

Law Office of
Stephanie L. Schneider, P.A.

Board Certified Elder Law Attorney

1776 N. PINE ISLAND ROAD, SUITE 208
PLANTATION, FLORIDA 33322

TELEPHONE (954) 382-1997

www.fl-elderlaw.com

FACSIMILE (954) 382-9997

Your Trusted Planning Advisor Through Life

LEGAL PLANNING OPTIONS FOR THE ELDERLY AND DISABLED

By Stephanie L. Schneider, Esquire

**Estate & Incapacity
Planning**

- ◆ Probate & Trust Administration
- ◆ Last Will & Testament
- ◆ Revocable Trust
- ◆ Durable Power of Attorney
- ◆ Designation of Healthcare Surrogate
- ◆ Quit Claim Deed
- ◆ Living Will

Advocacy Services

- ◆ Guardianship & Guardian Advocate
- ◆ Facility Residents' Rights
- ◆ Medicaid Applications & Appeals
- ◆ Veterans Benefits Counseling

Government Assistance

- ◆ Special Needs Trusts
- ◆ Representation of Trustees
- ◆ Protecting Lawsuit Proceeds & Inheritances to Preserve Medicaid & SSI Eligibility
- ◆ Exceptions to Medicaid Lien Recovery

*Proper Planning
May Create Peace
of Mind*

The increasing growth rate of our elderly population in the United States is causing the legal profession to take a long hard look at the everyday problems people face as they age, become incapacitated or disabled, and to create practical working solutions for our clients, their families and caretakers. Statistics show, for example, that Florida has one of the largest elderly populations in the United States and moreover, that the fastest growing age group is age eighty-five. We are witnessing firsthand a time period where medical technology and the American lifestyle have made it possible for people to live longer, healthier and more active lives. However, the senior citizen and disabled populations face two frightening realities associated with increased life expectancies.

The first is that many of our citizens outlive their money and are forced to look to the federal and state governments for public assistance. This scenario creates an additional dilemma for older Americans who are caring for or supporting their adult disabled child. The second reality is that the aging process is by no means gracious and so what many people find is that their senior citizen years are not always the "golden years." As a result, we require greater medical assistance, assistance in the home or residency in an assisted living or nursing home facility which can be enormously expensive. A catastrophic illness can completely wipe out a couple's or single individual's life savings. Our health care system is presently in a transition heading towards what is called managed care. While there are unknowns ahead of us, we have already seen that mandatory types of services are being reduced and clients with limited financial resources will be directly impacted.

This article explores the legal and non-legal planning tools available to educate our clients and assist them in making informed decisions concerning the management of their finances, property and health care decisions. Whether you are already an elder law practitioner or a general practitioner who provides services to older or disabled clients, we have an ethical obligation to educate ourselves about new developments in representing the elderly and disabled so that we can best serve our clients. This article takes an interdisciplinary approach to counseling the client and assessing the client's needs because, quite simply, the client is multidimensional and their needs extend beyond their legal problems. The planning we do today can directly impact on our clients' future needs, legal options and tax implications.

We are coming into a new age of the legal practice which requires us to move beyond conventional solutions to meet the current and ever-changing needs of our clients. As practitioners we have a wonderful opportunity to engage in creative problem solving. This, of course, requires that we continue to expand our educational process to include non-conventional resources such as communicating and sharing information with geriatric care

managers, social service agencies that provide adult day care services, financial planners and insurance agents. This list is by no means all inclusive. Today's practitioner may very well be called upon to act in other capacities such as a psychologist or financial advisor. However, many of us have no prior experience or schooling in those areas. Common sense dictates that we not render opinions or give advice in areas that we have no expertise. Notwithstanding, it is our role to identify the problem or issue and to assist the client in seeking appropriate solutions or assistance from other professional resources. It is this author's experience that the attorney who elects to service the elderly and the disabled becomes a clearinghouse of information about resources available to the client and their caretakers that are not always legal related.

