

Bernard A. Krooks
 JD, CPA, L.L.M, CELA, AEP (Distinguished)
 Littman Krooks LLP
www.littmankrooks.com

**Dealing with Individuals with
 Diminishing Capacity/Chronically Ill
 Estate Planning Council of
 Delaware**

1

Graying of America

- 40 million Americans over age 65
 - 13% of the population
 - 25% of these people will live past age 90
 - 10% will live past age 95
- By 2050, over 65 population expected to increase to 88.5 million
 - 20% of the population
 - Fastest growing segment is age 85 and older
- Quantity of years/quality of life

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Alzheimer's Disease

- Over 5 million Americans have Alzheimer's disease
 - By 2050, this number will triple
 - 200,000 people under age 65
- Most expensive disease in the nation
 - Current annual cost of care is \$259 billion
 - Cancer costs \$66 billion annually
 - Cost projected to rise to \$1.1 trillion by 2050
 - Government pays for about 68% of the cost

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Special Needs

- More than 40 million Americans living with a disability
 - Mental
 - Physical
 - 12% of U.S. population
 - As many people as entire state of California
- One in 6 children ages 3 to 17 have one or more developmental disabilities
- One in 59 children have autism

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Elder Law Myth

- It won't happen to me
- I'm never going into a nursing home



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Elder Law Reality

- 70 percent of Americans will need some form of long-term care
- 50 percent will need long-term care in a nursing home



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Elder Law Myth

- Medicare will pay for the cost of my care



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Elder Law Reality

- Medicare does **not** pay for long-term care
 - Skilled nursing care v. custodial care
 - Acute v. chronic illness
 - No expectation of recovery
 - Alzheimer's disease v. heart attack
 - Long term care
 - Help with activities of daily living, such as bathing, dressing, toileting, transferring, continence, eating

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Elder Law Reality

*The United States has **no** health insurance system for long-term care*



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Elder Law Myth

- Long-term care is not that expensive




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Elder Law Reality

- Most Americans are in for sticker shock if they or a loved one ever requires long-term care



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Elder Law Reality

- Long-term care *is* expensive
 - Average annual cost exceeds \$100,000
 - Cost exceeds \$200,000 in some areas



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Elder Law Myth

- I am not responsible for my spouse's care

13

Elder Law Reality

- You **are** responsible for cost of your spouse's care
 - Spousal protections
 - Separate accounts
 - Pre-nuptial agreement
 - Long-term care insurance
 - Trust
 - Divorce

14

Elder Law Myth

- I can and will make my own decisions

15

Elder Law Reality

- You may **not** be able to make your own decisions
 - Financial
 - Health care
 - Where to receive care
 - Who pays for care
 - Who can visit you
 - Advance directives
 - Guardianship

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Overview

- Draft estate plans that work
 - Provide for possible contingencies
 - Life is fluid; estate plan should also be
- Anticipate potential changes in lives of clients and beneficiaries in the planning process
 - Carry out the wishes of the client
 - Incorporate client's goals
 - Avoid litigation

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Estate Tax

- Not a concern for most Americans
- Raises less than \$15 billion annually
- Less than 1900 estate tax returns filed in 2018 reported a tax due
 - Less than .1% of the 2.7 million people who died
- Some states still have a state estate tax

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Choice of Fiduciaries

- Key to proper estate plan
 - Not enough time spent on this
- Perfectly drafted estate planning documents will likely fail without proper fiduciary
- Trustee
 - Corporate v. individual
 - Powers
 - Successor trustee

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Choice of Trustee

- Depends on a number of factors
 - Duration of trust
 - Value of trust assets
 - Type of assets in trust
 - Beneficiaries of trust
 - Special needs/spendthrift
 - Distribution standards
 - Discretionary distributions are more complicated to administer

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Trusts

- Increased use of trusts
 - Non-tax reasons; death, divorce, spendthrift, creditor protection, special needs
 - Greater duration
 - Heightens importance of drafting
 - Family values statement
 - Statement of intent/wishes

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Revocable Trusts

- Incapacity of Settlor
- Removal of trustee for incapacity
 - How to determine incapacity
 - Sensitive issue for clients
 - Difficult to confront one's own mortality or incapacity
 - Concern that a third-party will too quickly judge them incapacitated and they will lose control of their own assets
 - Failure by trustee to cooperate/HIPAA waiver

