It’s Hard Getting Old: Helping Clients Keep Control of Their Lives and Money

NAEPC

PRESENTED BY:
Louis W. Pierro, Founding Partner
Peter J. Strauss, Senior Partner

PIERRO, CONNOR & STRAUSS, LLC
Trusted Counsel

Our Team Of Attorneys

Louis Pierro

Aaron Connor

Peter Strauss

Caryn Keppler

Ingrid Johnson

Frank Hemming, III

Richard Rothberg

Theresa Skaine

Jacob Verchereau

Kristen Peck

Bethany Van Pelt

Carolyn Glynn

Robert Bosman

Planning Ahead: Take Control

THE FAILURE TO EXECUTE ADVANCE DIRECTIVES FOR HEALTH CARE DECISION-MAKING AND PROPERTY MANAGEMENT WILL RESULT IN LOSS OF INDIVIDUAL CONTROL AND AUTONOMY

- Persons with little knowledge of a patient's history and wishes may become the decision maker
- A court-appointed guardian may obtain the right to make decisions, including end-of-life decisions
- The person who may be appointed guardian or be recognized as the "surrogate" may not be the person the incapacitated person would choose
- A partner in a non-traditional, loving relationship may have no authority to make health decisions
- These concerns apply for both healthcare decisions and financial affairs

Can A Person With Diminished Capacity Engage In Advance Planning?

- Traditionally, physicians have tended to construe capacity as either present or absent
- Today, physicians use a decision-specific approach, whereby the measure of capacity is a person's understanding of a specific decision or task
- The level of capacity needed to perform a task or make a decision will vary depending on its complexity

Evaluating Capacity

- Consider having a physician or psychologist do a capacity test since there is some doubt about whether a client can engage in advance planning

- Consider the following guidelines developed by Peter J. Strauss based on current thinking and the rules of professional conduct for attorneys promulgated by the American Bar Association and several states

Guidelines To Determine Whether A Client Can Execute Advance Directives

A client can be determined to have sufficient capacity to engage in advance planning if:

- She's aware that she has difficulty with decision making for health care or managing day-to-day decisions at the present time or in the future
- Her choice of a fiduciary to assist is reasonable
- Her choice is consistent with the history of prior choices and lifetime decisions
- She can articulate the reason underlying the need to establish a particular legal document
- She can appreciate the consequences of the execution of the legal document

Memory vs. Judgment

Advance Directives: Health Care Proxy

- Appoints a person – the health care agent – to make health care decisions
- Presumption of capacity
- The health care agent's authority to act begins when a physician determines that the patient lacks capacity to make health care decisions (ability to give informed consent)

Advance Directives: The Living Will

At Pierro, Connor & Strauss, we refer to this as a “Health Care Declaration.”

- Expresses a person’s wishes about the type of care and treatment she or he would want or refuse
- Guides the Health CareAgent
- The Health Care Declaration must be honored by physicians and other health care providers, **but compliance is spotty (statutory vs. common law)**
- PCS has designed language for its Declaration to deal with the compliance issue

Drafting Suggestion

"In the event I suffer from an injury, disease or illness which renders me unable to make health care decisions on my own behalf, which leaves me unable to communicate with others meaningfully, and from which there is no reasonable prospect of recovery to a cognitive and sentient life (even if my condition or illness is not deemed to be "terminal" and even if my death is not imminent), I direct that no medical treatments or procedures (except as
provided in paragraph 4 below) be utilized in my care or, if begun, that they be discontinued"

Avoid using terms such as "terminal condition," terminal illness," "death is imminent" or "heroic measures."

When is the Health Care Declaration effective?

When Living Will Is Operative

PA STATUTE, TITLE 20 CH. 54, HEALTH CARE SECTION 5443

(a) When operative. A living will becomes operative when:

(1) a copy is provided to the attending physician; and

(2) the principal is determined by the attending physician to be incompetent and to have an end-stage medical condition or to be permanently unconscious.

(b) Compliance. When a living will becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with the transfer provisions of section 5424 (relating to compliance).

- New York and several other state have no “living will” statute
- Do not create this problem by adding limiting language in the document you draft

Making Decisions at the End of Life

- The **doctrine of informed consent** was established by the case of *Schloendorff v. Society of New York Hospital*, 211 N.Y. 1 25 (1914) where Justice Benjamin Cardozo, then on the New York Court of appeals, wrote:

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

Does the Right to Refuse Extend to Incapacitated Persons?

