

FLORIDA ELDER LAW,
MEDICAID PLANNING AND ESTATE PLANNING

by

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To my parents, J. Richard Frazier and Anne R. Frazier,
and my grandparents, Richard O. Frazier and Marian R. Frazier,
whose life-long dedication to higher education
served as an inspiration for this book.

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Introduction to Elder Law, Medicaid Planning and Estate Planning

Florida's aging population is growing at an incredible pace. The elderly face a host of unique and pressing legal concerns, ranging from disability and healthcare, to holding on to their life savings and property. Growing old includes many twists and turns, and no two paths are the same. Too often, seniors and their families struggle when all they need is the right advice and a trustworthy guide.

The practice of elder law centers on the special rights and problems of senior citizens and people with special needs. The legal practice areas of Medicaid planning and estate planning play key roles in the practice of elder law. While Medicaid Planning and Estate Planning may exist independently, when applied together under the scope of elder law they reinforce one another to serve seniors in all respects.

Elder law embraces a wide range of laws, legislation and regulations which deal with aging and disability. The focus of the elder law attorney is to provide legal advocacy, guidance and services to enhance the lives of seniors. The elder law attorney is experienced and trained in

working with government benefits, long term care planning, special needs, incapacity and guardianship, estate planning, probate, asset protection, financial planning, taxes, housing, retirement, pensions, veterans' benefits, age discrimination, consumer fraud and elder abuse.

These are legal concerns that may someday affect each and every one of us. Families caring for an aging parent suddenly find themselves in a complicated situation and are not sure how to proceed. Because things like Medicaid planning, estate planning, wills, trusts, incapacity and guardianship are all a part of the elder law picture, someone seeking such help needs an attorney with formal training and experience in these very fields. So, whether we're trying to help our parents as their health declines, or we have entered the golden years ourselves and are striving to sustain our independence and our rights, the legal advocate qualified with the appropriate training and expertise is the elder law attorney.

The Importance of Long Term Care Planning and Estate Planning

People often assume that planning ends with retirement; thus, they have taken measures to save enough money in hopes of sustaining their present standard of living, often with the help of retirement benefits and pensions. But what about planning for living well past our "expected" retirement years, or in the event we need long term care? Without a comprehensive life plan for these scenarios, we are leaving our last years in someone else's hands.

Here are two questions to consider:

1. *If you become disabled and require nursing home or assisted living care, how will you pay for it?*

In 2013, the average annual cost of a semi-private room in a Florida nursing home is \$82,125, and a private room is \$91,250; the average cost of in-home care in Florida is \$41,115 to \$42,328 annually, and the average annual cost for a private room in an Assisted Living Facility in Florida is \$36,000.¹ Without sound planning, there are not many who can afford to pay such an expense out of pocket, or the cost of long term care insurance. Planning and preparation are more important now than ever before. Beware of the mindset that “this won’t happen to me;” research shows that at least 70 percent of people over age 65 will need long term care services at some point in their lifetime.² Medicaid planning offers a vital legal solution for lower, middle and upper middle class families to qualify for financial assistance to pay for assisted living and nursing home care.

2. *Do you have a comprehensive estate plan tailored to your specific needs and wishes as you age?*

An estate plan is not just for the wealthy. Comprehensive estate planning will ensure your estate is protected during your lifetime and properly distributed at your death, while protecting you personally as you age. At a minimum, this involves decisions regarding: (1) wills and trusts (2) a living will (3) designation of someone to act on your behalf regarding financial decisions if you cannot make those decisions; (4) health care advance directives to designate someone to authorize medical treatment and make medical decisions if you cannot; and (5) provisions for Medicaid eligibility.

In the chapters that follow, we'll discuss how each of these practice areas, when applied under the "elder law umbrella," can protect your money and your assets, plan for emergencies, plan for long-term care, incapacity and end-of-life concerns, and proactively help you control what will happen to you and to your assets.

Chapter 1 focuses on the practice of elder law in Florida and what an elder law attorney does. Attorneys who specialize in elder law serve as true resources to the families they serve. With specific knowledge and awareness of the needs of older individuals, they offer guidance and counsel regarding every aspect of safeguarding seniors, their families and their assets.

An essential part of Florida elder law is Medicaid planning. **Chapter Two** is about how Medicaid planning can help the average senior living in Florida—regardless of their financial situation—to legally restructure and shelter their assets in order to qualify for Medicaid benefits. Seniors who practice proper Medicaid planning with their elder law attorney have peace of mind that the soaring costs of nursing home or assisted living care will be paid for without depleting their hard-earned savings. If you read this book for no other reason, the information herein regarding Medicaid planning can literally save you and your family hundreds of thousands of dollars.

Chapter Three covers estate planning, and why almost everyone needs an estate plan regardless of their age or financial situation. A typical estate plan is a series of legal documents that arrange for the preservation of your assets while you are living and the handling and distribution of your assets when you die. When estate planning is applied under the scope of elder law, the bigger picture of your life throughout your senior years is taken into account. Not

only will your assets be sheltered and transferred properly, a comprehensive estate plan takes into consideration your health, the potential for long-term care, incapacity, special mental or physical needs, and your wishes as to how each situation would be carried out.

Chapter Four describes important veterans benefits, both service connected and non-service connected. The Department of Veterans Affairs (VA) offers different services that provide benefits to older veterans and their families. One of the lesser known VA benefits is the Aid and Attendance and Housebound Improved Pension, which provides substantial benefits for a veteran and spouse, and a veteran's widow. You do not need to have suffered a service-related injury. It can cover the costs of in-home caregivers or be used to pay for assisted living or nursing home care. With effective planning, many veterans find they qualify for VA benefits they did not think were available to them.

Veterans also may need to qualify for Medicaid to help cover nursing home expenses – yet the wrong planning techniques can disqualify the veteran from being eligible to receive Medicaid benefits. In order to assist veterans in the preparation, presentation and prosecution of claims for benefits, an attorney must be accredited by the Department of Veterans Affairs as a Veterans Claim Attorney. Many elder law attorneys are accredited by the VA, and a major focus of their practice is to coordinate VA benefits with any other benefits the veteran may apply for in the future.

Transition to an Assisted Living Facility (ALF) or a nursing home is a difficult time for every family, with important factors to consider and decisions to make. To help make this major change much smoother, **Chapter Five** prepares you with practical tips, questions to ask, and

checklists to follow when selecting an Assisted Living Facility or nursing home. Unfortunately, the search for a nursing home is frequently made in times of crisis and emotional strain. Just as with Medicaid planning and estate planning, it is in everyone's best interest to plan ahead and compare several facilities. When the time for the transition arrives, you will have a plan that you and your loved one are comfortable with.

In **Chapter Six**, we bring your attention to an ethical and fiduciary tragedy that happens all too often in Florida and across the United States: the unlicensed practice of law, commonly referred to as UPL. The unlicensed practice of law occurs when a person who is not a licensed attorney engages in the practice of law.³ UPL can happen in any area of law, and a growing sector of UPL that affects seniors occurs in Medicaid planning. This targets some of the most vulnerable groups of individuals in Florida – the elderly, and individuals with severe mental and/or physical disabilities. Great harm can be caused to seniors and their families by individuals who practice law without the proper training and licensure. Chapter Six gives examples of UPL, explains how to protect yourself or a loved one from becoming a victim, and outlines the actions you can take to fight UPL if it happens to you.

The purpose of this book is to give senior Floridians and their families valuable information on Florida Elder Law, Medicaid Planning, and Estate Planning. It is an introduction to these important areas of law, and is not meant to replace personal legal representation. It is our hope that by speaking plainly about these legal issues, you will come to understand that many legal options are available to you. There are opportunities that you might not be aware of, and critical reasons for you to overcome any procrastination of your own lifetime planning.

Use this book as a starting point to further get the guidance you need to legally protect your assets, your spouse, your life-savings and your future as you age, and to pass your legacy on to your children and loved ones. It all starts by putting the right legal plan in place for your specific situation.

Chapter 1

Florida Elder Law

The 2010 Census Bureau reports that there are now more Americans age 65 and older than at any other time in U.S. history. Compared with other states, Florida has the greatest share of the population who are at least 65 years old (17.3 percent).⁴ This exploding population may include anyone from a robust sixty-five year-old CEO to a ninety-year-old nursing home patient. With age come new and unique legal concerns. For almost every aspect of life, health and financial management for aging Americans, there is some form of law that protects the senior's rights.

What Is Elder Law?

The practice of elder law concentrates on the quality of life of elders and people with special needs. Elder law is unique because it employs key elements of several legal practice areas specifically as they apply to the older population. In a typical day, an elder law attorney may work with an aging mom and her daughter to set up a Personal Services Contract so mom can receive Medicaid benefits; assist a disabled veteran on obtaining Aid & Attendance benefits;

help revise a couple's estate plan to include advance healthcare directives and strategies for long term care; and later appear in Probate Court on behalf of a son petitioning for guardianship of his father.

With few exceptions, the greatest concern to the people we assist as elder law attorneys is their fear of spending most, if not all, of their wealth and assets to cover the costs of nursing home or assisted living care. Locating long-term care facilities suitable for each person's specific needs, aligning government programs and private resources to finance the cost of care, and protecting the senior's right to the best care possible are all part of the elder law practice.

The specific purpose of Medicaid Planning is to enable seniors to be able to pay for nursing home or assisted living care, while protecting their savings and assets from being depleted in the process. Florida Medicaid is not only for people with limited income or assets. Federal and Florida laws enable seniors of almost any wealth status to legally restructure their money and assets in order to qualify for Medicaid benefits.

In addition to Medicaid, veterans in need of long-term care may be eligible for significant non-service connected benefits from the VA that will finance in-home care, assisted living and nursing home care.

How does estate planning fit in? Estate planning documents are important for preserving your assets and property, and for leaving your estate behind to those you choose when you pass. Within the vision of elder law, estate planning also embraces living as you age. Elder law takes a comprehensive approach to make sure you are prepared for each stage of your life in the context of your overall estate planning. An elder law attorney will assist you in matters of wills, trusts,

durable powers of attorney, estate and gift tax planning, guardianship, long term care planning, Medicaid benefits, planning for incapacity, and veterans planning.

Closely aligned with the practice of elder law is special needs planning. Individuals of any age with special mental or physical needs face legal, social, medical and financial challenges. The elder law attorney is highly qualified to help families plan for when a special needs child, grandchild, sibling or other relative reaches adulthood, and for the time when a parent or other adult is no longer able to act as the primary caregiver. Disabled individuals may be included as heirs to an estate, yet traditional estate plans often do not take into account the fact that inheritance and other monies awarded to the special needs person can result in the loss of their government benefits. Special Needs Trusts, Supplemental Needs Trusts and other legal strategies will establish a comprehensive care plan for the disabled person that involves government benefits, legal and healthcare decision making, education and vocational training, health insurance coverage, housing and more.

The “Elder Law Umbrella”

With so many roles and so much at stake, the elder law attorney’s knowledge must be expansive. The attorney must be knowledgeable about:

- health and long-term care planning
- estate planning
- probate and asset protection
- estate administration
- retirement planning and pensions

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- elder abuse
 - age discrimination
 - tax and financial planning
 - advance directives and surrogate decision-making
 - guardianship
 - senior housing
 - public benefits (Medicaid, Medicare, Social Security, VA programs)
 - long term care insurance
 - recognizing the elder's physical and mental capacity
 - community services and agencies that serve Florida's senior citizens

Planning ahead for these life management issues can dramatically improve the senior's financial well being, arrange for their desired living environment and housing options, and assist in making wise health care and fiduciary decisions. Elder law approaches these matters from various perspectives. When you may think you need advice on just one issue, the experienced elder law attorney realizes how one decision impacts other choices, sometimes with devastating effects if done incorrectly.

