LONGEVITY PLANNING - BREAKING DOWN THE SILOS

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LAURIE L. MENZIES, ESQ.

- "Longevity Planner"
- Practicing this for 20 years.
- Differs significantly from practicing Elder Law
- Holistic financial planning incorporates legal, social and long-term care considerations for life's later years.

Pfalzgraf Beinhauer & Menzies LLP
Counsel for Generations

DR. KATHLEEN GRIMM, M.D.

- Supportive Care & Palliative Medicine
- More than " End of Life" Care
- Care that is concordant with personal values and goals
- Team based approach that addresses the emotional, spiritual, physical aspects of living with chronic disease,
- Life planning

Lawyers, Financial Consultants and Accountants do Retirement Planning and Estate Planning

ASPECTS OF HEALTHY LONGEVITY:

Financial

Social

Legal

Health

+ Good attitude about getting and being older

UNHEALTHY REALITY OF TODAY'S ADVISORY SYSTEM:

SILO 1

Financial Planner

Advice #1

SILO 2

Lawyer

Advice #2

SILO 3

Doctor

Advice #3

SILO 4

Free Government/ Facility Social Worker

Advice #4

Confused Client

RESULT : INACTION

- Everyone wants to live longer (What's the alternative?)
- Who is doing a good job of planning for it with their clients?
- Who is helping the client put all of these pieces together?
- The Advisor who can help create their longevity plan will be most valuable.

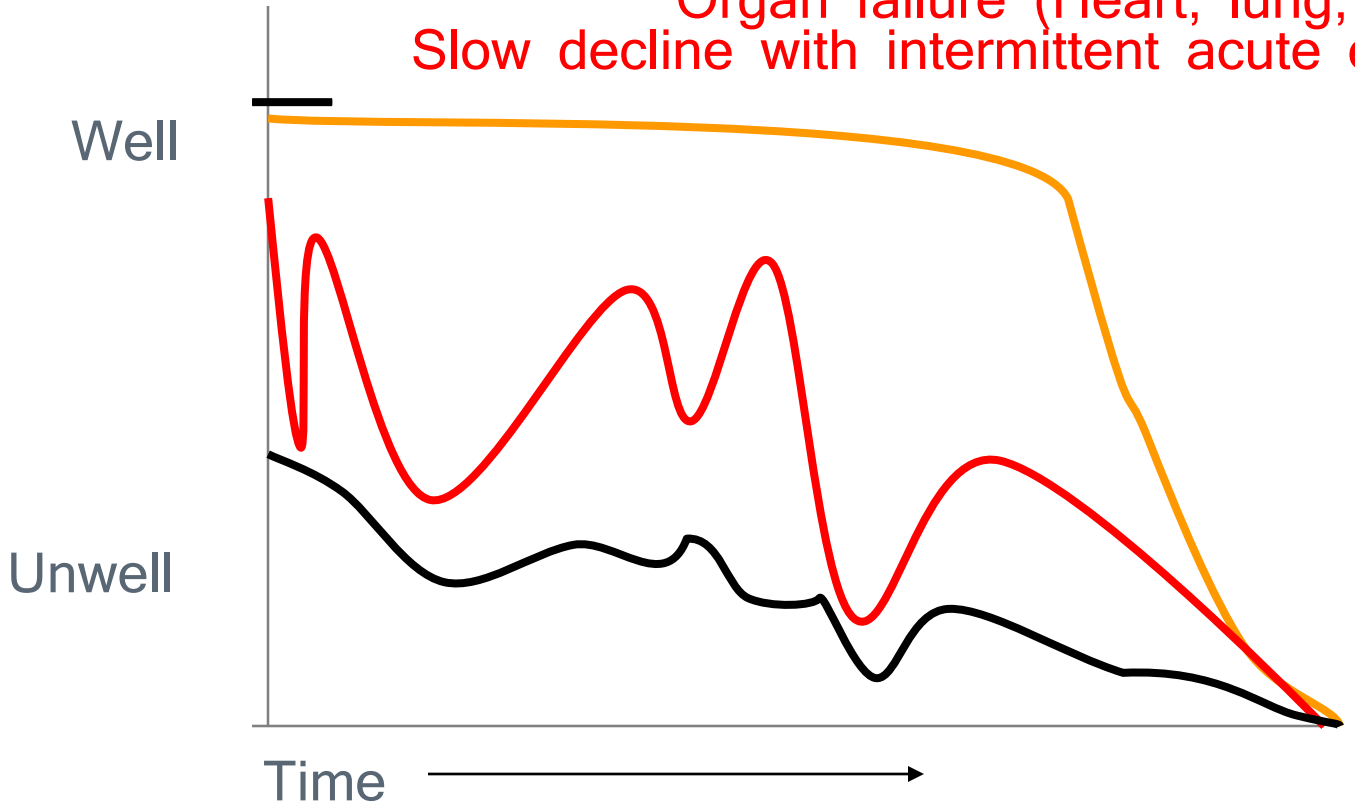
HEALTH / LONG TERM CARE PLAN FOR LONGEVITY