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Sterling v. Sterling

- L.A. Clippers owned by revocable trust
- Donald and wife Rochelle were co-trustees
- NBA imposed lifetime ban on Donald resulting in need to sell team
- Trustees both agreed to sale of team
- Donald later changed his mind
- Trust provided that any individual deemed incapacitated shall cease to serve as trustee
- Rochelle attempted to remove Donald

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Sterling v. Sterling

- Definition of incapacity
 - Two licensed physicians examine the trustee and certify in writing that he is incapacitated
 - Regularly called upon in their practice to determine capacity of others
 - Neither related by blood or marriage to any trustee or beneficiary
- Donald removed as trustee and team sold

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Amend Trust

- Can someone other than settlor make modifications in event of incapacity
 - Are these powers reserved solely to the Settlor
 - Agent under power of attorney
 - Guardian
 - Trustee
 - Trust protector
 - Proper hierarchy
 - Conflict resolution provision

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Trust Distribution Standards

- Wholly discretionary
- Ascertainable standard
 - HEMS
- Mandatory distribution of income or principal
 - Unitrust
- Special needs trust
 - Contingent SNT

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Support v. Discretionary

- Support trusts are usually available since a beneficiary can compel trustee to make distributions
- Discretionary trusts are not usually available since a beneficiary cannot compel trustee to make a distribution
- Settlor's intent
 - Supplemental language expressly stated
 - If not specifically stated, then factual determination must be made

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Medicare Part A

- Nursing home coverage
 - Skilled care
 - 3-day hospital stay
 - Observation status
 - Nursing home admission within 30 days
 - Same condition for which you were hospitalized
- Improvement standard
- Benefit period
 - Not in receipt of inpatient hospital or Medicare covered SNF care for 60 days in a row

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Medicare Part A

- Hospital deductible \$1,364
- Hospital co-insurance amounts \$341 per day for days 61-90, \$682 per day for days 91-150 (lifetime reserve)
- Skilled nursing facility co-insurance amount \$170.50 per day for days 21-100
- No premiums for most Up to \$437 a month
 - Paid Medicare taxes for 10 years

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Medicare Part B

- Health insurance coverage
- \$185 annual deductible
- \$135.50 monthly premium
- IRMAA – higher share of part B costs
- Premiums up to \$460.50/month
- MAGI above \$85,000
 - AGI plus tax-exempt interest
 - Two-year lookback
 - Increase in MAGI due to sale of home, business
 - Not currently indexed for inflation

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Medicare Part B

- **Hardship waiver**
 - Reduction in income
 - Divorce
- **Recent legislation lowered IRMAA MAGI thresholds**
 - More people now paying higher premiums
- **IRMAA indexing starts in 2020**

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Long-Term Care Insurance

- **Covers the cost of long-term care**
 - Pays for custodial care
- **Rigorous physical and cognitive exam**
- **Benefits based on daily rate**
- **Inflation rider**
- **Elimination period**
- **Partnership policies**
- **Increasing prices**
 - Genworth recent 58% price increase

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Deductibility of LTCI Premiums


- **Age 40 or less** **\$420**
- **Over 40-50** **\$790**
- **Over 50-60** **\$1,580**
- **Over 60-70** **\$4,220**
- **Over age 70** **\$5,270**
- **State tax credit or deduction**
- **10% medical expense threshold**

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Tax Treatment of Benefits

- Benefits received under a qualified LTC policy are not considered taxable income
- Tax-free cap of \$370/day applies to indemnity policies



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Special Needs Planning

- Goals
- Government benefits
 - Medicare
 - Social Security Disability
 - Medicaid
 - Supplemental Security Income (SSI)

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Special Needs Planning

- First Party Special Needs Trusts
 - (d)(4)(A)
 - Payback
 - Self-Settled
- Pooled Trusts
- Third Party Special Needs Trusts
 - Supplemental Needs Trusts
- ABLÉ accounts

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Third Party SNT

- Funded with assets of third party
- Disinherit/verbal commitment
- Even "wealthy" should consider
- No federal law
- No sole benefit requirement
 - Can have more than one beneficiary
 - Separate trusts versus one trust
- No age restriction
- No payback requirement

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Third Party SNT

- Testamentary
 - Required for spouse
 - Pot trust
- Inter-vivos
 - Revocable
 - Irrevocable
 - Letter to family

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38

Thank You!

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39