

**WJCT LUNCH & LEARN
CARING FOR THE CAREGIVERS
NAVIGATING LEGAL ISSUES**

Ailish O'Connor

Board Certified Elder Law Attorney

Advance Directives

- Durable Power of Attorney
 - Health Care Surrogate
 - Living Will
 - Designation of Preneed Guardian
 - Do Not Resuscitate Order
-
- Key Terms:
 - The Principal is the one giving the power to act
 - The Agent is the person who is designated to act on behalf of the Principal



What Is a Durable Power of Attorney (DPOA)?

- A **Durable Power of Attorney** is a legal document allowing someone (the *agent*) to make decisions for another person (the *principal*) even if the principal becomes incapacitated.
- Continues during illness or cognitive decline
- Can cover finances, healthcare, or both
- Essential for avoiding guardianship proceedings
 - In Florida, DPOA must be immediately effective
 - A DPOA that becomes effective only upon future incapacity is not valid in Florida unless executed before October 1, 2011

Why a DPOA Matters

- Prevents court-appointed guardianship
- Ensures trusted decision-makers
- Allows access to bank accounts and insurance
- Can be useful if signing care facility contracts on behalf of elder
- Very difficult to do Medicaid planning or VA benefits without one, if the elder is incapacitated
- A power of Attorney terminates upon the death of the Principal

What Happens Without a DPOA?

- Florida courts may require **guardianship**, which is:
 - Expensive (often \$5,000–\$10,000+ in fees and costs)
 - Demeaning to Elder
 - Time-consuming
 - Public record
 - Restrictive for family: every big decision must be ratified by judge
- A DPOA may prevent a guardianship, although a guardianship might be needed if there is severe family conflict or if the Principal ignores or overrides the Agent

Health Care Surrogate

- Can be added to a financial DPOA (health care power of attorney)
- In Florida, it is more often a stand-alone document called a Health Care Surrogate (HCS).
 - It can be immediately effective OR springing (only effective when 2 doctors say the Principal is not capable of making their own decisions)
 - The Agent must use Substituted Judgment – must do what the principal would have wanted. Can't take an action that the Agent knows would go against the Principal's wishes
- If there is no designated surrogate, there is a Proxy statute
- Free forms on Florida Bar website, elder law section website and Community Hospice: honoringchoicesfl.com

Living Will

- **A Living Will** is a legal document outlining your end-of-life medical care preferences if you become terminally ill, in an “end stage” condition, or vegetative
- It’s not a **Living Trust**; it doesn’t distribute property
- It is not euthanasia
- It must be signed in front of two witnesses; one of whom must not be a spouse or blood relative
- Free forms on Florida Bar website, elder law section website and Community Hospice: honoringchoicesfl.com

Do Not Resuscitate

- Not prepared by a lawyer; it is Form 1896, from the Florida Department of Health website
- It is a physician's order for medical providers to **not provide CPR**.
- Always printed on yellow paper.
- Signed by the person and their physician; or if incapacitated, by the physician and the Health Care Surrogate.
- CPR often means broken ribs, internal bleeding and immediate placement on a ventilator afterward.

Pre Need Guardian

- No one *wants* a guardianship
- The whole point of the advance directives is to avoid a guardianship, but sometimes it can't be avoided
- You can't MAKE someone do something just because you have a durable power of attorney; you can't stop them from sending money to a scammer; can't make them take their medicine or go to the doctor But a guardianship judge can!
- The Preneed Guardian allows you to name the person (or an alternate person) you would want to serve as guardian if you become incapacitated

Scams

- Activate setting on phone to SEND UNKNOWN CALLS TO VOICEMAIL
- Slow down, verify a suspicious message independently (call the company directly, and **not** by looking up their contact information on Google, because that can be hacked too).
- Legitimate organizations will never ask for passwords or demand immediate payment over the phone
- AI can impersonate the Sheriff's voice, your child's voice; **believe nothing**

Legacy Contact

- Add a “trusted contact” to bank and brokerage accounts. The bank or brokerage company can then call the “trusted contact” if they see fraudulent activity.
- Use the Social Security Advanced Designation to appoint a trusted person as representative payee of Social Security benefits, before the need arises.
- Both Apple and Android phones allow a cell phone owner to designate a "Legacy Contact."
 - Legacy contact has no access to the phone **until and unless** the phone owner dies.
 - After death certificate received, Apple/Android would unlock the phone to the legacy contact. The Legacy contact could then access iCloud photos, messages, notes, files, contacts, and device backups.