For some seniors, elder law issues may trigger their first encounter with an attorney. Understandably, they are neither sure of what to ask, nor what to expect. The elder law attorney will encourage the senior client by discussing with them the right questions in order to seek out and understand their needs, and just as important, what their wishes are. The attorney will assess the situation fully within the purview of situations requiring crisis intervention such as sudden,

catastrophic illness or discharge from a hospital, and non-emergency situations such as transfer of assets, drafting an estate plan or handling probate.

In addition to the senior client, several participants often take part in legal decisions and strategies concerning the elderly. The family is integral to comprehensive planning; therefore, the elder law planning process is usually one that the family must go through together. In these cases, the senior's family members may meet with the elder law attorney. Elder law planning may also involve government agencies, geriatric care managers, medical professionals, insurance agents, accountants, financial planners and other lawyers. Elder law attorneys engage with a valuable network of professionals who serve Florida's aging population, and can connect families with essential senior centers and agencies.

With the interplay of family involvement, fiduciary planning and the challenges of age-related disabilities, the door is open to ethical issues. Elder law attorneys are held to high ethical standards which charge them to be ever-mindful of the elderly client's rights, their ability (or inability) to make decisions, and the avoidance of undue influence or conflicts of interest with family members and business relationships.

An Overview of Elder Law Issues

The range of specific legal services provided by an elder law attorney depends on the client's overall situation. Elder law services can occur in both proactive and reactive situations. By all means, legal planning best serves everyone before a crisis happens; however, elder law attorneys are often called to help families when a healthcare or financial crisis is already upon them.

The practice of elder law helps seniors protect themselves and their assets in the following matters:

Medicaid Planning and Other Public Benefits

A fundamental element of elder law is advising seniors about public benefits programs, and legally helping them secure these benefits through their training and experience with government programs and regulations.

- **Medicaid Planning.** Medicaid planning is perhaps one of the most essential, yet misunderstood, tools in your elder law toolbox. Medicaid is a joint federal and state program which pays for nursing home and assisted living care, but you must meet strict asset and income limitations in order to be eligible for benefits. Many people simply don't think they could ever qualify for Medicaid because they have more income and/or assets than are allowed under Medicaid requirements.

Medicaid *planning* is the legal practice that helps seniors—who otherwise would not be eligible for the program—qualify to receive Medicaid benefits. The reason this is so critical is because the average Florida senior (and the average family) cannot afford long-term care, nor have they made provisions to pay for such care if they should need it. Medicaid planning offers a way to cover the exorbitant costs of nursing home or assisted living care, and will legally protect the senior's assets and life savings. Chapter 2 is devoted to the Florida Medicaid program and Medicaid planning. As you will learn, you do not have to be “poor” or “destitute” to be able to receive Medicaid benefits that will pay for long term care. But to be certain you meet the eligibility requirements, avoid

misinformation, and escape the many pitfalls of Medicaid law, you must have a proper legal plan in place.

- **Social Security Retirement Benefits.** The Social Security Administration offers several programs and benefits to seniors. Social Security retirement is not based on welfare or means; it is based on your entitlement into the program by working and paying the Social Security tax known as the Federal Insurance Contributions Act (FICA). You must pay 12.4% of earned income into Social Security (up to an annual limit), and an additional 2.9% into Medicare. The tax money is used to pay you when you retire or if you become disabled, and will also pay your survivors if you should die.

In the scope of long-term care planning, estate planning and other forms of preparation for the future, an elder law attorney will consider Social Security benefits that you are entitled to that include: retirement benefits, spousal benefits, children's benefits, divorced spouse's benefits, and survivor benefits.

- **Social Security Disability Income (SSDI).** A Social Security benefit program for individuals, under the age of 65, who have previously worked and paid into the Social Security system for a certain minimum period of time. A person meeting these previous requirements will become eligible for SSDI when they become physically or mentally disabled. To be classified as disabled, the individuals must establish that they are unable to work as a result of the disability for a minimum of 12 months, or they must establish that the disability is expected to end only as the result of death. As a general rule, a

person who is receiving SSDI benefits will also automatically meet the level of care requirement for Medicaid.⁵

- **Supplemental Security Income (SSI).** Supplemental Security Income is a public benefit program under the Social Security Administration. The program is based on need, and provides a base-level income to disabled, blind or over-65 individuals with limited assets and income sources. SSI is federally funded and regulated by federal law. With SSI, there is no requirement that the SSI beneficiary has ever paid into the Social Security system. However, if a person receiving SSI later receives too much income or too many assets from other sources, the recipient will lose eligibility for SSI benefits.⁶

A person applying for SSI must meet strict income and resource tests to qualify. The State of Florida will also supplement the federal SSI payment. SSI does not pay for medical care; however in Florida, individuals who are eligible for SSI are also eligible to obtain medical benefits through the Florida Medicaid program.

- **Medicare.** Medicare is a federal health insurance program in which most people enroll when they turn 65 years old. Medicare also serves individuals who are under 65 with certain disabilities, and people of any age with permanent kidney failure who need dialysis or a kidney transplant. Unlike Medicaid, Medicare is an entitlement program—it is not based on financial need. Medicare is funded by Social Security tax contributions (FICA). Unlike Medicaid, Medicare requirements are uniform in all 50 states. However, if you are unable to pay for Medicare coverage, Florida has Medicare Assistance

Programs that can help cover the costs. Florida's state *Medicaid* program can also help you cover the costs of co-payments and premiums required for Medicare.

Here is the basic breakdown of the complex Medicare structure:

Medicare Part A: Hospital Insurance – If you paid Medicare taxes while working, you generally will not have to pay a monthly premium for Medicare Part A coverage. If you did not pay Medicare taxes, the cost of Part A coverage in 2013 can reach \$441 a month. Coverage includes emergency services, inpatient care, limited nursing home care, hospice, and approved home health care. Note the *limited* long-term care component to Medicare. At best, Medicare may pay up to 100 days of nursing home care for rehabilitation or therapy. After the 100 days of coverage are used, you must resort to other alternatives: (1) long term care insurance (2) pay with your own assets or (3) Medicaid.

Medicare Part B: Medical Insurance – Seniors who receive Part B Medicare benefits generally pay out-of-pocket costs in the form of monthly premiums. Costs of Part B coverage is determined by income as reported on your IRS tax returns. Coverage includes doctor's services, outpatient care, and medical equipment such as wheelchairs, and services such as lab tests or ambulance services.

Medicare Part C: Medicare Advantage, or Medicare Health Plans – an alternative to Parts A and B, Part C offers private health plan options run by Medicare-approved private insurance companies. The out-of-pocket costs of these plans are established each year. Medicare Advantage Plans offer the benefits and services covered under

Part A and Part B, and most plans offer prescription drug coverage (Part D). Some Medicare Advantage Plans offer additional benefits for an added cost.

Medicare Part D: Prescription Drug Coverage – Seniors who receive Medicare drug coverage will pay varying out-of-pocket costs in the form of monthly premiums, co-pays or deductibles.

As we live in a time of national economic uncertainty, the possibility of funding cuts for many public programs is a reality. As of this writing, Medicaid, Medicare, Social Security and Veterans Benefits are not affected. Your elder law attorney should be a valuable resource regarding the status of these public programs that are so critical to America's aging population.

Comprehensive Estate Planning

Your estate is everything you have worked for and own—your home, car, personal belongings (jewelry, artwork, furniture, pets, etc.), bank accounts, IRA, stocks, life insurance policies and the like. Estate planning is a process that organizes and arranges for the distribution and transfer of your estate when you die. Just as important, a well-crafted estate plan determines what happens to you and your assets while you are living. Core legal documents and special purpose estate planning documents are prepared according to your wishes that will protect you and your assets in times of good health and in the event of your incapacity or disability during your lifetime.

Among the most important legal issues affecting us as we age are those that affect our independence. The competent senior has the right to make their own decisions about health care,

incapacity and end of life planning. It can be easy to overstep the delicate balance of maintaining respect for the elder's independence when making alternative housing decisions, in cases of guardianship and incapacity, or situations calling for decisions on end-of-life treatment. Consider a scenario in which you experience a decline in physical or mental health, and you are no longer able to live independently. It is your right to establish a comprehensive estate plan for the way these events are to be handled in the manner that *you* desire, and decisions made on your behalf by the person or persons *you* choose.

Elder law integrates all of the traditional estate planning services into a broader, comprehensive approach to ensure you will not lose a lifetime of assets, no matter how great or small, to the government, a nursing home, lawsuits, taxes or other burden, and that you will be taken care of financially and medically during good health, incapacity or at the end of your life, according to your wishes.

The basics of estate planning and the legal documents used in the process are described in Chapter 3, Florida Estate Planning.

Assisted Living Facility and/or Nursing Home Planning

Creating a plan to pay for long term care is a key part of elder law. For most people, Medicaid planning is the most practical avenue. Medicaid planning can legally shelter most of your assets to enable you to qualify for Medicaid—and keep your lifesavings in the family instead of paying it to a nursing home. For others, it is important to make sure enough money has been put aside in a trust to meet assisted living or nursing home expenses. For still others, this planning involves the purchase of long term care insurance.

Elder law addresses all legal aspects regarding long term care insurance and related asset protection planning. Although planning for nursing home care is best done in advance while you are in good health, there are ways that an elder law attorney can help protect assets even if relocation to an Assisted Living Facility or nursing home is needed right away.

Guardianship and Incapacity

At some point, a senior may become incapable of handling his or her day-to-day personal and health care needs, or of managing their money. Dementia, stroke and other infirmities can rob even the healthiest person of these abilities. Incapacity also renders a person susceptible to those who would take advantage of them for personal gain.

When no plans for incapacity have been made in advance, it becomes necessary to undertake Florida guardianship proceedings. This means the person is declared incompetent by the court, and a guardian is appointed by the court to act on his or her behalf. Guardianship proceedings can be costly, lengthy and emotionally traumatic for all involved.

The incapacitated person becomes the “ward” of the guardian. The responsibilities appointed to the guardian may cover all or some aspects of the ward’s life. The guardian owes the incapacitated person a special duty of care and accountability, and these duties are overseen by the court. Florida law requires that a guardian must be represented by an attorney. The guardian may also be asked to complete a court-approved training program.

Are there alternatives to guardianship? Yes—guardianship can be avoided with estate planning strategies such as a carefully drafted Durable Power of Attorney, Trust, or Health Care Advance Directive. In fact, Florida law requires the use of the least restrictive alternative to protect persons incapable of caring for themselves and managing their financial affairs whenever

possible.⁷ It is important to explore your options with an elder law attorney while you are able to make decisions and state your wishes about who *you* want to manage your affairs in the event you no longer can.

Elder Abuse, Neglect and Exploitation

A variety of laws come into play concerning elder abuse. Violations take many forms, and the practice of elder law deals intently with the crimes of abuse, neglect and exploitation of seniors and the disabled.

- **“Abuse”** means the intentional infliction of physical or emotional pain or injury. Sexual abuse is any non-consensual sexual contact of any kind.
- **“Neglect”** means the refusal or failure by those responsible to provide necessities – food, health care, protection or shelter. Neglect also includes abandonment, or desertion, of an elder by someone who has assumed the responsibility for care or custody of that person.
- **“Exploitation”** means illegally taking financial advantage of a disabled or elderly victim, as well as the misuse or concealment of the person’s funds.

In addition to federal laws on elder abuse, Florida Statute Chapter 825 – *Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults* – gives specific legal remedies to combat each form of abuse.

The elderly can suffer physical, sexual or emotional abuse and neglect at the hands of institutions (nursing homes, hospitals, assisted living facilities) as well as people they love and trust (caregivers, family members, in-laws and neighbors).

The elderly are also targets of predators who wish to financially abuse them by taking their money, assets or property. The offenders range from unscrupulous professionals (business associates, money managers or financial advisers) to family members, caregivers or friends who gain the trust of the individual, and then use that trust to their financial advantage.

