



Legal Tools for the Family Caregiver



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Estate Planning, Elder Law, Special Needs Planning

Tools for the Family Caregiver

- ▶ Healthcare Power of Attorney
- ▶ Advance Directive for a Natural Death (Living Will)
- ▶ Durable General Power of Attorney
- ▶ Special Needs Trust
- ▶ Caregiver Agreement



Advance Directives vs. Physicians Orders

Advance Directive – any statement by a competent individual of the individual's preferences for treatment and/or appointment of a decision maker, in the event the person loses the ability to make decisions.

Formal Advance Directives:

- ▶ Advance Directive for a Natural Death (Living Will)
- ▶ Health Care Power of Attorney

Medical Orders:

- ▶ DNR (Do Not Resuscitate)
- ▶ MOST (Medical Order for Scope of Treatment)

Healthcare Powers of Attorney

- ▶ Naming someone to make health care decisions when you lack capacity to communicate your own decisions



Living Will

Advance Directive for A Natural Death

A document where you state your wishes for life sustaining treatment.



What Treatment Can Be Withheld?



- ▶ “Life sustaining procedures”
 - ▶ Defined as care or treatment that only serves to prolong dying process.
- ▶ Can include mechanical ventilation, antibiotics, dialysis, artificial nutrition and hydration, etc.

Who decides if there is no directive?

- ▶ Spouse
- ▶ Majority of Available Parents and Children
- ▶ Majority of Available Siblings
- ▶ Individual with “Established Relationship”
- ▶ Attending physician



Planning for Incapacity Money Management

Durable Power of Attorney

vs.

