job must be covered employment. The major types of employment not covered by Social Security include:

   A. Federal government employees hired before January 1, 1984.

   B. Employees of non-profit organizations, prior to January 1, 1984, who did not arrange for Social Security coverage.

   C. State/local government employees for whom coverage has not been arranged.

   D. Railroad workers.

   E. Some agricultural and domestic workers.

3. The individual must pay Social Security taxes on wages received or net earnings from self-employment.

4. The individual must accumulate sufficient quarters of coverage, based on earned income, to give the insured the status needed for a particular benefit.

Receiving Benefits

Both the worker and the worker's spouse are entitled to Social Security benefits. Eligibility begins when the worker reaches age 62, provided that he or she has become fully insured by earning 40 consecutive quarters of coverage or one quarter for each calendar year between 1950 or age 21 (whichever is later) and retirement age or death.

Workers who apply for benefits at the full retirement age of 65 or later for those born after 1937 will receive the full primary insurance amount to which they are entitled. Benefits received by persons who retire between ages 62 and the full retirement age are paid at a permanently reduced rate.

Year of Birth	Full Retirement Age
1937 or earlier	65
1938	65 and 2 months
1939	65 and 4 months
1940	65 and 6 months
1941	65 and 8 months
1942	65 and 10 months
1943—1954	66
1955	66 and 2 months
1956	66 and 4 months

1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

***If you were born on January 1st of any year you should refer to the previous year.*

The worker's spouse is also eligible for Social Security benefits if he or she is at least 62, has the care of a disabled child, or has a child under age 16. The amount paid to a spouse is one-half of the amount paid to the worker. In order to qualify for spousal benefits, the spouse must have been married to the worker for at least one year, and he or she must be the parent of the worker's child.

The unmarried, divorced spouse who was married to the worker for at least ten years becomes eligible for spousal benefits at age 62. The benefits are lost upon remarriage.

The worker's dependent, unmarried children are also entitled to benefits if they are below age 18 or over age 18 and disabled. The child's benefits are terminated when he or she attains age 18 and is not disabled, or when the child marries.

The parent of a deceased worker who was fully insured is also entitled to benefits if he or she was the natural parent of the worker, the adoptive parent of the worker before he or she reached age 16 or the stepparent of the worker before the worker attained age 16. The parent must be at least age 62, must not have married since the worker died, must have been dependent upon the worker at the time of the worker's death, and must have applied for benefits.

Under the "higher benefits" rule, a person who is already (as a worker) entitled to Social Security or disability benefits which are larger than the proposed benefits arising from another worker's benefits will continue to receive those larger benefits, rather than qualify for the spouse's, children's, or parent's benefits.

Lump-Sum Death Payment

The sum of $255, or three times the worker's primary insurance amount, whichever is less, is payable to the deceased worker's surviving spouse who was living in the worker's household at the time of death. If there is no qualified surviving spouse, the death benefits are paid to the person who was entitled to the widow's benefits or the parent's benefits at the time of death. The application must be filed within two years of the date of the worker's death.

Disability Benefits

Disability benefits are paid to the worker and his or her surviving spouse who becomes disabled. In order to qualify, the worker must be under age 65, have been disabled for at

least five consecutive months, continue to be disabled, and have insured status for disability.

A worker has insured status for disability if:

1. The worker would have been fully insured if the worker had attained age 62 and applied for old-age benefits when disability began; and

2. In the quarter when the worker's disability began, the worker had at least 20 quarters of coverage in a 40 quarter period ending with that quarter, or the worker became disabled in a quarter before age 31 and had quarters of coverage in one-half of the quarters from the quarter the worker attained age 21 and the first quarter of disability, or the worker is disabled by blindness. In addition, the worker must satisfy all the requirements for disability as defined by the Social Security Administration. Disability payments end when the disability ends, the worker becomes 65 years old (at which time he/she begins to receive retirement benefits), or the month before the worker dies.

