Elder Law: An Overview

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Elder Law is estate planning for disability in old age, with a particular emphasis on qualifying for public benefits. It is best done as part of a traditional estate plan, as the language of the Revocable Trust can have a critical impact on future eligibility for government benefits.

Planning for Disability. Disability can hit any of us at any time in life, and all of us will likely encounter some type of disability in ourselves or a loved one if we live long enough. Disability, like natural disaster, is always around the corner. Mercifully, it happens to most of us rarely, but when it is does occur it can be catastrophic and life changing.

Sometimes disability descends suddenly and without warning, as with a catastrophic accident. And sometimes it comes on slowly, as a condition that develops over time, eventually enacting a debilitating toll on a person's physical or mental competence. Either way, it takes center stage when it arrives, and can quickly drain the emotional, physical and financial resources of the individual and family affected.

People in the United States are living longer, and there is a huge concern on the part of many that they will outlive their money. This inescapable trend of increased longevity can be a scary subject because, to a great extent, we have little or no control over whether or not our last years will be spent in a state of disability. Because quality disability care usually requires a great deal of money, early and thoughtful planning is essential.

The easiest way to ensure that one will not run out of money due to a long life and need for expensive disability care is to be very wealthy. This option is not available to most people, however. For those of us without great wealth, the need for careful planning is much greater than for those who have sufficient funds to cover all of their potential needs.

The most effective way to plan for disability is through a comprehensive and customized estate plan. Working with an attorney to create such a plan is a significant investment in time and money, but a well-considered plan can pay off in effectiveness and security when a time of need arrives.

Types of Services for the Elderly. There are many options for our care as we age. Some of them are appropriate only for times of illness and recovery, but some will cover all the needs of the elderly. Some are available only if paid for with private funds, some are only available to those who qualify for public funding, and some are available through both types of funding.

Following are descriptions of some of the services that are available in most urban areas of the U.S. for the elderly:

Continuing Care Retirement Communities ("CCRC").
Payment options: Private funds

This option is often very expensive and therefore not an option for many people, but it is a well-established way to prepare for end of life care. As such, it offers a sense of security to many people. One of the main attractions of such communities is the independence it provides the elderly from their families. Families do not need to be caregivers to individuals in these communities, allowing them to be friends and companions as they choose. Such communities usually are organized so that the elderly residents can live independently in their own apartments or separate homes on the same property with other elderly people. Services and activities for the elderly are provided and convenient. Types of services vary from one community to another, as do the costs. But there is usually an entry fee or a purchase price followed by a monthly maintenance fee attached to the dwelling that must be paid whether or not the resident is living there. Convalescent and skilled nursing facilities may be on site but usually cost extra when they are needed.

Home Care Assistance Agencies.
Payment options: Private funds

Such agencies are usually local businesses that provide various levels of help in the home, such as caregivers, home health aides, etc. Home care assistance is a growing field, as "aging in place" at home is the most comfortable and affordable path for most people, and the services offered in this area are expanding and changing rapidly. Long term care insurance may cover some of these costs.

Local Senior Centers.
Payment options: Private and/or Public funds

Senior centers exist in many communities. They are usually either non-profit organizations or are funded by the local government or both, and offer a variety of information and services as well as social and educational activities. One such service is the "Village" concept, where a prepaid membership provides access to services in the home or the community, sometimes at a reduced fee.

Skilled Nursing Facilities
Payment options: Private and/or Public funds

Skilled nursing facilities (SNF's) are convalescent medical facilities that offer 24-hour care for a variety of different medical needs. Many of these facilities will accept public funding for some types of care.

Some SNF's are equipped to handle dementia services. Such services are costly, if paid for with private funds. Medi Cal is accepted in most SNF's, but admission may be more difficult and services may be more limited.

It is best to have sufficient private funds or long term care insurance to ensure admission to a skilled nursing facility. Once admitted, if the resident becomes sufficiently impoverished to be accepted for Medi Cal coverage, skilled nursing facilities in California cannot refuse to continue to serve that particular resident.

Board and Care Homes
Payment options: Private and/or Public funds

There are licensed care homes in residential neighborhoods that provide live in care or day care for a small number of elderly patients. Some Board and Care Homes are designed to accept payments within the limits of public funds provided by SSI, SSDI or Veterans benefits. The availability of private funds as the source of payment or as a supplement to public funds can enlarge the options available for such facilities. Certain Board and Care homes can also handle some types of dementia patients.

Planning for the Cost of Care.

When considering how to ensure that resources will be available for the possibility of disability, both private and public funding sources should be explored.

