

## Growing Practice Area Meets the Needs of Elderly

The legal practice area known as “elder law” was developed by members of the bar to address the specific needs of the burgeoning number of seniors in our society and in anticipation of the graying of America. Thanks to advances in medical science, our actuarial life expectancy has improved significantly over the past several decades, but so has our risk of dementia and incapacity. This reality has led to a growing need for legal representation in planning estates, protecting vulnerable seniors from financial exploitation, assisting with court appointments as conservators and guardians for the elderly, and planning for eligibility for Medicaid (preserving assets from spend-down for long term health care costs).

Legal matters in which an elder law attorney should be well-versed include:

**Medicaid Planning** - Elder law attorneys routinely provide legal advice about ways to protect assets in the face of impending long term health care expenses for a loved one. Attorney involvement in these matters can range from an office consultation on the available options under Medicaid asset transfer rules to active representation before an administrative hearing officer or the courts to determine eligibility for Medicaid. Strategies are developed and implemented in an effort to preserve assets and income for the spouse or family, especially pertaining to the rules affecting the “well” spouse when the other is entering the nursing home. There are special rules for trusts, annuities, transfers to disabled or caregiver children, capital gains taxes and spousal income allowances which require careful consideration in the decision-making process in the Medicaid context.

**Guardianships** - Virginia recently reformed its guardianship statutes, providing for a standardized procedural framework designed to protect the incapacitated person. For example, family members must be given adequate notice of a pending court appointment in order to provide full awareness of the pending determination. A separate appointment of a guardian (personal matters) and a conservator (financial matters) is made, although these roles are typically given to the same person. Preparation and filing of the petition, coordination with the guardian ad litem, and representation at the hearing requires counsel, and it is advisable for the appointed conservator and guardian to continue working with the attorney to ensure compliance with fiduciary reporting requirements. Of course, it is desirable to have a living trust or powers of attorney in place, but where they do not exist and the person no longer has legal capacity to execute them, the elder law attorney can assist with the solutions to these health and financial management issues.

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**Basic Estate Planning Documents** - Most elder law attorneys are experienced in the planning and preparation of living trusts, wills, powers of attorney for financial and health care matters and living wills. These documents help families handle the practical issues facing their loved ones in times of crisis as well as longer periods of incapacity. Special considerations for the terms of these documents, such as whether to provide the agent with a power to make gifts of the parent's property, should be raised by the elder law attorney. Clients in blended families also raise challenges to naming the proper person to handle the incapacitated person's affairs (i.e., second spouse or oldest child?). The person who makes the will or power of attorney must also have the legal capacity to do so, and the elder law attorney knows how to secure the medical opinion necessary to support the validity of the instrument.

**Advanced Planning** - Often, circumstances call for special arrangements for ownership and control of assets in order to protect those resources from various risks. For example, some seek to establish "special needs" trusts, which are asset management trusts designed to provide funds for quality of life for one who is receiving government aid without requiring that the funds be "spent down" first. Federal and state laws require compliance with very technical rules in order to achieve the purpose of the trusts, and they are not always the most appropriate remedy. Further, transfers to trust can also cause an extension of the period of Medicaid ineligibility and must be considered carefully.

**Other Legal Matters** - While the foregoing issues are those most commonly encountered in the elder law practice, others arise in representing senior clients which overlap with various legal specialties:

- Retirement Account Beneficiary Designations
- Long Term Care Insurance (Policy Analysis and Claims Enforcement)
- Nursing Home Litigation
- Housing Options
- Age Discrimination
- Prenuptial Agreements (Drafting and Enforcement)
- Spousal Estate Claims
- Defense of Unwanted Guardianships
- Tax Matters Affecting Seniors

Elder law matters can be complex and, as with any legal matter, planning makes life easier for

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all concerned. The elder law attorney is equipped to address most legal problems whenever they arise in the context of senior clients and their families.

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