Payment of Benefits

The amount of Social Security retirement benefits is based upon the worker's "primary insurance amount" (PIA), which in turn is based on the worker's "average indexed monthly earnings" (AIME). A person's AIME is determined by using the tables provided by the Social Security Administration and the elapsed years (after 1950 or the year after age 21, up to the year before the year of death, disability, or attaining age 62), less five years, and the earnings for each year (deleting the five years of lowest earnings).

A portion of the Social Security benefits is included in the recipient's taxable income if the recipient's adjusted gross income, plus non-taxable interest income and one-half of the Social Security benefits, exceeds the base amount. The base amount for a single taxpayer is $25,000 and $32,000 for a married couple filing jointly. There is no exclusion available for couples who file separately. The amount included as taxable income is the lesser of one-half of the benefits or one-half of the excess amount.

Benefits are increased automatically each January, based on the Consumer Price Index. Workers who delay retirement beyond age 65 are entitled to an increase in retirement benefits of 0.25% for each month they postpone retirement (3% per year). The delayed retirement credit will be gradually increased to 8% per year between 1990 and 2008.

If a person works and is full retirement age or older, there is no reduction of benefits regardless of the amount earned.

Retirement benefits for workers under age 65 who continue to work will be reduced if the worker's earnings exceed the annual limit. If a person is younger than full retirement age, there is a limit to how much can be earned and still receive full Social Security benefits.

An employed person younger than full retirement age during all of 2011, will lose $1 from benefits for each $2 earned above $14,160.

Medicare

Medicare is a health insurance program for persons age 65 and over and for some disabled persons. The program is administered by the Health Care Financing Administration and the Social Security Administration (SSA) within the Department of Health and Human Services (DHHS). DHHS contracts with private insurance companies for processing of payments to health care providers and patients. Companies called "fiscal intermediaries" are selected by the service provider (the Blue Cross Company, in many states) and companies called "carriers" are selected by DHHS. Specific claims for coverage are handled by the fiscal intermediary or the carrier. Inquiries and complaints about the programs should be made at the local Social Security district office.

Medicare Benefits: Part A and Part B

Medicare benefits consist of two parts. Part A (hospital insurance) provides hospital benefits, limited post-hospital skilled nursing facility care, part-time home health services, and hospital care. Medicare beneficiaries pay the deductibles and co-payments to the provider.

Persons age 65 or older, who are entitled to retirement benefits as insured workers, or as the dependents or survivors of a worker, are eligible for Part A benefits. Persons under age 65 who are entitled to Social Security disability benefits, or who have end-state renal disease, are also eligible for Part A benefits. U. S. citizens or permanent residents (those who have resided in the United States for five years) who are age 65 or older may purchase Part B coverage (by paying a monthly premium), if they are entitled to Part A coverage.

Part B (supplemental medical insurance) is a voluntary program of health insurance that covers physician's services, certain outpatient services, home health care, diagnostic tests, and medical appliances. Enrollees for this coverage pay monthly premiums; the government matches this amount from general funds.

Persons who are entitled to Part A insurance are eligible to enroll in Part B. Persons who have resided in the U. S. for five years (citizen or permanent resident) may also enroll in the program. After an annual deductible of $100, Part B pays 80% of the patient's covered expenses.

Private Health Insurance ("Medigap") Policies

Private health insurance can be combined with Medicare coverage. The available policies include the following:

1. Medicare Supplement - This policy will pay for some or all of Medicare's deductibles and co-payments. However, most of these policies do not pay for expenses outside Medicare coverage.

2. Hospital Indemnity Benefits - This policy pays a fixed amount for each day the insured is hospitalized, up to a designated number of days.

3. Catastrophic or Major Medical Expenses - This policy helps cover the high cost of serious illness or injury, including some health services not covered by Medicare. To help consumers in selecting supplementary insurance coverage, DHHS has certified policies that meet or exceed certain content and benefit-payment standards.
4.

Medicare Benefits: Part D-Prescription Drug Coverage

Beginning on January 1, 2006, everyone with Medicare, regardless of income, financial resources, health status, or prescription drug usage, is eligible for prescription drug coverage under a variety of plans, premiums and co-payments. Medicare prescription drug coverage is insurance that covers both brand-name and generic prescription drugs at participating pharmacies. If the eligible participant does not sign up for the prescription drug coverage when first eligible, there may be a penalty at later enrollment.

