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Planning for an Aging Population

Bernard A. Krooks

Elizabeth Valentin

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By Bernard A. Krooks, JD, CPA, LL.M,
CELA, AEP (Distinguished)
and
Elizabeth Valentin, JD, CELA¹

¹ Bernard A. Krooks and Elizabeth Valentin are partners of the New York law firm Littman Krooks LLP. The subject of this article was presented by Mr. Krooks at the 42nd Annual Notre Dame Tax & Estate Planning Institute.

With the aging of the Baby Boomers and increased life expectancies, the number of seniors in this country will vastly grow in the next several years. It is predicted that by 2030, 20% of the American population will be age 65 or older. Quantity of years, however, does not necessarily equate to quality of life. While people are living longer than ever before, there has also been an increase in the number of seniors suffering from dementia or other memory or cognition impairments, resulting in the need for greater assistance and increased care costs. The accessibility of government programs designed to assist our seniors with these issues is also growing but the eligibility decisions are complex. Coupled with the rapidly rising costs of long-term care, this makes the need for appropriate elder law planning more essential than ever.

ELDER LAW GOALS AND VALUES

Elder law issues are complicated and generally involve, and affect, every member of the senior's immediate family. Therefore, the need for a competent elder law attorney is important. Elder law attorneys do not just address a senior's financial future in the face of long-term care needs but also his/her overall quality of life. In fact, most elder law attorneys take a holistic approach to addressing their clients' needs. The ultimate goal often is to be able to preserve the client's autonomy and freedom through effective estate and financial planning. This involves planning for and promoting suitable acute and long-term care choices that are in alignment with the client's wishes in the event that his/her health declines. To ensure that the client's wishes are carried out, the elder law attorney should also assist the client with developing surrogate decision-making plans in the event of a loss of mental capacity. In doing so, it is critical that the client and the surrogate decision maker discuss the client's preferences for long-term care, and what, if any, consideration the surrogate decision maker should give to estate preservation when making those decisions. While the goal is to create a life plan for the client that allows him/her to address his/her asset preservation and desired care preferences, the available options are often limited if the planning is not done far enough in advance.

INCOME DURING RETIREMENT

When addressing long-term care costs, the discussion is often tailored around the client's income during retirement (assuming there are no long-term care needs prior to retiring) and how best to use those funds to cover any potential care costs. Most clients will have three main sources of income during retirement — Social Security, 401(k)/403(b)/IRA distributions and savings.

When discussing Social Security, the client should be advised of how the system works, what types of benefits are available under the system, when s/he may be eligible to collect the benefit, and how the timing of its election can be critical to the estate plan. For example, the client should be informed of the three key ages (early retirement at age 62, full retirement at ages 65 to 67, and late retirement at age 70), how the benefit is affected if s/he is still working, and the possible value in delaying the collection of benefits. The client should be made aware that there is a 25% reduction in the benefit if claimed at age 62 compared to at the full retirement age. This will be a 30% reduction when the full retirement age is 67. However, there

is an 8% annual increase in the benefit amount if the claimant waits until age 70 to collect. Depending on the client's immediate need for income and his/her life expectancy; this is a critical decision that must be made by the client in consultation with his/her advisors.

The client should also be advised of possible spousal rights to Social Security benefits. As a spouse, the client may be entitled to receive benefits based on his/her spouse's work record. Again, at what age the client receives the spousal benefit will affect how much s/he will receive.

While some clients may be familiar with how Social Security benefits work, many will not be as familiar, and will require assistance, with understanding their retirement accounts. Clients may need to address issues involved with rolling over a 401(k) into an individual retirement account, or inheriting the retirement account of a deceased spouse. The timing of the retirement distributions and the effects of accessing the principal to cover the costs of long-term care needs will also need to be discussed. The client may also require assistance with converting a savings account into an income stream, such as purchasing an annuity, to address the same concerns.

MEDICARE

As the country's health insurance program for those age 65 or older (and those younger with certain disabilities or special illnesses), Medicare is a key component to elder law planning. It is essential for the client to understand the basics of Medicare and how it is factored into his/her planning strategies. For example, Medicare eligibility is tied to eligibility for Social Security benefits; however, the client does not have to be collecting Social Security to qualify for Medicare. One is eligible to receive Medicare at age 65, or after having received Social Security disability benefits for a minimum of 24 months, or if afflicted with one of the special designated illnesses. Similar to Social Security benefits, spouses may also receive Medicare benefits based upon the other spouse's entitlement; this includes divorced spouses as well.

