

Elder Law Insight...

Addressing the Legal Issues of Aging and Asset Protection

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Special points of interest:

- Medical care and the heart-break of dying. Read [Advance Directives... A Must for Everyone!](#)
- Discover the realities of Long-Term Care. Read [Long-Term Care.](#)
- The Adult Protective Services Act provides help for seniors. Read [Elderly Victims of Abuse: There is help.](#)

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Advance Directives... A Must for Everyone!

Lest you think only the elderly need advance directives and healthcare proxies, think again. A current case in Florida is on its fourth round of appeals and that may not end the fighting among family members.

In the Guardianship of Schiavo, husband is pitted against in-laws in a case that might have been avoided.

Terri and Michael Schiavo were married on November 10, 1984, and moved to Florida in 1986. On February 25, 1990, at age 26, Terri suffered a cardiac arrest as a result of which she has been in a persistent vegetative state.

As a result of her condition, Michael eventually sought court permission to remove his wife's feeding and hydration tube, an action which Terri's parents

vehemently opposed. Thus began the round of hearings and appeals. The last appeals court decision remanded the matter to the trial judge for a hearing on when the tube should be removed.



Advanced planning must not be ignored!

Would an advance directive have solved the Terri Schiavo problem? A simple, naïve answer would seem to be yes. And yet, could Terri's parents be convinced to let go? Would

any document have persuaded them to refrain from 13 years of legal actions?

This situation points out the need for everyone, young and old, to have advance directives. And, it also points out the need for everyone, young and old, to sit down with family and friends to discuss their needs and desires. It's not enough to merely draft and execute the document. One needs to understand the choices he or she makes and communicate his wishes to others.

Drafting a "living will," as most people refer to these documents, is not an easy thing to do. Often it is the first time that an individual must confront his or her mortality. While we all recognize we will die someday,

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Long-Term Care

To many of us the possibility of living out our days in a nursing home or assisted living facility is something akin to being assigned to purgatory when judgment day comes. At best a long-term care facility is clean, attractive, prop-

erly staffed and equipped to deal with our unique needs. And, at worst it seems to be that purgatory we seek to avoid. Yet, one in two adults over the age of 75 will spend time in a long-term care facility.

Today, baby boomers

are turning 50 at the rate of one every seven seconds. The fastest growing segment of our population is that group that is 85 and above and of that group one out of every two will be confined to a long-term care

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Long-term Care

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facility. The American Health Care Association projects that by the year 2020 the number of senior citizens living in long-term care facilities will increase by 58%. These are staggering figures and will certainly place a substantial burden on the long-term health care delivery system.

How and by whom is the cost of

Even moderately wealthy individuals can expect to be pauperized if they live long enough!

long-term care paid? Currently, individuals pay 35.8% of the cost and Medicaid pays 46.5%. The balance is paid by Medicare (9.4%), churches and groups (4.1%) and by insurance (3.2%).

As Timothy C. Pfeiffer said in his article, *The Long-Term Care Dilemma: An Insurance Strategy*, published in *Experience*, Vol. 13, #4, at page 11, "A primary reason Medicaid bears so much of the long-term tab is not because so many elderly people are poor but because they have spent their available assets on long-term care expenses and must now turn to the government for assistance. This process is called "spend down," and entails spending down all "countable assets" to Medicaid thresholds. Countable assets include all cash over \$2,000, all stocks and bonds, IRAs and Keoghs, savings bonds, T-bills, investment properties and vacation homes, CDs, single premium deferred annuities, cash value life insurance and second vehicles."

The average senior citizen today, those 65 and older, with assets of less than \$1,000,000 and income of less than \$6,500 a month can expect, should

he or she live long enough and be unfortunate enough to require long-term care, to be pauperized and require Medicaid to pay the cost of care in their final years.

Presently, long-term care is paid primarily by three sources: The individual, Medicaid and long-term care insurance. Most individuals over the age of 65, the overwhelming bulk of our clients, do not have long-term care insurance and therefore must use their own funds to cover the cost. If possible, health, income or assets permitting, those in this age group should consider the possible purchase of long-term care insurance. Even with high premiums it may make good economic sense.

Consider, for example, a senior citizen age 70 who is in excellent health with monthly income of \$3,500

Long-term care insurance may be a wise, Medicaid planning strategy for a senior citizen.

and assets of \$500,000. If the yearly premium for a policy which provides three years coverage is \$10,000, she only needs to buy coverage for a maximum of three years. During this three year period she can engage in Medicaid planning so that at the end of that time she could have effectively reallocated her assets to protect them from spend down. If at any time her health fails she has her insurance and income to cover her monthly expenses. If she is not institutionalized she can elect to drop the coverage at the end of the three year period should she desire and Medicaid will pick up her nursing home costs should she require institutionalization in the future. If she requires care during the three years coverage is in effect the insurance will cover her under the "Medically Needy"

program.

