A Layman's Guide to Navigating Medicaid, Estate Planning, and Services for Seniors

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Disclaimer

This book is intended to be a resource for you as you navigate the Medicaid health care system. It is written in plain language, as much as I can. I have included real world stories of clients of mine, that helps you to understand the complexity of the issues along with a basic understanding of the law. This book does not create an attorney-client relationship, and you should not think that I am your attorney, unless an engagement is signed and payment for services is provided.

Please Note that there will be many acronyms utilized throughout this book. I use them not to confuse you, rather to have you become accustomed to them as professionals you speak with will use them. I will always define the acronym the first time it is used. For example, "An Assisted Living Facility (ALF) is commonplace in Florida. There are many different types of ALF's in Florida".

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Why I Wrote This Book

I often am asked by family members of services that encompass more than simply a Medicaid application. As an Elder Law Attorney, I am asked for assistance in finding a good Assisted Living Facility for mom or dad, a good senior therapist to help the family handle long standing issues that need resolution, Advanced Directives for the seniors, Estate Planning issues, and such. For these reasons, I have compiled a book touching on these issues, and more.

Please do NOT use this book as anything other than informational purposes only. It should NOT be used as a legal how to guide. You have not engaged me as an attorney to represent you, by simply obtaining this book. My office requires a signed engagement letter and payment for proper representation.

If you have any questions, please feel free to pick up the phone and call our office, or send us an email. We are happy to talk with potential clients. That is why we are in business.

What is Long Term Care

Long Term Care (LTC) is best described as medical care that occurs over a prolonged period of time. The time frame itself may only be a couple months, to a few years. It includes Home Health

Care, Assisted Living Facility, Skilled Nursing Facility, Rehabilitation Center, or Nursing Home. I am purposely not including Hospice care because Hospice is paid for by Medicare. Home Health Care is having a home health aide, that could be a non licensed companion care all the way to a nurse, assist the client with Activities of Daily Living (ADL). An ADL is an industry term to describe the ability to dress, bathe, eat, prepare food, mobility, and ability to go to the bathroom.

An Assisted Living Facility (ALF) is a home for seniors. They typically range in size from 6 beds to 200 beds. Imagine a dorm for seniors. Some ALF's provide many amenities, such as car or bus service to doctors offices, mall service for silver sneakers, or even to the banks. An ALF typically provides a room, a single or shared, laundry service, daily activities, and two or three meals per day. If you recall the movie Cocoon that facility in the movie was an ALF. Typically, an ALF will require that the client can walk 40 paces or stand unaided. I say typically, because each ALF is a little different as to the type of client they would admit.

Finally, there are placement people who can help you navigate the rivers in choosing an ALF. They are paid a commission directly from the facility, so you do not have to pay them out of

pocket. I would recommend to pay them directly though, so that there is not a conflict of interest. Also, speak with the facility who may waive certain fees if they do not have to pay a commission.

A Skilled Nursing Facility (SNiF) is an ALF for clients who need more personal medical attention. Think of someone on dialysis but otherwise would qualify for an ALF. The SNIF is staffed with Registered Nurses (RN), Licensed Practicing Nurses (LPN), and Certified Nursing Assistant (CNA). They provide more medical care for the client.

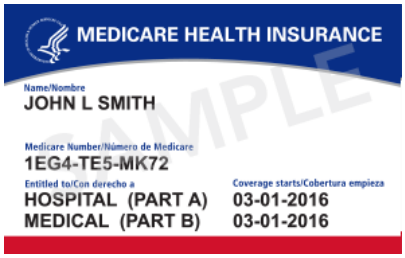
A Nursing Home is a medical facility for clients who need personal medical attention, but have outlived their stay at a Rehabilitation Facility. A Nursing Home and SNiF are virtually interchangeable.

A Rehabilitation Facility is an acute care facility for broken bones, wound care, surgery recovery, and such. The average admittance for a Rehabilitation Facility is not surprisingly 20 days. I will get into this reason in a little bit.

These are the types of Long Term Care (LTC) available to the client. Each segment serves a slightly different need for the client and it is important to understand the differences.

What Does Medicare Cover

Unfortunately, there is a fundamental misunderstanding regarding what is Medicare and what it



covers. Medicare is essentially a health insurance plan. Everyone over the age of 65 is qualified, as long as they are a citizen, for Medicare. Medicare provides for hospitalizations, but NOT long term care in a SNiF, Rehabilitation Center, Nursing Home, or Assisted Living Facility. Medicare does pay for doctor's visits, specialists, surgery, medications (if a Part D is included), durable medical equipment, and such. I am not an insurance agent, so I am not going to try to explain to you the differences of a supplemental plan, straight Medicare, and the like. However, I am able to refer you to experts in that field, who would be happy to help you.

That being said, Medicare does NOT pay for Long Term Care (LTC). Let me repeat that statement. Medicare does NOT pay for Long Term Care (LTC). Should I repeat it once more? You get the idea. Medicare will pay for a SNiF, Rehabilitation, or Nursing Home for 20 days. After 20 days, the family is responsible for $167 per diem payment[1], meaning everyday after 20 days you must pay $167 per day, up through day 100. At day 101 the facility will kick out the patient. How do they do this? Well, the social worker for the facility will work with the family to find a suitable facility, or in extreme circumstances the facility will re-admit the client to the hospital for a slightly different ailment, and then refuse to re-accept at time of discharge. Remember, that the facilities are a business and they can not have a non paying client in their facility. Yes, of course there a

[1] Subject to annual updates. The per diem amount might change from year to year.

Medicare supplements and such that would pay the per diem amount, but regardless of the type of Medicare you might have, at 100 days you need a game plan in place that is being executed. Day 95, 90, or even 70 is not the time to start thinking of a game plan. Day 70 is then time to start implementing the game plan.

Costs of Long Term Care Facilities

Like everything else in life, the cost depends. How much is a new car? Well, it depends on the type of car, and the trim level, ETC. Same with LTC costs. An ALF is less expensive than a Nursing Home. The various Levels Of Care (LOC) in an ALF would affect the cost. The type of ALF would affect the cost. Let me break this down for you.

An average ALF in Florida ranges from $2000 to $6000. This is the Honda versus the Mercedes. It really depends on your tastes and needs. There are some facilities that at $2000 I would not place a loved one, while there are others at $2000 that I would move into myself. The differences in price are primarily based on the amenities of the facility, and the staff ratios. I would strongly recommend that you speak with a Senior Placement professional. If you like please call me for a recommendation of someone.

The average cost of a Nursing Home or SNiF in Florida is $9800 per month. That is $117,600 per year!! [2] That is going to diminish someone's life savings. Again, each facility is a little different and I recommend that you shop around a little. You would shop for a new car for $30,000, but not for a facility for mom or dad that is going to cost $100,000, with 100% depreciation from day one? To me, that does not make a lot of sense.