As a result, Florida courts may see elder abuse in a variety of contexts:

- criminal cases of assault, battery, forgery, fraud, murder, rape, or theft
- civil fraud or conversion matters to regain misappropriated property
- personal injury actions
- guardianship
- mental health commitment
- special protective proceedings initiated through adult protective services (APS) agencies
- cases involving health care decisions for an incapacitated patient
- criminal or civil cases regarding institutional care in nursing homes or other long term care facilities⁸

The Florida Department of Elder Affairs works closely with the Department of Children and Families (DCF), Adult Protective Services (APS) and the Aging Network to protect disabled adults or elderly individuals from abuse. To report elder abuse of any form, the following contacts are available 24 hours a day, seven days a week:

Florida Abuse Hotline: Call 1-800-96-ABUSE (1-800-962-2873) – Press 2

TDD (Telephone Device for the Deaf): Call 1-800-453-5145

Online: DCF website at <https://reportabuse.dcf.state.fl.us/>

Elder abuse is a serious issue that must not be ignored. Cases of elder abuse often require the representation of an attorney who is experienced in the rights of elders and nursing home residents.

Age Discrimination

Unfortunately, seniors often face discrimination on many fronts: in the workplace, seeking housing or applying for credit. Age discrimination is an important focus of elder law because it is a critical component of protecting seniors' rights.

In the workplace, aging individuals are often mistakenly considered to be physically or mentally challenged, incompetent or unable to learn new skills. Some employers turn older workers away because they know a competent senior's strong base of experience deserves higher wages which they don't want to pay. Employers may disguise discriminatory termination of aged employees by saying the company is "downsizing" or "reorganizing."

In situations involving lending or applying for credit, the elderly may be viewed as unable to make decisions or manage their financial affairs. Housing rentals and tenant screening laws prohibit discrimination based on a person's advanced age.

Federal laws in place to prevent age discrimination are:

- The Age Discrimination in Employment Act of 1967 (ADEA)
- The Age Discrimination Act of 1975, the Rehabilitation Act of 1973
- The Fair Housing Amendments Act of 1988
- The Americans with Disabilities Act of 1990

- The Equal Credit Opportunity Act of 1974
- The Truth in Lending Act of 1968.⁹

In addition to federal laws, Florida prohibits age discrimination under Florida Statute Chapter 760 - *Discrimination in the Treatment of Persons; Minority Representation*. Each of the laws prohibiting age discrimination has specific conditions of enforcement. All of them provide for governmental assistance in protecting the rights of elders and the disabled. In certain instances, the laws allow for a private lawsuit to be brought for damages resulting from age discrimination. Elder law attorneys are equipped to counsel individuals to seek the best route in enforcing the claim of illegal age discrimination.

Retirement and Financial Issues Affecting Seniors

Retirement planning is more important now than ever before. As we live longer, we face the rising cost of living and health care. In addition to Social Security Retirement benefits, the comprehensive scope of elder law helps seniors plan for retirement living through private retirement funds and pension benefits.

If you have a pension plan through your employer, this certainly plays an important role in your estate plan. Pension plans typically transfer an employee's income toward retirement income. An elder law attorney can help you understand pension options, and advise you about how pensions may affect Medicaid, long term care and your estate as a whole.

What if you don't have a pension plan? These days, the burden of retirement planning often relies on a senior's own savings and Social Security benefits. Elder law takes a holistic approach to planning for retirement, and applies health, financial and legal insights into

strategies designed to protect your assets, establish individual, realistic goals about your desires for retirement living, with plans for long term care and incapacity should that need arise.

Probate and Asset Protection

Probate is a time-consuming and expensive court-ordered process that occurs then you die with a will. Under Florida probate law, the assets owned in your name, your bills, and your taxes are to be gathered, calculated and distributed to your beneficiaries through probate. Thus, Florida probate is where many estates end up. The practice of elder law helps you plan ahead to shore up your estate so your family's inheritance doesn't end up in probate. Most people would like to avoid probate altogether. Elder law concentrates on using Florida statutes, rules and laws on probate to protect and shield your assets, so that you can leave more to your loved ones instead of having your assets wind up in the hands of creditors, the IRS, or others who try to make a claim against it.

Asset protection planning is about making wise and strategic decisions today to protect yourself and your property from future loss due to lawsuits, creditors or bankruptcy. Affluent seniors may fear ruinous lawsuits. All seniors need to protect themselves against future disabilities or illness. Asset protection also includes crisis planning, such as when a prolonged nursing home stay is imminent.

Elder Law attorneys are trained in the legal options available to provide for these scenarios. Wills, trusts, powers of attorney, personal service agreements, advance directives, living wills, and knowledge of estate and inheritance taxes—all are tools of the elder law trade for avoiding probate and protecting your assets.

Veterans Benefits

Many Veterans who are now senior citizens are struggling because they require skilled nursing home care or need to enter an Assisted Living Facility. Other veterans may be housebound and need in-home care. The Department of Veterans Affairs provides financial help to wartime veterans who need long term care. One VA benefit is *Aid and Attendance* (A&A) and is part of a group of tax-free benefits under the VA's Improved Pension program for *non-service connected* disabilities. A&A also assists the spouses, widows, and widowers of veterans. Unfortunately, many veterans are unaware of this benefit, thinking that it is only for veterans who were injured or disabled during service.

It is essential for veterans to receive the proper counsel and planning necessary to qualify for these and other benefits, in order to avoid serious mistakes that may surface down the road. Some planning methods that can qualify you for VA Aid and Attendance can later disqualify you from getting Medicaid to help pay for nursing home or assisted living care.

The following chapter discusses long-term care needs involving nursing home and assisted living care, where stakes are high and mistakes can be devastating. Most seniors who need long-term skilled nursing care have not planned on it. Eventually, these seniors must deal with the Florida Medicaid program, a very complex blend of federal and state laws. Please read on to see the enormous benefits that can come from Medicaid Planning with an elder law attorney.

Chapter 2

Florida Medicaid Planning

Suppose long-term nursing home care is suddenly needed for a loved one in a crises situation. Or what if, one day, you need to be placed in a nursing home? How would you pay for it?

Placement of a family member in a nursing home and the resulting expenses present the most significant threat to estate preservation for most people. The cost of skilled nursing home care can range from \$5,000 - \$8,000 per month or more. The median annual cost in Florida for a semi-private room in a nursing home is \$82,125. For a private room, the median annual cost jumps to \$91,250.¹⁰ Most seniors and their families cannot afford to pay such excessive amounts. Without a plan in place, nursing home bills can wipe out an entire life savings in a matter of months.

Perhaps a nursing home stay is imminent because a loved one has Alzheimer's or other progressive disease, or a stroke has left your spouse powerless. You and your family must work

through these matters at a time of great emotional and financial stress. At times like these, it is essential that you pause, take a deep breath and understand that there are things you can do. Whether someone is on the nursing home doorstep or you wish to plan for the future, proper Medicaid planning can help you meet the enormous cost of nursing home and assisted living care, while preserving all or most of your assets.

Many people believe they must liquidate their assets – sell their home or give away possessions and money – before they can be eligible for Medicaid. This is not the case, and is a dangerous misconception. This chapter summarizes the many ways in which you, with qualified legal counsel, can apply Medicaid planning to help you or your loved one qualify for Medicaid benefits.

What Is Medicaid?

Medicaid is a jointly funded federal and state government program that provides public health and medical coverage. While Medicaid is set up under federal law, the rules for administering Medicaid differ from state to state. The Florida Medicaid program sets and oversees Medicaid's eligibility requirements in Florida, and the rules may differ somewhat from county to county.

To meet the rules of eligibility for the Florida Medicaid program, a person must be:

- A resident of the state of Florida;
- 65 years of age or older, or be blind and on Social Security disability income, or be disabled.

Medicaid coverage is available only to those with medical need and limited income and assets. Does this mean a senior must be needy or impoverished to be able to benefit from the Medicaid program? Not at all.

What Is Medicaid Planning?

The Medicaid Program can help seniors avoid impoverishment resulting from nursing home and assisted living expenses. This is possible because the U.S. Congress and Florida laws allow seniors to *restructure* their assets so they may qualify for Medicaid benefits. Assets are the entire property of a person, including a home, cars, money – everything of real value that a person owns. Even if you have hundreds of thousands of dollars in assets and are currently ineligible for Medicaid benefits, careful Medicaid *planning* can help you legally meet the eligibility requirements for this important program.

Under Medicaid rules, a person's assets are considered to be in one of two categories: *Countable* or *Non-Countable*. The assets in the *countable* category are the assets that will affect the senior's chances of being approved for Florida Medicaid.

Generally, the type of asset and how an asset is titled will determine its category.

Examples of non-countable assets are: the applicant's primary residence, one vehicle, household items and furnishings, most personal items, life insurance with no cash value, an irrevocable funeral service contract or cremation contract, and one burial plot.

Examples of countable assets are: the applicant's non-homestead property and other real estate, additional vehicles, boats, cash, savings accounts, certain annuities, retirement accounts, stocks, bonds and gold or silver.

By following strict rules, Medicaid planning strategies basically move assets, property and income from the countable category to the non-countable category. Consequently, these items no longer affect the senior's eligibility for Medicaid, enabling the senior to qualify for Medicaid benefits while legally protecting their assets.

Medicaid Eligibility

There are three basic requirements, or tests, for Medicaid in Florida. These tests are:

- **The Medical Test** – First, the State of Florida must evaluate whether or not a person is healthy enough to live independently at home and without assistance. If they are found to be able to live independently, the person would generally not pass the medical test for Medicaid. The testing is handled by the Florida Department of Elder Affairs CARES unit. The medical criteria are based on the applicant's ability to perform very basic tasks, referred to as the Activities of Daily Living. They include: bathing, toileting, eating, dressing, and transferring (moving around).
- **The Asset Test** – As of 2013, to be eligible for Medicaid, the applicant must have less than \$2,000 in *countable* assets. The Medicaid applicant's spouse who will remain living at home is allowed to keep a great deal more assets. If both spouses are applying for Medicaid, their assets are considered together.

- **The Income Test** - Florida is an Income Cap state. This means there is an income limit for Medicaid eligibility. The income limit in income cap states is tied to the Federal Supplemental Security Income (SSI) monthly benefit for the year. Each year, the SSI benefit level is adjusted by the Social Security Administration.¹¹

“Income” means gross monthly income, and includes money received from Social Security, pensions, dividends, IRAs, rent and other forms of income. In 2013, the monthly gross income limit for the Medicaid applicant is \$2,130. If the Medicaid applicant’s monthly gross income exceeds this limit, they would fail the income test.

Federal law has, however, made it possible for a Medicaid applicant whose income exceeds the gross monthly limit of \$2,130 to obtain Medicaid qualification. In 1993, Congress passed a law called the Omnibus Budget Reconciliation Act (OBRA ’93). Among many other changes, OBRA ’93 authorized certain trusts to be established by Medicaid applicants so they can obtain Medicaid benefits. The type of trust that can be used is a “Qualified Income Trust.”¹²

Florida has very favorable asset protection laws. But keep in mind, the laws are complex and ever-changing. Every individual has his or her own special circumstances. It is essential to consult with an Elder Law attorney who specializes in the field of Medicaid Planning to carefully protect your wealth and property *and* be legally eligible for Medicaid. Wrong decisions lead to costly mistakes. The right decisions and strategies will help you or your loved one receive quality care without exhausting family resources.

The following is a brief overview of how assets are restructured to obtain Florida Medicaid benefits.

Medicaid Planning Strategies Used Primarily for Single People

Personal Services Contract

One very effective way to reduce the countable assets of a Medicaid applicant is through a Personal Services Contract. A reasonable dollar amount can be paid to one or more caregivers to compensate the caregivers for their time and effort in caring for the needs of the Medicaid applicant. The dollar amount must be “reasonable,” and the term of the contract must be equal to or less than the Medicaid applicant’s life expectancy under the Social Security life expectancy tables. The caregiver will need to remember that funds paid under a personal services contract constitute taxable income.¹³

Special Needs Pooled Trust

A special needs pooled trust is a way for the elderly and the disabled to shelter countable assets and quickly obtain Medicaid benefits. This type of trust is authorized by the Omnibus Budget and Reconciliation Act of 1993 (OBRA 1993).