There are four parts that make up the Medicare system: Part A, Part B, Part C (Medicare Advantage), and Part D. Part A does not generally have a monthly premium, and partially covers the costs associated with hospice care, hospitalizations and limited skilled nursing home care. It does not cover the costs of custodial care. Most people automatically qualify for Part A when they reach age 65. Part B covers the costs of care for doctors and some outpatient services, and requires the payment of monthly premiums and there are deductibles that must be met. Part C consists of health plans from which those enrolled in both Part A and Part B can choose to receive all of their health care services through a private company approved by Medicare. Lastly, Part D provides prescription drug benefits to those enrolled through private insurance plans.

LONG-TERM CARE

Most clients would prefer to "age" at home, making the need to plan for long-term care essential to preserving the senior's assets in order to keep with his/her wishes, if possible. However, with the increased risk of abuse by a caregiver, social isolation and the high costs of in-home care, some seniors may be better served by a different living environment.

Depending on the senior's care needs, there are three main alternatives to in-home care. Continuing Care Retirement Communities (CCRC) offer a residential level of care that changes with the senior's care needs. Upon entry to the CCRC, the senior must be able to live independently; however, as care needs increase, the facility provides greater care. The main benefit offered by CCRCs is that the resident can feel comfortable knowing that s/he will be residing at the same facility for the remainder of his/her life, without any fear that s/he will ever have to move again. Another benefit offered by CCRCs is that they allow spouses to remain close to one another even when one has significantly greater care needs than the other. The main disadvantage is the cost; many of these facilities have extremely high, entry costs (sometimes non-refundable), often hundreds of thousands of dollars, in addition to high monthly fees of several thousand dollars, which increase annually. Also, most do not accept Medicaid for the nursing home component.

Another alternative to in-home care is an assisted living facility. Here, the senior is allowed to live mostly independently in an apartment-like setting, while receiving some level of supportive assistance. Although they are not licensed to provide medical care, these facilities provide meals, housework, group activities and assistance with personal hygiene needs. Most facilities require that the senior be ambulatory. Many have special dementia units that are designed to prevent the senior from wandering from the facility. This is one of the big advantages of an assisted living facility; by having this extra level of support, seniors suffering from dementia are able to remain at the assisted living facility longer and delay a nursing home stay. The cost of an assisted living facility is generally significantly less than that of a nursing home; however, depending on where the facility is located, the quality of care and the degree of luxuries provided, the cost may increase significantly. Also, the cost will be higher if the resident needs the help of a private aide to help perform certain tasks. Most assisted living facilities do not accept Medicaid.

The more commonly known alternative to in-home care is the nursing home. Nursing homes provide the highest level of medical assistance in an institutionalized setting. However, they are the most expensive long-term option, costing \$15,000 a month and up in some major metropolitan areas. Most of the nursing homes accept Medicaid as a form of payment.

Other than privately paying for the costs associated with the long-term care, there are three primary ways of covering the costs: Medicare, Medicaid and long-term care insurance. Medicare provides very limited assistance with long-term care costs. It will pay up to 20 days of skilled nursing home care, but only if the person has spent at least three days in a hospital and has met other related conditions. For days 20 through 100 in the nursing home, Medicare will require a co-payment of \$164.50 a day, and there is no coverage after 100 days during any one benefit period.

Medicaid is currently the primary means of paying for long-term care for those seniors who qualify. It pays for over 62% of all long-term care costs nationwide. Medicaid is a joint federal and state sponsored program; states have to meet certain minimum eligibility requirements in order to qualify. Medicaid does not pay the nursing home its standard private rate, but rather pays a reduced amount that varies according to the nursing home's location, among other factors. Most seniors who qualify for Medicaid do so as "medically needy," meaning they cannot afford the cost of their care. The income and asset rules vary depending on whether the senior is married or not. An unmarried senior must essentially spend down all of his/her resources and devote all of his/her income to the cost of care in order to qualify for Medicaid; whereas, a married couple with one spouse applying for Medicaid may preserve some income and assets. There are also very specific rules about gifting and its effect on the person's eligibility.