[2] Genworth Study https://www.genworth.com/aging-and-you/finances/cost-of-care.html

Paying For Long Term Care

There are only three methods of paying for Long Term Care. The first is LTC Insurance. Some of you, statistically only 1 out of every 10 that read this book, will have LTC Insurance. LTC Insurance would pay for an ALF, SNiF, Nursing Home, or Rehabilitation, depending on the type of insurance. Some policies pay up to a certain amount, while others have a time limit for payments. Medicaid could work in conjunction with an existing Long Term Care policy, and not replace it.

The second method of payment for LTC is your savings account. You have worked your life to save money, hopefully to leave a legacy for your kids and grandkids. Unfortunately, now you must use these savings to pay for your Long Term Care. Imagine having to write a graduation card to your grandkid graduating from college stating that while your intention was to pay off their student loans, or a new car as a graduation gift but unfortunately instead you have spent your life savings on the Nursing Home. How devastating would that be to you? To your grandkid?

The third method is Medicaid. Medicaid would supplant Medicare, including any supplements. This is very helpful for the client who is paying $134 for Medicare plus an additional $350 per month for Medicare Part C and Part D. Medicaid will pick up these costs in their entirety. Medicaid would also eliminate any co-pays for doctor visits or hospitalizations. Medicaid would also pay for Long Term Care.

There is the possibility of a dual enrollment in Medicare and Medicaid. Sometimes I have clients who like their Medicare doctor, but he or she does not accept Medicaid. Yes, the client can be dual enrolled and keep their doctor of 30 years.

Medicaid and Long Term Care

Medicaid would pay for the "health insurance" aspect of the client that was traditionally covered by Medicare. Medicaid would also pay for ONE of the following:

Home Health aide of up to 20 hours per week. The average is 12-15 hours per week. Does this cover everything? Of course not. What it does do is provide some financial relief to the family in the approximate amount of $1140 per month (15 hours x $19 dollars per hour = $1140 per month). The family could then take the Medicaid strategy that we establish, and make those dollars extend longer for an aging in place senior. "Age in Place" means exactly what it sounds like: having the senior remain in their home for as long as possible and delaying a facility for as long as possible. With some good planning, this could be accomplished through Hospice care.

Medicaid would pay for the Level of Care (LOC) in the *Assisted Living Facility*. Recall that an ALF has a base room and board fee, plus the "trim" levels of the personal care required. LOC could be help with medication dispensing, bathing, dressing, eating, etc. Medicaid in Florida would pay the facility directly up to $1400[3] for this Level of Care. I am often asked if the client is allowed to keep their Social Security Income, and the answer is a resounding YES.

Medicaid would pay for the entire cost of the *Nursing Home or Skilled Nursing Facility*. The client is expected to pay the facility their Social Security Income, as well as any other income that the applicant is receiving, and then Medicaid pays the remainder of the monthly cost. So for instance,

[3] This amount might increase in future years.

Mary is receiving $1105 in Social Security and the Nursing Home is $10,500 per month. Mary would pay $1000 to the Nursing Home, and Medicaid would pay the remainder balance of $9,500. Some of you who are reading rather than skimming are going to ask what happens to the $105 from the Social Security. The client is allowed to keep a "personal allowance" of $105 per month to pay for their personal needs [4]. The personal needs could be diapers, catheters, or even the beauty salon.

Social Security Income and Medicaid

The individual's Social Security Income remains with the individual, in its entirety, for both Community or ALF Medicaid Services. For ICP, or Nursing Home, Services, then the Social Security Income is remitted to the facility, with the individual keeping $105 for personal care needs.

I am often asked this question usually when a family is doing a financial analysis for budgets and the cost of an ALF is factored into the equation and the Social Security Income is really needed to help make it all work financially.

[4] Subject to annual updates. The amount might change from year to year.

Eligibility Requirements

Needs Based Program

Medicaid is a "needs based" program. This means that in order to qualify the client must meet certain financial requirements. In other words, the client can not have too much income or assets. If the client surpasses the thresholds, then they would not qualify for Medicaid without first creating some sort of strategy.

The other common needs based program is Supplemental Security Income (SSI). I mention this only to state that the majority of Medicaid rules are lifted directly from the SSI manual. The manual is called the POMS (Procedure and Operations Manual Systems). The SSI issues generally arise in the Special Needs Trust area of Elder Law. While I practice Special Needs Trust law, it is outside the realm of this particular conversation. More information could be found in a later chapter dedicated to Special Needs Trusts.

Program Types

There are several types of Medicaid Programs in Florida. For our purposes I will focus on Long Term Care Medicaid, which has two types of programs. The first is "Waiver", or what was called Diversion only a couple of years ago. The Waiver program is for those clients applying for Medicaid who wish to age in place (meaning they are staying at home) and need some home health assistance, or going into an Assisted Living Facility. I sit on the Executive Management Board of the Miami Alliance for Aging, the organization that oversees Waiver Medicaid Applications.

Unfortunately, I can tell you that it will take a year or more to get approved in Miami. The solution is not to wait until it is too late, but start earlier. In Broward the waiting period is generally about six to nine months, and in Palm Beach the waiting period is generally about three to six months. Of course, this time frame heavily depends on the medical status of the individual. Once the applicant is "released" from the wait list, the application would take an additional two to three months to complete.

The second type of Medicaid program is the ICP or Institutional Care Program. That is for Nursing Home Medicaid. The wait period, regardless of county in Florida, is two to four months. The individual need for care is much greater so Medicaid does not have this elaborate approval process. My clients often ask for retroactive for Medicaid. Unfortunately, Medicaid today does not reimburse the patient retroactively. This reimbursement was up to three months in 2018, but the Florida Governor amended it to one month then to nothing as a budget gap issue. Hopefully, the full three month retroactivity will be reinstalled soon. It is difficult for some families to afford the nursing home even for this short period of time.

Income

There is an income limit in order to qualify for Medicaid. The threshold is $2313 [5] of *gross income* from all sources. I am always asked the question from clients if pension income counts, IRA distributions, or some other income source. The only income that is not counted is Holocaust

[5] This threshold amount of income increases slightly nearly every year.

Reparations money. That income is counted as an asset. Otherwise, all income from all sources is counted as income.

If the gross income is greater than $2313 per month, then we simply create a Qualified Income Trust. Essentially, the income continues to get deposited into the regular checking account of the client, and the amount greater than $2313 is siphoned off into the Qualified Income Trust (QIT) account that is established, which is then used to pay for care that Medicaid is not paying or reimbursing.

Assets

There is an asset threshold of $2000 of countable assets in order to qualify for Medicaid. That might seem like a very low value, but recall that only those assets that are countable are counted. So what is a non countable asset?

Non Countable Assets

Lets start with the non countable asset for Medicaid. There are only a handful of non countable assets for Medicaid eligibility. I will list them along with a brief explanation.

