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# LEGAL AND FINANCIAL PLANNING FOR AGING IN PLACE

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# LEGAL DOCUMENTS

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**Does your client have the legal documents that she will need:**

Who will make essential medical decisions?

Who will pay bills and manage assets?

Will they have authority to act?

# ADVANCE DIRECTIVES

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Every client should have the following essential **advance directives**:

- **HIPAA Medical Privacy Release**
- **Health Care Proxy**
- **Living Will**
- **Power of Attorney with Statutory Gifts Rider**

# HIPAA MEDICAL PRIVACY RELEASE

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Every client should have appointed agents under a HIPAA (Health Insurance Portability and Accountability Act) medical privacy release.

The HIPAA medical privacy release authorizes a health care provider to release medical records and discuss the patient's medical condition with the appointed.

# HEALTH CARE PROXY

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Every client should have a Health Care Proxy appointing an agent to make medical decisions if the treating physician determines that the principal (client) cannot make those decisions.

Agents must be named one at a time, and it is advisable to name alternate/successor agents.

# LIVING WILL

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New York is one of two states that does not have a living will statute. NY law places authority to make end of life decisions with the agent under the Health Care Proxy.

The Living Will is advisable to provide guidance to the agent in order to carry out the wishes of the principal in end of life decision making.

The Living Will also provides the required “clear and convincing evidence” of the patient’s end of life wishes if no agent is available under a Health Care Proxy.

# TALK ABOUT IT!!!

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It is important to discuss end of life treatment with loved ones and family members.

Copies of the Health Care Proxy should be provided to family members, caregivers and treating physicians.

Copies of the Living Will should be given to the agents named in the health care proxy.

# POWER OF ATTORNEY

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## **Essential tool for legal and financial management**

Names an agent to manage handle legal and financial matters.

Significant changes in the New York statutory form enacted in 2009 and 2010.

Form should be drafted and customized by an elder law attorney.



# MODIFICATIONS

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Principal may expand or restrict the standard provisions in the Modifications Section of the POA.

**Recommended modifications include the ability to create and fund a trust, open and close bank accounts, apply for government benefits, etc.**

# GIFTING BY AGENTS

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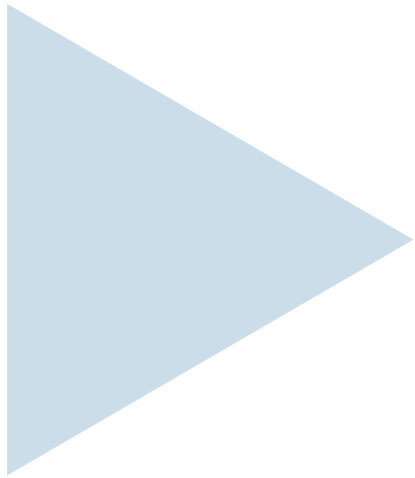
Standard POA limits gifts to annual total of \$500 in the aggregate.

Principal must execute a **STATUTORY GIFTS RIDER (SGR)** and **modify it** to permit additional gifting by agent.

This is essential to permit tax and Medicaid planning.

# CAUTION!

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**CLIENTS SHOULD RETAIN AN ATTORNEY TO  
DRAFT POWER OF ATTORNEY AND  
STATUTORY GIFTS RIDER.**

# REVOCABLE LIVING TRUST

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Can provide for management of trust assets by successor or co-trustee in case of incapacity.

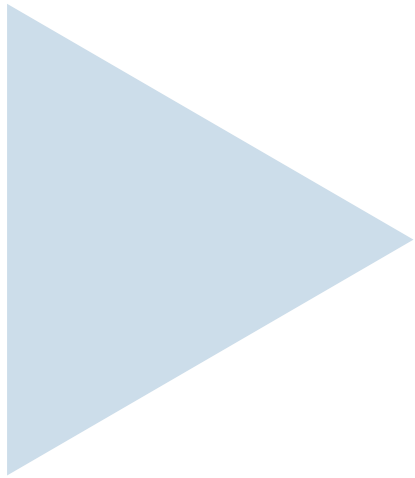
Will provide for distribution of trust assets estate upon death without a court proceeding.

Trusts must be funded, i.e. assets must be transferred to the trust.

