

The Basics of Elder Law

By Lenoard Mondschein

Part 1: What is Elder Law?

Miami Elder law is a specialty of law that addresses the rights of the elderly. It is a broad area of law that encompasses many distinct specialties. National and State Certification exams require an understanding of almost twenty areas of law. Some of these specialties are Public Benefits (e.g. Medicaid, Medicare, SSI and VA), Guardianship, Probate, Estate Planning, Special Needs Trusts, and Elder Abuse. Many specialties such as Social Security, Special Needs Trusts, and Guardianship also affect the disabled who are not necessarily elderly. In those cases, elder law attorneys have specific knowledge of public benefits and other overlapping areas of law.

Public Benefits is a sensitive field determined in large part by governmental economic forces. Dealing with public benefits is the most important characteristic of an Elder Law attorney and distinguishes him or her from a traditional Estate Planning attorney. As the cost of long term care, whether at home, in an assisted living facility, or a nursing home, rises each year, those who do not possess large savings or adequate long term care insurance will require Medicaid to pay their care. Since Medicaid rules are complex and constantly changing, Elder Law attorneys are needed now more than ever and will be necessary in the future to help people plan for long term care, as the population attains higher ages.

HOW CAN I FIND A TRUSTED MIAMI ELDER LAW ATTORNEY?

There are many ways to find an Elder Law attorney. The Florida Bar lists those attorneys who are Board Certified in Elder Law. This informs the public about which attorneys have passed a comprehensive

written examination covering nineteen areas of Elder Law, including peer review. In addition, the National Academy of Elder Law Attorneys, through the National Elder Law Foundation, administers the Certification in Elder Law known as a CELA. This national certification also requires a written examination, as well as peer review. A list of all attorneys in Florida who are board certified in Elder Law can be found at *Flabar.org*, and a list of CELA's can be found at *NELF.org*.

In addition to state and national certification in Elder Law, attorneys who serve in leadership positions, such as Chair of the Elder Law Section of The Florida Bar, or publish articles on various Elder Law subjects indicate their commitment to the practice of Elder Law.

When you speak to an Elder Law attorney, sometimes referred to by the lay public as an Elder Care attorney, ask the following two questions: How much of your practice is devoted to Elder Law? The answer here demonstrates how current the attorney may be on the problem you need resolved. Which specific areas of Elder Law does the attorney specialize in? This is the most important question, since Elder Law is a broad practice area.

In conclusion, research the qualifications of the Elder Law attorney you plan to hire to be sure he or she is the right fit for your situation. Does the Elder Law attorney possess the requisite skills and education to complete the task you are hiring him or her to do?

Part 2: Planning for an Aging Parent

Many years ago, planning for the future meant retirement and estate planning. In recent years, planning for the future has taken on new meaning. It now includes planning for long term care. This change in society is a result of an aging population Living beyond normal retirement age as a result of advanced

medical care, better nutrition, and increased exercise. In order to address the needs of this new paradigm, families need to consider the cost of long term care and how they are going to pay for it.

There are three distinct ways of paying for long term care. The first is a person's own savings. This solution only works if a person has substantial assets, typically a million dollars or more. The second way of paying for long term care is long term care insurance. This is a good solution if a person can qualify for a comprehensive policy and is able to pay the premiums. The last way to pay for future long term care expenses is public benefits. The most common public benefits are Medicaid and Improved Pension with Aid and Attendance for Veterans. However, a person has to have served in the military during specific wartime years, as well as fulfilling other requirements, before the veteran, or the spouse of a deceased veteran, can qualify for that benefit. Medicaid is the largest provider of long term care funds for those who are indigent. While Florida currently permits certain types of Medicaid Planning on an emergency basis, there is no guarantee that the laws will remain the same in the future, and this could create a large problem for those individuals who do not plan ahead.

So, how should a person plan for an aging parent? Accumulating a large savings is one way to pay for future long term care, but most children have very little control over that. Long Term Care Insurance might be the solution if the parent can qualify and afford the policy.

