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# Medicaid Divorce: Preserving Benefits, Minimizing Spend-Down, Protecting Assets, Electing Spousal Refusal

Family Law, Medicaid Regulations, and Public Policy Concerns to Safeguard Medical Benefits

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TUESDAY, OCTOBER 13, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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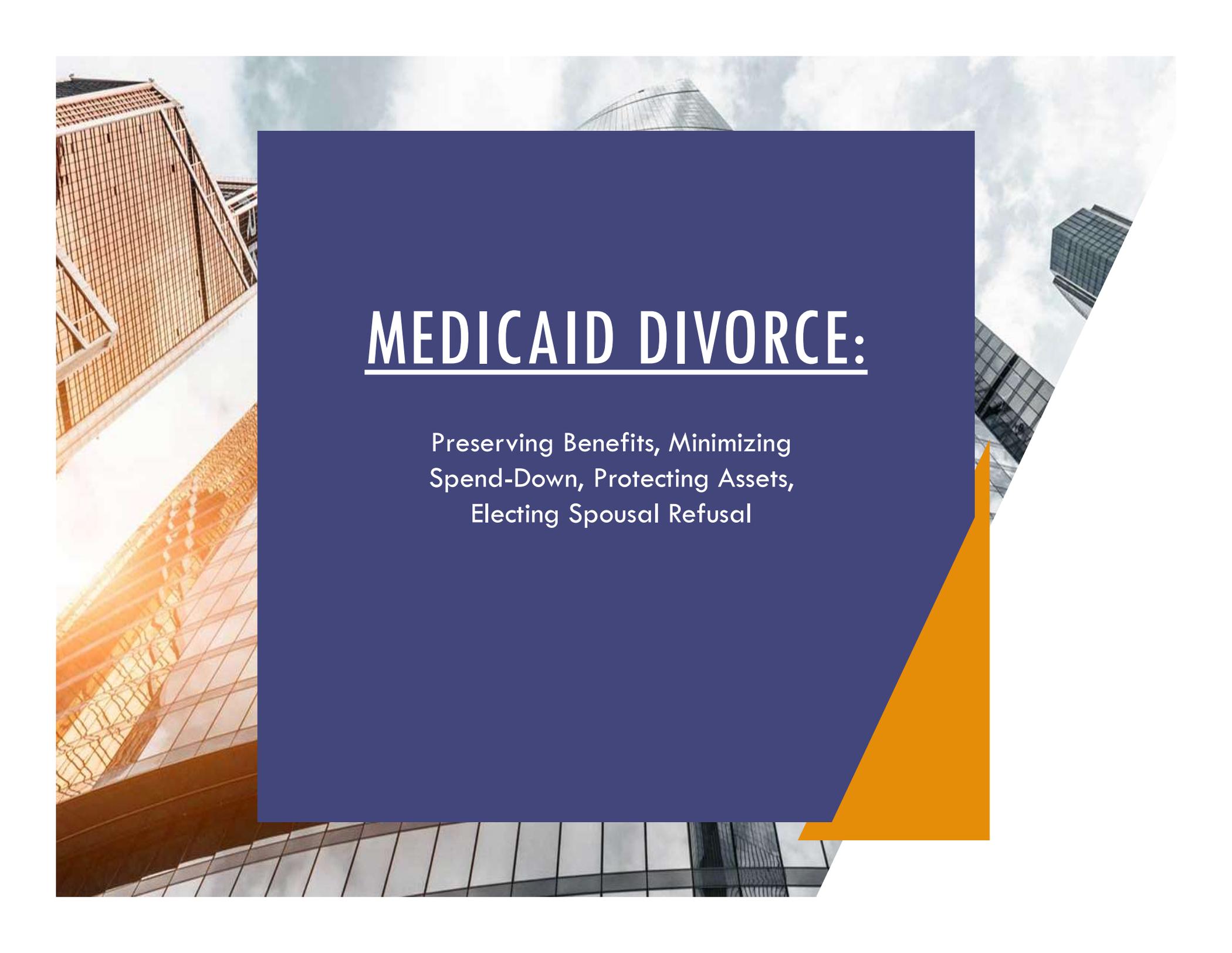
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# MEDICAID DIVORCE:

Preserving Benefits, Minimizing  
Spend-Down, Protecting Assets,  
Electing Spousal Refusal



# BACKGROUND RE: GREY DIVORCE

## BACKGROUND RE: GREY DIVORCE

- Our population is aging. More and more, people are getting married for a second or third time. We are living longer. Over one half of our population is now 50 or over.




## BACKGROUND RE: GREY DIVORCE

### Physical Issues in Grey Divorce

- The longer we live, the more our parts wear down and there are more physical problems that can occur.
- Health and insurance issues must be scrutinized and factored in regarding the grey divorce, especially for those who may not be eligible for Medicare by virtue of not having turned 65.
- Dementia and Alzheimer's can be serious issues in the end of second or third marriages. There is a study that shows a correlation between a 10% cognitive impairment resulting in a 20% loss of one's net worth.
- In many divorces among those who are aging and suffering from mental or physical problems, it is critical to appoint a conservator and/or a guardian so that all parties are protected.

