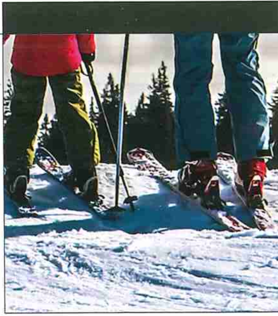

Estate and Disability Planning Ideas for Elderly Clients

For aged clients, disability and long-term care preparation is a heightened concern that should be addressed along with general estate planning considerations.

STUART C. BEAR

The "law" of advising elderly clients is a rich combination of statutes and case law addressing disability planning, succession planning, and eligibility for entitlement benefits—which is best applied with practical knowledge of human interactions and family dynamics.

It is a well-known fact that the population in the U.S. is aging. According to the 2010 U.S. Census Bureau, more than 40 million people (approximately 13% of the population) were over the age of 65.[1] The U.S. Census Bureau projects that by 2030, one in five individuals will be over the age of 65, and by 2060 the number of individuals over 65 years old will reach 98 million.[2]

Representing elderly clients, particularly clients with diminishing capacity, is both challenging and rewarding. The functionality of the family is directly related to the success an aging parent, client, relative, or friend will have in achieving planning goals and objectives. This article addresses the estate, disability, and long-term care planning considerations relevant to representing elderly clients.

Ethical considerations

Practitioners need to be cognizant of the ethical issues involved in representing elderly clients. Elderly clients, especially those with diminishing capacity, become increasingly reliant on other individuals. The client may require a child or financial advisor to transport him or her to the meetings, and it is not uncommon for an elderly client to have that individual attend the meetings. During an initial meeting, the practitioner should:

1. Remind everyone at the meeting who the client is.
2. Determine who the client has authorized to act on his or her behalf.
3. Establish with whom the practitioner can share confidential information.

The practitioner should unambiguously state this information in a written engagement letter to assure the client understands the terms of the professional relationship, but more importantly to protect the practitioner from potential liability.

Clients with diminished capacity. If a client's capacity to make adequately considered decisions is diminished, the practitioner must, as far as reasonably possible, maintain a normal client-lawyer relationship.[3] The practitioner should abide by the client's decisions concerning the objectives of representation and should consult with

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the client as to the means by which they are to be pursued.[4] However, the practitioner should not allow a client to execute legal documents if the client does not possess the requisite capacity.

An added difficulty of representing elderly clients is determining whether the client has the requisite capacity to sign each document.

Confidentiality. The practitioner must not reveal information relating to the representation of a client unless the client gives informed consent.[5] Before revealing confidential information with a client's family members or representatives, the practitioner should obtain the client's consent. If a client's child or family member is present at the initial meeting, the practitioner should have a separate conversation with the elderly client prior to sharing confidential information. The amount of confidential information disclosed to family members is dependent on each client and his or her family dynamics. While increased transparency is beneficial for some clients, it causes conflict for others.

Notwithstanding the above, the practitioner may disclose confidential information if he or she reasonably believes the client:

1. Has diminished capacity.
2. Is at risk of substantial physical, financial, or other harm unless action is taken.
3. Cannot adequately act in the client's own interest.

If all three requirements are satisfied, the practitioner may, but is not required, to take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

Capacity

An added difficulty of representing elderly clients is determining whether the client has the requisite capacity to sign each document. The fact that a client may not have had the requisite capacity prior to or after executing a document is not determinative; the client must have the requisite capacity when executing the document.

"Capacity is also situational and contextual, and it may even have a motivational component. It may be affected by many variables that constantly change over time. These variables include external factors such as the time of day, place, social setting and support from relatives, friends and supporting agencies.... Finally, capacity is not necessarily static. It is fluid and can fluctuate from moment to moment. A change in surroundings may affect capacity, and a person's capacity may improve with treatment, training, greater exposure to a particular type of situation, or simply the passage of time."[6]

The practitioner should have an honest and candid discussion with the client if he or she notices the client's capacity is diminishing. The practitioner should document his or her observations by taking in-depth notes that evidence the client's capacity to be used as a resource if capacity is ever challenged. To successfully challenge capacity, the contesting party must establish incapacity by the requisite standard of proof at the time the documents were signed.