Assets not transferred to the Trust during lifetime may be funded in the Trust by using a “pour-over Will” or designating the Trust as beneficiary of a life insurance policy.

# Act Now!

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A failure to plan is a plan to fail.

# CHECKLIST FOR FINANCIAL MANAGEMENT

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Determine income.

Determine expenses.



# ASSETS

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Bank accounts

Treasuries and US Bonds

Municipal and other government bonds

Corporate bonds

Retirement Accounts which are tax deferred

- IRAs
- 401(k)s
- 403(b)s
- Other
- Roth IRAs

# FINANCIAL ASSISTANCE

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**FEE FOR SERVICE FINANCIAL PLANNERS** will assist in budgeting and advise regarding investments. They will be expensive.

**INVESTMENT ADVISORS** will assist in investing; they may charge a percentage of assets as a fee or may take commissions. Total costs are often hidden.

**ACCOUNTANTS** may be needed for tax returns.



# THE HOME AS AN ASSET

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Sale

Home equity loans (Home Equity Line of Credit)

Reverse Mortgages

# Transfer of Home with Mortgage: Garn-St. Germain

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## 12 U.S. Code § 1701j-3 - Preemption of due-on-sale prohibitions

- “(d) Exemption of specified transfers or dispositions with respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon....
  - (3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;.....
  - (5) a transfer to a relative resulting from the death of a borrower;.....
  - (6) a transfer where the spouse or children of the borrower become an owner of the property;...
  - (8) a transfer into an inter vivos trust in which the borrower **is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property...**”

# Garn St. Germain and Transfer to Trust

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## REVOCABLE TRUSTS

Always applies because the trust is simply an “alter-ego” for the Grantor.

## IRREVOCABLE TRUSTS

Only applies if:

- The Grantor remains a beneficiary of the Trust; and
- the Grantor retains lifetime rights to occupancy in the property.

# LONG TERM CARE FACTS

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Over 70% of people over 65 will require some form of long term care.

Over 40% will spend some time in a nursing home.

# LENGTH OF NURSING HOME STAY

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▶ 5 years or more	12.0%
▶ 3 to 5 years	12.0%
▶ 1 to 3 years	30.3%
▶ 6 to 12 months	14.2%
▶ 3 to 6 months	10.0%
▶ less than 3 months	20.0%

# AVERAGE LENGTH OF STAY

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- ▶ Female 2.6 years
- ▶ Male 2.3 years
- ▶ Married 1.6 years
- ▶ Single / Never Married 3.8 years
- ▶ Widowed 2.3 years
- ▶ Divorced / Separated 2.7 years

# COST OF LONG TERM CARE

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## **NURSING HOME:**

\$15,000 to \$25,000 per month.

## **ASSISTED LIVING:**

\$3,500 to \$11,000 per month

## **HOME CARE:**

\$15 to \$27 per hour. May be over \$10,000 per month for live-in care.

Major issues with compliance with labor law rules. Also Social Security withholdings, Unemployment and Disability Premiums and tax withholdings.

Issues, including potential criminal liability with immigrant employees who do not have a Green Card.

# PAYING FOR LONG TERM CARE

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## **Medicare**

### **Medicare Advantage and Medicare Medigap Insurance**

- Provides very limited long term care coverage

## **Private payment**

- Costs a fortune

## **Long Term Care Insurance**

- Provides coverage and worth exploring if able to get coverage, but very expensive and premiums can increase

## **Medicaid**

- Pays for homecare in NY, some assisted living and skilled nursing care
- There are ways of getting Medicaid and protecting some assets.



# LONG TERM CARE INSURANCE

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Policies generally pay for home care, assisted living facility or skilled nursing facility.  
**Review the policy!**

Premium based upon age and health when purchased.

Individuals with diagnosis of illness which is likely to result in need for long term care may not be insurable.

Factors effecting cost: inflation protection, daily rate of coverage, elimination period and gender.

# N.Y. STATE PARTNERSHIP POLICIES

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Policies generally cover three or four years of care in a nursing home or up to six years of home care.

**Total Asset Protection Plans:** The insured will qualify for NY State Medicaid coverage without regard to resources/assets after using up the policy.

**Partial Asset Protection Plans:** Medicaid asset protection provided up to the amount of insurance purchased.

Income must be paid towards nursing home or home care services.