An alternative to emergency planning or purchasing long term care insurance is to consider a "5-Year Trust." This type of planning recognizes an aging parent's declining chronic condition and plans for the eventuality of long term care by creating a trust to protect the parent's assets, if Medicaid is needed to pay for that care. Although there are many issues to be considered, an experienced elder law attorney can guide the family through each issue so that the final trust document and related planning addresses the parent's specific needs. Some of those issues include whether or not to make the trust an "income

only” trust, requiring income to be distributed to the parent, and whether or not to transfer “Homestead” property into the trust. The answers to these and other issues require careful analysis before making a decision.

In conclusion, if crisis Medicaid planning is not an appealing option, and long term care insurance is too expensive or cannot be purchased, the “5-Year Trust” may be the right solution to planning for long term care.

For more information about the “5-Year Trust,” or other solutions to planning for long term care, call our Miami Elder Law Center for a FREE telephone consultation.

Part 3: Health Care Surrogates

Choosing a Health Care Surrogate (HCS) is a critical part of a client’s estate plan, since the person that the client is appointing may determine his or her future healthcare needs. However, most clients concentrate on their wills or trusts and spend very little time considering who should have the important responsibility of healthcare decisions.

When choosing a HCS, most clients will select among their family members. A family member is usually the obvious choice but may not be the best choice. A client should ask himself or herself the following questions: Does the family member have the temperament and common sense to act as a HCS? Does this person know what the client wants, and will he or she carry out the client’s wishes, especially under pressure? Is it wise to appoint someone who lives far away and may be unable to assess the situation when a complicated medical procedure is required? If a client’s child lives in another state and has his or her own children, it may be difficult for the child to travel to the client’s home state to assess the situation and make the best medical decisions.

Assuming that the client wants to appoint a family member and considers the above issues, which family member should be appointed? Typically, if the client has children, he or she will appoint the oldest one first with other children as alternates. The client can appoint the family member who best fulfills the criteria that was discussed above. Sometimes, a parent may appoint two or more children to act together, either for purposes of family harmony or to bring all of the children together for a more thoughtful decision.

If there are no family members that the client wishes to appoint as a HCS, a close family friend or a family physician can be appointed to make healthcare decisions. There are even cases where the client has close family but prefers a non-family member to make healthcare decisions. This may be due either to the lack of confidence in the client's family members or to just the nature of the relationship with the non-family member. A domestic partner is an excellent example of a non-family member who is typically appointed as a HCS.

In conclusion, clients engaged in the estate planning process should consider the appointment of a HCS as critical as the drafting of provisions in their wills or trusts. Choosing family members or non-family members and single surrogate or multiple surrogates are just two of the issues that should be considered by the client before selecting a Health Care Surrogate.

Part 4: Gerontologists (Who are those guys?)

Gerontologists are health care professionals who specialize in working with the elderly. They provide services to individuals in nursing homes, senior centers, hospitals, and at home, as well as work with home health care agencies and other facilities.

Some gerontologists are involved in research while others develop programs and training for the delivery of services to the elderly. Their professional training is in areas such as nursing, psychology, sociology, and social services.

Gerontology is the study of the aging process and the social environment of our elderly population. It is a multi-disciplinary field that involves the study of physiology, sociology, psychology and economics. Specifically, Gerontologists often work as case managers. They counsel the elderly on health, financial, or personal planning, develop programs to assist the elderly, research and evaluate existing programs and coordinate services with other agencies.

In a broader context, gerontologists formulate and advocate public policy dealing with aging. They increase public awareness of the need and availability of services for the elderly and their families.

Scientifically, gerontologists study the influence of heredity, lifestyle and environment on human aging, life span, and age related diseases. Gerontologists have identified a number of age interrelated clues to the aging process that one day may help treat diseases of the elderly and possibly even extend the human life span.

The importance of the field of gerontology is evidenced by the fact that by 2030 about 25% of the U.S. population will be 65 years of age or older. Their needs and concerns will be a dominant force in business and government planning.

Additional information on gerontologists and the field of gerontology can be obtained from the “National Council on Aging” at www.ncoa.org. and the “American Society of Aging”, www.asaging.org.

Part 5: What Does it Cost to Probate an Estate?

When a loved one dies with real or personal property in just his or her name and not paid on death to another person, the court administration process of settling an estate, known as “Probate,” is required. The first question most people ask is, “What does it cost to probate and estate?” In order to answer this question fully, several factors must be considered. These factors include attorney’s fees, personal representative’s fees, accountant’s fees, appraisal fees, brokerage fees, taxes, insurance, and other fees and costs, depending on the issues involved. The following is a discussion of these fees, taxes and costs in greater detail, to help individuals understand the real cost of probate.