Wills. The testamentary capacity to establish a will requires knowing:

1. The nature and extent of one's property.
2. Who will take that property.
3. The plan for disposing of property in that way.[7]

Testamentary capacity is a relatively low bar to meet, so low, in fact, that not even a deathbed change to a will creates the presumption that the testator did not have testamentary capacity.[8]

Trusts. Pursuant to the Uniform Trust Code (UTC), the requisite capacity to create, amend, revoke, or add property to a revocable living trust, or to direct the trustee of a revocable living trust, is the same as that required to establish a will.[9] Given that the primary use of a revocable living trust is disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. If the practitioner's state has not adopted the UTC, he or she should make sure the client meets his or her state's requisite capacity standard.

The capacity to create an irrevocable trust is the same capacity required to enter into a contract.[10]

1 Werner, "The Older Population: 2010," U.S. Census Bureau (November 2011).

2 Colby and Ortman, "Projections of the Size and Composition of the U.S. Population: 2014 to 2060," U.S. Census Bureau (March 2015).

3 Model Rules of Prof'l Conduct R. 1.14 (2009).

4 Model Rules of Prof'l Conduct R. 1.2 (2009).

5 Model Rules of Prof'l Conduct R. 1.6 (2009).

6 In the Matter of the Conservatorship of Ellen P. Groves, 109 S.W.3d 317 (Tenn. Ct. App. 2003).

7 See, e.g., In re Estate of Kottke, 6 P.3d 243 (Alaska 2000); In re Estate of Gallavan, 89 P.3d 521 (Colo. App. 2004); Norwest Bank Minn. N., N.A. v. Beckler, 663 N.W.2d 571 (Minn. Ct. App. 2003).

8 See, e.g., Vaccaro, Annotation, "Solicitation of Testator to Make a Will of Specified Bequest as Undue Influence," 48 A.L.R.3d 961 § 9 (2016); Carew et al., "Testamentary Capacity—Conditions That May Affect Testator's Capacity—Old Age, Ill Health, Physical Weakness—'Deathbed' Will Not Presumptively Invalid," 2 Harris N.Y. Estates: Probate Admin. & Litig. § 24:245 (6th ed. 2015); Eclavea et al., "Opportunity to Change Will; Deathbed Will," 64 Cal. Jur. 3d Wills § 176 (2015).

9 Uniform Trust Code § 601 (2010).

10 *Id.*

Powers of attorney and health care directives. A power of attorney (POA) or health care directive (HCD) establishes an agency relationship by agreement. Therefore, the client must have the capacity to contract. "Competency to contract does not require an ability to act with judgment and discretion. All that is required is that the contracting party reasonably knew and understood the nature, extent, character and effect of the transaction. A party will be excused from the contract on the grounds of incapacity only when (1) he or she is unable to understand in a reasonable manner the nature and consequences of the transaction or (2) he or she is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know it."[11]

Beneficiary designations. In order to change a beneficiary designation, the person must have the capacity to contract. "The exercise by an insured of his right under the policy to change the beneficiary thereof, effects an amendment of the former contract, and it is, itself, the making of a contract which is voidable at his option if he then lacks the mental capacity to make it."[12] The legal capacity to surrender a life insurance policy for its cash value also requires a capacity to contract.

Deeds. The majority of states require a grantor have the capacity to contract. A person incurs only voidable contractual duties by entering into a transaction if by reason of mental defect: (1) he or she is unable to understand in a reasonable manner the nature and consequences of the transaction, or (2) he or she is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his or her condition.[13] The determination of incapacity is a question of fact, which typically must be proven by a preponderance of the evidence by the challenging party.

