

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

Using Advance Planning to Avoid Unnecessary Conservatorships

Webinar Transcript

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Presenters:

Lauren Carden

Director, California Elder
Rights,
Justice in Aging

Judith Logan

Directing Attorney,
Central California Legal
Services

Lauren Carden, ...:

Hey, welcome everyone. Thank you all for joining us today for this training on Using Advanced Planning to Avoid Unnecessary Conservatorships. I'm Lauren Carden. I'm the director of California Elder Rights at Justice in Aging, and I'm excited to be joined today by Judith Logan, the directing attorney at Central California Legal Services. So, I'm going to do a few logistics, and then I'll introduce Judith, and we'll start the presentation. For those who don't know, Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable healthcare, economic security, and the courts for older adults with limited resources. We focus our efforts on fighting for people who have been marginalized, and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency. And this presentation today is made possible through funding from the California Department of Aging.

Just some housekeeping, so everyone is muted. So, if you'd like to ask a question, please use the Q&A function, and we will try to leave time at the end of the presentation to answer substantive questions. If you're having any technical difficulties, you can reach out through the Q&A box, or you could email us at trainings@justiceinaging.org. The webinar is being recorded, and the recording will be available on our website resources page, and you'll also receive a post webinar email with the recording, and materials. Closed captioning is also available. To access closed captioning, enable CC on your Zoom control panel. And just a reminder, if you'd like to stay up to date on future trainings from Justice in Aging, please join our network. You can sign up by going to our website, or sending us an email. And then finally, Justice in Aging is committed to advancing equity for low-income, older adults in economic security, healthcare, housing, and elder justice initiatives.

We strive to address the enduring harms, and inequities caused by systemic racism, and other forms of discrimination that uniquely impact low-income, older adults in marginalized communities. So, a presentation today is on

advanced planning, so I just want to set the scene before we go into our training. We really hope that this presentation helps demonstrate the importance of advanced planning cases for our clients. Advanced planning is not just managing wealth, and passing on assets. It's planning for the support that a person may need if an illness, or injury causes them to need help with healthcare, personal, or financial decisions in the future. And proper advanced planning is really planning for decision supports to in the client's life based on the client's wishes, goals, and values. Advanced planning is also a crucial tool to prevent abuse later in life, and help avoid unnecessary conservatorships. And planning failures, so most people fail to plan rather than having plans that fail to meet their needs.

Failing to plan can lead to confusion about how to support the person when they lose capacity, and can lead to disagreements between family, and friends about how to support the person in making decisions. Failing to plan can also lead to heirs, friends, and family, having a lack of legal authority to help the person, and again can lead to avoidable conservatorship filings if the proper documents aren't in place. So, here's our roadmap for today. So, I'm going to introduce Judith, and then she will cover advanced planning options to prevent conservatorships practical tips for taking advanced planning cases. She'll discuss some hypos to see how advanced planning cases can show up at your office. And then I will go through some models for advanced planning practices. So, today we have a great presenter. Judith Logan is the directing attorney for the consumer senior benefits team at Central California Legal Services. CCLS serves the Central Valley, including Fresno, Merced, Tulare, and Kings counties.

Judith has 25 years of experience in elder law, and non-profit work. She graduated from Fresno State University, and Central California School of Law. In her spare time Judith enjoys reading, volunteering with guide dogs for the blind, raising puppies for their program, and spending time with her family. So, I will now pass the presentation to Judith.

Judith Logan, D...:

Thank you, Lauren. I appreciate the invite, and we're going to get started today, and hopefully give you some really good tips on advanced planning. Just a couple of things I want to mention as we start with the first slide is advanced planning is not just for wealthy people, and it's really important for our clients to do advanced planning to avoid conservatorships, and potential abuse. When we talk about... We're going to talk also about the tools that you can use for planning. And even the model that I use here in my office in the Central Valley, the population is growing older. Older adults need advanced planning. Everyone actually needs advanced planning, but we focus obviously on older adults. And so it's really critical. I think it's much more critical than some might think, because when you think about, well, we've got evictions to do, we've to defend, not to do, to defend. We've got housing issues for older adults, we've got maybe even domestic violence, all of these really important things, how does this fit into the work that we do as a legal aid organization?

I hope that comes through in some of these slides. So, alternatives. So, we want to talk about alternatives to a conservatorship, right? One of the first things you can do is you can do an advanced healthcare directive, right? There are statutory forms in California, or you can do an advanced healthcare directive, and it allows you to name an agent to make decisions for you if you can't make them yourself, right? It's really a power of attorney. I like to say sometimes that the advanced healthcare directive was mistitled, because an advanced healthcare directive, first, and foremost names an agent to act as the decision-making person for you as your agent to make decisions that benefit you, or related to healthcare. And secondly, it allows you to make some directives what kind of care you might want at the end of your life. So, we call it a directive, but it's much more than a directive.