The funds held in a pooled trust are available to the Medicaid recipient through a request to the trustee of the pooled trust. The funds in the pooled trust can be used for anything that benefits the Medicaid recipient, such as the payment of expenses, repairs to the homestead, payment of the supplemental health care needs, periodic payments to caregivers, or the payment of lump sum personal service contracts to caregivers.

The State of Florida may give increased attention to personal service contract payments made from a pooled trust to family members or friends. When the Medicaid recipient dies, there will be Medicaid benefit recovery of any funds left in the trust. Alternatively, the pooled trust also has the option of retaining the funds for the benefit of other members of the trust pool, instead of paying the money back to the state of Florida. Therefore, if a primary goal of Medicaid planning is for family members to inherit the funds, the use of a pooled trust may not be a good option for such a client.¹⁴

Chapter 3, *Florida Estate Planning*, provides more information about trusts and how they work.

Level Payout Medicaid Qualifying Annuity/Medicaid Qualifying Life Insurance

A Medicaid Qualifying Annuity is a specially structured annuity which meets the following criteria:

- No cash value
- Non-assignable
- Non-transferable
- Single premium immediate annuity
- The term of the annuity is equal to or less than life expectancy under the Social Security life expectancy tables.

Florida law requires that the annuity must pay out a certain dollar amount on a monthly basis, which would be paid to the nursing facility as part of a single Medicaid applicant's patient responsibility. Florida law requires that the annuity be a "level pay out" annuity. A "level pay

out” annuity has a level monthly payment, which would pay back the entire annuity amount, in equal monthly payments, over the term of the annuity.

The Deficit Reduction Act of 2005 (DRA) requires that the state of Florida be named as the beneficiary of the annuity to the extent of Medicaid benefits paid out. The DRA went into effect in Florida on November 21, 2007.¹⁵

The Purchase of Income Producing Property

The *Florida Medicaid Policy Manual* states that real estate rented for a fair market value is a non-countable asset, for Medicaid purposes. Accordingly, it is possible to take countable assets and transform them into a non-countable asset, by purchasing income producing property.

For a single Medicaid applicant, the net rent (gross rent minus expenses) must be paid to the nursing home, as part of the patient responsibility. For a married couple, the community spouse may be entitled to income allocation of the net rent. The Medicaid applicant agrees to title the property in such a way as to avoid probate upon his or her death. A common way to avoid probate in Florida is through the use of a living trust.¹⁶

Purchase of Homestead

The purchase of a homestead property is a feasible way to restructure countable assets, for a person not yet admitted to a nursing home or assisted living facility. In order to be classified as a homestead for Medicaid purposes, most Elder Law attorneys believe the Medicaid applicant needs to have actually resided in the homestead, for the property to be classified as exempt. The Deficit Reduction Act went into effect on November 1, 2007. The DRA creates a cap of \$500,000.00 in home equity for many Medicaid applicants.¹⁷

Gifting

When it comes to Medicaid planning, the Deficit Reduction Act strictly limits gifting for any gifts given after November 1, 2007. *Assets cannot be given away by the Medicaid applicant to obtain Medicaid benefits.* A gift is any transfer of assets for less than fair market value compensation.

Florida law presumes that any gift made by the Medicaid applicant (or his/her spouse) – within five years of the date of a Medicaid application – was done for the purpose of obtaining Medicaid benefits and is therefore potentially disqualifying. However, with proper legal counsel, most prior gifts can be successfully dealt with, so that Medicaid can be obtained. The Medicaid applicant must agree to stop any gifting of assets upon hiring attorneys.¹⁸

The Purchase of Other Exempt Assets

Personal effects such as furniture, clothing, televisions, one automobile, wheelchairs, hearing aids and eyeglasses, are all exempt assets. Oftentimes it is advisable to purchase these types of exempt assets, to shelter countable monies.¹⁹

Repairs to the Homestead

Because the homestead is an exempt asset, repairs to the homestead such as painting, roofing, installation of cabinets, and landscaping would all be ways to restructure countable assets. The Florida Department of Children and Families (DCF) requires copies of checks, invoices, and receipts for all repairs and supplies, in order to allow the expenses to be used to restructure the Medicaid applicant's assets.²⁰

Payment of Debts and Payment of Current Expenses

If a Medicaid applicant has credit card debts, a mortgage, a car loan, or any other lawful debts, it is permissible to pay down those debts, to reduce countable assets.²¹

Purchase of an Irrevocable Funeral/Cremation Service Contract

The purchase of an irrevocable funeral service contract is a non-countable asset. If the irrevocable contract is funded with a life insurance policy issued through a funeral service provider, the contract is also a non-countable asset.²²

Burial Savings Account

A burial savings account up to \$2,500 is treated as an exempt asset for Medicaid purposes. A burial savings account can be established up to 90 days after the first month Medicaid is needed. Therefore, it is often advisable to not set up a burial savings account, in case additional assets are found later, after Medicaid is applied for. The Medicaid applicant agrees to sign written instructions prepared by his or her attorney before establishing a burial savings account.²³

Purchase of an Automobile

One automobile, regardless of value, is exempt. Furthermore, additional vehicles, seven years old or older, which are not classified as luxury models, are also exempt.²⁴

Additional Strategies Available for Married Medicaid Applicants

The asset protection strategies discussed for single individuals will also apply for married couples when one spouse is confined to a nursing home and the other spouse still lives in the community.

When a married person applies for Medicaid, the income test applies to only the spouse who is applying for Medicaid benefits, and additional planning opportunities are created.²⁵

Spousal Refusal/Assignment of Rights to Support

This Medicaid planning strategy involves transferring countable assets to the healthy spouse, and then the healthy spouse “refuses” to make those assets available to pay for the nursing home. Florida reserves the right to pursue Medicaid payback if this strategy is used.²⁶

Medicaid Qualifying Annuity

A Medicaid Qualifying Annuity can be used to shelter the excess assets of the community spouse. The DRA limits Medicaid Qualifying Annuities to “level payout” annuities, and the state of Florida must be named the beneficiary of the annuity, to the extent of the Medicaid benefits paid out.²⁷

Medicaid Planning and Veterans Benefits

Many senior or disabled veterans in need of nursing home or assisted living care may seek assistance from Florida Medicaid as well as from the Department of Veterans Affairs (VA). In such situations, it is important to know that the legal and financial qualifiers required for eligibility for certain Veterans Benefits (such as VA Aid and Attendance) and Medicaid benefits are both based on limited income and assets. Depending on the veteran’s circumstances, qualifying for VA Aid and Attendance may involve planning techniques, such as transferring and restructuring assets, which may be penalized under Medicaid rules. It is essential to examine how such restructuring will affect current or future Medicaid qualification.

To avoid the risk of being disqualified from receiving important Medicaid benefits at some point in the future, veterans are encouraged to seek guidance from an attorney who is accredited by the Department of Veterans Affairs to practice law before the VA, who also specializes in Medicaid planning. Many veterans find they can actually qualify for both VA and Florida Medicaid benefits, resulting in significant assistance in paying for long term nursing home care. More information about VA benefits is presented in Chapter 4 – Veterans Benefits.

Many viable, effective strategies exist that an Elder Law attorney will consider in regards to each individual's situation.

Before any plan of action is set, Medicaid planning involves careful analysis of the senior's current income and assets, estate planning documents, medical expenses, and the desires of the individual. Ideally, Medicaid planning should be undertaken years in advance. This is a critically important issue for most middle class seniors and their families. Yet even when emergencies arise and no preplanning has been done (which is very often the case) Elder Law attorneys use their knowledge of Medicaid rules to help you qualify for Medicaid benefits and protect your assets from devastating nursing home costs.

Chapter 3

Florida Estate Planning

What is Estate Planning?

Estate planning allows you to control the handling and distribution of your assets and other legal issues that will arise upon your death, as well as critical issues that might arise during your lifetime. A common misconception is that estate planning is only for the wealthy. We often hear phrases associated with estate planning, such as “wealth preservation” and the “transfer of wealth.” What is wealth? It is all that you own, from your home, your bank accounts, your business and your pension to your smallest personal treasures.

The reality is that estate planning, whether it is a simple plan or a complex strategy, is a must for everyone. It is not just about your individual wealth, however large or small. It is about the peace of mind that comes from knowing you have taken careful legal measures to ensure that your goals and your desires for yourself and for you loved ones will be carried out according to your wishes.

This chapter focuses on what the average Floridian needs to know about proper estate planning.

What Does an Estate Plan Do?

Traditional estate planning directs that if you have assets when you die, they will go to your intended beneficiaries, with as little as possible in taxes and other expenses. The operational word here is “if.” *If* you have assets when you die is a far cry from *knowing you will* have assets when you die. A basic estate plan alone will fall short if you or your spouse (or both of you) become disabled and require long term nursing home care, and no plans have been made to prepare for this expense.

However, estate planning under the advocacy of Elder Law will consider the inevitability of death plus the possibility of an extended life, and the prospect of disability. Elder law estate planning serves to preserve and protect your assets, avoid the expense and delay of probate, while at the same time making sure that everything is not lost to nursing home expenses and taxes.

We can break such an estate plan into its primary objectives:

- Ensure you maintain your standard of living and that you will be properly provided for throughout your lifetime;

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- Upon your death, ensure your assets and property go to the heirs and beneficiaries you choose, in the orderly and efficient manner that you choose, avoiding probate (if appropriate) and with minimum taxation or other expenses;
 - Allow you to select who will handle administrative and fiduciary functions on your behalf after your death;
 - Plan for incapacity with health care decision-making documents, granting a loved one or trusted advisor the ability to make financial and healthcare decisions for you when you cannot;
 - Plan for long-term care needs while you are living. This includes planning for nursing home care through long term health insurance, Medicaid planning, and other appropriate strategies;
 - Protect your assets from creditors, lawsuits or other claims;
 - Ensure that any minor children or loved ones with special needs are cared for according to your wishes during your lifetime and upon your death.

Each of these objectives is tailored to your individual situation. Estate planning attorneys who are also Elder Law attorneys focus their practice on the laws surrounding all of these actions. Your attorney creates the estate plan by drafting specific legal documents that express your decisions, plans and legal arrangements. These documents are largely comprised of various trusts, as well as powers of attorney and other legal arrangements. In order to arrive at the actual production of these documents, a great deal of strategy and advance preparation goes into the

estate planning process. Once the documents are finalized, any trusts created in the plan must be funded. Trust funding involves re-titling assets (such as bank accounts, IRAs, real estate) from your name to the Trustee of your trust. Only then is a trust effective.

As with any important legal arrangement, your estate plan should undergo regular review to ensure it stays in compliance with the law.

Documents/Legal Arrangements Commonly Used in Estate Planning

Some of the most common estate planning documents are described below.

Florida Last Will and Testament

Perhaps the most familiar estate planning tool is a Last Will and Testament. A will is a legal document that states how you want your assets and property to be distributed at death. Without a valid will, your estate becomes subject to Florida laws, and may not be distributed as you would like. A will can also be used to designate a preference for the guardian of any minor children you may have. Without a valid will, the court would be required to appoint a guardian through the Florida guardianship process.

The distribution of the estate under a will is controlled by a formal legal process called probate, and is overseen via Florida probate court in the county in which you (the maker of the will) reside. The will may designate a Personal Representative who is responsible for handling your estate throughout the probate process. This can take up to a year or more to complete, depending on the circumstances, and requires the hiring of an attorney to assist with the process.

Legal probate proceedings are necessary to ensure that your debts are paid off, financial affairs are finalized, and that assets reach the intended beneficiaries. Assets and property affected by probate are those assets owned solely by the deceased at the time of death. Assets that are owned jointly or assets that designate a beneficiary (such as 401Ks or insurance policies) would not pass through probate. With many estates, determining which assets are subject to probate is a complicated issue. A qualified estate planning lawyer can answer this and many other questions.

