



BRADFORD & HOLLIMAN, LLC

Estate Planning, Elder Law & Special Needs

Elder Law Overview for Caregivers:

**Critical topics for Family Caregivers about the Legal Aspects of
Long-Term Care including Pre-Planning and Crisis Planning**

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Our Focus

- What is Elder Law?
- Estate Planning: Basic Documents Everyone Should Have
- Pre-Planning for Aging
- Crisis Planning – When the Pre-Planning Window has Closed

WHAT IS ELDER LAW?

- Elder Law is Estate Planning with an emphasis on the needs of seniors, including but not limited to:
 - Does the senior have the mental capacity to create an estate plan?
 - Does the senior have a Last Will and Testament or a trust (usually revocable living trust)? If the senior has an estate plan, is it current?
 - Has the senior named appropriate agents to handle financial and healthcare decisions if necessary? Are the documents naming the agent up to date? Will other states accept the documents?
 - How will the senior handle aging and long-term care issues? What options does the senior have?
 - How will the senior pay for long-term care? What options for payment does the senior have?
 - Does the senior want to consider advanced estate planning for asset protection purposes and to address family issues?

What Does “Capacity” Mean?

In Elder Law or Estate Planning, “capacity” generally means:

- **Wills:** Testator is deemed to have capacity if, at the time that he executes his will, he is able to know and understand the significance of his action. The is considered to know and understand if the Testator (1) knows the property the Testator wishes to bequeath, (2) the Testators natural heirs, (3)the manner in which the Testator wishes to bequeath property, and (4) the intended consequences of those actions.
 - Fletcher v. DeLoach, 360 So.2d 316 (Ala. 1978)
 - In Re Estate of McIntyre, 2000 WL 33191354 (Tenn. Ct. App. 2000)
- **Contracts or Trusts:** Typically a lesser standard
 - The burden initially falls on the party claiming that the person who executed a power of attorney was incompetent when he or she executed the power of attorney; if, however, it is proven that the person who executed the power of attorney was habitually or permanently incompetent before executing the power of attorney, the burden shifts to the other party to show that the power of attorney was executed during a lucid interval.
 - A party seeking to avoid a contract based on the defense of incapacity must prove either permanent incapacity or contractual incapacity at the very time of contracting.
 - Stephan v. Millennium Nursing and Rehab Center, Inc., 279 So.3d 532 (Ala. 2018).

Capacity Considerations

- Diagnosed dementia
- Age-related forgetfulness
- Has capacity been officially tested by medical experts?
- Is there a Durable Power of Attorney?
- Is there a Healthcare Power of Attorney?
- Has a legal guardian and/or conservator already been appointed by the Court?

- Capacity Issues may be a slippery slope. Get professional help if there is any doubt about capacity.

No Capacity: Legal Guardians

Responsibilities: Make decisions about the individual's health and well-being

- The Court will consider appointing from these sources:
 - Family member
 - Volunteer
 - Lawyer working pro bono (no charge)
 - Lawyer
- Could be same individual as Conservator or a separate individual

No Capacity: Conservators

Responsibilities: Access financial information, pay bills, and make decisions about the individual's finances.

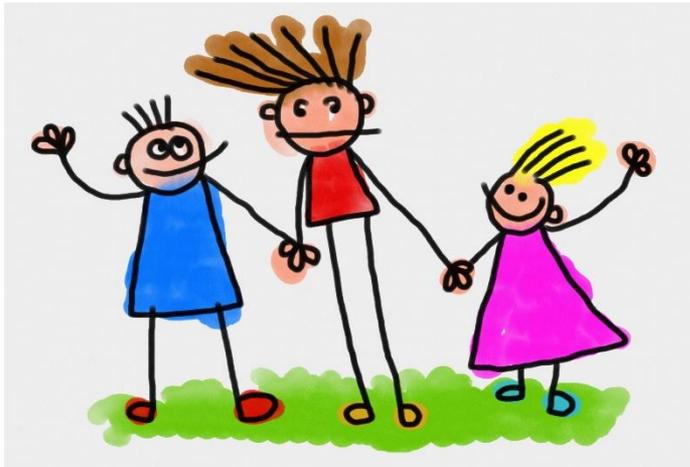
- The Court will consider appointing from these sources:
 - Family member
 - Volunteer
 - Local lawyer working pro bono
 - County conservator (legal rates)
- Could be same individual as Guardian, but also could be a separate individual

Bird's Eye View of Estate Planning

- Do I need it?
- What do I need it to do?