It's really a power of attorney to make sure you are choosing, the client is choosing who they want to make decisions for them in the event that it's needed. Also for financial decisions, there are several options. One is you can do a financial power of attorney. That's really, really important. Again, you're naming an agent to make financial decisions for you in the event you can't make them for yourself. You can also do that through appointing a trustee in a living trust situation, and we'll talk more about that. Or you can name a representative payee for social security benefits, which actually you can do early, even before you need it if you choose to. There's something fairly new in California called supportive decision-making agreements that you may have heard of. These have always been done informally, and they really are for someone with a disability, or impairment that wants their trusted friends, or family to help them make those decisions, to come into meetings, to come to the medical appointment, to come to the IEP.

And basically it is not a situation where you're giving that trusted advisor power to make the decision for you. The individual's still making decision, hence the name supported decision-making, and we can talk about that. Plan as early as you can. Everybody needs a power of attorney for healthcare, advanced healthcare directive, and a financial power of attorney, and many people need a trust, and all of these documents in advance planning can serve to protect against conservatorships that may be unnecessary if you have the proper documents in place. Supportive decision making. I kind of already talked about that, but someone asked me not too long ago, well, how is that different from a power of attorney? A power of attorney is the legal authority legally naming an agent to make that decision for you.

A supportive decision making agreement is just a document that says, "Here are the people I want to bring into the meeting with me so that they can listen to my options, and advise me on maybe the best decision that I can make, but I still am making that the individual disabled individual still has the right to make that decision." So, that's from an attorney standpoint, I can see that being very beneficial, and very helpful, but it doesn't rise to the level of an agent that can actually make decisions for you if you're in a situation where you might need a

conservatorship unless you have the proper documents in place, if that makes sense. So, it is a good tool. I don't think it rises to the level of what everyone needs, what all of our older adults need. Okay, so when you think about planning for healthcare decisions, we talk about a person-centered, or person-driven model of decision-making.

And so it's really about finding out about the individual, what their needs are, who they prefer to have them be a supporter, what they want, what the client wants to know, what are their values, what are their goals? And that will shape how they do advanced planning. If they have, maybe they have a disabled child, and they need to make plans related to the care for that disabled child, that's going to completely change, and shape what the individual decides they need to do in advance planning. That's just kind of one example, but all of it has to do with what the needs are of the individual, what their wishes are, what their values are, and then as attorneys, we come in to give them the legal knowledge, and the legal advice to help them make good decisions. Advanced healthcare directive, right? You're creating a power of attorney for healthcare, which I mentioned earlier. So, you're naming an agent to make healthcare decisions for you.

Now, generally, that agent is not going to make decisions unless the individual client can't talk to the doctors can't make those decisions for themselves. You can set a timeframe to say, "Hey, I want my daughter to make healthcare decisions for me today." You can do that, but most people do not do that. They usually set it up so that unless they can't communicate with the doctors, they're the ones that are going to continue to make decisions. I think it's really important for clients to continue to have as much autonomy, and independence, and decision-making as they can make until they can't. We don't want people to give up their independence, and their ability to make decisions for themselves. We want them to hold onto that as long as they can until it's absolutely necessary to make a change. So, there is a statutory advanced healthcare directive. Interesting to note, the American Medical Association used to have forms. It used to be a yellow booklet, was really a nice booklet for advanced health care directives.

They used to give them out free. And so all hospitals, everybody had the same directive. It was great, but then the hospital started having to pay for those, and when it started, it was \$5.00 a piece, and they didn't like that. And so now if you go to a hospital, and you can go to your hospital, your local hospital, and ask for a statutory advanced healthcare directive, and they will give you that to fill out. Sometimes if you go in for surgery, they'll hand you one, and have you fill it out. But now every hospital has a different form. They are similar to the statutory form, but they're all a little bit different, which I think is unfortunate. I think it's better when you're handing a directive to a hospital personnel that they recognize that form, they don't get too upset about it, and send it off to their legal department. So, a statutory form for healthcare directive is a good option for our clients. Planning for financial decisions.

