

HELPING TO SUPPORT THOSE WHO SUPPORTED YOU: ESTATE PLANNING & ELDER LAW ISSUES

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ESTATE PLANNING – IT IS FOR EVERYONE!

- Adults at all levels of wealth and age should have at least the following documents in place:
 1. Last Will and Testament;
 2. Financial Power of Attorney; and
 3. Advance Directive/Living Will.

- In addition to having these documents in place, everyone should know how their assets are titled and understand the current status of their beneficiary designations. Continuous and systematic asset review is essential.

ESTATE PLANNING AND ELDER LAW RELATIONSHIPS ARE KEY!

- As loved ones and family members caring for and working with older adults, you are at the forefront of being able to help protect vulnerable older adults from financial exploitation and to understand how their estate plan works.
- Being able to assist your loved ones with understanding how the estate process works, along with the underlying documents and asset titling, is a great way to ensure their estate plan is consistent with their wishes.
- You'll be able to provide peace of mind and clarity before something happens – while also being able to prevent exploitation from happening.
- You can also assist your loved ones in preserving quality of life and coordinating care if diminished capacity begins to set in. Loss of control is often key – and tied strongly to emotion.

DIMINISHED CAPACITY - ISSUES

- Various symptoms of cognitive decline could include: 1) Memory Loss; 2) Decreased or poor judgment; 3) Difficulty understanding simple concepts; 4) Mood swings; 5) Difficulty communication; 6) Confusing with time and place; 7) Difficulty with familiar tasks; 8) Trouble with spatial relationships; 9) Withdrawals from work or social activities; 10) losing things; and 11) Uncharacteristic impulsive activities.
- Often, family members are unable or unwilling to keep track of these changes, and it may often come down to you or someone in your team having to help them face the truth. To do otherwise puts their loved one in great danger, to themselves and others.

FINANCIAL PREDATORS & ELDER ABUSE

- The elderly are prime targets for fraud and those with cognitive impairments are especially vulnerable. Sometimes trusted family members are perpetrators. They may use the following reasons to rationalize taking money from an older adult relative:
 - “I’m entitled to it because I’m helping them.”
 - “I’m just borrowing the money. I’ll pay it back” after crisis passes.
- Rationalization often starts small and grows over time.
- Family members can be compensated for services they provide to a loved one, but compensation should be planned and transparent to other family members.

FINANCIAL PREDATORS & ELDER ABUSE

- I have prepared a checklist for you to use, to help protect against financial predators within the family.
- A big step would be to incorporate regular financial reviews into your schedule – along with honest discussions about these issues.
- Create a team of trusted advisors, including an attorney, a CPA/accountant, family members and friends, to be available to assist you.
- Checks and balances are key – for everyone, including family members.
- Act early and often. If you see something that seems unusual or out of the ordinary, take steps to protect your loved one.

FINANCIAL PREDATORS & ELDER ABUSE

- In Maryland, it is prohibited to financially exploit a vulnerable adult:
- (b)(1) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult's property.
- (2) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.
- MD Code, Criminal Law, § 8-801

FINANCIAL PREDATORS & ELDER ABUSE

- In Maryland, Undue Influence is defined as:
 - “Undue influence” means domination and influence amounting to force and coercion exercised by another person to such an extent that a vulnerable adult or an individual at least 68 years old was prevented from exercising free judgment and choice.
 - “Undue influence” does not include the normal influence that one member of a family has over another member of the family.
 - MD Code, Criminal Law, § 8-801

FINANCIAL PREDATORS & ELDER ABUSE

- In Maryland, Deception, as is relevant here, is defined as:
 - (i) create or confirm in another a false impression that the offender does not believe to be true;
 - (ii) fail to correct a false impression that the offender previously has created or confirmed;
 - (iii) prevent another from acquiring information pertinent to the disposition of the property involved;
 - (2) “Deception” does not include puffing or false statements of immaterial facts and exaggerated representations that are unlikely to deceive an ordinary individual.
- MD Code, Criminal Law, § 7-101

THE LAST WILL AND TESTAMENT

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- A Will controls what happens to probate assets upon a person's death. It also allows the person to control the following:
 1. They can nominate guardians of their minor children in the event they and their spouse are both deceased. This is essential for parents of young children.
 2. It allows for the distribution of specific property to individuals outside of the family.
 3. It allows the person to nominate specific individuals to serve as Personal Representative. This person will handle the affairs of the estate and step in the shoes of the deceased.

- Maryland has certain requirements as to what constitutes a valid Will.

WHAT IS PROBATE PROPERTY?

