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Life Care Planning and the Elder Law Attorney

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Abstract

The practice of life care planning is familiar to members of the International Academy of Life Care Planners and others who regularly read this publication; however, the practice of elder law as related to life care planning may not be as familiar. This article provides a description of and historical overview of the elder law forensic life planning function (not to be confused with life care planning as provided by the professional life care planner). For purposes of this article, rehabilitation professionals who practice life care planning are referred to as "Professional Life Care Planners." In comparison, the life planning function of attorneys who concentrate in the field of elder law is referred to as "forensic life planning." Beneficial collaboration between elder law attorneys who practice life planning and Professional Life Care Planners is discussed. Ethical considerations also are addressed.

History and Development of Elder Law

The practice of law can be traced to the arguments and rhetorical speeches echoing through the halls of the Greek courts. Cicero, the Greek intellectual and philosopher, vividly describes the scenes of this primitive form of law practice (Sutton & Rackham, 1942). Since the days of Cicero, the practice of law has evolved into numerous areas of specialized practice.

Relatively speaking, elder law, as an identified area of practice concentration, is in its infancy in comparison to bedrock subjects including the law of property, crimes, torts and contracts. Elder law became formally recognized as a specialty practice in 1988 with the founding of the National Academy of Elder Law Attorneys, Inc. (National Academy of Elder Law Attorneys, n.d.). The NAELA serves as the "professional association of attorneys dedicated to improving the quality of legal services to the elderly" (NAELA, n.d.). In addition to facilitating the enhancement of elder law practice, the NAELA serves as an interdisciplinary link between practicing elder law attorneys and those in other professions which serve the elderly.

In furtherance of its organizational mission, the NAELA Board of Directors formed the National Elder Law Foundation (NELF) in 1993. The NELF exists to improve the professional competence of elder law attorneys and to seek recognition of the specialty area of elder law practice by judicial authorities and the bar in general. To that end, the NELF created a program to certify qualified practitioners as elder law specialists. The specialty practice of elder law was officially recognized by the American Bar Association's House of Delegates in February 1995. (National Elder Law Foundation, n.d.).

The Nature of Elder Law Practice

As defined by the NELF,

> 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 (NELF, *Rules and Regulations,* n.d.).

Further, it is fundamental that elder law attorneys be capable of identifying, coordinating and triaging issues that arise, or may arise, while advising and representing older persons. Elder law attorneys must be proficient in matters of health and life insurance, contracts, long term care, employment, retirement, and housing. Elder law attorneys address, from the forensic perspective, issues which arise during an elder's life transitions. These life transitions arise when the elder ceases to be solely in charge of health care, housing, personal care and business decision making in favor of a team approach to life management involving a combination of persons involving the caregiver, the attorney, the Professional Life Care Planner and the geriatric care manager.

According to the Board of Certification of the NELF, an elder law attorney's knowledge must be broad; the attorney must know an assortment of topics, including, but not limited to:

- "health and long term care planning;
- public benefits (includes Medicaid, Medicare, Social Security);
- surrogate decision-making (includes powers of attorney and guardianship);
- older persons' legal capacity; and
- the conservation, disposition and administration of the older person's estate (includes wills, trust and probate of an estate)" (Needham, n.d.).

As part of the forensic life planning function, an elder law attorney offers counsel on various subjects which arise in the context of the aging process:

1. Health and Personal Care Planning, including the preparation and use of custom designed advance medical directives (medical powers of attorney, living wills, and health care declarations), and providing counsel to older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.
2. Pre-mortem Legal Planning, including the drafting and execution of wills, trusts, general powers of attorney, financial powers of attorney, real estate ownership, gifting, and the financial and tax implications of related transactions.
3. Fiduciary Representation, including the provision of counsel to one serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.
4. Legal Capacity Counseling, including advising how capacity is determined and the level of capacity required for various legal activities, and representing those 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 Medicaid, Supplemental Security Income, and Veterans' benefits.
6. Advice on Insurance Matters, including analyzing and explaining the types of insurance

available, such as health, life, long term care, home care, COBRA, Medigap, long term disability, burial/funeral policies and dread disease coverage which, under certain life policies, allow for advanced payment of a portion of the death benefit when the insured develops certain fatal conditions or which, under certain annuity contracts, allows for accelerated payment of a portion of the accumulated value of the contract under such circumstances.