# BACKGROUND RE: GREY DIVORCE

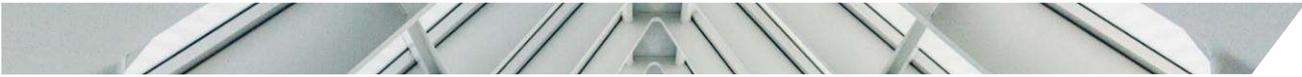
## The Impact of Death During a Grey Divorce



- When is a divorce final?
- Divorce vs. inheritance can be critical issues, especially if a death occurs prior to the divorce becoming final.



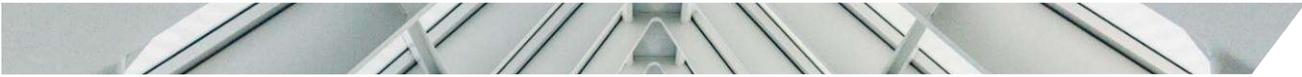
# ASSET PROTECTION TOOLS

# ASSET PROTECTION TOOLS

## Preuptial Agreements

- When someone is contemplating a second or third marriage, there is often more at stake.
- In our 50s, 60s, and 70s, we have more assets to protect. There can be future inheritances that can become an issue.
- Prenuptial agreements are legal just about everywhere in the United States.
- The California Supreme Court in *In re Marriage of Bonds*, 5 P3d 815 (2000) observed that there is nothing novel about premarital agreements regarding property because these agreements were long common and legally enforceable under English law.

# ASSET PROTECTION TOOLS

## Preuptial Agreements: Practice Points for Drafting and Enforceability

- Was the agreement obtained through fraud, duress, mistake, misrepresentation, or nondisclosure of material fact?
- Was the agreement unconscionable when executed?
- Have the facts and circumstances changed since the agreement was executed to make its enforcement unfair and unreasonable? *Rinvelt v. Rinvelt*, 190 Mich App 372, 475 NW2d 478 (1991).


# ASSET PROTECTION TOOLS

## Preuptial Agreements: Practice Points for Drafting and Enforceability

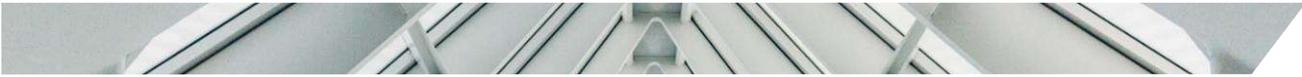
- A well-drafted prenuptial agreement should cover all issues including alimony, property division, what is to be deemed separate property, and what is to be deemed marital property in the event of a divorce.
- It should also cover inheritances and any other issues that are relevant to the particular situation.
- It must be signed prior to the marriage.
- It should be drafted and reviewed by attorneys for each party and should also include a list of assets and liabilities that the parties have at the time of marriage.

# ASSET PROTECTION TOOLS

## Preuptial Agreements: Practice Points for Drafting and Enforceability

- Prenuptial agreements are meant to cover death as well as divorce and these issues should be discussed as well. These are all important issues to discuss with clients and to explain fully as they are often a subject of litigation in the event of divorce.
- A prenuptial agreement should be tied in with an estate plan to cover as many contingencies as possible.

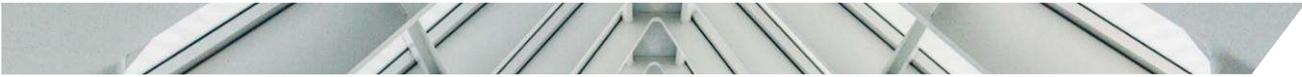




# ASSET PROTECTION TOOLS

## ERISA Transfers

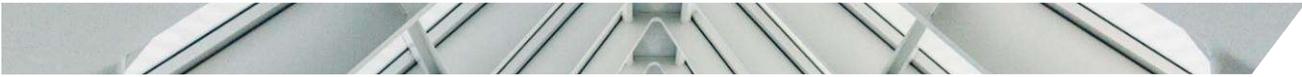
- Employment Retirement Income Security Act (“ERISA”) plans can be potential land mines.
- A problem can arise where there is a provision in the prenuptial agreement that a party’s interest in a qualified retirement plan will remain the party’s separate property.
- Section 205 of ERISA requires that each pension plan of a participant, whose plan is vested but who dies before the annuity starting date, provide to the surviving spouse a qualified preretirement survivor annuity. 29 U.S.C. § 1055(a)(2). The section also provides that these surviving spouse rights may be waived only if the spouse of the participant consents in writing to such election (to waive). 29 U.S.C. § 1055(c)(2)(A)(i).