> *Primary residence* is not a counted asset in Medicaid, as long as the net equity is less than $572,000 [6]. If the equity is greater than $572,000, then the value of equity over the $572,000 limit is counted as an asset. There is a common myth that Medicaid will take

[6] This amount increases slightly nearly each budget year.

your home. This could not be further from the truth. An applicant is allowed to own a home. However, there is an Estate Recovery that many Elder Law attorneys simply ignore to detriment of their clients. Please refer to the chapter on Estate Recovery for further explanation.

A *vehicle*, of any value, is not counted as an asset. OK, now I always get the question of purchasing a Maserati with countable monies, and then apply for Medicaid. Yes, this would work, except for Medicaid Estate Recovery. We will talk about this later, but I know of an Elder Law Attorney in Florida that also happens to own an antique car dealership. Most of his clients purchase an antique car, making them Medicaid eligible, only to find out years later that the State takes the car from the family as part of Medicaid Estate Recovery.

A *Pre Paid Burial* contract is not counted as assent, as long as it is irrevocable and non transferable.

Life Insurance policy with a cash value of $1500 or less. These are typically known as burial policies.

Interestingly, a *401k*, or other retirement account, is not a counted asset in Florida as long as it is under regular monthly distributions. Many of my clients take the Required Minimum Distribution (RMD) at year's end. I counsel them to start having monthly rather than annual distribution.

Reasonable household furnishings. I say reasonable, because if a client has a small condo worth $175,000 and $1,000,000 worth of fine art, that is not reasonable. That looks like they purchased the fine art as a means of making themselves Medicaid eligible. Will Medicaid figure this out? You bet they will. As part of the application you authorize the

State to go back five years into your finances. Large purchases like fine art shows up in the bank and financial statements. Truly, not worth the risk of committing a federal crime.

Investment Real Estate

This is a very interesting "loophole" within the Medicaid rules, that really only works in Florida. A second home is a counted Medicaid asset, unless it is rented out for fair market rent. Then the property is not counted as an asset, but the rents are obviously counted as income. Recall that for income greater than $2313 we simply create the Qualified Income Trust. I say that this really only works in Florida, and a handful of other states, is the Estate Recovery Program for Medicaid. If an investment property is purchased as a Medicaid Strategy, then a Medicaid Deed could be created to avoid Probate and thus any Estate Recovery. Please see the strategy section later in this book to explain this in a little more detail.

Combined countable assets can not exceed $2000. This includes money in the *checking accounts*. Does that mean that I can not have more than $2000 at any time in the checking account? How will the client continue to pay for living expenses? I tell my clients that at the end of every calendar month, they can not have more than $2000 in their checking account. I actually peg the threshold lower at $1000, in order to allow for checks written on the 25th or later of the month to clear the account. Obviously, the client may have income greater than $2000 going into the checking account, but after the expenses are paid, there can not remain more than $2000. Again, as a rule of thumb I instruct my clients at $1000 and I create a budget analysis for them that helps the caregiver manage this process.

Look Back Period

Let me mention the look back period. Medicaid has a "look back period" of five years. This means that if you transfer any asset, for less than fair market value, within five years of applying for Medicaid then you will be ineligible for a certain period of time. There is a formula of the total amount of transferred assets divided by $9800[7] yields a number. That number is the number of months the client is ineligible for Medicaid. If the application was done properly, the client would be approved following the "penalty period". For example, client transfers $98,000 to adult child three years ago. 98,000/9800 = 10 months. The client would be ineligible for 10 months for Medicaid. However, let me caution you against trying to do this on your own, as you must perform the initial transfer and the required reporting correctly, in order for this to work.

I always get a client who placed their adult child on the deed of the their home as a means to circumvent the Probate process. Unfortunately, you get what you pay for. By doing this action, they have created a "gift" to the adult child the value of the home!! This same result occurs with placing the child on a bank account, and removing the senior from the account. Still a gift.
Of course, a proper Medicaid strategy would eliminate this penalty period.

Countable Assets

Pretty much everything else not listed above as a non counted asset is a counted asset. For those clients who have assets greater than $2000 we create a Medicaid Strategy. The Medicaid

[7] This divisor will change with standard of living increases.

strategies are legal and effective. If you are looking for the statute that outlines them, please click the Florida Medicaid Rules. (https://www.flrules.org/gateway/ruleno.asp?id=65A-1.712&PDate=4/6/2012&Section=3)

So how do we handle a client who has more than $2,000 of countable assets but needs Medicaid?

Medicaid Strategies

Following is a brief summary of the most common Medicaid Strategies. I would never recommend that you try to implement them on your own, as there are pitfalls that the layman could fall into

and make their mom or dad ineligible for Medicaid. Also, I would not recommend that you seek out the least expensive attorney to do the work. When you visit a dentist's office, you did not find the dentist by making some calls and found the cheapest one in town, hopefully. You asked some friends for referrals, and you might have called a couple of them to get a sense of their practice. The same with an Elder Law Attorney. There will always be someone cheaper, but cheaper is not necessarily less expensive. The inverse is also correct. The most expensive is not necessarily better. I am a member of a national list organization for Elder Law attorneys. I recently saw a post from a very expensive, and long time practicing elder law attorney in south Florida, asking for advice on what the Qualified Income Trust could pay. I also know of a new Elder Law Attorney in South Florida, who happens to be new to the practice area of Elder Law, who "wrote" a book on Medicaid. Well, a ghost writer wrote the book for him, and the advice he is giving is very good, for New Yorkers!! The ghost writer is from New York and tailors the strategies to New York law. Please, don't fall into this trap.

Before I jump into the strategies, let also spend a moment discussing the difference between pre planning and crisis planning. Pre planning is planning for an eventuality, of which you are not sure when it might occur. Crisis planning is planning after the occurrence of the eventuality. Imagine the timing belt in your car. Most manufacturers will recommend to change the timing belt at 60,000 miles. That does not mean that exactly 60,001 miles the timing belt will break. It

means that the manufacturer is alerting you to some maintenance. If you replace it at the 60,000 oil change, then the costs are lower. If you wait and the belt disintegrates at 72,000, now you have to pay for a tow, a rental, and explain to your boss why you missed the important client meeting. Much more costly then having to replace the timing belt when recommended. Medicaid pre-planning is much like the recommended car maintenance, less costly then waiting for a crisis mode.

Crisis mode is when mom fell in the bath, is in rehabilitation, and needs to go into a Nursing Home. I can tell you that with pre-planning I can save 115% of the money without any undue consequences, not even tax!! The extra 15% is available as a complete capital gains reduction to 0% that is unavailable in crisis planning. However, each Medicaid Strategy, which by definition is crisis planning, has some adverse consequence.

Qualified Income Trust

The only option if your income is over the limit is a Qualified Income Trust (QIT). As described earlier, if the gross income from *all* sources is greater than $2313 per month, then a QIT is drafted to handle the over flow income. It is important to note, that like many of the strategies, the client is not paying for the length of the document. The client is paying for the knowledge and experience the attorney provides in guiding the client to properly utilize the document so as to become Medicaid eligible.