The decision about Medicare prescription drug coverage depends on the kind of health care coverage the participant has. There are two ways to get Medicare prescription drug coverage. The eligible participant can join a Medicare prescription drug plan or a Medicare Advantage Plan or other Medicare Health Plan that offers drug coverage

Long-Term Care Coverage

Long-term care insurance covering nursing home and home health care is also available. It is important to make certain that the policy covers custodial care, since Medicare does not pay for this. The policy should also provide for several years of costs and cover a substantial portion of the average daily cost of nursing home care.

Medicaid

Medicaid is a joint federal-state program of medical assistance to eligible needy persons. In addition to the following federal requirements, state law should be consulted, as it may be more restrictive. Basic Medicaid benefits include inpatient hospital services, nursing home care, and physicians' services. Some states provide additional services such as diagnostic tests and services, rehabilitation, prescribed drugs, eye glasses, dental care, etc. To be eligible for Medicaid, a person must meet two basic criteria:

1. The person must be eligible for Supplemental Security Income (SSI) or Aid to Families with Dependent Children (AFDC) programs, and

2. The person must be financially needy. The states may differ in their application of various requirements and benefits. The local state office administering the Medicaid program should be contacted for details.

In some states a person must also be medically eligible requiring a level of nursing home care to receive Medicaid benefits.

Financial Responsibility of Spouse

Federal law allows states to consider the income and resources of both spouses in determining whether one spouse is financially qualified for Medicaid. The application of these "deeming" rules depends on the spouses' living arrangements. The income and resources of spouses living together in the same household will be deemed available to either one of them, even if the "needy" spouse makes no actual contributions to the other.

If spouses cease to live together and only one is eligible for Medicaid, the income and resources of the ineligible spouse will be deemed available to the eligible spouse only until the end of the month of separation. If the separation is based on any reason other than admission to a care facility, both spouses' incomes and resources are deemed available to one another for six months following the month of separation.

Residential Property

> "Depending on the state, nursing home residents do not have to sell their homes in order to qualify for Medicaid. Under the DRA (Deficit Reduction Act 2006) on , principal residences may be deemed noncountable only to the extent their equity is less than $500,000, with the states having the option of raising this limit to $750,000. In some states, the home will not be considered a countable asset for Medicaid eligibility purposes as long as the nursing home resident *intends* to return home; in other states, the nursing home resident must prove a *likelihood* of returning home. In all states and under the DRA, the house may be kept with no equity limit if the Medicaid applicant's spouse or another dependent relative lives there." http://www.elderlawanswers.com/elder_info/elder_article.asp?id=2751#2

Pursuant to a court judgment, a lien on otherwise exempt real property may be imposed. If the state can prove that a person will not return home and there is no spouse, minor, blind, or disabled child residing in the house, a lien may be placed on the home. The lien is dissolved when the recipient is discharged from the institution and returns home. At the recipient's death the property would be sold and proceeds used to satisfy the state's claim.

Transfer of Assets

A major rule of Medicaid eligibility is the penalty for transferring assets. States can "look back" to find transfers of assets for a certain number of months prior to the date he or she applies for Medicaid.

For transfers made prior to enactment of the Deficit Reduction Act on February 8, 2006, state Medicaid officials will look only at transfers made within the 36 months prior to the Medicaid application (or 60 months if the transfer was made to or from certain kinds of trusts). But for transfers made after passage of the DRA the so-called "look back" period for all transfers is 60 months.

If a transfer of assets for less than fair market value is found, the State must withhold payment for nursing facility care (and certain other long-term care services) for a period of time referred to as the penalty period which is a period of time during which the person transferring the assets is ineligible for Medicaid.

The length of the penalty period is determined by dividing the value of the transferred asset by the average monthly private-pay rate for nursing facility care in the State. Example: A transferred asset worth $100,000, divided by a $5,000 average monthly private-pay rate, results in a 20-month penalty period. There is no limit to the length of the penalty period.