Joint Ownership



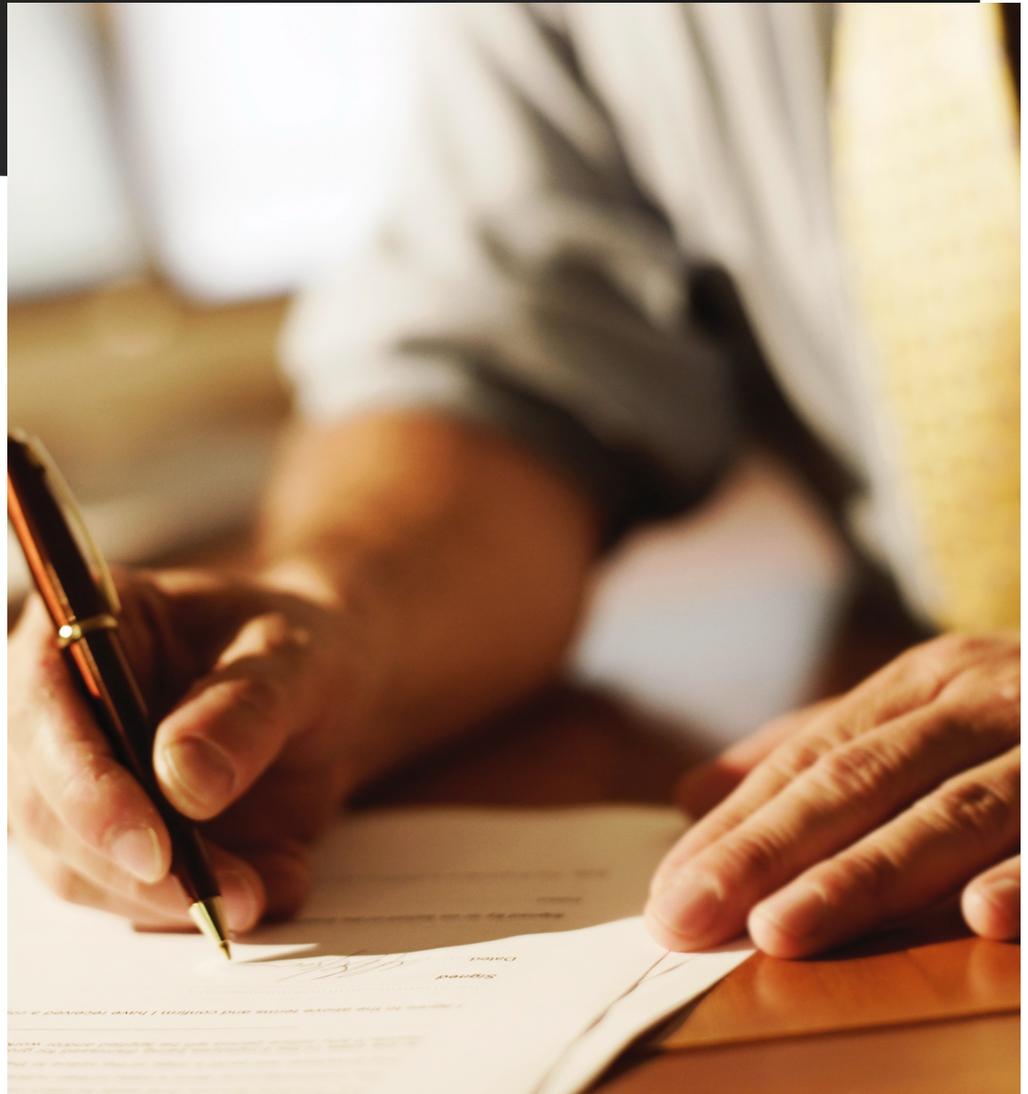
Titling Assets Jointly With Children

- ▶ Parents' assets now subject to creditors and liabilities of child
- ▶ Tax Issues
 - ▶ Gift Tax
 - ▶ Capital Gains Tax
- ▶ Disrupts estate plan



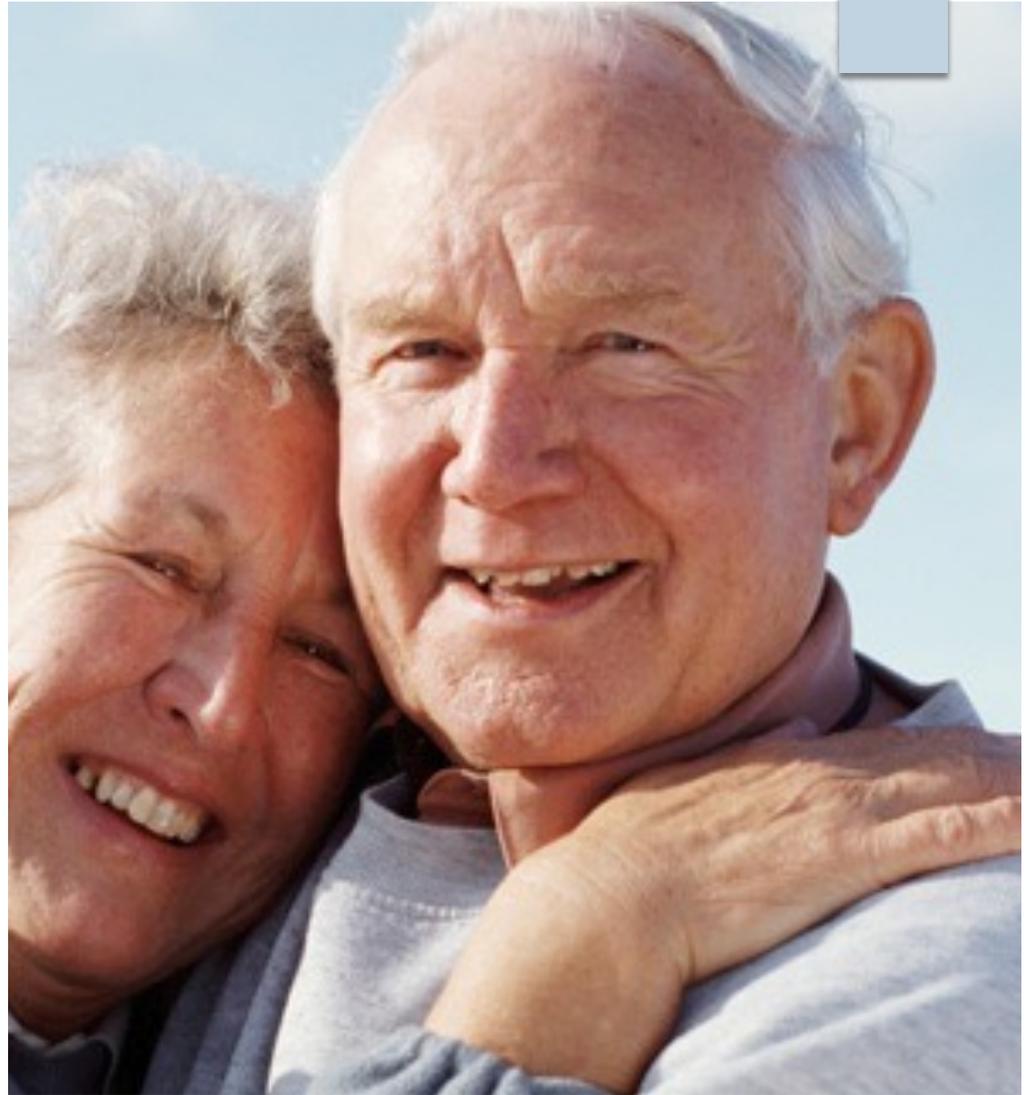
Power of Attorney

A written instrument where one person (the Principal) gives another person (the Agent) the authority to manage the Principal's property



Jack and Jill

- ▶ Married 40 years
- ▶ Jack has advanced dementia
- ▶ Nursing home costs \$10,000 per month.
- ▶ Jack has a power of attorney, appointing Jill as his agent.