The result is that for the cost of \$30,000 she has saved \$500,000 and used the thirty-six month look back to maximum advantage. Compare this to the cost of paying for nursing home care. On the average, in the State of New Jersey at the present time, a semi-private room costs between \$6,000 to \$7,000 a month. The \$30,000 spent on insurance would pay no more than five months in the nursing home.

What must one look for when considering long-term care insurance?

Look for a financially secure company. Check A.M. Best, Standard & Poor's or another comparable rating company.

Make certain you obtain the desired coverage. Does it provide in-home care, adult day care, respite and hospice care? Determine what is important and purchase accordingly.

Do you want inflation protection? The younger one is the more important this protection. The closer to institutionalization one is the less important this becomes. Also, consider the individual's income and assets when analyzing this feature.

What daily rate do you need and how long a waiting period should you consider? This depends on the individual's monthly income, how long she wants to be self-pay and how much, if any, Medicare may pay. The longer the waiting period the lower the premium but, if engaging in Medicaid planning, a short waiting time is probably more important than a lower premium.

Waiver of premium, is it important? This should be seriously considered so that premiums cease once the individual is eligible for coverage.

Analyze the financial impact of this purchase to see if it makes sense for the individual. Even a costly purchase may make sense.

A Medicaid Myth:

"If I enter a nursing home as a private pay resident, I must use up all my assets before I can get Medicaid."

...*The Truth:* You are not required to use all your assets to private pay for nursing home care. However, some nursing homes might try to make you believe that you do have to do this. They are paid less under the Medicaid program than they collect from private pay patients. Some people seek advice from an elder law attorney to find out how they can become Medicaid eligible before having spent a significant part of their assets at the private pay rate.

Advance Directives,... a Must for Everyone!

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for most of us the concept of "someday" is still illusory. Senior citizens are more pragmatic about death, some even awaiting the release it will bring. For most, however, discussion of death and its implications is something to be avoided.

Had Terri Schiavo discussed her desires with her parents, as her husband claims she did with him, perhaps it would have been easier for them to accept the realities of her situation. And, perhaps it would have been easier to let her go. As it is, there are no winners in Terri's case and, no matter the outcome, there never will be.

In any event, Terri's case clearly demonstrates the need for a well-drafted advance directive and for the

requisite discussions that should follow. It also demonstrates the need for young and old to realize that death and disability are not solely the province of the elderly.

Attorneys should be sensitive to the needs of their clients in this area. As should be obvious, an advance directive for healthcare should be drafted with the needs of the particular client in mind. These documents should not be considered form, boilerplate forms nor a Chinese menu of choices. Before drafting the "living will," counsel should discuss with the client what he or she wants and expects from life. What constitutes a meaningful life for that particular individual? Without an understanding of these basic facts it is impossible to draft a living will which

meets that client's needs.

The attorney should discuss who will serve as proxies for the client and the duties the proxy fulfills. Selection of a proxy should be carefully thought out. Avoid "knee-jerk" selections of the spouse or the oldest child. If the spouse is elderly he or she may not be capable of coming face-to-face with the client's mortality. Likewise, the oldest child is not necessarily the right choice. A proxy should be someone who, when the time comes, will make the difficult decisions; the decisions the client would make if he or she were capable.

Suggest an advance directive with a proxy to all your clients; you'll do them a favor.

...recent cases and law of interest from here and there:

...An elderly couple transferred ownership of their condominium to a trust and retained a joint life estate. After the wife was admitted to a nursing home the husband died. Then, the trust sold the condominium and transferred ownership without any consideration going to the wife. When she applied for Medicaid her application was denied based on the "gift" of her interest in the condominium. The appellate court held, on appeal from the decision of an administrative law judge, that the wife had the burden of proving that she was entitled to Medicaid and that the transfer of the life estate did not constitute a "divestment" (i.e. gift) of her interest in the property. As the court said, "[E]ligibility for MA [medical assistance] is not a default presumption which the Department must rebut, but a privilege for which the applicant must prove eligibility. *Hopp v. Wisconsin Department of Health and Family Services*, www.wicourts.gov/html/ca/02/02-3352.htm

Comment: The transfer of a life estate, whether to a trust as in the *Hopp* case, or to the life tenant and remaindermen must be approached with care. Boards of Social Services are reluctant to accept these transfers, notwithstanding the language of the administrative code or other applicable law, as they effectively transfer a valuable asset for a percentage of its value. In *Hopp*, the life tenant took no action to claim her interest at the time of sale, choosing to adopt the position that the life estate had no value at the time of sale. This position was based on a provision in the trust which said that after the life tenants had been out of the property for 120 days the life estate would terminate. Unfortunately, the wife failed to meet her burden of proof and her application for Medicaid was denied.