> "The second and more significant major change in the treatment of transfers made by the DRA has to do with when the penalty period created by the transfer begins. Under the prior law, the 20-month penalty period created by a transfer of $100,000 in the example described above would begin either on the first day of the month during which the transfer occurred, or on the first day of the following month, depending on the state. Under the DRA, the 20-month period will not begin until (1) the transferor has moved to a nursing home, (2) he has spent down to the asset limit for Medicaid eligibility, (3) has applied for Medicaid coverage, and (4) has been approved for coverage but for the transfer.
>
> For instance, if an individual transfers $100,000 on April 1, 2007, moves to a nursing home on April 1, 2008, and spends down to Medicaid eligibility on April 1, 2009, that is when the 20-month penalty period will begin, and it will not end until December 1, 2010. How this change will be implemented from state-to-state will be worked out over the next few years."
> http://elderlawanswers.com/elder_info/elder_article.asp?id=2751#3

For certain types of transfers, these penalties are not applied. The principal exceptions are:

- Transfers to a spouse, or to a third party for the sole benefit of the spouse;
- Transfers by a spouse to a third party for the sole benefit of the spouse;
- Transfers to certain disabled individuals, or to trusts established for those individuals;
- Transfers for a purpose other than to qualify for Medicaid; and
- Transfers where imposing a penalty would cause undue hardship.

Resource Allowance for Community Spouse (Medicaid)

Concern for the spouse remaining at home after one spouse is admitted to a nursing home is a major concern. At what point is the nursing home spouse eligible for Medicaid benefits for long term care? Generally, the initial assessment required to answer this question should be done as early in the nursing home stay as practical.

Asset eligibility determination for married persons when only one of them is in the nursing home requires calculating the Protected Spouse Amount (aka Community Spouse Resource Allowance). The PSA is the amount of assets the community spouse will be allowed to keep for his or her own needs in addition to the applicant's resource allowance of $2,000.

The PSA is an amount equal to half of the total countable assets as of the initial assessment date or *snapshot date*, but not less than $21,912 (2011) and no more than $109,560 (2011) unless another amount is established through a Medicaid hearing or by court order. Generally, the snapshot date is the date that represents the first period after September 30, 1989, that the applicant has been in a hospital for a continuous period of 30 days or more. This date certain could have occurred years in the past and may present challenges in recovering records for these long ago events. In most cases (hopefully) the event that led to the need for Medicaid planning for which services are required will be the event that triggers the snapshot date.

The basic formula for determining how much must be spent (spend down amount) so that the nursing home spouse is eligible for long term care benefits is summarized as follows:

Countable assets on snapshot date
Less: Protected spouse amount
Less: Nursing home spouse asset allowance ($2,000 typically)
Equals the Medicaid spend down amount

Notice these examples:

- Example 1: Countable assets on the snapshot date are $25,000. The PSA is $21,912. The amount necessary to spend down before application is $1,088 ($25,000 -$21,912 -$2,000 =$1,088).

- Example 2: Countable assets on the snapshot date are $100,000. The PSA is $50,000 (50% of countable assets). The amount necessary to spend down before application is $48,000 ($100,000 -$50,000 -$2,000 =$48,000).

- Example 3: Countable assets on the snapshot date are $300,000. The PSA is $109,560 (maximum allowed). The amount necessary to spend down before application is $196,360 ($300,000 -$101,640 -$2,000 =$188,440).

Generally, it is not necessary at the time of application for the assets used to establish a PSA to be titled in the name of the community spouse. A community spouse has one year

from the date of eligibility to remove the name of the Medicaid beneficiary from the assets. This is called the presumed asset eligible period.

Once a married applicant is qualified for benefits, the community spouse's assets may increase through inheritance, income, lottery winnings, or in any other manner, and this increase will have no effect on the ongoing eligibility of the institutionalized spouse.

Spend down funds can generally be used for paying off debt (e.g. home equity loan), repairs or painting home, exempt automobile repairs (new tires, repairs etc.) furnishing for nursing home spouse's room (e.g. rocking chair, television), and prepaying funeral/burial arrangements for both spouses. Knowledgeable legal counsel should be consulted regarding spending down resources to preserve eligibility for long term care benefits.