Everyone needs an Estate Plan



- If you have loved ones, you need an estate plan
- If you have charities or causes you support, you need an estate plan
- If you have STUFF, you need an estate plan.



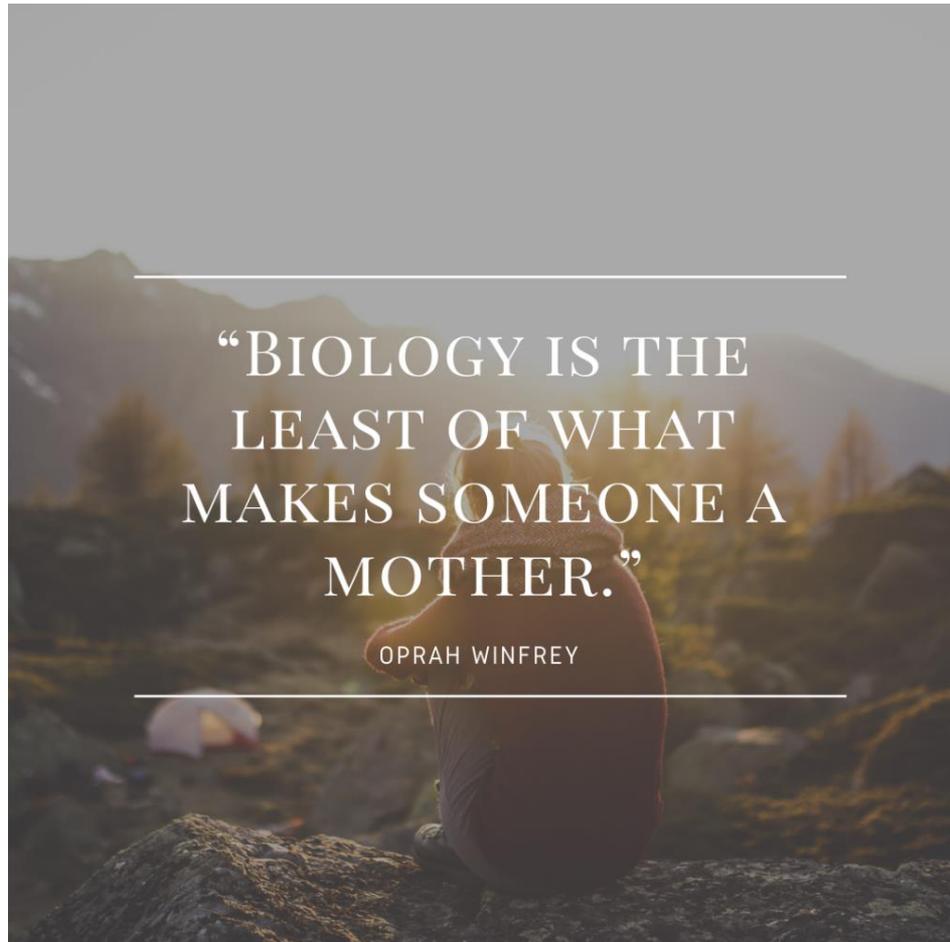
Fears about Estate Planning

- ▶ Taxes
- ▶ Too overwhelming
- ▶ Family conflict
- ▶ Indecision
- ▶ Not sure of options

Myths

- ▶ It all goes to my spouse anyway? Depends on state law.
 - ▶ It's just a form.
 - ▶ I can just write out my Will on a napkin.
 - ▶ I can use something from the internet.
-
- Recent catches:
 - Homemade Will left everything to the children when parent died. No provision for a surviving spouse. Testator forgot that the spouse might still be alive (i.e. not both die while traveling)
 - Durable Powers of Attorney – lacking key authority to handle long term care planning issues. Copied a poa that didn't address that issue.

Blended Families



“BIOLOGY IS THE
LEAST OF WHAT
MAKES SOMEONE A
MOTHER.”