7. Resident Rights Advocacy, including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in private homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.
8. Housing Counseling, including reviewing the options available and the financing of those options such as: mortgage alternative, renovation loan programs, life care contracts, and home equity conversion.
9. Employment and Retirement Advice, including pensions, retiree health benefits, unemployment benefits, and other benefits.
10. Income, Estate, and Gift Tax Advice, including consequences of plans made and advice offered.
11. Public Benefits Advice, including planning for and assisting in obtaining Medicare, Social Security, and food stamps.
12. Counseling with regard to age and/or disability discrimination in employment and housing.
13. 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 future of elder law practice portends dynamic change in two aspects. First, the scope of issues which confront the elder continues to grow with the increasing variety and complexity of the health care delivery system, housing options, personal financial products and asset protection strategies. Second, the needs of the elder client group have come to be recognized as largely comparable to those of persons with disabilities. Accordingly, some elder law attorneys are beginning to identify themselves as special needs counsel, a phrase which serves as an umbrella descriptor for any attorney who serves persons affected by aging or disability.

Elder Law as an Emerging Specialty

Given trends in contemporary society and based on the authors' opinion, the next 50 years of elder law practice in the United States will be driven by two phenomena: the rapid increase in the elderly population and the corresponding increased concentration of wealth among that generation. In the first phenomenon, data from the U.S. Bureau of the Census and the U.S. Administration on Aging foretell a startling rate of growth in the older population. In 2011, the "baby boom" generation will begin to turn 65, and by 2030, it is projected that one in five people will be age 65 or older. It is expected that by the year 2030, there will be approximately 70 million Americans age 65 or older (U.S. Census Bureau, 2000). In the second phenomenon, in 1995, the median net worth of persons age 65-69 was $106,408, the highest median net worth of any age group. It has been estimated that during the first decade of the 21st century,

$6 trillion in wealth will change hands from parents to their baby boomer children. (Takacs, 2007).

Despite increased wealth and longevity, the reality of the aging population is that, "increases in life span do not guarantee a commensurate improvement in quality of life" (Takacs, 1998, p. 2). It has been hypothesized that the most prominent health problems for the elderly will likely be chronic conditions, such as heart disease, neuropsychiatric illness, and cancer. According to a study by Dr. Olafur Aevarsson (1996) reported in the *Journal of the American Geriatrics Society*, almost 10 percent of persons age 85 to 88 will develop dementia each year. Dr. Aevarsson stressed that the danger of the elderly developing dementia is substantial (Aevarsson, 1996). The need to evaluate, assess, plan and care for persons with dementia is, therefore, imperative.

Based on available data, the nursing home will be the residence for three out of every four elderly persons at some point during their lives (Takacs, 1998). The duration of nursing home stay for half of the elderly persons in a nursing home will be six months or less. The other half will, on average, stay in a nursing home five years or more. At any given time, 4.41% of the 65 and older population in the United States is in a nursing home. Recently, in the state of Minnesota, that number reached 7.95% (Takacs, 1998).

The Holistic Approach (AKA: Forensic Life Planning)

Statistics confirm what common sense inherently tells us: the elderly have a higher risk of poor health, disability, loss of income, and incapacity than the population in general. In recent years, the federal government and state governments have enacted legislation on almost a continuous basis in an effort to protect the elderly and expand benefits available to them. The elderly have become more aware the benefits available to them. In this regard, the elderly and their caregivers have sought attorneys to assist them in planning matters to seek the benefits that are available and to advocate for the rights of the elderly.

While the typical attorney-client relationship generally involves two parties, the elder client relationship is usually a three-sided affair, involving the elder, the attorney, and the family or caregiver, who often serves as the catalyst for engaging the attorney. In many cases, elder law attorneys welcome, and depend upon, the family's or the caregiver's participation in planning for the elder person. While this configuration presents obvious ethical challenges, i.e., identifying the elder as client and serving the client's best interest even when that duty departs from the preferences of the caregiver, it recognizes the reality that effective assistance to elders requires a team effort, a multidisciplinary treatment, a holistic approach.