- In general, yes. *Matter of Quinlan*, 70 N.J. 10 (1976)
- Where a patient did not have advance directives and/or her or his wishes were not known most states have allowed a "surrogate" to make medical decisions, including end of life decisions, based on the theory of either **substituted judgment** or **best interests**

"Informed Consent" Includes The Right To Refuse Treatment"

See *Cruzan v. Director*, *Mo. Dept. of Health*, 497 U.S. 261 (1990)

- "The common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"
- "...the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be viewed from our prior decisions"
- This right exists even where the decision to decline treatment will result in death.

Honoring Patient Choice

Expectation: Health Care Providers should follow Schloendorff, Quinlan and Cruzan, but a review of U.S. Case Law shows that is not often the case - patient rights are being denied.

Until recently, courts have not allowed lawsuits for provider failure to follow patient's rights

Cronin v. Jamaica Hospital Medical Center,60 A.D.21 803 (2009) is typical:

There is no right of action for "wrongful living"

A New Direction At Last

Dr. Gerald Greenberg completed a living will and health care proxy in 2011 stating that in the event of irreversible brain damage *he did not want medical treatment except comfort care*. Dr. Greenberg subsequently developed advanced Alzheimer's and in November 2016 was admitted to Montefiore Hospital with severe sepsis.

Despite the wife's instructions the hospital proceeded to treat Dr. Greenberg's sepsis, administering antibiotics and other curative treatments on multiple occasions. As a result of this unwanted treatment, Dr. Greenberg lived an additional 30 days in immense pain and suffering.

The trial court dismissed the case, stating that Dr. Greenberg did not suffer any damages by being kept alive against his explicit wishes, following the Cronin decision.

On March 31, 2022, the Supreme Court of the State of New York, Appellate Division, First Judicial Department reversed the lower court's decision. Greenberg v. Montefiore New Rochelle Hospital, 205 A.D.3d 47 (1st Dept. 2022). As a result, Plaintiffs could now hold the hospital accountable for Dr. Greenberg's pain and suffering because of the unwanted medical treatment in violation of its required standard of care.

New Provision In PCS Power Of Attorney Form

In the Pierro, Connor & Strauss Power of Attorney form, we authorize the agent:

"…to provide funds for actions of the health care agent."

The New Issue: Supplemental Advance Directive for Oral Feeding for Dementia Patients

- Legal in all states to withhold or withdraw artificial feeding

  (NG tubes, stomach tubes (PEG), and IV feeding)
- But can an individual with capacity refuse natural feeding in advance of losing capacity?
- VSED is legal
- Terminal sedation is legal
- If a health care agent can implement a patient's spoken choice expressed in an advance directive, and take the above actions, why not this choice?

The New Dementia Advance Directive

The Pierro, Connor & Strauss, LLC Health Care Declaration provides:

In the event I suffer from an injury, disease or illness which renders me unable to make health care decisions on my own behalf, which leaves me unable to communicate with others meaningfully, and from which there is no reasonable prospect of recovery to a cognitive and sentient life (even if my condition or illness is not deemed to be "terminal" and even if my death is not imminent**), I direct that no medical treatments or procedures (except as provided in paragraph C below) be utilized in my care or, if begun, that they be discontinued.**

- Typical – deals only with medical treatments
- The law is clear that nutrition and hydration by mechanical means is a medical treatment
- There is growing interest in allowing rejection or stopping of ***natural feeding*** by health care agents directed to do so in a **DEMENTIA ADVANCE DIRECTIVE**

Supplemental Advance Directive For Oral Feeding For Dementia Patients

The Ulysses Contract

- In the Odyssey, Ulysses has his crew tie him to the mast so that when he hears the songs of the sirens he will not be able go to them no matter how strongly he demands to be untied. This has historically been referred to as the Ulysses Contract.

- Physicians have analogized the Ulysses Contract to their own dilemma in cases where they have agreed with a patient to honor the patient's wishes as described in an advance directive but later do not agree that the patient's best interests are served by compliance.

Critical Issues

- Can the physician comply with the request if the agent has only the basic HCP/HCD?
- If not, would the Supplemental Advance Directive enable a decision to stop the natural feeding?
- Suppose Barbara evidenced pleasure when being fed? She smiles when brought to the lounge to listen to music in her Assisted Living Facility?
- Does behavior evidencing that Barbara is not presently unhappy demonstrate a NEW SELF that means the wishes of the OLD SELF should not be honored?
- Is there a presumption that the values and wishes of an older person will change over time thus freeing the agent/child from earlier promises?

Critical Issues

- Must respect for the autonomy of the old self prevail even if it appears not to be in Barbara's best interest?
  - Is the agent legally bound by a contract? Ethically bound?
  - Can the agent now make a best interests decision?
  - Does there ever come a time when strict adherence to the primacy of autonomy becomes
  - immoral?

- Or must respect for autonomy prevail?
- Does there ever come a time when strict adherence to the primacy of autonomy becomes immoral?
- Or, as dementia increases and the person's condition declines, does the sanctity of the advance directive increase?