There is another strategy for income that is a Special Needs Trust. I rarely utilize this strategy because it works best for a very small group of seniors. Someone who is relatively young, say in their early to mid 70's, in relatively good health, and is either staying at home

or going into an Assisted Living Facility. Otherwise, the cost to establish and maintain the Special Needs Trust does not provide an economic advantage over a Qualified Income Trust.

Personal Services Contract

The Personal Services Contract (PSC) is a very common Medicaid Strategy. I often utilize it for my clients. Essentially, the money from mom or dad is transferred to the adult child, who then promises in a contract to take care of mom or dad. The downside is that the money is technically income to the adult child who would have to report as income on their tax returns. What I tell my clients is that isn't it better to pay $5000, $10,000 or even $20,000 of extra tax money to save $10,000 per month for the rest of mom's life?

Spend Down

A Medicaid Spend Down is ideal for a relatively small amount of money, for someone who is aging in place. The idea is that since the home is not a counted asset, spending money to upgrade the home transfers countable money into a non countable asset. For example, mom might have $20,000 in the bank as her only countable asset. Well, upgrading a kitchen would "eat up" the savings. We have taken a countable asset, the $20,000, and mutated it into a non countable asset, the home. It works well for someone who is not going into a facility, obviously.

Reverse Half Loaf

This one my clients always have a hard time understanding. Imagine that mom has $98,000 in cash. Now, if she gave it to her daughter, then she would incur a 10 month penalty period in which she would be ineligible for Medicaid. The formula is based on the total gift divided by the average monthly nursing home cost that yields the number of months of ineligibility. (98,000 / 9800 = 10) However, the adult daughter pays for the Assisted Living Facility or home health care from the "gifted" money, which is less cost than the average $9800 per month divisor. This works well if mom were staying at home or going into an Assisted Living Facility. Lets assume mom receives $2000 monthly social security and the cost of the ALF is $3500. Well, the adult daughter would need to pay $1500 per month, for 10 months, or a total of $15,000. Recall that mom transferred $98,000. So $83,000 is now outside of Medicaid!! This works well if you have an adult child who you trust 110% to pay for your needs during the penalty period. You will not have any control over your assets, and will rely completely on your adult child.

Reverse Half Loaf with a Special Needs Trust

This is the same scenario as above, but instead of a gift to an adult child, we use a Special Needs Trust. This is beneficial for someone without an adult child, or one whom they can not completely trust. Instead of transferring $98,000 to her daughter though, she only transfers $49,000. That is a gift of $49,000 or a five month penalty period. The other $49,000 mom places into a Special Needs Trust. The Special Needs Trust is not considered as an asset by Medicaid, nor does it incur any penalty. So mom now uses $7500 from the Special Needs Trust ($1500 ALF cost times five months) and has a remaining $37,500 for

her care. The remaining $37,500 in the Special Needs Trust would be used for her continuing Assisted Living Facility costs and care. The downside of a Special Needs Trust is the payback provision. Please read the chapter on Special Needs Trust for further explanation.

Pre Paid Burial

I am not sure if you have priced the cost of a funeral, but it is expensive. Even a simple funeral in a simple pine casket can be $10,000. Since Medicaid does not count a pre paid burial contract as an asset, one method is to simply use a countable asset, namely your checking account, and purchase a pre paid burial contract. The downside is that the money is tied up and you can not use the money.

Medicaid Annuity

There is a special type of annuity that we call a Medicaid Annuity. It is not counted as an asset for Medicaid purposes, nor is it counted as a gift or transfer of assets for eligibility. The annuity would pay a monthly "income" to the client, recall that if the total income is greater than $2313 we would have to also create a Qualified Income Trust, that the client could use as they see fit. The downside is that this only works well if the monthly existing income would be low enough to have the room for extra annuity income. The other aspect to consider is that if the client passes away before the termination of the annuity, then any money left in the annuity is first paid to Florida Medicaid to recover their costs.

Spousal Refusal

Obviously, it only works when there is a spouse who will remain at home. The Medicaid spouse transfers all of his assets (calling the client a him for simplicity purposes) to the spouse. Not a transfer with a penalty period for Medicaid because they are married. Now, the well spouse, the one staying at home, says that she refuses to pay for her spouse's services. Medicaid then considers the husband, the Medicaid applicant, as not having any assets. This works well, but there is a catch. The wife now has all of the assets and she would need to do some Medicaid Pre Planning. Some Elder Law attorneys will charge a full second fee for this, which I think is wrong. The more ethical Elder Law attorneys would discount the second planning for the community spouse.

Investment Real Estate

This is really an ingenious strategy. According to the Medicaid Rules for Florida, a second home is counted as an asset, unless it is rented at fair market value. Obviously, the rental income is counted as income, and a QIT is utilized if needed, but the property itself is not an asset. Florida also recognizes a Medicaid Deed, so there is not an Estate Recovery issue with the investment property. A large amount of money is transferred to an investment property, and when needed, the property is sold and the family is able to preserve the money, while getting mom approved for Medicaid. There are two companies in Florida that specializes in investment property for Medicaid. I am a principle of one of them, Medicaid Investment Properties, LLC, www.medicaidinvestmentproperties.com Personally, many of my clients have used this strategy.

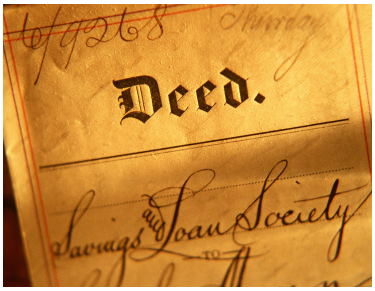
Life Estate

The individual can purchase a life estate in the home a loved one. This would effectively take an amount of money, and give it to the owner of the home. The actual amount of money is based on the projected life expectancy of the Medicaid Client and the Life Estate Percentage Table, multiplied by the value of the home itself. Both the Life Expectancy and the Percentage Table are published by the Social Security Administration. By way of example, if the individual has a Life Expectancy of say 10 years, with a 50% Percentage Table, and the home is worth $200,000, then 50% x $200,000 = $100,000. So the Medicaid Applicant effectively transferred, in a legal manner, $100,000 of cash assets to the adult child, who in return granted a Life Estate in the adult child's home.

The only caveat to this strategy is that the Medicaid Client then MUST reside in the home for at least a year.

Estate Recovery

Medicaid Estate Recovery is something that the federal government mandates each state to pursue.



It is designed to recoup some of the costs that Medicaid has expended on the client. However, each state does it a little differently. In Florida, Medicaid recovery is done through the Probate Court. For this reason, it is critical to have any remaining assets stay out of the Probate Court. A good Elder Law attorney would guide you through this process as part of the Medicaid Strategy. If the attorney is not talking to you about Estate Recovery, thank him or her for their time and do not return their calls. They are doing you a disservice.