Supplemental Security Income (SSI)

The Supplemental Security Income (SSI) program is a federal program, involving state participation, which provides a minimum level of income for certain categories of needy persons. Unlike Social Security, eligibility for SSI is not based on employment. SSI benefits are paid to the aged, blind, and disabled whose income and resources fall below a specific minimum standard.

In order to be eligible for SSI benefits, a person must be age 65 or older, legally blind, or disabled. Only U. S. citizens or permanent resident aliens who are present in the U. S. for 30 consecutive days will be eligible to apply for benefits. Aliens must be permanent residents for three years before becoming eligible.

SSI Income Limits

Allowable income limits vary by state. Social Security Administration should be contacted for assistance in calculating allowable income.

Social Security does not count all of an applicant's income when determining eligibility for SSI. For example, the following are not counted:

- The first $20 a month of most income received;
- The first $65 a month earned from working and half the amount over $65;
- Food stamps;
- Shelter you get from private nonprofit organizations; and
- Most home energy assistance.

SSI Resource Limits

Persons whose resources exceed $2,000 for single persons and $3,000 for married couples may be ineligible for SSI benefits. Some assets are excluded, such as the claimant's home, household goods, and personal effects with current value up to $2,000, motor vehicles with current market value of up to $4,500, life insurance policies of up to

$1,500 face value, and a burial expense fund of up to $1,500. SSA Form 795 is used to set up a separate bank account within 30 days of filing an SSI application.

Transfer of Resources

Includable assets that are transferred to another person for less than fair market value within 24 months of application are counted as an available resource. Records of sales should be kept and the proceeds should be used to improve the home or pay bills.

While the applicant's home is an excludable asset and could be transferred without jeopardizing one's eligibility for SSI benefits, such a move may make the owner ineligible for Medicaid benefits.

Planning for Incapacity

Elderly persons sometimes become incapacitated so that they are unable to conduct business, manage their property, or make personal care decisions. This possibility should be recognized and plans made to provide for substitute decision-making, should the need arise.

Three legal devices are commonly used in planning for incapacity:

1. Advance Directives including the durable power of attorney, power of attorney for health care and living will.

2. The revocable living trust.

3. Joint tenancy with right of survivorship.

In the event that these mechanisms are inadequate, a conservatorship may become necessary.

Advance Directives

Durable Power of Attorney

A power of attorney is a written instrument by which one person (the "principal") appoints another as his/her agent (the "attorney-in-fact") and gives broad powers to the agent in all areas involving the principal's business transactions and his/her property. A special power of attorney limits the agent's authority to specific areas enumerated in the document.

The validity of an ordinary power of attorney rests upon the requisite legal capacity of the principal to understand the nature of his/her act. Therefore, when the principal becomes incapacitated, the power of attorney is voided. For this reason, the ordinary power of attorney is useless when dealing with mental disability.

Most states have now enacted statutes authorizing a durable power of attorney that survives the incapacity of a principal.

1. It must be in writing.

2. The instrument should contain the following or similar language: "This power of attorney shall not be affected by the subsequent disability of the principal or by a lapse of time."

3. The principal must have legal capacity to make the appointment at the time the power is created.

4. Some states require witnesses to the execution of the document, in addition to notarization.
5. Some states require recordation of powers of attorney.

   State law should be consulted to make certain that all requirements are satisfied.

A durable power of attorney is intended as an alternative to a conservatorship. It will usually confer upon the agent the powers exercised by a trustee or conservator. Any limitation of powers should be expressly stated in the instrument (such as a limitation on the power to revoke trusts, etc.).

The durable power of attorney may also provide for the nomination of a conservator, should such appointment become necessary. In some states, the appointment of a conservator automatically revokes the power of attorney.

A power of attorney terminates when it is revoked by the principal, upon the death of the principal, or upon the expiration of the term specified in the instrument, if any. Good faith acts of an attorney-in-fact who has no actual knowledge of the principal's death are binding on the principal's successor in interest, unless otherwise invalid or unenforceable. Third parties often require the attorney-in-fact to execute an affidavit stating that the agent had no actual knowledge of the termination of his/her authority by revocation or the death of the principal.

