

Coping with Aging, Incapacity and Dementia disorders

Estate and Long-Term Care Planning

A. The Capacity/Incapacity Spectrum

Capacity

Power of Attorney for Property Mgmt.
Power of Attorney for Personal Care
Advance Health Care Directive
Authorization for Release of Information
for Fraud Prevention
Wills, Trusts (Revocable and Irrevocable)
Community Property Declaration
Asset Transfers

Incapacity

Conservatorships

Probate proceedings

Court Petitions for Asset Transfers

There is a premium on counseling families with a loved one suffering with dementia, senility or Alzheimer's to act while the affected person still has capacity. First, that person can plan his/her own future, or play an active role in same. Dignity is maintained. Second, one can take advantages of procedures that avoid court or state involvement. Third, there are more options, greater flexibility, and opportunities to save money in the planning process.

B. Essential Tools for Planning (and notes on appropriate costs)

1. Initial consultation: it should be possible to receive thorough guidance from an attorney experienced in this area in consultation lasting an hour or two, or less. Prerequisite: preparing documents in advance; completing whatever questionnaires or summary sheets the attorney sends to the client. The costs provided below are estimates of what the appropriate range for such services ought to be.

Planning note: How to get started? Attorneys often see the family members of an afflicted person only after a crisis. The reason is that it often takes a crisis to break through the momentum that has shaped the dynamics of a particular family. If dad has been getting progressively worse over time, mom has tried to adjust and to hang in there. Going to see a lawyer may take a lot of extra effort. This is a situation where a facilitator or counselor can be a great help. The best person for this job is a younger family member, someone not overtaken by the stress and turmoil of an illness that often overburdens persons, especially seniors, to the point that they cannot take initiative in such matters. What if there is no nearby family member? There are a number of support services,

private agencies, private fiduciaries, and other “professional assistants” working in the Bay Area. Choose with CARE.

Whether it is a family member or a trusted outsider, the facilitator should help mom and dad review the finances, list their assets, write down what all the income sources are, check out the life insurance policies and the benefits plans from work, and locate the critical family documents, like old wills, marriage licenses, birth certificates, and other documents that might be necessary in the future.

2. The Durable Power of Attorney for Property Management (DPA): This document allows an appointed agent to deal with the assets of a principal as a fiduciary (e.g., for the benefit **ONLY** of the principal). A spouse can serve for a spouse or a child for a parent, etc.

This document can be written to become effective immediately or upon incapacity. It lasts even after loss of capacity, but not after death.

A **DPA** allows the agent to handle bank accounts, real property, stocks, and other assets. The document can even provide for amendment of a trust, for gifting, or for entering into contracts. One cannot, however, prepare a will using a **DPA**. One can coordinate a **DPA** with Medi-Cal planning by giving the power to an agent to retitle, transform or transfer assets or make gifts of assets, including a house.

A **DPA** can authorize different people to perform different functions: one child can handle real property, while another can handle a stock account, for instance. Cost: \$50-\$500 for an attorney-drafted document, plus fees to record the document, if necessary.

3. Advance Health Care Directive (AHCD): On and after July 1, 2000, this directive takes the place of the former durable power of attorney for health care and other health care directive(s). This allows you to name an agent to give consent for medical treatment, and to spell out in great detail types of medical treatment, if any to be avoided. This document permits your agent to instruct doctors and other health care providers to refrain from using extraordinary means to sustain life or to use artificial nutrition and hydration. A Durable Power of Attorney for Health Care signed on or after January 1, 1992 but prior to July 1, 2000, is valid indefinitely. If you executed one prior to 1992, the document is good for seven years, but if you are incapacitated at the time it lapses, it will stay in force. If you signed a pre-printed DPAHC, review it carefully to be sure whether it has language limiting its duration. While a physician may presume a health care power is valid, a pre-printed DPAHC form signed on or after July 1, 2000 **may** not be accepted by physicians and hospitals. Please review any document you sign, and on and after July 1, 2000, the **AHCD** should be used. The **AHCD** is effective immediately and not based on your inability to communicate health care desires to doctors, or incapacity and can be revoked orally up to the last moment of life. Cost: \$0-\$500.