In order to be valid, wills must be properly drafted under the laws of Florida. They may be changed or added to at any time. A valid will only becomes final upon death. Many people wish to avoid probate altogether. Proper estate planning can allow you to arrange your assets so that the Florida probate process is bypassed.

Powers of Attorney (POA)

A power of attorney is a document that gives another person of your choosing the legal right to act on your behalf in all manner of legal and business matters, when you cannot be present. The person given this power is known as an Agent or Attorney-in-Fact. You are called the Principal. The agent acts as your *fiduciary*, meaning they have the responsibility for managing your assets and money. The agent must therefore be a person who will act in good faith and serve to preserve your estate plan.

In Florida, any powers granted under the POA document must be specific, such as granting the agent the authority to conduct explicitly defined transactions on your behalf. For example, a power of attorney may be used to make banking or investment transactions, close on

a sale of a house, transfer a title on a car, make health care decisions, or sign certain contracts or other legal documents.

Powers of attorney go into effect immediately. General Powers of Attorney also terminate upon the incapacity of the principal – due, for example, to a stroke or Alzheimer's disease.

Durable Power of Attorney

The term “durable” when combined with “power of attorney” means that the powers granted in the document remain in effect even if the principal becomes incapacitated, either physically or mentally. Explicit language to this effect is drafted into the POA document. Without this durable provision, a power of attorney is not valid if the principal becomes incapacitated.

Situations of incapacity or disability are the times when a durable power of attorney is most needed; therefore, it is critical to establish a valid durable power of attorney *before* a person becomes incapacitated. None of us like to think about the possibility of not being able to make our own decisions. The reality of life is that young and middle aged people have a better chance of being disabled than they do of dying. If you become incapacitated from either illness or injury, you will need someone you trust to make decisions for you.

As far as Medicaid qualifications are concerned, a properly executed durable power of attorney is one of the most important documents in a Medicaid case. A durable power of attorney is critically important because the typical nursing home or assisted living resident is often too ill to act on his or her own behalf. If a person loses capacity and is no longer competent to execute a

new durable power of attorney, the only other option is guardianship – an expensive, time-consuming, and court-ordered process. Guardianship proceedings create costly delays in the completion of Medicaid planning.²⁸

Living Wills

A Living Will is a document in which you specify the type of life-sustaining procedures that you do and do not want to be used to prolong your life in a terminal or end-stage condition. This incredibly important document is a tremendous aid to family members should they be faced with such health care decisions on your behalf. A copy of the Living Will should be given to your physician and family members, and the original Living Will should reside in a known location.

Trusts

Trusts are the most powerful tools in estate planning. A trust is a legal document that contains your instructions about exactly how you want your assets to be handled and distributed.

By creating a trust, you establish a fiduciary arrangement between three people:

- you (the grantor)
- the person or entity that will manage the trust (the trustee)
- and those who will benefit from the trust (the beneficiaries)

In order to fund the trust, you transfer the title of your assets to the name of the trust while you are living and have capacity to do so. In effect, the trustee holds your assets on behalf of the beneficiaries of the trust.

Unlike wills, trusts are private documents and are not filed with the probate court – therefore trusts are often used in estate planning as a way to avoid Florida probate. Trusts also provide tax shelters, allow you to avoid guardianship, provide for disabilities and special needs, allow you to make gifts of your properties, protect your assets from creditors, and offer many other ways to protect your life’s assets. Trusts are not a substitute for a will, but are tools that give you great flexibility in planning for the future depending on your goals and situation.

There are many types of trusts, and some of the most commonly used trusts in estate planning are described here.

Revocable Living Trusts – This form of trust can protect your assets from the Florida probate process as well as provide certain tax advantages. If you become disabled, a Revocable Living Trust protects you against court-appointed guardianships and helps to provide for you and your family. Just as important, a Revocable Living Trust allows you to name yourself as the trustee and have complete control over and access to the trust while you are living.

You would also arrange for a *successor trustee* to manage your assets in the event of your death, or if you become incapacitated. A revocable trust generally becomes irrevocable upon your death.

Because it is “revocable,” this type of trust is flexible and can be dissolved at any time, should your circumstances or intentions change. It also means that during your lifetime, the trust is treated like any other asset you own. For this reason, Revocable Living Trusts are not used as a Medicaid planning tool, because your assets are still accessible to you and would be considered a countable asset.

Irrevocable Trusts – An Irrevocable Trust typically transfers your assets out of your estate, sidesteps probate, and shelters your assets and property from estate taxes. Once you, the grantor, execute the trust, you lose control over the assets and the terms of the trust cannot be changed, nor can the trust be dissolved. Because these assets are no longer available to you, Irrevocable Trusts are excellent tools for Medicaid planning.

An Irrevocable Trust is also a good estate planning tool if your primary aim is to reduce the amount subject to estate taxes. You are not subject to tax liability on any income generated by the trust assets; only the distributions by the trust would carry tax consequences. Assets in the trust would also be protected if a legal judgment was brought against you.

Testamentary Trusts – This type of trust is outlined in your last will and testament. Your will instructs that the trust be created upon your death. Because the funds with which the trust is to be created are subject to probate, estate debts must first be paid to creditors and all other costs wrapped up under the court's supervision. Your estate planning attorney would then transfer the title of your designated remaining assets to the name of the Testamentary Trust, and the trust would be funded.

A Testamentary Trust would be considered when probate is not a concern. Like other types of trusts, Testamentary Trusts hold and manage money and/or property for the benefit of your surviving family and loved ones when you die, and can be set up to achieve various estate planning goals.

Special Needs Trusts – You may have a loved one who has special medical or other needs, and is currently receiving government benefits such as Medicaid. A Special Needs Trust is an

estate planning device that provides a source of funds for a disabled or aged beneficiary, without disqualifying him or her from receiving government benefits. Remaining eligible for government benefits is the intent of the Special Needs Trust. It is a type of Irrevocable Trust, and the assets held in the trust are not considered countable assets. Distributions from the trust are designed to supplement the beneficiary's public benefits, paying for expenses such as equipment and critical services that Medicaid or other benefits may not cover.

Additional “Special Purpose” Trusts – Trusts may be established for many specific purposes. Just a few examples of common trusts by purpose include:

- *Asset Protection Trusts* – designed to protect assets from the claims of creditors.
- *Credit Shelter Trusts* – used by married couples with large estates to avoid federal estate taxes upon the death of the first spouse to die.
- *Charitable Trusts* – these trusts have charitable beneficiaries, and offer a way for the grantor to benefit from income tax deductions and other tax benefits.
- *Life Insurance Trusts* – a form of Irrevocable Trust designed to hold life insurance on the life of the grantor or another person, with the objective of excluding the insurance proceeds (payable on the death of the grantor) from federal estate taxation.
- *Pet Trusts* – a trust that ensures that money is available for the care and benefit of a pet, as well as a caretaking system as desired by the grantor.
- *Spendthrift Trusts* – a form of Irrevocable Trust written in such a way as to protect the assets of the trust from the beneficiary's creditors, as well as guard against a

beneficiary who does not handle money well, so that the beneficiary's needs will be taken care of for as long as possible.

Health Care Advance Directives

Florida recognizes the rights of competent adults to make advance directives, or instructions, regarding their own medical care. Different types of Health Care Advance Directives are available that serve specific medical and legal situations. As described earlier, a Living Will is such an advance directive; however, it is limited to terminal or end stage medical scenarios.

A well-rounded estate plan generally includes another health care advance directive called a Designation of Healthcare Surrogate:

Designation of Healthcare Surrogate – One of the most important forms of advance directives, a Designation of Healthcare Surrogate allows you to authorize someone you trust to be your representative in healthcare decisions, and includes instructions concerning your medical treatment. The healthcare surrogate handles decisions on issues that may arise *before* you are terminally ill, such as admission to a hospital, operations, and transfusions. Your representative also makes medical treatment decisions for you if you are incapacitated or unable to express these decisions yourself.

The Healthcare Surrogate document also authorizes your designated representative to receive your confidential medical information, apply for Medicaid and Medicare on your behalf, and various other critical estate planning responsibilities. A Designation of Healthcare Surrogate does not authorize someone to make the decision to terminate life-sustaining measures.

A good, traditional estate plan can structure assets behind tax shelters, avoid the costs and inconvenience of probate, manage finances and establish trusts to protect assets and provide for your loved ones when you're gone. Yet traditional estate plans often do not take into consideration that the *countable assets* in an inheritance, when distributed to someone in need of government benefits, can disqualify that person from receiving those benefits.

An Elder Law Attorney can help you create an estate plan that is truly a life plan, carefully bearing in mind the special circumstances and needs of older and disabled persons. Special Needs Trusts and other legal tools will establish a well-rounded estate plan designed to handle the event of disability or long-term care needs, elderly housing issues, healthcare decision making and guardianship avoidance. It is wise thinking to protect your life savings from the perspective that nursing home care, assisted living or other long term care may indeed become necessary.

Chapter 4

Veterans Benefits

Overview of Veterans Benefits

Veterans Benefits may be available to elderly veterans, or their surviving spouses, under certain circumstances. If the Medicaid applicant is a veteran (or the surviving spouse of a deceased veteran), the Florida Department of Children and Families (DCF) caseworker will often require that an application for Veterans Benefits be filed with the Department of Veterans Affairs before the Medicaid application is approved. Any benefit received by the veteran (or the surviving spouse) will transfer some of the cost burden paid out by the Medicaid program to the Veterans Administration.

Reprinted with permission from John R. Frazier, *Protecting your Family's Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, 1st ed. (Rainbow Books Inc., 2008), 76–79.

Because the approval of Veterans Benefits typically takes several months, the DCF caseworker will not require proof of an actual *approval* of Veterans Benefits; the caseworker will only require proof that the person has actually *applied* for the Veterans Benefits.

Under some circumstances, Veterans Benefits can be quite significant. There are even certain situations where the Department of Veterans Affairs may pay for the entire cost of nursing home care, which would eliminate the need to apply for Medicaid benefits. However, these circumstances are rather rare.

There are two general categories of Veterans Benefits: **service connected** benefits and **non-service connected** benefits. There are also other important concepts related to eligibility for Veterans Benefits.

One requirement is that of having performed active service in the US military, which, incidentally, does include a broader scope than just the US Army, Navy, Air Force, Marines and Coast Guard. Prior membership in the Merchant Marines, the Woman's Army Auxiliary Corps, or the National Oceanic and Atmosphere Administration (NOAA), as well as several other organizations, may lead to eligibility for Veterans Benefits. The US Department of Veterans Affairs can be contacted for a complete list of all organizations that may lead to eligibility for Veterans Benefits by calling 1-800-827-1000.

As a general rule, other requirements are that the active service must have occurred during a period of wartime (at least one day), the veteran must have actively served a minimum of 90 days, and the discharge from service must be for other than a "dishonorable" reason.

Service Connected Disability Benefits

If a veteran meets the criteria for active service and becomes disabled as the result of an injury during active service (or a disability that worsens as the result of active service), the veteran will be eligible for Service Connected Disability Benefits. The disability levels range from a low of 10% disability up to a maximum of 100% disability, with 10% interval classifications between. If the disability worsens over time, it is possible for the veteran to increase his or her level of disability classification, creating a higher level of benefit payment.

Non-Service Connected Veterans Benefits (“VA Improved Pension” or “Pension”)

A veteran can qualify for Non-Service Connected Veteran Benefits if the veteran:

- meets the basic 90-day rule of active service;
- served at least one day during a time of war;
- is permanently disabled;
- meets certain asset and income criteria; and
- discharge is other than dishonorable

The Aid and Attendance Program

When dealing with Medicaid applications, a Veterans Benefit referred to as “Aid and Attendance” is the program that is most commonly encountered. If the veteran meets the basic eligibility criteria described previously, and the veteran (or spouse) needs assistance from

another person with the activities of daily living, then the veteran will qualify for the Aid and Attendance benefit. Aid and Attendance is particularly important in the assisted living setting.