...Attorney who allegedly counseled client regarding a transfer of assets to avoid a potential obligation to creditors and who subsequently issued an opinion letter to client's bank may yet be liable to the bank under theories of common law and creditor fraud. The bank contends that the attorney knew when he issued the opinion letter that the client's net worth was less than required by the bank to provide a loan. The bank asserts reliance on the letter to its detriment, one of the elements of common law fraud. The court also considered the claim for creditor fraud against the attorney and held that the bank should have the opportunity to prove its case. The bank's complaint had been dismissed on the attorney's motion to dismiss for failure to state a cause of action and following appeal the matter was remanded for trial. *Banco Popular v. Gandi*, 360 N.J. Super. 414 (App. Div. 2003).

...Wealthy aunt named nephew trustee of her living trust and executor of her will. In addition she gave him her power of attorney. Shortly thereafter he began raiding her assets for gifts to himself and his family and sought control of her business interests. Subsequently he had his Arizona attorney draft a will in which she made him her sole beneficiary, supposedly in keeping with her expressed wishes. Thereafter, nephew read the will to his aunt, at her nursing home bedside, over the course of three days following which she executed the document with an "X." When he could not obtain control of her business assets, due to the resistance of her general partner, he brought suit to have the will admitted to probate and to force transfer of her business interest to him. The trial court ruled against the nephew and the appellate court affirmed saying that the nephew was clearly overbearing and that while a testator is presumed to be of sound mind and competence even a will which on its face appears to have been validly executed can be overturned upon a demonstration of undue influence. *In re Will of Catelli v. Villone*, 361 N.J. Super. 478 (App. Div. 2003).

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A Concept Not to be Missed!

Regular review of wills, powers of attorney, living wills, living trusts and similar documents is necessary to insure their continued relevance. Senior citizens' needs fluctuate rapidly, their support groups change and the possibility of poor health with resulting institutionalization demands planning documents which can meet their changing circumstances. Since documents tend to be static in nature, regular reviews and revision are in order. "Life planning," that is the reallocation of assets while well and competent, must be considered a viable approach to the overall planning process. Assets retained for disposition until death may be lost to a nursing home or other long-term care facility.

The *Elder Law Insight...*, a publication of The Elder Law Firm of PRICE & PRICE, LLC, is published regularly and is written for attorneys, accountants, financial advisors, doctors, geriatric care-managers, health care and other professionals.

The Elder Law Firm of PRICE & PRICE, LLC, concentrates its practice in the areas of Elder Law, Medicaid/Asset Protection Planning, Guardianship, Special Needs Planning, Estate Planning and Probate. If you have a legal question or concern in any of these areas, please feel free to contact us.

PRICE & PRICE, LLC, will be pleased, upon request, to provide copies of any of the following articles produced by the firm:

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| »Preventing Elder Fraud | »Understanding Medicare |
| »The Practice of Elder Law | »New Jersey Death Taxes Explained |

Elderly Victims of Abuse: There is Help

New Jersey seeks to protect its senior citizens through implementation of the Adult Protective Services Act, N.J.S.A. 52:27D-406. This act authorizes service providers, such as the County Board of Social Services, to pursue legal relief for the benefit of vulnerable adults. The service provider responds to reports from individuals or institutions.

According to the Act, when a person has reasonable cause to believe that a vulnerable adult is the subject of abuse, neglect or exploitation, that person can report it to Adult Protective Services for action. Upon receipt of a report, protective services shall initiate a prompt and thorough evaluation of the matter within 72 hours.

A perfect example of Adult Protective Services fulfilling its duties is illustrated in the case of *In the matter of Allen M. Farnkopf, Alleged to be in*

need of Protective Services, decided October 2003. In that case the Salem County Office on Aging received a report from a local bank that a 90-year old widower, Allen M. Farnkopf, was withdrawing \$70,000 in cash to give his caretaker. The Office on Aging immediately investigated and obtained a court order to protect Mr. Farnkopf from an exploitation until the matter could be thoroughly investigated.

Abuse is defined in the statute as "the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation of services which are necessary to maintain a person's physical and mental health." And, "exploitation" means the act or process of illegally or improperly using a person or his resources for another person's profit or advantage."

As the court said, "the Act consti-

tutes a legislative response to the risks and dangers of abuse, neglect and exploitation faced by our older, infirm and vulnerable citizens, as well as all other adults who are physically or mentally disabled or deficient."

If you know someone who you have reasonable cause to believe is in jeopardy, you can report it to your County Board of Social Services. Seniors are perhaps the most vulnerable of all the members of society and frequently need the help of neighbors and others. Remember that as members of society we have a responsibility to others less fortunate than we. The frail elderly are likely to be victims of abuse, often from their own children, and need our help.