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Elder Law 101: Navigating the Long-Term Care Maze

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Presented by

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Topics to Be Covered Today

- Background
- Medicare
- Medicaid
- Medicaid Planning
- VA Benefits
- Other Options for Financing LTC
- Advance Planning Legal Documents



Background



Population Shift

- By 2015, persons 65 or older are expected to be 14.84% of the U.S. population. By 2030, this number is expected to grow to 20.3% of the U.S. population.
 - Source: U.S. Census Bureau website, Population Projections
<http://www.census.gov/population/projections/files/summary/NP2012-T2.xls>
- The oldest-old population (those 85 and older) is projected to grow rapidly after 2030, when the Baby Boomers begin to move into this age group.
 - Source: U.S. Census Bureau, Current Population Reports, P23-209, *65+ in the United States: 2012*

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Increased Care Needs in Society

- Advancing age often (not always) means a decreasing quality of life, and more need for long-term care services
- Because of the ongoing growth in the ranks of older Americans, especially the very elderly, we are all likely to have at least one experience with long-term care
 - Parent
 - Spouse
 - Friend
 - SELF

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Who Needs Long-Term Care?

- About 10 million Americans need long-term care services to assist them in life's daily activities
 - 59% are age 65 or above
 - 41% are below age 65
 - http://www.ltcfeds.com/start/aboutltc_what_is.html

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Where is Care Being Provided?

- **Over 70%** of people with LTC needs are receiving care in the community as opposed to a nursing home
 - <http://www.medicare.gov/longtermcare/static/home.asp>

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The Cost of Long-Term Care

- Average annual cost of **Nursing Home Care**: \$81,000
- Average annual cost of care at **Assisted Living Facility**: \$40,000
- Average daily cost for **Adult Day Care**: \$61.00

– <http://www.skillednursingfacilities.org/articles/nursing-home-costs.php>

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Who Funds Long-Term Care?

Total LTC Expenditures (Total in 2010: \$342 billion)

Other	17%
Private Insurance	7%
Medicare	20%
Out-of-Pocket	15%

Medicaid	41%
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Source: <http://www.kff.org/medicaid/upload/8403.pdf>

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What is Long-Term Care?

- Services and support a person needs when her ability to care for herself has been reduced by a chronic illness or disability (cognitive or physical)
- May include assistance with activities of daily living (ADLs), such as ...
 - Eating
 - Dressing
 - Toileting
 - Managing a home and preparing food
 - Managing medication
 - NEW: Independent Living ... non-medical home care agencies are housed within independent living facilities
 - Example: Garden Plaza (independent living) provides office space to Preferred Care at Home (home care agency)



Long-Term Care Settings

- Assisted Living Facilities
- Continuing Care Retirement Communities
- Nursing Homes
- At Home with Caregivers
- Adult Day Care



Assisted Living Facilities

- Generally feature individual rooms, common areas for recreation and socializing and a common dining area
- Services and fees vary from facility to facility
- May provide additional support
 - Activities of daily living
 - Medication management
 - Housekeeping
 - Medical care

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Assisted Living Facilities - Admission Contract

- Contract should specify:
 - Date of occupancy
 - Unit to be occupied
 - Who is responsible for maintenance of the unit
 - Frequency of housekeeping; what is included in housekeeping
 - Services performed by facility for base monthly rate; cost of additional services
 - Amount of security deposit and under what conditions it will be refunded

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Continuing Care Retirement Communities (CCRCs)

- Provide three levels of housing
 1. Independent living
 2. Assisted living
 3. Nursing home care



CCRCs

- Generally, CCRC contracts feature an initial up front payment, along with ongoing monthly fees
 - There may be a modest rise in fees for additional care as resident ages
 - The resident of a CCRC is "guaranteed" the care needed by his contract with the facility



Nursing Homes

- Ongoing custodial care for many of our frailest citizens (cognitive and physical impairments)
- Skilled nursing and rehabilitation services
 - Physical therapy
 - Occupational therapy
 - Speech therapy
 - Respiratory therapy
 - Cardiovascular disease treatment

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Nursing Homes

- Choosing a nursing home
 - Consider the financial status of person entering facility – some nursing homes do not accept Medicaid
 - Start early! Some nursing homes may have waiting lists

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Caregivers at Home

- When hiring caregivers, perform background checks
- Written contract should describe duties and expectations of caregiver
- Hiring may require withholding of payroll taxes, including unemployment compensation and Social Security
- Purchase umbrella policy to protect homeowner against intentional or negligent acts by caregiver
- Consider family member as formal, paid caregiver