Medicaid Deed

Generally the most valued asset is the home. Unfortunately, the client could not simply change the deed and place the adult child on the deed, as this would create a "gift" of the home to the adult child. So, when the client passes away, a Probate needs to be opened in order to have the asset pass to the adult child. It is at this point that Florida Medicaid will place a lien on the home. Notice that I say "will" and not "may" or "might". As a matter of course, the lien will show up. Now, many attorneys will say "Yes, but since the property was Homestead, it will pass free of any liens to the adult child". Let me ask you, do you want to pay tens of thousands of dollars to an attorney to fight this issue in Probate Court? The Florida Legislature has written into law the costs of Probate for attorney's fees at 3% of the estate!! Yes, this is law. Is the same attorney who "forgot" to mention Estate Recovery to you? Is this is the attorney who neglected to have mom sign an

"Intent to Return" form to maintain the homestead status? Would it not be worth a couple thousand dollars to avoid this nightmare?

We create a special Medicaid Deed that does not create a gift of the home, and yet avoids Probate. It is well worth the money spent to avoid a fight in court, and a potential loss of the most valued asset.

Spousal Will

When there is a spouse involved, the well informed Elder Law attorney will, or should, inform you

of the need to create a new Will with a Special Needs Trust provision for the community spouse. Recall the community spouse is the spouse who is not enrolling in Medicaid. The reason is simple. If the community spouse passes away, then any assets that spouse has, will pass back to the Medicaid spouse. This would be disastrous to the Medicaid spouse. For this reason, it is highly recommended to create a new Will with a provision for a Special Needs Trust. In fact, I have my clients sign a Waiver Form removing any liability from me if they refuse to create the new Will. I fully understand that all of this planning can become expensive, but is not worth saving Medicaid on mom? Do you want to save a few dollars today to pay $9800 per month for a Nursing Home?

Application Process and Wait Times

The application times could be very frustrating for the client. There are two types of Medicaid Applications for Long Term Care, and the time frames are very different. The first type is Nursing Home application.

Nursing Home Medicaid Application

The process is relatively streamlined for a Nursing Home Medicaid Application. The Medicaid Attorney creates the strategy, and the family executes on the strategy. Once the strategy is fully implemented, a Medicaid Nursing Home Application is done on-line through the Florida Access website. Following the formal application, a representative from CARES, part of the Florida Department of Elder Affairs will conduct an in-person interview of the individual. This takes about a month. Following the interview, the Medicaid Attorney will forward the executed Medicaid Strategy documents and proofs to the Florida Department of Children and Families for an asset and income review. This takes also about one month. Following approval, the family then chooses one of three Medicaid providers. There is a slight difference between the three, so you should look into the three choices carefully. The entire process takes about two to four months for a Nursing Home Application.

Waiver Program

The Medicaid Waiver Program is the second type of Long Term Medicaid Application. It is used if a client is going to remain at home, aging in place is the common term, or enter an Assisted Living Facility. Florida Medicaid would provide up to 20 hours per week for home health care, based on need, or up to $1400 per month for the Level of Care in an Assisted Living Facility.

Recall that Level of Care are the extra costs associated with an Assisted Living Facility that they charge the client. It is not part of the general "room and board" of the facility. The Level of Care could include medication dispensing, assistance with washing, assistance with getting dressed, etc. Please check the individual facility for these costs.

The Waiver Program starts with a referral to the local Area Agency for Aging. The local Area Agency then conducts an initial phone intake with the client, or a family member if the client is unable to conduct the phone intake. This initial phone intake is utilized to confirm the information provided by the Medicaid Attorney, as well as scheduling the Phone Assessment. After a couple of weeks, the local Area Agency then conducts a more comprehensive Phone Assessment. This normally takes about 45 minutes and a Level of Priority is established based on the Phone Assessment. That Level of Priority determines how long the client will have to wait on the "Wait List" before being released. The wait time is based on the Level of Priority and funding provided by Tallahassee. Unfortunately, I do not have any control regarding the wait time. In Miami the wait time could take up to one and half years, in Broward up to one year, and in Palm Beach approximately six to nine months. The remainder of the state has wait times roughly equivalent to Palm Beach. It is simply a factor of the number of applications in each county. Miami is overloaded with applications, which is why the wait times could be so long.

Once the client is released from the Wait List, then the process is the same as the Nursing Home Application.

Minimum Monthly Maintenance Needs Allowance

The Minimum Maintenance Needs Allowance entitles the community spouse (the spouse remaining in the marital home) to have a portion of the institutional spouse's (the spouse applying for Medicaid) income diverted to the community spouse to help pay for the shelter costs of the marital home. Shelter costs are mortgage or rent, HOA, taxes, insurance. The amount diverted is generally up to a one third of the shelter costs, up to $2800 per month.

Special Needs Trust

Understand Difference Between SSDI, SSI, Medicare, and Medicaid

Supplemental Security Income (SSI) and Medicaid are needs based. This means that there are strict restrictions to income and assets in order to qualify for the programs. This restriction is $2000 of countable assets, and $2313 of gross income. If the individual acquires more assets than allowed, then their SSI or Medicaid benefits would be terminated.

Social Security Disability Income (SSDI) and Medicare are not needs based programs. An individual is vested into these two programs through either a work history for SSDI, or a US Citizen who turned 65 years old for Medicare. The work requirement is 20 of the last 40 quarters, or five of the last ten years of work history. I am often asked by an individual that they worked for 20 years but were denied SSDI. After a couple minutes of conversation, it is revealed that the work was for themselves, and they did not pay themselves a W-2 wage. Social Security does not have a record of this work, and thus the person is considered as not have worked.

Medicaid and Special Needs Trusts

Medicare, remember, does not pay for long term care such as an Assisted Living Facility or a Nursing Home. For this reason, Medicaid was created. Medicaid and Special Needs Trust intersect at two critical junctions. The first is where an individual is already receiving Medicaid benefits and gets a personal injury settlement or an inheritance. The second junction is when a Special Needs Trust is used as part of Medicaid Planning, such as a Pooled Special Needs Trust.

Lets go back for a second to the inheritance issue. My clients often overlook the unique issue of a husband and wife situation where one spouse, lets call this the IS or institutional spouse, applies for Medicaid. Now, the other spouse, the CS or community spouse, remains at home and is not receiving any Medicaid benefits. Lets see for a second how a Special Needs Trust and Medicaid intersect with an inheritance, that you would likely not think of unless you were faced with this situation. Imagine that the CS passes away, and the life insurance, which is normally to the benefit of the other spouse, is now inherited by the IS. Or in other words, the IS, who is on Medicaid, just received a $250,000 check from the life insurance company after the passing of the community spouse. I hope that you can now sense the complexity involved in Medicaid Planning and Special Needs Trust. Take this a step further, and if the Will is not drafted properly, then only a Pooled Trust is allowed by law, which creates a payback provision to Florida Medicaid for any monies left in the Special Needs Pooled Trust. If the Will is properly drafted then a third person Supplemental Needs Trust could be utilized that would avoid any payback provision, potentially saving tens of thousands of dollars.

