

# Protecting Your Assets

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# Objectives

- ▶ To understand the importance of advance planning
- ▶ To identify the steps to getting legal, financial and future care plans put in place
- ▶ To become familiar with the specific legal issues, future care options, and financial issues for aging elders
- ▶ To provide tools for making plans now
- ▶ To explain the difference between financial planning and financial abuse

# The Importance of Early Planning

- ▶ Early planning allows for the diagnosed person to be actively involved and make informed decisions.
- ▶ Avoids the difficult consequences of waiting too long.
- ▶ Use the time now to make informed and reasoned decisions instead reacting to an emergency.
- ▶ Competency is more likely to fade as time progresses.



# Let's Talk About “Competency”

- ▶ A person needs to be legally competent when executing (signing) legal documents.
- ▶ A diagnosis of dementia or Alzheimer's disease does not mean that person lacks competency.
- ▶ Competency is a sliding scale.
- ▶ Kentucky's “Lucid Interval” Doctrine. See *Bye v. Mattingly*, Ky., 875 S.W.2d 451, 455 (1998).

# 5 Important Documents Everyone Needs

- 1) A list of assets, accounts, insurance policies, and funeral instructions
- 2) Durable Power-of-Attorney for Legal and Financial Affairs
- 3) Durable Power-of-Attorney for Health Care
- 4) Living Will
- 5) Last Will and Testament



# Powers-of-Attorney

- ▶ A Power-of-Attorney (POA) is a written legal document where one person appoints another person to act on their behalf.
- ▶ Needs to list specific actions the appointed person can take.
- ▶ Should name at least one person and one back-up
- ▶ Must be created in accordance with state law.



## Contents of Legal and Financial POA

- ▶ Financial Affairs
- ▶ Electronic Accounts
- ▶ Contracts
- ▶ Real Estate
- ▶ Gifting
- ▶ Access to Health Care Information
- ▶ Choice to Pay Agent

# Financial Powers

Ability to access bank accounts

Ability to access accounts online

Investments - sell, retain, direct, etc.

Withdrawal and check-writing

Borrow Money

Lend Money

Change beneficiary designations

Change ownership on accounts

Exoneration for Banks and other Financial Institutions





# The Power to Make Gifts

- ▶ When is authority to make gifts a good idea?
- ▶ When is it a bad idea?
- ▶ How much authority should be given?
- ▶ What key words are financial institutions looking for?

# Accountability of the Agent

- ▶ Fiduciary relationship - or not
- ▶ Accounting
- ▶ Durable?
- ▶ Compensation



# HB 11 - New Power of Attorney Statute

- ▶ Uniform Power of Attorney Act
- ▶ Witnesses Required
- ▶ Durable
- ▶ Guardianship terminates POA
- ▶ Execution time (long ago does not mean expired)
- ▶ Fiduciary duties
- ▶ Different Form of POA should not be required
- ▶ Ability to request an advisory opinion on the POA
- ▶ Reported Financial or Physical Abuse

# Health Care Power-of-Attorney



- ▶ Ability to access health care information
- ▶ Waive HIPAA (Health Insurance Portability and Accountability Act)
- ▶ Ability to make medical decisions

# Living Will

- ▶ AKA “Advanced Directives”
- ▶ Indicate preferences about treatment, care, and end-of-life wishes
  - ▶ Refuse or request life prolonging treatment
  - ▶ Refuse or request artificial feeding or hydration (feeding tube)
  - ▶ Organ donation
- ▶ Family member and health care providers should have a copy



# Last Will and Testament

- ▶ Appoints a trusted person to be in charge of administering your estate. (Called the executor or personal representative.)
- ▶ Outlines how you want your estate divided/distributed.
- ▶ Controls property you own in your name alone without a beneficiary designation at the time of your death.
- ▶ Probate court costs in Kentucky are under \$300

# Trusts

- ▶ Two general types of trusts: Revocable (or “Living”) and Irrevocable.
- ▶ Revocable Trusts were popular in the 1980s, 1990s, and early 2000s.
- ▶ No longer a tax benefit to your estate unless you have \$5.4 Million.
- ▶ For the Grantor, revocable trusts do not “protect assets from Medicaid.”
- ▶ Trusts only control assets that have been titled in the name of the trust. These assets do “avoid probate.”
- ▶ How to identify a trust scam!



## Practical Advice on Legal Planning

- ▶ Your original documents should be together in one location.
- ▶ Let your family members or a trusted person know where your documents are located.
- ▶ If you are an unmarried domestic partner, you need planning too. Without the proper documents, you may not be able to make decisions for your partner.
- ▶ Have an experienced attorney draft these documents for you. This is not the time to try DIY.



