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Necessary Evils: Exploring Legal and Financial Issues Hope Hospice Family Caregiver Education Series October 15, 2020

I. Introduction and Guiding Principles

Life has unexpected surprises – some pleasant, some not. A diagnosis of a serious illness, a fall, divorce or death in the family can leave us scrambling to figure out what to do next. Fortunately, you can reduce some of the uncertainty by planning ahead! The goal is to put your desires in writing while we still have mental capacity to plan, so that spouses, family and friends know what you want and can carry out your wishes. I will be addressing some of the legal planning tools you can use to manage your finances and health care to help you and your family to get through the tough times in the best way possible.

A. Guiding Principles: Self-Determination, Least Restrictive Method & Protection

All adults are presumed by the law to be mentally competent to make their own decisions, unless a court has taken away certain decision-making power, such as with a conservatorship. Each person also has the right to live as independently as possible for as long as possible. To respect a person's independence, the fields of health, mental health and social services follow the principle that the "least restrictive" method that is effective should be used in financial management and health care decision making.

If you think about it, these are the same guiding principles that any of us would want for ourselves – to make our own decisions and have them respected as long as we are able to make those decisions. When we are not able to, we would want someone to help us, by following our wishes that we had previously made known to our doctors and to those people closest to us. By using the least restrictive methods, the people helping us can best balance our need for protection with our right to self-determination.

There are court procedures available to assist when there has not been advanced planning, but court procedures are generally more expensive, complicated and slower.

"Mental capacity" varies depending on what action you want to take. There is a lower standard to make a Will, and a higher standard to make a Trust or enter into a contract. You must do your legal planning while you have the mental capacity to do so.

Health issues that can temporarily affect mental capacity include fevers, infections, pain, and reactions to antibiotics. A person's physician is a good person to start with to help determine the person's mental capacity, especially if the doctor is a "geriatrician," a doctor who specializes in aging issues. Sometimes, a "neuropsychological evaluation" by a specialist may be recommended to evaluate more in-depth a person's mental capacity to make financial decisions and to recommend the most appropriate treatment, especially if dementia is suspected.

II. Methods of Financial Management (starting with the "least restrictive") for Asset Management During Life (and possible incapacity) & Transfer at Death

Role of Elder Law Attorney: Elder focus, possible conflicts of interest

Please note: The financial resources are the parents' resources and should be used for the benefit of the parents to provide for their health care and quality of life.

There are various methods you can use while you have mental capacity to plan for management of your assets during life (and in case of possible incapacity), and to transfer your assets at death.

A. Management During Life and Possible Incapacity

Tax Caution: The various methods of transferring assets have different tax consequences. Consult a tax advisor or attorney (tax/estate planning/elder law) before choosing which options are best for you, especially if real property is involved.

1. "Durable Power of Attorney" from a particular bank or financial institution
Some financial institutions require that their own power of attorney form be used.

2. Durable Power of Attorney for Finances (Statutory Form or specifically drafted by an attorney)

Real property management: when a person owns real property, it is helpful to have an attorney draft this document to include the legal description of the property and the specific powers that are desired for the agent, and then "record" the document.

3. Community Property; Joint Tenancy

Caution: persons listed as joint tenants have equal access to the funds or property, so be sure this is a trusted person.

4. Direct Deposit or Representative Payee for Government Benefits (such as Social Security benefits or Veterans' benefits)

5. Revocable Living Trust

This method allows for management during life and distributes assets at death. This is especially important if you own a home or other real property. A Trust should be drafted by an estate planning attorney after discussing your personal needs and individual situation. Caution: "Trust mills" (offers from high-volume, "one-size fits all" firms) do not give you individual planning advice and generally should be avoided.

6. Conservatorship of the Estate This is a Probate Court process for financial management if the person lacks the "mental capacity" to manage own finances. The Public Guardian" Office may be available if there is no other conservator available.

