

2016 Consumer's Guide to
Legal and Financial Planning
for an
Aging Relative

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LITTMAN KROOKS
LLP

Helping Seniors and their Families Plan for the Future

Elder Law ▪ Estate Planning ▪ Special Needs Planning ▪ Special Education Advocacy

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Introduction

Many of us have been affected by a loved one's aging. When this happens, what do you do? How do you help your loved one face the realities of aging? How do you provide the necessary care and support?

Since the aging process is unpredictable, it is crucial to plan in advance and before your loved one becomes incapacitated. The support you can offer now will help him/her to plan for his/her future. Your support now will allow your loved one to participate in the decisions that will affect his/her life and the lives of the family members.

Planning for the future should start with the retention of an experienced Elder Law attorney. S/he will assist your loved one by preparing and executing all of the necessary documents (such as a Power of Attorney, Advance Health Care Directives, a Trust, and a Will). Having these documents prepared will protect your loved one and include him/her in the decision-making process regarding his/her future care.

It is important to be educated about the options available for the long term care of your loved one, including, but not limited to, the availability of care facilities. There are many care facilities from which to choose. It is crucial to understand the differences in care options provided by these care facilities, as well as the payment options available to cover the cost of care.

Consulting an Elder Law attorney will help you understand what the immediate issues are that need to be addressed, allowing your family to be at ease and spend time caring for your loved one. Most importantly, the Elder Law attorney will be able to ensure that your loved one's future is secure.

It's Critical To Plan

Since age-related diseases may strike at any moment and the symptoms may suddenly become more severe, it is important to assist your loved one with his/her life and estate planning before s/he becomes incapacitated.

Discuss all of the care options available with your loved one. Once his/her wishes are known, seek the assistance of an experienced Elder Law firm to implement a plan which will ensure that s/he is protected should the time come when s/he is unable to advocate for him/herself. It is so crucial for your loved one to do this planning sooner rather than later. Signing these documents can only occur while your loved one still has the capacity to do so. For example, only when your loved one has the capacity required may s/he create and execute a Power of Attorney. This document will enable your loved one to appoint a trusted individual to manage his/her finances should s/he become incapacitated. Additionally, executing a Health Care Proxy will allow your loved one to place someone s/he trusts in charge of his/her medical decisions should s/he become unable to do so. Having these documents in place will protect your loved one's wishes and ensure that someone s/he trusts will have the legal authority to manage his/her care needs and finances should that time come when it's needed.

What Documents Should be Prepared?

For all of us, it is critical to make sure that our estate planning documents are prepared and done so correctly.

Last Will and Testament (Will)

A Will is a legally-binding statement directing who will receive your property at the time of your death. It also appoints a legal representative to carry out all of your wishes.

A Will covers only probate property. Many types of property or forms of ownership pass outside of probate. Jointly-owned property, property in trust, life insurance proceeds and property with a named beneficiary, such as IRAs or 401(k) plans, all pass outside of probate.

Why should you have a Will?

- Your Will directs where, and to whom, your estate (what you own) will go after your death. If you die intestate (without a Will), your estate will be distributed according to the laws of New York State. The statutory mandated distribution may not be in accordance with your wishes.

Many people try to avoid probate and the need for a Will by holding their property jointly with their children. Although doing so can achieve that end, oftentimes people spend unnecessary effort trying to make sure all that the joint accounts remain equally distributed among their children who they wish to inherit. However, these efforts can be defeated by a long-term illness of the parent, reducing the amount in certain accounts but not, creating an unequal distribution of the parent's estate. The death of a child can cause a similar inequities. Holding one's property in jointly held accounts simply to avoid probate has too many unforeseen risks which can cause inequities in the final distribution of the estate and subsequently not reflecting the person's wishes. A Will is a much simpler means of protecting one's wishes regarding the distribution of assets.

- Another reason to have a Will is to insure that the administration of your estate will be a smooth process. Oftentimes the probate process can be completed more quickly and at less expense to your estate if there is a Will. With a clear expression of your wishes, it is less likely that there will be any costly, time-consuming disputes over who gets what.
- In addition, a Will allows you to choose the person you wish to administer your estate and distribute it according to your instructions. This person is called your executor. If you do not have a Will naming a person of your choice, a family member will have to petition the court to be appointed the Administrator of your estate.
- For larger estates, a well-drafted Will can help reduce estate taxes.
- A Will also allows you to appoint the person who will take your place as guardian of your minor children should you and their other parent passes away.