So, this slide is what I would call workarounds, right? So, what happens when your client calls you, and they don't have a power of attorney for mom, and mom has been diagnosed with early onset Alzheimer's, and can't pay her bills anymore. What do I do if she no longer has the capacity to execute a power of attorney for finances? And so this is kind of a slide that says, "Well, maybe everything is directly deposited into her bank account. Maybe we can set up automatic payments for bills that minimize any check writing, or makes it necessary for her to make decisions." Automated payments for bills have to be monitored, but maybe the daughter already has access to online banking for mom, and really works to get mom's bills paid, and set up automatically so that a conservatorship is not necessary yet. There may come a point when it is, but right now we can get mom's bills paid.

So, there are certain things that we do, and by the way, our clients do this all the time. They do work, what I would call workarounds from getting a legal document, which is obviously preferable, to make life better for the older adult. The representative payee is another way that we can make sure that their social security benefits are paid to them, and that someone is monitoring that. So, those are a few things. There's probably other things, this is not an exhaustive list, but there's some ways that people often already find to manage accounts, and to manage things for the older adult that needs assistance. You want to make sure that person is trustworthy. Obviously, we do have cases sometimes where a family member, or a friend, or a neighbor gets access through those same workarounds, and maybe they're not using all the funds to benefit the senior, or the older adult. So, that's something we have to be cautious of too. But these are important things to know on a practical level.

Okay, a financial power of attorney, what exactly is that? So, a power of attorney is only good while you're living. If I execute a power of attorney for my husband to make decisions for me, and I pass away, that power of attorney ends at the moment of my death. A lot of people don't realize that power of attorney allows the client to name an agent to manage their financial affairs, right? This is a really important document that everyone needs. However, it's a powerful document. So, we want to make sure we name the right person, the trustworthy person that's going to do what's best for the client. The power of attorney can be limited in ways. For example, maybe I only want a power of attorney for them to handle my house real estate, or maybe I only want the power of attorney to do certain narrow things. People can execute a power of attorney for specific, and limited types of powers. They can also limit the timeframe. So, I can say this is only good while I'm incapacitated, and a doctor has to say I'm incapacitated.

So, a statutory power, there's a statutory durable power of attorney in California that is a good option for our clients. It's simple, it's straightforward. The banks typically recognize it. The financial institutions typically recognize it. Why is that important? Well, it's important because if I'm the power of attorney for someone, and I take that power of attorney to the bank so that I can handle

their affairs, if it's very complicated, and they may anyway, they may send it to their legal department. If you've ever dealt with a big bank who shall all remain nameless, they send a lot of things out to their legal department, and their legal departments are on a little island somewhere off the coast that no one knows where they are. No one can call them except employees, and no one can talk to them except employees. And so information that goes to their legal department goes through several people, and the information that comes back to you also goes through several people.

It is inefficient, and really extremely frustrating. So, if we can simplify that, and make sure it looks like most of the other powers of attorney that they see, it may reduce the complications with the big banks. I will tell you that community banks, and credit unions are much easier to deal with on these issues for the most part. So, that's just FYI. Okay, we'll go to the next slide. Okay, the next thing that you can do is you can appoint a trustee, and a living trust. So, a living trust is, and we're going to talk more about that, I think there's another slide about it. But basically, if you create a trust, I have a trust, and I have, my husband, and I are both the current trustors, and the trustees. We've created the trust, we manage it. We're in total control, but we can appoint someone after us, a successor trustee to step in, and manage our finances if we can't do it, and we're still living, or to administer everything in our death.

And so many, many people are creating trusts for multiple reasons. But one of the main reasons that it can be helpful is you can name a successor trustee to step in either due to illness, or at death. Okay. Oh, so why is that important? Well, why do we create a living trust? And I will tell you that at my work here at Central California Legal Services, when I came, we were doing simple wills, and which makes sense. A lot of people, again, have the idea that we don't have wealthy clients. So, why would we set up trusts for them? Why would we even do estate planning for them? Well, you're going to find out why. So, we want to avoid them being in a conservatorship. We want to avoid the court process of proving the will, probate. So, probate is expensive in California. It's different in every state. It's time consuming, and we want to stay out of probate if we can. We save time, and money by avoiding probate. How do we avoid probate? We create a trust. So, when we create a trust, we move assets.

So, in my trust, the assets are moved out of mine, and my husband's name into the name of the Logan trust. And so when I die, that property is no longer in my estate, so I don't have to go to probate. It's in the name of my trust. Now, that can be a little scary for clients that don't understand that, but the idea is that it's in my trust. It's controlled by me as long as I am able to control it. And then when I die, it's called the living trust, because it lives after I die. It continues on. And the next successor trustee steps in. So, we want to avoid probate. Why? Because it's expensive. It's time-consuming. And if we have a trust that's privacy for our clients, that probate is public record. If I have to petition the probate court, and I submit a will for probate, that's public record. Everyone knows who

my heirs are, what my bills are, who's getting the assets. Everything is public record for anyone to look at, and see.