WE ARE PERFECTLY UNPREPARED FOR SOMETHING TOTALLY PREDICTABLE

EOL Trajectories

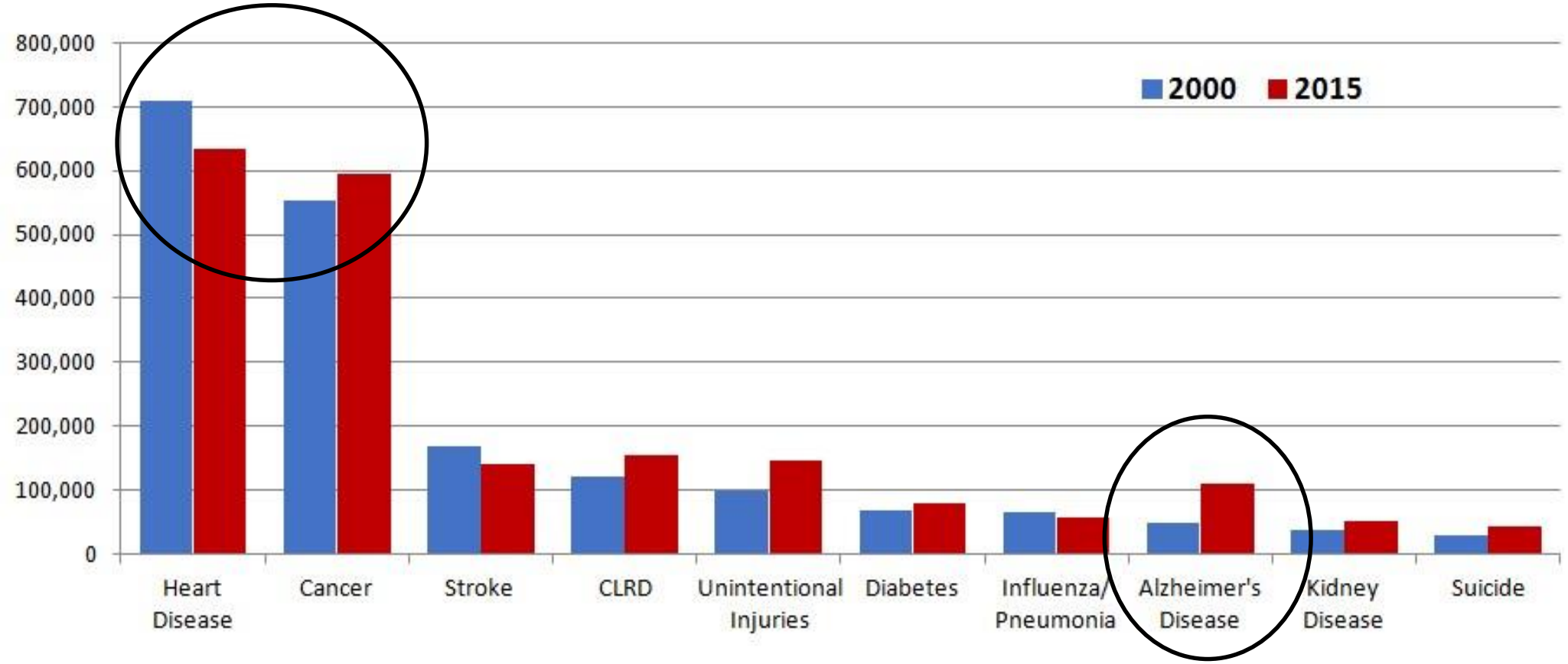
Cancer: Short period of decline

Organ failure (Heart, lung, kidney): Slow decline with intermittent acute episodes



Frailty and dementia (prolonged dwindling) Joanne Lynn, “Living Long in Fragile Health: The New Demographics Shape End of Life Care” Improving End of Life Care: Why Has It Been So Difficult? Hastings Center Special Report 35, no. 6 (2005): S14-S18.

