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Legal Preparedness: The Challenge of "Capacity"

Prepared & Presented by:

Scott C. Suzuki, J.D., M.P.H.

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Scott C. Suzuki, Attorney at Law

Estate Planning for Everyone.

(808) 983-3850 * 1013 Poha Lane, Honolulu, Hawaii 96826 * info@suzukiaal.com * www.suzukiaal.com

What We Will Cover

- Introduction to Legal Capacity
- Traditional Law
  - Guardianships
  - Conservatorships
- Preventative Law
  - Powers of Attorney
  - Advance Health Care Directives
  - Trusts
- Long-Term Care

Note: This presentation contains GENERAL information only and NOT legal Advice.
This presentation does NOT establish an attorney-client relationship

“Legal Capacity”

- “The ability, capability, or fitness to do something”
- Difficult legal concept
  - Based on context
  - “Capacity for What”
- Presumption of capacity
- Challenge to Promote Autonomy

Diminished Capacity

- Nearly 1 in 5 Americans have a disability
- Nearly 60% of adults over 65 need assistance with at least 1 basic action or complex activity
- More than 5 million Americans have Alzheimer's
- 1 in 3 seniors dies with Alzheimer's or another dementia
- 2017 national care estimated to cost $259 Billion

The Challenge

- Clients are ever-changing
- Prevalence of Dementia and related conditions causing us to evolve
- Traditional practices are responsive
  - But we are missing opportunities
  - We can anticipate needs better

Traditional Law: Dealing with Disability

- Reactive
- Focus on Guardianship and Conservatorship

Guardianship/Conservatorship

- Court Proceedings to appoint someone to make personal decisions for an "incapacitated" adult (called a "Guardian") or to make financial decisions for a person who is unable to manage finances (called a "Conservator")
- Guardianship usually not necessary until age 18
- Alternatives include Power of Attorney, Health Care Directives and certain trusts
  - Must have capacity to create these documents

Who can be a Guardian?

- Priority is not binding, but it includes:
- A current guardian, other than a temporary or emergency guardian,
- A person nominated as guardian by the respondent,
- An agent appointed by the respondent under any medical directive or health care power of attorney or, if none, any designated surrogate,
- The spouse or reciprocal beneficiary of the respondent or a person nominated by will or other signed writing of a deceased spouse or reciprocal beneficiary;
- An adult child of the respondent;
- A parent of the respondent, or an individual nominated by will or other signed writing of a parent; and
- An adult with whom the respondent has resided for more than six months before the filing of the petition.
- An owner, operator, or employee of a long-term care institution or other care settings at which the respondent is receiving care **may not** be appointed as guardian unless related to the respondent by blood, marriage, or adoption, or otherwise ordered by the court

What does a Guardian do?

- HRS 560:5-314, 315 and 316.
- Guardian makes decisions concerning a ward's support, care, education, health, and welfare.
- Apply for and receive money payable to the ward
- Take custody of the ward and establish the ward's place of custodial dwelling
- Consent to medical or other care for the ward;
- Consent to the marriage or divorce of the ward; and
- If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well being.

What can a Guardian NOT do

- Duties of a Conservator (e.g. borrow money; sell/convey property, substantial investments; loan money, etc.)
- Actions not consistent or in the best interest of the Ward
- Make medical decisions that are inconsistent with the Ward's individual instructions on healthcare directives, etc.
- Standard limitations of fiduciary – no lying, cheating, stealing, etc.
- NOTE: Guardian CANNOT commit Ward without a hearing.

Who needs a Guardian?

- Only an "incapacitated person" needs a guardian.
- What type of Guardian is necessary?
  - Limited/Unlimited
  - Emergency
  - Temporary substitute
- Others may get by with alternatives

Incapacitated

- An “Incapacitated Person” is “an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.” HRS 560:5-102.

Always Seek Alternatives FIRST

- Guardianship proceeding is long, expensive
- Guardians are appointed for life (their own or the incapacitated person’s)
- Many duties of the Guardian
- Limits rights of the Ward
- Attorney is “of record” for duration of the Guardianship

Preventative Law

- Durable Power of Attorney documents
- Healthcare Directives
- Trusts
- Help us prevent the need for conservatorship, guardianship, probate, self neglect and/or exploitation

Power of Attorney

- New Law in 2014 (update older documents)
- Authorizes an agent to assist a principal
- Presumption of validity
- Presumption of durability
- Variety of powers, but exclusive of health care decisions

Health Care Decisions

- Advance Health Care Directive
- POLST
- Statutory forms
- Should be gold standard

Many Types of Trusts

- There are many types of trusts available.
- There is no one-size-fits-all template!

What is a Trust?

- Settlor/Grantor = Person who owns property and makes instructions for its management
- Trustee = Manager of the property for the benefit of the Beneficiaries
- Beneficiaries = end-users. Could be the Settlor during life
- Manage assets during life and distributes them after death
- Avoids Probate
- Can also "exempt" income/assets from means-testing

Revocable or Irrevocable?

- One you can cancel, the other you can’t
- Many uses,
- Prevent abuse/exploitation/neglect
- Avoid court
- Help to finance care

What is Long-Term Care

- Treatment of chronic conditions that do not necessarily require “traditional” medical attention.
- Treatment that lasts for years
- NOT (usually) treatment of acute conditions

Why do I need to plan for LTC?

- LTC is a relatively new phenomenon
- Cost of LTC can be devastating - $15,000/month in Skilled Nursing is common
- LTC is not inevitable, but chances of it becoming a part of life increases with age.

Long-Term Care

- With the increase in the size of the estate tax exemptions, and the relative ease needed to avoid probate, a very common over-looked planning opportunity is to plan for long-term care.