And it also is a forum to say, "Hey, if you have any claims against Judith Logan's estate, any credit, or claims, come make them." We put an ad in the paper, and we say, come on down, everybody make your claims. That's part of the purpose of probate. And then a judge supervises the process, and there's final accountings done, and ultimately the assets are distributed to the heirs. Now, in Fresno, that's average about two years process. In more crowded, more populated counties, it can be longer. And depending on the assets, it can really be a frustrating process. The other reason that we do a trust for our clients that have real property is because we want to avoid Medi-Cal liens on client assets. So, we have clients that own a house. They live very frugally. They're on a fixed income. It's all they have in the entire world, and we don't want them having to go through probate, and losing their house because of Medi-Cal liens.

In 2016, the law changed in California, and basically the state of California said, if you don't come through probate, we're not going to come after your assets, which was wonderful, because now my client that has a home that they've worked their entire life for, they can protect, and pass on to heirs. This is issue of generational wealth. Really critically important. One of the main reasons that we do simple trusts here at CCLS, and it makes a huge, huge difference. So, the other thing I wanted to mention, I'm going to talk about how property passes at death. What you want to think about is if I have a client that doesn't own any real estate, they only have personal property, they still need a will, and they still need a power of attorney for finances, and for healthcare. Why do they need those? To avoid a conservatorship. For clients that don't have very many assets, those two documents are probably more important than even the will, although the will gives people peace of mind.

So, if they don't have real estate, and they just have personal property, and they have a bank account, and they have a vehicle, they're not going to go through probate. They don't have enough assets. And so the critical documents for them are going to be the financial power of attorney, and the advanced healthcare directive so that they name people to make decisions for them if they need it, and then the will allows them to distribute to heirs their property, hopefully without any fighting within the family. So, the mistaken idea that because you don't have assets, you don't need to do advanced planning is really wrong. It's just really wrong. It's very critical for older adults, and actually for everyone, because people can be incapacitated at 25, or 30. There can be car accidents, things like that. We want to make those decisions. We don't want to let a court do that, and we want our clients to make those decisions. That's why advanced planning is critical for them.

When you look at advanced planning, it's important to think about not only the house, or the assets, or the bank account, but how property passes at death. So, one way is operation of law. Joint tenancy with right of survivorship goes to the

surviving joint tenant. That can be great, and that can be problematic, because if my will says I have two kids, which I do, everything goes to the two kids, and then I have a joint tenancy. Let's say I put the kids on the deed, which is a big, big no-no, because I know, oh, they're going to get it through joint tenancy, and then whoever is the last surviving one. So, I have two kids. I want each of the families. I have grandchildren, I want each of them to get a share of my estate, but if I have everything in joint tenancy, it's the last person surviving that will get everything. So, we need to look at the deeds.

We need to know how property's titled, or maybe a client has community property with right of survivorship, which is actually better than joint tenancy for tax reasons, or maybe we have tenants in common. I've seen clients put five children on a deed, and they're all tenants in common, meaning every time one of those five children dies, they'll have to probate that one fifth share, which is terrible. Instead, let's do a trust. Let's simplify things. Let's make it easy, and less risk for our older adults. The other thing you need to look at is you need to look at assets that may be controlled by contract, like you have an insurance policy, you've named a beneficiary. That's really important to review that with a client, because maybe they have an ex-spouse on there who's going to get their life insurance, and that's not what they want. So, who's the beneficiary that life insurance is not going to pass through the will. It's not going to pass through the trust probably. What about their bank accounts?

Do they have beneficiaries named on the bank accounts, or do they have joint owners on the bank account that will get those bank accounts at the moment of their death? Or maybe they already own it in conjunction with the older adult, which is also problematic. There can be investment accounts where you do a TOD, or transfer on death. So, my client could have a small account with Charles Schwab where they have named a beneficiary that's going to pass outside their will, and trust. The same with retirement accounts. IRAs, 401Ks, all are controlled by beneficiary designations. Whoever is the beneficiary by contract, that financial institution has to pay that money to them. So, some things pass with a will, or what we call intestate without a will. And then I think that's it for that slide. Okay. So, resources for discussing goals, and values. Here are some things that you can use, or you can direct your clients to think about who they want to name, or what are their goals, what does their advance planning look like?