Most states allow a "springing power" which creates the power of attorney upon the incapacity of the principal. This is usually accomplished by providing a mechanism for determining incapacity. For example, the instrument might require a certification by two parties (other than the agent), one of which may be the principal's physician, to certify that the principal is no longer able to conduct his/her business affairs.

Durable Power of Attorney for Health Care

Some statutes provide for the use of a durable power of attorney authorizing the person acting under the power of attorney to delegate health care decision-making power to another who is authorized to give consent, refusal of consent, or withdrawal of consent for health care.

Specific procedures are required in the execution of the health care instrument. For example, one state requires that a patient advocate witness the document if the principal is a patient in a skilled nursing facility.

Other states provide for an expiration date for the health care power of attorney that is automatically extended if the principal is incapacitated. The health care instrument may also provide for the nomination of a conservator to care for the principal's person.

The durable power of attorney for health care is also useful in authorizing the agent to make decisions regarding the use of life-sustaining medical treatment.

Living Will

Some jurisdictions have authorized the use of a "living will." This document allows an individual to express his/her preferences for the type of treatment he/she wishes to receive under certain circumstances, in the event that he/she is no longer able to make these decisions. Some health care providers prefer the durable power of attorney for health care to living wills because it authorizes another individual, besides the medical practitioner, to make decisions for the patient.

Revocable Trust

A revocable trust can be an effective tool in transferring management functions to another person in the event of incapacity. The trust may be funded at the time of its creation or it may be funded at the time of the trustor's incapacity through the use of a durable power of attorney (where local rules allow).

One advantage of the revocable trust is that it allows the trustor to retain control of his/her affairs while he/she is competent, yet provides asset management if he/she becomes incapacitated.

Joint Tenancy with the Right of Survivorship

A useful, but limited, mechanism for providing management of certain assets for an elderly person is joint tenancy with right of survivorship. This allows the "non-owner" joint-tenant to step in and care for assets in the event of incapacity. It also removes the asset from the individual's estate. Such an asset is no longer subject to the individual's will or trust.

Generally, this method is recommended for small bank accounts that permit the withdrawal of funds by the "non-owner" to cover the expenses of the elderly person. When this is done, it is recommended that some written document be executed by the parties to state the intention of the owner of the funds and any terms controlling the use of the funds in the account.

Conservatorship

Traditionally, a conservatorship is established when a person is adjudicated to be mentally incompetent. In some jurisdictions, however, conservatorship does not carry with it the stigma of mental incompetency or insanity. For example, the California Probate Code provides that a "…conservator may be appointed for a person (a) who is unable to properly provide for his personal needs for physical health, food, clothing, or shelter or (b) who is substantially unable to manage his own financial resources or resist fraud or undue influence."

Generally, conservatorships deal with two aspects of an individual's affairs. The conservator of the person deals with the personal needs involving the physical well-being of the conservatee. The conservator of the estate deals with the management of the property and the financial affairs of the conservatee. Depending on the circumstances, the court may appoint one conservator of both the person and the estate, or two conservators, one for each of these areas.

A conservator must behave like a trustee in the broadest sense of the term. He/She is under an obligation to the conservatee to deal with the property for the conservatee's benefit. Also, like a trustee, a conservator has a fiduciary relationship with the conservatee. The functions of a conservator are narrower than those of a trustee. A conservator is appointed only if a person is incapacitated. The powers of a conservator are fixed by state statute and do not depend upon the terms of any written instrument. In many states, a conservator's powers of investment are narrower than those conferred upon a trustee, even in the absence of provisions in the terms of the trust. The conservator's authority does not extend beyond the jurisdiction of the court that appointed him/her, although a trustee who has title to the trust property can exercise its powers outside the court's jurisdiction.

The conservator should exercise his/her own judgment and discretion in matters relating to the ward, but remains subject to judicial supervision. The conservator is entitled to compensation (at the court's discretion) for services rendered, but where the matter is regulated by statute, compensation may be allowed only in cases falling within the purview of the statute.