The more detailed the HCD is with regard to specific care, the less likely a lawsuit will ensue based on interpretation of the document.

The minority of states require the grantor have testamentary capacity. The question is whether at the time the grantor executed the deeds in question he or she had sufficient mental capacity to understand the business in which he or she was engaged, to know and understand the extent and value of his or her property, and how he or she wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others.[14]

Disability planning

At an initial meeting, the practitioner should establish the client's goals. Typical client responses include "avoiding probate," "saving taxes," and "protecting assets from the nursing home." The client typically does not focus on the management of his or her assets during his or her lifetime or the overseeing of his or her health care. While measures can be taken to achieve the above mentioned goals, the practitioner should stress the importance of disability planning. The POA and HCD are extremely powerful documents and should be incorporated with the estate plan to avoid the expenses of guardianship and conservatorship proceedings.

Power of attorney. A POA is a legal document in which an individual (the principal) authorizes a third party (the agent or attorney-in-fact) to manage his or her property as if it were his or her own property. The practitioner should follow statutory requirements relating to the requisite number of witnesses and whether the POA must be notarized. While not a requirement in all states, it is prudent to have the POA signed in the presence of two witnesses and a notary, which deters contesting the validity of the document. A POA comes in many forms; it can be general or limited, durable or nondurable, and effective upon execution or incapacity.

A general POA authorizes the agent to perform any and all acts the client themselves would perform on a daily basis. Conversely, a limited POA, as the name indicates, limits the agent's authority to specific acts or for a specific time. For example, the agent's authority may be limited to the sale of a specific piece of real estate or the payment of bills from a specific bank account, or the authority may be limited to a specific time period while the client recovers from surgery or is on vacation.

Upon the client's incapacity, an agent's authority under a durable POA continues to be effective whereas his or her authority ceases to be effective under a nondurable POA. Under the Uniform Power of Attorney Act (UPOAA) and Uniform Probate Code (UPC), which incorporated the UPOAA, a POA is durable unless it expressly states that it is terminated upon the incapacity of the client.[15] Conse-

[11] See Moore v. New York Life Insurance Company, 146 S.E.2d 492 (N.C. 1966), citing Restatement of Contracts 2nd § 15(1) (1981).

[12] *Id.*

[13] Restatement (Second) of Contracts § 15 (1981).

[14] Barrett v. Swisher, 324 Mich. 638 (1949).

[15] National Conference of Commissioners on Uniform Laws, Uniform Power of Attorney Act. section 104 (2006).

quently, the POA is commonly drafted to continue to be effective upon the client's incapacity.

At common law and under section 109(a) of the UPOAA, unless otherwise provided a POA is effective upon execution. However, a POA with a "springing" power becomes effective upon the client's incapacity. If a springing power is included, the practitioner should define incapacity and specify who determines when the client is incapacitated. The practitioner should consider drafting a broad definition of incapacity to eliminate the burdens involved with proving incapacity. An expansive definition may include the inability to effectively manage one's property or financial affairs because of age, illness, mental disorder, dependence on prescription medication, or any other cause. Incapacity may be determined by the client's attending physician, two independent physicians, or a private determination by the client's spouse, children, or loved ones.

The agent's authority terminates when any of the following occur:

1. The client dies.
2. The client becomes incapacitated, if the POA is non-durable.
3. The client revokes the POA.
4. The POA provides that it terminates.
5. The purpose of the POA is accomplished.
6. The agent dies, becomes incapacitated, or resigns, and the POA does not provide for another agent to act under the POA.