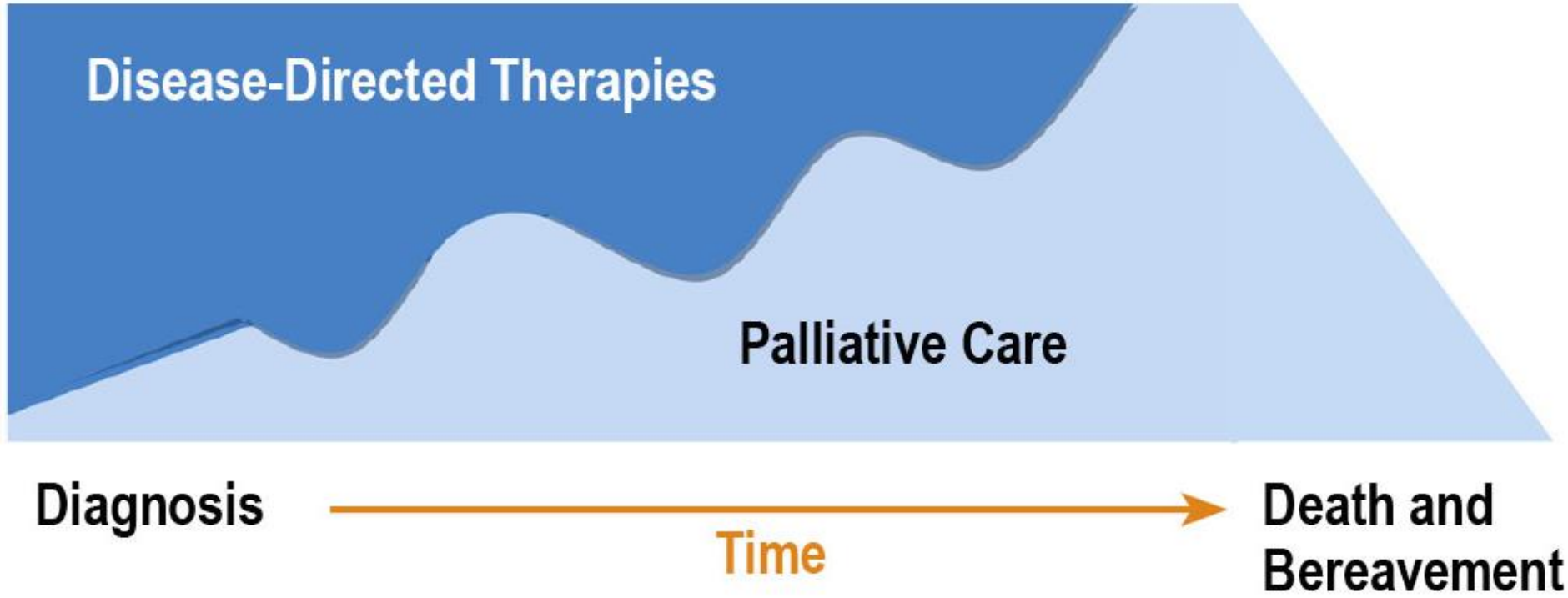
DEMOGRAPHICS HAVE CHANGED THE LANDSCAPE



AGING AND COGNITIVE IMPAIRMENT

- In 2010, experts estimated that as many as 5.1 million Americans, aged 65 years and older, have Alzheimer's disease. That is nearly 1 out of every 8 people in that age group.
- The Alzheimer's Association estimates that every 70 seconds, someone in America develops Alzheimer's disease
- By the middle of the century, someone will develop the disease every 33 seconds. This translates into a projected 13 million Americans with Alzheimer's disease by 2050.[11]

NEW MODEL FOR PALLIATIVE CARE



COMMUNICATION IN SERIOUS ILLNESS

- Effective communication supports, not only end-of-life care, but quality of life throughout the illness trajectory, even if death is not an imminent outcome.

Many patients do not discuss their goals with clinicians

- Fewer than one third of patients with end-stage medical diagnoses discussed end-of-life (EOL) preferences with physicians
- Patients with advanced cancer:
  - First EOL discussion occurred median 33 days before death
  - 55% of initial EOL discussions occurred in the hospital
- Conversations often fail to address key elements of quality discussions

Heyland DK Open Med 2009; Mack AIM 2012; Wright 2008

DANA-FARBER CANCER INSTITUTE

the conversation project

"IT ALWAYS SEEMS TOO EARLY, UNTIL IT'S TOO LATE"

(THE CONVERSATION PROJECT, 2013).

- It's never too soon to start talking about advance care planning. Talking with patients and their loved ones–or even **your own family** members–and helping them plan for future medical needs is the best way to make sure their wishes will be respected.

PRIORITIES BEYOND MERELY LIVING LONGER…

"A few conclusions become clear when we understand this: that our most cruel failure in how we treat the sick and the aged is the failure to recognize that they have priorities beyond merely being safe and living longer; that the chance to shape one's story is essential to sustaining meaning in life; that we have the opportunity to refashion our institutions, our culture, and our conversations in ways that transform the possibilities for the last chapters of everyone's lives."

Atul Gawande
Advisor To The Conversation Project

the conversation project

What makes an effective approach?

