

**Representing Clients with Diminished Capacity:
Addressing their Needs and Dealing with their Families**

Littman Krooks LLP
Bernard A. Krooks
J.D., CPA, LLM (in taxation)
CELA, AEP® (Distinguished)
www.littmankrooks.com



LITTMAN KROOKS
LLP

1

Elder Law Myths

- It won't happen to me
- I'm never going into a nursing home
- Medicare will pay for cost of my care
- Long-term care is not that expensive
- I am not responsible for my spouse's care
- I can and will make my own decisions

LITTMAN KROOKS
LLP

2

2

Elder Law Realities

- 70 percent of Americans will need some form of long-term care
- 50 percent will need long-term care in a nursing home
- Medicare does **not** pay for long-term care
 - Skilled nursing care v. custodial care
 - Acute v. chronic illness
 - No expectation of recovery

LITTMAN KROOKS
LLP

3

3

Elder Law Realities

- Long-term care *is* expensive
 - Average annual cost exceeds \$100,000
 - Cost exceeds \$200,000 in some areas
- You *are* responsible for cost of your spouse's care
 - Spousal protections
 - Separate accounts
 - Pre-nuptial agreement
 - Long-term care insurance
 - Divorce

LITTMAN KROOKS LLP

4

4

Elder Law Realities

- 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

LITTMAN KROOKS LLP

5

5

Long-Term Care

- Home
- Assisted living facility
- Nursing home
- Continuing care retirement community
 - CCRC

LITTMAN KROOKS LLP

6

6

Home Care

- Preference for most
- Costly
- Risk of abuse
- Informal caregiver
- Reverse mortgage
- Long-term care insurance
- Medicare
- Medicaid

LITTMAN KROOKS LLP

7

Home Care

- Medicare
 - Skilled care
 - Part time or intermittent
 - Does not pay for 24-hour-a-day care
 - Homebound
 - Does not mean bedbound
 - Cannot leave without assistance
 - Leaving alone is contra-indicated (dementia)

LITTMAN KROOKS LLP

8

Home Care

- Caregiver agreement
 - In writing
 - Define scope of services
 - Tax issues
 - Family issues
 - Medicaid issues
 - Rate charged by caregiver
 - Lump sum payment
 - Executed in advance
 - Actuarially sound
 - Medicaid payback for unearned services

LITTMAN KROOKS LLP

9

Assisted Living

- No federal regulation
- Private pay typically required
- Fewer Medicaid beds
- Admissions agreement
 - Sometimes non-negotiable
 - Personal guarantors
 - Binding arbitration
 - Sign as POA or representative

LITTMAN KROOKS LLP 10

10

Assisted Living

- Grounds for discharge
 - Financial
 - Health
 - Notice
- Add-ons to daily rate are common
- Some are age-restricted
- Medical expense deduction
 - Statement from facility

LITTMAN KROOKS LLP 11

11

Nursing Home

- Federal regulations
- Responsible party
- Third party guaranty
- Sponsor
- Security deposit
- Arbitration provision
- Medicare
- Medicaid



LITTMAN KROOKS LLP 12

12

CCRC

- Age in place
- Married couples
- Financial stability of CCRC
- Entrance fee
- Rental
- Resident owned
- Monthly fee

LITTMAN KROOKS LLP 13

13

CCRC Tax Issues

- Medical expense
 - 10% threshold
- Must relate to health care and be non-refundable
 - Monthly fee
 - Entrance fee
 - Statement from CCRC

LITTMAN KROOKS LLP 14

14

Medicare

- Federal program
- Administered by CMS
- Short-term rehabilitation
- Prior hospital stay required
- Deductibles and co-pays
- Does not cover custodial care
- Improvement standard
- Observation status

LITTMAN KROOKS LLP 15

15

Medicare

- Secondary payer if still employed and covered by health insurance
- Should apply for Part A
 - No cost
- Part B covers doctors
- Part D covers prescription drugs
- Monthly premiums for both
- Medicare Advantage

LITTMAN KROOKS LLP 16

16

2019 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

LITTMAN KROOKS LLP 17

17

Medicare Part B

- \$185 annual deductible
- \$135.50 monthly premium
- \$130 if paid through social security
- Above \$85,000 income, premium increases to as much as \$460.50
- Hardship waiver
 - Reduction in income

LITTMAN KROOKS LLP 18

18

Medicare

- Medigap policy
 - Pays for the gaps in Medicare
 - Does not cover long-term care
 - Not available for those who have Medicare Advantage plans
 - Regulated by federal government
 - Does not include prescription drug coverage

LITTMAN KROOKS LLP 19

19

Medicaid

- Payer of last resort
- Federal/State program
- Administered through state and county agencies
- Federal minimum standards, but states allowed flexibility
- Spend-down state v. income-cap state
- Quality of care
- Access to desired facility

LITTMAN KROOKS LLP 20

20

2019 Medicaid Limits

- Single Individual \$2,000 - \$15,450
- CSRA Maximum \$25,284 - \$126,420
- Single Individual \$859
- MMMNA \$2,113.75 - \$3,160.50
- Home equity limit \$585,000 - \$878,000

LITTMAN KROOKS LLP 21

21

Medicaid

- Crisis planning
- Non-crisis planning
- Single v. married persons
- Exempt assets
- Exempt transfers
- Nursing home
- Assisted living
- Home care

