

Legal Issues Facing the “Sandwich Generation”

Handout

April 14, 2010

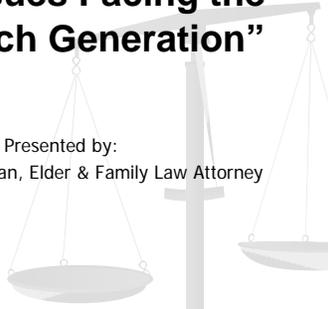
Presented By:
Barbara E. Bullman, Family and Elder Law Attorney



Sponsored by NIH Child Care Board & ORS/
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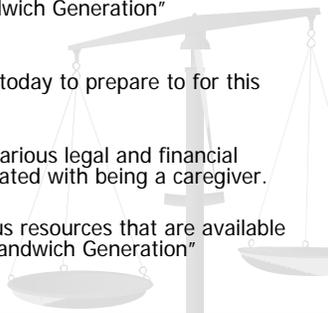
Legal Issues Facing the “Sandwich Generation”

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Barbara E. Bullman, Elder & Family Law Attorney



Objectives

- What is the “Sandwich Generation” phenomenon?
- What can you do today to prepare to for this time in your life?
- Learn about the various legal and financial documents associated with being a caregiver.
- Discuss the various resources that are available to those in the “Sandwich Generation”

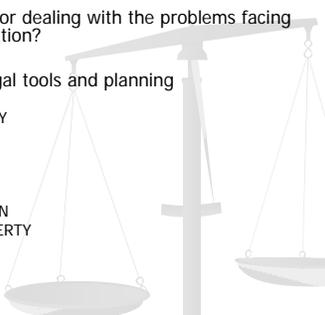


Topics of Discussion

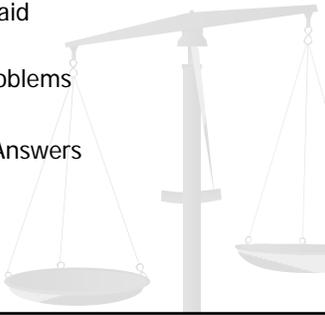
- What is the Sandwich Generation?
- What are the issues?
- Whose Interests are being protected?
- Whose rights are being affected?



- How do we prepare for dealing with the problems facing the Sandwich Generation?
- Discuss the Basic Legal tools and planning considerations:
 - POWER OF ATTORNEY
 - ADVANCE DIRECTIVE
 - WILL
 - TRUST
 - GUARDIANSHIP
 - ASSET PRESERVATION
 - JOINTLY HELD PROPERTY
 - LIFE ESTATES
 - MARRIAGE
 - DIVORCE



- Medicare/Medicaid
- Actual Client Problems
- Questions and Answers



An Important Service for NIH Employees:
If you are a caregiver, contact us for free consultation and resources to help meet your family's needs. Support is only a phone call away.

1-800-777-1720

NIH Dependent Care Resource & Referral Service



NIH Employees, trainees and contractors have free, unlimited access to a Work/life Specialist, who can help you to assess your caregiving role and support you by providing a range of resources and referrals. Examples include:

| | | | |
|-------------------------|--------------------------|-------------------------|--------------------------|
| Housing Options | Home Health Aides | Evaluating care options | Special needs resources |
| Transportation Services | Preventing Elder Fraud | Child care providers | College planning |
| Meal Services | Long-distance caregiving | Nanny / in-home care | Tips for paying for care |
| Adult Day Care | Communication tips | Back-up care resources | And more... |
| | | Adoption information | |

This program is sponsored by the NIH Office of Research Services,
 Division of Amenities and Transportation Services.
 For more information visit:
<http://does.ors.od.nih.gov/childcare>.

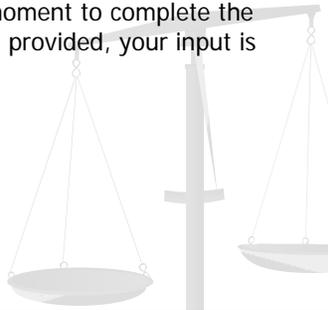
Other Resources

- Medicare Caregiver Website (National)- www.medicare.gov/caregivers/
- Eldercare Locator- www.eldercare.gov
- The AARP Guide to Internet Resources Related to Aging- <http://www.aarp.org/internetresources/>
Provides information about resources on the Internet related to aging. It lists and describes Web sites concerned with aging-related issues, including researchers, policy makers, service providers, caregivers and students. It has an alphabetical index and a list of contents where sites are listed by topic.
- AARP - Retirement Planning- <http://www.aarp.org/internetresources/>
A section of the AARP Web site which focuses on retirement planning options, financing retirement and other important issues.
- Family Caregiver Alliance- www.caregiver.org



Thank You

- Please take a moment to complete the evaluation form provided, your input is appreciated.