Institute of Medicine *Dying in America* Study, 2014

- Effective programs:
- Shift the focus of end-of-life decision making away from document completion and toward **facilitating discussion of values and preferences**.
  - **Do not stress importance of making choices about every possible intervention**
  - Provide guidelines for how to make decisions

What makes an effective approach?

Institute of Medicine *Dying in America* Study, 2014

Effective programs:

- Refocus discussion of preferences away from autonomy and toward **personal relationships**, for example, by asking the question, "How can you guide your loved ones to make the best decisions for you?"
  - Reduces burden on loved ones called upon to make decisions in times of crisis
  - Reduces conflict if wishes are discussed openly

THE CONVERSATION PROJECT

- We know that no guide and no single conversation can cover all the decisions that you and your family may face. What a conversation can do is provide a shared understanding of what **matters most to you** and your loved ones. This can make it easier to make decisions when the time comes.

the conversation project

REMEMBER THAT THE GOAL IS TO **STIMULATE AUTHENTIC DIALOGUE!**

Patient Centered-Care at End of Life

HealthAffairs

- Elicit and accept as valid patient and family goals and preferences
- Ensure that dialogue is a critical component of diagnostic and treatment processes
- Tailor information shared to expressed goals and preferences
- Recognize that a good outcome = one that best delivers on what is meaningful and valuable to the individual patient

THE SENATE COMMISSION ON LONG TERM CARE IN ITS REPORT TO CONGRESS SEPTEMBER 30, 2013

"Problems remain for individuals and families who need care, notwithstanding the commitment and dedication of paid and family care givers providing loving and quality services.

Paid services and supports are highly fragmented and difficult for individuals and family caregivers to access, lacking the focus and coordination across agencies and providers necessary to ensure the best outcomes for the person and family …" (page 4)

❖ Longevity planning strategy should include:

- Analysis of future risks
- Costs
- Anticipating decisions regarding health and long-term care expenses.