SPECIAL PROBLEMS OF THE ELDERLY AND THE DISABLED

The elderly and the disabled client experience some common problems while there are issues unique to the disabled individual. There are generally four areas of concerns that the practitioner should address and evaluate. They are: (a) the client's health care needs; (b) the client's mental capabilities; (c) the client's financial resources and planning needs; and, (d) the disposition of the client's estate upon death.

Since these issues are very personal and private in nature it is of primary importance that the practitioner create an atmosphere of trust and confidence at the initial client contact. In this way, the client will share the information that is necessary in order for us to render proper advice.

A. Health Care Decision making and Related Issues

It is recommended that we begin our assessment by evaluating each client's particular health problems and needs as they can impact on their present and future legal planning needs. This will likely trigger discussion about available health care programs and public assistance. Many people do not understand or confuse the programs known as Medicare and Medicaid. It is therefore crucial that the practitioner have a firm understanding of government assisted programs, their eligibility requirements and events that trigger disqualification. Since a discussion of Medicare and Medicaid is beyond the scope of this article, it is suggested that the practitioner contact the local state agency that is responsible for administering such programs to obtain detailed information about the programs including the administrative guidelines and rules that govern the implementation of these programs on the state level.

When meeting with an older married couple it is likely that one spouse's physical or mental condition is healthier than the other spouse. We must be careful not to disregard or fail to assess the needs of the well spouse. The well spouse tends to be the care giver which is a physically, emotionally and mentally challenging role. Many care givers forget or put aside their own needs. It is helpful for the practitioner to be familiar with city, county and state programs that offer respite care, counseling and other support services to the care giver.

At the initial meeting with the client it is appropriate to raise the issue of planning ahead for potential temporary or permanent incapacity. From the standpoint of planning to deal with future physical incapacity, there are two aspects of planning. There is the legal aspect of ensuring that the client's wishes and desires regarding his/her health care decisions are made known in an acceptable form that complies with state law. There is also the financial aspect of planning to deal with the rising costs of health care so as not to deplete a person's resources and leave them penniless, but rather to permit them to age and be cared for in a dignified manner.

First, as to the legal aspect of health care planning the practitioner should inform the client of their fundamental right of self-determination. Decisions pertaining to the client's own health include the right

to choose or refuse medical treatment. The emphasis should be on ensuring that those rights are not lost or diminished by a later physical or mental incapacity. The client should be advised about the availability of naming a health care surrogate to make health care related decisions on the client's behalf in the event that the client becomes unable to do so. Most states have enacted statutes which permit a competent individual to designate a surrogate by way of a written document signed in the presence of witnesses. These statutes have also anticipated that certain clients have a physical condition, such as palsy, rheumatoid arthritis or Parkinson's, which makes them unable to sign and so the statute provides that the client can direct another person to sign the client's name. Generally, the statutes permit the client to give the surrogate authority to provide informed consent for medical treatment, surgical and diagnostic procedures, to provide, withhold and withdraw consent on the client's behalf, to apply for public benefits to defray the cost of health care, and to authorize admission to or transfer from a health care facility. It is important that the practitioner review the statutory restrictions placed on a surrogate in the absence of express delegation of authority by the client. For example, some state's statutes prohibit a surrogate from providing consent for withholding or withdrawal of life-prolonging procedures from a pregnant patient prior to viability. It is recommended that the client designate an alternate surrogate in the event that the original surrogate is unwilling or unable to perform the duties requested. As a practical matter, copies of the executed document should be provided to the client's surrogate(s) and treating physician.