# ASSET PROTECTION TOOLS

## ERISA Transfers

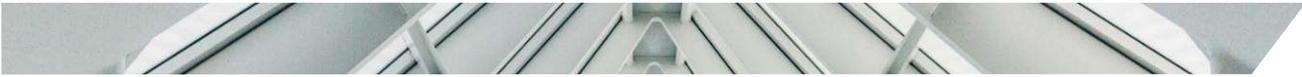
- Case on point:
  - *Hagwood v. Newton*, 282 F3d 285 held that a prenuptial agreement does not meet the statutory requirements for a waiver of rights by a spouse, because when the agreement was executed the plan participant had no spouse. The solution is to provide in the agreement:
    - that within 30 days after marriage, each party will execute a formal waiver of any rights each party acquired under the plan by virtue of the marriage; and
    - that if the waiver is not provided, the other spouse may set off an amount equal to what the nonliving spouse could receive from the plan, against other entitlements the waiving party is entitled to receive.



# ASSET PROTECTION TOOLS

## Social Security Retirement Benefits

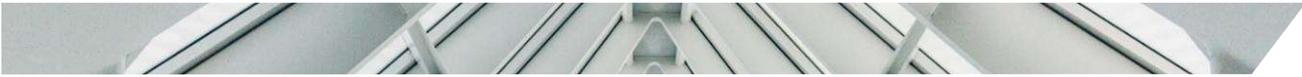
- They are a future income stream based on past employment contributions. After 10 or more years of marriage, an ex-spouse may collect benefits equal to half the benefits being paid to the other spouse without reduction of the other spouse's benefits. 42 U.S.C. § 402(b)-(c).
- When a dependent homemaker spouse has accrued no benefits for the homemaker's own account and may only claim half of the benefits of the breadwinner spouse, this can lead to a sizeable disparity in what the two spouses collect at retirement.



# ASSET PROTECTION TOOLS

## Social Security Retirement Benefits

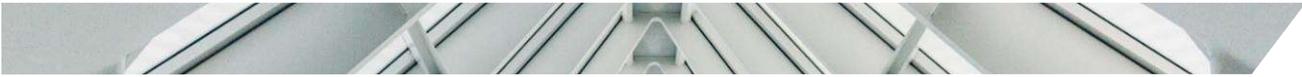
- The Social Security Act's anti-alienation provisions preempt an agreement in a divorce judgment's property provisions to "equalize" Social Security benefits. This is unenforceable.
- Possible solutions: In Michigan, a court may take into account, in a general sense, the extent to which social security benefits received by the parties affect the property division. See *Sparks v. Sparks*, 440 Mich 141, 485 NW2d 893 (1992).
- There is also an exception in the anti-alienation provisions in the case of child or spousal support. 43 U.S.C. § 659(a).
- A court may divide Social Security payments as spousal support. *In re Marriage of Hulstrom*, 794 NE2d 980 (Ill. App. 2003)

# ASSET PROTECTION TOOLS

## Military Pensions

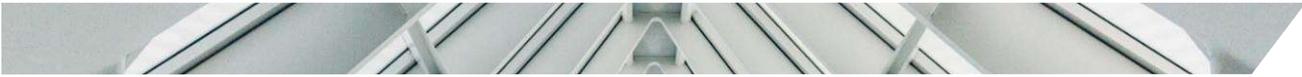
- The federal statute covering military pension division is the USFSPA, 10 U.S.C. § 1408. This was passed by Congress in 1982 to make military pensions subject to division by state courts in divorce and property division proceedings.
- A Survivor Benefit Plan (SBP) is an annuity that lets a retired service member (active duty or National Guard or reserves) provide continuing income to specified beneficiaries after the service member's death. 10 U.S.C. § 1447-1455.
- The death of a military retiree terminates all pension payments. When an SBP is elected, however, on the retiree's death, the designated survivor receives a lifetime annuity for 55% of the selected base amount (full retired pay or lesser figure).

# ASSET PROTECTION TOOLS

## Survivor Benefit Plans

- Practice tip:
  - It is imperative to identify the SBP in the judgment of divorce and to state which party will be responsible for the SBP premium, as the premium reduces the income available from the SBP.
  - The DFAs will not accept SBP requests from former spouses unless they are specifically addressed in the judgment.