Note:

- Health care costs are likely to account for a greater percentage of all of our expenses
- 70% of people turning age 65 can expect to need some form of long-term care during their lives (*longtermcare.gov)*

The challenge: Help clients understand that these decisions are just as important as the investment decisions.

Various services exist to address these difficulties, however,

> "The network of providers to deliver this support is complex, multifaceted, specialized and isolated from other service providers, and confusing to the average consumer." (page 14)

- Currently there is no comprehensive approach to care coordination for these individuals and families … (page 15)

Get started on a Plan:

- ❖Co-create their health and long-term care plans
- ❖Involve those who provide social/physical support
- ❖Plan before a crisis hits
- ❖Dynamics change when everyone is involved

CONSIDERATIONS FOR ASSISTANCE WITH ACTIVITIES OF DAILY LIVING:

1. Home Care will provide 1-to-1 care; allow you to stay in home
2. Nursing Homes (One aide to approximately 10-12 residents)
   - Use your diaper, don't expect to be assisted quickly when you call
   - Institutionalization
   - Up at 6:00 a.m. - 7:00 a.m. even if you don't want breakfast
   - Group needs, not individual desires

MEDICAID PROVIDES FOR HOME CARE WITH NO LOOK-BACK

(But requires attentive family members to monitor care)

MLTC / NHT / CONSUMER DIRECTED

- **Long-Term Care Insurance**
  - New hybrid life insurance plans can be a good for clients with significant wealth. (People will pay for care more readily infusing dollars set-aside for this purpose - even wealthy [self-insured] skimp on hours because they don't want to spend on care)
- **What are you saving for?**
  - If you're 95, are your children (now in their 60s or 70s) still waiting for your money?

SOCIAL PLAN FOR LONGEVITY

Where do you want to live if you:

- Can't drive any longer?
- Need assistance with activities of daily living?

Who will be available to help you on an ongoing / regular basis?

- Don't rely on family to provide care at home
- Children can't be there all the time
- Spouse may be too old or frail also

Living Considerations

- Community/relationships are key in shaping psychological and spiritual well-being as we age.
- These break down loved ones are lost to illness or death
- Important considerations in discussing clients residential options ahead of time.
- Longevity planning can increase awareness of the importance of establishing new relationships, motivating clients to make different decisions about how and where they live.
- Increased longevity has produced many creative and opportunities for our aging population.

FINANCIAL PLAN FOR LONGEVITY

By retirement or beyond, many clients have accumulated assets

- Located in many institutions; not consolidated
- Not reviewed investments in relation to goals for the rest of their life.

