

Legal Issues for Caregivers

You may have an elderly parent or relative who is stricken with a serious health problem and needs long term care. If you are in the role of caregiver, you may become so overwhelmed by the pervasiveness and stress of caregiving that you fail to consider the legal ramifications of your loved one's long term disability. However, legal and financial planning in this situation is absolutely critical and should not be neglected. This planning should address at least five issues: ensuring access to assets, preventing financial exploitation, ensuring health care decisions are made appropriately, inheritance and estate tax planning and financing long term care costs.

***Do you have access to your loved one's assets?**

You should be concerned about any assets titled solely in the name of the disabled person (i.e., bank accounts, IRA's or retirement plans) and any assets that require joint signatures to liquidate (i.e., a house in joint tenancy).

Access to financial accounts, including bank accounts, can be gained by adding a name as a signor or joint owner. Beware that if ownership is with the "right of survivorship," the survivor will get all of the funds in the account upon the death of the joint tenant, even if a will divides up the deceased person's assets differently. Also beware that if the person named jointly on your account is sued, your money could be subject to collection on any judgment entered against that person.

For the reasons noted above, it is usually preferable to sign a financial or durable power of attorney which allows the agent to access a bank account and also to conduct other financial business such as filing income tax returns and accessing retirement accounts. However, it is important that the agent appointed by the disabled person be honest and trustworthy!

***Is your loved one protected from misuse of funds by himself or others?**

What if your loved one has a disability that causes him to go on an irresponsible spending spree? Will the fact that you are his financial agent appointed under a power of attorney protect him from himself?

The answer is no because the power of attorney did not take away any legal authority from him. It merely gave you the power to also handle his financial

affairs. Similarly, a power of attorney does not protect the disabled person from being financial exploited or unduly influenced by someone else who is taking him to the bank on a regular basis and convincing him to “give” the money to the exploiter.

Protection from spending sprees and exploitation by others can be provided to your loved one through a living trust. Your loved one’s assets are titled in the name of the living trust and managed by the trustee. Only the trustee will have access to the assets. If the initial trustee becomes disabled, a named successor trustee can take over.

The assets of your loved one can also be protected by a court order through a “conservatorship,” which provides the highest level of protection. With a conservatorship, nobody has access to the assets without a court order, or if the appointed conservator posts a bond, the conservator can gain access to a limited amount of the assets. Conservatorships, however, are relatively expensive and the management is time consuming.

***How do you ensure your loved one’s health care decisions are carried out according to his wishes?**

In a health care power of attorney your loved one can choose an agent to make decisions for him in accordance with his wishes. Additionally, if specifically stated, this document can authorize the agent to admit your loved one into a psychiatric hospital if it ever becomes necessary.

A living will can be used to set forth your loved one’s directions about life support if he becomes terminally ill, comatose or lapses into a persistent vegetative state. A “pre-hospital medical directive” can also be executed to ensure that emergency care personnel do not use extraordinary methods to extend your loved one’s life.

***Are your loved one’s wishes for providing an inheritance reflected in his estate plan?**

A will or trust should be prepared and/or reviewed when the individual is first diagnosed with the long term illness. If you anticipate that the person may need benefits through the Arizona Long Term Care System (ALTCS), which has financial eligibility requirements, drastic changes in the will or trust may be required. If the individual is married, the spouse may want to consider changing the spouse’s will to ensure that the disabled person will not be disqualified from

ALTCS by inheriting from his spouse. In most cases, it is also appropriate to take all assets out of the couple's living trust if ALTCS benefits are being sought. In larger estates, it is important to ensure that appropriate estate tax planning has been done.

***How is your loved one going to pay the costs of his long term care?**

Medicare provides very limited benefits for long term care costs. Therefore, the family should carefully examine their income and expenses to determine whether a "spend-down" out of savings will be required, i.e., whether expenses will exceed income. Sometimes decreasing expenses by finding more affordable care, cutting down on other expenses and increasing return on one's investments is all that is necessary to prevent "spend down." However, often proper budgeting alone is not sufficient to close the gap between income and expenses. In this situation, obtaining benefits through ALTCS may become necessary. ALTCS provides substantial long term care benefits including home care benefits, as well as coverage for the cost of adult foster care homes, and many assisted living homes and nursing homes. There are both income and resource financial eligibility requirements to qualify for ALTCS benefits.

Planning can be done to preserve assets from being "spent down" on long term care while at the same time hastening the individual's eligibility for benefits through ALTCS. Strategies that can be used include, among others, transferring assets to an individual or to an irrevocable trust, purchase of excluded assets such as a home or buying a single premium annuity. The ALTCS rules are complex and these strategies should only be tried with the advice of a knowledgeable elder law attorney. However, with appropriate planning a substantial amount of the disabled person's assets can usually be preserved from spend down on long term care.

- **Timing is important**

The timing for your loved one's legal and financial planning is very important. Start the legal planning for your loved one immediately after a diagnosis of a long term illness. Your loved one must be legally competent in order to engage in planning and execute estate planning documents. Once your loved one is mentally incapacitated, it will be too late to have him sign powers of attorney or living trusts and costly court proceedings may be required. For example, a client of mine wanted to sell his home. Unfortunately, his wife was mentally incompetent and could not legally sign the documents required for the sale of the home. Consequently, we had to file a petition with the court asking that

my client be appointed as his wife's conservator so that he could sign the papers required for the sale of their home. If the wife had signed a financial power of attorney while she was mentally competent, they could have avoided thousands of dollars in court costs and legal fees.

Planning ahead with respect to financing long term care is also important. Sometimes "transferring" assets to qualify for ALTCS benefits is a good idea, but it is much more effective if it is done prior to care for the disabled person becoming too expensive. There are many options available to ensure that your loved one's legal and financial needs will be met, but planning should be started early and assistance should be obtained from qualified professionals.