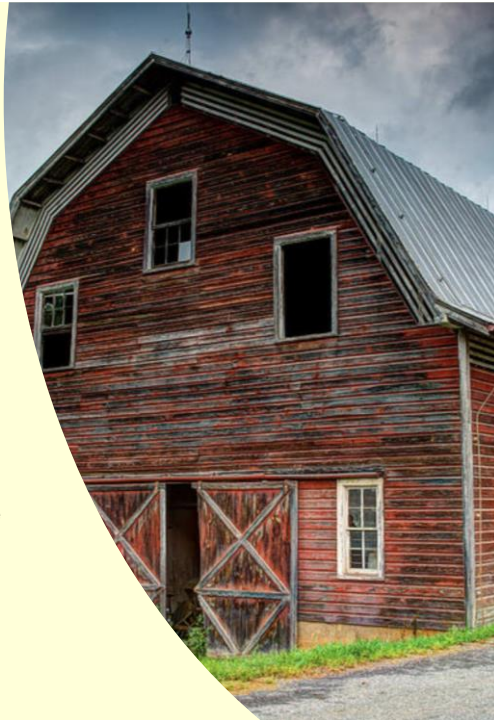


ESTATE PLANNING BASICS

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Need For Personal Legal Advice

The information in this presentation and accompanying material is provided for educational purposes only. It is not a substitute for individual legal consultation with an Attorney.

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Power of Attorney for Asset Management

- Grant of power to another to manage assets (convenience / incapacity)
 - Alternative to not having POA AM: Conservatorship. (Incapacity determination by Court / continued Court oversight / Agent must be certified by State of NE)
 - Statute defines powers (plenary – complete, unqualified) Include express powers to file tax returns, life insurance, gifting, create trust, fund trust, access safe deposit box, dealing with retirement plans and Social Security
-

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Power of Attorney for Healthcare

- Grant of power to another to make healthcare decisions
 - Alternative to not having POA HC: Guardianship. (Incapacity determination by Court / continued Court oversight / Agent must be certified by State of NE)
 - Not a Living Will
 - Not an Advanced Medical Directive
 - Communicate medical directive wishes to Agent
-

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POA AM and HC

- POA for AM and HC are separate documents
 - Primary: Spouse; First Successor: Child 1; Second Successor, Child 2; Second Successor 3, 4.
 - POA AM: consider naming Corporate as Successor
 - Co-Agents as POA not recommend
 - Encourage Parents, Siblings, and Adult Children
-

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Why Plan Estate?

- Human only creature on earth that knows it's going to die yet fails to prepare for it.
- 10-70 years accumulating assets will likely take more than 10 minutes of thought to dispose.
- No Estate too small to NOT plan...small plans need more, one can argue.
- Old enough to know you don't get something for nothing (unintended or intended consequences).
- No Plan is "perfect" unless you plan 2 weeks prior to death. Process, not an event.

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Why Plan Estate?

3. Decedent's Intent vs. Intestate (Die w/o Will)

2. Cost (Planning vs. Not Planning)
 - Gift, POD/TOD, Will / Trust / Probate / Trust Administration vs. Intestate

1. Taxes
 - Federal Estate Tax, NE State Inheritance Tax, Gift Tax, Capital Gain Tax (Step-up Basis)

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Outline

- Taxes
- **What** do you own (& **How**) do you own assets?
- **Who** are your beneficiaries (fair vs equal)?
- **How** Assets are Transferred?
 - Gifts During Lifetime (irrevocable / basis)
 - Life Estate / Remainder Interest (uit consequences)
 - POD / TOD (outright)
 - Will (probate)
 - Trust(s) (trust administration)

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Tax: **Federal Estate Tax**

- Policy - at each generational level assets transferred are subject to FET
- Occurs at time-of-death transfers and fair market value of assets
- FET due 9 months after death
- Unlimited Marital Deduction - No FET imposed on transfers between spouses

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Tax: Federal Estate Tax

<u>Year</u>	<u>Exemption</u>	<u>Tax Rate</u>
2010	Repealed	0%
2011	\$5 million	35%
2012	\$5 million	35%
2013	*\$5,250,000	40%
2014	*\$5,340,000	40%
2015	*\$5,430,000	40%
2016	*\$5,450,000	40%
2017	*\$5,490,000	40%
2018	*\$11,180,000	40%
2019	*\$11,400,000	40%
2020	*\$11,580,000	40%
2021	*\$11,700,000	40%
2022	*\$12,060,000	40%