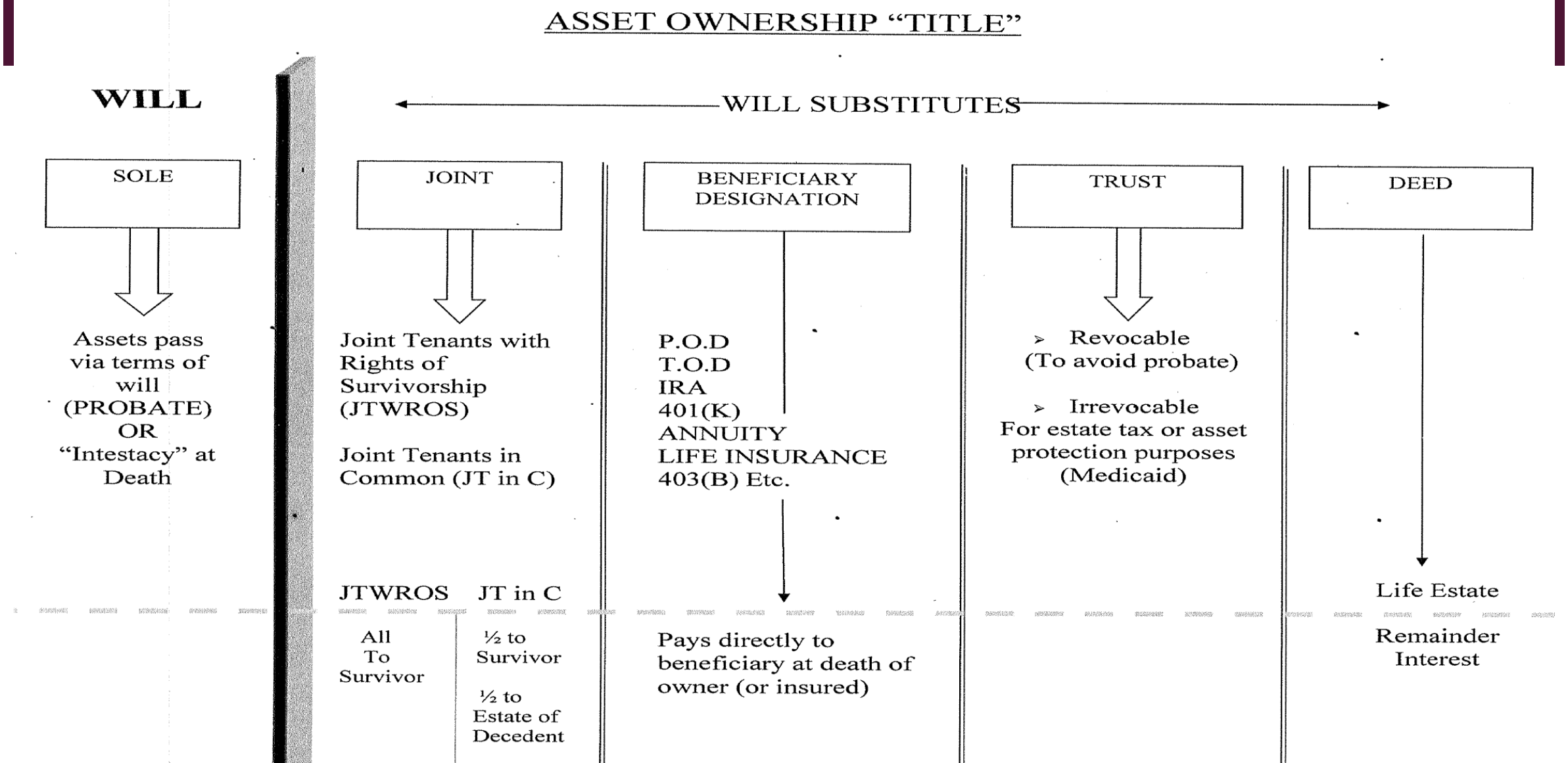
1. Take a complete financial inventory
2. Include trusted family members
3. Don’t wait for a crisis when stress is high and decisions need to made quickly
4. Older generations can be slow to disclose financial information to children

LEGAL PLAN FOR LONGEVITY

“YOUR WILL IS NOT THE WAY”

- If only a Last Will and Testament: Best that you die quickly and without much to distribute to loved ones
- A Will guarantees legal fees and frustration for your family
- Large estates should use Trust and beneficiary designations to avoid Court involvement
- Power of Attorney or Trustee will protect your wishes

1. COORDINATE DISTRIBUTIONS



2. SELECT TRUSTED AGENTS FOR FINANCIAL ASSISTANCE

- New York State Durable Power of Attorney
- Should always include Gifts Rider (otherwise future planning/transfers may be prohibited)
- For Health Care decision
  - Health Care Proxy
  - MOLST

For clients who can't get or won't pay for long-term care

...Consider an **Irrevocable Income Only Trust**

❖ AN IRREVOCABLE INCOME-ONLY TRUST:

- Can preserve assets from long-term care costs and to avoid probate.
- May be appropriate for those who don't qualify for long term care insurance

COMPETENCE, CAPACITY AND SURROGATE DECISION-MAKING

- We often use the terms “competence” and “capacity” (short for “decision-making capacity”) interchangeably. However, they are not exactly the same.
- Competence is a legal term. Competence if presumed unless a court has determined that an individual is competent. A judicial declaration of incompetence may be global, or it may b e limited (e.g., to financial matters, personal care, or medical decisions).
- Decision-making capacity, on the other hand, is a clinical term that is task-specific. A physician may determine that a patient does not have the capacity to make a decision for or against surgery for a hip fracture, but she may have the capacity to decide if she wants a sleeping pill or laxative.