4. Durable Power of Attorney for Personal Care (DPAPC): This document allows an appointed agent to deal with the personal care needs and issues, other than health

care decisions, of a principal, such as providing for or making arrangements for residential location, meals, transportation, recreation, mail, management of household staff, contents and structure, care for household pets, spiritual or religious needs, etc. This can be a stand-alone document or provisions can be included in the DPAFM. Cost: \$0-200.

5. Will: This conventional estate-planning document allows a person to plan how the person's estate is to pass. Individuals with minor children should use wills to nominate guardians for their minor children.

A will can allow for trusts to be set up after death.

A simple will can be a few pages long and will assure that a person's property and remains will be disposed of according to that person's wishes; or a will can be a many-layered document that sets up several trusts and does all the tax planning that a complicated living trust can do.

If a person's estate is substantial, a will requires probate and can incur substantial fees for an attorney and a fiduciary; but in complicated matters a will might be preferable, to assure the oversight of the probate process. Due to a change in the law effective January 1, 1997, a person can leave up to \$100,000 to be distributed under the terms of a will without having to open a probate. But remember that only a Superior Court can appoint someone to have the powers of an executor or administrator. Cost: \$500-\$2,000.

6. Trust: A revocable living trust permits planning of the estate, like a will, but it does not require court supervision and thus can pass on property without the expense and delay of probate. A revocable instrument can be amended, changed, or canceled. The trust is living because it comes into existence during the life of the principal.

Some persons create trusts to pass on administrative chores to their children/heirs during the lifetimes of the principals.

The trust can be used to do tax planning; maximizing what a couple can pass on without need of probate and by avoidance of federal estate and gift tax. Cost: \$1500-\$4000.

7. Special Needs Trust/Irrevocable Intentionally Defective Trust: These are instruments that have more and more importance for people who are on SSI or who might be recipients of public benefits in the future. Friends and family members might want to set up a special needs trust to name a trustee to care for that person, but in a manner that does not cause that person to lose public benefits. The special needs trust allows the trustee to meet the special needs of the person without disturbing eligibility for benefits. These trusts can be revocable or irrevocable, and it is possible for someone to give money to a special needs trustee for him or herself under certain circumstances. A special needs trust has complicated tax and public benefits consequences and should be used only with skilled assistance. Cost: \$400-\$4,000.

8. **Deeds—Joint Tenancy:** Creates instant survivorship; no need for will; but causes loss of step-up basis.

Use of joint tenancy deed for intergenerational passing of title is fraught with problems; the person you name as joint tenant can attempt to sell the property or otherwise get the value out of his/her portion.

Upon death of first joint tenant, survivor files a simple document with recorder to perfect title. Cost: \$50-\$700 for preparation of deed, for affidavit of death of joint tenant, preparation of change of ownership form for county (PCOR).

9. **Deeds—Community Property (WROS):** The right way for spouses to hold title with each other: permits full step-up basis upon death of first spouse. Since July 1, 2001, a new title is accepted: Community Property with right of survivorship; allows for probate avoidance **and** stepped-up basis. Consult your tax professional for more concise information.

Recommended for most instances where spouses have purchased property with community property. Cost: \$50-\$700 for preparation of deed, for preparation of PCOR.

10. **Transfers of Property:** Property can be gifted from parent to child, for example, on annual basis (\$13,000 per gift) to reduce an estate and not lose exemption for estate transfers; spouses can make unlimited gifts to each other. Cost: Pre- or post-nuptial agreements cost \$300-\$5,000 and, if properly done, require two attorneys. These agreements are contracts that can transmute property (from community to separate, and vice versa). Note: just because you take your spouse's name off an account does not mean that that account is now your separate property.

C. **Long-Term/Continuum of Care Insurance**

As federal and state governments tighten eligibility requirements for Medi-Cal qualification, and as costs climb astronomically for individuals needing various forms of long-term care ("LTC"), long-term health care insurance is becoming a more recognizable and feasible alternative estate planning vehicle, shifting some of the potential risk to an insurance company.

