Elder Law 101

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Disclaimer

- This presentation is meant as general information for the viewers and doesn't create any attorney-client relationship
- This presentation isn't tax or legal advice

What are the Critical Issues?

- The cost of long-term care
- Medicaid eligibility
- Estate Planning / Advanced Directives
- Communication and Transparency with loved ones
- Implementing the Plan

Estate Planning Basics

- Advance Directives
  - Health Care Proxy
  - Living Will
  - HIPAA Form
  - Agent to Control Disposition of Remains
  - Power of Attorney
- Last Will and Testament
- Revocable Trusts
- Irrevocable Trusts

Health Care Proxy

- A HCP allows you to decide who will make health care decisions for you if you are unable to make them for yourself.
  - closest relatives who may be legally entitled to act on your behalf, may not be able or willing to act according to your wishes.
  - An HCP enables you to choose someone you trust to act in accordance with your wishes.
  - You can only appoint one agent at a time (not co-agents) and you can appoint alternates.
  - Every adult, regardless of age, should have a fully executed, up to date Health Care Proxy at all times.

HIPAA Form

- **What is a HIPAA Form?**
  - Authorization for Release of Health Information Pursuant to HIPAA (Health Insurance Portability and Accountability Act of 1996)
- **Why do I need one?**
  - This document allows another individual (typically your health care proxy) to obtain copies of your medical records from your physicians.
  - Also allows another individual to discuss issues with your doctors.
  - HIPAA Authorization is also in Health Care Proxy

Living Will

- **Why do I need a Living Will?**
  - A Living Will is a document that contains your directions regarding medical treatment and end of life decision making, in case you are not able to make those wishes known at the time necessary.
  - Although there is no NYS law that requires that a Living Will be followed, NYS courts have consistently upheld them.
  - You should have a Living Will, in case there is any question as to your wishes, especially if you do not wish to be kept alive by extraordinary measures.

Agent to Control Disposition of Remains

- Legal document that allows you to appoint a specific adult to make all decisions regarding your body after death
  - Burial / Cremation
- Without this form, the default is to follow your next-of-kin hierarchy (spouse, adult children, parents, siblings, etc.)
- New York Public Health Law § 4201(2)
- Prepaid funeral under NYS General Business Law §453

Durable Power of Attorney

- **What is it?**
  - A Durable Power of Attorney (POA) is a document that allows an individual appointed as agent to handle the principal's financial affairs in the event the principal is unable to handle them his or herself.
- **Why do I need one?**
  - If you are unable to handle your own finances, due to accident, illness, etc.
    - family may not be able to access your assets.
    - bills may not get paid.
    - Other legal actions may not be able to be taken in a timely manner.
  - Without a valid POA an Article 81 Guardianship proceeding may need to be commenced.
- **How does it work?**
  - It authorizes an agent to act on the principal's behalf in some or all legal matters:
    - Sign documents and make contractual commitments on principal's behalf regarding real estate, etc..
    - Make financial transactions from your accounts.
  - May be initiated upon signing the POA, or at such time that you become incapable of doing such things for yourself. (springing Powers of Attorney are *not* recommended)
  - Principal may name a relative or anyone that you trust.

Durable Power of Attorney

- Agent has broad power to transfer assets and engage in asset preservation.
- Gifting powers can be customized based on comfort level of the Principal.

POA- General Provisions

- Real Estate Transactions
- Banking Transactions
- Business Operations
- Estate Transactions
- Claims / Litigation
- Health Care Billing
- Purchase / sale of goods
- Tax Matters
- All Other Matters

POA- Modifications Section

- Power to Gift assets
- Trust Transactions
- Safe Deposit Box entry
- Retention of Attorneys/ Accountants/personal Service Contracts, etc
- Statutory Elections
- Spousal Refusal forms
- Medicaid Applications
- Digital Assets / Devices

Last Will and Testament

- Having a will allows one to indicate in a legally binding way:
  - **Who** will receive **what** from your estate
    - Beneficiaries and Bequests
  - **Who** will make sure that your wishes are carried out
    - Executor and Trustee

Last Will and Testament

- What must the will include?
  - Named Beneficiaries
    - People
    - Entities (Charities, etc.)
    - Pets
  - What the beneficiaries receive
    - Tangible personal property
    - Specific bequests
    - Real property
    - Residuary Estate
  - Names of Fiduciaries
    - Executor(s)
    - Trustee(s) [if any]
  - Other Instructions
    - Guardians of minor children
    - Tax implications and considerations
    - Information regarding IRAs
    - No Contest Clauses
    - Simultaneous death clauses

What happens if you pass away without a Will?