- *Portability allowed in 2013 and beyond.*
- *Sunsets January 1, 2026 – back to \$5 million.*

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Tax: Gift Tax

Gifts during lifetime

<u>Year</u>	<u>Exemption</u>	<u>Tax Rate</u>
2010	\$1 million	35%
2011	\$5 million	35%
2012	\$5 million	35%
2013	\$5,250,000	40%
2014	\$5,340,000	40%
2015	\$5,430,000	40%
2016	\$5,450,000	40%
2017	\$5,490,000	40%
2018	\$11,180,000	40%
2019	\$11,400,000	40%
2020	\$11,580,000	40%
2021	\$11,700,000	40%
2022	\$12,060,000	40%

NOTE: 2022 annual gift tax exemption \$16k, per person, per year

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Tax: Nebraska State Inheritance Tax

Due w/n 12 months of DOD
Penalties & Interest for late/non-payment

<u>Relationship</u>	<u>Rate</u>	<u>Exclusion</u>
Spouse	0%	Unlimited
Immediate <i>(sons, daughters, siblings, parents, grandparents)</i>	1%	\$40,000 each
Remote <i>(nieces, nephews, aunts, uncles)</i>	13%	\$15,000 each
Other	18%	\$10,000 each

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Tax: Capital Gains Tax

- Basis
- Sale of Asset
- Sale price exceeds basis
- Tax on gain (capital gain tax)
- Pass Assets upon death, heirs receive a step-up in basis
- Gift during lifetime, Grantee gets Grantor's basis

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Cost of Estate Planning

- Communication with Attorney / Comfort / Trust
- The cost of estate planning **always** less than the cost of not planning
- Create list assets / ownership of assets (single, co-ownership, POD / TOD, etc.)
- Consult attorney and ask to bid the project (akin to a contractor)

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Intent: What / Who / How

- **What** is your estate / assets? **How** are assets titled?
 - Personal Property, Real Estate, Vehicle(s), Checking, Savings, CDs, Life Insurance, Annuity, Investment Accounts (Qualified and Non-Qualified)
- **Who** will receive your estate
 - Beneficiaries
- **How** will your estate be transferred?
 - Gift, LE / Remainder, POD / TOD, Will, Trust
(*combination of all of the above*)

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What: Assets

- Personal Property (Laundry List / Memorandum)
- Real Estate
- Vehicle(s)
- Checking Accounts
- Savings Accounts
- CDs
- Life Insurance
- Annuities
- Investment Accounts (Qualified and Non-qualified)
- LLC, INC, Partnership, etc.

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What: Assets

- Single ownership
- Accounts with a signatory
- Co-Owned Assets
 - Joint Tenancy With Rights of Survivorship
 - Tenancy in Common
- POD / TOD Assets (Payable on Death / Transfer on Death)
- Life Estate / Remainder Interest
- LLC, Inc., P-Ship

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What: Co-Owned Assets

- Joint Tenancy With Rights of Survivorship
 - survivor takes all (non-probate)
 - Immediate access to property after death
 - Simplifies estate planning / settlement
 - Be specific – “as joint tenants with right of survivorship and not as tenants in common”
- Tenancy in Common
 - Owners have distinct and separate interests
 - No right of survivorship
 - Right of possession is undivided
 - Each owner may transfer separate interest, including by Will/Trust or Intestate
 - Absolute Right of Partition (sale) for ALL owners

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What: Assets

- POD (pay on death) & TOD (transfer on death)
 - Bank accounts, Retirement accounts, Life Insurance
- Life Estate with Remainder Interest: Owner transfers property subject to Owner's life estate (use and income)
 - Popular in Newspaper
 - Deed RE to children and retain a life estate
 - What if child dies prior to parent, gets a divorce, has health or financial problems? Juice not likely worth squeeze.