B. Transfer of Assets at Death

1. Designated Beneficiaries

- Transfers "automatically" at death (with death certificate)
- Used for life insurance, 401(k), and bank accounts with "Pay-on-Death" provision

2. Joint Tenancy / Community Property

- Transfers "automatically" at death (with death certificate)

-See attorney if real property is to be transferred

3. Will

- Form from stationary store or internet with two witnesses, attorney drafted with two witnesses, or holographic (completely handwritten, dated and signed)
- Probate process at Court to administer -- high fees and long process
- “Executor/Executrix” carries out the provisions of the Will
- “Pour-over Will” is used with a Revocable Trust to catch assets not transferring any other way

4. Small Estate Affidavit (Under \$166,250)

- Assets to be distributed are under \$166,250, not counting assets that transferred any other way
- Avoids Probate process at Court

5. Revocable Living Trust

- Transfers assets according to person’s written wishes
- Avoids expense and delay of Probate process at Court
- Private process; usually Court is not involved
- “Trustee” carries out the provisions of the Trust
- Requires “Trust Administration” process, usually by an attorney

6. Intestacy

- If there is no will, trust, joint tenancy property, or designated beneficiaries at death, the assets in a person’s estate pass by California law called “Intestacy.”
- Intestacy law sets up the order that the assets will pass: to spouse, children, parents, other relatives.
- Public Administrator Office handles the intestacy transfer of the estate at death.

You should see an attorney for consultation (estate planning/trust administration/probate/elder law) at the death of a family member, especially if there is real property, since documents will need to be filed at the County Recorder’s Office to transfer real property.

III. Methods of Health Care Decision Making (starting with the “least restrictive”)

A. Advance Health Care Directive

Be sure to discuss your health care wishes with your doctor! Then use written health care planning documents to make your health care wishes known and followed. The law changed in July 1, 2000 to create the “*Advance Health Care Directive.*” There are two parts.

A “Power of Attorney” allows you to appoint an “agent” to make health care decisions consistent with your wishes if you cannot make them for yourself. An “Individual Health Care Instruction” is your written or oral instructions concerning your health care decisions.

“Health care decisions” include decisions regarding the choice of health care providers and institutions; diagnostic tests, surgical procedures, programs of medication; and whether to provide, withhold or withdraw artificial nutrition and all other forms of health care, including CPR.

“Mental capacity” (for making health care decisions) is defined as “a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.” (California Probate Code section 4609)

B. Durable Power of Attorney for Health Care

This document was used before July 1, 2000, is still valid and does not need to be re-executed under the new law.

C. POLST (Physician Orders for Life-Sustaining Treatment)

This document is an order by a doctor that must be followed in California, that helps give seriously ill patients more control over their end-of-life care. It is usually on bright pink paper and is signed by both the doctor and patient, and specifies the types of medical treatment a patient wishes to receive toward the end of life, including whether to attempt CPR, administer antibiotics and IV fluids, use intubation and mechanical ventilation, and provide artificial nutrition.

A POLST is voluntary and can prevent unwanted or medically ineffective treatment, reduce patient and family suffering, and help ensure patient’s wishes are honored.

D. Conservatorship of the Person

This is a Probate Court process that appoints an individual to take care of the personal needs of a person who is unable to provide for their own food, clothing, shelter and well-being. (Conservatorship of the Estate oversees finances). Public Guardian” Office may be available if there is no other conservator available.

E. LPS Conservatorship (under the Lanterman-Petris-Short Act)

This is a Probate Court process for “gravely disabled” persons who cannot provide for their food, clothing or shelter due to a serious mental disability, and appoints an individual to take care of the person’s needs.

IV. Public Benefits / Government Benefits and Financing Health Care

A. Home Care

In-Home Supportive Services (IHSS) 1-408-928-3737: persons 65 or older, blind or disabled with very low income and resources may be eligible for help paying for domestic service and/or personal care assistance at home.

B. Retirement Homes

There is no public benefits coverage specifically for these types of living situation.

C. Residential Care / Board and Care / Assisted Living

There is no public benefits coverage specifically for these types of living situation. *Long-term Care Medi-Cal*: Does not cover residential care / board and care / assisted living.

Supplemental Security Income (SSI): persons 65 or older, blind or disabled with very low income and resources may be eligible to supplement their income to a basic level. Social Security Office 1-800-772-1213 (7 a.m. – 7 p.m.); www.ssa.gov.

D. Skilled Nursing Facility (SNF)

Medicare: Medicare has very limited coverage for SNFs. Medicare only covers for a short period of time if the nursing home care is “medically necessary,” and only after a hospital stay of at least 3 days.