Paying for Care in Florida

Florida families typically use:

- **Private pay:** agency caregivers may cost \$35+/hour; ALF may be \$5,000+/month depending on care needs; nursing homes cost \$10,000+/month
- **Local nonprofit agencies:** like Aging True, ElderSource, APD
- **Long-term care insurance**
- **Florida Medicaid Long-Term Care (SMMC LTC)**
- **VA benefits**

Caregiver Legal Requirements

- Written caregiver agreements
- Documentation for Medicaid/VA
- Compliance with Florida employment laws
- Tax withholding- possibly including self employment tax



Medicaid Payment for Long Term Care

- Very elaborate and precise rules
- The program is designed to pay for **nursing home** level of care; BUT there is an option to pursue a "Medicaid waiver" that would provide a small amount of assistance to pay for an assisted living facility, and also the possibility of care at home, but not round-the-clock care.
- The rules are very different whether the person is:
 - married (the State of Florida is much more interested in protecting the spouse)
 - or single (Medicaid is the payer of last resort)

General Rules for Medicaid

- The person has to be a US citizen (or certain green card holders)
- Over the age of 65 or disabled
- In danger of needing nursing home level of care
- Utilizing other payment options (long-term care insurance or VA)
- Not be under a gifting penalty for gifts made in the prior five years
- Gross monthly income less than \$2,982/month OR establish and fund a qualified income trust to hold the excess income
- \$2,000 in countable assets if single, plus a laundry list of exempt assets
- \$162,660 in countable assets if a community spouse, plus exempt assets



Gifting

- Just because the IRS says you can give \$19,000 per person per year, does not mean it's okay with Medicaid.
- Medicaid's philosophy is that if you give away money that you could have used to pay your own health care, they can penalize you.
- Gifts **between spouses have no penalty** unless using spousal refusal.
- The look back period is five years.
- There is no written exemption for church contributions, birthday presents, etc. Medicaid will review the applicant's bank statements carefully. As a rule, anything above \$500 is likely to be questioned.

Big Ticket Exemptions

- Homestead is exempt; the value of the homestead must be \$752,000 or less, *unless* a spouse or disabled child lives in the home.
- One automobile
- A cemetery plot and an irrevocable prepaid funeral plan
- Life insurance with a cash surrender value of \$2,500 or less
- IRAs if taking RMD

Not Exempt

- Cash in the bank
- Cash in the mattress
- Brokerage accounts
- Boats, airplanes, tangible property with inherent value
- Non-Homestead real property
- Horse farm in Kentucky

Caregiver Contracts

- There are a lot of scenarios:
 - Is it a **family member**? Are they doing it out of the "goodness of their heart?" or do they want to be paid? Do they think they're getting a bigger share of the estate?
 - Is it **somebody you found on care.com or through church or a family friend**? They will want to be paid. You need a contract showing: they will submit to a background check, prove their work eligibility status, state how many hours per week they will work, what the hourly rate is, are they an employee or an independent contractor, and how you will take out all appropriate taxes. Does there need to be Worker's Comp. or will the homeowners insurance cover?
 - Is it a **Home Health agency**? They will have done the background check and usually handle all of the tax reporting.

Personal Service contracts as part of a spend-down

- Suppose an 84-year-old widow is going to a nursing home and doesn't have a lot of money. According to the Social Security life expectancy tables, she has a 6.86 year life expectancy. If she wants to contract with one of her children and pay them IN ADVANCE for specific personal services that that adult child will provide for the rest of the elder's life, the math might look something like this:
 - $6.86 \text{ yrs} \times \$25/\text{hr} \times 10 \text{ hours/week} \times 52 \text{ weeks in a year} = \$89,180.$
- It's not the right answer for every family because it can cause family conflict. But in this example, the mom could make a lump-sum payment of \$89,180 to her daughter in exchange for the signed contract. There are significant income tax consequences. But it's a way to transfer funds to someone else and not have a gifting penalty.

VA Pension with Aid and Attendance

- For veterans who served during wartime, or their surviving spouses, whose monthly medical expenses approach or exceed their income
- The VA has very specific dates of what constitutes wartime; need 90 day of service overall and one day of wartime.
- Very limited assets permitted: a homestead on 2 acres of property or less, a car, max of \$163,699 in cash, brokerage or other real estate. IRAs are not exempt. Income producing property is not exempt.
- Max \$2,874/mo for a married veteran; Max \$1,558/mo for widow of veteran
- Consult County veteran service officers; or veteran aid organizations

Caregiver Burnout

- Caregivers frequently report:
 - Emotional stress
 - Financial strain
 - Lack of respite
 - Difficulty navigating Medicaid/VA
- Support options:
 - **Respite programs (VA, hospice, some ALFs)**
 - **Support groups**
 - **Ageing True**
 - **ElderSource (Area Agency on Aging) services**

Consider Palliative Care/Hospice

- Hospice will never call you; you have to know when it's time to call them
- Hospice offers “palliative care” and “end of life care;” it can be at home, or in care facility, or inpatient at hospice
- Paid for by Medicare
- Palliative care is for anyone seriously ill; curative treatment can be pursued as well
- End-of-life hospice care is usually for a diagnosis of six months or less
- The net result is **more** care, not less care, and better quality of life.