



CARE-CENTRIC ELDER LAW IN FLORIDA

When a loved one is facing chronic health issues or imminent long-term care, the correct estate planning, incapacity planning and long-term care planning can be a daunting task. The family will want to make sure that their loved one receives the best possible care while ensuring the assets are maximized for the elder's best and most efficient use. To make matters worse, an extremely fragmented system will leave a family with a great deal of confusion and frustration in receiving assistance related to the elder's care, long-term care placement, financial and legal issues. When faced with their loved one's age-related issues, a family may have a great deal of questions, such as:

- How can I make sure the elder has an efficient and coordinated estate plan?
- Who is the best person to make the correct medical and financial decisions if the elder is not able to make those decisions themselves?
- How will the elder stay home for as long as possible throughout the aging process?
- What public benefits is the elder entitled to and what do they have to do to qualify for them?
- How can we use the assets to take care of the spouse who is still at home, to ensure good care, and provide an inheritance for the children?
- Who will I turn to on questions of the elder's quality of life, health care crises or care coordination?

Our goal as a "Care-Centric" elder law firm is to assist the family in promoting the good health, safety and well-being of the elder/client, whether he or she is at home, in independent living, assisted living or already in a nursing home. Our Care-Centric planning focuses not only on Medicaid and other government programs, but on effectively assisting the family care for the client throughout the aging process. This elder-focused practice model is a new way to help coordinate a family's needs by offering holistic solutions for families struggling with the demands of a loved one's care. Where "traditional" elder law firms focus on saving the elder's money for the next generation, our goal is to efficiently use the elder's money to maximize the elder's quality of life and independence.

Our Care-Centric elder law practice brings together a team approach to providing for the elder. This approach is designed to:

- Help implement the proper estate plan;
- Help ensure the most useful incapacity planning documents are in place;
- Help ensure the family is ready in a time of crisis;
- Help ensure the spouse at home is being cared for;
- Help ensure the elder is in the appropriate setting and receiving good care;
- Help ensure the elder's assets are properly coordinated so that the maximum private and public benefits are available to the family's use;
- Properly address probate and tax issues;
- Address health insurance issues;
- Help ensure maximum Veteran's benefits are used;
- Provide peace of mind knowing the family has a place to turn to help the many practical issues that may arise in caring for a loved one;
- Properly use and coordinate with the Medicaid Waiver and Diversion programs

If you, your spouse or your loved one is facing the early stages of a chronic illness (i.e., Parkinson's, Alzheimer's or stroke), our office will be integral to answering your questions so that you are able to provide the elder with the best care possible, while causing the least amount of stress for the family.

DeLoach & Hofstra, P.A. was founded in 1976 in Seminole, Florida by Dennis R. DeLoach, Jr. We have established our "Care-Centric" Elder Law practice because we saw many needs that were going unaddressed with the "traditional" elder law practice. When an elder/client faces long-term care problems, the family often did not know where to turn for the many questions they faced. While a traditional elder law practice can protect the elder's assets, many of our clients needed a great deal more than what we were able to provide. We discovered that while asset protection was a concern, families just needed help in knowing that their loved one was properly cared for and did not know where to turn for good, practical advice.

Seeing that our traditional elder law practice was not helping our clients to the best extent possible, we began our quest to establish the kind of law practice we could feel good about. With the progression to the "Care-Centric" focus, we did not want to be the lawyers who just hide their client's money from the government – we want to help you **create a team that provides for the client/elder's best care possible**. In doing this, we have assembled a team to look at care and asset management from a long-term solution while providing the counseling and referral coordination our families need.

Our Care-Centric elder law practice will help you and your loved ones at the many different areas of the aging process. To help with these matters, our services include, but are not limited to, the following matters:

- Referrals to a suitable nursing home or assisted living facility
- Accessing home health care benefits through Medicare and Medicaid
- Rehabilitation and home health care issues and referrals
- Health Insurance matters
- Hospital and doctor referrals
- Medicaid and Asset Protection Planning
- Veteran's Benefits coordination
- Wills and Trusts
- Durable Powers of Attorney, Health Care Surrogates and Living Wills
- Probate and Trust Administrations
- Planning for Disabled Persons with special needs trusts
- Real Estate transactions

In looking for the correct legal representation, you should ask yourself – Does your attorney have the ability to help you with of the above questions?