OPRAH WINFREY

Common Blended Family Problems

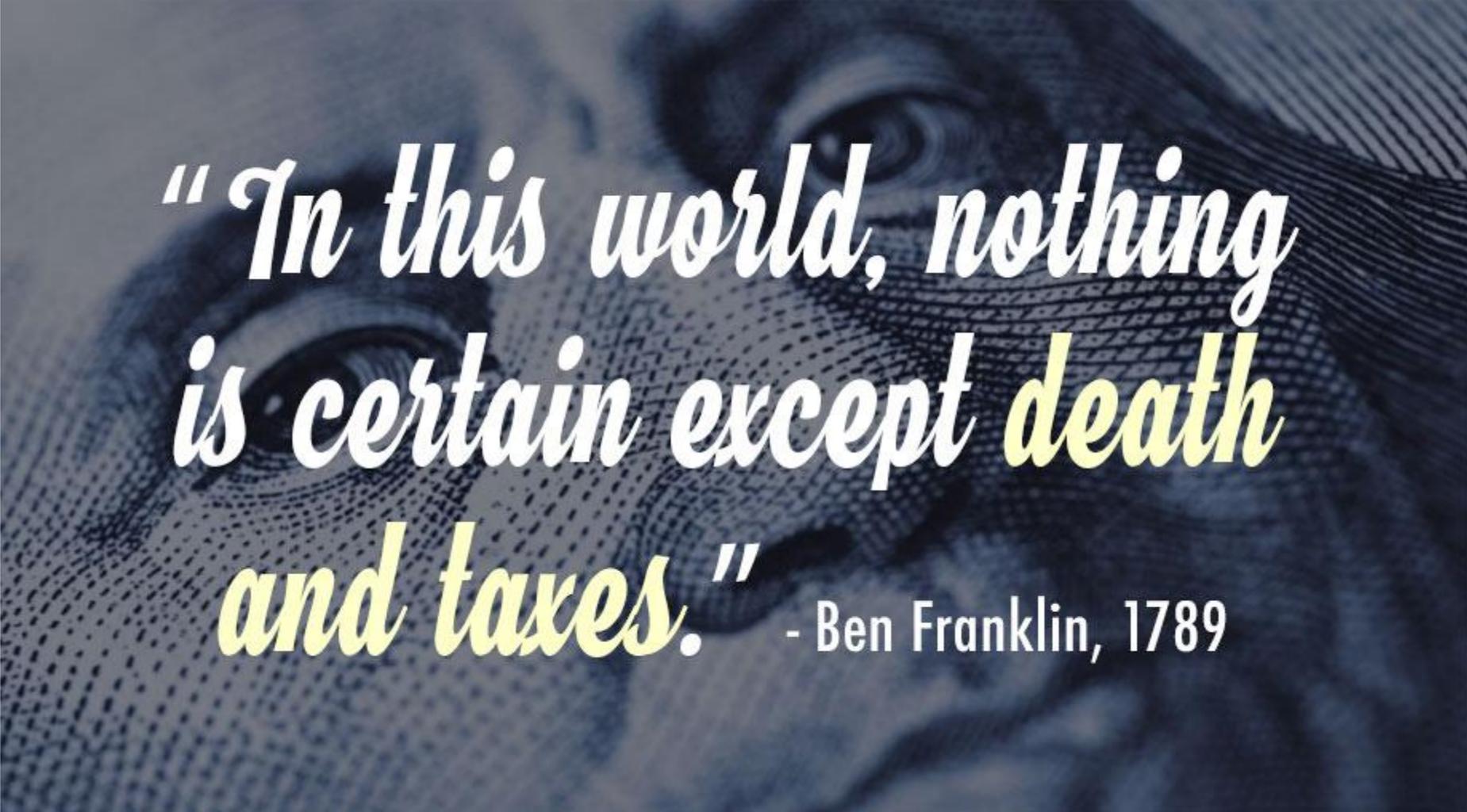
- ▶ How do I provide for my spouse but still protect my children?
- ▶ How do I protect my estate from the constantly needy child?

Common Family Dynamic Problems

- ▶ How do I protect the inheritance I'm leaving for my child from my child's creditors (including a possible future divorce)?
- ▶ How do I protect my child from poor decision making?
- ▶ How do I protect my child from substance abuse issues?
- ▶ How do I protect my child from an overbearing spouse?

No "One Size Fits All" answers. Estate Planning should be custom to your unique situations and goals.

The Fear of Estate Planning



"In this world, nothing is certain except death and taxes." - Ben Franklin, 1789

Estate Taxes/Inheritance Taxes

- Estate taxes are taxes on the privilege of transferring property to your heirs. It's the estate of the deceased that is liable for the tax.
- An inheritance tax is a tax on the privilege of receiving property from a deceased benefactor. The (living) heir pays an inheritance tax, NOT the estate of the deceased.

State Estate Taxes

- FEW STATES IMPOSE ESTATE TAXES
- As of 2021, Washington, Oregon, Minnesota, Illinois, Maryland, Vermont, Connecticut, New York, Rhode Island, Massachusetts, Maine, Hawaii and Washington, D.C. all levy state estate taxes.