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Legal planning

The availability of the legal tools described in this handout are determined by state law, which also specifies the conditions under which specific instruments can be used.

Because terms and definitions may vary, it is important to seek the advice of a lawyer in the older relative's community who is familiar with legal tools for the elderly in that state. The Elder Care Referral Service of the Bar Association in your relative's community can offer referrals for lawyers, or you can call your employee resource program.

1. Legal Tools

There are two types of legal tools:

- Tools that can be prepared by the **older person (the principal)** in advance of any need, while he or she *is competent* to execute legal documents and make decisions on his/her own behalf.
- Tools that must be resorted to when the **older person (principal)** *is judged incompetent* and has not legally authorized another person to act as his/her agent.

Legal tools that can be used when the principal is able to make decisions on his/her own behalf include the following:

Financial and Personal Planning:

- **Will** – document that outlines how person wants personal assets distributed after death
- **Power of Attorney** - one person, the principal, authorizes another person to act as his/her agent for decisions and transactions that are specified in the document. The authority given to an agent can be as wide-ranging or limited as the principal wants, and can be limited to a specific period of time. The principal does not lose authority to act in his/her own behalf, but is simply authorizing another person to do so as well. This tool is effective only so long as the principal is competent.
- **Durable Power of Attorney** – same as the Power of Attorney with the important exception that it continues to be effective even if the principal is no longer competent. Springing Power of Attorney is a form of power of attorney that becomes effective only upon occurrence of a named or designated event such as incompetence.

- **Trust** - an arrangement under which one person or institution, the trustee, holds the title to property for the benefit of persons called beneficiaries. A Living Trust benefits the older person during his/her lifetime. A Testamentary Trust does not take effect until the person who set up the trust dies.

Health Care Planning:

- **Medical Power of Attorney** - like the Durable Power of Attorney that is directed specifically to govern health care decisions and is activated if the principal is unable to give informed consent to medical treatment.
- **Living Will** - a legal document allowing the signer to state his/her wishes about the use of life-sustaining medical procedures if he/she is terminally ill or has a serious accident and is unable to provide further instructions.

The following options can be utilized if decisions concerning the principal need to be made at a time when an older relative is unable to act on his/her own behalf and no planning devices have been set up in advance.

- **Representative Payee** - In the case of some payments, such as Social Security payments, it is possible to name a "representative payee" - someone who is authorized to receive payments on someone else's behalf. Appointing a representative payee can avoid the necessity of going to court to name a conservator to receive the funds. You should contact the organizations which issue checks to your older relative to find out their process for creating a representative payee. This procedure does not require a lawyer.
- **Guardianship or Conservatorship** - These are the legal tools of last resort. A guardian is someone appointed by a court to manage the property and/or personal affairs of an incapacitated person; a conservator is also appointed by a court but is usually responsible for managing the person's assets -- not for managing the older person's personal affairs. These options can be expensive and time consuming, and may not necessarily place decisions in the hands of someone the incapacitated person would have chosen.

II. Criteria for Deciding Which Legal Tools to Use

When considering decisions that involve assigning others to act on the older relative's behalf, keep the following guidelines in mind:

- Plan ahead; otherwise, the older relative may lose the power to choose who will act on his/her behalf.

- Optimize the older relative's authority by giving him/her as much control over what happens as possible.
- Choose the least restrictive legal option that serves the older relative's needs.

III. Helping Your Older Relative Preserve His/Her Desires

Here are five key steps to keep in mind:

1. Talk with your relative about the wisdom of planning ahead to make sure people understand his/her wishes if others must ever act on his/her behalf.
2. Help your relative identify personal needs and goals.
3. Consult a lawyer in your relative's community who is knowledgeable about legal issues that affect the elderly, who is familiar with current Medicaid eligibility standards, and who will explain options available to accomplish the older person's goals.
4. Keep in mind that your goal is to maximize your relative's ability to retain control over his/her life by choosing options that place the least restrictions on his/her autonomy.
5. When you get to the point of deciding whether to use options suggested by the lawyer, ask yourself:
 - Do my relative and I understand what the chosen legal tool is?
 - Do we understand what it is used for?
 - What does it mean for my relative?
 - How will it affect me or other caregivers?
 - What are the advantages and disadvantages?
 - When someone is being considered as a legal agent to act on behalf of my relative:
 - Does the person understand what he/she is responsible for?
 - Is the person willing and able to take on the responsibility?
 - Does the person have the time and skills required?
 - Does he/she live close enough to my relative to be available when needed?
 - If the person is unable to continue serving as agent at some point, is there another person who can fill this role?