FLORIDA ESTATE AND INCAPACITY PLANNING

To further our clients' knowledge regarding estate planning, incapacity planning and asset protection planning, please review the following, which will provide a good basis for many of the issues the elder and their family may face during their lifetime.

Wills and Probate

Your will is a legally-binding written statement directing who will receive your assets at the time of your death. Your will also nominates a personal representative who will carry out your directions and represent your estate. A will can be a simple or complex document and is the cornerstone of any estate plan.

One very important aspect to consider is that your will governs only those assets in your individual name (probable assets). Many types of property pass outside of probate, including jointly-owned property, property in trust, life insurance proceeds and property with a beneficiary designations, such as IRAs or 401(k) plans. Thus, in order to create a coordinated estate plan, you must know which of your assets are probable and where and how your non-probable assets shall pass.

If you die without a will, your estate is distributed according to Florida's laws of intestacy, which generally provide for your property to be distributed equally among your family members. This may not be in accord with your wishes. **CONTRARY TO POPULAR BELIEF, IF YOU DIE WITHOUT A WILL ALL OF YOUR ASSETS DO NOT AUTOMATICALLY GO TO THE STATE OF FLORIDA.**

Your will nominates the person to administer your estate and distribute it according to your desires and instructions. This person is called your "personal representative". If your nominated personal representative does not live in Florida, he or she must be related to you by blood.

Upon your death, the assets in your own, individual name are distributed according to your will through the probate process. Probate is the legal process of settling the estate of a deceased person and, more specifically, distributing the decedent's property. Again, probate does not generally cover assets that are jointly held with rights of survivorship, life insurance, IRAs and 401Ks, annuities, and property held in a living trust.

The court having jurisdiction over the decedent's estate (generally referred to as the "probate court") supervises probate in order to ensure the decedent's property is

distributed according to the direction of his or her will and the laws of the state. Much of the probate process involves making sure all of the decedent's creditors are paid before the heirs receive their distributions.

The personal representative is appointed and bonded by the probate court. The personal representative's most common task is the marshalling of the decedent's assets throughout the probate process. If there is no will, or if the will does not name a personal representative or if he or she declines to serve, then the probate court will appoint a personal representative upon petition of interested parties.

Generally speaking, the avoidance of probate is a good goal. With probate, you must hire an attorney, whose fee is normally based upon the size of the estate. Additionally, the process usually takes around six (6) months or more in most situations, although a summary administration may be available in certain circumstances. Our office will help you properly avoid probate, if that is your aim, or will correctly represent the heirs in an efficient and straightforward manner.

Revocable Living Trusts

In order to avoid probate, people often create a Revocable Living Trust. A trust is a legal arrangement which one person (or an institution, such as a bank), called a "Trustee," holds legal title to property for another person, the "beneficiary." The person who creates the Trust is known as the "Settlor". The rules or instructions under which the Trustee operates are set out in the trust instrument. Trusts typically have one set of beneficiaries during the Settlor's life and another set -- often the Settlor's children -- who begin to benefit only after the Settlor dies. The Trust is presently active, hence the name "Living Trust". Assets that would normally be subject to probate are transferred to and held by the Trustee so that upon the Settlor's death, the Successor Trustee continues to administer as specified in the Trust, all without the burden of probate.

There can be several advantages to establishing a Trust, depending on your situation. Best-known is the advantage of avoiding probate. Upon the Settlor's death, the Successor Trustee distributes the assets to the remaining beneficiaries without requiring probate. The avoidance of probate would likely save time and money for the beneficiaries.

In addition to the potential to avoid probate, another advantage of trusts is their continuing effectiveness even if the Settlor becomes incapacitated. In such a case, assets held in the Trust will continue to be held by the Successor Trustee for the

Settlor's benefit. This is generally a better way to manage an incapacitated person's assets than through a power of attorney alone.