Unreimbursed medical expenses (which include the cost of the assisted living facility) can be considered to help qualify the assisted living facility resident in receiving Aid and Attendance. The monthly payments from Aid and Attendance will help to pay the cost of the assisted living facility. Because of that, Aid and Attendance benefits can sometimes eliminate the need to apply for Medicaid – for some assisted living residents.

Chapter 5

Selection of an Assisted Living Facility (ALF) or Nursing Home

An assisted living facility is a residence that offers an intermediate level of care appropriate for many seniors. They can help monitor the care of elderly residents who need assistance with the Activities of Daily Living (ADLs), yet who wish to live as independently as possible. Assisted living facilities work more like a traditional housing facility, but with the support staff on hand to deal with age-related issues.

Unlike assisted living facilities, a nursing home is a place for residents who cannot care for themselves. With extensive resources, residents with medical issues as well as mobility issues can have the support they need when family members are unable to step in and help.

Originally published in a slightly different form in *Protecting your Family's Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, 2nd ed., John R. Frazer (Rainbow Books Inc., 2012), 149-163.
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How to Select an Assisted Living Facility (ALF)

These facilities can supervise the residents as well as help them with:

- The administration of medication
- Basic health needs
- Personal care tasks

Many of these assisted living facilities are currently covered by Medicaid, though others have lost their ties to Medicaid coverage. Checking with the facility ahead of time can allow a family to see which facilities may be more cost-effective.

Some of the things a resident can expect from an assisted living facility include:

- A trained medical expert available during certain hours
- A staff who can handle basic needs and tasks
- Private apartment-like housing for each resident or couple
- Common areas for socializing with other residents
- Communal eating in some facilities

Unlike nursing homes, the assisted living facilities will not have medical equipment on hand. There might be nurses who come in to provide basic care, but long-term and chronic diseases may require more extensive care than an ALF can provide.

A good candidate for an assisted living facility is one who can manage to move around on their own, even with the help from a motorized scooter or other mobility devices. This person might be able to live on their own, but may have issues with:

- Isolation

-
- Trouble with medication management
 - Everyday tasks like shopping and cleaning

Questions to Ask the Assisted Living Facility Staff

The burden of proving that an assisted living facility is up to the task of caring for its residents lies solely on the residents and their families. Therefore, it's a good idea to ask a number of questions before signing up a loved one for this sort of residence. Some of the questions one might want to ask include:

- Does the facility have a current license from the state?
- Is there a formal quality assurance program in place?
- Who is on the staff and what are their certifications?
- Is the staff expected to continue training and maintain their licenses?
- What services are provided to the residents?
- What should residents NOT expect to find at the facility?
- What problems have occurred in the past?
- Have there been any complaints?
- How much can the family be involved in the planning process of the resident's care?
- What will happen in an emergency?
- What activities will a resident enjoy?
- What are the costs associated with living at this facility?
- Is Medicaid an insurance which can cover some costs?
- If the Medicaid status is taken away from the facility, what happens to the resident?
- What handicap accessibility features are in place?

- What meals are available to the residents, should they choose to use that service?
- How long is the waiting list for the facility?
- A prospective client and their family should also be certain to tour the building to make sure it fits their needs as well as their personal comfort levels.

Safety

Safety issues that should be discussed prior to signing any paperwork for the facility include:

- What happens during a medical emergency?
- How fast can help be summoned?
- Is the property protected from outside intruders?
- What safety features will keep each resident safe in their individual apartments?
- Are there railings for safety in common areas and in some of the apartments?
- What measures are in place to prevent falls and slips in the hallways?
- How would the resident alert someone of an emergency?
- Is there help on call 24 hours a day?

Staffing Issues

The people who are available for the residents will help not only to ensure the safety and the well-being of the residents, but they can also act as liaisons between the residents and their families.

While the staff cannot be expected to be everywhere at once, the assisted living facility should have a large staff on hand during the daytime hours to help with all of the needs of their residents. The staff should include:

- Licensed health care workers (nurses, MAs, etc.)

- Regular staff members
- Maintenance workers
- Management staff

Some questions to ask the assisted living facility include:

- How high or low is the turnover in this facility?
- What are the current licenses and certificates on file for the staff?
- Can I check the validity of these licenses?
- Have background checks been run on all of the staff members?
- Is the staff able to speak clearly and in a language the resident will understand?
- How often are staff members going to check in with the residents?
- What will the staff members do for the residents?
- When will the staff be available to residents?

Health Care Services

When moving into an assisted living facility, complications can happen – and health troubles may need to be addressed. The nurse or other highly skilled staff member will not be on call at all times of the day, but the resident should still have confidence that they will be supported if something happens during their stay at the facility.

Other health care concerns to keep in mind:

- What is the nutritional content of the food served at the facility?
- What health testing options are available?
- How can the facility cater to specific needs for your loved one? i.e. a low cholesterol diet.

-
- What are the different levels of assistance available at the facility?
 - What will happen if the resident requires more supervision or medical care?
 - How does the facility support medication checks and refills?
 - Are there services to take residents to doctor appointments?
 - What conditions is the assisted living facility unable to support? i.e. Alzheimer's.

Activities

Elder residents may not realize how isolated they were when they lived in their own home. The assisted living facility situation can remind them just how nice it is to be around others the same age, enjoying shared activities and games.

Questions to ask about the social aspects of the ALF include:

- What weekly activities are available?
- Are there special outings the residents can enjoy?
- What resources will be available to residents? i.e. library, board games, cards, DVDs, music.
- Is there a regular schedule of activities?
- How are holidays and birthdays celebrated?
- Is there a common area for the residents to share?
- Can all of the residents enjoy the common room at once?
- Are there exercise facilities available?

A resident who is able to interact with others their age tends to be a resident who is not only happier, but also one who stays more mentally fit as the years go on. Having someone to talk to

and to share their lives with allows residents to feel less like a patient and more like an everyday person.

Other important considerations affecting the choice of an assisted living facility include location and accessibility, price and costs, and the cleanliness of the buildings and housings areas.

How to Select a Nursing Home

Nursing homes are places where residents can receive more specialized care than they might in more independent living situations. Residents will be able to receive:

- help with bathing
- help with grooming
- help with dressing
- help with moving from one place to another
- specialized therapies – physical therapy, etc.
- skilled nursing services
- access to activities which promote social interaction
- nutritional support for their conditions
- support for more complicated conditions
- constant supervision, if needed
- help when the resident is immobile

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- interaction with staff members and fellow residents
 - the transition from ill to well

A Checklist for Choosing the Right Nursing Home

A number of questions need to be considered before making the final decision as to where to send a resident. Not all nursing homes provide the same services or level of care that a resident may need now or in the future. The following checklist may help you make your final decision:

- What kinds of certifications and/or licenses does the nursing home have?
- What do the state health department records reveal about the cleanliness?
- Are the current residents happy and healthy?
- How many staff members are available to residents?
- What are the qualifications of the staff members?
- Are staff members friendly and helpful?
- What is the standard of care in terms of mental health treatment?
- What range of conditions can the nursing home handle?
- What are the costs of the nursing home? What insurances can cover costs?
- Are the rooms adequate in space? Private? Have windows?
- Is there some privacy for residents?
- What is the condition of the main rooms?
- Are there activities present for residents to enjoy?
- Are there different levels of activities available for different residents?
- How noisy is the nursing home?

-
- Are there handrails in place in the halls and bathrooms?
 - Is the menu and meal planning overseen by a registered dietician?

As in the selection of the assisted living facility, nursing home selection requires some time from the family members or a geriatric care manager to make sure the facility meets the needs of the resident. Families may want to visit several facilities before making a final decision.

More Tips to Choose the Right Nursing Home

Care should be taken to ensure that the resident is comfortable and safe at all times. With some scary stories emerging of elder abuse, families owe it to their loved ones to ensure the nursing home is not only supporting their physical health, but also their mental health.

Check out the staff. It is essential that the nursing home perform thorough background checks on all of the staff members before they are hired. Staff members should also be sent for regular training programs and to update licenses and certifications.

Special services. If the resident is suffering from dementia or Alzheimer's, it is crucial that the resident have access to staff members who are equipped to handle such situations. More often than not the resident who has severe cognitive impairment will require specialized supervision and care.

Loss prevention. Systems should be in place to help residents who might lose their possessions while at the nursing home facility. Are there places where the residents can store valuable items or should those be left with a loved one?

Abuse prevention training. The nursing home facility should also provide abuse prevention training to its staff to ensure residents are treated with the utmost respect and care during their stay in the facility.

Separate units. As some residents may require constant supervision, it may become necessary for the nursing home to have separate wards or units for different types of residents. For residents who may be in the early stages of dementia, for example, the flexibility of having multiple wards available can help to ease a future transition into a more secure unit.

Cultural and religious support. A resident in a nursing home may want to have all of the comforts of home they have already come to enjoy. Having cultural respect and religious service or guidance available can help to keep a resident at ease during their stay.

Care plan updates. Checking to see how often care plans for residents are updated will give families the chance to see how a resident is progressing and whether they need more or less specialized care.

Privacy issues. Residents may want to have their own space from time to time to feel as though they are in a place which is more like home. Having access to a phone line that is out of the way of others as well as to have a place to sit and reflect without interruption can be helpful to residents. In addition, if family members want to visit, a private area where the resident and the family members can interact is much appreciated.

In the visits to various nursing homes, families of residents will want to eat the food, go to the rooms, and see the home from the point of view of their loved one.

Communication for Out of Town Family Members

As many families are now spread out around the globe, it may become necessary for the elderly resident to be in a nursing home which is far away from their hometown or from the cities where their relatives reside. In these common situations, it is advised that residents and their families know that the lines of communication are always open and available.

The resident should be able to call on a regular basis and receive calls as they come in from their children or other loved ones. The staff should also be frequently updating the families on the condition of the resident or be readily available to answer questions via phone, email, or fax, if possible.

Chapter 6

The Unlicensed Practice of Law in Florida

Non-lawyers can get into serious legal hot water if they attempt to pass themselves off as lawyers. The reasons are self-evident. But how do you define the so-called Unlicensed Practice of Law (UPL)? Why do people engage in this practice? What punishments might they incur?

In Florida, UPL is defined through case law as opposed to through some universal, unchanging definition. In other words, context matters.

More specifically, the law says:

The practice of law ... includes the giving of legal advice and counsel to other as to their rights and obligations under the law and in preparation of legal instruments, including contracts, by which legal rights are either obtained, secured, or given away... ²⁹

Reprinted with permission from John R. Frazier, *Protecting your Family's Assets: How to Legally Use Medicaid to Pay for Nursing Home and Assisted Living Care*, 2nd ed. (Rainbow Books Inc., 2012), 169–184.

The biggest concern that the court has in defining, preventing, and regulating legal practice is “the protection of the public from incompetent, unethical, or irresponsible representation.”³⁰

To determine whether a non-attorney’s actions constituted UPL, you must examine existing case law and view the non-lawyer’s actions (or non-actions) in the context of these other cases.

Examples of Courts Ruling That a Non-Attorney Is Engaged in Unlicensed Practice of Law:

- When someone gives advice, consults, explains, or recommends legal documents, that constitutes UPL.³¹
- The Supreme Court, in a 1992 Advisory Opinion, said that a non-lawyer who assembles, drafts, executes or funds a living trust for a third party is engaging in UPL.³²
- A non-attorney who obtains a standard legal form – something you might print off a reputable internet site, for instance – and then engages in any “creative” drafting may be charged with the Unlicensed Practice of Law if he or she does anything more than act as a secretary or scrivener.³³
- The court holds that amateurs practicing law are as potentially harmful to Florida communities as are amateurs who practice surgery.³⁴
- In Florida, practicing law without a license is a third degree felony – a very serious crime that can lead to lengthy jail sentences.³⁵

UPL and Medicaid Planning: Why There Has Been a “Vast Proliferation” of Non-Attorneys Advising the Public

In recent years, there has been a great increase in the number of non-attorneys who have begun to provide Medicaid planning services. In many instances, the services being provided by non-attorney Medicaid planners appear to be very similar to the services being provided by attorneys who provide Medicaid planning services.