- When someone passes away without a Will and has assets titled to their name alone, an Administration Proceeding needs to be commenced in the Surrogate's Court of the County where the decedent was domiciled.
- SCPA 1001 provides a hierarchy of individuals who may obtain Letters of Administration from the Court
- EPTL 4-1.1 provides for distribution of an intestate decedent's property
- Not having a will forfeits your right to state who you want to control your estate and who receives your money. Instead, the "intestacy laws" decide for you.

Revocable Living Trusts and Probate Avoidance

- A **Revocable Living Trust** is a trust made while the person establishing the trust (the Grantor) is still alive for their benefit during their life.
- Most commonly used to:
  - Avoid probate
  - Quickly transfer assets to a beneficiary
- A **Revocable Living Trust** allows you to make changes to the trust and continue to control and receive benefit from the assets held by the trust during your lifetime.
- A revocable trust directs how the trust assets are distributed to your beneficiaries after your death.
- Assets held in a trust are "non-probate" assets and may avoid an estate administration or probate proceeding after death of the Grantor.

Irrevocable Medicaid Asset Protection Trust

- Benefits:
  - 5 years after transfer occurs, property and assets are protected for Nursing Home Medicaid eligibility purposes
  - 2 and ½ years after transfer occurs, property and assets are protected for Home Care Medicaid eligibility purposes (once the lookback period is implemented, possibly in 2026)
  - The transfer allows the transferee to receive the premises with a stepped-up cost basis upon the death of the transferor, through the reservation of the life estate to the grantor
  - Allows property to be sold during transferor's lifetime without income tax consequences
  - The personal residence exclusion of $250,000 if single, or $500,000 if married, is still available

Irrevocable Medicaid Asset Protection Trusts, cont'd.

- Detriments
  - No annual exclusion is available
  - If a limited power of appointment is retained, the gift to the trust is incomplete
  - The assets are still includible in the Grantor's taxable estate
  - Planning should be considered early- when one is healthy and not likely to need long term care at home or in nursing home.

The Cost of Long Term Care and the Home Care Medicaid Program

Cost of Nursing Home Care

- NY:
  - Westchester: Approx. $170,000- $200,000 /year
  - NYC: $200,000-$225,000/year
  - Long Island: $200,000-$225,000/year
- CT:
  - $182,000/year
- NJ:
  - $145,000/year

Cost of Home Care

- Approx. $35 to 45/hour
- If receiving 8 hours of care per day, seven days a week
  - $102,200 to $131,400 /year

How Can I Limit the Cost of my Care?

- Medicaid Eligibility
- Long Term Care Insurance
  - (a) State Certified Policies
  - (b) Straight Long-Term Care Coverage
  - (c) Hybrid Policies
- Advanced Long Term Care Planning
  - Medicaid Asset Protection Trust

Long-Term Care Insurance

- Private LTC policies can provide financial assistance with home care or nursing home care.
- Newer hybrid policies combine LTC benefit with death benefit if the LTC benefit is not fully redeemed.
- NYS Partnership Policies are a way to combine private LTC insurance with later Medicaid coverage.
    - As of January 1, 2021, no partnership polices are available for purchase in NYS. This does not affect current, active insureds who are Partnership qualified. (See, https://nyspltc.health.ny.gov/ as of 6/25/24).

Medicare

- Medicare:
  - Eligibility: Most Seniors over age **65**.
- Coverage is Divided into Parts:
  - A: Hospital Care and Skilled Nursing Facilities
  - B: Medical Insurance
  - C: Medicare Advantage Plan
  - D: Prescriptions

Medicare Part A

- Part A covers a skilled nursing facility up to 100 days if you have available days in your benefit period, your doctor determines you need rehabilitation, and the stay is not deemed purely "custodial."
- Days 1-20 fully paid.
- Potential for 80 more partially paid days at a skilled nursing facility, with a co-pay of $217 each day.
  - Prior to the Jimmo Settlement Agreement in January 2013, rehabilitation services were terminated if they were not leading to any "improvement."
  - The current standard under the Jimmo Settlement Agreement is to provide services to maintain function or prevent slow decline.
  - Coverage terminated if patient is deemed "recovered."
- After 100 days, you pay all costs of the skilled nursing facility.

