# Table of Contents

About the Author ........................................................................................................... v
Preface ............................................................................................................................... vii

Chapter 1: Paying for Health Care ...................................................................................... 1
1.1 Medicare .................................................................................................................. 1
1.2 Medicare Part A Eligibility and Enrollment ......................................................... 2
   [1] Individuals Age 65 or Older ............................................................................... 2
   [2] Individuals under Age 65 ............................................................................... 4
   [3] Enrollment ........................................................................................................ 4
      [a] Hospital Insurance Benefits ....................................................................... 7
      [b] Spell of Illness and 90-Day-Coverage Period ............................................. 8
      [c] Lifetime Reserve 60-Day Coverage .......................................................... 9
      [d] Skilled Nursing Facility (SNF) Care ......................................................... 10
      [e] Home Health Care .................................................................................... 11
   [6] Hospice Care .................................................................................................... 14
   [7] Medicare Savings Programs .......................................................................... 16
1.3 Medicare Part B ...................................................................................................... 17
   [1] Eligibility ......................................................................................................... 17
   [4] Services Not Covered by Part B ................................................................... 22
1.4 Medicare Advantage (MA) (Formerly Medicare Part C or Medicare + Choice) ....... 22
   [1] Eligibility ......................................................................................................... 22
   [2] Enrollment ...................................................................................................... 23
iv CONTENTS

1.5 Medicare Part D Eligibility and Benefits .......................25
       Retiree Prescription Drug Plans .......................29
1.6 Medicare Payment Procedures......................................30
1.7 Appeals from Medicare Denial of Coverage..................31
1.8 Appeals for Beneficiaries in Medicare Advantage
   (Medicare Part C)..................................................32
1.9 Medicare Reimbursement and Workers’
   Compensation and Insurance ....................................33
1.10 Medigap Insurance Policies.......................................33
1.11 Program of All-Inclusive Care for the Elderly
   (PACE).......................................................................35
1.12 Employer Health Insurance for Employees
   Age 65 and Older......................................................36
1.13 Employer-Provided Retiree Health Care Benefits .........37
1.14 Veterans Health Care Benefits..................................38

Chapter 2: Long-Term Care Housing Options ......................41
2.1 Introduction..................................................................41
2.2 Aging in Place............................................................41
   [1] Advantages and Disadvantages............................41
   [2] Meeting the Challenges of Aging in Place..............43
      [a] Is Aging in Place Affordable?.........................43
      [b] House-Sharing with a Relative .......................45
      [c] House Sharing with a Nonrelative .................46
       Health Care.........................................................47
   [4] Adult Day Care....................................................49
2.3 Age-Restricted Housing.................................................50
   [1] Federal and State Fair Housing Laws....................50
   [2] Types of Age-Restricted Housing.........................53
      [a] Rental Property.............................................54
      [b] Ownership...................................................55
2.4 Retirement Housing Options..........................................56
   [1] Planned Communities.........................................56
   [2] Condominiums..................................................58
   [3] Cooperative Ownership.....................................60
   [4] Mobile and Manufactured Homes.........................60
Contents

2.5 Supportive Housing ..........................................................62
  [1] Congregate Housing.....................................................62
  [3] Board and Care Homes ...........................................68
  [4] Continuing Care Retirement Communities (CCRCs) .....................................................................69
    [a] What Is a CCRC? ............................................69
    [b] Admission Contract and Fees ........................71
    [c] Eviction...................................................................74

2.6 Nursing Homes ..................................................................74
  [1] Services........................................................................75
  [2] Governmental Regulation ........................................77
  [3] Contracts of Admission ...........................................78
    [a] Responsible Party Provisions ........................79
    [b] Binding Arbitration Clauses ..........................80
  [4] Transfers and Discharges ........................................82
  [5] Federal Nursing Home Reform Act (NHRA) ........83
  [6] State Ombudsman.....................................................87
  [8] Common Law Tort Rights ......................................89
    [a] Intentional Torts .............................................89
    [b] Medical Malpractice .....................................90
    [c] Negligence ...................................................91
    [d] Contract ........................................................94

2.7 Hospice Care ......................................................................95
  [1] Medicare Eligibility for Hospice Care .................95
  [2] Hospice Services ...................................................96

Chapter 3: Paying for Long-Term Care ..............................................99

3.1 Introduction .......................................................................99

3.2 Sources of Private Pay.....................................................100
  [1] Personal Savings and Family Assistance ..........100
    [a] Retirement Savings and Annuities ..............103
    [b] Variable and Fixed Annuities .....................105
    [c] Deferred Annuities ........................................107
    [d] Income Taxation of Annuities ....................108