State Inheritance Taxes

- FEW STATES IMPOSE AN INHERITANCE TAX.
- Six states levy an inheritance tax: Nebraska, Iowa, Kentucky, Pennsylvania, Maryland and New Jersey.
- Maryland is the only state in the country that levies both an estate tax and an inheritance tax.

Estate Tax Exemption in 2021

- If your estate is worth **\$11.7 million** or less, you don't need to worry about the federal estate tax. However, any estates worth more than that are taxed only on the amount that surpasses the \$11.7 million threshold. For most of the federal estate tax tiers, you'll pay a base tax, as well as a marginal rate. Current federal estate taxes max out at 40% for taxable amounts greater than \$1 million.

Step-Up Capital Gains Tax Basis

- Heirs receive a tax basis in inherited property equal to fair market value at the time of death.
- **For example, if a parent leaves a \$2 million asset that was originally purchased for \$500,000, that \$500,000 cost basis is reset to \$2 million for the heir. If the heirs sold the asset immediately, they would pay zero capital-gains taxes.**

Proposed Changes to Federal Estate Taxes

- Reduction of the estate and gift tax exclusion currently at \$11.7 million to \$3.5 million. Tax rates between 45% - 65%
- Eliminate the step-up exemption on any inherited asset that has gained more than \$1 million in value between purchase and death.
- Capital gains tax rates will increase from 29% to almost 49%

DON'T PANIC

- Talk with your personal estate planning attorney and CPA
- Generally, attorneys are recommending that clients wait to see what actually happens instead of trying to take action based on proposed changes.

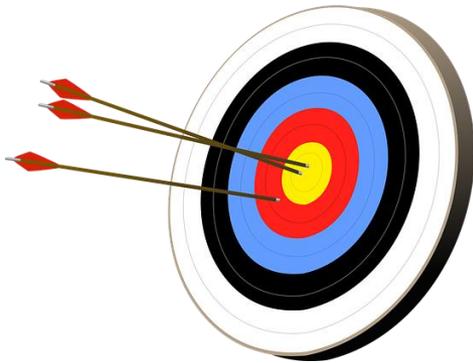
What is an Estate Plan?

A Plan to Reach Your Goals

A plan that directs what happens if you become incapacitated or pass away.



GOAL SETTING



- Give what I have to whom I want, the way I want, when I want
- Manage the risks of incapacity
- Delegate health care decisions
- Promote family harmony
- Plan for children, including children with special needs
- Plan for cost of long-term health care

The Modern Estate Plan: The Basics

BASIC



- Last Will and Testament (must go through probate)
- Revocable Living Trust
- Financial Durable Power Of Attorney
- Healthcare Power of Attorney
- Advance Health Care Directive (Living Will)
- HIPAA Authorization

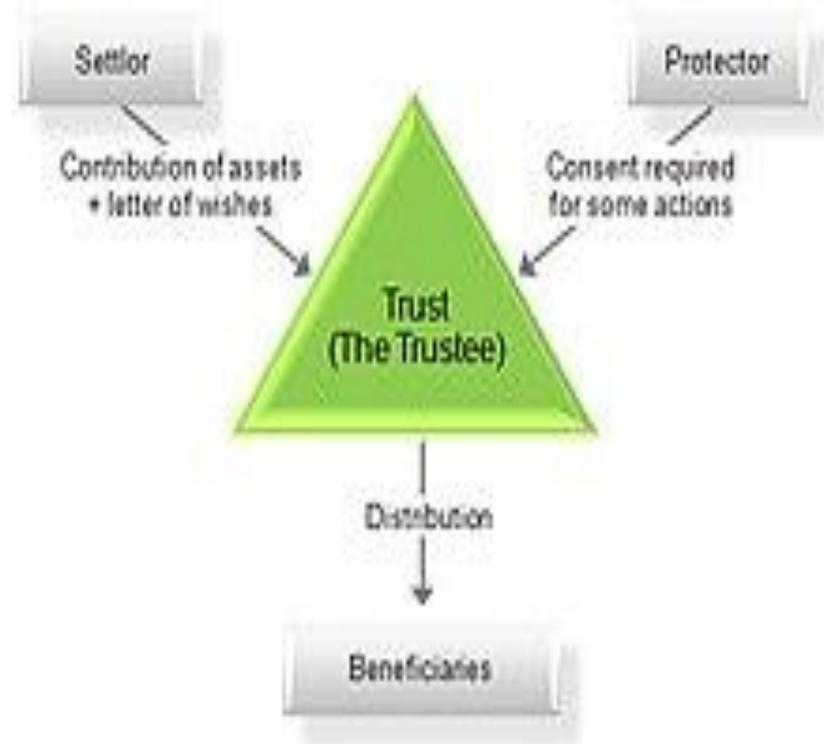
Last Will and Testament

- Directs how an individual's assets will be distributed at death.
- Makes it easier for the estate to be administered.
- Can omit anyone except a spouse. Children are not automatically "entitled" under a will.
- Can create terms and conditions to control how assets are passed on to beneficiaries.
- Must be probated after the testator's death to be effective and valid.