# Guardians and Conservators

- ▶ What is the Difference?
- ▶ KY law makes this confusing
- ▶ Guardian: person in charge of financial and personal affairs
- ▶ Limited Guardian: person in charge of personal affairs
- ▶ Limited Conservator: person in charge of financial affairs
- ▶ KRS 387.500 et seq.

# Asset Preservation Planning

- ▶ Estate taxes are no longer the biggest threat to your nest egg
- ▶ Costs of long term care
- ▶ Pre-Planning is possible



# Long-term Care Insurance

- ▶ Provides for flexibility in care and treatment.
- ▶ Permits time to do last minute asset preservation planning.
- ▶ The sooner you get it, the cheaper it is!
- ▶ ASK:
  - ▶ Is Alzheimer's disease covered?
  - ▶ What is the daily benefit?
  - ▶ What is the maximum lifetime payout?
  - ▶ What kinds of care will the policy cover?
  - ▶ Are there tax implications for receiving benefits?

# Medicare vs. Medicaid

## Medicare

- ▶ Government insurance program
- ▶ Age-based  
(65 years of age or older)
- ▶ Federally-administered
- ▶ LIMITED payment for long-term nursing home care

## Medicaid

- ▶ Government assistance program
- ▶ Needs-based
- ▶ State-administered
- ▶ Pays for long-term nursing home care



# Medicaid Basics

- ▶ Why do we care?
- ▶ 76 million Baby Boomers
- ▶ Nursing Home Costs
- ▶ LTC Eligibility
  - ▶ Medical
  - ▶ Financial

# Medicaid Financial Eligibility for Long-Term Care

- ▶ Resources (assets)
  - ▶ Single Person - \$2,000 or less, a prepaid funeral, and car
  - ▶ Married Couple
    - ▶ Resource Assessment: Community Spouse keeps between \$23,844 & \$119,220 depending on amount of assets.
    - ▶ Home, car, funerals are exempt.
    - ▶ IRAs and Retirement Funds do not count.
- ▶ Income - \$2,250/mo or less; Easily fixed with a Qualified Income Trust

# Medicaid Gifting Rules

- ▶ 5 year lookback
- ▶ IRS Annual Gift Tax Exclusion amounts do count!
- ▶ What is Gifting?
- ▶ Gift Penalty - calculated by dividing daily cost of Nursing Facility care (\$199.46) into amount of gift.
- ▶ Homestead Exceptions: Caregiver Child, Disabled Child, Minor Child.
- ▶ Gifts from husband to wife or wife to husband do not affect eligibility.
- ▶ Consider “Half-a-Loaf gifting” to save family resources

# Medicaid Estate Recovery

- ▶ Medicaid estate recovery allows the state and federal governments to recoup certain Medicaid expenditures made on behalf of individuals who resided in a nursing home or other institutional setting or who received home and community based services prior to death.
- ▶ Limited exceptions: surviving spouse, disabled child, estate less than \$10,000.
- ▶ All States are mandated by federal legislation to pursue estate recovery.
- ▶ Enforcement of Estate Recovery varies widely between different State Medicaid Departments



# VA Benefits

- ▶ Medical benefits
- ▶ Health care insurance
- ▶ Service-connected disability income
- ▶ VA pension
- ▶ Aid and attendance benefit
- ▶ Death benefit for spouse
- ▶ Burial expenses



- ▶ Find your Representative:  
<http://veterans.ky.gov/Benefits/fieldreps/Pages/default.aspx>

# Conclusion: Plan Now



- ▶ Creates Peace of Mind
- ▶ Memorializes your wishes and desires
- ▶ Makes things easier for family upon death
- ▶ Provides ability to make medical and financial decisions during periods of incompetency
- ▶ Avoid Guardianship
- ▶ Ability to plan for the costs of long term care

# Resources and Suggested Reading

- ▶ [www.bgelderlaw.com/blog](http://www.bgelderlaw.com/blog)
- ▶ National Conference of Bankruptcy Judges, Public Outreach Committee, *Elder Care* Information, available: [www.kyeb.uscourts.gov](http://www.kyeb.uscourts.gov)
- ▶ KRS 398.500 et seq (Guardianship and Conservators)
- ▶ KRS 311.625 (Living Will Directive)
- ▶ KRS 386.093 - 386.150 (Powers of Attorney)
- ▶ KRS Chapter 394 (Wills)
- ▶ 907 KAR 20:001 - 100
- ▶ Faller, Bernard M. ed., *Kentucky Practice*, Vol. 23, *Elder Law* (2017).
- ▶ *Kentucky Estate Planning*, 4<sup>th</sup> ed. (UK/CLE 2015).
- ▶ *Kentucky Estate Administration*, 5<sup>th</sup> ed. (UK/CLE 2014).

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