CAUTION: Need qualifying hospital stay to trigger any nursing home coverage.

- To qualify, you must have spent at least three consecutive days as a hospital inpatient within 30 days of admission to a nursing home and need skilled nursing or therapy services.

Medicare Part B

- Medical services necessary to treat a disease or condition
- Clinical research
- Ambulance services
- Durable medical equipment
- Mental health
- Second opinions
- Limited outpatient prescriptions
- Preventive screenings and wellness visits

Very limited home care benefit (roughly 8 hours per week, post surgery, for wound or other skill needs, lasting 3-6 weeks in duration).

Medicaid Eligibility
Federal Requirements

- Must be a US citizen or permanent lawful resident
- Must be 65 or older or disabled as defined by state's Medicaid provision
- Must be a resident of the state and county where the application is filed

Each state has their own Medicaid rules and eligibility criteria

The Cost of Long Term Care and the Home Care Medicaid Program

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Medicaid Eligibility Example

New York State Resource/Income Requirements

Single Individual

- Income:
  $1,836/month + $20 *disregard
  If Nursing Home: $50 Personal Needs Allowance
- Resources:
  $33,038.00 + Irrevocable Burial Trust Account

Couple in community

- Income:
  $2,509.00/month per couple
- Resources:
  $44,796.00/couple

Community Spouse

- Income:
  $4,066.50/month
- Resources:
  1. Minimum CSRA: $74,820.00
  2. Maximum CSRA: $162,660.00

What Resources count.....

Non-retirement monies including, but not limited to:

- Checking
- Savings
- Investments
- Mutual Funds
- Vacation home(s) and/or homestead greater than the 2026 equity limit
- Non-qualified annuities
- Stocks / bonds
- Cash value of a whole life insurance policy
  - Exception: Burial fund; The applicant and spouse may each have a burial fund. Up to $1,500 from the cash value of a whole life insurance can count toward same.

What sources of income count…

- ****Always obtain the GROSS amount
- Social Security
- Pension
- IRA required minimum distribution
- Veteran's benefit
- Dividends / Interest
- Alimony
- Worker's compensation
- Exempt income:
- Holocaust Reparations

Medicaid Eligibility – Spousal Refusal

Creates Medicaid eligibility in an individual needing Medicaid covered services, either in the community or institution.

Allows "community spouse" to retain resources and income above the levels ordinarily permitted to an unmarried individual without impacting eligibility of the spouse applying for Medicaid.

Medicaid Eligibility – Look Back Period

- Medicaid Home Care
  - Currently no look back period
  - In the future (timing currently unknown), there will likely be a phased-in 30 month look back period for any uncompensated transfers made on or after October 1, 2020.
- Medicaid Nursing Home: 60 month look back period (5 years)
  - If uncompensated transfers were made during look back period, an application for Medicaid should not be filed without first speaking to any attorney.
  - Can appeal imposition of penalty period at a Medicaid Fair Hearing.
  - Presumption is uncompensated transfer was made for the "purposes of qualifying for Medicaid eligibility"

Key Takeaways

- Health Care Proxies, HIPAA forms, Living Wills, Agent to Control Disposition of Remains, and a well-drafted Power of Attorney with broad gifting power are important documents that all individuals should have in place.
- A valid properly executed Last Will and Testament allows one to control their estate and who receives their money when they pass away; otherwise, the State's "intestacy laws" will decide.
- Revocable and Irrevocable Trusts allow one to avoid probate and to quickly (and privately) transfer assets to their chosen beneficiaries.
- Irrevocable Medicaid Asset Protection Trusts are also important tools for Medicaid planning.
- Medicaid / Medicaid planning and/or Long-Term Care insurance can help protect one's life savings from the costs of long-term care.

How to Implement the Plan

- Physically organize your affairs
  - Create files / folders (paper and/or digital)
  - Organize and keep 8 years of financial bank records
- Review and update existing Estate Plan
  - Last Wills, Trusts and Advanced Directives
- Ensure you have a Durable General Power of Attorney with broad gifting powers
- Organize and review all insurance policies
  - Ownership, primary / secondary beneficiaries
- Create list of your financial and health care providers
- Review and assess income
  - Pension, Social Security, retirement fund RMD
- Review and organize burial arrangements

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