Adult Day Care

- Provides older adults an opportunity to get out of the house and receive mental and social stimulation
- Planned program of activities
- Operate during daytime hours
- ADC can give family in-home caregivers a break
- Good candidates for ADC are seniors who may be physically or cognitively challenged but do not require 24-hour care



Medicare Benefits for Long-Term Care

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Skilled Nursing Home Care

- Coverage for a "spell of illness"
 - Days 1-20: All costs at 100%
 - Days 21-100: All costs above \$148.00 per day (2013)
 - Days 100+: Medicare pays nothing
- Spell of illness:
 - Starts when a patient has an illness or injury and requires the covered level of care
 - Ends sixty (60) days AFTER the patient ceases to receive the covered level of care
 - If the patient does not receive the covered level of care for at least sixty (60) days, the current spell of illness ends and the patient can again be eligible for long term care Medicare benefits if the patient again satisfies the above criteria

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Skilled Nursing Home Care

- What is skilled care?
 - Look at level of skill required to administer care (IVs, tubal feedings, physical therapy)
- Patient must have been in hospital for 3 days, and must enter nursing facility within 30 days of hospital discharge
 - NOTE: "Observation" days will not count toward the requirement that patients be in the hospital for at least three (3) days. The three (3) days must be days in which the patient has actually been admitted to the hospital.



Skilled Nursing Home Care

- Must be provided at Medicare approved skilled nursing facility
 - Past: Patient's health must continue to improve or care is required to maintain quality of life
 - Recent revision: Medicare coverage does not turn on presence or absence of potential for improvement; but rather depends on whether the patient needs skilled care, even if such care would simply maintain the patient's current condition or slow further deterioration (*The Elder Law Report*, December 2012, Page 3).



Limited Home Health Care Services

- Part-time or intermittent skilled, medically necessary nursing care and other services - Medicare covers 100% of approved amount
- Medicare covers 80% of approved amount for durable medical equipment ("DME")

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Limited Home Health Care Services

- Patient must be "homebound"
 - Cannot leave home without assistance of another person or aid of a supportive device such as a wheelchair
 - Must be under the care of a physician who establishes a plan of care
- Care must be received through a Medicare-certified Home Health Care Agency

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Medicare Hospice Benefits

- Palliative care benefits for terminally ill patients
 - Palliative care - affords relief, but not cure
 - Curative care - tends to overcome disease, and promote recovery
- Patient must be expected to die within 6 months or less, but coverage may be extended beyond 6 months

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Medicare Hospice Benefits

- Typically includes
 - Physician services and nursing care
 - Physical therapy and similar services
 - Homemaker services
 - Medical supplies and drugs
 - Counseling
 - Short-term inpatient care

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Medicare Part D Benefits Prescription Drug Cost Assistance

- Must be enrolled in Medicare
- May join 3 months before or 3 months after turning 65
- If disabled may join 3 months before or 3 months after the 25th month of disability payments
- Plans cover both brand name and generic drugs
- Plans have a yearly deductible, as well as coinsurance or copayment
 - Affordable Care Act working toward closing the "doughnut hole" between now and 2020.
- If did not enroll during initial eligibility period, can enroll October 15, 2013 – December 7, 2013



Medicaid/TennCare Benefits for Long-Term Care



Medicaid LTC Options

- Primarily covered nursing home care in the past - but this has changed
- Alternatives to nursing home care through Medicaid waiver programs
 - The Alexian PACE program (Hamilton County, TN only) - Program of All-inclusive Care for the Elderly
 - Medicare and Medicaid services
 - CHOICES (next slide)

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Long-Term Care - CHOICES

- Single point of entry for Medicaid LTC services - AAAD Offices
- Integration of nursing facility LTC and waiver programs into one coordinated program
- Goal: expand and promote home and assisted living options for Medicaid LTC services as option to nursing home care
- Least costly alternative for care

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CHOICES

- Old Approach
 - CHOICES 1: Nursing Home
 - CHOICES 2: Home Based Services
 - Both programs required failing 2 or more ADLs
- Approach since July 2012
 - CHOICES 1: Nursing Home - Must score 9 or higher on the Level of Care Acuity Scale and need 24 hour nursing home care with acute medical needs and/or rehab, dementia or permanent confusion
 - CHOICES 2: Assisted Living/HCBS – Must score a 9 or higher on the scale and not require daily inpatient nursing care (but do require daily supervision)
 - CHOICES 3: "At-Risk" Home Based Services – Score between 4 and 8 on the scale ... capped at \$15,000/year
- Current Regime subject to change every 6 months