3.3 Refinancing the House ......................................................108

3.4 Reverse Mortgages ...........................................................109
  [1] Description ..........................................................109
  [2] The Home Equity Conversion Mortgage ............111
## CONTENTS

### 3.5 Sale of House and Leaseback .........................................113
1. What Is a Sale and Leaseback? .............................113
2. The Lease .................................................................114
3. Federal Income Tax Consequences .....................115
   a. Statutory Exclusion of Gain ........................115
   b. Calculation of Gain......................................117
4. Tax Consequences to the Parties .......................118
5. Advantages and Disadvantages .........................119

### 3.6 Sale of Remainder Interest .............................................120

### 3.7 Continuing Care Retirement Communities (CCRCs) ...........................................121
1. Admission Policies and Fees ..............................122
2. Federal Income Tax Deductions of Fees ............125
3. Levels of Care and Personal Security ..................125
4. Regulation ...............................................................126

### 3.8 Long-Term Care Insurance ...........................................127
1. Benefits .................................................................128
2. Insurability, Cost Considerations, and Lapsing of Policies ...........................................130
3. Federal Income Tax Consequences .....................132
4. State Partnership Policies .......................................133
5. Hybrid Long-Term Care Insurance Policies .......133

### 3.9 Medicare ...........................................................................136

### 3.10 Medicaid ...........................................................................137
1. Introduction ............................................................ 137
2. Paying for Nursing Home Care ...........................138
3. Eligibility Requirements for Single Individuals ...........................................138
   a. Residency .....................................................138
   b. Categorically Needy ...................................139
   c. Optional Categorically Needy .....................140
   d. Medically Needy .......................................141
   e. Resource Eligibility Requirements ..........142
4. Eligibility Requirements for Married Individuals ...........................................144
   a. Income ......................................................144
   b. Resources ...............................................145
[5] Community Spouse Resource and Income Rights .................................................................146
   [a] Spousal Resource Allowance ..................147
   [b] Income for the Community Spouse:
       Minimum Monthly Maintenance Needs Allowance (MMMA) ..........................147
   [c] Use of Institutionalized Spouse’s Income for the Benefit of the Community Spouse ..149
   [a] Look-Back Period and Period of Ineligibility ...........................................150
   [b] Transfers for Fair Consideration:
       Personal Services Contract ........................................153
   [c] Exempt Gifts .............................................................155
   [d] Transfer of Home ......................................................156
   [e] Gifts in Trust ............................................................157
[7] Planning Techniques for Married Couples ......158
   [a] Repayment of Debts by Institutionalized Spouse ........................158
   [b] Conversion of Countable Resources into Exempt Assets ..................159
   [c] Conversion of Countable Resources into Income for Community Spouse ......160
   [d] Changing Beneficiaries .............................................161
[8] Statutorily Approved Trusts That Create Eligibility.........................................................162
   [a] “Miller Trusts” ...........................................................162
   [b] Payback Trusts .........................................................162
   [c] Pooled Trusts ..........................................................163
[9] Estate Recovery .................................................................164
3.11 Paying for Adult Day Care .........................................................164
3.12 Life Insurance as a Source of Long-Term Care Financing ...........................................165
   [1] Accelerated Benefits ..................................................165
   [2] Viatical Settlements ......................................................166
Chapter 4: Legal Implications of Mental Incapacity: Guardianship, Conservatorship, and Powers of Attorney ...................................................167

4.1 Introduction .....................................................................167
4.2 Guardianship Terminology ...........................................172
4.3 For Whom May a Guardian be Appointed? ...............172
4.4 For Whom May a Conservator be Appointed? ...........174
4.5 The Relationship between the Need for a Guardian and the Individual’s Medical Condition ..........................................................175
4.6 The Requirement of a Demonstrated Need for a Guardian..........................................................176
4.7 Types of Guardianships...................................................178