Children and Special Needs Trusts

I would be negligent if I did not write a short paragraph regarding children and the parents estate planning. Lets imagine a couple has three children, one of whom is a special needs child who is receiving Medicaid benefits. Now lets also imagine that the other two children are doing very well financially. One is a hedge fund manager and the other married a successful surgeon. How would a family plan for their kids? One immediate, almost knee jerk reaction, is to divide everything by 3 and distribute equally. Is that really fair though? Obviously the needs of the three children are very different. Another reaction might be to not plan for the special needs child, because they are

receiving government benefits. We can all agree that just because someone is receiving government benefits does not mean that all needs are met; just the basic healthcare needs.

I would argue that a better reaction is to draft a Will and a Revocable Trust with the provisions for a Supplemental Needs Trust for the child receiving Medicaid benefits. Why a Supplemental and not a simple Special Needs Trust? For two reasons. The first is the lack of a payback provision with a Supplemental Needs Trust. The second is the less restrictive rules associated with a Supplemental Needs Trust.

Purpose of Special Needs Trust

In order to receive certain government benefits, namely Medicaid or Supplemental Security Income (SSI) then the individual can not have more than $2000 of countable assets. Supplemental Security Income is when a person is disabled and applies for Social Security Disability Income (SSDI). However, the person had not worked long enough to become "vested" into the Social Security System, so instead the individual is placed on Supplemental Security Income. The monthly benefits are less than SSDI, usually approximately $753[8] per month, and there are restrictions while on SSI. When an individual who is receiving SSI or Medicaid, and an inheritance, or a personal injury settlement is awarded, then the monies would cause the individual to lose their government benefits because they would have too much assets. So Congress allowed

[8] Subject to small annual increases.

the creation of a Special Needs Trust in order to have the individual maintain their benefits, while also enjoying the inheritance or personal injury settlement.

There are two types of Special Needs Trust. A First Person or Self Settled Special Needs Trust, and a Third Person Supplemental Needs Trust. The first question is why the slight name change. I like to utilize a more precise nomenclature to separate the two distinct types of Special Needs Trusts. The difference between the two are based solely on the source of funds that will go into the Special Needs Trust. If the source of the funds are from the individual him/herself, then it is a First Person Special Needs Trust. If the source of the funds are from a third party, like a parent, or grandparent, then it is a Third Person Supplemental Needs Trust.

A *First Person Special Needs Trust* is when the beneficiary, the person who is on Medicaid or SSI, has the funds for the Special Needs Trust. For example, an individual receiving Supplemental Security Income is part of a personal injury lawsuit and receives a settlement. Since the individual receiving Supplemental Security Income is also the individual receiving the settlement, the funds belong to the individual. For this reason, it is a First Person Special Needs Trust. Occasionally, I have a client who tries to avoid this problem by cashing the settlement check and then giving the money to a family member. Unfortunately, this does not work and could cause the individual to lose their benefits. It is not worth the risk of losing the benefits to save a few dollars.

A *Third Person Supplemental Needs Trust*, again I utilize the nomenclature of a Special Needs Trust for a First Person, and Supplemental Needs Trust for a Third Person, is used when a parent or grandparent leave funds for the individual, usually in a Will situation.

The SNT (Special Needs Trust or Supplemental Needs Trust) will have a Trustee named whose function is to disburse the funds from the SNT to the beneficiary as needed. The Trustee must keep accurate records of all expenses. We try to have close family member act as the Trustee, primarily from a financial aspect. A corporate Trustee, either a bank, or Trust company, is going to charge a monthly or annual fee for acting as the Trustee. It is important to note that if the individual beneficiary is over the age of 65, then a third person will have to be appointed as a Trustee. They go through a "Pooled Trust" with a corporate trustee.

Pooled Trust

A Pooled Trust is simply a non-profit organization that manages a pool of SNT's. They charge an initiation fee, anywhere from $900 to $2500, and a monthly fee, ranging from $200 per month to 3% of the size of the SNT. Prior to December 2017, every First Person SNT had to go through a Pooled Trust, unless there was a court case that authorized the establishment of the Special Needs Trust. The reason is that an individual could not establish their own Special Needs Trust. Congress finally amended the law that now allows for an individual to create their own Special Needs Trust. The only catch is that if the individual is over the age of 65, then the Special Needs Trust still has to be administered through a Pooled Trust.

Restrictions of the SNT

There are three critical restrictions to the SNT, either the Special Needs Trust or Supplemental Needs Trust. Philosophically, the restrictions are established to make sure that the monies in the SNT are being used for the individual. Aside from the Food and Shelter restrictions, the SNT

could purchase anything else for the individual. This could include a computer, cell phone, education, vacation, car, or even home.

The first is that the SNT can not pay for "Shelter" for the individual, because the SSI payments are meant to pay for food and shelter. Shelter is defined a little differently by the Social Security Administration, which is for SSI, and Medicaid follows the SSI rules. The obvious is rent or mortgage, the less obvious is home owners insurance, electric, water, Condo/HOA fees, cable, and phone.

The second restriction is that the SNT can not pay for food. This is because SSI is supposed to be used for Shelter and Food. Food includes Publix, obviously. Less obvious is dinner with a friend at a restaurant. The individual will have to pay for their dinner as if the SNT did not exist. Meaning, they would have to pay from their SSI monies. Another less obvious is Walmart or Target. Since these stores also sell food, I guide my clients not to pay for items from these stores through the SNT, unless they keep very detailed records, which often does not happen. It would be a shame if an individual lost their Medicaid and SSI because they bought a shirt at Target with the SNT but did not keep good records.

Another restriction, that I really don't count as restriction because it does not affect the individual. The SNT can not pay for duplicative services for Medicaid. This one is pretty straight forward. If Medicaid is paying for a medical procedure, than the SNT can not also pay for the same procedure.

The third restriction is that the SNT can ONLY pay for the *sole benefit* of the individual. This means that anything the SNT purchases must be for the sole benefit of the individual. The best way to explain this is through examples. An example is a trip to Disney. The SNT could pay for the individual's hotel, and theme park tickets. Now, if the individual is a minor child, who needs to be accompanied by an adult, then the SNT could also pay for the theme park tickets for an adult. Lets now assume that the individual has a sibling and the whole family is going to Disney. Well, the SNT would pay for the individual's hotel, and theme park tickets, as well as one parent's theme park ticket, but not the other parent's or sibling's tickets.

The other restriction, which is true even without a SNT, is that the individual can not have more than $65 in cash per month. So the SNT can not give the individual more than $65 cash per month. This is a SSI restriction, not strictly a SNT. I often receive pushback from clients in this issue, and I am never sure why because this particular restriction exists regardless of the SNT; meaning they were living with this particular restriction prior to the establishment of the SNT.