Despite some historical problems, long term care insurance is now a terrific idea because it allows you maximum control of your financial destiny. This type of insurance is primarily useful for people with substantial assets to protect enough discretionary income to cover the premiums easily, and anxiety about the possibility of institutionalization. It allows you to maintain control of your countable assets until you need long-term care. If you subsequently need a nursing home, you can shift assets. While the look-back period can be up to 60 months, the policy will step in and pay for your care up to the dollar amount you purchased.

The long-term care policies fall into two broad categories: “stand-alone” and life insurance-based. The stand alone is based on claims made, in other words, the premium dollars are not recuperated unless the insured makes a claim. The life-insurance based product pays long-term care benefits if needed during a lifetime, but any remaining cash value flows to heirs.

All top-rated stand-alone policies include coverage for these alternate long-term care arrangements. Some products limit coverage or restrict access to a narrowly constructed range of settings clearly named within the body of its LTC policies. Some life insurance products do not cover respite care (care provider relief) and make hospice care so restrictive that the benefit probably never would be available.

In summary, when looking for the appropriate coverage or policy, important features of risk coverage to be considered include:

- Cost of policy;
- Amount of the deductible;
- Amounts paid out under the policy (daily and total of plan life);
- Stability of insurance company, both historical experience and future solvency prospects, the best policy in the world is no good if the company is not financially able to honor it;
- Coverage of all levels of care, from in-home, to assisted living/board and care to skilled nursing level care;
- Elimination periods;
- No requirement of a hospital stay preceding the nursing home stay;
- Coverage for non-medical custodial care;
- No restriction that reimbursement is only for items or services covered by Medicare;
- Waiver of premium (i.e., no premium payment is due if the client is in a nursing home);
- Non-forfeiture provisions which allow you to get a reduced benefit if you stop paying but have paid for a period of time, such as ten to fifteen years;
- Case management services;
- Non-cancelable due to the client’s age or health;
- Coverage of home improvements such as a ramp or a bathroom fixture designed for the handicapped;

- A short period of non-coverage for pre-existing conditions;
- Ability to be assessed by an independent care coordinator of one's choice;
- Benefit plan life;
- Does the plan qualify under existing federal and state laws;
- Definition of "Activities of Daily Living" (ADLs); policies must include at least five of the six activities of daily living and the trigger is being unable to perform at least two ADLs;
- Is an inflation factor built-in or optional? Is there an automatic benefit increase feature? Buy coverage both for now and for the future;
- Reimbursable benefits or direct pay;
- No restriction on use of funds, i.e. will the policy allow the policy holder or her agent to decide who to pay;
- Only purchase the policy if the premiums can be paid out of income you would otherwise be adding to your savings. Do not sacrifice your current standard of living in order to pay the premiums.

Policies vary; but generally, inability to perform two of five (six, seven) ADLs can trigger a claim. These should be explicit and independent of one another. One policy included bathing under the "mobility" definition, opening the "gray area" of interpretation of any given claim. This policy added further restrictions to the ADLs, which are the trigger for either nursing home or home health care benefits, defining them as needing "continual one-on-one assistance." By contrast, most quality stand-alone products broaden the ADL definition to include "needing help now and then", or "needing any human assistance."

You need to weigh benefits and features of policies, always considering the exposure to potential estate diminishment, in determining whether purchase of either type of policy is appropriate. Although, it might be difficult or impossible to obtain coverage for one of you due to a prior diagnosis, LTC insurance covering in-home health care benefits, for example, might be available to the other spouse which when received would serve to benefit both spouses at home.

D. Medi-Cal Eligibility

1. For persons in long-term care since Pre-9/30/89: If you are aware of someone who has been in long-term care continually since prior to 9/30/89, have the long-term care person's spouse contact an attorney or visit the nearest Social Services Agency

immediately. Changes in the Medi-Cal law, and the provision of the California transitional rules, will allow the spouse in long term care to transfer everything to the spouse at home and be eligible for Medi-Cal right-away. Every month of delay will cost the spouse at home another \$4,000-\$9,000 in nursing home costs.

2. For persons entering long term care on or after 9/30/89: Spouses can still save substantial assets, including a house, a car, all furniture and furnishings, jewelry, pensions, and some other assets. In addition, the spouse at home can have at least \$109,560, in cash or “nonexempt” assets. A family that wishes to get an assessment of eligibility for Medi-Cal can do so at the nearest Medi-Cal office of the County Health and Human Services Agency (Social Services Department of the County).