[1] Guardian of the Estate...................................................179
   [a] Limits on the Authority of the Guardianship of the Estate ...........................................179
   [b] Expenditure of Principal.........................................181
   [c] Control of the Person ..................................182
   [d] Voluntary Conservatorship or Guardianship .................................................184
[2] Guardian of the Person...................................................185
   [a] General Authority ...........................................185
   [b] Mental Health Treatment ............................185
   [c] Termination of Life-Sustaining Treatment .......................................................186
   [d] Proof of the Incapacitated Person’s Desires .............................................189
[3] Plenary Guardianship.....................................................192
[4] Limited Guardianship ...................................................194
   [a] The Concept of Mental Capacity ................194
   [b] The Purpose of Limited Guardianship .............................................196
   [c] Reluctance to Use Limited Guardianship .................................................197
[5] Temporary or Emergency Guardians .........................201
   [a] Procedures...................................................202
   [b] Reasons for Temporary Guardianship .................................................203
4.8 Guardianship Procedures ............................................... 206
   [1] The Petition ............................................................. 206
         [a] Content ........................................................... 207
         [b] Nomination of the Guardian ...................... 211
         [c] Where to File the Petition .................... 213
         [d] Changing the Residence or Domicile of the Ward ...... 213
         [e] In Rem Jurisdiction ...................................... 216
   [2] Notice ....................................................................... 217
         [a] Presence of the Allegedly Incapacitated Person .......... 219
         [b] Right to a Jury ................................................ 220
         [c] Court Visitors ................................................ 220
         [d] Right to Counsel ......................................... 221
         [e] Guardian Ad Litem ....................................... 223
         [f] Evidentiary Standards .................................. 224
4.9 Selection of the Guardian ............................................... 226
   [1] Guardian Nominated by the Petitioner .............. 227
   [2] Nomination of Guardian by the Incapacitated Person .... 228
   [3] Statutory Priorities ................................................. 229
4.10 Paying for the Costs of Guardianship ......................... 233
   [1] Attorneys’ Fees ....................................................... 234
4.11 Reporting Requirements and Court Supervision of the Guardian ........................................ ..... 236
   [1] Annual and Final Reports to the Court ............ 236
4.12 Termination of Guardianship ....................................... 238

Chapter 5: End-of-Life Decision Making ................................................. 241
5.1 The Right of a Competent Patient to Forego Life-Sustaining Medical Treatment ......................... 242
       [1] Informed Consent ................................................. 242
5.2 Health Care Decision Making Absent Judicial Proceedings for the Mentally Incapacitated Patient ......................................................245
  [1] Informal Reliance upon Spouse or Family ........245
  [2] Statutorily Designated Surrogate
     Decision Maker ......................................................247
     [a] General Description ......................................247
     [b] Selection of the Surrogate ............................248
     [c] When Surrogates Disagree ..........................249
     [d] The Authority of the Surrogate ...................249

5.3 Health Care Decision Making for the
    Incapacitated Patient: Guardianship and Judicial Oversight ....................................................253
  [1] Cruzan: The U.S. Supreme Court Sets
      the Framework ........................................................253
  [4] Termination of Treatment under Best
      Interest Standard .................................................256

5.4 Living Wills ......................................................................257
  [1] Procedural Requirements ......................................258
  [2] State Forms and Substantive Requirements .......259
     [a] Permanently Unconscious ...........................260
     [b] Terminal Illness .............................................261
     [c] Artificial Nutrition and Hydration ...............262

5.5 Health Care Powers of Attorney ...................................264
  [1] Procedural Requirements ......................................266
  [2] Statutory Forms and Customized Documents ..268
      Care Facility ..........................................................271
  [4] Selection of the Surrogate:
      Who, How Many, and Successors ....................271
      to Act Begin? ..........................................................273
  [6] The Extent of the Surrogate’s
      Decision-Making Authority ..............................273
  [7] Relation of Surrogate and Guardian
      of the Person ..........................................................274
  [8] HIPAA .................................................................275
5.6 DNR Orders ................................................................. 276
[1] CPR ................................................................. 276
[2] State DNR Statutes ............................................ 277

5.7 POLST ........................................................................ 280

5.8 Palliative Care at the End of Life ................. 282
[2] Terminal Sedation ........................................... 283
[3] Impediments to Adequate Pain Management ................................................. 284
[a] Use of Opioids for Acute or Chronic Pain ............................................. 286
[b] Federal Barriers to Use of Opioids ............... 287
[c] State Barriers to Adequate Pain Relief .............................................. 289
[d] Liability for Failure to Adequately Treat Pain ........................................... 290

5.9 Hospice Care .......................................................... 291
[1] Medicare Payment for Hospice Care ............ 291
[2] Hospice Care Services ....................................... 293
[4] Paying for the Cost of Hospice Care .......... 296

5.10 Disposition of the Decedent’s Physical Remains .. 300
[1] Common Law .................................................. 301
[2] Statutory Law ................................................... 302
[3] Other Evidence of the Decedent’s Intent ....... 304
[4] Re-interment and Payment ........................... 305

5.11 Organ Donation ...................................................... 306

Table of Cases .................................................................. 000
Index ................................................................................. 000