Financing Long-Term Care

- Three-Legged Stool
  - Your savings and income
  - Third Party Payments – insurance
  - Government Benefits – Medicare, Medicaid, VA…

Medicaid

- Last resort to pay for medical bills
- Federal and State program
- “Means Tested” Program
- NOT the same as Medicare
- Single largest payer of long-term care costs

Rehabilitation Ass'n of Virginia v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994)

- "There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase."

Eligibility for Medicaid

- 3-Part Test
  - Level of Care
  - Income
  - Assets

Level of Care

- Services covered by Medicaid must be “medically necessary”
- Detailed medical assessment used to determine the need
- Long-term care services generally only provided in “Foster Home” or “Skilled Nursing”

Income

- Income will not disqualify you from the Medicaid program in Hawaii UNLESS your income exceeds your medical bills.
- "Medically Needy" standard.
- Hawaii uses a "cost share." You keep the first $50 of monthly income. Rest of your income goes to care provider. Medicaid will pay the remaining balance.

Assets

- Assets are the things you own that you can use (or liquidate to use) to pay your medical bills.
- Your total assets cannot exceed $2000.

Exempt Assets

- Some assets do not count towards your $2000 limit
  - Home (not in trust and up to $840K in equity)
  - Funeral Plan/Burial Plot
  - Cars
  - Wedding/Engagement Ring
  - Household "stuff"
- With proper planning, assets in certain irrevocable trusts can also be exempt.

Special Rules for Married Couples

- Income and asset rules are different for Married Couples because many times there will be a healthy spouse (CS) and a sick spouse (IS)
- CS can keep up to $3,022.50 of IS monthly income.
- IS will keep first $50. CS will keep remaining income of IS to bring CS income up to $3,022.50 and the rest of IS income will go to the nursing home.

Special Rules for Married Couples

- Married couples can keep more assets than singles.
  - CS can keep $120,900
  - IS can keep $2,000
- This protects against “Spousal Impoverishment”

How Do I Qualify for Medicaid

- Application to verify LOC, Income and Assets
- BUT, they will "look back" and assess a "penalty period"

Look-Back Period

- This is applied in every case. It is NOT the same as a penalty period and is not punitive.
- Evaluation of whether any assets were transferred ("gifted") for less than fair market value in return within the FIVE YEAR period ending as of the date of application

What is a gift?

- a gift is a transfer of assets for less than fair market value within the five years immediately prior to application for long-term care services
- "Gift" does NOT have the same definition as the tax code
- Gift applies to gifts of applicant and applicant's spouse
- Transfer of INCOME is also considered a gift
  - If an individual transfers either a lump sum of income received in a given month or the right to receive income from another source, the total expected value of the funds transferred will be used to calculate a penalty period

Transfer of Asset Penalty

- The transfer of asset penalty is the period during which an individual will not receive long-term care Medicaid benefits as a result of a transfer of an asset during the applicable look-back period
- To calculate a penalty period, total the cumulative uncompensated transfer of all assets during applicable look-back period and divide that value by the average monthly cost of nursing home services in the state in which a person will receive care

Penalty Period

- Value of Gift / \$8850 = Penalty Period
- Period begins as of date of eligibility, if otherwise eligible
- Subsequent gifts can have penalty begin immediately or as the date a negative action could be taken

Running of the Penalty Period

- An established Penalty Period continues to run, regardless of whether the individual continues to be eligible for assistance or even in need of LTC services
- A penalty that results in a partial month penalty shall not be rounded down or disregarded.
- Return of the asset "cures" the gift"

“Exempt Transfers”

- Transfers that are NOT penalized

Home – Exempt Transfers

- Spouse
- Child under age 21
- Blind child
- Disabled child
- Sibling with equity interest in the home who has resided in the home for at least one year immediately prior to the individual's institutionalization
- adult child who has resided in the home for at least two years immediately prior to the individual's institution and who provided care allowing the individual to remain in the home

Concerns with Home Transfer

- Where to live?
- Property taxes?
- Capital gains taxes?
- Disinheritance issues?
- Estate recovery?

Other Exempt Transfers

- Spouse
- Child under age 21 or a trust for such child
- Blind child or a trust for such child
- Disabled child or a trust for such child
- Special needs trust for disabled person

Estate Recovery/Liens

- As a condition of allowing people to qualify for Medicaid, the Government has the right to attach a lien to your home property
- Under certain conditions, the government can re-collect every dollar they paid for your LTC needs

How Do I Avoid a Lien?

- Sell Home?
  - Selling your home will avoid a lien, BUT it will mean you won't be able to qualify for medicaid until your sale proceeds are spent.
- Gift Home?
  - Gifting your home will avoid a lien, but it may mean that you will not qualify for Medicaid for a long period of time

Gifting Home

- From the date that you apply for Medicaid, the government will look back 60 months (5 years) to see if you made any gifts during that time.
- If any gifts were made, they will total the value of the gifts and calculate a penalty period.
- The penalty period is the number of months that you will not qualify for LTC assistance starting on the date that you are in a nursing home and otherwise qualify for assistance

Gifting Home

- If your home is worth $885,000 and you gift it, you may not qualify for LTC assistance for about 100 months
- Gifts must be made outside of the lookback period (60 months) or to “exempt” individuals

Exempt Transfers

- Gifting the Home will not be penalized if you gift it to:
  - Spouse
  - Minor/blind/disabled child
  - Sibling with equity interest who has lived at the home for at least 1 year prior to SNF
  - Adult child who has lived in home for at least 2 years prior to SNF
  - Special Trust for benefit of person with disability

Many planning opportunities

- There are many ways to plan for LTC, but BE CAREFUL.
- No one-size-fits-all solution
- Planning is extremely individualized
- Drastic implications for improper planning or bad application of good tools

Questions?

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