3. It is possible to obtain substantial increases in the sums that spouses may retain under the Community Spouse Resource Allowance (“CSRA”). If a spouse at home has less than \$2,739 in income coming in her/his name, including income from the Community Spouse Resource Allowance, it is possible to have the Allowance increased to extend to whatever amount would be necessary to bring in a total of \$2,739 in income. For example:

Mr. and Mrs. Brown own a \$400,000 house, have \$150,000 in C.D.s and bank accounts, and Mr. Brown, who has Alzheimer’s and is in long term care, draws \$1,300 in pension and Social Security income. Mrs. Brown draws \$350 in pension and Social Security income. Their C.D.s produce income at 3.5%, which is \$437.50 a month. In this case, Mr. Brown will be eligible for Medi-Cal and Mrs. Brown will get to keep all of the money, but it will be necessary first to get either a court or a state administrative law hearing judge to award her the enhanced CSRA or convert certain assets. (In this case, by the way, Mrs. Brown also gets to keep all of Mr. Brown’s income.)

If Mrs. Brown had some enormous medical expenses, or other extraordinary expenses, it might also be possible to get her Minimum Monthly Maintenance expanded from \$2,739 to some higher figure. This would also require action by a court, which could raise her community spouse income allowance, or by a Medi-Cal fair hearing officer. Where the spouse at home has extremely high living costs, it has been possible to persuade the judge to raise the spouse’s allowance to over \$4,000.

It is also possible, if Mr. and Mrs. Brown have substantially more assets, for Mrs. Brown to take \$200,000 of community property assets and purchase a qualified annuity payable only in her name. This would effectively remove the \$200,000 as a countable asset. **Please note that Medi-Cal law requiring annuities, transfers, trust, and gifting has been substantially revised between 1993 and 2006, by both Congress and the State Legislature. Annuities rules were changed effective November 1994. California adopted new regulations in 1995-96 for annuities and Medi-Cal is expected to announce sweeping changes to Medi-Cal’s eligibility and recovery regulations. Congress is continually debating sweeping changes in Medicare and Medicaid coverage and it is possible that many of the techniques explored herein will not be valid in the future.**

E. Veterans Benefits

General Qualifications for Non-Service Connected Aid and Attendance Veteran, Widowed Spouse, and Dependent or Disabled Child (Any May be a Claimant)

- Veteran Must have Served at Least Ninety Days Active Duty with One Day of the Ninety During a Qualified War Period (Ninety Days Must Generally be Consecutive, with Some Exceptions)
- Veteran Must have had an “Other Than Dishonorable Discharge”
- Claimant’s Physician Must Declare Him/Her as Housebound and in Need of Assistance from Another Individual, Which May Include Services Offered by Assisted Living
- Claimant Should have Less than \$80,000.00 in Household Assets; Excluding Primary Home, Car, and Personal Belongings (If Assets are Jointly Owned by Other than Spouse, Only the Claimant’s Share is Generally Countable. In the Case of a Married Veteran, Both His/Her Assets are Countable. Although \$80k is Typically the Asset Cap, the VA May Also Consider the Claimant’s Life Expectancy and Demand Lower Total Assets. In the Case of Excessive Assets, It May be Best to Consult an Elder Law Attorney)
- Claimant’s Household Out-of-Pocket Yearly Medical Expenses Must Exceed or Come Close to His/Her Total Yearly Household Gross Income (Total Yearly Cost of Assisted Living is Typically Considered a Medical Expense)
- Widowed Spouse Must have been Married to the Veteran for at Least One Year, OR have had Children by the Veteran if Married Less than One Year, AND Never Remarried
- Widowed Spouse Must have been Living with the Veteran at the Time of the Veteran’s Death, Unless the Separation was Due to Medical or Military Reasons (There May be Some Exceptions Related to Separations Due to Abuse)
- Minor or Disabled Adult Children May Qualify for Limited Benefits on Their Own