And that's really, really important. One of the things that we do at CCLS, which is kind of our model, is we do a lot of community education. So, there's really two reasons for that. One is we want to educate our communities. We have a lot of rural communities around the valley, and we want to educate them about advanced planning, and then we give them an opportunity. So, we go, and do a presentation about what's a will? What is a trust? Why do you need it? Why do you need to do advanced planning? What are the pitfalls? Why should you not sign over your deed to your children? Things like that. So, we provide that community education, and then we provide a signup sheet. If they're interested

in doing some advanced planning through us, they can sign up, and say, "Yeah, I have an interest in this", and we can do an intake, and open a case for them. So, by doing the education early, it's really helpful to me because then, or to an advocate, because when I talk to the client, they're going to have an idea of what a will is.

They're going to have an idea of what a trust is, and why they might need it. If that doesn't happen, someone comes to me, and I'm meeting with them, I have to start from scratch. Maybe they don't even understand what a will does, or if they need a will, or what a trust is, or what are these powers of attorney, and should I really do... Should I create those? Those are kind of scary to people sometimes. So, if you're interested in doing this kind of work, this has been a really good way to get a lot of information to a group of people all at once, and then educate them, and then give them an opportunity to know about our services if they want to do this advanced planning. So, I think that's probably it for that slide.

Okay. Practical tips. I like practical tips. I'm a practical lawyer. I like to know if there is a way to do it without doing litigation, I want to know. If there's a way to do it that helps the client, I want to know. When we talk about maybe you with your law firm, or if you're doing a nonprofit legal aid work, what does that look like? How do you start that? Well, you're going to start with your client meeting, and the practical tips here are you want to gather information about the family, and about their assets. Those are two really important things. So, why is it important? Well, you could have a meeting with a client. They could come in, and say, "I want a will, and I have four kids, but I want to leave two of them out, and I want you to do the will. I have surgery next week, so I need it done by Friday."

You could say, okay, that's what you want. I'll do your will, and I'm going to give you a will real quick so that it's before your surgery, and this is what you're doing. But you need more than that. You have to kind of play detective. When you're doing advanced planning. You need information on the family. So, I usually start by talking to the clients. Are they single, or married? If they're married, how long have they been married? How many children do they have? I want to know about their children. So, I'm going to ask them about every, I'm going to say, who's your oldest child? Where do they live? I want to know, do they live with the client? Do they live off the client? Do they work? Do they have their own family? Do they live far away? Do they live near? All of those things are really important. Are they able to work? Are they disabled? Right?

All of the things that will come out when you start talking to them about their children, who's the oldest? Tell me their name. How old are they? Tell me where they live. What do they do for a living? Tell me about their family. Do they have children? All of those things will bring you a lot of information that you need to know. If there's a problem, if there is a family fight, you'll probably find out about that. Maybe the child is disowned from the family, or the child has

disowned the family. You'll find that out. This is important in helping the client to set up their own goals, and values, and getting a plan done. The other thing you have to talk to them about is their assets. The two things that people are most private about is their family, and their assets, and those are the two things you must talk to them about if you do advanced planning.

In my opinion, if you don't talk to them about these things, that's malpractice. That's my opinion. So, because the assets matter, because what kind of an advanced plan they need is determined by the assets they have. So, if they just have, if I go to the senior complex that's head housing. I already know that most of my clients are not going to have real estate. They're not going to have a lot of assets, but I need to know that I need to make certain that's the case, because then I know that they don't need a trust. They don't need a trust, because they don't have enough assets that will push them into probate. They need other things. They need a simple will. They need powers of attorney. If they have a home, if they have real estate that tells me, and they die with that real estate in their name, their home in their name, they're going to go to probate.

So, even if they don't have a lot of other assets, that's a lot of our clients, I need to talk to them about a trust, a simple trust, and how do we get that done for them, and why they would need it, and the risk that it reduces for them. [inaudible 00:36:34] So, we're going to start by offering a simple plan. That's one of the things that we do. Our goal here at Central California Legal Services is not to compete with the private bar. People that can afford to go to an attorney should go to an attorney, and pay the attorney to get the work done because why? Because the people that can't afford to go to an attorney that need the help, we want those people to be our priority. So, what we do here is we offer only simple advanced planning, or estate planning. Simple will a simple trust if they own real property, simple power of attorney, we use statutory forms. We use statutory forms for advanced healthcare directive.

That's really all that's needed. And so if somebody comes to me, and they have a business, and they have multiple pieces of property, that's probably not a plan I'm going to do. I'm going to say, "We only do simple estate plans", but I won't know that until I talk to them, until I've found out about their family, and their assets, and then I'm going to give them advice, and counsel, and send them, give them an attorney referral number, the attorney referral line. So, that is one way that you can narrow down the help that you can provide to older adults. Now, estate planning can include planning to avoid conservatorships, through the advanced planning, and the powers of attorney for both finances, and healthcare, and then planning for asset distribution, and making sure that we've looked at the assets that the client has named the beneficiaries they want for those specific assets that are controlled by beneficiary designations, and that at a minimum, we've given anybody that calls in advice, and counsel on what they need to do.