With a revocable Trust, the Settlor maintains complete control over the Trust and may amend, revoke or terminate the Trust at any time. The estate avoids probate while the Settlor maintains the ability to alter his estate distribution during his or her lifetime. The main difference between a will and a trust is that the will directs the distribution of the probate assets while the Trust avoids probate in its entirety. Consultation with our offices will clarify the better choice for you.

Basic Incapacity Planning

Any estate plan should include preparing for your possible incapacity. There are three (3) documents which are highly recommended in all incapacity situations: the durable power of attorney, the health care surrogate and the living will. The importance of these documents cannot be overstated for many reasons, one of which is the new privacy rules. Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), your medical records are private and closed guarded by your medical providers. The correct incapacity planning documents as set forth below will help your family gather and share medical information in times of crises.

Durable Power Of Attorney

For most people, the durable power of attorney is the most important estate-planning instrument available--even more useful than a will. A power of attorney appoints the person of your choice -- your "attorney-in-fact" -- to act in your place when and if you ever become incapacitated. Most powers of attorney take effect immediately upon their execution, even if the understanding is that they will not be used unless and until the grantor becomes incapacitated. A "durable" power of attorney means that the power survives your incapacity, such as a stroke or advanced dementia. NOTE: A DURABLE POWER OF ATTORNEY, LIKE ALL POWERS OF ATTORNEY, IS AUTOMATICALLY CANCELLED AT THE TIME OF YOUR DEATH.

If you become incapacitated and you never created a power of attorney, the only likely recourse is a court ordered guardianship. The guardianship process is lengthy, expensive and onerous. Though no one plans to become incapacitated, a power of attorney can avoid a lot of difficulty and/or financial burden. It is unfortunate, but many of our clients have waited until it was too late to execute a power of attorney.

Your power of attorney should be updated periodically in order to be most useful. We can unequivocally state that our power of attorneys change according to our practice and, if you need to rely upon any document, you need the best, most recent one available.

When you have designated someone as your attorney-in-fact, you, of course, have delegated this to someone whom you know will be faithful and who will uphold this fiduciary obligation in the highest manner. If you have any doubts as to whether or not this person will uphold these obligations in your best interest, then we suggest that the Power of Attorney be canceled. The power of attorney is active when created, unless the document provides otherwise. Our Power of Attorney document names alternate agents, who can serve when the nominated person is unable or unwilling to serve.

The Power of Attorney may be used for a broad range of business and other activities. One cannot predict the many ways a power of attorney can be helpful. If you wish to use the Power of Attorney immediately, it may be best to have it approved by the entities in question. The refusal to honor the Power of Attorney is contrary to Florida law, but you will often need a letter from these offices, at the least, to fix any problems the institution may have with the document.

Advanced Directives

Living Will and Health Care Surrogate Designation

Any complete estate plan should include both a designation of health care surrogate and a living will. These documents are generally referred to as *advanced directives*.

A living will allows you to document your wishes concerning medical treatments at the end of life. A health care surrogate designation allows you to appoint a person to make medical decisions on your behalf when you are unable to make those decisions yourself.

Your surrogate should be someone you trust and who understands your desires. You will need to ask if he or she is willing to act on your behalf. Not everyone is able to be an effective agent. Talk to your surrogate about your wishes regarding end-of-life medical treatment. Even family members may not know how much treatment a loved one desires. Talking clarifies what you want and diminishes a surrogate's potential guilt and anguish over whether he or she is doing the "right thing".

Estate and Gift Taxes

The Federal Estate Tax is a transfer tax based upon your gross estate, taxing that amount of your estate that exceeds the applicable credit amount. There is a great deal of misunderstanding regarding estate taxes. Generally speaking, unless the value of your estate exceeds the credit amount (\$3,500,000 in 2009), your estate (i.e., your heirs) will not have to pay any estate taxes. If your estate does exceed the credit, taxes are assessed only on the value of the estate exceeding the credit amount. Florida does not have an estate tax to speak of.

MEDICAID AND ASSET PROTECTION IN FLORIDA

This section discusses the basics of Medicaid, which can be very useful in paying for the elder's long term care. Nursing home and other long-term care costs can quickly use up a lifetime of savings due to costs typically ranging between \$7,000-\$8,000 per month. While definitely not for everyone, Medicaid and other government programs may be available to help an elder's money last longer, for his or her benefit.