Revocable Living Trust

- Is a type of contract between the trust maker and the trustee to distribute the trust maker's assets
- Avoids the probate process because it is a contract
- Is private, not a matter of public record like a will
- Avoids court costs.
- May be fast if there are no waiting periods or restrictions specified in the trust
- Can hold property in any state; thereby, avoiding a probate process in each state
- Is usually cheaper in the long term



Powers of Attorney / Attorney in Fact

- Most recent one?
- What specific powers are included?
- Does the agent(s) know he/she is the POA agent and what aspects of affairs he/she is to manage?
- What is the agent's contact info?
- Is the agent very familiar with the client's preferences?

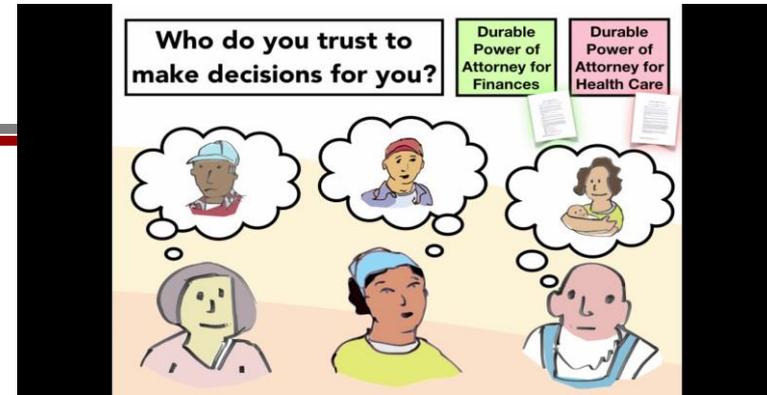
Use of POA should always be accompanied with the POA document

*Principal's Name by
Jane C. Smith, Attorney in
Fact*

- Durable POA
- Conditional POA
- Financial POA
- Healthcare POA
- Springing POA

Durable Power of Attorney for Healthcare Decisions

If an adult is unconscious, does not have capacity, or is otherwise unable to tell healthcare professionals what actions should be taken regarding care, a healthcare power of attorney allows a trusted person to make those decisions.



- The document can grant very broad powers to allow any medical decision to be made or, it can be limited.
- You may name a different agent to make medical decisions than the agent named to make financial decisions.
- You may allow the agent to make end-of-life decisions or you may choose to make those decisions yourself, using a Living Will and only allow the agent to make other medical decisions.

Living Will

(Advanced Healthcare Directive)

- Clear statement of intent to loved ones
- May prevent family arguments
- May prevent guilt
- Can insure that you do not linger on because family members cannot “let go”



Advanced Modern Estate Plans

- Irrevocable Asset Protection Trusts
- Special Needs Trusts (for disabled family members)
- Life Insurance Trusts (typically used for estate tax issues)
- Business Succession Planning
- Long Term Care Planning

Irrevocable Asset Protection Trusts for Long-Term Care Planning

THIS IS A FORM OF PRE-PLANNING!

- Can protect assets, if done five years in advance
- Can protect the step-up in tax basis for the children, if set up correctly
- Can still control or regulate when the children or grandchildren receive money and how they receive it.
- Avoids probate

Supplemental Needs Trusts a/k/a Special Needs Trusts

What is a Special Needs Trust?

- A special needs trust is designed to protect assets. The assets are then used for the benefit of the disabled individual.
- The disabled individual receives any government benefits to which he/she qualifies.
- Trust assets are used to supplement the needs of the disabled individual.
- It is important to know that there are different types of special needs trusts. This type of trust is not “one size fits all.”