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What: Assets

- LLC units
 - Operating Agreement
 - Buy/Sell Agreement
- Inc. shares
 - By-Laws
 - Buy/Sell Agreement
- P-Ship interests
 - Partnership Agreement
 - Buy/Sell Agreement

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Who: Beneficiaries

- Spouse
- Children
- Grandchildren
- Charity

- Equal vs Fair
- Outright or in Trust?

- Not a legal question
- Determination of your own wishes and judgments
- Often most difficult determinations

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Who: Fiduciaries

- Personal Representative (Executor) and Trustee
 - Do they possess sufficient expertise and experience?
 - Are they independent? Conflict of Interest?
 - Appropriate fiduciary demeanor?
 - Longevity to see job through?
 - Physical location compared to assets?
 - Compensation. Yes.
 - Accountable?
 - Affect family relationships?

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HOW

- How / When will the transfer of your estate to your heirs occur?
 - **Gift now** (Irrevocable / Basis, Unintended Consequences)
 - **Life Estate / Remainder Interest** (Beware of Unintended Consequences)
 - **POD / TOD** (Lack control depending upon facts)
 - **Will** (Probate)
 - **Trust** (Trust Administration)
- What is the least costly and most efficient way to accomplish my estate planning goals?

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How: Gift

- Annual Exclusion: \$16k
- Gifts in excess of annual exclusion require a Gift Tax Return and reduce Federal Estate Tax Exemption
- [Irrevocable]
- [Basis: Grantee's basis is Grantor's basis]

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How: LE / Remainder

- Deed Remainder Interest in real estate
- Reserve Life Estate (use / income)
- [Irrevocable]
- [Beware of Unintended Consequences: child dies prior to parent, child divorces, child has health issue (SSDI, Medicaid), child has creditor issues, LTC issues, 1031 Exchange]

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How: POD / TOD

- Pay on death / Transfer on death real estate, vehicles, checking, savings, CDs, LI, Annuities, Investment Accounts (qualified and non-qualified)
- [No PR or Trustee to manage assets not POD/TOD]
- [Cumbersome to manage as facts change]

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How: Will

- Revocable (can be changed)
- Name a Personal Representative (Executor)
- [Probate]: Prove validity of Will, Name PR, Venue set for contests, Creditor's Claims Date, Close Estate.
- Probate: PR prepares inventory with FMV, notice to creditors to file claim, if claims not filed - forever barred, Collects and preserves Estate, pays debts, expenses and taxes

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How: Trust(s)

- Dead Hand Control: Protect assets from beneficiaries
- Avoid Probate in NE and other states if own RE in another state
- Protection from Creditors' Claims, Claims of Spouses and Ex-Spouses
- Protect beneficiary from self, guardianship, conservatorship, minors
- Provide a nest-egg for Beneficiaries
- [Cost]
- [Complexity]
- [Fiduciary Duties of Trustee]

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How: Combination of all of the Above

- Most effective Estate Plans utilize a combination of:
 - POA AM
 - POA HC
 - Gifts
 - POD / TOD
 - Will (Pour Over)
 - Trust(s)

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How: Irrevocable Life Insurance Trust (ILIT)

- Set up trust first
- Trust buys life insurance
- Trust document needs to “get it right”
 - Trustee has all ownership rights
 - Trustee can accept tax free gifts from you as Settlor/Grantor to pay premiums
- Insurance is not included in taxable estate if the insured does not own policy and does not pay premiums (also, insured’s estate cannot be beneficiary)

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How: Charitable Trust

- Charitable Remainder Trust (CRT): income paid to Settlor/heirs, remainder goes to charity
- Charitable Lead Trust (CLT): income paid to charity, remainder to heirs
- ***Complicated rules, numerous variations***

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How to make sense of it all:

- Team: Attorney, CPA, Insurance Agent(s), Banker, Financial Advisor(s)
- Team understands plan
- When in doubt, keep it simple...know how to SPELL out your plan

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Long-Term Care

- Adequate income or reduction of assets
 - After tax available income
 - Earnings and asset sales
- Long-Term Care Insurance
- Medicaid safety net
 - Deprivation of Resources (5-year look-back)

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Medicaid: Deprivation of Resources

- Transfers within 60 months of Medicaid application - “Look Back” period
- Application completed 30 days after enter nursing home
- Ineligibility determination calculations
- Ineligibility period begins only after a) move to nursing home, b) spend down assets to \$4k, c) apply for Medicaid and d) be approved for coverage but for the transfer

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Asset Preservation and NE Medicaid

August 21, 2019, Question to NE Bar Association Attorneys:

A prospective client reports that she contemplates Medicaid for her elderly mother. She learned of *Elder Advantage* (“EA”) service that offers to assist in Medicaid Applications. EA is telling daughter that of Mom's assets of approximately \$175,000, they will help her retain \$98,000 after 14 months. EA's fee is \$6,400. Has anyone heard of EA? Are they legitimate? Is there a way to preserve \$98,000 for a widowed applicant?