Trust

A trust is a legal arrangement through which one person (or an institution, such as a bank or law firm), called a trustee, holds legal title to property held for another person called a beneficiary. The rules or instructions under which the trustee operates are set forth in the trust document. Trusts have one set of beneficiaries during the life of the grantor (the person who creates the trust) and a second set - often the grantor's children - who begin to benefit only after the first group has died. The first group is often called the life beneficiaries and the second group the remaindermen.

Uses of Trusts

There can be several advantages to establishing a trust. One primary advantage is to avoid probate. In a trust that terminates with the death of the grantor, any property in the trust prior to the grantor's death passes immediately to the beneficiaries by the terms of the trust without requiring probate. This can save time and money for the beneficiaries.

Certain trusts can also result in tax advantages both for the grantor and the beneficiary. These are often referred to as credit shelter or life insurance trusts. Other trusts may be used to protect property from creditors or to help the grantor qualify for Medicaid. Unlike Wills, trusts are private documents and usually only those individuals with a direct interest in the trust need to know of the trust assets and its distribution. Provided they are well-drafted, another advantage of a trust is that it remains effective if the grantor dies or becomes incapacitated.

Kinds of Trusts

Trusts fall into two basic categories: testamentary or living.

A testamentary trust is one created by your Will. It does not come into existence until the testator (the person whose Will it is) dies. An intervivos trust is one created and in effect during the creator's lifetime.

There are two kinds of living trusts: revocable and irrevocable.

Revocable Trusts

With a revocable trust, the grantor retains complete control over the trust and may amend, revoke or terminate the trust at any time. This means that you, the grantor, can take back the funds you put in the trust or change the terms of the trust. Thus, the grantor is able to reap the benefits of the trust arrangement while maintaining the ability to change the trust at any time prior to his/her death.

Revocable trusts are generally used for the following purposes:

1. **Asset management.** They permit the named trustee to administer and invest the trust property for the benefit of one or more beneficiaries.
2. **Probate avoidance.** At the death of the person who created the trust, the grantor or donor, the trust property passes to whomever is named in the trust. It does not come under the supervision of the probate court and its distribution need not be held up by the probate process. However, the property of a revocable trust will be included in the grantor's estate for tax purposes.
3. **Tax planning.** While the assets of a revocable trust will be included in the grantor's taxable estate, the trust can be drafted so that the assets will not be included in the estates of the beneficiaries, thus avoiding taxes when the beneficiaries die.

Irrevocable Trusts

An irrevocable trust cannot be changed or amended by the grantor. Any property placed into the trust may only be distributed by the trustee as provided for in the trust document itself. For instance, the grantor may establish a trust under which s/he will receive the income earned on the trust property but bars his/her access to the trust principal. This type of irrevocable trust is a popular tool for Medicaid planning.

Testamentary Trusts

As noted above, a testamentary trust is a trust created by a Will. Such a trust has no power or effect until the Will of the grantor is probated. Although a testamentary trust will not avoid the need for probate and will become a public document as it is a part of the Will, it can be useful in accomplishing other estate planning goals. For instance, the testamentary trust can be used to reduce estate taxes on the death of a spouse or provide for the care of a disabled child.

Supplemental Needs Trust

The purpose of a supplemental needs trust is to enable the grantor to provide for the continuing care of a disabled spouse, child, relative or friend. The beneficiary of a well-drafted supplemental needs trust will have access to the trust assets for purposes other than those provided by public benefits programs. In this way, the beneficiary will not lose eligibility for benefits such as Supplemental Security Income and low-income housing. A supplemental needs trust can be created by the grantor during life or be a part of a Will.

Power of Attorney (POA) and Statutory Gift Rider

For many people, a Power of Attorney (POA) is the most important estate planning instrument available. A POA allows the person you that you appoint as your agent to act in your stead for financial purposes as soon as it is executed. It is particularly useful when, and if, you ever become incapacitated.

The person you appoint as your agent will be able to step in and take care of your financial affairs. Without a POA, no one can represent you with regard to your financial affairs unless a court appoints a guardian. This court process takes time, costs money, and the judge may not choose the person you would prefer. In addition, under a guardianship, your representative may need to seek court permission to initiate planning measures that he could implement immediately with the use of a simple POA .

If you wish to grant gifting authority to your agent, a Statutory Gift Rider is also required. This may become an important tool in estate and elder law planning. Without it, your agent is unable to gift more than \$500 total each year.

Health Care Proxy

Any complete estate plans should include a medical directive. This term may encompass a number of different documents, including a Health Care Proxy and a Living Will .

A Health Care Proxy and a Power of Attorney for Health Care allow you to designate another individual to make health care decisions for you if you are unable to do so yourself. A Living Will are your medical instructions. For example, your Living Will can state that you would like life support to be withdrawn if you are terminally ill or in a vegetative state. A broader medical directive may include the terms of a Living Will, but also provide instructions if you are in a less severe state of health but are still unable to direct your health care yourself.