Resource and referral information is provided to employees for their convenience; such provision does not constitute an endorsement or quality guarantee. If you have any questions or concerns please contact us.

For further assistance please call 1-800-777-1720 or 1-877-252-8550

Worksheet for Older Relatives' Legal Planning

This worksheet will assist you in identifying your older relatives legal needs and goals and will provide you with a central place to record them. It is important that you work with your older relative as you address these important legal matters.

DATE _____

RELATIVE'S NAME _____

The following needs/concerns about the future may require legal planning:

Personal

1. _____

2. _____

3. _____

Medical

1. _____

2. _____

3. _____

Financial

1. _____

2. _____

3. _____

_____ Has identified where to get legal help for addressing the above concerns

_____ Has a Will

_____ Has a Power of Attorney or Durable Power of Attorney

_____ Has determined that a Trust arrangement

_____ would be useful

_____ would not be useful

_____ Has a Living Will

_____ Has chosen a dependable person/persons to be his/her agent/agents under _____ a Power of Attorney or Durable Power of Attorney

_____ Has fully discussed his/her finances and personal wishes with this person

_____ Has chosen a dependable person/persons to be his/her agent/agents under a Medical Power of Attorney or Health Care Proxy

_____ Has spoken to his/he doctor about his/her wishes in case of serious illness

_____ Has given his/her doctor a copy of the Medical Power of Attorney and Living Will to put into his/her medical record

_____ Has all legal, personal, and financial papers located where his/her agent or next of kin can easily locate them

4 Documents Every Parent With Minor Children Should Have

By: Nicole Kinsey White

If you have minor children, then you need a comprehensive guardianship plan to ensure your children will always be taken care of if something happens to you and your spouse, if you are married.

A comprehensive guardianship plan is a set of instructions and legal documents to establish who should take care of your minor children and how they should be taken care of. If you are in an accident or you become incapacitated, your comprehensive guardianship plan will make sure your children are not taken into the custody of Child Protective Services or a stranger until the State appoints a guardian to care for your minor children.

A common misconception is that some people believe it is sufficient to tell family members who they want to take care of their children if something happens. I call this the "momma said" misconception (e.g., "well, momma said I should take care of little Billy not you"). "Momma said" will not hold up in court. That is why you need legal documents to name guardians for your minor children.

A comprehensive guardianship plan allows you to choose guardians to provide temporary and/or permanent care for your children and provide instructions to your caregivers and guardians so they will always know what to do if something happens. Some people think naming a permanent guardian in their Will is sufficient. However, a guardian named in your Will only takes effect after you die.

At the very least you should have the following four documents:

1. **A legal document to name short-term/temporary guardian(s).** In this document you will name someone (or a couple) who lives nearby and who can immediately be there for your children. The temporary guardian(s) should have a copy of this document to establish to law enforcement or a court that he/she has the legal authority to care for your minor children.
2. **A legal document to name long-term/permanent guardian(s).** In this document you will name someone (or a couple) to provide long-term or permanent care for your children. Again, the permanent guardian(s) should have a copy of this document to establish to law enforcement or a court that he/she has the legal authority to care for your minor children.
3. **Instructions and Guidelines.** You should also have a set of instructions for anyone who takes care of your children so they will always know what to do if anything happens to you. For example, if you use a babysitter, provide him/her with detailed instructions including who to call and all necessary contact information. In addition, you should prepare guidelines for your long-term/permanent guardian(s) stating how you would like your children to be raised.
4. **A Medical Authorization and Power of Attorney for your minor children.** This document is especially important when your children travel without you or when you travel without them. A Medical Authorization and Power of Attorney will allow your children's caretaker to make medical decisions for your children so they will receive medical care when they need it.

CAREGIVER TIPS

- Keep perspective on your caregiving, as it is only part of who you are.
- You can only take care of your family member as well as you take care of yourself.
- Caregiving can be a complicated business; see guidance from professionals when you need it.
- Don't isolate yourself; reach out to others and accept help.
- Trust your instincts.
- Educate yourself about the condition.