Power of Attorney



- ▶ Gifting Powers
 - ▶ Power to sign deeds, sell or purchase property is not the same as the power to gift the property
 - ▶ Gifting is not presumed
 - ▶ Problems with limitations on gifting
 - ▶ Community Spouse
 - ▶ Disabled Child

Jack and Jill Medicaid Eligibility

- ▶ Nursing Home Spouse - \$2,000
- ▶ Community Spouse – Half of “countable resource” up to a max of \$137,400
- ▶ House is non-countable, but if home is in Jack’s name at his death, it will be subject to estate recovery.



Jack and Jill

- ▶ Jill would like to transfer the house into her sole name.
- ▶ Jack's power of attorney states that Jill can make gifts of Jack's property "***in amounts not to exceed the annual exclusion amount for federal gift tax purposes.***"



Jack and Jill



- ▶ Due to the limitation on gifting in the POA, Jill cannot re-title the house in her name.
- ▶ She finds out that she can apply for Medicaid, but if the property is in Jack's name at his death, it will have to be sold to payback the state.
- ▶ Jill will have to petition the Court if she wants to transfer the house into her name.

Jim and Susan



- ▶ Jim has a power of attorney that allows gifts to Susan as his spouse without a limitation on the amount.
- ▶ Susan applies for Medicaid for Jim and uses the POA to transfer the house in only her name.

Jim and Susan



- ▶ To further protect the property upon Susan's death, Susan updates her Will to leave everything to Jim in a special needs trust.
- ▶ This means Jim won't lose his Medicaid if he inherits property from Susan and the property can pass to the couple's children at both of their deaths.

Special Needs Trust



- ▶ A trust set up in your will for a disabled spouse
- ▶ The Trustee uses the funds in the trust to pay for things the disabled spouse needs
- ▶ If the disabled spouse is on Medicaid, the trust will not cause him or her to lose Medicaid
- ▶ At the disabled spouse's death, the funds pass to the children (or whomever you choose)

Bob and Ruth



- ▶ Ruth has advanced dementia and is no longer able to manage her bank accounts.
- ▶ Ruth does not have a power of attorney.

Guardianship

- ▶ Incompetency Hearing
 - ▶ Service by Sheriff
 - ▶ Appointment of a Guardian ad Litem (G.A.L.)
 - ▶ G.A.L. makes a recommendation to the court
 - ▶ If declared incompetent, Guardian appointed



Bob and Ruth

- ▶ Ruth has \$300,000 in an account titled in her name only
- ▶ Ruth and Bob own their house jointly
- ▶ Bob is appointed General Guardian for Ruth



Bob and Ruth

- ▶ Guardianship Fees = \$1,200
- ▶ Bond Premium = \$3,000
- ▶ Bob can't sell the couple's house w/o court approval
- ▶ Bob must petition the court whenever he needs to use money in the guardianship estate for Ruth's care.
- ▶ Bob must file annual accountings with the Clerk of Court



Judy's Story

- ▶ Judy hired a caregiver to help with bathing, dressing and meal preparation. She did not use a contract.
- ▶ A few years later, Judy needed nursing home care.
- ▶ When Judy applied for Medicaid she was told that the money she paid her caregiver was considered a “transfer of assets” and she would not get any assistance from Medicaid for 3 years!



Caregiver Agreements



- ▶ Must be in writing, signed by the caregiver and the recipient (or his or her agent) and must be dated
- ▶ Must be signed before services are performed
- ▶ Either party must be able to terminate at any time
- ▶ Person receiving care can not be in a nursing home at the time
- ▶ Services must be recommended in writing and signed by doctor as necessary to prevent entry into a nursing home
- ▶ Must specify the type, frequency, and duration of services
- ▶ Must specify amount to be paid
- ▶ Amount paid can't be greater than fair market value

Planning Tips



- ▶ Meet with a qualified elder law attorney
- ▶ Health Care Power of Attorney – name someone to make health care decisions for you
- ▶ Living Will – have a talk with family members about your wishes for end of life treatment
- ▶ Durable Power of Attorney – consider whether the agent should be able to make gifts to the spouse or others
- ▶ Caregiver Agreements – must have written agreement if payments are made to caregivers
- ▶ Update Last Will & Testament – consider special needs trust.

THANK YOU!



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