While the POA takes on many forms, the most important aspect is selecting the appropriate agent. When the agent upholds his or her legal fiduciary duties, and acts only in the best interest of the client, the POA is a very effective tool. However, if the improper agent is selected, things can go terribly wrong. Therefore, the agent should not be selected based on arbitrary factors such as the oldest child or the child who lives in town. An ideal agent is able to handle the level of sophistication required to manage the client's assets. Additionally, the ideal agent has good credit, no bankruptcies, and has a proven track record of fiscal responsibility. Most important, however, the agent must be of high moral character, honest, trustworthy, and free of active addictions.

The best a client can hope for is an agent who possess some, if not all, of the qualities of a good agent on the day the document is signed. There is no crystal ball for tomorrow, but the selection should be a rigorous, considered process to be sure the agent chosen will act prudently and fairly at the job. The client's agents should be reviewed every few years and immediate changes should be made when necessary. If the client revokes an agent's authority, the client should send the revocation to all financial institutions where he or she has accounts. While the POA is a powerful document, the HCD is arguably the most important document in any estate and disability plan.

Health care directive. The HCD is commonly referred to as the health care power of attorney, living will, or health care proxy. The HCD serves three main roles, it:

1. Nominates a client's health care agents.
2. Sets forth a client's wishes about his or her medical care.
3. Contains a Health Insurance Portability and Accountability Act (HIPAA) release, which allows medical professionals to disclose a client's medical information to his or her health care agents.

A valid HCD can be signed by the client, or by another person at the direction of the client. Similar to the POA, it is prudent, but not required in all states, to execute the HCD in the presence of two witnesses and a notary.

Most states have a suggested statutory HCD form, but many forms exist in each community, including Honoring Choices and 5 Wishes. The balance between the different forms is about specificity versus centralized authority. The medical profession highly regards the client's exact words and directions. The downfall of such a form is the client often will stall out on the execution of such a labor-intensive form. A shorter form that has sweeping powers and appoints an agent to act for the client in all capacities is easier for the client to comprehend and sign. What is lost is evidence of the actual character of the client to reflect upon when tough choices are made.

Setting forth the client's health care wishes should be seen as a gift from the client to his or her agents. Regardless of a client's wishes, the practitioner should encourage the client to unambiguously state his or her preferences towards organ donation and burial or cremation. The death of a loved one is a tragic moment and it is a great burden to force the agent, without any guidance, to make these tough decisions shortly after the passing of the client.

If the family gets along, talks to each other, reasons things out with one another, and is able to come to a consensus decision, all will be fine. The use of the HCD, however, is needed in case the family cannot agree, and the health care of the client might suffer as a result of indecision and in-fighting. At that time, the client will benefit from central authority resting in the capable hands of someone the client trusts.

Practitioners should avoid ambiguous language, which is left to interpretation. The purpose of the HCD is to remove the possibility of argument. The more detailed the HCD is with regard to specific care, the less likely a lawsuit will ensue based on interpretation of the document. However, a document that places full authority into the hands of one agent is less open to litigation, unless of course the absolute power has corrupted the agent. An action in probate court is required to remove a health care agent who fails to look out for the best interest of the client.

POLST. The practitioner should advise the client of the difference between an HCD and a provider orders for life-sustaining treatment (POLST) form. If a client has specific medical orders for his or her treatment to be followed during an emergency, he or she should complete a POLST form with his or her medical professional. Because a POLST form is a medical order, emergency medical services and emergency medical technicians must follow the medical order on file. If a client has a HCD, but does not have a POLST form, the emergency professionals must do everything possible to attempt to save his or her life. The HCD is reviewed only after emergency measures have been taken and the client is in a stable condition. A POLST form should supplement, not supplant a client's HCD.

Estate planning

After appropriate attention has been placed on the POA and HCD, the practitioner should determine the client's wishes regarding the distribution of his or her estate. The practitioner should discuss the difference between wills and trusts and which document is most appropriate given the client's situation. The practitioner should discuss methods of avoiding probate for clients who want to avoid probate, but do not require the complexities of a revocable living trust.

Wills and trusts. The primary estate planning documents for transferring assets at death are wills and revocable living trusts.