CAUTION: *It is not the standard trust often used in wills or living trusts which names a trustee and states the trustee can pay anything, within the trustee’s discretion, for “health, maintenance, or support.” This type of trust will cause the disabled individual to be ineligible for benefits or lose benefit*

Elder Care Action Plan: A Roadmap for the Family

- Analysis of:
 - All assets
 - All sources of income
 - Government benefits that may be helpful to the client, including VA benefits
 - Any actions taken that may cause problems with obtaining long term care
- Recommendations to:
 - Provide the desired levels of care for as long as possible
 - Strategies to correct problem issues
 - Strategies to make application for government benefits a smoother process

Types of Long-Term Care

- In-home Care - with family or caregiver providing care (supplemented with home health, Meals on Wheels, senior day-care, and other community programs), or may be in a family member's home
- Independent Living
- Assisted Living
- Memory Care
- Skilled Nursing Care – a.k.a. “the nursing home”
- VA Nursing Home

Problems with Home Care

- Spouse may not be physically or emotionally able to care for the incapacitated spouse
- Family may not be able or willing to care for the incapacitated person
- Caregiver burnout/fatigue
- Private caregivers through an agency generally cost around \$18 hour, but they are bonded/insured.
- Paying someone “under the table” may be cheaper; but, is illegal and has greater risk for theft and abuse. Also creates problems when later applying for Medicaid.
- Care can cost much more than the cost of assisted living, memory care or skilled nursing home care.
 - [Example: 24/7 care at \$18 hr = \$12,960 per month; nursing home is \$7000 - \$8000 per month]

Independent Living

- Resident is in an independent home or apartment but has access to help if needed.
- Generally, a more protected environment where help is readily available and transportation to doctors and stores is available.
- Additional services such as housekeeping and meal preparation may be available for an additional cost.

Assisted Living and Memory Care

- Residents have their own apartments or bedrooms furnished with their belongings.
- Residents are expected to be generally self-sufficient. Some assistance with dressing, bathing and other personal care needs is provided.
- Private Pay at a general range of \$4,000 per month.
- The cost is much lower than skilled nursing care and the environment is more like home.
- VA Aid and Attendance benefit, if applicable, can be used to pay for Assisted Living.

Nursing Home: Skilled Nursing Facility

- Regulated by federal and state law.
- All residents under care of a physician.
- Licensed nursing care must be available 24 hours a day.
- Provides care for individuals recovering from certain illnesses; and, provides long term custodial care.
- Very limited payment under Medicare, possible payment under Medicaid; otherwise, private pay of an average monthly amount of \$7,000-\$8,000.

Veterans Administration (VA) Nursing Homes



- ▶ V.A. nursing homes
 - Long waiting lists
 - Veterans with service-related injuries and disabilities receive top priority
- ▶ 4 V.A. nursing homes in Alabama:
 - Bill Nichols State Veterans Home in Alexander City
 - Floyd E. “Tut” Fann State Veterans Home in Huntsville
 - William F. Green State Veterans Home in Bay Minette
 - Colonel Robert L. Howard State Veterans Home in Pell City

How to Pay for Long-Term Care?

- Medicare (very limited)
- Long-Term Care Insurance which covers care not generally covered by health insurance, Medicare, or Medicaid
- Private funds
- Veterans Administration (V.A.) Benefits
- Medicaid



Medicare



- Limited to 100 days
 - May pay for days 1 to 20 following a 3-day hospital stay if the patient needs skilled nursing or rehab care.
 - For days 21 to 100, the patient pays \$185, and Medicare pays any remainder.
 - Medigap policies may pay the patient's daily deductible for days 21 to 100 of rehab stay

Long-Term Care Insurance

Medicare

- + Health Insurance
- + Long-Term Care Insurance Benefits
- + Income
- + Savings/Assets

LONG TERM CARE PLAN TYPES

- Individual
- Employer-Sponsored
- Organization-sponsored
- State Partnerships
- Joint Policies

Payments for Long-Term Care
in a Skilled Nursing Facility

Private Pay

- ▶ The average cost of assisted living care each month is \$4,000.
- ▶ The average cost of nursing home care each month in Alabama is \$7,000 - \$8000.
 - Only room and board are included.
 - Payment will come from client's income, savings, and assets (including IRAs, annuities, CDs, bonds, land, and life insurance).
 - If married, payment will come from a combination of the couple's assets as determined by a formula.

VA Aid & Attendance Pension Benefit

- Pension benefit; not service-related disability
- Income and asset requirements: needs based benefit
- Benefit for a Wartime Veteran is up to **\$2,296** (2021) per month (\$2,169 with one dependent).
- Benefit for a Surviving Spouse of a Wartime Veteran is up to **\$1,244** (2021) per month.
- Benefit is reduced to \$90 per month for nursing home care IF application is made for Medicaid benefits.