# ASSET PROTECTION TOOLS

## Protecting the Former Spouse from CRSC Deductions

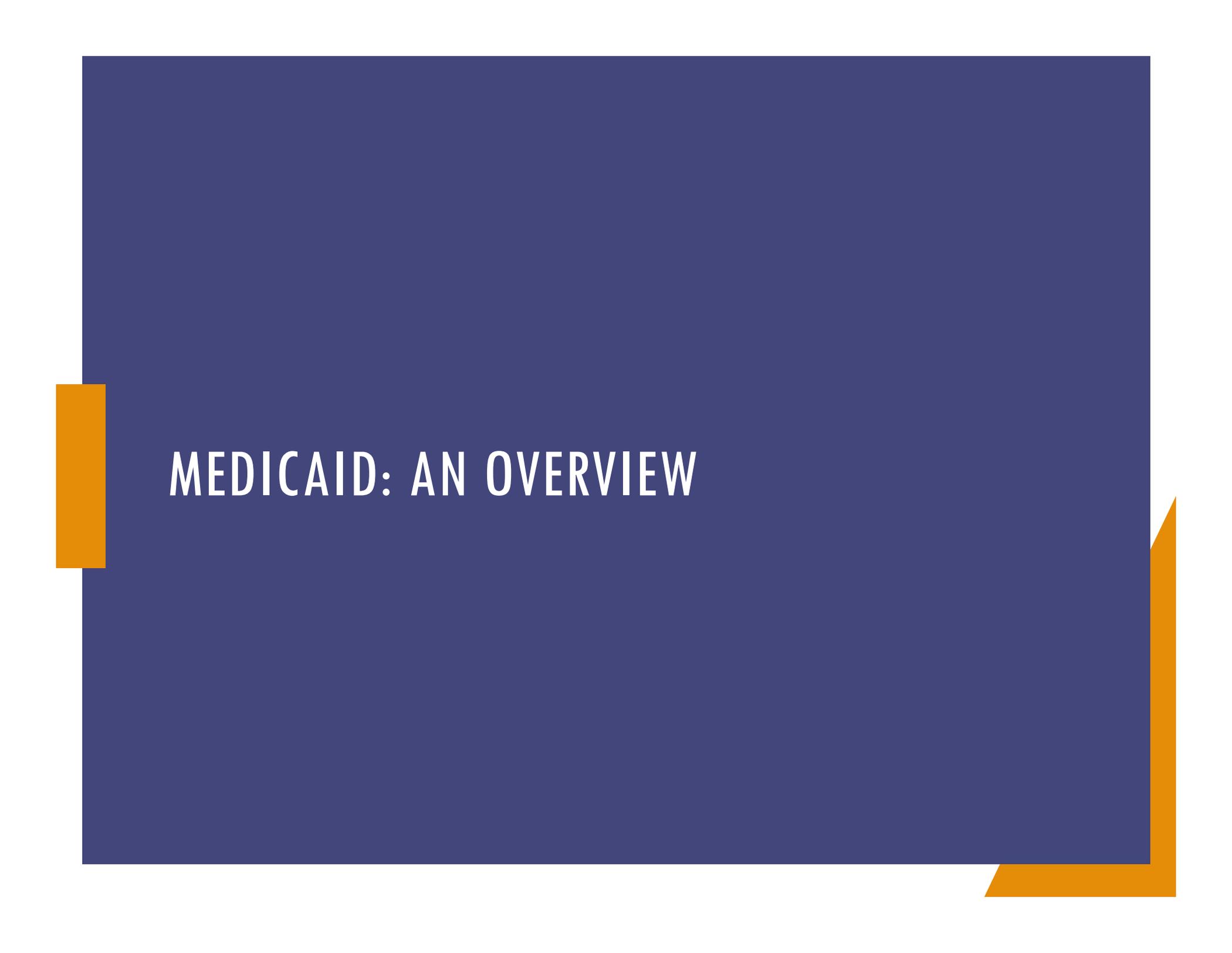
- If counsel for the former spouse is negotiating a settlement document, make sure that there is an indemnification clause.
- Be sure to include language that states that the military spouse will repay your client any money that is removed from the military spouse's share of total pay due to any action of the retiree.
- This is a tricky area due to the fact that if a recipient of a military pension applies for CRSC, which is a benefit provided by Congress for those who have a combat-related disability of at least 10% under certain conditions, it will trigger a reduction in the amount received by the former spouse. This is an area where benefits due to disability are not assignable. The key is to negotiate some property offset or even a reservation of spousal support to deal with this possibility. The key case in this area is *Mansell v. Mansell*, 490 U.S. 581 (1989) which provides federal protection.

# ASSET PROTECTION TOOLS

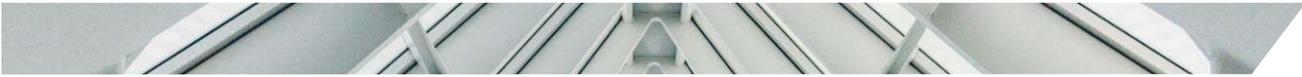
## Other

- Estate Planning – Trusts
- Maintaining separate property





# MEDICAID: AN OVERVIEW

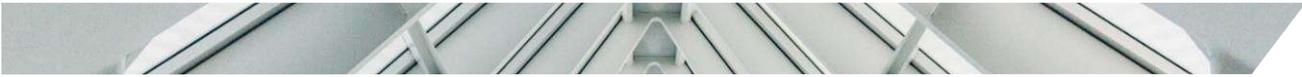
  


# MEDICAID

## General Explanation – Long Term Care Program

Medicaid is a federal needs-based long-term care assistance program created by Title XIX of the Social Security Act. Medicaid eligibility is determined by the total income and assets of a couple, which are pooled and totaled. A spousal resource allowance is determined by calculating one half of the assets to a certain limit, which is subject to regional adjustment techniques. The remaining assets are then spent down for the Medicaid spouse. There are also certain limitations governing the amount of monthly income allocated to both spouses.