- A will transfers singly owned assets at death and requires probate. Probate involves judicial involvement, at some level, in overseeing the distribution of assets. A will appoints the personal representative and specifies the distribution of assets, which helps streamline the probate procedure.
- A revocable living trust is established during a person's life and is analogous to a legal entity. The settlor, who typically serves as initial trustee, creates the trust agreement and transfers assets (typically, non-tax-deferred assets and real estate) to the trustee. The settlor reserves the right to revoke or amend the trust, and the trustee controls the assets owned in the name of the trust. At the death of the settlor, assets are distributed much like a will, but without the necessity of a probate procedure.

Both wills and revocable living trusts allow assets to be distributed to beneficiaries outright or in a testamentary trust arrangement, particularly in connection with estate tax savings, establishing an A-B testamentary trust arrangement or disclaimer trust arrangement, and also various testamentary trust arrange-

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ments for younger beneficiaries. Therefore, both wills and revocable living trusts provide the same substantive measures in terms of distribution of assets at death, but the primary distinction is that while wills streamline the probate process, a properly established and funded revocable living trust serves to avoid the probate process.

Factors in selecting a will or trust as the primary estate planning document. When recommending a will or revocable living trust as the primary estate planning document, the practitioner should consider:

1. The nature and extent of the client's assets.
2. The complexity of the estate plan.
3. Whether the client has a taxable estate.
4. The client's preference towards confidentiality.

If the vast majority of a client's assets consist of life insurance, retirement accounts, annuities, and nonqualified assets, it may be appropriate to structure the assets to avoid probate via beneficiary designations and prepare a will as a "safety net" to ensure improperly structured assets have a streamlined probate process. A client with a diverse portfolio of assets may be better served with a revocable living trust as his or her primary estate-planning document. The revocable living trust consolidates assets, making for an orderly transition at death. If a client owns real estate in multiple states, retitling the properties into a revocable living trust would eliminate the necessity of probate procedures in multiple states.

A will is appropriate for clients with a fairly straightforward estate plan. If a client is comfortable with an outright distribution of his or her assets to the designated beneficiaries, whether they be a spouse, partner, or children, a will is an appropriate document. As discussed in more depth later in this article, assets can be structured to avoid probate. A will is also appropriate for clients with minor children, as a probate procedure is required to appoint a guardian for minor children. Clients looking to establish a much more complex estate plan are better served with a revocable living trust. Complexities may include specific gifts to individuals and charities; the establishment of a series of testamentary trusts, such as a generation-skipping trusts, supplemental needs trusts, or spendthrift trusts; or providing unique assets such as a family business or family cabin to specific beneficiaries.

The practitioner should also advise married clients with taxable estates of possible estate tax-savings strategies. Beginning in 2018, 12 states will have state estate taxes.[16] Four states, Hawaii, Maine, Maryland (effective 1/1/19), and New York (effective 1/1/19), have state estate tax exemptions equal to the federal limit.[17] The remaining eight states have state estate tax exemptions lower than the federal limit: Connecticut ($2 million), Illinois ($4 million), Massachusetts ($1 million), Minnesota ($2.1 million), Oregon ($1 million), Rhode Island ($1.515 million, indexed to inflation), Vermont ($2.75 million), and Washington ($2.129 million).

It may be necessary to adopt A-B testamentary trusts or disclaimer trusts to reduce or eliminate estate taxes. In order to implement this strategy, it is necessary to split the ownership of assets so that each spouse owns assets separately, in each spouse's respective name. Splitting assets would result in a probate procedure upon the death of each spouse. Establishing revocable living trusts avoids the necessity for both probate procedures and is much more advantageous than wills. The practitioner should also advise the client of possible inheritance taxes. As of 2017, six states—Iowa, Kentucky, Maryland, Nebraska, New Jersey, and Pennsylvania—impose inheritance taxes. All six states have spousal exemptions and Iowa, Kentucky, Maryland, and New Jersey have exemptions for assets devised to lineal descendants.