Public services, including Medi Cal (Medicaid outsider of California) and Veterans Administration benefits are generally available exclusively to impoverished people. There are strict rules surrounding eligibility for such services, but that doesn't mean that one must totally run out of money before planning to apply for public services.

The determination of impoverishment allows for the exclusion of certain property, including a person's primary residence, so one should not assume they will be ineligible for public assistance without carefully reviewing the eligibility criteria. If it appears that funds are going to be low enough that private care may be unaffordable now or in the future, the services of an Elder Law attorney can be very important in planning to conform to these rules and become eligible for public services without becoming completely impoverished. To be most effective, planning for public services should be done at least five years before services might be needed, and should be seriously considered for any disabled person or any person over the age of 65 with an estate of $500,000 or less in liquid assets.

Following are the various types of private and public funding that should be considered when planning for possible future disability:

Private funding for care

Long term care insurance. This is insurance specifically designed to supplement the convalescent care all U.S. citizens over the age of 65 receive under Medicare. This insurance takes over when the Medicare option either expires or Medicare determines that the patient "is not improving." Such insurance is a supplemental plan to cover long term custodial disability care in the home, convalescent facility or hospital. Policies vary, as this insurance is sold and administered by private for-profit insurance companies.

Reverse Mortgages. (HECM mortgages) This is a type of mortgage available only to people over the age of 62, and is based solely on the equity in the home of the elderly person. Income is not a consideration. Such mortgages are often useful, but should be approached with great caution, as the interest compounds, making it possible or even likely that the size of the mortgage may exceed the value of the property before the elderly person's death. Since the financial debacle of 2008, these mortgages have been regulated to provide that the homeowner cannot be forced to sell even if the mortgage exceeds the value of the property, and even then, there is no recourse on the part of the mortgage holder to any other property of the homeowner. So long as the homeowner lives in the home, he or she must be permitted to stay.

Homeowner's Equity Line. In areas with high appreciation in real estate in the past 30 years or more, like most of coastal California, a home equity line is a good option for those who have sufficient retirement income to qualify.

Pensions. Income pensions are an item of the past for most employees of private companies, but many government employees and union members still have them. Such financial instruments provide income for life for the former employee and in most cases do not reduce Social Security payments. Such income can provide great security to many during their old age.

IRAs (Individual Retirement Accounts). Most people under the age of 80 now have IRAs instead of pensions. These are investment accounts, but were funded before income tax was levied. When money is withdrawn from such accounts, those withdrawals are fully exposed to ordinary income tax. Every IRA owner over the age of 70 1/2 must withdraw a percentage of their IRAs every year, called a RMD or MRD (Required Minimum Distribution), and pay tax on it as ordinary income. They can also withdraw more than the minimum, but must pay income tax on it.

Private Investments (including Roth IRAs). These after-tax accounts are free of income tax, and can include money market accounts, mutual funds and other brokerage managed investments. Roth IRAs are included in these types of accounts because while they are still subject to the law controlling IRAs, they are not taxable. Once a Roth IRA owner is 59 ½ and is more than five years beyond the first establishment of a Roth IRA for the owner, the money in the account is available to spend, tax and penalty free. Any money left in the Roth IRA account after these deadlines are met is still subject to federal law regulating IRA accounts. Such private cash accounts are the most liquid type of financial security one can have, and are favorite investment vehicles for many elderly people, as they can grow tax free and can be left to beneficiaries income tax free at the death of the original owner.

Life Insurance and Annuities. Life Insurance can have cash value, which can be used for financial security. Paid up whole life policies can also be sold to others for ready cash. Annuities are investments that are designed to pay regular income at a designated age to a designated beneficiary for a designated period of time. Annuities are often sold and managed by life insurance companies, and are an excellent way to transform a lump of cash into a regular income stream.

Irrevocable Donee Trusts. When an elder has property of his or her own and needs to establish eligibility for government services that require him or her to be impoverished, that property can be given to a family member or another trusted individual or individuals (donee) by the person (donor) or his or her attorney in fact. The property must be dispersed in sufficiently small daily amounts to each donee so that the 30 to 60 month look-back period for Medi Cal is not triggered. These gifts are known as “stacked gifts” for the purpose of establishing Medi Cal eligibility. When a trust is desirable to preserve the property for the benefit of the person during his or her lifetime, the donee or donees are then expected to use the gifts received from the donor to fund the trust for the benefit of the donor during his or her life, with the remainder of the trust to be distributed to the beneficiaries of the donor at the donor’s death in the same manner as applies to a Third Party SNT.