Since Medicare does not pay for any significant long-term care costs and Medicaid is designed for people with limited resources, clients must consider other options when planning for long-term care. One such option is long-term care insurance. This is insurance that covers some portion of the cost of long-term care. The terms of each policy will vary depending on the needs of, and items chosen by, the purchaser of the policy. Generally, long-term care insurance pays for the cost of the care when the care is necessary and the expense has been incurred. Benefits are paid through a daily dollar amount, such as \$300 a day, generally not to exceed the actual cost of the daily rate incurred. If the daily cost of care exceeds the daily rate under the insurance, the policyholder is required to pay the amount not covered by the insurance. There are many different types of long-term care insurance policies available. It is important to stress to clients that long-term care insurance becomes more expensive the older the person gets, and is generally not available after age 80.

HEALTH CARE DECISION MAKING

Part of an elder law attorney's role is to assist the client with planning for health care decision making. At the age of majority, we all have the right to decide what to do with our bodies, assuming we are of sound mind. Patients with capacity must give informed consent for medical procedures, and have the right to refuse or terminate life-sustaining medical treatment. All adult patients are presumed to have capacity, unless it has been previously determined that they do not.

Seniors with capacity can do prior planning and appoint surrogate decision makers in the event they lose capacity. For example, an individual can designate an agent under a health care proxy or other advance medical directive to assist with medical decision making. Here, the agent derives his/her authority directly from the individual, but the document must be prepared before the individual loses capacity. One way for the senior to assist the surrogate in making decisions that are aligned with his/her wishes is to execute certain advance directives. One such document is the "living will." It must be prepared before the client loses capacity. The living will provides surrogate decision makers and doctors with medical instructions regarding the wishes of the individual in the event that s/he losing the ability to express those desires.

Alternatively, if no prior planning was done or other circumstances arise, a guardian may be appointed by the court. The extent of the guardian's decision making authority is determined solely by the court, requiring court approval for all actions. Some states have statutes that appoint a default surrogate health care decision maker if none was appointed. It is important to note that these statutes should not be a substitute for executing an advance health care directive, as the default surrogate may not be who the client wants making decisions on his/her behalf, and s/he may have no idea what the client's wishes are.

SPECIAL ISSUES INVOLVING OLDER CLIENTS

When representing elderly clients, the attorney must address certain issues specific to this age group. For example, the attorney may need to adapt his/her representation of the client to address potential physical and mental limitations of the senior. The attorney should be watchful in the client interactions for any indications of possible dementia, depression, physical frailty, mental incapacity or undue influence by family or friends.

When representing spouses, the elder law attorney should consider the effects of the differences in ages, health, planning

needs and attitudes of each spouse. When there is a significant difference in age or health, it is crucial to plan for the financial future and autonomy of the surviving spouse. Good planning anticipates possible dementia, physical frailty and social isolation. The elder law attorney must also plan for the possible remarriage of the surviving spouse.

When representing clients who are in a second marriage with children from the prior marriage, it is important to ensure that both spouses are comfortable with how the children of each spouse are treated. Often in these cases, the children are over the age of 50, making nontaxed-based generation skipping a critical issue to discuss. It may also be appropriate in these situations to consider the use of trusts as part of the estate planning. The goal of the attorney here is to create a plan that will reduce the likelihood of any family disputes in the future.

As mentioned above, all estate plans should include planning for incapacity; that is even more critical with senior clients. Advance estate and asset protection planning should be discussed with the client to address possible future physical and mental incapacity. Various planning options that can be utilized to address these issues are a power of attorney, inter-vivos trusts, family partnerships and LLCs. Advance health care directives, "life care plans," and nominations of guardian are also important planning tools.

CONCLUSION

The goal of the elder law attorney is to assist the client in implementing a plan that provides for his/her comfort in the upcoming years and also to preserve assets for his/her loved ones. Properly advising the client of the estate planning options, government benefits and private resources available, will allow him/her to plan for the unknowns of the future with greater ease and trust that his/her wishes will be carried out.