Many states' statutes also provide a competent adult with the opportunity to execute an advance directive directing their physician to give or withhold treatment (i.e. resuscitation, ventilation, tube feeding, transfusion, antibiotics) in a specific situation (i.e. irreversible coma, persistent vegetative state) that will likely lead to death if emergency treatment is not provided. Similarly, statutes have been enacted that permit a competent adult to execute a written directive known as a living will which authorizes the application or withdrawal of life-prolonging procedures in the event of a terminal condition. Because the artificial prolongation of life for a person diagnosed with a terminal condition (generally, that means there is no medical probability of recovery) may provide a burdensome existence with no benefit and only prolong the dying process, the law provides each person with the right to choose between quality of life and quantity of life. These are decisions that are personal to each client and are impacted by one's religious, moral and ethical values. It is important to stress to the client that they have the opportunity to exercise their rights now while they are competent and to ensure their choices are respected even after they are no longer able to participate actively in such decisions.

Equally important as exercising the rights we are given by law is the obligation to protect ourselves from the soaring costs of health care and inflation. Long term care includes a broad range of medical, personal and social services provided to individuals who are unable to care for themselves on an independent level for an extended period of time. This includes nursing home or institutional care, home care and adult day care. The costs associated with these services are prohibitive for many older clients. What many clients don't know or realize is that programs such as Medicare, Medigap do not pay for long-term health care. Moreover, while Medicaid will pay for most long term care costs, a person must first deplete their assets and financial resources to a minimal level in order to qualify. Long term care insurance is a planning option to help prepare and provide for health care protection for the client's future. Many of the policies available today offer the insured benefits for both institutional and home health care, guaranteed renewability and death benefits. Consequently, long term care insurance is a concept with which the practitioner should become familiar as its purpose is to provide a source of payment in the event of a catastrophic illness. It is recommended that you begin by contacting

the National Association of Insurance Commissioners for their publication entitled A Shopper's Guide to Long Term Care Insurance.

B. The Importance of Property Management Tools When Dealing with Mental Incapacity

During our initial meeting with the client we will also be assessing that person's mental capacity, their ability to manage their financial affairs and to understand the consequences of their actions. This means that among other factors we look at the client's functional autonomy, working memory, orientation, attention span. We also take into account the client's ability to articulate reasoning for a decision, communicate and implement the decision and whether the decision is irreversible. Do not pre-judge a client's mental competency merely because they choose to do something we ourselves would not do--hear the client out. You may want to engage a psychologist or geriatric case manager to assist in assessing the client's level of functioning, deficiencies and needs.

When our clients are experiencing a physical or mental incapacity they are generally unable to properly and effectively make rational decisions concerning their property. On a daily basis, this means that bills are not promptly paid, investments may not be properly managed, and the client may become the victim of financial exploitation by others. Moreover, many older clients experience that handling their financial affairs becomes overwhelming and burdensome. It is therefore important to stress to the client that planning in advance to deal with these situations can save them time, money and grief. It also offers them more planning options.

Two of the options that are available when the client is competent are the durable power of attorney and the living trust. Most states have enacted statutes authorizing the creation of a durable power of attorney. A state by state survey was included in the September/October 1995 issue of Probate & Property. Through the durable power of attorney, the client designates a trusted individual to act on their behalf in the event of a temporary or permanent incapacity or disability. The attorney-in-fact can be given very specific, directed authority as to the scope of managing the client's affairs, business, property and finances. Careful thought needs to be given to the client's present and anticipated needs with respect to the scope of authority granted. With careful planning, the client should be able to avoid needing a legal guardianship down the road. Generally, the agent's authority remains in effect during any period of disability generally provided that there is no legal adjudication of incapacity or a filed petition to determine incapacity or to appoint a guardian. Each state's statute must be reviewed to determine whether the durable power of attorney is effective immediately upon execution or, whether it can contain a springing power. The serious nature of delegating authority must be communicated to the client. Additionally, it is recommended that the client keep the original in their possession and notify the family as to where it can be located in the event it must be produced.

The living trust is another planning tool available to the competent client and is a reasonable alternative to a legal guardianship proceeding. Similar in purpose to the durable power of attorney, it provides for continuity of management of assets and investments during a period of incapacity. It permits the client to serve as trustee while they are capable and to name a successor trustee to administer the trust and carry out daily routines of property management during the client's incapacity or disability. The living trust has the added feature of establishing a track record and credibility by operating while the grantor is alive and making it less susceptible to being challenged at the client's death.