Although certain assets may be held by the couple or transferred to the well spouse, the value of the assets that can be held or transferred is limited. Thus, the couple must “spend down” their assets for the Medicaid spouse to qualify for Medicaid. It is not as easy as gifting their assets to other family members, because such transfers create a period of ineligibility before the spouse can qualify for Medicaid. State agencies will look at the couple’s total assets during a “look-back period” to determine whether any disqualifying transfers were made.

# MEDICAID

## The Kind of Medicaid Benefit That We Are Not Covering

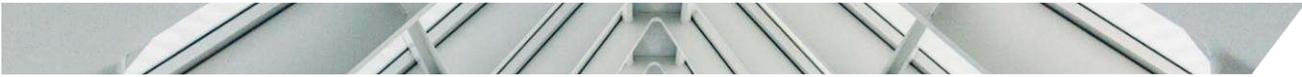
- Health Insurance Medicaid
  - Medicaid provides health coverage to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities. Medicaid is administered by states, according to federal requirements. The program is funded jointly by states and the federal government.
  - States establish and administer their own Medicaid programs and determine the type, amount, duration, and scope of services within broad federal guidelines. Federal law requires states to provide certain mandatory benefits and allows states the choice of covering other optional benefits.
  - Mandatory benefits include services including inpatient and outpatient hospital services, physician services, laboratory and x-ray services, and home health services, among others. Optional benefits include services including prescription drugs, case management, physical therapy, and occupational therapy.

# MEDICAID

## Eligibility Requirements

- What it covers?
- How to Qualify?
- Look-back Period
- Estate Recovery (or other reimbursement methods)

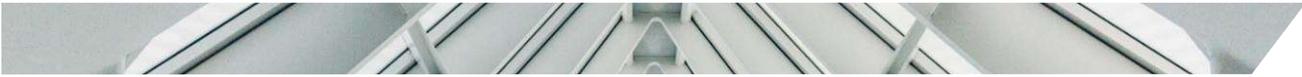


# MEDICAID

## Eligibility Requirements

- What it covers?
  - In-home Care
  - Nursing Home
- What it does not cover?
  - Assisted Living

# MEDICAID

## Eligibility Requirements

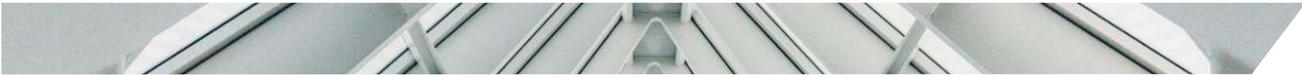
- How to Qualify?
  - Physical Eligibility
    - 3 ADLs (Activities of Daily Living) – Personal Care Needs
      - Bathing
      - Dressing
      - Using the toilet
      - Transferring (to or from bed or chair)
      - Ambulation
      - Eating
  - Asset Test
  - Income Test

# MEDICAID

## Eligibility Requirements

- Look-back Period
  - 5 years
    - Penalty Period for improper divestments
  - “Crisis Planning” when you do not have 5 years