Medicaid and other programs are all difficult to understand due to the many rules, regulations and practices. We frequently see caregivers receiving conflicting and inaccurate information at a particularly trying and stressful time in their lives. The following will discuss many of the rules for obtaining Medicaid benefits.

What is Medicaid?

Medicaid is the federal program to help the poor and middle classes cope with extraordinary health care costs. Health care providers all across the country give a wide range of services with Medicaid dollars. The Medicaid system is funded from both state and federal dollars. Florida runs the Medicaid program under guidelines provided by the Federal government. The state program is administered through the Department of Children and Families ("DCF"), where application is made for any potential benefits.

The most common Medicaid program an elder law attorney deals with are the long-term care programs. The Institutional Care Program (ICP) covers nursing-home costs (including skilled, intermediate and custodial care) for those who qualify. There are new programs such as the Diversion and Waiver programs, which can be very useful in helping the costs of assisted living. Our office specializes in using these programs to properly aid in the elder's care.

What is Medicare?

Medicare is the United States government health insurance plan that provides hospital, medical, and surgical benefits for person's age 65 and older and people with certain disabilities. Paying money into the system during your working years, like Social Security, allows Medicare benefits at the appropriate time. Medicare benefits are generally divided into parts A & B. Part A pays for hospital visits, nursing home and hospice coverage while Part B pays part of outpatient visits and other medical services and Medicaid equipment. Medicare Part C is the choice of plans that typically include joining an HMO, instead of Medicare, for your health needs. Medicare Part D is the new prescription drug coverage.

Difference Between Medicaid and Medicare

Medicaid and Medicare are two extremely different programs. For our purposes, we can generally say that Medicare was created for hospital and other medical purposes while Medicaid is a needs based system with strict financial requirements, which can include long-term care.

Both Medicaid and Medicare will pay for "skilled" nursing care for qualified patients. Medicare coverage includes "skilled" nursing care if the patient is in the hospital for three (3) full days before he or she is transferred into skilled care. Medicare pays the entire cost of care for the first twenty (20) days as long as the patient is generally improving or is responding to therapy. For the next eighty (80) days, the patient pays a co-pay (exceeding \$130/day), which changes annually. Medicare coverage can be terminated at any time if the individual's medical condition does not improve, i.e., if the patient will not get any benefit from skilled nursing care. Thus, most patients do not receive the one-hundred (100) days of Medicare benefits. Once Medicare will not pay for your nursing home stay, then either you or Medicaid will be responsible for your long-term care.

If you are a member of an HMO instead of Medicare, you will need to review their cost schedule. Often, Medicare is more favorable than an HMO. Our office will be able to advise you on the best program most useful to you.

Eligibility Requirements For Medicaid.

Aside from the asset and income caps explained below, Medicaid has other stringent requirements for the nursing home and assisted living programs. The applicant must be;

- At least 65 years of age or disabled;
- A United States citizen or a “qualified” alien;
- A Florida resident; and
- “Medically needy”, as established by the Medicaid process. This determined through intensive testing once Medicaid benefits are requested. The testing is done by the CARES team. The testing determines the level of care needed if the services are those covered by Medicaid benefits. The testing involves a team evaluating the individual's capacity to perform certain activities of daily living (ADL's). Generally, if an elder is in the correct facility, we assume that they are medically needy for medicaid purposes.
- Income: Gross monthly income must not exceed a set limit, which changes annually.
- Assets: Countable assets for a single person must not exceed \$2,000. Assets for a married couple allow the Community Spouse (the spouse not in the nursing home) to have over \$110,000 in countable assets, which also changes annually.

Financial Requirements – Income and Assets

Medicaid benefits are only available to those individuals or couples who meet a complex list of requirements. There are many rules and exceptions that can drastically effect a planning scenario. The financial requirements are divided into two separate and distinct categories: Income and Assets. These two particular requirements rarely interact with each other.

Income. A single person's gross monthly available income must not exceed the applicable limit. Gross income is not the same as taxable income, meaning that social security and the Medicare Part B premium, and employee subtracted health insurance, are not deducted before calculation of income.