VA Aid and Attendance Pension

- **Wartime Service (or widow of wartime veteran)**
 - 90 days or more of service
 - One day during a period of war
 - Honorable or general discharge; or
 - Served for any period of time and discharged for service-related disability

- **Medical Criteria**
 - Needs assistance with two or more ADLs

- **Income and Asset Requirements** - Countable income must zero out for max benefit; asset limits determined by age formula.

VA Aid and Attendance: Eligibility

➤ **Wartime Service**

- World War I: April 6, 1917 – November 11, 1918
- World War II: December 7, 1941 – December 31, 1946
- Korean War: June 27, 1950 – January 31, 1955
- Vietnam War: August 5, 1964 – May 7, 1975 (February 21, 1961 – August 5, 1964 for veterans who served “in country”).
- Persian Gulf War: August 2, 1990 - present

Medicaid



- If the senior needs assistance with activities of daily living, does not have long term care insurance, and lives for a lengthy time, the assets the senior spent years accumulating may be exhausted paying for assisted living care.
- When this happens, the senior has little choice but to move to a skilled nursing facility.

Resource Requirements

- A Medicaid applicant is limited to \$2,000 in countable resources.
- Some resources are excluded, but those exclusions are very limited.
- If a couple is married, **EVERYTHING**, no matter how the property is titled or “tied up” is on the table for Medicaid eligibility purposes.

Monthly Needs Allowance for Community Spouse

- The Community Spouse, the spouse remaining at home, is allowed to keep the portion of the Institutionalized Spouse's income necessary to raise the gross monthly income for the CS to \$2155 (2021).
- The CS cannot retain this income during the spend down period.
- Example: Mr. Smith receives a pension and Social Security totaling \$3,000 per month. Mrs. Smith receives Social Security totaling \$800 per month. Once Mr. Smith is eligible for Medicaid, Mrs. Smith may keep \$1,355 of Mr. Smith's income to supplement her income. The remainder of Mr. Smith's income will be applied to his health insurance premiums, prescription drug premiums, \$30 monthly allowance with the remainder being paid to the nursing home.

$\$2155 - \$800 = \$1,355$ that Mrs. Smith can keep.

The Snapshot: Determining the Assets

- Medicaid will take a “snapshot” of a couple’s assets on the date of institutionalization to determine the amount of spend down for the IS and what the CS can keep.
- All resources owned by either spouse are included in this assessment. It does not matter if there is a prenuptial agreement.
- To the surprise of most, the CS’s IRAs, cash value of life insurance, separate accounts, business interests, and assets inherited from other sources are included.

What Can a Spouse Keep?

- Out of all countable assets, the CS may keep:
 - A minimum of \$25,728 in countable resources; or
 - One half of the couple's total assets up to a maximum of \$128,640 (2021).

- This can have very harsh results. It may mean that the family farm your patient/client's wife inherited from her parents must be sold. It may mean the CS's IRAs are liquidated and used for the IS, not the CS – despite the fact that she earned the funds.

Medicaid Problems: Penalty Issues

- Son took \$40,000 from Dad's account. Dad did not authorize this, but Dad refuses to criminally prosecute son.
- Granddaughter "convinced" Grandmother to "loan" her \$10,000 as a down-payment for a car. No written documentation regarding the "loan" exists and granddaughter refuses to pay the money back.
- Sam had a stroke that completely disabled him at age 60. He is in a skilled care facility. Before the stroke, Sam had a gambling problem. He routinely went to Tunica and Biloxi to gamble. More recently, he went to Wind Creek to gamble. Sam always took cash on his trips and there is little to no documentation proving he was gambling. Over the last few years, it is estimated that he lost over \$125,000. There is no proof that he ever won.
- Son transferred \$110,000 overseas for a mail-order bride. Mom has Alzheimer's, but she sent a note to her financial advisor approving the transfer because her son "is lonely."