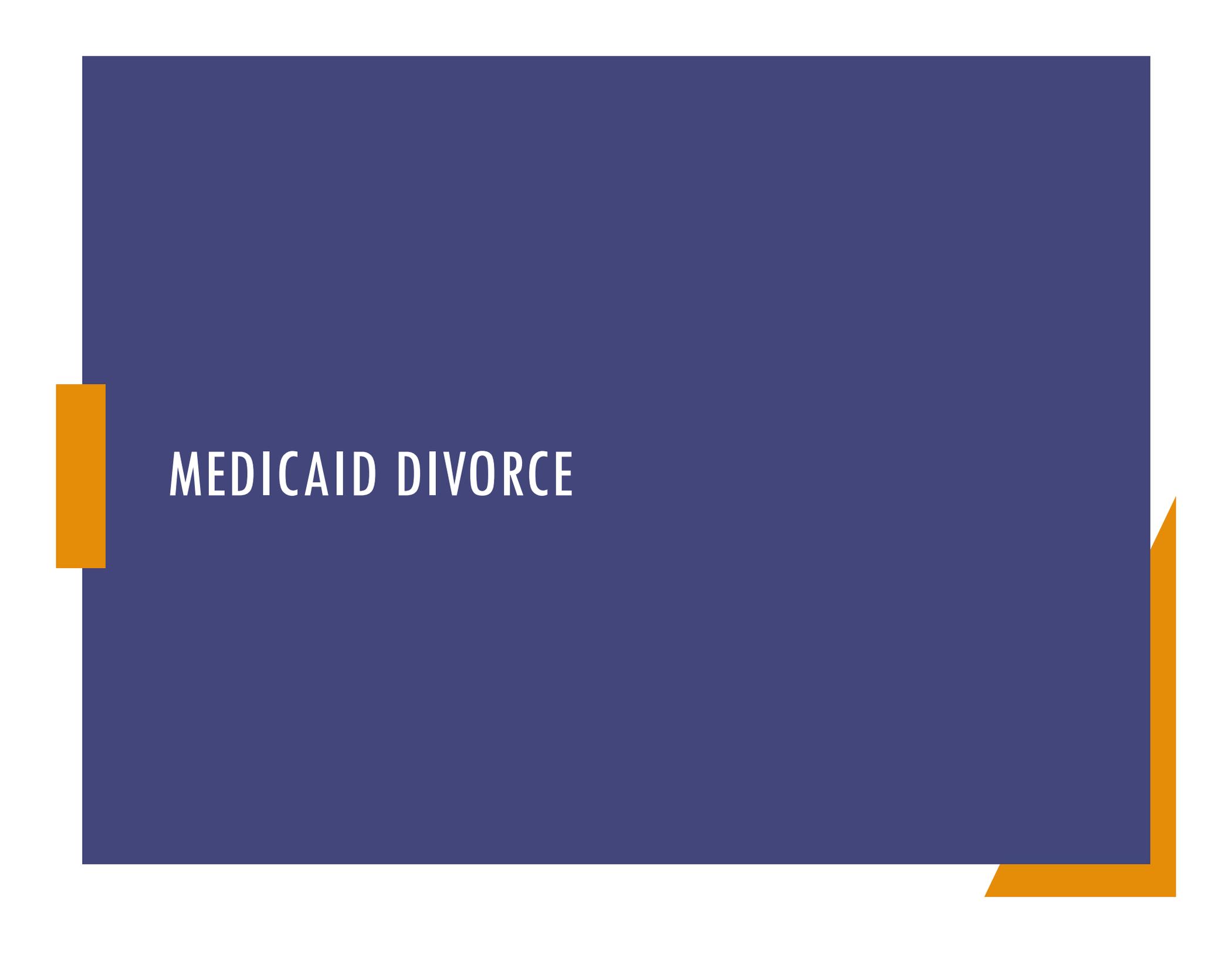




# MEDICAID

## Eligibility Requirements

- Estate Recovery & Other Reimbursement Methods
  - Probate Only
  - Liens on Residence
  - Up to the amount paid on an individual's behalf



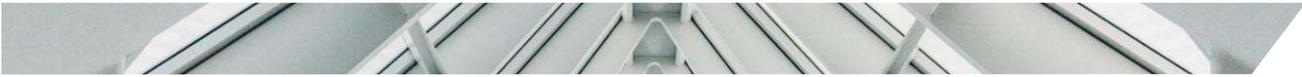
# MEDICAID DIVORCE

# MEDICAID DIVORCE

## Definition

- Dissolution of a marriage because one spouse needs long-term care which the couple cannot afford without significantly depleting their assets potentially leaving one spouse with very few assets.
- Medicaid divorce is intended to protect assets for the non-applicant spouse, also called the healthy spouse or the community spouse. By divorcing, the healthy spouse may be able to receive a greater amount of the couple's assets.

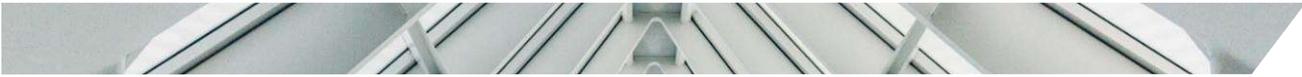




# MEDICAID DIVORCE

## Making the Decision

- Significant assets (\$500,000 or more)
- Protect assets for healthy spouse
- Future inheritance

# MEDICAID DIVORCE

## Income

The healthy spouse's income may not affect Medicaid eligibility, but there are income related divorce entitlements that should be considered.

### **INCOME AND CHILD SUPPORT**

- Are the funds paid or received considered income “available to meet the needs of the Medicaid applicant?”
- Under the Affordable Care Act, Medicaid eligibility is determined based on the Medicaid household's modified adjusted gross income. This does not include the child support that it receives.
- Child support payments made by the payer may be considered as available income depending on the state.

### **INCOME AND ALIMONY (SPOUSAL SUPPORT)**

- Are the funds paid or received considered income “available to meet the needs of the Medicaid applicant?”
- Alimony paid is deducted from income.