Attorneys fees are typically the largest expense of probate. There are different methods of determining attorney’s fees, depending on the facts of the case. When the attorney and all residuary beneficiaries (those who will pay the fee) can be certain as to the approximate time involved in settling the estate, a fixed fee can be determined. Clients usually like this method, as it eliminates any surprises later on. However, the attorney is taking on the risk of unforeseen events which may necessitate additional time required to probate the estate.

To solve this dilemma, the agreement can exclude certain situations which, if they arise, will increase the fee to cover those extra services. A second fee arrangement is a percentage fee. The Florida Probate Code, F.S. 733.6171, contains a fee schedule starting at 3% and decreasing for estates over \$1,000,000.00. While this schedule is meant to be a guide for attorneys and judges in case of fee disputes, it has been used by probate attorneys in estates where the percentage constitutes a reasonable fee. The statute also takes into consideration additional fees for extraordinary services required to probate the estate. A variation of this type of fee is to have an agreement which is either the higher of the percentage fee or a reasonable hourly rate. This takes into account unforeseen circumstances, especially

where there are multiple beneficiaries or the possibility of potential litigation. The final type of fee arrangement employed by attorneys in probate case is the hourly rate. This type of fee arrangement is based strictly on time and, therefore, does not take into account any facts which create extraordinary or complex services requiring greater skills than a typical probate case. Also, the hourly rate will vary depending on the attorney's time, paralegal time or assistant time. Typically, a Board Certified Wills, Trusts and Estates Attorney or Board Certified Elder Law Attorney knows which of the above fee arrangements is the most appropriate for the type of probate case to be undertaken.

Personal Representative's fees vary widely depending on how the will is drafted. Some wills state that the personal representative serves without compensation. This is typical of small estates which involve only family members. Other wills are silent or provide for "reasonable compensation." Still other wills, usually for larger estates, appoint banks to act as personal representatives who serve based on their published fee schedules. The Florida Probate Code, F.S. 733.616, contains a fee schedule for personal representatives as a percentage, similar to the attorney statute. Again, this schedule is to be used as a guide and can be challenged if the percentage is unreasonable based on the actual time devoted to probating the estate by the personal representative. The hourly rate type billing can also be used with a lower hourly rate for a non-professional personal representative. It is advisable that both the personal representative who intends to charge for his/her services and the attorney keep accurate time records, even if a percentage is to be used, to substantiate the actual time expended to probate the estate, if requested by a judge.

Accountant's fees are almost always computed on an hourly basis which include accountings, income and estate tax return preparation and audit services. Sometimes, Tax Attorneys will prepare Estate Tax Returns as well. Whether the attorney or the accountant prepares the Estate Tax Return depends on both the competency of each professional in Estate Taxes and Estate Tax Return preparation, and the

relationship between the client and the professionals. The personal representative should discuss the accountant's hourly rate, estimate of the number of hours involved, and the likelihood of an audit.

Sometimes an IRS problem arises from the past income or gift tax returns of the decedent.

Consequently, the accountant would not be aware of these potential problems until later on in the estate administration.

Appraisal fees, estate bonds, and brokerage fees are specific amounts rather than hourly fees or percentages. Complex appraisals may necessitate an hourly billing, but most appraisals can be done on a flat fee billing. Appraisals need to be done on estate assets for the preparation of the Estate Inventory as well as the Federal Estate Tax Return, if required. In addition, appraisals are also important to establish a "date of death" value so that the future sale of an estate asset, either by the estate or beneficiary, will allow the accountant to compute the capital gains tax. (Either profit or loss).

Taxes are another consideration in arriving at the cost of probate. If the estate is greater than the Federal Estate Tax Exemption, there may be Federal Estate Taxes to pay depending on several factors, the decedent's last Federal Income Tax return may have income tax liability as well as income earned in the administration of the estate.

Insurance needs to be in place on estate assets during the time the estate is in probate to cover all assets which might suffer a diminution in value as a result of an unforeseen disaster. Real Estate, automobiles, antiques and other personal property are among the assets typically insured during administration. If you have any questions concerning Medicaid, call our Miami office for a free telephone consultation: **(305) 274-0955**.