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Home Based Services - CHOICES

- General Features
 - Case management
 - Personal care services
 - Homemaker service
 - Adult day care
 - Personal emergency response system
 - Personal care assistant

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Home Based Services - CHOICES

- General Features
 - In-home respite care
 - Inpatient respite in a nursing home or assisted living facility (9 days a year)
 - Minor home modifications
 - Pest control
 - Home delivered meals
 - Assistive technology

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Medicaid Qualification for LTC

- Two Step Process
 1. Medically Needy Test
 2. Financial Means Test
 - Income
 - Assets

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Medically Needy - Nursing Home Patient

- Patient in nursing facility for 30 consecutive days prior to attaining Medicaid eligibility
- Need for daily inpatient nursing care, skilled nursing or rehabilitative services on a daily basis
- Pre-Admission Evaluation ("PAE") approved for nursing facility care

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Medically Needy - CHOICES Waiver Enrollee

- Must meet new PAE medical criteria for Level I nursing facility care
- Must be able to receive services in the home at a cost less than that of institutional care
- Must have an identified caregiver available

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Medically Needy Test

- Harder to qualify under new standards
 - Bureau of TennCare:
 - TennCare does not intend to raise the number of medical deficits required for qualification
 - Using an approach that will use the same ADLs, ADL-related and clinical criteria that we use today
 - **But each components will be weighed on a scale of 0 to 5, depending on the amount of assistance that would be required for a person with that level of deficit**



Income Rules – Income Cap

- Applicant's **gross** income may not exceed 300% of the current SSI FBR (**Currently \$2,130 per month - 2013**)
- Exception: excess income paid into **Medicaid Qualified Income Trust** ("Miller trust" or "QIT")



Income Rules

- Medicaid recipient (nursing facility) keeps only **\$50 per month** of income for personal expenses.
 - CHOICES enrollees who live outside a facility receive a personal needs allowance equal to 300% of the SSI FBR, which is currently $\$710 \times 3 = \$2,130$
- Remaining income goes to
 - Health Insurance Premiums
 - Unreimbursed Medical Care
 - Recipient's Spouse At Home (Details Next Slide)
 - Nursing Facility

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Income Rules – Allocation to Spouse at Home (SAH)

- SAH receives enough of nursing home spouse's income to bring SAH income up to **\$1,892** per month (2013), plus
- Shelter allowance if monthly "shelter costs" exceed **\$567.38**
- Current ceiling of allocation: **\$2,898**
- SAH keeps all personal income (even if over limit...but would not receive allocation from nursing home spouse's income)

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Asset Rules – Exempt Assets

- Certain assets of a person with a qualified LTC insurance partnership policy
- Recipient's home if spouse or disabled child in home regardless of equity
- Recipient's home if intent to return home UP TO EQUITY OF \$536,000 (2013)
- Motor vehicle
- Life insurance policies with a total FACE value in the aggregate of \$1,500 or less



Exempt Assets

- Personal effects and household goods worth up to \$2,000 (unlimited if there is a community spouse)
- Certain income-producing real estate (*Note*: net rental income counted), very limited exception
- Burial plot and irrevocable burial contract
- At-home spouse's retirement account in Tennessee
- \$2,000 cash



Non-Exempt Assets

- Cash above \$2,000
- Savings
- Investments (mutual funds, stocks, etc.)
- Applicant's retirement accounts
- Cash value of life insurance policies with a face value above \$1,500
- Home equity over \$536,000 if no spouse or disabled child in home

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Special Asset Rules for Spouse at Home

- Non-exempt assets counted REGARDLESS of actual ownership
- Measure assets as of the date the spouse entered the nursing home
- Prenuptial agreements disregarded

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Special Asset Rules for Spouse at Home

- Community Spouse gets to keep $\frac{1}{2}$ of non-exempt assets as of ...
 - Nursing home: The first day of the month that the institutionalized spouse begins a continuous period of institutionalization (at least 30 days)
 - At home care: The date that the Medicaid application is filed
- The rule above is subject to the following floors and ceilings (Community Spouse Resource Allowance ("CSRA")) ...
 - 2013 Minimum CSRA : \$23,184
 - 2013 Maximum CSRA: \$115,920
- All non-exempt funds above CSRA must be spent down before eligibility obtained