# MEDICAID DIVORCE

## Assets

- If married, the assets are considered jointly owned regardless of how titled
  - Divorce Laws – community property state or equitable distribution state
  - Separate Property vs. Marital Property
  - Gifts and Inheritances
  - Property Division – moderate imbalance
  - Prenuptial Agreements – disregarded for purposes of Medicaid eligibility and cannot be the basis to qualify a Medicaid spouse

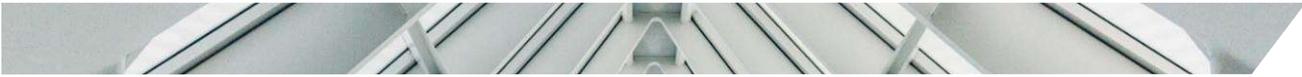


# MEDICAID DIVORCE

## Retirement Accounts & Pensions



- Is the IRA or other retirement account an asset or income?
- Is the IRA or other retirement account an asset of one spouse, both spouses or neither spouse for Medicaid eligibility purposes?
- If live in an equitable distribution state and IRA value is very high, Medicaid divorce may be relevant.

# MEDICAID DIVORCE

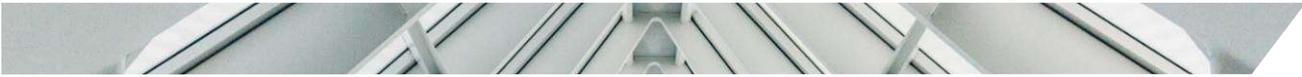
## Other Public Benefits (Social Security, SSI, Veteran Benefits)

Divorce will have an impact on other benefits that the couple or individual spouse may already be receiving or expect to receive in the future.

- Impact of divorce on SSI payments requires careful consideration. For example, medical care and services paid directly to a provider are not considered income of the SSI recipient.
- Social Security retirement benefits and survivor benefits – must be married at least 10 years to qualify to take advantage of other spouse's working history (will be entitled to one half of spouse's benefit, or if divorced and former spouse dies, entitled to 100% of former spouse's benefit) – Often the need to qualify for Medicaid will be the decisive factor, but it is necessary to determine what assets will be available for the well spouse following the divorce.
- Veteran's benefits under Title 38 of the United States Code – divorce affects veteran's entitlement to extra dependent allowances and may restore certain death benefits that had expired because of remarriage.



# ETHICAL CONSIDERATIONS OF A MEDICAID DIVORCE

# ETHICAL CONSIDERATIONS

## Medicaid Divorce - Is it Ethical?

What are the requirements in your state?

- Fraud and against public policy - *Vandervort v. Vandervort*, 134 P.3d 891 (Okla. Civ. App. 892: The parties colluded to misrepresent incompatibility as a ground for divorce to deceive public agencies concerning Wife's eligibility for Medicaid.

Has there been a breakdown in the marriage such that the bonds of matrimony are irreconcilably broken?

- Financial and/or emotional pressures experienced as a result of circumstances of unhealthy or incapacitated spouse causing a breakdown in the marital relationship
- Emotional pressures experienced as a result of circumstances of unhealthy or incapacitated spouse causing a breakdown in the marital relationship
- Incompatibility



# ETHICAL CONSIDERATIONS

## Other Thoughts

- Should elders or individuals with disabilities be prevented from ensuring their own quality of care?
- Other situations where people pre-plan in anticipation of a potential, future event that might otherwise harm their finances and ability to provide for themselves, i.e., bankruptcy and business planning.
- The U.S. healthcare and economic systems do not provide the right to basic health care and long-term care. Better care goes to those who can pay for it. The “spend down” Medicaid requirement results in an individual’s inability to pay for other basic needs.
- The older population and incapacitated individuals should similarly be able to pre-plan to protect their financial well-being and access to good health care. Often a matter of survival.



# ETHICAL CONSIDERATIONS

## Acting as the Lawyer

What are your ethical responsibilities as the lawyer?

- Each spouse should have their own attorney
- Is the unhealthy spouse competent?
- Is a Guardian Ad Litem or Power of Attorney needed for the incapacitated spouse?