If the applicant's income exceeds the designated limit, a Qualified Income Trust (QIT) must be created and funded in order to shield the income from being counted. The trust is extremely important in this situation. An attorney must establish the QIT by following very specific rules and regulations.

The income of the spouse staying at home (the “community spouse”) is not included in determining gross income. He or she can have unlimited income. However, should the community spouse’s gross income not exceed a certain level, the community spouse is able to divert some of the applicant’s income for his or her own financial needs. This is known as the spousal diversion.

Assets. As Medicaid is a “needs-based” program, most individuals applying for benefits can only have \$2,000 in countable assets. The community spouse is allowed to have over \$100,000 in countable assets. If both spouses are institutionalized, only \$3,000 in countable assets is allowed between them.

Assets are divided into countable and non-countable assets. The most important asset, the homestead, is not a countable asset unless it exceeds \$500,000. There are a few other non-countable assets such as:

- 1) Any one car of unlimited value;
- 2) Second car if over seven years old and not a collectible car;
- 3) funeral plots;
- 4) irrevocable burial pre-paid policies; and
- 5) Life Insurance with face value less than \$2,500. If face value exceeds \$2,500, the cash value therein is counted towards the asset level.

There are many other rules to the assets where legal advice can be indispensable. One such rule is that jointly held bank accounts are **not** divided among the owners. Thus, it does not matter if a son or daughter has been added to an account; it is all attributed to the applicant unless this can be proven otherwise.

Patient’s Responsibility.

In receiving Medicaid benefits, the Medicaid recipient is responsible for paying his or her income to the nursing home, known as the Patient’s Responsibility, retaining a personal needs allowance (PNA) of \$35/month. This allowance is intended to cover haircuts, laundry, etc., which the individual will need each month. Of course this is an absurdly low number that others (family and friends) will typically need to supplement. After deducting the \$35.00, the spousal diversion, as briefly described above, is deducted, allowing the community spouse to keep a set amount of the Medicaid recipient’s income. The remaining income, if any, is paid to the nursing home as the patient’s responsibility.

Basic Application Procedure.

A Request for Assistance (RFA) form is used to apply for Medicaid. Additionally, the applicant must allow Medicaid to check all medical and financial records.

The application process can be long and arduous. All assets need to be accounted for, valued, and categorized. Our office can help in gathering the needed information, attend a possible interview with you, and help save the family many thousands of dollars in nursing home costs and much time and frustration. An applicant is eligible for Medicaid if he or she meets the criteria and applies within three (3) months of financial eligibility. However, the best policy is to apply as soon as possible.

Options Available for Obtaining Medicaid Eligibility.

There are many available options in protecting the assets to allow eligibility. Each and every case needs individual attention to decide what is best for the applicant. The many options, to name a few, include the use of Medicaid qualified annuities, strategic gifting, and personal service contracts, among others. These can typically be done in advance or on the cusp of a nursing home stay. Regardless, our office will be able to work with the family in order to provide proper care for the elder, proper application for all benefits, and elder law attorney is the best way to know all of your options as there is a great deal of misinformation regarding the rules, options and application process. It is never too late to discuss options with your attorney.

Gifting and Asset Transfers

The largest limit on asset protection planning is the transfer penalties. It only makes sense that you are not allowed to give all of your assets away in order to become eligible for Medicaid. Upon application, DCF will look at all uncompensated transfers (gifts) of assets that have occurred within the past three (3) years, which may, in the future, move to five (5) years. This is the applicable look-back period. There is no penalty for transferring assets to your standard revocable living trust or to your spouse.

Any uncompensated transfers *not permitted under Medicaid rules* require a transfer penalty making the patient ineligible for benefits for a set period of time. This basically means that there can be no transfers (gifts) within three (3) years of application.

If you have made gifts within the past three (3) years, you will need to discuss your options with an elder law attorney before planning can begin.

Medicaid Waiver and Diversion Programs

Government assistance can also be used when an individual is in an assisted living facility (ALF) through the various Waiver programs. The financial information described above applies to these programs. Importantly, not all ALFs accept these programs and the government funding can vary from time to time. Our offices can help decide which program is available and most helpful to you, which can be a particularly confusing subject to the uninitiated. Additionally, certain Waiver programs can even help keep an elder at home longer.

