

Checklist of Some Legal Issues for Seniors and their Family Caregivers

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Following is a checklist of some of the legal issues that may arise for seniors and their family caregivers. For each of these issues that may apply to you, you should consult a qualified attorney practicing in that area.

The topics in this list are based upon the list of practice areas in which an attorney must have substantial experience in order to qualify for certification as an Elder Law Specialist under the Rules and Regulations of the National Elder Law Foundation.¹ Such certification is a voluntary indication of competence that some attorneys choose to seek, but it is not necessary for all attorneys practicing in these areas.

As a general indication of the typical areas of legal practice that may affect elders, the Rules and Regulations of the National Elder Law Foundation define “Elder Law” as follows:

“Section 2 Definitions

2.1 “Elder Law” is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons’ legal capacity, the conservation, disposition and administration of older persons’ estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.

2.2 In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons, and be capable of recognizing the professional conduct and ethical issues that arise during representation.”

In addition to this general definition, the National Elder Law Foundation’s Rules and Regulations (Section 5), also list more specifically the areas of practice in which an attorney seeking certification must demonstrate the required level of experience, both in number of matters handled and number of hours of experience.

¹ The National Elder Law Foundation is a non-profit organization founded by the Board of Directors of The National Academy of Elder Law Attorneys (NAELA). It is dedicated to the development and improvement of the professional competence of lawyers in the area of elder law. The American Bar Association’s House of Delegates approved the National Elder Law Foundation as the certifying entity for specialization in elder law in February 1995. If all of the requirements of the National Elder Law Foundation’s Board of Certification are satisfied, the attorney may announce that the attorney is “Certified as an Elder Law Attorney by the National Elder Law Foundation.” It is important to note that certification by the National Elder Law Foundation is a voluntary process that attorneys may choose to go through. It does not indicate that they are permitted to hold themselves out as “Elder Law Specialists” under the laws and regulations of the State Bar in the State where they are licensed to practice. Most of the State Bars have special examinations and requirements which an attorney must meet in order to hold himself or herself out as a “Certified Elder Law Specialist” in that state. Ultimately, it is the laws and regulations of the State or States where the attorney is licensed to practice that the attorney must comply with in order to be in good standing to practice law in such State(s). More information about the National Elder Law Foundation and the Rules and Regulations governing its voluntary attorney certification process, can be found at its website: <http://www.nelf.org/randregs.htm#nelf>

These specific practice areas provide a good preliminary checklist of the types of legal issues that you as a caregiver may need to address with your aging loved one:

1. Health and Personal Care Planning:

(i) Advance medical directives (such as medical powers of attorney, living wills, and health care declarations or proxies);

(ii) Do Not Resuscitate Orders, and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

2. Pre-Mortem Legal and Estate Planning, including advice and preparation of documents regarding:

(i) Wills and probate matters;

(ii) Trusts;

(iii) Durable general or financial powers of attorney;

(iv) Real estate titling, sale, conveyance or gifting;

(v) Gifting of property (sometimes in connection with advance planning to qualify for future Medicaid benefits), and the financial and tax implications of any proposed action.

3. Fiduciary Representation and Planning for Incapacity:

(i) Advice regarding the appointment of an attorney-in-fact;

(ii) Appointment of an executor or personal representative of one's estate under a will or a trustee under a trust;

(iv) Appointment of a guardian, conservator or one's person and/or property in the event of incapacity;

(v) Appointment of a representative payee, or other formal or informal fiduciary.

4. Legal Capacity Counseling, including:

(i) Advice as to how capacity is determined in the State of your elder's residence, and the level of capacity required for various legal activities in that State and in any other States where the elder may own property);

(ii) Representation of those elders who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

5. Public Benefits Advice, including planning for and assisting in obtaining:

(i) Medicare;

(ii) Social Security;

(iii) Veterans benefits (where applicable based on being a veteran of service in the U.S. military or being a spouse or family member of a veteran);

- (iv) Medicaid (upon qualification based on low income and little or no owned property);
- (v) Supplemental Security Income (in the event of disability);
- (vi) Food stamps (for unemployed individuals).

6. Advice on Insurance Matters, including analyzing and explaining the types of insurance available, such as:

- (i) Health insurance;
- (ii) Life insurance;
- (iii) Long term care or home care insurance;
- (iv) COBRA;
- (v) Medigap insurance to supplement Medicare;
- (vi) Long term disability, dread disease, or burial/funeral policies.

7. Resident & Patient Rights Advocacy & Privacy Rights, including advice to patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues. In addition to patient rights, legal privacy rights under federal and state laws should be considered.

8. Housing Counseling, including reviewing the housing options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

9. Employment and Retirement Advice for elders, including pensions, retiree health benefits, unemployment benefits, and other benefits for your elder.

10. Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.

11. Counseling with regard to age and/or disability discrimination in employment and housing for a senior. Also, you may need advice on your employment rights as a caregiver required to take time to care for a disabled or elderly loved one.

12. Litigation and Administrative Advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

The above list of legal practice areas is not an exhaustive list of all the possible legal issues that you and your aging loved one may face, but it provides a good basic preliminary checklist of areas to consider. You should consult a qualified attorney practicing in these areas to address these issues and determine whether any other legal concerns may apply to you and your aging loved one.

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