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Transfer Penalties after Deficit Reduction Act (2006)

- "Look back" period is 60 months (5 years) from the date of the Medicaid application. To figure penalty period of no Medicaid coverage caused by gift transfer:
 - Divide amount of gift transfer by the average cost of nursing home care ("ACC") figure. If transfer made within 60 month period, no limit on the number of months of ineligibility

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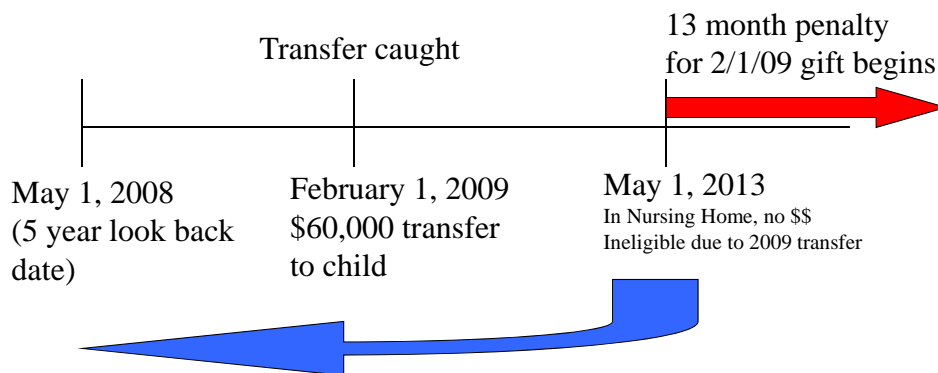
Transfer Penalties

- Transfer = \$60,000; ACC= **\$4,591 (TN – 2013)** applicant is ineligible for Medicaid for 15 months
- Rule for all post DRA transfers - penalty period begins to run only as of date of Medicaid application, assuming applicant is out of funds and needing LTC when application filed
- Old rule - penalty period started to run the month the transfer was made

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Transfer Penalties





Exempt Transfers

- Certain transfers by holders of LTC Partnership insurance policies
- Transfer of assets to spouse (or to another for the sole benefit of the spouse)
- Transfer of assets **by** spouse of CSRA assets **after** eligibility obtained for nursing home spouse
- Certain transfers of the home
 - To child under age 21 or adult blind or disabled child
 - To sibling with equity interest who resided in home for 1 year prior to applicant's entry into nursing home
 - To child residing in home for 2 years prior to applicant's entry to nursing home and who provided care that permitted applicant to stay at home

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Exempt Transfers to Trusts

- Trust for benefit of disabled child - (c)(2)(B) trust
- To qualifying trust for the benefit of a disabled person under age 65 - (d)(4)(A) trust
- Must meet Social Security definition of "disabled" – i.e. cannot engage in substantial gainful employment, which for 2013 means you are unable to make \$1,040 or more per month (not that you don't make that much, but that you are unable to make that much)

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Estate Recovery

- Deceased recipient over 55 years of age when recipient received Medicaid assistance; no surviving spouse; no surviving child under 18 or blind or disabled
- Tennessee typically seeks recovery solely from the "probate estate" **but federal law allows expanded recovery from the non-probate estate should Tennessee desire to do so**
- Release from the Bureau of TennCare required to close probate estate in Tennessee
- Exemption: certain assets of person with LTC Insurance Partnership Program policy



Medicaid Planning



Major Strategies

- Convert countable assets to exempt assets
- Spend down assets
- Convert countable assets to income
- Transfer assets



Convert Countable Assets to Exempt Assets

- Pay off mortgage on home
- Make home repairs or improvements
- Make home more accessible
- Purchase irrevocable burial contract
- Purchase vehicle
- Make deposit for assisted living facility or CCRC
- Purchase household goods or personal items



Spend Down Assets

- Purchase items for safety and/or comfort
- Pay debts
- Prepay items such as utilities, taxes, insurance, etc.
- Reimburse caregivers for verified time spent on the beneficiary's behalf (be careful – you will need receipts or an official care contract)



PAST Techniques

- **TennCare has recently started scrutinizing the following technique, which were common in the past:**
 - Purchase life estate in a child's home (purchaser must reside in home for at least 1 year after purchase date)
 - Purchase a Medicaid Qualified Annuity