Nomination and Appointment

Those states that have instituted voluntary conservatorship allow individuals to nominate a conservator while they are mentally and physically competent. That nomination takes effect upon the prospective conservatee's disability.

As a general rule, an individual's legal incapacity must be judicially determined before a conservator is appointed. Statutes identify those persons who are authorized to initiate such proceedings. Usually, the application is made by written petition and provides sufficient facts to give the court jurisdiction and to justify the appointment of a conservator.

Notice of the proceedings must be given to all persons specified by the statute, although it is sometimes held to be unnecessary to give notice to anyone other than the alleged incompetent. It is sometimes required, and usually advisable, to give notice to members of the alleged incompetent's family or next of kin. This notice must be in writing, conform to the statutory requirements, and should be served in the manner prescribed by statute or in accordance with local practice. In most jurisdictions, third parties may waive notice; however, there is disagreement among authorities as to whether or not the alleged incompetent may waive notice.

Some jurisdictions require that the alleged incompetent be present before the court when the application is heard, and under some statutes a *guardian ad litem*, that is, a guardian for the purpose of this litigation, must be appointed.

The question of appointing a conservator may, and in some jurisdictions must, be submitted to a jury. In some states a commission must be appointed to examine the alleged incompetent and determine whether a conservator should be appointed. The presumption, until disproven, is that the alleged incompetent has legal and mental capacity. There must be clear evidence of the statutory grounds for the appointment and of the necessity for intervention by the court.

The court has wide discretion in the selection of a conservator. While the court will consider the recommendations of all interested persons, the paramount factor is the welfare of the incompetent individual. Therefore, the court may appoint any proper person as conservator and is not bound to appoint the petitioner.

Administration of the Estate

Upon appointment, the conservator should immediately begin to collect the individual's assets. All of the conservatee's assets should be located and taken into possession. As soon as this is done, an inventory and appraisal of these assets should be prepared. This provides the court and all concerned parties with a starting point for all of the conservator's accountings.

After completing the inventory, the conservator should review the assets to determine what investment changes should be made, if any. In most states, investment changes must be approved by the court or be in harmony with the controlling statute. The conservator, in the absence of statutory authorization, ordinarily has no power to sell or lease real property without a court order.

Duties and Liabilities of the Conservator

The conservator of the estate is obligated to protect the interests of the conservatee. The conservator must file an inventory of the ward's estate as required by statute. He/She has the duty and right to marshal the assets of the ward and to collect the debts and obligations owed to the estate.

The conservator is not liable for the contracts of the conservatee, but he/she may be liable on his/her own contracts; likewise, the conservator may be liable individually in tort for an injury caused by his/her negligence in the management of the conservatee's estate.

The conservator, or de facto guardian, is required to account for the management of the estate and ordinarily must render periodic accounts (at least annually) of the administration of the estate, including a final report on the termination of his/her office. The conservator must account for all of the conservatee's property which came into his/her possession by the exercise of his/her office. He/She is accountable for rents and profits derived from the estate, and if he/she permits the conservatee's money to remain idle for an unreasonable time, he/she is liable for lost interest.

On the other hand, the conservator is entitled to credit in his/her account for all reasonable expenditures, such as those made for the support of the conservatee and his/her family, including legal fees incurred through any litigation necessary to protect the estate, etc.

Various persons, such as the personal representative of the conservatee, any heirs or creditors, the surety on the conservator's bond, or the Veterans Administration (in the case of an incompetent veteran), may require an accounting by the conservator or may be necessary parties to any proceedings for the settlement of conservatorship accounts.

Ordinarily, all accounting expenses are to be borne by the estate.

If and when the conservatee is restored to legal competency, a settlement may be made between the conservator and the conservatee with regard to the estate. However, upon the resignation of a conservator and appointment of a successor, the original conservator must account to his/her successor in office, and if the original conservator is deceased, his/her personal representative must make the accounting to the successor.