- Probate property is all property owned by the deceased that is in their name alone at the time of death.
- This does not include property owned jointly with rights of survivorship or property with a valid beneficiary designation.
- This is why it is important to help identify with the client how their assets are titled and what would happen upon their death.
- It is critically important to ensure beneficiary designations are updated, especially after major life events.
- Sometimes, you want to list the “Estate” or “Trustees under my Will” as beneficiaries, depending on the overall plan.

THE ELECTIVE SHARE

- The Elective share
 - In Maryland, the surviving spouse has the absolute right to elect against the augmented estate instead of receiving what is listed in the Will. The augmented estate is the value of the decedent's assets (both probate and non-probate) used to calculate the elective share.
 - If the deceased has children, the spouse can elect up to $\frac{1}{3}$ of the probate estate.
 - If the deceased has no children, the spouse can elect up to $\frac{1}{2}$ of the probate estate.
 - Very important to discuss this with the client, especially with blended families.
- Often, the client insists that their spouse or they won't take the election – but when death occurs, the surviving spouse may change their mind!

INTESTATE ESTATE & STEP-CHILDREN

- If a person dies without a Will, their property is distributed under the rules of “intestacy” – basically, under the laws of Maryland.
- The current statutory scheme distributes assets depending on their closeness in legal and blood relation to the decedent, beginning with the surviving spouse, their minor or adult children, the surviving parents of the decedent, and continuing down the family line.
- In the current statutory scheme, step-children only inherit if there are NO blood relatives left alive.
- Thus, by not having a Will in place, step-children are virtually disinherited.

DEATH BED WILLS / EXPLOITATION

- Be wary of distant relatives flying into town at the last minute to “save” the dying elder. Often, they will work to dismantle current systems of support and isolate the dying individual to take control. If this occurs, call 911 and/or APS.
- Last minute changes to estate plans are not illegal per se – but such dramatic changes – such as disinherited relatives that have long been recipients under documents, naming completely new individuals, etc., should all be supported by capacity assessments and doctor certificates.
- Wills should be safeguarded – Wills can be filed with the Register of Wills in the County the person is domiciled in. This way, it cannot be destroyed or “lost”.
- Family members and other close relatives are in a special position to identify these financial “bullies” and stopping them from the onset.

THE FINANCIAL POWER OF ATTORNEY

FINANCIAL POA

- This powerful document allows someone to appoint an agent to handle financial affairs on their behalf. Basically, the agent can do anything the person could do financially.
- The person signing the POA and appointing the agent is called the “Principal”.
- A “Durable” Power of Attorney does not require the principal to be incapacitated in order for the POA to be effective. In Maryland, POAs are considered durable unless stated otherwise in the document.
- Having a POA in place may avoid the need for a Guardian to be appointed to care for the principal and their assets, as the agent can do this instead.

STATUTORY POA FORM IS MANDATORY

- Under the current law, as long as the POA signed by the principal is consistent with the statutory form, the bank is required to accept it without requiring an additional form to be signed.
- If the bank refuses to do so, under the law, the agent can hire an attorney to obtain a court order against the bank to accept the POA form. If this occurs, the bank is also responsible for the applicable legal fees.
- This was put in place because back in the day, banks would require additional forms and the principal was no longer competent to sign. The bank would refuse to work with the agent and Guardianship would need to be sought instead.

AGENT HAS FIDUCIARY DUTY TO PRINCIPAL

- The Agent under a POA has a fiduciary duty to maintain the estate plan of the principal to the best of their knowledge and ability. They cannot simply alter the plan at the last minute to benefit themselves.
- It is practically very hard to obtain restitution if an Agent steals the money from a principal. Thus, only trusted agents should be named. If a trusted agent cannot be chosen, guardianship may be the only logical alternative.
- Disclosures of receipts and transaction history can be requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, on the death of the principal, by the personal representative or successor in interest of the principal's estate.

MORE TOOLS: TRUSTS & DEEDS

Trusts

- A useful tool that allows for the control and disposition of assets before and after death. These can be created on their own or under a Will. Some will create them to protect funds for a spendthrift child, or to provide funds to care for a special needs child. The options are virtually limitless.

Deeds

- Often, real property is one of the largest pieces of a person's wealth. It is essential to make sure that the Deed is titled properly based on the overall plan. A Life Estate Deed can be used to transfer property outside of a Will, providing peace of mind and making it easier for the beneficiary to inherit the property.

ANY QUESTIONS?

Thank you for having me today! We are honored to contribute this program on behalf of Carroll County and World Elder Abuse Awareness Day for 2021.

Please do not hesitate to reach out to our firm if you have any questions, or need referrals to resources. We'd be happy to assist however we can.

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O'BYRNE LAW, LLC
Planning your today and their tomorrow