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Asset Preservation and NE Medicaid

Responder 1:

As someone who has taken court appointments as a Guardian for people on Medicaid, my advice to clients when it comes to trying to shelter assets to go onto Medicaid is this: If you have to go to a nursing home someday and you want to be able to go where you or your family wants, and when you want, instead of being on a waiting list, and have a private room, and high enough staffing levels to really care for you properly, and good medical care (since that is taken over from your primary physician by the nursing home) then you DO NOT want to go on Medicaid. I get the high cost and the panic that puts into people but that is money the elderly person (or his or her spouse) worked hard for and saved for their needs in retirement. Children should not be trying to put their parents on Medicaid so that they have more money to inherit. It sounds like this woman has enough assets to go into a good quality nursing home for long enough that if and when she runs out of money she can meet the residency requirement to stay there on Medicaid (often two years). That is what I tell people their goal should be regarding nursing home care. If this offends any of you who counsel Clients on how to go on Medicaid to shelter money, I recommend that you take a few appointments as guardian for some indigent elderly people and see how that works out.

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Asset Preservation and NE Medicaid

Responder 2 :

Responder 1, I appreciate your sensibilities and your advice of paying to be able to stay in a good facility when the funds run out. My goal is to help a client avoid being robbed by a scammer who would take money from people who are in a stage of life when every dollar counts. On the other hand, I suppose I have a duty to my clients to accurately report the law and so a duty to learn what I can of the law. So, if our law would provide such an avenue or alternative, I guess I must learn what I can. Oh, and I too have struggled to help wards who are penniless and at the mercy of the State.

Responder 3:

I agree with what Responder 2 says, but I've lost many clients because they felt otherwise. The clients walked out of my law office and went to another lawyer that promised to protect their assets???

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Asset Preservation and NE Medicaid

Responder 4 :

Who's assets? When the kids show up with Mom and/or Dad, there are questions as to: Who is the client; conflict-of-interest; knowing/voluntary waiver of the conflict; etc.

Responder 5:

A lawyer that advises a Client that one can retain assets beyond those that are exempt and qualify for Medicaid may be doing a greater service to the Client by providing long term care benefits through the lawyer's error and omission insurance for malpractice. We have successfully gained benefits for a client that relied on advice ***that her trust would not prevent her from qualifying for Medicaid.*** There is not much that can be done except buy long care insurance and make gifts, then wait 60 months before applying for Medicaid.

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Asset Preservation and NE Medicaid

Responder 1 (again):

And only if you can guarantee that in the next 60 months you (the Client) won't have a stroke, fall and break a hip, etc. Otherwise, it is my understanding it would disqualify you from Medicaid benefits until you have self-pay up to the amount of the gifts, but you can't self-pay if you gave it all away, so you'll have to ask for those gifts back and hope the children haven't spent it all. I've only recommended gifting when I knew the client still had enough assets and/or long term care insurance to self-pay for at least 5 years, to get past the lookback period if something bad happens to them.

Responder 6:

Responder 1 has made some excellent points. As one who has dealt with this issue numerous times, I think it is important to counsel your clients (among the other issues) concerning the difference between care facilities which are primarily Medicaid patient facilities versus care facilities which are mostly private pay facilities. The difference in quality between the two types of facilities is striking, and I believe the trend will intensify, given current demographics and governmental budget concerns. I also counsel my clients that, although we all want to leave something to our children, their first responsibility is to take care of themselves.

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Final Questions

- Who can get into safety deposit box?
- Where is your will/trust located?
- Should heirs know what you plan?
- Have you compiled all end-of-life information in one place, made copies?

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