Attorneys who follow the holistic approach characterize their practice model as a collaborative effort among the elder, the attorney, the geriatric care manager, the family, and various health care facilities and professionals, with the elder always being the primary focus. "Elder Law attorneys use a holistic, multi-disciplinary approach to help seniors, people with disabilities and their families in a caring, compassionate way that seeks to preserve dignity for such individuals" (NAELA, n.d.). These attorneys have become affiliated in the newly organized Life Care Planning Law Firms Association. Most elder law practitioners that employ the forensic life planning model customarily represent the client over the balance of the client's lifetime. The forensic life planning process generally followed by elder law practitioners typically involves an evaluation, assessment and continued reassessment of the following areas during the representation of an elder client or a client with a disability:

1. **Housing Arrangements** – An assessment is performed to determine the level of care a client needs. The spectrum of living arrangements for clients varies from residing in the

home to receiving skilled care in a nursing home. Between these two living arrangements lay home health care, continuing care retirement communities, independent living facilities and assisted living facilities.

2. Asset Protection Strategies – An assessment of a client's assets is usually performed to determine what, if any, public benefits can be made available to a client. Strategies seeking Medicaid and Veterans Administration benefits eligibility are developed and reviewed with the client and implemented according to the client's desires.
3. Health Care Delivery Assessment – A geriatric care manager assesses the client's current health status and their care needs. In this regard, the geriatric care manager monitors the delivery of health care and anticipates future health care needs.
4. Financial Management Strategies – The client's monthly income and expenses are analyzed to maximize beneficial use of income and to control costs.
5. Estate Planning Assessment – An assessment of the estate planning strategies is necessary in order to maintain continued eligibility for public benefits. It is imperative to avoid any seemingly benign transaction which may nonetheless impair the client's eligibility for public benefits
6. Advocacy and General Representation – Oftentimes, it is necessary for an attorney to engage in the "traditional" legal role of advocating for the client. Advocacy skills are most important when communicating with benefits providers and insurance companies in order for the client to obtain the best possible outcome.

It has been insightfully observed that elder law is the only area of law practice that is identified by the unique legal needs of a particular client group and not necessarily by a body of substantive law, hence the need for comprehensive, personalized planning. The critical distinctive common to elder law practitioners who provide forensic life planning services is that they directly engage care managers in the development and execution their plan. Prototypically, the practitioner utilizes the services of a care manager to meet with clients in their residential setting, assess clients' health care and housing needs, and assist and implement care plan decisions which are made. A former president of NAELA considers that his elder law practice addresses the personal, emotional, and legal needs of the client. He describes the goal of his practice as assisting clients in maximizing the quality of their lives (Takacs, 2007).

This distinctive, holistic approach recognizes care managers as professionals who bring a quality-of-life component to the process of developing and implementing a client's life care plan. It has been said that, "The elder law attorney who practices life planning defines a satisfactory professional relationship with clients not in terms of resolving legal issues but … in how effective(ly) he [or she] has enabled his [or her] clients to 'maximize the quality of their lives'" (as cited in Takacs, 2007, 1-21).

Ethical Considerations

In addition to the many ethical obligations inherent in the discharge of the professional duties of the Professional Life Care Planner and the elder law attorney, a body of complex ethical issues may arise when the life care planning / forensic life planning dichotomy is examined. Specifically, these issues, in their various fact-specific permutations, can spring from the dilemma of the impact of funds availability on future care planning. Elder law attorneys typically approach the forensic life plan from the standpoint of first quantifying existing financial resource availability and then developing a plan within the parameters of those financial constraints. Accordingly, forensic life plans for three clients with identical personal needs would be markedly different in light of the resource availability for each client. Where continuing court oversight of a plan of care is contemplated, as in the case of an adult under conservatorship or a minor under guardianship, the judge in charge of the case will take a balance sheet approach to approval of a proposed plan and to review of action taken in the implementation of an existing plan.