Liabilities Of and Claims Against the Estate

The conservatee's property should not be applied to the reconciliation of his/her general indebtedness, as distinguished from claims for his/her present maintenance, until a sufficient fund is set aside for his/her support and that of his/her family. The conservatee's estate generally is liable for reasonable attorney fees incurred in the protection of personal property, and ordinarily the conservator is authorized to pay all valid debts and claims against the conservatee.

The court with jurisdiction over the estate may, and should, see that the conservatee's proper care and comfort are provided for out of the funds under its control. If the estate is sufficient, the conservatee should be maintained in that degree of comfort to which he/she had become accustomed when legally competent. In this regard, estate income should first be applied to the maintenance of the conservatee, reserving the corpus for his/her future support.

Termination of Conservatorship

The conservatorship of an incompetent person is terminated upon (a) the death of the conservatee, (b) the resignation of the conservator, (c) the exhaustion of the estate, or (d) the restoration of the conservatee to competency.

A person who has been judged incompetent has the right to have his/her competency tested so as to relieve him/her of the disabilities imposed by the adjudication of incompetency. This proceeding for judicial restoration to competency is a special proceeding of a summary nature. It is ordinarily held in the probate court, or the court exercising probate jurisdiction, and the application should be made, if possible, to the court in which the proceedings were held which resulted in the adjudication of incompetency.

When one seeks restoration, the test is whether the original condition has ceased to exist; that is, whether he/she is capable of understanding and acting with discretion in the ordinary affairs of life, whether he/she has so far regained his/her reason as to be capable of managing his/her person and property. There is a conflict of authority as to whether the conservatee may institute the proceedings for restoration to mental competency or is a necessary part thereto; therefore local legal counsel should be sought.

In the absence of a contrary statute, notice of the proceedings for the restoration of competency should be given to all interested persons.

If the relationship terminates as a result of the conservatee's death, the conservator is responsible for managing the estate until a personal representative is appointed, accounting for the period prior to death, and making distribution to the personal representative. If the conservator resigns, he/she must account for all transactions up to the resignation date and make distribution to the successor. If the conservatee is restored to competency, the conservator must account for all transactions up to the date of restoration and make distribution to the restored person. If the estate is exhausted, certain

problems may arise. Several months prior to the exhaustion of the estate, the conservator should estimate the period for which the assets are going to last, account for them, and estimate fees and expenses through termination. The conservator of the person should arrange for public aid after the assets are exhausted.

The court will discharge the conservator after the final accounting and cash reconciliation reflecting the disposition of all funds is filed.

Gifts from the Conservatee's Estate

Some jurisdictions give conservators the authority to make gifts on behalf of a conservatee, based on the following criteria:

1. The conservatee's incapacity must appear permanent, with no likelihood of recovery.

2. The remaining principal must be sufficient to provide enough income for the foreseeable needs of the conservatee and his/her dependents.

3. The transfers can be made only to those who are the natural objects of the conservatee's bounty.

4. There must be evidence of the donative intent of the conservatee, shown either by his/her former conduct or by a previous relationship and intimacy that indicate that the proposed donees would be objects of the conservatee's bounty.

When the above criteria are met, the court may grant or continue the donations of the conservatee. Generally, the donees involved are children or dependents of the conservatee. It is unlikely that tithes and offerings will be included in this class of gifts unless there is written intention to donate executed by the conservatee while still competent.

The Conservatee's Estate Plan

While the conservator is empowered to manage the estate of the conservatee, he/she has no authority to thwart the conservatee's estate plan. Care should be taken in the disposition of the conservatee's assets. Those that are not specifically bequeathed or devised in the conservatee's will should not be sold without disclosure to, and authorization from, the court.

The conservator has authority to receive the income from assets held by the trustee on behalf of the conservatee. However, the withdrawal of principal and the revocation or amendment of a revocable trust can only take place under a court proceeding involving the conservator and the trustee. When the court has allowed such action, the trust assets were required for the immediate care, maintenance, and support of the conservatee.

When it becomes absolutely necessary, joint tenancy and Totten trust accounts may also be terminated with court approval. Short of extreme circumstances, courts are generally hesitant to authorize actions by a conservator that would drastically affect the conservatee's estate plan.