MEDICAID MYTHS AND REALITY

The following illustrates the basic misunderstandings the public has regarding Medicaid.

Myth: I am allowed to gift away up to \$10,000 per year per person to enable me to become eligible for Medicaid.

Reality: The annual gift tax exclusion, which has increased to \$13,000, is a matter of federal estate and gift tax law. The Medicaid ineligibility period has nothing to do with this gift tax exemption. Remember, there is no gifting (outside very specific exceptions) within the three-year lookback period.

Myth: You must sell your home in order to become eligible for Medicaid.

Reality: An applicant's homestead is exempt if there is intent to return home, no matter how remote that possibility is. The home must be worth less than \$500,000. You are generally not allowed to lease your home as this will remove the exemption.

Myth: If the applicant has joint bank accounts, the other owner can simply take the joint assets and the applicant will then become eligible.

Reality: This is a transfer that will cause periods of ineligibility, just like most other gifts of property.

Myth: Medicaid patients receive lower or less treatment than do their private pay counterparts.

Reality: It is illegal to discriminate between public and private pay patients. If this is occurring, there are a number of options to correct this practice.

Myth: Even if asset protection planning is performed, the State gets everything upon my death.

Reality: It is true that Medicaid (i.e., the State of Florida), is a creditor in your estate, just like any other creditor. But, if your assets avoid the probate process, your creditors have nothing to make a claim against. Also, your homestead, usually the most valuable asset, is exempt from your creditors under most instances under the Florida Constitution.

VETERAN'S BENEFITS

It is estimated that about one-quarter of our nation's population is eligible for Veteran's benefits through the Department of Veteran's Affairs. Frequently, our clients are not even aware that they may be eligible for their own Veteran's benefits, which is typically the Special Pension with Aid and Attendance (A&A) benefits. This Special Pension allows for Veterans and their surviving spouse who require the regular attendance of another person to assist in eating, bathing, dressing, undressing or taking care of the needs of nature to receive additional monetary benefits. It also includes individuals who are blind or a patient in a nursing home because of mental or physical incapacity. Assisted care in an assisted living facility also qualifies.

This most important benefit is overlooked by many families with Veterans or surviving spouses who need additional monies to help care for ailing parents or loved ones. This is a "pension benefit" and is not dependent upon service-related injuries for compensation. Most Veterans who are in need of assistance qualify for this pension. Aid and Attendance can help pay for care in the home, nursing home or assisted living facility. A Veteran is eligible for up to \$1,644 per month, while a surviving spouse is eligible for up to \$1,055 per month (2009).

Our office, as part of a care plan, will be able to help coordinate this benefit for the elder's proper care.

WHO ARE WE?

DeLoach & Hofstra, P.A. was founded in 1976 in Seminole, Florida by Dennis R. DeLoach, Jr. Peter T. Hofstra joined the firm in 1978 and practices primarily in real estate and association law. Paul R. Cavonis joined the law firm in 1992, practicing primarily in personal injury and civil litigation matters. DeLoach & Hofstra, P.A., is an “a.v.” rated law firm, receiving the highest possible rank for ethics and legal work.

In 2001, D. “Rep” DeLoach, III joined to the firm to practice primarily in estate planning and elder law. In 2005, Rep became Board Certified by the Florida Bar Association in Elder Law. Board Certification requires a peer review and thorough examination and is obtained by approximately one percent (1%) of practicing attorneys. Rep is a member of the executive council for the Elder Law section of the Florida Bar Association, a member of the Real Property and Probate section of the Florida Bar, the National Academy of Elder Law Attorneys (NAELA), the Academy of Florida Elder Law Attorneys (AFELA), and the estate planning and elder law section of the Clearwater Bar Association. He is a frequent lecturer on estate planning issues to the general public and has provided his services to other attorneys for continuing legal education (CLE) credits. Having been actively involved in numerous community activities, he is currently a board member of SPCA Tampa Bay.

To obtain other handouts concerning the above services, please visit www.deloachandhofstra.com.