# RECIPROCITY

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As of March 2014, NY has reciprocity with 42 other states which offer Partnership Insurance Plans.

Policy holders who move to a participating state will qualify for Medicaid with asset protection **up to the amount of insurance purchased.**

Map of participating states available on NYS Partnership website.

# NEW DEVELOPMENTS IN LTCI

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New hybrid policies combine universal life insurance with a long-term care benefits rider.

Long term care benefits may be purchased for 2 to 7 years.

Single premium purchase price is guaranteed to be paid to beneficiaries or used for LTC reimbursement.

Some policies have simplified underwriting.

# MEDICAID

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The only government program which pays for long term care in a skilled nursing facility and long term home care and some assisted living.

Medicaid has become the largest payor of long term skilled nursing facility care for the middle class, as well as the poor.

Stringent financial eligibility requirements.

Benefits available vary in each state. NY has one of the most generous programs.

# 2018 MEDICAID LIMITS

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## **RESOURCE LIMIT:**

\$15,150 for individual;

\$22,200 for a couple, if both are applying.

## **COMMUNITY MONTHLY INCOME LIMIT:**

\$842 for an individual;

\$1,233 for a couple if both applying.

# HOMESTEAD

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There may be ways to protect the home against the right of recovery, including exempt transfers to a caretaker child or a sibling with an equity interest. Retain an attorney to provide advice regarding the home.

Beware of tax issues if the home is transferred or sold.

# MEDICAID HOME CARE

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24 hour care available in NYS.

No penalties for transfers of assets.

Recipients must enroll in managed long term care plans.

It is difficult to get hours approved.



# PROTECTION FOR THE SPOUSE

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## Community spouse resource allowance

- Minimum of \$74,820
- Maximum of \$123,600

**Income allowance : \$3,090**

## **Spousal refusal: permitted if spouse has more than the limits**

- **Not a free ride.** DSS can commence recovery and support proceedings to recover amounts spent for the care of the Medicaid recipient spouse.

# Transfer of Assets Penalties

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**60 month (5 year) “Look back period”**

Gifts create periods of disqualification for skilled nursing facility coverage, **but not for home care.**

Penalty only starts to run once individual is in a nursing home **AND** assets are below the resource limit.

# Exemptions

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- ▶ Gifts to Spouse.
- ▶ Gifts to disabled children.
- ▶ Gifts to an “exempt sole benefit trust” for the benefit of a disabled individual.
- ▶ Gifts of the home to a caretaker child, a disabled child, or a sibling with an equity interest in the home.
- ▶ Gifts made exclusively for a reason other than Medicaid planning.

# MEDICAID PLANNING

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Outright Gifts.

Exempt Transfers.

Irrevocable Trusts.

“Half a Loaf” Gift/Loan Planning or annuity.

**RETAIN AN ATTORNEY FOR ADVICE BEFORE MAKING GIFTS!!!**

# JOINT ASSETS

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Assets held jointly with right of survivorship (JTWROS) may provide the joint owner with access to the assets. This is true for bank accounts and most but not all investment accounts but is not true for real estate and some other assets.

CONSULT AN ATTORNEY BEFORE MAKING AN ASSET JOINT.

# HIRING AN ATTORNEY

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You need an attorney who practices Elder Law. Most general practitioners and trusts and estates attorneys are not able to do Elder Law Planning.

Best source is a referral.

Some organizations have lists of knowledgeable attorneys.

Ask about fees. Many elder law attorneys have a consultation fee. Ask what it includes and if they can provide any idea of total fees.

Unlike personal injury attorneys who take a percentage of what they get for the client, most elder law attorneys charge hourly or a fixed fee which usually represents the estimated hourly cost. If the consultation is free, the attorney will have to get paid from additional work.

# GERIATRIC CARE MANAGERS (GCM)

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- ▶ Assess care needs and oversee the provision of care including:
  - Providing home care
  - Assisted Living Facilities
  - Nursing Home
  - Medical Care
  - Rehabilitation
  - Day Care
  - Social services
  - Family issues
  - And other help
- ▶ Client retains them privately and pay them privately.
  - ▶ They can be expensive.
- ▶ Sometimes agencies will offer care coordination but they are employees of the agency with a primary duty and loyalty to the agency not to the client or family.

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Questions?