As mentioned in Chapter 2, the Federal Deficit Reduction Act of 2005 (DRA) was enacted into law in Florida on November 1, 2007. The Deficit Reduction Act made significant changes to *Medicaid Qualifying Annuities*. One of the major changes made by the DRA was that balloon style Medicaid qualifying Annuities could no longer be used to shelter assets for unmarried Medicaid applicants. Without question, the most commonly used insurance/annuity product used to obtain Medicaid benefits for unmarried Medicaid applicants in Florida prior to November 1, 2007 was the balloon style Medicaid Qualifying Annuity.

Although the balloon style Medicaid qualifying Annuity could still be used by the community spouse after the DRA, the new law also now requires that the State of Florida be named the first beneficiary on a Medicaid Qualifying Annuity used by a community spouse to shelter assets to obtain Medicaid benefits for his or her spouse. For all of these reasons, Medicaid Qualifying Annuities went from being one of the most commonly used Medicaid planning strategies in Florida to a strategy that is rarely used in Florida.

Prior to November 1, 2007, it appeared that the vast majority of non-attorney Medicaid planners involved in Medicaid planning were Florida-licensed insurance agents, who limited

their Medicaid planning services to the sale of Medicaid Qualifying Annuities. Prior to November 1, 2007, most non-attorney Medicaid planners were neither involved in counseling prospective Medicaid applicants on the laws to obtain Medicaid benefits nor the preparation and submission of the Medicaid files to the Florida Department of Children and Families (DCF).

Because of the changes in Florida rules regarding Medicaid Qualifying Annuities after November 1, 2007, financial planners who made most of their income from commissions from the sale of Medicaid Qualifying Annuities effectively no longer had a source of income. Because of this legal change, many of those same financial planners, who previously were involved exclusively in the sale of Medicaid Qualifying Annuities, prior to November 1, 2007, have now become *Medicaid Planners* and are counseling the public on the Florida laws to obtain Medicaid benefits. Since November 1, 2007, there has been a vast proliferation in the number of non-attorney Medicaid planners who are advising the public on how to obtain Medicaid benefits. Some of those individuals are insurance agents, and some of those individuals have no state license of any kind. There have even been reports of individuals who have lost their insurance license from the State of Florida, and they are now providing Medicaid planning services to the public. There has even been a report of a disbarred attorney who has established a Medicaid planning company.

An Example to Highlight the Hidden Dangers: A Life's Savings, Wiped Out in Months

Consider this nightmare scenario:

Your great Aunt Eloise, who is a resident of Pasco County, Florida, is hospitalized with complications from her diabetes. The medical crisis disables her, and she needs to be placed in a nursing home as a permanent resident.

To “help” Aunt Eloise now that she is sick, you ask a friend or family member – a non-attorney – to draft a document for her called a Durable Power of Attorney (DPOA). This document is intended to serve as a blueprint for your aunt’s legal and financial planning.

Two years pass, and your great aunt suffers a stroke. Now, she can no longer make her own decisions. So you go to your attorney to ask him to assist Aunt Eloise with applying for Medicaid to defray her nursing home care costs. In Florida, these costs can amount to \$6,000 a month or more, depending on the facility and care needed.

But your attorney has some terrible news: the Durable Power of Attorney documents that the non-lawyer drew up do not contain provisions needed to proceed with Medicaid planning.

More simply put: Aunt Eloise will not be getting the \$6,000 per month she needs to pay for her care. What happens next? Who will pay for her care? Will Aunt Eloise’s life savings be drained away, perhaps in months, due to a momentary lapse of reason and improper planning?

The scenario above is just a single instance of the kind of tragedy that can unfold when unqualified people participate in the Unlicensed Practice of Law (UPL).

The moral is: you need to choose your representation carefully!

How to Make the Safest Choices

There are legal and ethical considerations that need to be made when choosing a professional to help you with restructuring the assets and income of your loved one to obtain Medicaid benefits. To be eligible to practice law in Florida, an individual must be a member in good standing with the Florida Bar. If a person who provides Medicaid planning services is not a member of the Florida Bar, and you are considering the use of such a person to obtain Medicaid benefits for your loved one, the following considerations need to be made:

- By definition, a non-attorney has no license to practice law in Florida. The person is unlicensed to practice law.
- Because the person is not licensed by the Florida Bar, the person is therefore not regulated by the Florida Bar. This means that a non-attorney is not required to follow the rules and procedures that attorneys must follow to maintain their law license with the Florida Bar. If you are injured by a non-attorney who is providing Medicaid planning services, what entity is going to make you whole and discipline the non-attorney if they are not regulated by the Florida Bar? Attorneys who practice law in every state are regulated by numerous rules and regulations governing their conduct. The primary reason

for these rules and regulations is to protect the public from being harmed by people who are not qualified to practice law.

Example: Carmela holds a valid durable power of attorney for her father Xavier, who is a resident of Santa Rosa County, Florida.

Xavier is a long-term resident of a skilled nursing facility. Xavier's gross monthly income is \$2,050 per month, which is slightly below the 2013 Florida income cap of \$2,130 per month.

Instead of hiring an attorney, Carmela hires a very likable and popular insurance salesman named Tony, who is holding himself out as a Medicaid Planning Specialist.

Tony was recommended by the nursing facility to Carmela. Tony was paying the nursing home representative \$200 for each client referral he received from the facility. Tony also holds a real estate license, and he is actively involved in real estate sales.

Tony, the non-attorney Medicaid planner, is somewhat familiar with Florida Medicaid rules, and he recommends that Carmella purchase income-producing property to restructure Xavier's assets and bring Xavier below the \$2,000 asset limit.

Upon hiring Tony, Xavier had \$200,000 in his checking account.

Tony charged a fee of \$6,000 for his advice to restructure the assets. Because Tony was also a real estate agent, Tony recommended that Carmela purchase a piece of rented real estate on which he was the listing agent. Tony then sold the real estate to Xavier (for \$192,000 minus his commission), and Tony earned a commission on the sale of the real estate. The property was rented for \$300 per month. In the consulting agreement, Tony

wrote into the contract with Carmela that if the rental property now owned by Xavier were ever sold at any point in the future, Tony would be entitled to 50% of the gross profit on the sale of the property. Tony then submitted the Medicaid application to the Florida Department of Children and Families (DCF), and the Medicaid application was denied.

The Medicaid application was denied for two reasons:

1. Tony failed to advise Carmela that the \$300 monthly rent put Xavier over the \$2,130 income cap, and no qualified income trust was established.
2. The DCF caseworker determined that the \$300 per month rent was not a *fair market value rent*, and the rental property was determined by DCF to be a countable asset because the rent was not a fair market value rent.

In addition to failing to properly advise Carmela on all the legal ramifications of his advice, Tony, if he were an attorney, may have also committed some serious ethical violations. First of all, since he was the real estate agent in the sale, and he earned a commission on the sale of the rental property, that action raised a serious question about a conflict of interest. Second, by sharing in the profit on the sale of Xavier's rental property, Tony also acted in a way that would raise serious questions about a conflict of interest. Further, by failing to advise Carmela on the legal ramifications of all of the consequences regarding the purchase of the rental property, Tony failed to adequately represent Carmel and Xavier, and the Medicaid application failed. Since Tony is not licensed or regulated by the Florida

Bar, what Florida government agency would be responsible for regulating Tony's conduct and protecting Carmela and Xavier from the harm that Tony caused them?

A third problem with hiring a non-attorney Medicaid planner to perform Medicaid planning services is that non-attorneys, since by definition they are not attorneys, could not be covered by legal malpractice insurance.

Example: Consider the preceding example regarding Carmela, Xavier and Tony.

After the problems Tony caused Xavier and Carmela because Tony was not licensed, regulated, or trained as a Florida attorney, the family had to locate an experienced Elder Law attorney to fix the damage caused by Tony. By the time the new elder law attorney was hired, the Qualified Income Trust was established, and the rental property was rented out for a fair market value rent. Eight months had passed since Tony first told Carmela he would obtain Medicaid benefits for Xavier. The facility had a private pay rate of \$220 per day during that time. Therefore, the base cost to Xavier was \$6,600 per month. In addition, other incidentals (such as over-the-counter medications, laundry, transportation to and from doctors and hospitals, etc.), which are covered by Medicaid, cost Xavier an additional \$600 per month. Accordingly, Xavier now owed the nursing home \$57,600 (\$7,200 x 8 months) for the cost of his care for the past 8 months.

Carmela sued Tony for the \$57,600 owed to the facility, but she quickly found out that Tony had no legal malpractice insurance because he was not an attorney. Carmela then discovered there were multiple other lawsuits pending against Tony because of

failed Medicaid cases and that Tony had just filed bankruptcy to protect himself against the pending lawsuits. Unfortunately, after learning of these circumstances, Carmela realized that Tony would not be able to make Carmela or her father whole.

To add to Carmela's woes, the nursing facility had asked Carmela to sign the admissions documents to the nursing home, when her father was admitted to the facility. Carmela was under a lot of stress. She did not understand it at the time, but one of the admissions documents she signed made her personally liable for any unpaid bill at the nursing home, and now Carmela owed \$57,600 to the nursing home.

The actions of Tony in the preceding examples can also lead to potential liability for the nursing home and its employees.

Example: Consider the preceding two examples regarding Carmela, Xavier and Tony.

After realizing that she was personally liable for the \$57,600 owed to the facility, Carmela contacted another attorney who concentrated his practice in negligent referral lawsuits. After listening to the fact pattern, the attorney advised Carmela to sue the nursing home under a theory of negligent referral.

A lawsuit was filed against the nursing home, and the facility decided to settle the case out of court, because the corporate owners realized that the nursing home employee was clearly negligent in referring Carmela to Tony, who was not qualified to handle Medicaid cases.

The nursing home also fired the employee, because she negligently referred Carmela to Tony, and because she accepted \$200 payment from Tony as a kickback.

The Florida Bar Standing Committee for Unlicensed Practice of Law has also recently addressed the issue of non-attorneys providing Medicaid planning services. In a letter dated May 13, 2009, the Committee issued the following statement in their letter:

The committee voted that based on existing case law, the following activities would constitute the unlicensed practice of law: establishing irrevocable trusts, establishing Qualified Income Trusts, and hiring an attorney to review, prepare or modify documents for customers if payment to the attorney was through the company.³⁶

The Florida Bar Standing Committee voted that the following activities would have to be determined on a case-by-case basis: restructuring assets, counseling customers on the best way to get Medicaid approval, and advertising as an “elder counselor”.³⁷

Example: Alejandra contracted a non-attorney Medicaid planner, Steve, who is a Florida licensed insurance agent and holds himself out as a “Medicaid Planning Specialist.”

Alejandra’s father, Armando, has been a resident at an assisted living facility in Escambia County, Florida. The owner of the assisted living facility referred Alejandra to Steve.

The assisted living facility can no longer meet Armando’s medical needs, and Armando must now move to a skilled nursing facility.

Armando's gross monthly income is \$4,000 per month, which includes his Social Security and a DFAS pension, from Armando's prior military service in the United States Air Force. The \$4,000 per month in income had been just enough to pay the \$3,800 per month bill at the assisted living facility.

The private pay bill at the new nursing home is going to be \$7,100 per month, and Armando has no money saved up. He generally only has about \$1,500 left over in his checking account each month after paying the assisted living bill.