So, that's kind of the model that we use that might be helpful to you. Okay, we're going to talk a little bit about just some hypotheticals that I put out here, and I'm going to ask the questions, and answer them, and if you have questions about it, be sure to ask at the end, but these are some cases you're going to see. So, Mrs. Johnson, she's 75, it's important to know how old the senior is, because the older a senior is, the more chance there's someone that might contest their will. The more vulnerable they are to their own children, or to people around them. Okay? So, you need to know how old the senior is. The senior lives in her home that she's owned for 25 years. She still has a mortgage. She has a hard time making ends meet. This is not an unusual scenario for our clients. She has five children. One daughter lives with her. The home is the only asset except a bank account with a thousand dollars.

She knows all her children, and is aware of her assets. That is the standard for executing a will in California. You have to know who your children are. You have to know what your assets are. She's worried the state's going to take her home. What kind of advanced planning does she need? Well, the clue here is she has a home. So, she needs a simple will, I'm sorry, not a simple will. She needs a trust, and a will that works in conjunction with the trust. It's a will that we call a poor over will, right? It's kind of like a safety net for the trust. So, people that have a trust also have a will. It's called a poor over will, but this is what she needs. She needs, but she can't afford to go to a lawyer. She can't pay thousands of dollars for an advanced planning, or a trust. She needs to come to your legal aid office, and get that simple trust done. All right, let's go to the next one.

Okay, Mr. Smith, he's 86. He lives independently in a home he is owned for 50 years, but he can't pay his monthly bills. His electricity's been turned off. His only son lives in another state, and sometimes he forgets his son's name. He has neighbors that check on him. His home is his only asset except for a bank account, and he has some money in it. What kind of advanced planning does this client need? So, we know he's 86, so he's older. We know he is been his home forever. We know he is having some problems with monthly bills. We know he owns property, so he needs a trust, but we don't know if he knows enough to execute documents at this point. So, it may be that there's someone who can help him with bills. Maybe that's all he needs. Maybe a trusted friend, or neighbor could set up online banking for him, or something like that.

If he has capacity, and we don't know this without more information, then we want to do his estate plan, and his advanced planning yesterday. We want to put him as priority, and get things done if we can. So, let's go to the next slide. Okay, couple, they've been married 60 years. They can write a book. They're 89, and 90. Why is that important? Well, because they're elderly. They live in a rented house. Husband has some dementia, and so he uses a very nice adult daycare center three days a week to give the wife some rest. He's forgetting some names, and including his children's names, but Mrs. Barney, she wants to do advanced planning. She knows now that her husband is ill, she doesn't know what to do. They don't own real property, so they're not going to be pushed

into a probate, because they just have a small bank account. Well, the thing that they need the most is a healthcare directive, so a power of attorney for healthcare, and a power of attorney for finances.

Now, we don't really know if Mr. Barney can execute those anymore, but we're certainly going to do some more investigation to decide if he can. Now, if he can't, perhaps everything is going owned jointly, and Mrs. Barney can handle things. She can sort of do workarounds, and try to handle things, but we're definitely going to make sure that she gets the help, at least to do her powers of attorney. That's going to be critical so that she can name someone, and hopefully we can do something with the husband in advance of his continued decline.

So, that's a normal scenario coming into our office, and people are really in desperate need of help, and quick help. So, it becomes a priority. All right, so let's go to the next slide. So, these are some additional resources, and that you can use statutory forms so you can get them online. There's some tools there also, just for your help, I think you're also going to get my information at the end so that you can, if you need to, email me, you can. Okay.

Lauren Carden, ...: Okay. Thank you, Judith.

Judith Logan, D...: And I didn't go [inaudible 00:44:33] I think we've [inaudible 00:44:36] good time for lots of questions.

Lauren Carden, ...: Yeah. So, just before we go into questions, I just wanted to reiterate how important these cases are for our clients just like Judith said. I think advanced planning is becoming recognized more, and more as a crucial issue for all adults, but older adults especially. And we recognize that adding in additional cases, or another practice area can be difficult for organizations, but we really want to encourage you all to consider doing so, as advanced planning issues come up in a lot of other cases that you're probably seeing now. So, they can come up in housing issues, elder abuse cases, healthcare consumer, and so even just knowing the law can be very beneficial for your clients. Just some different models if you are considering adding this practice area. So, there's many models throughout the state for incorporating advanced planning.