A probate proceeding, by its nature, is public. The probate court file reveals assets, beneficiaries, and the nature and extent of the estate plan through the will. The evolution towards confidentiality is focused on confidentiality concerns for beneficiaries. A beneficiary dealing with a lawsuit, divorce proceeding, judgment, or who simply wants to protect his or her inheritance would benefit from confidentiality. A revocable living trust prevents others from knowing the identity of the beneficiary and the value of his or inheritance.

Avoiding probate: non-real estate assets. To avoid probate for non-real estate assets, the client must add an individual as a joint owner or designate a beneficiary on the account. The practitioner should inform the client that adding an individual as a joint owner exposes the client's assets to the joint owner's creditors. To eliminate the exposure, the client would be better served naming the individual as payable on death (P.O.D.) or transfer on death (T.O.D.) beneficiary. Other assets transfer outside of probate via beneficiary designation. Assets traditionally governed by beneficiary forms include life insur-

16 As of 1/1/2018, Delaware and New Jersey's state estate taxes will be eliminated.

17 In 2017, the federal estate exemption is $5.49 million per individual. The amount rises to $5.6 million in 2018.

ance, retirement accounts, and non-qualified assets. Bank accounts can be established in the P.O.D. or T.O.D. framework.

Some states have statutory limits that allow heirs to collect assets below a certain value without the need for a probate procedure. For example, Minnesota allows assets to be collected without a probate procedure if the value of a client's individually owned assets is less than $75,000.

Avoiding probate: real estate. If a client owns an interest in real estate in his or her name alone, his or her estate will be subject to probate procedure. Clients with revocable living trusts can retitle the real estate into the trust to avoid probate. Clients with wills can use the following methods to transfer real estate outside of probate:

1. Joint tenancy.
2. Transfer on death deeds (TODD).
3. Life estate deeds.
4. Gifting.

Most married clients own their home as joint tenants. Upon the first spouse's death, the property passes to the surviving spouse without the need for probate. Without further action, the second spouse's estate will be subject to probate procedure. For some clients, it may be appropriate to add a child as a joint tenant. The biggest disadvantage is the added exposure of the child's creditors. If the child gets divorced or is subject to other creditor claims, the creditor can collect against the house. Another disadvantage is the loss of control; if the client wants to sell the house, his or her child must consent. If the client is unwilling to subject him or herself to increased creditor exposure, the practitioner should suggest using a TODD.

Currently 26 states allow real estate to be transferred via a TODD or beneficiary deed. In general, the deed must:

1. State the transfer is to occur at death.
2. Identify the beneficiary by name.
3. Be recorded prior to the owner's death.

The primary advantage of a TODD is flexibility. Because a TODD is effective upon death, the client-owner, is not exposed to a beneficiary's creditors and may sell the property, revoke the TODD, or record a subsequent TODD changing the beneficiaries without a beneficiary's consent. Upon the death of the client-owner, the beneficiary receives the real estate without having to go through probate, and the real estate receives a step-up in basis under Section 2036. The primary disadvantage of a TODD is the inability to protect the real estate from Medicaid recovery. As discussed below, if a client transfers real estate reserving a life estate interest, or gifts the real estate to a beneficiary, he or she may be able to protect a portion of the real estate from Medicaid recovery.

For states that do not allow a TODD, the practitioner should consider using a life estate deed. Absent unforeseen circumstances, a life estate deed is a wonderful planning tool. Like a TODD, the beneficiary receives the real estate without having to go through probate and the real estate receives a step-up in basis under Section 2036. A life estate deed offers the potential benefit of protecting the value of the remainder interest from estate recovery for Medicaid, but may create a period of Medicaid ineligibility. The practitioner should warn the client about the loss of control and exposure to creditors similar to placing a child on as a joint tenant. The

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client is also unable to change the remainder beneficiary, which may create issues if a remainder beneficiary predeceases, gets divorced, or has creditors.