Elder Law Terms and Definitions

- **Elder Law**

Attorneys who practice focus on senior community and help clients in evaluating the options available for long term care support and services including home care, assisted living, nursing homes, and retirement communities. They also help you understand the public benefit programs, including Medicaid, Veterans Administration and state based programs that may help in paying for care, advise you of the planning options available for asset protection and assist you in accessing the benefits.

- **Long Term Care Insurance**

Long Term Care Insurance (LTCI) is a valuable asset preservation tool and the new LTCI partnership policies allow for increased asset protection under the Medicaid Long Term Care Program. LTCI provides coverage for individuals with chronic illnesses or disabilities who need assistance with activities of daily living, assisted living or nursing home care.

- **Continuing Care Retirement Communities**

Retirement Communities provide independent living and long term care services in one setting. Some communities can also help protect your assets if long term care is needed. Our attorneys will assist you in understanding how these communities work, review the contract(s) with you and advise you on other matters relating to your application to and stay at the community.

- **Medicaid Long Term Care**

Elder Law Attorneys can advise you on how to obtain Medicaid Long Term Care benefits to pay for nursing home care. The Medicaid Long Term Care program is a Federal/State program that has stringent eligibility rules. In order to obtain benefits individuals must meet three eligibility tests: technical, medical, and financial. Applications are made to the local Department of Social Services which is under the Maryland Department of Human Resources, but the policy is made by the Maryland Department of Health and Mental Hygiene. The attorneys are experienced in developing plans to preserve the maximum amount of assets for individuals, spouses, family members and persons with disabilities and obtain Medicaid benefits.

Medicaid Waivers for Home and Community Based Services

Maryland has several Medicaid Waiver programs that may assist in paying for community based care at home or in assisted living. Applications are made with different local agencies depending the program for which you are applying. The policy is made by the Maryland Department of Mental Hygiene. An Elder Law attorney can advise you of the programs that may be available in your case, help you understand the eligibility rules and assist you in applying for benefits.

- **Asset Protection**

An Elder Law attorney can work with you to develop an asset protection plan that may enable you to preserve your assets and obtain the care you may need now or in the future. They will gather information regarding your health care needs, family, income and assets to develop a plan specific to your needs. If Medicaid benefits may be needed, we will review the program rules as they apply to your specific situation including the impact of any gifts made during the look back period and discuss the pros and cons of different planning options.

The attorney can review different asset protection tools and evaluate whether they may be of assistance in your case. It is important to understand that every situation is different. Potential planning options may include:

- **implementing a gifting program**
- **purchasing an immediate payment annuity**
- **transferring assets to a disabled child**
- **placing assets in a special needs trust**
- **personal care contracts**
- **promissory notes**

- **retitling assets**
- **disinheriting an ill spouse**
- **paying privately for care**
- **purchasing long term care insurance**
- **moving to a continuing care retirement community**

The focus is to ensure that the senior will get the care that they need while preserving the assets to the extent possible. There may be tax consequences associated with some of the planning recommendations. Further, the attorneys may review this with you and may recommend that you consult with a CPA to assist you in assessing the tax consequences of liquidating and/or retitling assets.

What is a Trust?

A Trust is a legal document containing instructions directing the management and distribution of the resources placed in the Trust. The person creating or funding the Trust is the Grantor. The person who receives the benefit or on whose behalf the Trust was created is the Beneficiary. The Grantor appoints a Trustee, which is a person or entity (such as a bank) that will manage the Trust and distribute the Trust's funds for the benefit of the Beneficiary. Trusts are used for a variety of purposes in estate planning.

The Statute that made the Difference

In 1993, while closing many loopholes that permitted individuals to easily qualify for Medicaid by transferring their property to trusts, Congress created exemptions under the Omnibus Budget and Reconciliation Act for trusts created for the benefit of individuals with disabilities. Located in Title 42 of the United States Code Section 1396p(d)(4), the statutes provide that if a trust meets the U.S. Code requirements, then the trust **is not a countable resource** for SSI and Medicaid qualification purposes. Neither will a transfer of assets to a d(4)(A) trust give rise to **a period of ineligibility** for either SSI or Medicaid.

Requirements for a **self settled trust** that is exempt under 42 U.S.C. Sec. 1396p(d)(4)(A) include:

- The trust beneficiary must be an individual under the age of 65 who qualifies as "disabled"
- The trust must be established by a parent, grandparent, guardian, or court
- The trust must provide that at the individual's death, the State is repaid for the Medicaid services that it has provided during the individual's life

The **self settled trust** though established up by a Parent, Grandparent, guardian or the court is funded with the money or resources belonging to the beneficiary.

