Critical Elder Law Issues in Estate Planning to Prevent Financial Crisis in One's Golden Years

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By Alma Soongi Beck, J.D., LL.M. Taxation, Certified Specialist in Estate Planning, Probate and Tax Law, California State Bar Board of Legal Specialization

When people think of estate planning, they tend to focus on inheritance issues, where and how their property and assets will pass to others, and who will take care of their children and family in the event of passing away. While inheritance planning is indeed a central part of estate planning work, people tend to de-emphasize the other important part of the work --- creation of protections for yourself during times you are still alive, including in the event of incapacity or when long-term care assistance might be needed.

If you are age 60 or older, chances are that you have thought about the time you may need some kind of temporary or ongoing assistance, whether in your home or in a facility, possibly with assistance from a spouse, partner, or other family members, or from a professional caregiver. In legal and financial circles, when people have short-term or long-care assistance requiring legal planning or intervention, we call it "elder law," much of which overlaps with estate planning.

The purpose of this article is to highlight the two important issues that elders age 60 and above should consider incorporating in their estate planning documents as it relates to future care. If you are not sure if these issues have been included in your current estate planning, now might a good time for a review with an attorney who has experience with these issues:

(1) Gifting powers and powers to create irrevocable trust

Many, but not all, living trusts and powers of attorneys include the power to make gifts in the event of incapacity. These powers are only allowed to be exercised for the financial benefit of the person granting the power, which can occur primarily in two situations: (a) estate and gift tax planning for people with estates that approach or exceed the current exemption of $5.43 Million; and (b) long-term care planning such as to assist with qualification for Medicaid (Medi-

Cal in California) in the event you are admitted in a long-term skilled nursing facility, or for protection of assets from recovery claims against the estate at death. The second issue is one that primarily impacts people with "countable assets," as defined by Medicaid, typically not including one's primary residence or retirement accounts, in the range of $500,000 to $2 Million.

In California, Medi-Cal planning generally arises at the point an elder needs to be admitted to a long-term care skilled nursing facility (SNF). While long-term SNF care may never be needed, when it is, the cost can be extremely high, up to $10,000 to $15,000 per month and sometimes even higher depending on the level of care. This is typically the point that most people think they need to spend all their assets before they qualify for Medi-Cal (which is almost never the case), or they do the absolute wrong thing like sell the family home (which turns an exempt asset into a non-exempt one that can trigger disqualification). In fact, under current rules, most people can qualify for Medi-Cal within 1-3 months with proper advance planning. In some cases, such planning involves certain types of gifting into an irrevocable trust, or alternatively, a petition to the court to permit an elder's spouse or California state registered domestic partner to keep more of the assets of income than they would ordinarily.

The point is that if an elder has lost capacity at the point long-term care is needed, and his or her estate planning documents do not contain gifting provisions, or do not permit creation of irrevocable trusts, some of these options could become completely unavailable. These crucial provisions should appear in the Durable Power of Attorney and, if applicable, in the Revocable Living Trust.

(2) Irrevocable trusts for elders

In estate planning, one of the important choices when leaving assets to someone, either during life or at death, is whether to leave one’s share of assets directly to the person upon passing away, or to leave the assets in an ongoing trust for their benefit.

While beneficiaries tend to be resistant to inheriting in an ongoing trust, doing so can go a long way to reduce instances of future undue influence in the event an elder loses capacity. Irrevocable ongoing trusts can protect inherited assets from the beneficiary’s creditors, and can create safeguards from financial elder abuse from family, neighbors, or the would-be boyfriend of girlfriend. These trusts can be written to require oversight by Trust Protectors and Co-Trustees, which again can reduce financial elder abuse. At the same time, these trusts can be written in a way with surprisingly flexible provisions for the beneficiary.

Of course, every person creating an estate plan needs to decide for themselves whether they want to create (or impose) such protections for people who are inheriting from them. Either way, it's a good idea for individuals and couples to revisit this issue when they talk with their estate planning attorney every 3-5 years when reviewing their estate planning documents.

In sum, many difficult issues faced by elders can be easily avoided with sufficient advance planning, and a regular attention to revisiting one's estate planning documents. If you have not had your documents reviewed by your estate planning attorney in the last 3-5 years, and you think these issues might be relevant, now might be a good time to do so.

Alma Soongi Beck is a partner at Lakin Spears, LLP and a Certified Specialist in Estate Planning, Trust, and Probate Law with the California State Bar Board of Legal Specialization. She regularly sees clients in Palo Alto, San Francisco, and Los Angeles on issues relating to estate planning, long-term care, and Medi-Cal planning. She can be reached at abeck@lakinspears.com or (650) 289-6429.