A common model is through a partnership with pro bono volunteers. So, this could look like pro bono attorneys taking on these cases for full scope services, so kind of like a referral model, or it could be done in kind of a one-day clinic. Other organizations have medical-legal partnerships where the medical staff can help screen for patients, or clients that need advanced planning documents, and then that service can be done, or that warm handoff can be done to assist the client. And then several organizations have recurring clinics that can help with simple advanced planning documents. So, I think Judith had mentioned this, but these clinics are generally ideal for older adults who don't own a home, or other real property. And then their needed documents are more a power of attorney,

or an advanced healthcare directive. And then just like Judith pointed out, [inaudible 00:46:40] a great model, or a model that everyone can incorporate is just the community education outreach piece. Just educating the community about the need for this advanced planning, and how it can really prevent abuse, and avoid unnecessary.

Okay. So, we are going to go into questions now. First, I guess, Judith, an opinion maybe, do you have an opinion on clients speaking with an attorney to get these services done versus using just a legal document service, or just kind of filling out the statutory forms themselves? If you could talk about the benefits of working with an attorney.

Judith Logan, D...: Yeah, so you're asking an attorney that question, right? I am always going to say, you need an attorney to review this for you. I do think that when we talk about workarounds, or a family member that is trying to assist maybe a parent, and they get a healthcare directive, and go through it with them, and help them get it filled out, hospitals do this every day, or even powers of attorney that are statutory forms. I think that can be done, and it can probably be done fairly easily without an attorney. But my standard answer is always with an attorney. In fact, I do have people that come to me that have created all kinds of documents for themselves, and usually that's kind of a disaster. I haven't ever seen any that I thought, "Wow, you did a really great job here."

So, you could go to a paralegal service, and you could have a paralegal. I worked with a paralegal for years who could run circles around an attorney in this area, and you might be really lucky. Or you might go to a paralegal that really doesn't know what they're doing, and then you're stuck, right? Then you're stuck. Because what happens is at some point you need that document, and when you need that document, then it doesn't work for you. That's problematic. So, I think there's a place for it, but in general I would say you should have an attorney supervising, and reviewing what's being done.

Lauren Carden, ...: Thank you. We had some questions on kind of language that I don't know if it was brought this training, but it kind of exists when talking about estate planning. Can you clarify the difference between a durable power of attorney, and a non-durable power of attorney?

Judith Logan, D...: Well, durable power of attorney is just, if you use the statutory form, it's going to say uniform, statutory, form durable power of attorney. It's kind of this crazy thing. So, I think that durable means you can use it for immediate, you can use it, you can limit. It's kind of like if you think of the word durable is, the way I think of it in my head is that you can use it to limit the powers, and you can use it to limit the timeframe. It can be based on capacity, or it can be based on right now, today. I'm going to give Lauren a power of attorney today. It's immediate. It doesn't matter whether I'm incapacitated, or not versus a power of attorney that is not going to take effect, like we usually call that a springing power until something happens, a doctor says I'm incapacitated.

So, I think the durable power of attorney just gives you some flexibility in what the parameters are for. And I don't know that that's the legal definition, but that's how I see it. And I think the more important issue is, in my opinion, is it an immediate power, or is it a springing power? Is it an immediate power that I'm giving Lauren a power of attorney, she can go pay my bills today, take money out of my account today for whatever I need, or am I giving Laura a springing power of attorney that says, yes, I'm giving her a power of attorney, but she can't act unless I'm incapacitated, which means two doctors have to say, usually two have to say I'm incapacitated. For many of our older adults, this is not a good option. And the reason is because doctors don't always want to sign off that someone is incapacitated. If they have early onset, or if they have good days, and bad days, sometimes doctors won't do it at all. So, if you do an immediate power, you have to have someone you trust because it's today.

They can step in today if they need to, but you also need to... I mean, it's the client's choice, but those are the two issues. Those are the big issues. Do I want it today? And if someone is diagnosed with something, if they're ill, if they're very elderly, if they're in a skilled nursing, or assisted living, you need an immediate power of attorney. Do I want it to be bringing know that that's more protected, but it also can make it more difficult for the person to handle things.

Lauren Carden, ...:

Thank you. We had a few questions. I know we didn't touch on this too much today, but can you just talk about how capacities shows up in these cases, and how your organization takes that into account when creating the advanced planning documents?