LITTMAN KROOKS LLP 22

22

Medicaid

- Look-back period
- Penalty period
 - Regional rates
 - No cap
 - Transfers by spouse
 - Purpose other than Medicaid
- Disclaimers
- Prepaid funeral contract
- Estate recovery

LITTMAN KROOKS LLP

23

Medicaid

- Joint accounts
 - Banks
 - Financial institutions
 - Conversion from individual account to joint
- Trusts
 - Revocable trusts
 - Status of exempt homestead
 - Irrevocable trusts
 - Exempt trusts

LITTMAN KROOKS LLP

24

Special Needs Trusts

- First-party SNT
 - Under age 65
 - Sole benefit
 - Medicaid payback
 - SNT Fairness Act
- Third-party SNT
- Pooled SNT

LITTMAN KROOKS
LLP

25

Medicaid

- Annuities
 - DRA compliant
 - Irrevocable
 - Non-assignable
 - Actuarially sound
 - Equal payments
 - No balloon payments
 - State is remainder beneficiary to extent of Medicaid paid

LITTMAN KROOKS
LLP

26

Medicaid

- Life estates
 - Valuation
 - Transfer penalty
 - Availability as a resource
 - Sale during lifetime
 - Vacation home
 - Estate recovery
 - Medicaid trust
- Filial responsibility


LITTMAN KROOKS
LLP

27

27

Married Persons

- Community spouse resource allowance
- Right of election
 - Special needs trust
- Pre-nuptial agreement
- Divorce
- Disclaimer wills
- Portability



LITTMAN KROOKS LLP 28

28

Exempt Assets and Transfers

- Retirement accounts
- Transfer of residence to qualified persons
- Not for purpose of applying for Medicaid
 - Estate planning gifts
- Transfer to child with disabilities
- Transfer between spouses
- Residence
 - Home equity exemption
 - Exempt transfers

LITTMAN KROOKS LLP 29

29

Long-Term Care Insurance

- Fewer choices
 - Fewer products
 - Fewer companies
- Only pays for 7% of all long-term care costs
- 7 million policy holders
 - Relatively flat past 10 years
 - New policy sales are way down from 2002

LITTMAN KROOKS LLP 30

30

Long-Term Care Insurance

- Prices continue to rise
- Low interest rates
- Lapse rate
- Life expectancies
- Health care costs
- High capital requirement

LITTMAN KROOKS LLP 31

31

Long-Term Care Insurance

- More conservative underwriting
- Tougher approval process
- Higher costs for women
- Hybrid products
- Partnership policies

LITTMAN KROOKS LLP 32

32

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

LITTMAN KROOKS LLP 33

33

Deductibility of LTCI Premiums

- C corporation
 - Executive benefit
 - Fully deductible as a business expense
 - Not imputed income
 - Not subject to ERISA
 - Receipt of LTCI benefits are tax-free to the executive

LITTMAN KROOKS LLP 34

34

Long-Term Care Insurance

- Work with reputable agents
- Determine payment source
- Third party lapse notification
- Still makes sense for some
- Insure part of the cost
- Avoid family disputes

LITTMAN KROOKS LLP 35

35

ABLE Accounts

- IRC Section 529A
- Tax-advantaged investment accounts
- Favorable treatment for government benefits purposes
- Qualified Disability Expenses

LITTMAN KROOKS LLP 36

36

ABLE Accounts

- Account balance, contributions and distributions disregarded for SSI and Medicaid purposes
- SSI is suspended if account balance exceeds \$100K
 - Excess considered a countable resource
 - Medicaid not affected
- Medicaid payback on death
 - Applies to Medicaid only, not SSI

LITTMAN KROOKS LLP 37

37

ABLE Accounts

- Disability onset prior to age 26
- Account may be created at any time
- Limit of one account per beneficiary
- Annual contributions capped at \$15K
- Total account value capped at state 529 limit
 - \$250,000 - \$520,000

LITTMAN KROOKS LLP 38

38

ABLE Accounts

- Contributions limited to annual federal gift tax exclusion amount
- No gift tax on funding by designated beneficiary
 - Not a completed gift
 - Value of ABLE account included in estate

LITTMAN KROOKS LLP 39

39

ABLE Accounts

- No gift tax on funding by person other than designated beneficiary
 - Completed gift
 - Annual exclusion
 - Not included in estate
- Five-year up-front funding not permitted
 - Significant difference from 529 accounts

LITTMAN KROOKS LLP 40

40

ABLE Accounts

- No federal tax deduction for contributions
- State tax deduction or credit
- Some states limit tax benefit to residents who open accounts in home state
- Rollover from 529 account now permitted
- Tax-free growth
 - Similar to Roth IRA
- Distributions for QDEs are not taxable

LITTMAN KROOKS LLP 41

41

Ethical Issues

- Identify your client
 - Dealing with family members
- Conflict issues
- Attorney/client privilege
 - Waiver
- Diminished capacity
 - How to determine
 - Medical
 - Legal

LITTMAN KROOKS LLP 42

42

Ethical Issues

- Model rule 1.14
- Power of attorney
 - Powers of agent
 - Waive privilege
 - Replace/appoint fiduciaries
 - Fund/create trusts
- Guardianship
- Elder abuse

LITTMAN KROOKS
LLP 43

43

Thank You!

Bernard A. Krooks

Littman Krooks LLP

JD, CPA, LL.M., CELA, AEP (Distinguished)
www.littmankrooks.com

LITTMAN KROOKS
LLP 44

44