Do all special needs trusts have the "pay-back-the-State" requirement? **NO**. Just self settled trusts.

Note:

Under this exemption a **Third Party Special Needs Trust** can be set up and funded **by anyone** on behalf of the disabled individual with resources not belonging to or owned by the beneficiary. The person establishing the trust must have no legal obligation to support the disabled individual. **Third Party trusts** are **NOT** required to have a pay-back provision.

Illustration:

If a Parent sets up the trust with proceeds awarded to the child from an insurance settlement or from an inheritance, (the beneficiary's own funds), then this is a self settled or first party trust and would require a pay back clause.

If on the other hand, an uncle sets up a Special Needs Trust with his own funds for the benefit of his nephew who is disabled. That is a third party trust and does not require a pay back clause.

This is just another example of how planning carefully maximizes value.

Why Special Needs Trusts are important

They protect government benefits eligibility - The Special Needs Trust allows an individual with disabilities to have funds available for his or her benefit without the funds counting as a financial asset for benefit eligibility purposes

They protect the opportunity to access superior care and services options - Even where a beneficiary never needs Federal or State public benefits and services (which is very rare, but does happen) consider the special life management needs he or she still has, and use a SNT as part of a comprehensive plan to meet those needs in an organized manner.

Without Special Needs Trusts many individuals with disabilities would be relegated to subsistence living and have access to fewer opportunities and options. They have a typically greater disparity between income potential and the outflow. (expenses) They have higher medical care costs and may need special equipment. Transportation is going to be more expensive, and might need special help with even the most basic tasks. Public benefits are almost always vital for basic needs or as a safety net.

Putting it all together, What is an Supplemental Needs Trust?

A Supplemental Needs Trust is a special kind of trust which holds title to property for the benefit of a child or adult who has a disability. The funds in the Trust can be used to supplement benefits received from various governmental assistance programs including SSI and Medicaid. A special needs trust will manage a variety of resources for the benefit of the injured or disabled person while maintaining the person's eligibility for public assistance benefits.

- A Supplemental Needs Trust is, first of all, a Trust for the benefit of an individual under the age of 65 who qualifies as being "disabled"
- The Beneficiary has no direct control or access to funds in the Trust
- A Trustee manages the trust and has broad discretion to make distributions on behalf of Beneficiary according to trust distribution directives.

Result: Trust assets do not count against the beneficiary's resources or assets.

As an essential component of a comprehensive care plan, the well designed **Special Needs Trust (SNT)** will, at the same time

- **Protect public benefits** - The Special Needs Trust puts a middle step between the money or resources, and the person with a disability. Assets in trust **do not count as resources** to the individual with special needs and thus preserves eligibility for public benefits such as SSI and Medicaid.
- **Protect the quality of care** - A well designed Special Needs Trust provides for vastly superior care options and opportunities for treatment and rehabilitation, housing, electronic equipment, computers, job training, vacations etc. Supplemental items that will enhance dignity, productivity and comfort

Whatever the extent of your resources, preparing and executing a good Special Needs Estate Plan will make more effective use of those resources.

Planning for the future security of a loved one with special needs can seem a daunting task, but it is essential to **take action NOW!**

The first step is to find a competent attorney and/or financial planner. Special Needs Trusts must comply with complex federal and state laws to be effective, and although your unique input is absolutely necessary, the document should be drafted by your attorney.

The above information is provided to educate in a general way and is not intended to provide specific legal or professional advice.

Source: National Alliance on Mental Illness

<http://www.nami.org/>

This seminar was presented by
Barbara E. Bullman

Barbara Bullman was admitted to the bar in Maryland in 1983. She has a law firm located in Rockville, MD whose main focus is in the areas of Elder Law, Family Law and Bankruptcy.

Barbara's broad educational and professional background with the Internal Revenue Service and the Department of Health and Human Services, plus her volunteer experiences at AARP Legal Counsel for the Elderly and the Ombudsmen programs at the Department of Aging in Montgomery County, MD, uniquely qualify her to handle such issues. As an Ombudsman, she acts as an advocate for the residents of an Assisted Living and Nursing Home in Montgomery County.

Her philosophy begins with a commitment to working closely with each client by providing personal service to meet client's needs.

Her goal is to provide sound legal advice; options to meet their needs, whether it involves complex legal matters or hands-on support and assistance in other areas.

Her practice offers clients legal advice to help protect their legal interests and knowledge to help educate clients to make sound judgments and decisions that will lead to an improved quality of life and greater independence.

www.bbullmanlaw.com