DO WE UNTIE ULYSSES?

Nevada Law – Dementia Advanced Directive

Nevada revised Statutes Section 162A.870 (2021) now includes the following paragraph 2

The form for end-of-life decisions of a power of attorney for health care **for an adult with any form of dementia** may be substantially in the following form, and must be witnessed or executed in the same manner as the following form:

END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF DESIRES

(You can, but are not required to, state what you want to happen if you get very sick and are not likely to get well. You do not have to complete this form, but if you do, your agent must do as you ask if you cannot speak for yourself.)

..... (Insert name of agent) might have to decide, if you get very sick, whether to continue with your medicine or to stop your medicine, even if it means you might not live, ... (Insert name of agent) will talk to you to find out what you want to do, and will follow your wishes.

If you are not able to talk to..... (insert name of agent), you can help him or her make these decisions for you by letting your agent know what you want.

(cont.)

Nevada Law – Dementia Advanced Directive

(cont.)

Here are your choices. Please circle yes or no to each of the following statements and sign your name below:

1. I want to take all the medicine and receive any treatment I can to keep me alive regardless of how the medicine or treatment makes me feel. YES NO

2.I do not want to take medicine or receive treatment if my doctors think that the medicine or treatment will not help me. YES NO

3. I do not want to take medicine or receive treatment if I am very sick and suffering and the medicine or treatment will not help me get better. YES NO

4.<u>I want to get food and water even if I do not want to take medicine or receive treatment.</u> YES NO

(YOU MUST DATE AND SIGN THIS END-OF-LIFE DECISIONS ADDENDUM)

I sign my name to this End-of-Life Decisions Addendum on ..... (date)

at ..... (city), ... (state)

Excerpts From The Pierro, Connor & Strauss Supplemental Health Care Directive For Receiving Oral Foods And Fluids In The Event Of Dementia

OPTION A: The provisions of this option are selected.

_____(initial)

Assisted Hand Feeding

If my appointed health care agent concludes, after consultation with my primary health care provider, that I am suffering from advanced dementia and the conditions mentioned above are met, I want all provision of oral feeding by hand or by assisted oral feeding to be withheld or, if already begun, to be withdrawn.

If **I** appear willing to accept food or fluid offered by assisted or hand feeding, my instructions are that I do NOT want to be fed by hand even if I appear to cooperate in being fed by opening my mouth.

Excerpts From The Pierro, Connor & Strauss Supplemental Health Care Directive For Receiving Oral Foods And Fluids In The Event Of Dementia

Option B: The provisions of this option are selected. __(initial)

Assisted Hand Feeding

If my appointed health care agent concludes, after consultation with my primary health care provider, that I am suffering from advanced dementia and the conditions mentioned above are met, I would want to receive oral feeding by hand or by assisted oral feeding *only under the following circumstances:*

1. So long as I appear receptive and cooperate in eating and drinking by showing signs of enjoyment or positive anticipation of eating and drinking, I want to receive oral feeding by hand or by assisted oral feeding.
2. I would want to be fed only those foods I appear to enjoy, in any texture I prefer, and in whatever amount I readily accept.
3. I would want all attempts to provide assisted oral feedings stopped when I no longer seem to enjoy or appear willing to eat or drink, or if I begin to cough, choke or aspirate oral feedings into my lungs.
4. I do not wish to receive assisted feedings once I no longer willingly open my mouth or I appear indifferent to being fed, or spit out food or fluids.
5. I do not wish to be coerced, cajoled or in any way forced to eat or drink.

The Failure of Medicare

MEDICARE is America's health care program for persons over 65 younger persons with disabilities who are not covered by an employer health insurance plan.

When Medicare was enacted in 1965, President Lyndon B. Johnson stated the following prediction of Medicare's benefits for the elderly:

> ***"Every citizen will be able, in his productive years when he is earning, to insure himself against the ravages of illness in his old age. No longer will illness crush and destroy the savings that they have so carefully put away over a lifetime so that they might enjoy dignity in their later years."***

Changing Landscape

- Baby Boomers began turning 65 in 2011 at the rate of 10,000 per day (Now turning 77)
- Persons over 65 today= 46 million
- By 2050, the U.S. Census Bureau predicts there will be 86.7 Million citizens age 65 and older living in the U.S. – 21% of the total population
- 1 in 5 Adults is a Caregiver of an older American
- 50% of persons over age 85 can not function independently, mostly because of dementia caused by strokes, Parkinson's disease, M.S. and Alzheimer's disease and similar cognitive disorders
- Average net worth of older Americans in $232,000

Most Can't Afford Care

One Month of Care……	$14000 x 12=	$168,000
Stay at Home Spouse Needs	$4000 x 12=	$ 48,000
Total		$216,000

Budgeting for Long-Term Care

Social Security	$ 24,000
Pension Income	$ 36,000
Income from investments…..(@4%)	$156,000
	$216,000

Most would need $3M to $4M to "self-insure"

In metropolitan areas that number goes up to $6M or $7M because the cost of LTC is ~$15k to $18k per month.