Judith Logan, D...:

So, again, it's playing detective work, and we're not medical, we're legal, so we're not medical people. We can't make diagnosis. But what happens is advocates get very good at seeing flags. So, the flags might be the repeating of information. The flags might be they can't remember the names of their children, or anything about the children. The flags could be, I'm disinheriting five of my six children because this one child is the one that lives across the street from me, and maybe there's some cognitive decline. So, I think that we generally, what our advocates do is they talk to the clients first, and they ask for all the information that we get. And if there's anything that seems off that seems not right, sometimes it's just a hearing issue, or something like that. Sometimes then they'll schedule what we call an early attorney appointment. And so if there's any flags, whether it's from disinheriting children, which by the way, we basically will not take those cases.

If you come in, and you're 90 years old, and you want to disinherit children, that is not a simple estate plan. That is an estate plan that's going to be contested, and we will not draft those. So, we explain that to the client. We explain kind of what happens. Our clients don't have enough money to fight over. So, when they disinherit, although they have a right to do that, they need someone that can spend more time, maybe videotape them, maybe do some other things, the person will be deposed at some point. And so we send those out to private

attorneys. But I think that, I don't know if I answered the question, or not, but it's really a detective process. And if we have concerns, or one of the other things that happens sometimes is like let's say it's a phone conference with the advocate, and they're trying to gather information, and you can hear the client, you can hear someone in the background, and the client is saying, "What am I supposed to say to them?"

Or they're asking questions of somebody else in the room that they can't answer for themselves. And so those are flags as well. You need an in-person appointment at that point. You need an appointment with the attorney to, again, kind of see if what was happening with the advocate is going to happen with the attorney. And so there's not really a science to it, there really isn't. But they have to be able to know what their assets are, and they have to know who their children are, and how they want to distribute assets. So, it's not a perfect science at all. I don't know if they have a follow-up to that, or not, but those are hard things.

Lauren Carden, ...: Yeah. And I think you had mentioned this earlier in the presentation, that's just why, just reiterating, that's why doing advanced planning early is so important so that there's not this lingering question about capacity. So, that's kind of the part where community education, and outreach can really be helpful where someone is coming to your office before there's this immediate need for the documents.

Judith Logan, D...: Correct. Exactly right.

Lauren Carden, ...: Yeah. And again, failure to do the advanced planning, and then if the client has no capacity, that is when potentially there will be a conservatorship filing. And so that's really what we want to avoid.

Judith Logan, D...: Exactly, exactly. And sometimes people wait too late, and we aren't able to help them, and then it is a conservatorship at some point, but we want to do all we can to educate people, and try to keep them out of that.

Lauren Carden, ...: One question. So, I think maybe there's a hesitation to do this work because of potentially getting deposed, or called as a witness, and trust, or willed contests. So, I guess Judith, how often, or have you seen that at your office, or how often does that happen to your office for the documents you draft?

Judith Logan, D...: It's not happened since I've been here, but I will tell you this, that there can be some risk there. But I think that if you frame the services you're going to provide as a simple will, and trust, for the most part, if I have a couple, and they have two children, and they've been married 50 years, and they're giving, and I'm just making this up here, and they're giving everything to each other, and then equally to their two children, there is really not anything to contest. If they did nothing, their two children would receive those assets equally. So, I think that we protect ourselves in that sense by farming out the more complicated estate

plans. That means that if we don't think they have cognitive ability, and they're 90 years old, and they're making a change from a plan they had two years ago, we're not going to touch that case.

We're not going to do it, because there's too much risk there. If we stick with simple, straightforward estate plans where it's kind of going according to the probate code, so to speak, there's not a lot of risk in that sense. It's not that... There's always risk. If you had no risk, you would be doing no work for these clients. So, you have to have some risk. But I think we eliminate a lot of the risk. And then we never, ever, ever put children, or other people on their deeds, ever. We say, "No, here's a better alternative." If you put children on the deeds, which sometimes clients want to do, now they have risk if the child is in the car accident, or they have a tax lien, or they go through a divorce, we've created all this risk for the senior.

So, we never do that. What we do find is a lot of seniors that come to us, they've already done that. And then the day of reckoning is, are the kids going to sign off that deed, and let them create a trust, a simple trust to protect them, or not? And I have cases where they have been fantastic, and the kids sign off of it, and they didn't really understand what the parent had done, and I've had cases where the kids, or one of the kids refused to sign off. Yeah.

Lauren Carden, ...: Thank you. So, I just realized we're out of time for today, so all the questions we didn't get to, we do try to follow up with as many of you as we can after the end of this training. I just want to thank Judith again for all the knowledge you gave us today. Her email address is listed on this slide. If anyone would like to reach out to her for further questions. And thank you all for attending today.

Judith Logan, D...: Thank you so much, Lauren. I appreciated the invite.