CAPACITY FOR HEALTH CARE PROXY

- Competence to appoint a health care agent is presumed unless a person is adjudicated as incompetent and a guardian (or legal equivalent) has been appointed.

CAPACITY FOR POWER OF ATTORNEY:

Means the ability to comprehend the NATURE and CONSEQUENCES of executing, amending or revoking a POA.

- Has the client read the POA?
- Does the client understand it?
- Have you assessed the intent of the agent?
- Do you have an understanding of the relationships/family dynamics?

CAPACITY FOR LAST WILL AND TESTAMENT

- The threshold for establishing testamentary capacity is extraordinarily low (*see Matter of Rabbit*, 21 Misc 3d 1118 (2008)). This is because the capacity that is necessary to execute a valid will is less than that which is required or any other legal transaction. All that is necessary is that a testator: (a) understand the nature and consequences of making a will; (b) know the nature and extent of his or her property; and (c) know the natural objects of his or her bounty and relations with the [illegible] *r*, 6 NY2d 691 (1985)).

CLIENT CAPACITY

NY Disciplinary Rule 1.14:
Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with

http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf

The National Academy of Elder Law Attorneys revised the Aspirational Standards for the Practice of Elder Law and Special Needs Law was revised on April 24, 2017. The full text can be found at:

https://www.naela.org/Web/Members_Tab/Aspirational_Standards/Aspirational_Standards_Member_Page.aspx

NAELA ASPIRATIONAL STANDARDS

(a) Attorney should respect the right to self-determination and confidentiality of a client with diminished capacity.

(1) For example: Attorney should, to the extent possible, communicate directly with the disabled client, rather than a third party who may be present for support. Provide documents or information to the third party only when authorized by the client.

https://www.naela.org/Web/Members_Tab/Aspirational_Standards/Aspirational_Standards_Member_Page.aspx

(b) Attorney should develop and utilize appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.

(1) Capacity is task-specific. Ex- Contract v. Last Will and Testament.

(2) Document your screening and evaluation process in every file.

(c) Attorney should adapt the interview environment, timing of meetings, communications, and decision-making process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances.

(1) Be willing to go to the client's home or day program.

(2) Series of shorter meetings to discuss issues more slowly.

(3) Provide any reasonable accommodations.

https://www.naela.org/Web/Members_Tab/Aspirational_Standards/Aspirational_Standards_Member_Page.aspx

(d) Attorney should take appropriate measures to protect the client when the attorney reasonably believes that the client: (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest.

(1) Adult Protective Services.

(2) Social Work/ Geriatric or Care Management.

(3) Guardianship Proceedings.

(e) Attorney should take appropriate measures to protect the client which 1) are guided by the wishes and values of the client if known or, if not known, the client's best interests; 2) minimize intrusion into the client's decision-making autonomy; 3) respect the client's family and social connections; and 4) consider a range of supportive actions other than court proceedings and adult protective services.

https://www.naela.org/Web/Members_Tab/Aspirational_Standards/Aspirational_Standards_Member_Page.aspx

MEDICAL CAPACITY

- Raising the threshold level of capacity required for competence when the anticipated harm is greatest stems, by this argument, from a clinician's or a court's wish to be more certain. It means leaving a greater margin for error when the consequences are serious.
- President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in the US. The Commission's report referred to a 'greater need to be certain that the patient possesses the necessary level of capacity' when the consequences for wellbeing are substantial and concluded:

"A serious disagreement about a decision with substantial consequences ... may appropriately trigger further evaluation. When that process indicates that the patient understands the situation and is capable of reasoning soundly about it, the patient's choice should be accepted."