One last restriction, which again is not a SNT restriction but one of SSI, is that the individual can not make any gifts. This is an established SSI restriction, regardless of the SNT. I often have clients who want to pay back family members for previous loans given to the individual. Unfortunately, the SNT can not make these loan paybacks, unless a Medicaid strategy is employed. Yes, we can create a Medicaid strategy to stay within the guidelines of the SNT restrictions, and still have the monies reimbursed to family members.

In-Kind Support and Maintenance

If money is given directly to the individual, in form of cash, then the Supplemental Security Income would be reduced dollar for dollar to $0. So, if the SNT were to give the individual $300 in cash, then the Supplemental Security Income benefits would be reduced by $300 the following month. It is important to remember that if the Supplemental Security Income is reduced to $0, then any Medicaid benefits would be terminated. There must be at least $1 of Supplemental Security Income to maintain the Medicaid eligibility. The Trustee must be diligent to make sure that any cash payments do not exceed the funding level of the Supplemental Security Income as well as that any monies are not accumulated to break the threshold of $2000 of assets for the individual.

For In-Kind Support and Maintenance (ISM), which is monies paid on behalf of the individual, then any Supplemental Security Income would be reduced by 1/3 of the gifts given on behalf of the individual up to $250. For instance, if the individual's $600 rent is paid by the SNT, then the next month's Supplemental Security Income would be reduced by $200. However, if the rental payment was $900, the reduction would top out at $250.

Payback Provision

There is a payback provision for the first person Special Needs Trust. This means that any money left in the Special Needs Trust, including a Pooled Trust, when the individual passes away will first go back to Florida Medicaid to reimburse the agency for all of their expenses paid for on behalf of the individual. So, first Florida Medicaid gets paid back from any remaining funds, and then the individual's named beneficiaries. Yes, this could be perceived as being a little unfair, but

keep in mind that the Special Needs Trust allowed the individual to maintain their Medicaid and SSI benefits. Without the Special Needs Trust, they would have lost their benefits completely.

Supplemental Security Income does not require this payback provision. Neither does a Third Person Supplemental Needs Trust, because the money in the Supplemental Needs Trust was never "owned" by the individual. Recall that the funds were gifted into the Supplemental Needs Trust by the parent, or grandparent, for the benefit of the individual.

Guardianship

There is a dirty little secret in Elder Law, that most attorneys are reluctant to tell their clients. The secret is that most guardianships are completely unnecessary. Yes, you read the statement correctly. Most guardianships are completely unnecessary. The reason is that with a little bit of advanced planning, the family could save the cost and heartache of a guardianship. I can not begin to count how many times I have to file a guardianship that could have been avoided with some advanced planning. 95% of all guardianships are simply a result of lack of planning. So, how can you avoid a guardianship? The answer is very simple. Have a Power of Attorney and a Healthcare Directive in place prior to needing them. It is a little bit like car insurance. You would not call GEICO to get car insurance after you have an accident from the side of the road while waiting for the tow truck. Instead you get the car insurance in case you might have an accident at some point in the future. It is the same thing with a Power of Attorney and Healthcare Directive. When you need it, it would be too late to get one. Instead, do it earlier when you do not need it, yet. Also, please do not go to Legal Zoom to get the Power of Attorney. Please, see a competent Elder Law Attorney. We draft specific Power of Attorney for Medicaid Planning that a regular Power of Attorney would not suffice. Spend the couple hundred dollars to get it drafted correctly. It is much less expensive than the $6000 for a guardianship proceeding.

The purpose of this book is not to explain Guardianship in any great detail, so I am only providing an overview of Guardianship. Both Guardianship and Probate are easily avoided through some basic Estate Planning.

Types of Guardianship

There are three types of guardianships. The first is the Guardian of the Person, and the second is Guardian of the Property, and the third is both Guardian of the Person and the Property. As you can imagine, one handles the individual's healthcare decisions, the second the individual's property (bank accounts, real estate, etc), and the third is both.

There are also two forms of Guardianship. Either voluntary or involuntary. Voluntary Guardianships are relatively rare, while involuntary is generally the more common form of Guardianship.

Process

The process for a Guardianship is relatively straight forward. A "petition" is filed with the court by the petitioner, who is generally also the person seeking to become the Guardian. The court then assigns a three member examining committee who interviews the Alleged Incapacitated Person (AIP) to determine if the individual is in fact incapacitated. The three person examining committee consists of at least one physician or psychiatrist, and the remaining two people are typically another lawyer, social worker, nurse, doctor, or a gerontologist.

Incapacity Hearing

The Incapacity Hearing, which generally occurs about one month after the initial petition is filed, can be heart breaking. The Alleged Incapacitated Person is usually present, and the court hears the testimony of the examining committee, and then hears from the individual as well. Sometimes,

the individual is aware enough to protest the procedure, but not aware enough to handle their own affairs. This is when it becomes truly heart wrenching. I have been the attorney in cases where the individual is in tears begging the court not to remove their rights. The individual is aware that they will lose their rights to make their own decisions, yet unable to handle their own affairs, and this is truly difficult to watch.

Appoint Guardian

The court, upon finding that the individual in fact lacks the capacity to handle their own affairs, will appoint a Guardian. Generally, it is the same person that filed the initial petition. However, if an emergency petition were filed, then the temporary guardian can not become the permanent guardian. The only real restriction is that the proposed Guardian can not be a felon. A non Florida resident may still be a Guardian as long they are related to the individual. I have had a petitioner inform me during the initial consultation with me that they do not have any felonies, and sign off on the engagement letter that they are not a felon. During the background check, there was a felony 30 years ago that prevented the petitioner from being named the Guardian. Unfortunately, the Guardian became the state appointed Guardianship program.

The appointed Guardian would have to take a mandatory 8 hour class on guardianship, and provide an annual accounting to the court.

Costs of Guardianship

Guardianship is not inexpensive. Clients are often astounded by the cost. For uncontested guardianships, meaning family members would not fight for who will be the Guardian appointed

by the court, can range anywhere from $4000 to $8000. The easy answer is that Guardianship is completely unnecessary, with a little advanced planning from the family. I know it might sound harsh, but a failure to plan from the family will create hardships later. The follow up question is why a Guardianship is necessary.

In order to apply for government benefits, such as Medicaid or even Social Security, then a Power of Attorney is needed. In order to make healthcare decisions then a Medical Healthcare Directive is needed. Without these, then a Guardianship is the only alternative.

Probate

Probate is a court process that has an individual's assets from them to their family. Any asset that

has a title to it, such as a home, or car, or any asset that has designated a beneficiary, like a bank account, must pass through Probate, unless some pre-planning was performed. There is a common misconception that a Will does not need to go through Probate. Unfortunately, that is incorrect. A Will still needs to pass through Probate. Only a trust would avoid probate.

The purpose of this book is not to explain Probate in any great detail, so I am only providing an overview of Probate.