Nursing Home

As the aging process progresses, your loved one may be faced with the need for round the clock care. Deciding that your loved one must be placed in a nursing facility is a difficult one. Therefore, it is certainly advantageous to become educated now regarding the facilities in your area. Here are some rules of thumb:

Location, location, location! No single factor is more important to the quality of care and life of a nursing home resident than the number of visits had by loved ones. The quality of care is often better if the facility staff is aware that someone who cares for the resident is constantly watching and is actively involved. Visits can be the high point of the day/week for your loved one. So make it as easy as possible for family members and friends to visit.

Get references. Ask the facility to provide the names of family members of residents so that you can ask them about the care provided and the staff's responsiveness when the resident or relatives raise concerns.

Check certifying agency reports. The websites www.health.state.ny.us and www.medicare.gov can assist you in locating NYS nursing homes in your region and detail the services they provide.

Talk to the nursing home administrator or nursing staff about how care plans are developed for residents and how they respond to concerns expressed by family members. Make sure you are comfortable with their response. It is important that you meet with, and ask questions of, the people responsible for your loved one's care, not simply the person marketing the facility.

Tour the nursing home. Try not to be impressed by a fancy lobby or depressed by an older, more rundown facility. What matters most when looking at nursing homes is the quality of care they can provide and the interactions had between the staff and residents. Get a feel for how well residents are attended to and whether they are treated with respect. Also, investigate the quality of the food service. Eating is both a necessity and a pleasure that continues even when we're unable to enjoy much else. It is also advisable to try and get a tour of the facility that is not prearranged. While this is not always possible, it does give you the opportunity to see an unrehearsed atmosphere.

All these tips can help you in finding a care facility which works well for your loved one. It is possible to find a care facility which is clean, caring, and that provides an environment where your loved one won't feel alone, will be understood, and taken care of.

Paying for a Nursing Home

One of the greatest fears of aging Americans is that they may end up in a nursing home. Not only does this represent a great loss of personal autonomy, but also a tremendous financial price. Depending on location and level of care, nursing homes may cost between \$175,000 and \$250,000 a year in New York State.

Most people pay for their nursing home care out of their life savings and oftentimes exhaust those assets, at which time they can qualify for Medicaid to pick up the cost of the nursing home.

An advantage to paying privately is that you eliminate or postpone dealing with your state's welfare bureaucracy - an often time-consuming process. The disadvantage is that these facilities are quite expensive.

Careful planning, whether in advance, or in response to, an unanticipated need for care, can help protect your estate, whether for your spouse or for your children. This can be done by purchasing long-term care insurance or by making sure you receive the benefits to which you are entitled under the Medicare and Medicaid programs. Veterans may also seek benefits from the Veterans Administration.

◆ **Medicare**

Medicare Part A covers up to 100 days of skilled nursing care per spell of illness. However, the definition of skilled nursing and other conditions for obtaining this coverage are quite as-tringent, meaning that few nursing home residents receive the full 100 days of coverage. As a result, Medicare pays for only about 9 percent of nursing home care in the United States.

◆ **Medicaid**

For all practical purposes, in the United States, the only insurance plan for long-term institu-tional care is Medicaid. Lacking access to alternatives such as long-term care insurance cov-erage, most people pay out of their own pockets for long-term care until they become eligible for Medicaid. Although their names are similar, Medicaid and Medicare are quite different pro-grams. Those entitled to Social Security retirement benefits despite their asset or income level, will also receive Medicare as their health insurance. Medicaid, on the other hand, is means based. Therefore, in order to be eligible for the Medicaid program, you must meet the pro-gram's asset/income guidelines.

Also, unlike Medicare, which is a federal program, Medicaid is a joint federal . state program. Each state operates its own Medicaid system, but this system must conform to federal guide-lines in order for the state to receive federal money, which pays for about half of the state's Medicaid costs.

Those who are not in immediate need of long-term care may have the luxury of distributing or protecting their assets in advance. This way, when they do need long-term care, they will quickly qualify for Medicaid benefits. Listing the general rules for Medicaid planning techniques is difficult as every client's case is different. Some clients have more savings or income than others. Some clients are married, others are single. Some have family support, others do not. Some own their own homes, some rent. Still a number of basic strategies and tools are typi-cally used in Medicaid planning.

This document is not a substitute for legal advice. You should review your personal estate planning needs with a competent estate planning attorney.

We hope this information has been helpful.

**If you have questions about any aspect of your estate planning,
please contact us. We have an office near you.**

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