Long-term Care Medi-Cal Eligibility: Medi-Cal coverage may be available for persons 65 or older, blind or disabled with low income and resources. The skilled nursing care must be “medically necessary” for coverage. Eligibility rules are complicated and changing, and include strict rules about not “giving away” assets that the government says should be used to pay for the person’s care.

Resources: \$2,000 for an individual, \$3,000 for a couple

Principle residence exempt

Other exempt assets

“Spend down” – keep records,

Better to enter SNF as private pay rather than on Medi-Cal to have better choices

For further information see: *If You Think You Need a Nursing Home: A Consumer’s Guide to Financial Considerations and Medi-Cal Eligibility* (www.CANHR.org)

Caution: DO NOT give away assets without first consulting an attorney specializing in Medi-Cal rules and Elder Law. Also, BEWARE of attorneys promising to “preserve assets” for the next generation, since the resources belong to the older person to be used for older person’s benefit and quality health care. If any resources remain for the next generation after the older person’s death that is great, but preserving assets for the next generation should NOT be the primary purpose of planning for the older person’s finances.

Long-Term Care Insurance Caution -- Be sure to read any long term care insurance policies carefully before purchase to determine what coverage is provided, since coverage varies extensively. Keep older long-term care insurance in effect, because benefits used to be more generous than policies offered currently.

Reverse Mortgage Caution: Do not be pressured into purchasing a reverse mortgage. In some situations, these may be helpful if they suit your individual situation. However, they are expensive and not right for everyone. Get legal assistance before purchasing a reverse mortgage. See: <https://www.consumer.ftc.gov/articles/0192-reverse-mortgages>

V. Preventing and/or Dealing with Elder Abuse, Neglect and Fraud

A. Mandatory Reporting Law – Most professionals and those who have assumed care of an older or dependent adult must report all types of suspected elder/dependent adult abuse (physical; financial; neglect; abandonment; isolation; abduction; other actions that result in physical harm, pain or mental suffering; or withholding of goods and services by a care custodian)

- Permissive reporting

- “Reasonable person” standard

- Report to Adult Protective Services (APS) or Police for suspected abuse in the community

- Report to Ombudsman or Police for suspected abuse in a long-term care facility

-Call immediately and file written report form within two working days (SNF timelines shorter – see elder abuse resources below for details)

B. Financial Abuse/Fraud Prevention -- phone, mail, online, door-to-door:

-Don't send money, don't give personal information, don't answer door or phone

-See District Attorney brochure for state regulatory agencies: "Financial Abuse...It Can Happen to Anyone"

VI. Legal and Community Resources

A. Senior Information & Assistance - Area Agency on Aging

1-800-510-2020, 1-510-577-3530

"Senior Resource Guides" www.alamedasocialservices.org

B. California Advocates for Nursing Home Reform (CANHR)

Lawyer Referral Panel: 1-415- 974-5171 or 1-800-474-1116; www.canhr.org

C. Legal Assistance for Seniors (LAS): 1-510-832-3040; www.lashicap.org

D. Adult Protective Services (APS): 1-510-975-577-3500 or 1-866-225-5722
1-800-414-2002

E. Long Term Care Ombudsman Program: Ombudsmen are patient advocates for Skilled Nursing Facilities and licensed Residential Care Facilities.

1-510-638-6878 or 1-800-231-4024

F. Elder Abuse – Guidelines for Professional Assessment and Reporting (April 2019), by the Elder Abuse Task Force of Santa Clara County

<https://www.sccgov.org/sites/da/prosecution/DistrictAttorneyDepartments/Documents/Elder%20Abuse%20E2%80%93E2%80%93Guidelines%20For%20Professional%20Assessment%20and%20Reporting%2028April%202019%29.pdf>

G. "Seniors and the Law" by State Bar of California: email seniors@calbar.ca.gov and include your address and number of copies desired; 1-415-538-2000

It is difficult to talk about planning for possible incapacity, financial management, health crises, and end-of-life issues. But when you talk about these issues and put your wishes in writing, you and your family will be comforted to know that when the time comes they are managing your health care and financial affairs as you would like them to be handled.

Disclaimer: The previous information is intended to be general in nature and does not provide legal advice for your particular situations. It is recommended that you get legal advice to determine the best choices for your individual situation. It is also important to find out about tax consequences of any legal actions you may take.

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