The practitioner should discuss the option of gifting real estate if the client is seeking to protect real estate from the costs of long-term care (LTC) and is not concerned with increased creditor exposure and lack of control. Gifting may be the only opportunity for the client to provide an inheritance to his or her beneficiaries. If client gifts his or her home and applies for Medicaid five years after the date of the gift, the entire value of the home is exempt from estate recovery. An added disadvantage of gifting is carryover basis. The client's basis transfers to his or her beneficiaries, and capital gains tax will be due if the real estate is sold at a gain.

Long-term care planning

An added difficulty of representing elderly clients is planning for the costs associated with LTC. As the average life expectancy increases and the cost of LTC rises, there is a significant risk of depleting or severely diminishing assets the client intended to leave to his or her beneficiaries as an inheritance.

Medicaid is a federal-state partnership welfare program that provides, in part, for individuals age 65 or older for physician charges, durable medical equipment, hospital care, home care, care in an assisted living residence, and nursing home care. The practitioner should be aware of the differences between single clients and married couples when one spouse is in the LTC facility (the "institutionalized spouse,") and one spouse continues to live at home (the "community spouse".)

Payment. The three methods of paying for LTC are:

1. Private pay.
2. LTC insurance.
3. Medicaid.

Some clients are fortunate enough to be able to afford the costs of LTC. For these clients, the practitioner should establish a hierarchy for disposing of assets. Disposing of certain assets, like retirement accounts and highly appreciated assets, to pay for LTC may have significant income and capital gains tax consequences.

Other clients may be unable to afford to private pay or choose to leverage the risk of LTC costs by purchasing LTC insurance. The practitioner should encourage the client to obtain premium quotes for LTC insurance. Traditional policies typically cover a specific dollar amount for a specific period of time (i.e., $200 per day for two years). However, if a client with a traditional policy does not need LTC, the premium payments merely served to put the client's mind at ease, as no monetary benefit is provided to a client's beneficiaries. Newer hybrid policies allow a client to have an LTC insurance rider on a life insurance policy. If the client does not need LTC, a death benefit is paid to designated beneficiaries. If a client needs LTC, the death benefit is reduced by the value of care received. Several states have enacted an "LTC partnership program," allowing clients to protect assets equal to the amount of LTC insurance purchased.

As a means of last resort, if a client is unable to afford the costs of LTC and unable to afford or obtain LTC insurance, Medicaid will pay the costs of long-term care after he or she meets the asset and income eligibility requirements.

Medicaid eligibility. Medicaid asset eligibility requirements for elderly individuals over age 65 are state specific. The value of available assets an individual can have and still qualify for Medicaid ranges from $999.99 in Missouri to $14,850 in New York City.[18] The majority of states allow the institutionalized spouse to have $2,000 in available assets. Different resource limits apply when one spouse is in an LTC facility and the other spouse continues to live at home.

To determine asset eligibility, a client's assets are categorized as available, unavailable, or exempt. Common available assets include:

1. Cash and other liquid assets.
2. Retirement accounts.
3. Proceeds from the sale of exempt or unavailable assets.
4. Any real or personal property that could be converted to cash and are not exempt from being classified as available.

Unavailable assets include unsalable property and property owned jointly with a non-spouse.

Common exempt assets include:

1. The homestead property.
2. One vehicle of any value.
3. Household furnishings.
4. Property used in a trade or business.
5. Life insurance policies with up to $1,500 in face value.
6. Burial plots.

Exempt assets may become available if the community spouse dies or enters an LTC facility, or the institutionalized spouse is unmarried and no longer expects to return home.