In the event that the practitioner determines that the client lacks the capacity to execute a legal document a legal guardianship will likely be the last option available to address the client's health care and property management needs. Due to the serious nature of the proceeding and the removal of some or all of the client's rights, it is recommended that all other planning avenues be exhausted first.

C. Property Management

During our assessment we may observe that the client is not prudently managing investments or finances and that this is having a detrimental effect on the client's ability to meet their living requirements or provide for adequate retirement income. We have the opportunity to help improve the quality of our clients' lives by bringing to their attention the importance of financial planning which takes into account increased life expectancy and the rate of inflation. While we are not financial planners, we can certainly provide a better service to our clients by directing them to qualified professionals.

D. Estate Planning for the Disabled Child

Effective estate planning requires that we gain a working knowledge of our clients' family's needs and our clients' parental responsibilities. For those clients who have a disabled adult child, proper planning is crucial. If done incorrectly it can result in termination of the child's eligibility for government programs. In order to formulate a plan we must first understand the child's level of functioning, whether they are capable of holding a job or require training and vocational skills, they type of living arrangements they require and they type of government benefits they are receiving.

Clients must be advised that leaving money to a disabled child in their will is detrimental. This fact must also be communicated by the client to any relative that might leave a bequest to a disabled child. Generally, our end goal is to maintain that child's continued eligibility for government assistance and be able to provide the child with extras that are not covered such as trips, clothing, and toiletries.

The special needs trust, sometimes called the supplemental needs trust, is a management plan designed to support the disabled adult child and preserve access to government benefits. Since the purpose of the trust is to supplement, not replace, government benefits it is important to set forth the trust's purpose in the document. The disabled individual cannot have any power over the trust or its assets so that the trust assets are not deemed resources or income to the child.

Additionally, the trust document cannot say that the assets are to be used for the child's health, support, welfare because it will then be viewed as a primary source of support and funding. Practically speaking, the trustee should make all payments directly to the provider of the product or service purchased--the money must be kept out of the hands of the disabled child. The parents should give considerable thought to selecting a responsible, trusted person to serve as trustee, and successor trustee, to assume responsibility for the child. If there are no family members available to serve in this capacity, clients should consider a professional corporate trustee. The parents should provide the trustee with information regarding the child's history, physicians, psychologist or psychiatrist and priorities for care so that the trustee can make proper decisions on a day to day basis.

OBRA '93 changed the law regarding the use of special needs trusts where a disabled person received supplemental security income (SSI) or Medicaid and receives a personal injury settlement. These trusts can be used to assist the disabled person in obtaining or continuing eligibility for these benefits, and

preserve the settlement proceeds to provide for other special needs. OBRA '93 established two types of trusts for disabled persons: the disabled under age 65 trust and the pooled income trust. The 'disabled under age 65 trust' can receive the proceeds of a personal injury settlement of the disabled person. It is an irrevocable arrangement that can only be established by a parent, grandparent, legal guardian of the disabled person or a court. The trust must provide for the state to receive all amounts remaining in the trust upon the death of the disabled person up to the amount of the total medical assistance paid. The pooled income trust must satisfy additional requirements. For example, the trust must be established and managed by a non-profit association and a separate account must be maintained for each beneficiary of the trust. The practitioner should become familiar with the changes and particularly the Health Care Financing Administration's Transmittal 64.

Conclusion

In the coming decade we face a mixed blessing-a difficult task and an opportunity to employ old strategies and create new ones to address our clients' health care and property management needs. We can make legal services more affordable and educate the public about the importance of early planning. We will not only assist the elderly and the disabled client in living and dying with dignity and maintaining their independence but we will also achieve a fulfilling sense of professional and personal satisfaction.