Special Needs Trusts

- Special Needs Trusts are a tool to save the day
 - The trusts can protect assets for the use of the person
 - The trusts can solve many penalty issues

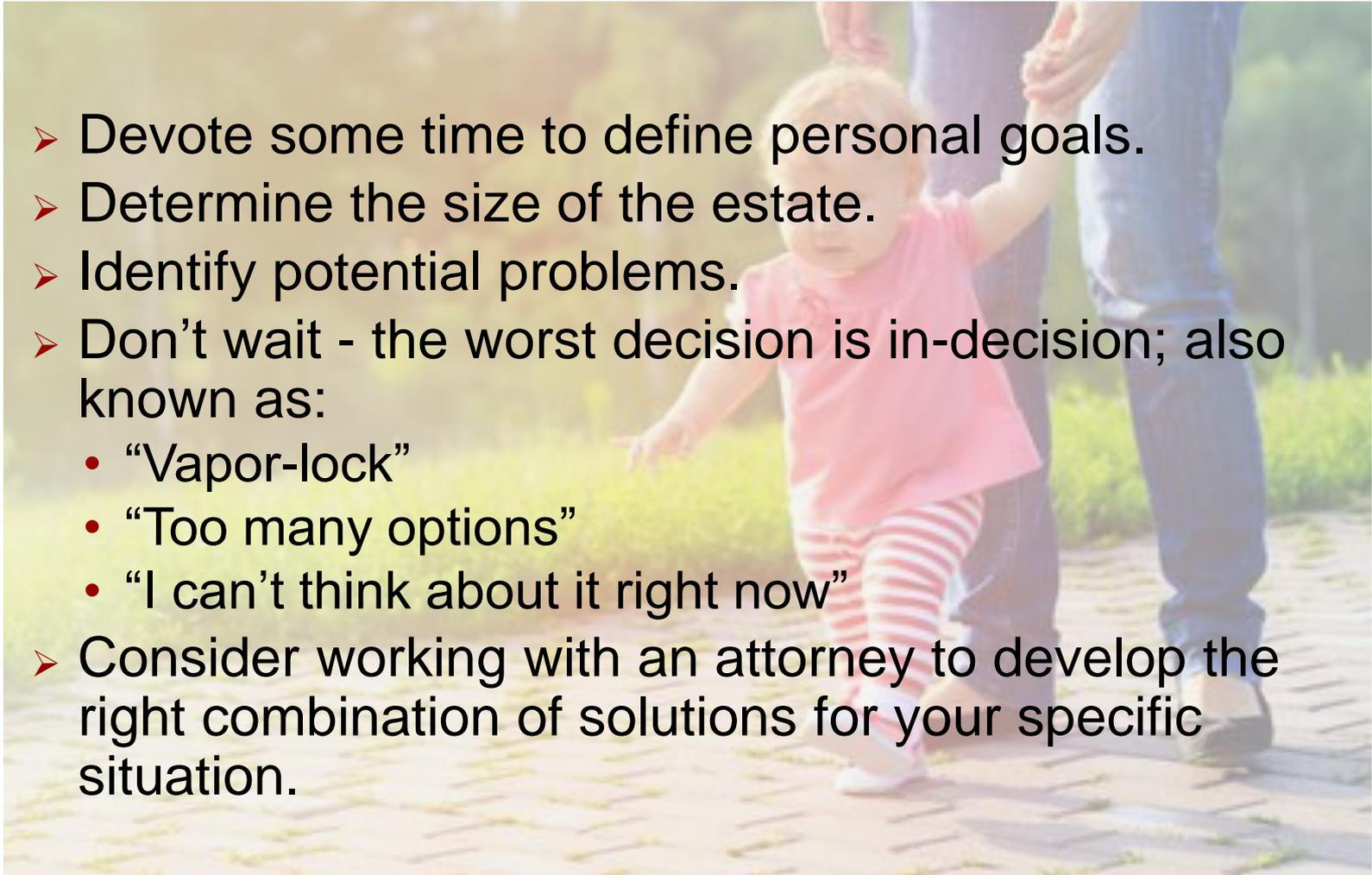
NOTE: For seniors 65 and older, check your state. Alabama, Tennessee and Florida allow the use of special needs trusts.

Mississippi and Georgia do not allow seniors 65 and older to use them to avoid spend down and transfer penalties.

Crisis Planning for Medicaid Issues

- ▶ Seek legal advice.
- ▶ Look for elder law attorneys.
 - NAELA – National Academy of Elder Law Attorneys has a good website and search engine.
 - Home Health Providers, Assisted Living Facilities, Nursing Homes, etc. can often provide names of attorneys that have good reputations for helping families

How to Begin Estate Planning

- 
- Devote some time to define personal goals.
 - Determine the size of the estate.
 - Identify potential problems.
 - Don't wait - the worst decision is in-decision; also known as:
 - “Vapor-lock”
 - “Too many options”
 - “I can't think about it right now”
 - Consider working with an attorney to develop the right combination of solutions for your specific situation.



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