Income eligibility is generally determined using the income methodologies prescribed for Supplemental Security Income (SSI), which is 133% of modified adjust-

18 Fleming and Davis, *Elder Law Answer Book*, Appendix 17-6 (Wolters Kluwer, 2016).

19 The statewide average cost of care ranges from $4,000 in Louisiana to $12,029 in New York City.

20 For 2017, Alaska's MMNA is $2,536.25 and Hawaii's is $2,333.75.

ed gross income (MAGI) as required by the Affordable Care Act. The practitioner should explain the impact of a client's income being greater than the income limit. For clients in "income-gap" states, a qualified income trust, commonly referred to a "*Miller* Trust," must be put in place, whereas clients in "medically needy" states are allowed to have income over the maximum limit if medical expenses are deducted from income.

Asset reduction strategies. The practitioner should advise a client how to best reduce his or her available assets. The sooner LTC planning is discussed, the more options available to the client. If addressed soon enough, the client may be able to protect assets by gifting assets to his or her beneficiaries. If the client is already in an LTC facility or will be entering soon, fewer planning options are available.

One common asset reduction/protection strategy is gifting assets. If a client gifts assets and does not apply for Medicaid within five years, the assets are exempt and protected from estate recovery. However, if the client applies for Medicaid within five years, he or she is subject to a transfer penalty calculated using each state's average cost of care.[19] The practitioner should advise the client to contact the practitioner before making gifts or applying for Medicaid. The practitioner should also advise the client of tax implications and transfer penalties associated with gifting.

The practitioner should advise clients who have already entered an LTC facility or will be entering one soon, the idea of converting excess available assets to exempt assets. This may involve purchasing a more expensive home, making home improvements, purchasing new appliances and furniture, purchasing a new vehicle, paying off an existing mortgage, and purchasing a funeral contract. Another common strategy is purchasing a single-premium annuity. If a client has $100,000 in available assets, he or she might choose to purchase a single-premium annuity for $98,000, reducing his or her available assets to $2,000 and becoming eligible for Medicaid. The purchase of an annuity creates a period of ineligibility unless the state is named as the primary beneficiary.

Spousal impoverishment. The practitioner should advise the client of community spouse resource allowances (CSRA) and minimum monthly maintenance needs allowance (MMMNA) when one client is institutionalized and his or her spouse is living in the community.

The CSRA allows the community spouse to maintain a minimum support needed to continue to live in the community. Similar to the asset limit of the institutionalized spouse, the community spouse is allowed to have only a certain amount of available assets. In 2017, the CSRA minimum resource standard set by SSI is $24,180 and the maximum resource standard is $120,900, however, most states implement their own maximum and minimum standards. Some states allow the community spouse up to $120,900 regardless of the value of the available assets (i.e., if the total available assets were $120,900 the community spouse could shelter the entire amount). Other states allow the community spouse to keep only 50% of the available assets subject to the minimum and maximum amounts (i.e., if the total available assets is $100,000, the community spouse is able to shelter only $50,000 in available assets).

The income of the community spouse does not affect the institutionalized spouse's eligibility. However, the MMMNA allows the institutionalized spouse's income to provide for the community spouse if his or her income is below a certain amount. The MMMNA set by SSI for 2017 is $2,030 for all states except Alaska and Hawaii; however, most states implement their own maximum and minimum standards.[20]

Estate recovery. In 1993, Congress required each state to implement an estate recovery program to recover for Medicaid expenditures. The state places a lien on personal or real property and seeks reimbursement up to the value of care received upon the death of the surviving spouse. The most common scenario is placing a lien on the homestead property. The homestead is often exempt during the lifetimes of the community and institutionalized spouse. However, when the homestead becomes an available asset it is subject to estate recovery.

Conclusion

Representing elderly clients poses many challenges, but is also a rewarding endeavor. Estate, disability, and LTC planning become increasingly important as our population ages. Aside from providing excellent service while abiding by an ethical standard, putting a client's mind at ease is the true reward of the relationship. Effective planning results in an efficient estate settlement and maintains family harmony. ■