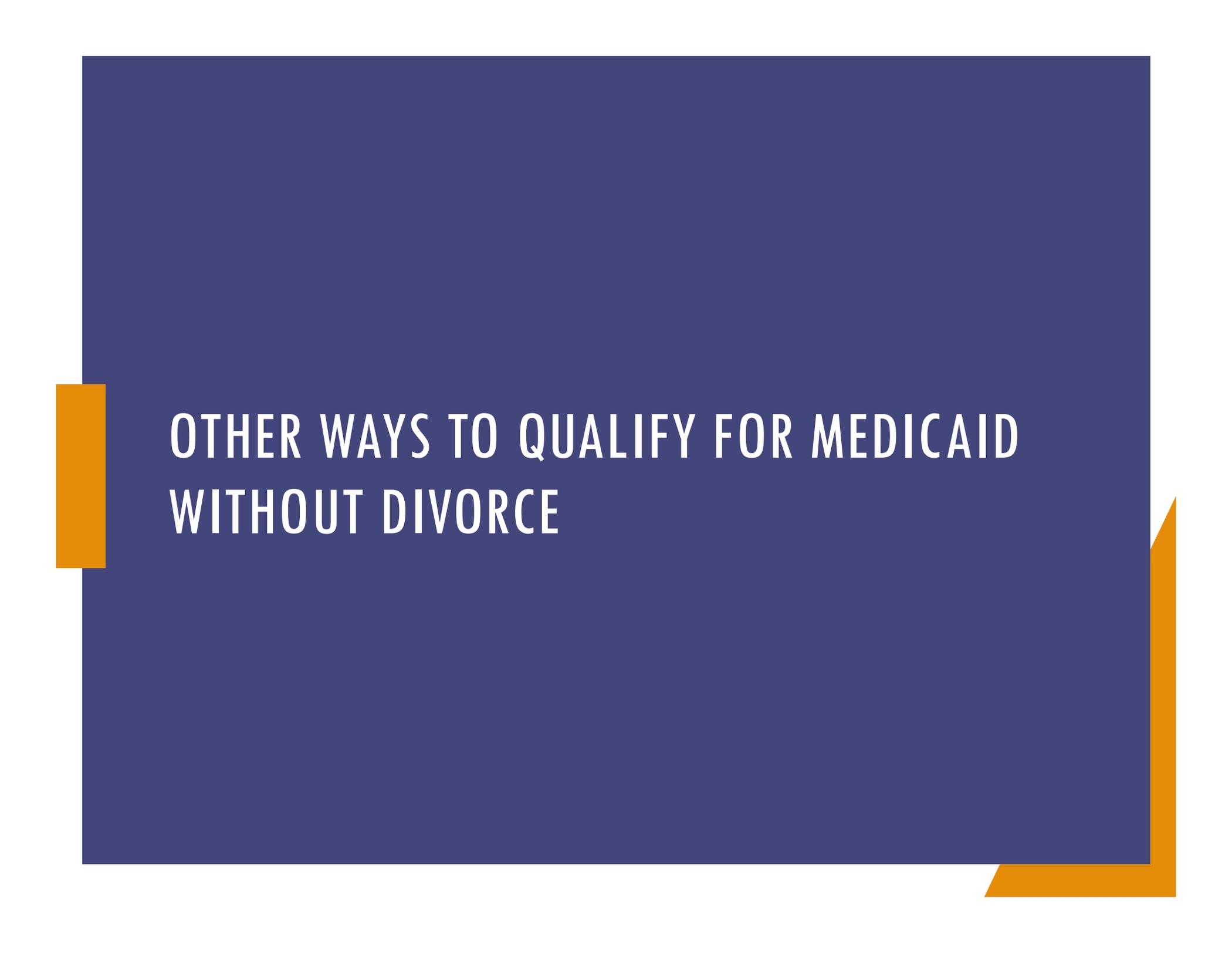
# ETHICAL CONSIDERATIONS

## Practice Pointers

Draft your documents:

- Framing the settlement consistent with the laws in your state (i.e. equitable distribution or community property)
- With a property division that is “mildly, but not wildly” imbalanced between the spouses
- With out using language regarding Medicaid planning/eligibility





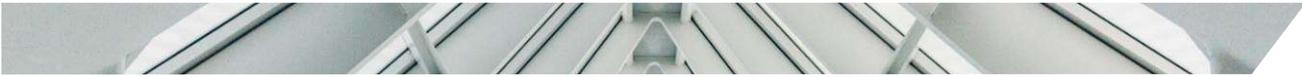
# OTHER WAYS TO QUALIFY FOR MEDICAID WITHOUT DIVORCE

# OTHER WAYS TO QUALIFY FOR MEDICAID WITHOUT DIVORCE

## Asset Protection Trust

- **Irrevocable Asset Protection Trust**
  - Transfer assets to a trust that protects them. This is done in “pre-planning” and must be outside the look-back window.
  - Retitle asset into name of Trust.



# OTHER WAYS TO QUALIFY FOR MEDICAID WITHOUT DIVORCE

## Spend Down

- **Prepay funeral expenses.** A prepaid or pre-need funeral contract allows you to purchase funeral goods and services before you die.
- **Pay off a mortgage, car loan, or credit card debts.** You can pay off the debt fully or make partial payment.
- **Make repairs to a home.** Fix the roof, make the house handicapped accessible, buy new carpet, etc.
- **Replace an old automobile.** This can be useful for the healthy spouse.
- **Update your personal effects.** Buy household goods or personal comfort objects. Buy a new wardrobe, electronics, or furniture.
- **Medical care and equipment.** Purchase items that aren't covered by Medicare or Medicaid. See a dentist or get your eyes checked if those items aren't covered by your insurance.
- **Pay for more care at home.** Make sure you get any caregiving agreements in writing, especially if family members are providing the care.
- **Buy a new home.** A home can be an exempt asset, so it may be possible to purchase a new home.

## OTHER WAYS TO QUALIFY FOR MEDICAID WITHOUT DIVORCE



- Medicaid Compliant Annuity
- “Half-a-loaf” planning / Promissory Notes
- Caregiver Agreement
- Spousal Transfer
- Spousal Refusal – New York & Florida Only

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