Transfer Assets

- Make large transfer and wait 5 years
- Transfer assets to Special Needs Trust for the benefit of a disabled child or other disabled person
- Consider testamentary SNT for disabled loved one or for individual already receiving benefits
- Watch out for the impact of federal gift tax
 - \$5.25 million federal unified estate and gift tax credit
 - Must utilize unified credit for gifts in excess of the Annual Exclusion (\$14,000 per year in 2013)
- Consider capital gains tax and loss of step-up basis in gift versus gift at death
- **Tennessee gift tax no longer an issue**

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VA Benefits for LTC

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Special VA Benefits

- Housebound: substantially confined to dwelling
- Aid and Attendance - requires showing of greater disability than housebound; veteran needs aid and attendance of another person

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Aid and Attendance

- Available to all veterans who have at least 90 days of service during a period of war who were not dishonorably discharged
- Must be "permanently and totally disabled" at the time of application - over 65, presumed disability
- Countable income must not exceed amounts on next chart, but unreimbursed medical expenses are *deducted* from applicant's income
- No true rule of thumb for amount of assets the individual may own
 - Major exceptions: home that is occupied, car, personal belongings
 - NOTE: A home that has been sitting empty may not be counted as exempt

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Aid and Attendance

Maximum Aid and Attendance Monthly Benefits- 2013

Married Veteran	\$2,054 per month
Single Veteran	\$1,732 per month
Surviving Spouse	\$1,113 per month

A and A benefits not considered income for Medicaid qualification purposes



Aid and Attendance

- Aid and Attendance will be reduced to \$90 per month once veteran is Medicaid eligible and in nursing home
- Veterans with service connected disabilities may be eligible for free VA nursing home care
- May also provide a burial benefit
- May be used to defray **assisted living costs**
 - **NOTE:** Recently, there has been a crack-down on costs of independent living facilities. Such costs are not unreimbursed medical expenses; rather, you will have to prove that some form of external care was brought in and paid for out of pocket.



Other Options for Financing LTC

- LTC Insurance
 - Most policies cover nursing homes, assisted living facilities, home health care, hospice care and respite care
 - Coverage typically time limited
 - Cost of obtaining coverage increases with age
- Qualified LTC Insurance Partnership Policy
 - Specialized requirements, including tax qualification under IRC §7702B
 - Benefit: dollar-for-dollar asset protection for Medicaid LTC purposes
- Reverse Mortgage
 - Federally-insured (Home Equity Conversion Mortgages (HECM))
 - Government-sponsored (Home Keeper – Fannie Mae)
 - Private



Advance Planning Legal Documents



Incapacity and/or Disability

- Financial Power of Attorney
- Health Care Directives
- Conservatorship

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Financial Power of Attorney

- Document appointing someone (agent) to manage financial or business affairs for another individual
- Usually gives agent ability to conduct bank transactions, deal with stocks, securities, or other property, or collect on any owed debts
- Usually effective immediately, but can be a "springing" Power of Attorney
- **Make sure it has appropriate gifting powers**
- **Make sure it is "durable" POA**

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Health Care Directives

- HC Power of Attorney and Living Will OR Tennessee Advance Care Plan
- Tennessee Advance Care Plan
 - Provides for appointment of health care agent
 - May indicate unacceptable quality of life conditions
 - May indicate treatments to be withheld or continued if quality of life becomes unacceptable
 - May give instructions related to burial arrangements, hospice care, and organ donation
 - Needs to be witnessed by a notary or 2 witnesses (should be unrelated)

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Health Care Directives

- POST Form
 - Standardized form created by State of Tennessee
 - Contains orders from physician regarding patient's end of life treatment preferences
 - Allows discussion of preferences with a healthcare surrogate if patient is unable to communicate preferences
- Advance Care Plan, Appointment of Health Care Agent, POST and Appointment of Surrogate forms (See <http://health.state.tn.us/Boards/AdvanceDirectives/index.htm>)
 - ACP versus POST/DNR: Advance Care Plans set out the end-of-life preferences for an individual – to be carried out by named agent. A POST/DNR form is specific to an institution and operates as a physician's order to staff to not resuscitate an individual in certain circumstances.

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Conservatorship

- May be the only option if no advance planning
- Expensive
- Must be deemed incompetent by a physician
- Requires court proceeding in which personal and financial rights are removed
- Conservator required to submit annual accountings to the court
- Can usually be avoided with financial POA and ACP
- Surrogate rules for health care decisions only

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Planning for Death

- Property considerations
 - Last Will and Testament/Living Trust
 - Last Will with an SNT for the community spouse
 - Asset Ownership and Beneficiary Designations
- Individual considerations
 - Pre-planning funeral service
 - Providing burial instructions

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Questions?

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