2011 Maximum Pension Rates for Aid and Attendance

Single Veteran \$1,644.00 Per Month or \$19,736.00 Per Year

Married Veteran \$1,949.00 Per Month or \$23,396.00 Per Year

Widowed Spouse \$ 1056.00 Per Month or \$12,681.00 Per Year

Veteran Married to Veteran \$2,400.00 Per Month or \$28,800.00 Per Year

Veteran Married to Veteran (Both A & A) \$2,540.00 Per Month or \$30,480.00 Per Year

Once Awarded Aid and Attendance or Housebound Status, a Veteran May Obtain Free Medications, Medical Equipment, Incontinence Supplies, Glasses, and Hearing Aides from the VA Hospital/Clinic via U.S. Mail Without Going to the VA Clinic or Hospital. A Separate Application Must be Made Through the Health Care System.

****Note: Each VA Claim is Unique and the Above Criteria is Generic in Nature and May Not be Applicable to Each Claimant.**

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F. Devices for Incapacity

1. **Conservatorships:** Often required in cases of Alzheimer's or other dementia, when afflicted person must be placed in a "secure" environment. No amount of planning can avoid this step, in the cases of those facilities that require a conservatorship to admit a person afflicted with dementia to a secure part of the facility.

Attorneys will recommend conservatorships in other situations only as last resort, where a spouse cannot adequately manage the community property; or where there is substantial separate property; or where there is no spouse. Conservatorship of the estate can be avoided where a couple or individual has made adequate plans to create a living trust or durable powers of attorney.

Conservatorships allow for special court orders separating property and confirming property to one spouse or another, in marital situations. These special orders will be necessary in Medi-Cal planning to create spousal resource shares larger than the shares allowed in the Medi-Cal law.

Cost: Creation of a conservatorship of the person and estate costs \$4,000 to \$12,000.

2. **Probate:** Jurisdiction of the Superior Court over estate administration is necessary where an estate is more than \$100,000, exclusive of certain types of property, and where property does not pass via joint tenancy with right of survivorship (JTWROS) or community property with right of survivorship (WROS), trust, or other similar mechanisms. Property passing to spouses can be handled through a nonprobate mechanism.

Probate is sometimes preferable, as where there is rental property in an estate that will be open for some time, or where there will be disputes between heirs. A probate, even if only of part of an estate, is often a good idea in order to cut off claims at a date certain.

Cost: Attorney fees and fiduciary fees are set by law. An estate of \$500,000 will ordinarily produce a probate fee of approximately \$13,000 for the attorney and a similar sum for the executor.

3. **Court Petitions for Asset Transfers:** Attorneys use the community property petition device, under Probate Code Section 3100, to transfer community property assets from the ill spouse to the well spouse. Where the property is not community property, the attorney may have to create a conservatorship and then use the substituted proceeding in the conservatorship law (Probate Code §2580). If a person has capacity, or has given authority to transmute to an agent acting under a durable power of attorney, it may be possible to avoid going to court.

Cost: Expect to pay \$1,500-\$5,000 for a community property transmutation petition, and you may have to pay substantially more in those counties where the court insists on appointing counsel for an incapacitated spouse. Such appointments have been known to cost an additional \$2,000.

G. Conclusions

1. Importance of advance planning. Empowerment of the individual.
2. Value of participating in one's own Life Plan.
3. Establish trust with a professional who is aware of your estate, mental and medical status. Educate yourself to become an intelligent empowered consumer, rather than an emotional one. Avoid taking advice from or acting on recommendations from "new found acquaintances," do not be intimidated by forceful sales tactics. Isolation makes for easy targets. Network with family, friends, spiritual and religious advisors, senior centers. Get involved and stay involved. You need not share your confidential information, but having people around you who know you, and are aware of their community are great security guards. Watch out for each other.
4. Continual education and information updates, stay abreast of new options pertaining to asset preservation, long-term care issues and current Medi-Cal and Veterans benefits. Video presentations pertaining to the "big business" of scams against seniors are available from my office; *Don't Fall for a Telephone Line* and *Charitable Donation Scams*; and one on which I was a panelist, entitled *Scams and Schemes*, are real eye-openers.
5. Take Care of Yourself, as well as your loved ones.