The insurance agent Steve tells Alejandra that he has drafted durable powers of attorney and Qualified Income Trusts for his clients in the past, and that he has successfully obtained Medicaid benefits for nursing home residents in the past. Steve advised Alejandra that Armando will need a Qualified Income Trust to obtain Medicaid benefits, because Armando's monthly income exceeds the \$2,130 income cap. Steve quotes a fee of \$3,800 to draft a durable power of attorney, a Qualified Income Trust, and submit the Medicaid application for Armando.

Steve is also a Notary Public. Steve prepares the durable power of attorney for Armando, and he goes to the nursing home to visit with Armando and execute the durable power of attorney.

Steve properly executes the power of attorney with two witnesses and then sets up an appointment with Alejandra, who Armando has named as his attorney-in-fact in his newly signed durable power of attorney. Steve then prepares a Qualified Income Trust and has Alejandra sign it in the presence of two witnesses. Steve tells Alejandra that he

has provided these exact same services for many Medicaid applicants in the past, and all of his cases have been approved.

After Armando's Medicaid is submitted to DCF, the Medicaid application is denied. Unfortunately, Steve was not aware that Florida adopted a new power of attorney statute on October 1, 2011. Steve continued to use the same power of attorney document after October 1, 2011 that he had been providing to clients for the past few years.

Under the new power of attorney statute, a "general grant of authority" is no longer effective, and to establish an irrevocable trust, a separate provision in the durable power document authorizing the establishment of the trust needed to be initialed or signed by Armando. Steve was not aware of the new power of attorney statute, so Steve continued to use the same durable power of attorney document he had always used in the past.

By the time the decision was issued by the DCF caseworker in Armando's Medicaid case, three months had passed, and the unpaid bill in the nursing home exceeded \$21,000. Neither Armando nor Alejandra had sufficient funds available to pay for the unpaid private pay bill in the nursing home, and when the Medicaid case was denied, the nursing facility issued a discharge notice to Armando, due to his failure to pay the bill.

Personal Service Contracts are also a very popular Medicaid planning strategy that are used by unmarried Medicaid applicants to obtain Medicaid benefits. However, caution must be exercised when using personal service contracts.

Example: Francisco is a resident of Indian River County, Florida, and he is a long-term resident in a nursing home.

His daughter Marisol is his attorney-in-fact under a properly executed durable power of attorney prepared by a Florida licensed attorney. Francisco currently has \$800,000 in savings, but the nursing facility is charging \$7,500 per month, and Francisco is expected to live another twenty years.

Francisco was recently diagnosed with dementia, and he is not expected to ever leave the nursing home. The business office at the nursing home refers residents' families to a non-attorney Medicaid Planner named Goldey, who is also an insurance agent.

Marisol meets with Goldey, and Goldey states that she has prepared personal service contracts for Medicaid applicants in the past, and all of her cases have been approved.

Goldey suggests that Marisol consider transferring approximately \$800,000 to herself, under a personal service contract, to reduce Francisco's countable assets below \$2,000. Goldey states that since Marisol is the only child of Francisco, and Marisol is the sole beneficiary of Francisco's Will, it would make perfect sense to transfer the money to Marisol. Marisol agrees, Goldey prepares the personal service contract, and Marisol issues a check to herself for \$790,000.

Goldey charged a \$9,000 fee to prepare the personal service contract. Goldey was not familiar with the IRS rules regarding personal service contracts, and Goldey never mentioned anything to Marisol about income taxes.

Goldey submitted the Medicaid application with the \$790,000 personal service contract. DCF promptly denied the Medicaid case, based on the fact the \$790,000 payment was not a fair market value payment for Marisol's services.

Marisol really liked Goldey, so Marisol just decided to forget about the whole thing and use the \$790,000 to pay the private pay bill at the nursing home.

The following year, the IRS audited Marisol due to a separate sole proprietorship business she owned. During the IRS audit, the IRS discovered the \$790,000 payment and the personal service contract. Marisol ended up having to pay the United States Treasury \$270,000 in back income taxes, interest and penalties.

Protecting the Public

What should you do if you have been injured by the unlicensed practice of law – or become aware of the unlicensed practice of law?

The Florida Bar's approach to investigating allegations of the unlicensed practice of law has been described as *complaint driven*. In other words, there is no way for the Florida Bar to become aware of alleged unlicensed practice of law activity unless someone reports the activity to the Florida Bar.

Another way to look at the unlicensed practice of law in Florida is that it is very unlikely that a particular instance of UPL will be investigated by the Florida Bar, unless someone reports the alleged UPL activity to the Florida Bar. As a practical matter, the way for the public to be protected is for members of the public to report alleged UPL activities to the Florida Bar. Remember the famous words of Edmund Burke: "All that is necessary for the triumph of evil is that good men do nothing."

If you become aware of, or have been injured by any of the following activities, you should report them to the Florida Bar:

- The drafting of qualified income trust documents by a non-attorney.
- The drafting of a personal service contract by a non-attorney.
- The drafting of a durable power of attorney by a non-attorney.
- The drafting of a living trust, and irrevocable trust, a Will, a living will, or a health care surrogate by a non-attorney.
- A person who is not licensed as an attorney and who states he/she is an attorney.
- A person not licensed as an attorney who appears to be giving legal advice to members of the public.
- Any person who has been paid a “kick back” by a nursing home or assisted living employee in return for a client referral.

The Florida Bar provides a short form that can be quickly completed to report alleged instances of UPL. To obtain the form from the Florida Bar you can call them toll free at 1-800-235-8619, or log on to their website at www.FloridaBar.org.

Remember, if you take no action against alleged instance of UPL, there is no way the Florida Bar can become aware of the problem or do anything to correct the problem.

Key Points to Remember Regarding Durable Power of Attorney and UPL:

Whether the senior lives in a nursing facility, or some other environment, one of his or her most pressing issues almost certainly involves how to finance the cost of their care. As discussed

earlier, this care can cost upwards of \$6,000 a month. If a resident stays in a nursing home for five years, those costs can exceed \$350,000.

To qualify for Medicaid, a senior often needs to engage in rather sophisticated planning; thus, the Durable Power of Attorney document must be carefully constructed. If a non-lawyer engages in the UPL and drafts a DPOA or other document related to estate planning, the senior may experience dramatic legal problems, including – potentially – disqualification from Medicaid.

The Durable Power of Attorney gives a third party, often known as an agent, authority and power to make decisions and act on someone's behalf. The agent will often be able to enter into contracts and create trusts on behalf of the senior as well as to design and execute a Medicaid plan.

Standard DPOA documents – so-called fill in the blank documents – may be inadequate to sufficiently protect the senior. It is generally far better practice for the resident to turn to an experienced Florida elder care attorney to draw up a customized DPOA.

Protecting Legal Rights

What can you do to protect yourself and the senior you care about?

Protecting Your Own Legal Rights

- Refrain from drafting a DPOA document for any senior or any other family members;
- Refrain from drafting or executing any other legal document, such as an estate plan document;

-
- Refrain from advising the senior about what forms to get, how to fill them out, etc.
 - Refer the senior to a Florida elder law attorney, who can help the senior structure her income and assets, develop effective options, and ensure an ethical and positive outcome.

Protecting the Senior

- *If the senior is of sound mind and body* – he or she should consider connecting with a Florida elder care and estate planning attorney to discuss documents and mechanisms to protect his or her assets and ensure effective end-of-life care.
- *If the senior is no longer able to make decisions effectively* – again, a visit to a qualified estate planning and elder care attorney may be appropriate.

Preparation is the best defense against costly misjudgments. Often, seniors and/or concerned family members engage in dubious practices, like the Unlicensed Practice of Law, because they find themselves blind sided by unexpected problems. Panicked, they rush to solve these issues and unwittingly create potentially catastrophic legal and financial problems.

Fixing Problems that Have Already Happened

If you or another non-lawyer has already drafted a legal document or engaged in other practices that you believe might have constituted UPL under Florida Law, you can take action to rectify the situation before it becomes problematic and/or leads to penalties, or other legal problems. The sooner and more proactively you address any problems – even problems that may seem insurmountable right now – the better the likelihood that you will receive the

compassionate, attentive help that you need to make it through your crisis. You should contact an experienced elder care attorney right away to discuss your legal questions in a confidential setting.

About the Author

John R. Frazier, J.D., LL.M.



John R. Frazier graduated Cum Laude from Hampden-Sydney College in Virginia with a B.A. in Economics in 1986. He received his Master's degree in Business Administration from Virginia Tech in 1994; graduated Cum Laude from the University of Toledo, College of Law in 1997; and received his LL.M. in Taxation from the University of Florida, College of Law in 1998.

John is licensed to practice Law in both Florida and Georgia, and he practices primarily in the fields of Elder Law, Medicaid Planning, Veterans Benefits Law, Estate Planning, Asset Protection, Taxation, and Business Organizations.

John is admitted to practice before the United States Court of Appeals for Veterans Claims, and he is accredited by the Veterans Administration to assist VA claimants present, prepare and prosecute claims with the VA. He is also a member of the National Organization of Veterans Advocates, Inc., the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys, and the Florida Bar Elder Law Section.

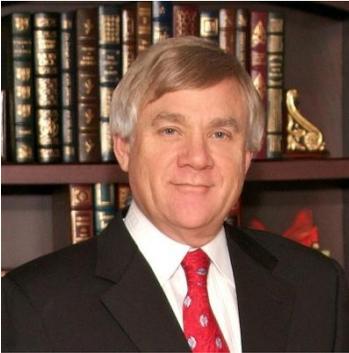
As the son of a physician and military officer, and with four brothers, John traveled widely in the U.S.A. and abroad while growing up. John's exposure to different cultures has created a lifelong interest in learning about other regions of the world. His current interests include the study of Latin America, Spanish music, Italian music and reading.

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About the Author

Joseph F. Pippen, Jr., J.D



Joseph Franklin Pippen, Jr., Attorney, was born in 1947 in Richmond, Virginia. He graduated from Virginia Tech in 1969 with a degree in economics. He also served in the National Guard as a Captain of a combat engineering group. From 1969 until 1980, he was an executive in management positions in the fields of manufacturing, production control, marketing, purchasing, finance and public relations.

From 1980 through part of 1982, Joe Pippen served as general manager of Micro-Plate, Inc. of Florida and helped guide the small, high-tech company into becoming a major force in the printed circuit-board industry.

Joe Pippen graduated from the University of Baltimore Law School in 1975 with a Juris Doctorate and has been practicing law since 1982. His law firm has grown to offices in Largo, St. Petersburg, Bradenton, Sun City Center, Tampa, Zephyrhills, Lakeland, Davenport, Clermont, Leesburg, Deland, Fruitland Park, and The Villages. Although Attorney Joe Pippen is an estate planning attorney; his law firm consists of nine attorneys that practice in the areas of estate and tax planning, probate, real estate, asset protection, Medicaid, bankruptcy, guardianship, and family law issues. He has also taught Business Law and Management at Anne Arundel Community College and at St. Petersburg College.

Besides his noteworthy career and business accomplishments, Pippen has numerous other achievements to his credit. He has been honored four times as one of the “Outstanding Men of

America,” has been listed in Who’s Who of Finance and Industry and Who’s Who in American Law. He also has been cited as one of the “Outstanding Volunteer Activists.” Of all his achievements, Pippen is most proud of the millions of dollars he has raised for the United Way and his volunteer role with young people and the free enterprise system through the Hugh O’Brian Youth Foundation.

Pippen is a noted speaker and Lecturer on motivational and personal dynamic subjects as well as management and legal topics. He provides weekly seminars, which anyone can attend at no cost. His weekly column “Ask An Attorney” appeared in several local newspapers, and he has hosted a continuous weekly radio call-in show entitled “Ask An Attorney” since 1985. He has also hosted a national call-in radio show with the same title on the Sun Radio Network.

He is married to his high-school sweetheart, Beverly, and they have two sons, Trey and Troy, and two grandsons, Austin and Trevor. They presently reside in Largo, Florida.

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Endnotes

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