In sharp contrast is the ethical obligation of the Professional Life Care Planner to develop a care plan that is needs-based rather than funds-based (Commission on Health Care Certification, 2007). In such circumstances, the challenge for the elder law attorney who collaborates with the Professional Life Care Planner is twofold; first, to educate the party having authority to approve and oversee the implementation of a life care plan as to the wisdom of the needs-based approach and second, to advocate for the incorporation of flexibility in the evaluation of care plans. The Professional Life Care Planner can become a critical partner to the party having approval authority in defining the success of the care plan and in so doing, can maintain adherence to the attendant professional standards and ethics of Professional Life Care Planners.

Elder Law Attorneys and Professional Life Care Planners: The Perfect Match

In consideration of the foregoing, it would appear that Professional Life Care Planners and elder law attorneys are positioned to work collaboratively to effectively assess, plan, advocate for and deliver services to enhance or maintain the best possible quality of life for elderly persons or persons with disabilities.

Throughout the United States, local laws require that certain transactions involving legal awards of money to or for the benefit of persons who are under disability due to age or mental or physical infirmity must be court approved. Professional Life Care Planners provide an invaluable service to the courts and the parties in developing an appropriate plan for the long term uses of the funds awarded. Anecdotal information provided by experienced Professional Life Care Planners suggests that, at times, life care plans, even though court approved, unfortunately are not always fully implemented. One of the stated reasons for this dilemma is that there sometimes is no one on the care planning team who can help structure the plan so that it is legally enforceable and so that there is continuing accountability for implementation. The involvement of an attorney in the creation of the plan can contribute to the development of a strategy which will ensure that the plan is carried out long term. Another potential reason is that life care plans are often not fully funded and a qualified Professional Life Care Planner can be invaluable with prioritizing needs as well as attempting to locate alternative funding sources in the implementation of the plan.

As observed above, the typical contexts in which the elder law attorney provides forensic life planning services generally are those which arise from the occurrence of a traumatic or acquired brain injury or other dementia where family involvement is a dependent element in successful planning. Elder law attorneys are not generally presented with the opportunity to serve persons with other disabling conditions (i.e., spinal cord injury, amputations, etc.) for whom personal independence in all aspects of life is a central issue and for whom there may be little, if any, involvement of family as caregivers. The elder law attorney can provide much needed forensic life planning services for this population, particularly in the area of advocacy under state and federal statutory provisions ensuring accommodation and access in workplace, employment and public facility settings. Professional Life Care Planners working with such clients can add a dimension to the services they render by incorporating the assistance of a legal advocate.

The Professional Life Care Planner often does not have a means of reaching many in the potential client population who have need for life care planning. Within the forensic arena, the Professional Life Care Planner is typically engaged as a consequence of a catastrophic injury and the engagement typically is initiated by a liability insurance carrier, an insurance defense attorney or a plaintiff personal injury attorney. Of course, there are other uses of life care planning outside the forensic arena such as hospital or nursing home discharge planning, estate planning, workers' compensation related, and others. However, within the forensic setting, the term of the engagement generally is for the amount of time necessary to assess the injured person's needs and to design and present the plan for care; thereafter, the engagement of the Professional Life Care Planner typically ceases. The elder law attorney, however, is in contact with a vast pool of persons coping with issues related to aging and disability who have voluntarily sought the attorney's services for a long term planning and management function.

The prospect of collaboration between the elder law attorney and the Professional Life Care Planner provides each the opportunity to expand the scope of his or her practice and the concomitant challenge to each to address serious and complex questions within the framework of his or her respective professional discipline. The attorney who seeks to provide forensic life planning for elders or persons with disabilities serves his or her client well when he or she incorporates the expertise of a Professional Life Care Planner throughout the course of representation.

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Terry C. Cox, Esq. is an Elder Law attorney in private practice in Collierville, Tennessee. He has represented individual and business clients in a broad range of civil and criminal cases in various courts, and is committed to providing advice and counsel to elders and their family on issues of aging to help clients protect their interests, plan for their future legal needs, and plan for their future health care needs.

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