Probate Estate

Really, all assets that are not already directly transferred to family members either through a Trust, a Deed on a home, or direct beneficiaries to bank accounts and such, becomes the Probate Estate.

Probate should be avoided for two primary reasons. The first is the cost. Florida Legislature has mandated what the Probate fees are for the family. They are 3% for an estate less than $1 million, and 2.5% for estate greater than $1 million. As you can imagine this becomes very expensive. An estate worth $750,000, which is not improbable given the value of a home, some life insurance, maybe some IRA, etc., which would cost $22,500 in Probate costs. For this reason, most clients would want to avoid this situation.

The second reason is time. Probate is an incredibly long process. It is not uncommon for Probate to take two years to complete, even an uncontested where family members are not fighting over an inheritance. Finally there are some attorneys who refuse to file a Probate in Miami Dade because of the time delays uniquely inherit with Miami Dade.

Avoid Probate

Depending on the asset, there are two very easy ways to avoid Probate. The first method is designed for titled assets, such as real estate, and cars. The second is for financial instruments like bank accounts, retirement accounts, and Life Insurance.

The use of a Revocable Trust helps the family from avoiding Probate. The Revocable Trust designates the wishes of the individual, meaning who gets what and when, while avoiding Probate. It really is a great tool that is not overly complicated or expensive to implement.

The second method is also an easy and inexpensive method of avoiding Probate. The individual just designates a beneficiary of the account should the individual pass away. There is a drawback to utilizing this method in that the beneficiary is given the money outright, which could be a potential problem from the beneficiary's creditors such as divorce, or bankruptcy.

Probate Process

The Probate process is relatively straight forward. A Petition is filed with the court with the Personal Representative, who is usually a close family member. The Personal Representative has

a fiduciary duty to the other beneficiaries not to "waste" the estate assets during Probate, and fairly divide and distribute the assets according to the Will.

Admitting Will

The first step is to have the existing Will admitted into the Probate Court. This is generally a simple process, if the original Will is available. If not, then the two witnesses who signed the Will must testify to have the Will admitted. For this reason, a good estate planning attorney will maintain the original Will in the office.

If there is not a Will, or a copy could not be admitted, then the line of succession for inheritances are a spouse, children, siblings, parents, grand parents, aunts and uncles. Generally, a surviving spouse would receive half, and the children would then inherit the other half, in equal shares.

There is also a statute called the Elective Share, which means that if an individual decides to remove a spouse from any inheritance, then the surviving spouse could still elect to have an elective share, which is 1/3 of the gross estate in Florida. So, if a person really wants to disinherit a spouse, the best method is a divorce.

Depository Accounting and Final Disbursement

The next steps, aside from having the Personal Representative approved by all parties, is to have the Personal Representative deposit any monies into a bank account established specifically for Probate. We call this a Restricted Depository, because only with a Court Order can any money then be distributed. The Personal Representative also files an accounting with the court listing all

of the assets of the individual. Finally, a Final Disbursement is filed to divide the money and disburse to the beneficiaries.

While this does not sound complicated, it does unfortunately take an incredibly long time to have a Probate finally closed. This is primarily because of the lack of judges in Probate, and the inefficiency of the court employees. In Broward, there are four Probate Judges for a County of two million people. Counter that to the 16 family court judges for divorces, and you can see why it takes so long.

Estate Planning

In order to understand estate planning, it might be helpful first to understand its function. Estate

planning is nothing more than having some advanced planning if an individual should become incapacitated, and a Revocable Trust to have the assets pass to the family outside of Probate.

Advanced Directives

Advanced Directives are really a collection of three critical documents. If an individual does not have these documents, then a Guardianship would be necessary. The Power of Attorney enables a named person to act on behalf of the individual in respect to financial institutions, and government agencies. A well written Power of Attorney also enables the person to do some advanced Medicaid planning, as well as having the ability to choose residencies for the individual.

The Healthcare Directive allows the named person to make health care decisions for the individual.

Finally, the Living Will, which is different than a regular Will and should not be confused, is a statement from the individual as to his or her desire regarding life support.

These three documents together create the Advanced Directives. If you do nothing else, please get these documents completed. They are not costly, and can save you thousands of dollars in Guardianship. They are also so critical especially for a senior to have them completed and accessible.

Revocable Trust

The Revocable Trust is the centerpiece of the Estate Plan. It does the same thing as a Will in declaring an individual's desires regarding their assets. However, it also goes a step further in avoiding Probate and enabling staged distributions to beneficiaries.

The Revocable Trust is very flexible. It can be created to have staged distributions to the beneficiaries, or kept in trust in perpetuity. A staged distribution is whereby the trust is distributed at regular intervals, usually 25 years old, 30 years old, and the last distribution at 35 years old, to the beneficiaries. A well drafted Revocable Trust would also have the ability for the Trustee to distribute to a beneficiary for a life event such as tuition for college, marriage, purchase of a home, or start a business.

The other option for distribution is to have the assets remain in the trust indefinitely and distributed as needed to the beneficiaries. This would protect the beneficiary from any creditors who could simply wait for a mandatory distribution at a staged distribution. This method also enables the Trustee to slow down or speed up the distributions based on the maturity level of the beneficiary and the need of the beneficiary.

The most important person of a Revocable Trust is the Trustee. The initial Trustees are almost always the husband and wife. It is then a question of which family members would follow should both parents pass away. The choice should not be taken lightly. I often have clients who choose a Trustee based on a decision not to offend someone. I think that this is the wrong approach to

choosing a Trustee. Another important consideration should be made if there are minor children. I never recommend the same person who becomes the named guardian of a minor child also be the Trustee and control the trust assets. I know this sounds a little crazy, but I have seen families insist on having the same person, only to have the minor child come to me years later as an adult and the trust assets have been depleted in upgrading the guardian's personal home.

Homestead

There is a split of decisions among Elder Law attorneys regarding the Homestead as it relates to the Estate Plan. While an Estate Plan would avoid Probate, some Estate Planning Attorneys recommend that the family file a Probate, even if there are not any assets. The reason is that a creditor has a limited amount of time in order to make a claim against an estate for monies owed. If a Probate is not filed, then the time frame is two years for a creditor to file a claim. Meaning, a creditor could conceivably come back to the family after one year demanding payment for monies owed. If a Probate is filed, then the time frame is greatly reduced to three months. This is helpful for the family in their ability to safely disburse any monies to the beneficiaries without any worries of future creditors potentially knocking on the door. This type of probate is much easier to handle from a legal perspective because the family is not waiting on the judge to sign orders for them to get any inheritance.

From an Elder Law perspective, I normally draft a Medicaid Deed for my Medicaid clients for the homestead. This prevents any Medicaid Estate Recovery for my Medicaid clients. If the senior is not applying for Medicaid, then I normally place the homestead into the Revocable Trust. The

reason is that any homestead exemptions are not lost, while the trust would provide a better avenue for the trustee to disburse any proceeds if the house should be sold.