Elder Law Clients

Proactive Planning Vs. Crisis Planning

- Estate Planning –Trusts, Insurance, Advance Directives
  - Prospective LTC Planning
- Crisis Planning – Immediate need for care; options to pay for care including insurance, Medicaid and tax planning
  - Medicaid Applications
  - No margin for error

Medicare vs. Medicaid

Medicaid is the only government program that pays for LTC

Medicare does not cover long-term care

Assessing Your Clients' Risks

- Losing Capacity
- Retirement Costs
- Health Care Costs
- Long-Term Care Costs- #1 cause of middle-class impoverishment
- Outliving your money

Key Questions On Paying For LTC

1. **Where** would you want to live?
2. **Who** would take care of you?
3. **How** would you pay for it - $200K+/yr!

Self-Insuring

Private LTC Insurance + Life Products

Medicaid

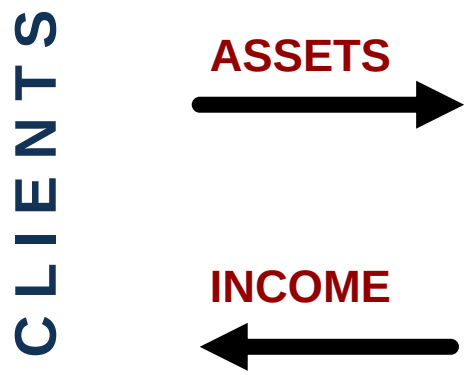
Typical Asset Protection Plan

SINGLE PACKAGE:

- Medicaid Asset Protection Trust
- Revocable Living Trust – only for Medicaid Recovery
- Pour Over Will
- Asset Protection Letter (optional)
- Enhanced Power of Attorney
- Healthcare Advance Directives

Estate Planning Plus!

Medicaid Asset Protection Trust



- Trustee – manages trust assets
- Beneficiaries – income & principal
  - Client – income for life and rights to use real and personal property
  - Heirs = Remaindermen - inherit when trust ends
  - Grantor trust for income tax purposes

Medicaid Asset Protection Trust

Home
Bank Accounts
Stocks & Bonds
Annuities
Life Insurance
Business
Real Estate

- Income can be paid or accumulated
- Principal can NOT be given back to the Grantor directly
- Principal can be paid during lifetime to children or others (who can use it for any purpose)

Medicaid Asset Protection Trust

KEEP OUT

Cash
Bank Acct.
IRA, 401(k) – varies by state

Security Features

- Power to change Trustee
- Power to change beneficiaries
- Can revoke under most state laws with consent of beneficiaries
- Consider Trust Protector

MAPT RESULTS

Long-Term Care costs will be covered by Medicaid (depending on state plan)

- Home and assets protected
- Wishes upon death will be followed
- No probate or court involvement
- Full step-up in basis for trust assets

What Are We Trying To Accomplish?

- Removing the assets from the reach of healthcare creditors for possible Medicaid applicant and spouse
- Providing more protection for patient's assets than an outright gift
- Tax Advantages: income taxed to the grantor, capital gains exclusion on the sale of the residence during lifetime and basis step-up at death

MAPT/Insurance Combined "Planning"

- Using LTCi/ MAPT Combination Plans to "bridge" the 5 -year lookback
- Partnership Policies = Medicaid Protection in Part (Dollar-for Dollar)
  -MAPT gives same result, for 100% of the assets
- Enjoy the flexibility and benefits of LTC Insurance
  -Home Care & Assisted Living coverage
  -Asset *and* income protection
  -Choice of providers
  -Limited availability
  -Hybrids
- With the benefits of a Medicaid Asset Protection Trust

2 + 2 = 5

Collaborations

- Elder Law Attorneys
- Financial Planners
- Accountants
- Insurance Professionals
- Geriatric Care Managers
- Banks & Trust Companies

Pierro, Connor & Strauss

- Consultations in person, virtually or by phone

New York:

New York City,

Albany - Capital Region

Hudson, Lake Placid,

Westchester, Nassau and Suffolk counties

Also licensed in:

- Massachusetts
- New Jersey
- Florida

THANK YOU!
QUESTIONS?

Louis W. Pierro

Peter J. Strauss

info@pierrolaw.com

518-459-2100

www.pierrolaw.com