

What is Elder Law?

Elder law attorneys should approach their client's issues the client's perspective using a holistic viewpoint. They should consider legal, medical, financial, social and family issues. The National Academy of Elder Law Attorneys describes Elder Law as a broad spectrum of legal issues affecting the elderly, including:

1. Preservation/transfer of assets seeking to avoid spousal impoverishment when one spouse enters a nursing home;
2. Medicaid;
3. Medicare claims and appeals;
4. Social Security and disability claims and appeals;
5. Supplemental and long term health insurance issues;
6. Tax planning;
7. Disability planning for financial management and health care decisions, and other means of delegating management and decision making to another in case of incapacity through the use of:
 - a. Durable Powers of Attorney;
 - b. Durable Powers of Attorney for Health Care;
 - c. Living Trusts; and
 - d. Directives to Physicians;
8. Access to health care in a managed care environment;
9. Guardianships;
10. Estate planning, including planning for the management of one's estate during life and its disposition on death through the use of trusts (including special needs trusts), wills, and other planning documents;
11. Probate and administration of estates;
12. Administration and management of trusts;
13. Long term care placements in nursing home and life care communities;
14. Nursing home issues including questions of patient's rights and nursing home quality;
15. Elder abuse and fraud recovery cases;
16. Housing issues, including discrimination and home equity conversions;
17. Age discrimination and employment;
18. Retirement benefits;
19. Health law; and
20. Mental health law.

The purpose of this article is to point out some common issues affecting those who might need an elder law attorney. Because of the cost of long term care, many of the issues are directly related to Medicaid qualification rules.

Nursing home Medicaid qualification is not appropriate for everyone who needs long-term care

- With proper planning, many people are able to stay home with in-home help and security precautions, such as a medical alert service and/or or home security system.
- Consider long-term care insurance (The National Association of Insurance Commissioners publishes a pamphlet called "A Shopper's Guide to Long-Term Care Insurance". Call 816-842-3600 or check the website at www.naic.com). Some insurance products offer the ability to take life insurance death proceeds, and use those prior to death to pay for long-term care.
- Create a long-term care plan before the need arises by considering all property and income, and analyzing various possibilities- how long would you be able to pay for care using all available resources, including, where appropriate, a reverse mortgage. The Texas Department of Insurance Long Term Care Resource Page at www.tdi.state.tx.us/consumer/hicap/hicapltc05.html has some helpful information.
- If you or a family member does need Medicaid to help pay for long-term care, be careful about "spending down." There is a misconception that people need to quickly spend their property. While spending down may be necessary, do so only after making a carefully thought-out plan, which is based on legal advice or research, not based on what a friend's family experienced. There is a lot of incorrect advice out there, and acting on it can result in financial devastation.

Who is the client when an elder law attorney is hired?

- It is very common for adult children to be involved helping their parents with all sorts of things, including estate and disability planning; however, even if the child sets up the appointment and even pays the legal fees, the parent is the client as far as his or her legal issues are concerned. The elder law attorney is bound by rules of ethics to advise the parent based on what is in the parent's best interests and to observe confidentiality rules unless the parent makes an informed and voluntary decision to waive those rules.
- It is common for adult children to drive their parents to appointments- your elder law attorney should suggest meeting privately, without your child present. Sometimes, well meaning children can pressure a parent into taking action they are not comfortable with.

An elder law attorney may counsel you about non-legal issues such as:

- Medical alert and security systems.

- Home safety issues (shower grab bars; throw rugs; step stools; caring for a spouse when there are physical or mental issues which make caregiving risky for either spouse; self neglect).
- Suggesting professional counseling regarding aging issues, illness, guilt about permitting a spouse to go to a nursing home, and death. A spouse who is a caregiver must take care of him or herself, and should try to get help such as with a home care agency.

There have been significant Medicaid rule changes in the past 2 years, both from a federal and state law standpoint. It is beyond the scope of this article to outline the Medicaid rules, but I want to point out some changes that have occurred recently. Medicaid is a federal program administered by each of the fifty states, so the rules vary from state to state, and the key figures change every year.

3/1/2005 Texas adopted the Medicaid Estate Recovery Program ("MERP")

- MERP applies to people age 55 or older, and who applied for long-term care services *on or after March 1, 2005* and provides that the state of Texas will recover costs paid by the Medicaid program from the estates of Medicaid clients after they are not longer living.
- The state of Texas will not pursue a MERP claim if the process is "not cost effective" (i.e., the estate is under \$10,000, or Medicaid costs were under \$3,000).
- There are some exemptions (non-probate property- that is, property which passes outside of a will; cases where the decedent was survived by a spouse, a child under age 21, a child of any age who is blind or permanently and totally disabled, or an unmarried adult child living in the Medicaid recipient's homestead for a period of at least one year prior to recipient's death; undue hardship, homestead under \$100,000 when heirs are low income).
- Deductions may be allowed if requested in writing (home maintenance and for necessary and reasonable expenses incurred for providing care that enabled the Medicaid recipient to remain in his or her home, delaying the institutionalization of the Medicaid recipient if sufficient supporting documentation can be provided).
- The state files probate creditor claim which ranks behind claims such as funeral expenses, mortgage liens, child support, and taxes.
- Homestead policy change- Texas has taken the position that placing the home in a revocable trust to avoid MERP disqualifies the homestead for Medicaid purposes.

11/1/2005 Texas Transfer Penalty Rules: Giving property away (or selling it for less than fair market value) results in disqualification for Medicaid based on the amount of property given away. Under the old rules, the government only looked at transfers within the 36

months before a person applied for Medicaid, and, if the gift was under \$2,908, there was no penalty.

- The transfer penalty is now calculated on a daily basis, rather than a monthly basis, so monthly gifting programs of transferring amounts just under the limit will result in disqualification.
- The transfer penalty is based on \$117.08 per day (i.e., for every \$117.08 worth of property given away, a person is disqualified from Medicaid for one day).
- Penalty periods which overlap run separately but consecutively.

2/8/2006 Deficit Reduction Act ("DRA")

- transfer rule changes- penalty period begins on date person enters nursing home or otherwise would have qualified for benefits.
- DRA extended the "lookback" period from 3 to 5 years, meaning that gifts made within 60 months of applying for Medicaid will count against the applicant according to the Transfer Penalty Rules mentioned above.
- The value of the homestead is limited to \$500,000.

Like all planning, planning for elder law issues should be done as soon as possible. It should be done before a crisis, and before you are about to go on vacation. The decisions you make at a time of crisis may not be the same decisions you would reach in other circumstances.