The two-stage gifts are necessary to avoid the look-back period for eligibility and also to avoid recovery of the property by the government at the death of the donor. The look-back period is important when the person who needs government benefits has sufficient property that would disqualify him or her for such benefits. Without the “stacked gifts” technique, that person would have to wait either 2 1/2 years or 5 years before applying for Medi Cal after giving the gifts, depending on the law in effect at the time of application for Medi Cal. (Currently the look-back law is 2 ½ years in California, but will change at some point in the future to 5 years to conform to federal law.)

Donee Trusts are not useful for elders who have little or no property of their own. Family property does not count against eligibility for public benefits unless and until it is legally received or inherited by the person. The definition of legal receipt is complicated and will usually have to be analyzed in any given situation by an attorney.

Public funding for care

Medicare. Almost all individuals over the age of 65 in the U.S. are eligible for Medicare. It is a universal health care system that is provided free of charge to the individual, and replaces private medical insurance for most hospitalization and related services. Most outpatient services must be paid for privately or through supplemental insurance available from a private insurance company for a monthly fee. If the individual patient does not have sufficient funds to pay such a fee, Medi Cal (or Medicaid outside of California) may cover it for them. There are four categories of Medicare:

> Part A is the free portion, and it covers hospitalization only;
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> Part B is the outpatient portion that must be paid for privately or by Medi Cal;
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> Part C is the "Medicare Advantage" program, which can be optionally selected to replace parts A and B, providing hospitalization, outpatient care and prescription drugs for a monthly fee through an HMO; and
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> Part D, the prescription drug coverage that is optional, is available from a private insurance company for a separate monthly fee, and administered for individuals enrolled in Part A and Part B.

Medicare is accepted by many, though not all, doctors and most hospitals. The program is an entitlement for which all elderly people in the U.S. who are citizens or permanent residents are eligible.

Medicare does not cover long-term care after 100 days or determination by Medicare that recovery is not progressing. Because of this limitation, Medicare does not address the ongoing care needs of seriously disabled people.

Medi Cal for the elderly. Medi Cal is federally funded medical insurance for very low income and low net worth people. It covers hospitalization, drugs, doctor's visits, and can cover long-term care in certain situations. It is a relatively generous safety net in California compared to many other states, but even so, to be eligible for it, an individual must qualify as impoverished according to Medi Cal rules. An Elder Law attorney can help to maximize limited funds and provide for early qualification for Medi Cal benefits so that private funds can be preserved for supplemental needs that are not covered by public benefits.

Most of us would prefer to never need public assistance. However, anyone who is not certain of having sufficient funds to pay for extended long-term care would be wise to work with an attorney to plan for the possibility of qualifying for Medi Cal in the future. There are opportunities for excluding certain property from the qualifying requirements, which can leave sufficient resources to maintain a person's standard of living without disqualifying him or her for Medi Cal benefits.

Medi Cal is a welfare program, and is not an entitlement. Great care must be used in managing finances when it is in place, because it is easy to become disqualified. Also, recovery by the state (reimbursement for money paid for an individual's care) against the estate after the death of the covered individual is almost inevitable if planning isn't done in a timely and careful manner.

Medi Cal for the disabled who are not elderly. The age at which a disabled person becomes "elderly" for Medi Cal purposes begins at 65. The only common denominator is that the person must be impoverished and disabled. Nevertheless, some Medi Cal recovery rules for the elderly begin to apply to the non-elderly disabled at age 55. Consultation with an Elder law or Special Needs law attorney is essential in such a situation, as the laws are complex and their effects can vary greatly from one person to another.

Veterans Benefits (VA). Military service connected disabilities can qualify a veteran for total care in VA run CCRC's, for lifetime disability payments and more.

The VA system is sometimes difficult to access, as is any large government agency, but since it is set up to serve elderly veterans, it can be managed with sufficient patience and fortitude. The rewards for persistence can be great, including pension benefits, Aid and Attendance, death benefit, services for spouses of veterans, etc. To be eligible for such services, a veteran must be age 65 or more, or totally disabled, and must have served in the military on active duty for at least 100 days, one day of which must have been during a period of wartime. Wartime dates currently include four separate spans of time, covering World War II; the Korean War; the Vietnam War; and the Gulf War. The latter war began for VA purposes in 1991 and is still going on.

There are resource and income limits for Veterans benefits similar to those for Medi Cal, but they are more generous. For anyone over the age of 65 who has served in the active military during one of the periods of war, it is definitely worth exploring the options in this area.

The goal for most of us is to have a plan for disability that will ensure that we get the best care possible, when we need it, that is affordable and readily available. That care is as likely to be in the public sector as it is in the private sector. An Elder Law attorney can help evaluate what is best in your situation, help you formalize a legally sound plan to prepare for your future needs, and help you be a savvy consumer.

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