

## Elder Law is Not for Sissies

4-23-13 by James M. Kane, Attorney

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I was wrong and short-sighted in my younger lawyering days. Maybe also simply too young (back then) to have had the ability to comprehend what getting older means or see the potential problems aging can present to families.

And, I admit I thought “Elder Law” was some kind of minor, marginal area of law practice for lawyers who probably could not decide easily between lawyering or teaching Sunday School. It is not. It is now becoming one of the most important planning areas, particularly for baby boomers.

Some commentators estimate there presently are 40 million Americans age 65 or older; by year 2030 this number will almost double; more than 10,000 baby boomers each day are turning age 65.

Some estimates also suggest 70% of individuals 65 and over will spend at least some brief time in a long-term care facility. The average cost of nursing home care is \$100,000 per year (and much more in high-cost areas like New York). Nursing home care is not covered by Medicaid (except for a brief stay stemming directly from a hospital visit.)

The problem for most of us is we optimistically assume we will be in the 30% lucky enough to avoid long-term care. I hope we are right, but the stats are not fully

in our favor.

Baby boomers, prior to a later unexpected emergency, should begin now to become familiar with social security benefit options, Medicare and gap coverage, long-term care, Medicaid nursing home planning, asset protection, etc.

This can avoid down the road considerably greater legal clean-up fees and more frequent headaches.

Below are a couple of fundamental planning items.

### Planning for Incapacity

First and foremost. Put into place (while you still are able) an unfunded revocable living trust as your core estate planning document (sometimes called a Declaration of Trust). It will already be in place if you later become incapacitated.

Without this Declaration of Trust, your other options in the event of incapacity are (i) trying to rely on a financial power of attorney or (ii) a court-managed guardianship. Neither of these is a good option.

The Declaration of Trust is better. This is because your successor trustee named in the trust document who steps in and manages the trust on your behalf is

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technically the legal owner (as a fiduciary) of the trust property. The trustee is not merely your agent (as is the case with your financial power of attorney).

By contrast, your agent under your power of attorney will constantly have to beg and grovel with third parties in order for the third parties to allow your agent to act on your behalf. If your incapacity were to last for years, your family will likely get fed up with the hurdles against your power of attorney and seek a court-managed guardianship. Again, the Declaration of Trust is designed to avoid the above two options.

Your trust can sit dormant and unfunded until your incapacity. This wait-and-fund approach works by having your agent at that later time -- under the express terms of your financial power of attorney -- transfer your property into your Declaration of Trust. The successor trustee then takes over on your behalf for the management of your property within the trust.

### Medicaid Planning Can Save Your House

Medicaid planning is the purposeful decrease in your assets (or a married couple's combined assets) in order to qualify for need-based Medicaid nursing home care.

For either one or both spouses to qualify for Medicaid nursing home care, a married couple collectively has to own virtually no assets.

This means a married couple will end up spending down all of their assets, including their home prior to qualifying for Medicaid nursing home care.

At a minimum, a married couple (or widow or widower) can put into place Medicaid planning that helps protect the spend-down of the family home. This can produce worthwhile savings compared simply to doing nothing.

This Medicaid house planning also ideally needs to be put into place at least five years prior to when either spouse might need Medicaid nursing home care.

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