

Asset Protection Law Newsletter



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A FREE LEGAL UPDATE FOR ELDERS AND SAME SEX PARTNERS WHO SEEK ASSET PROTECTION ♦ MAY, 2015 EDITION

QUESTIONS TO ASK AN ELDER LAW ATTORNEY

1. What age should I be to see an elder law attorney?

There is no minimum age to seek the advice of an elder law attorney. Elder law attorneys often address issues concerning medical conditions, disability, capacity and medical expenses, as well as traditional estate planning. These issues concern clients of all ages.

2. My neighbor said she did her Will and Power of Attorney on the internet. Should I do that?

Legal documents should always be prepared by a qualified attorney admitted to practice in Florida.

Although a document obtained on the internet might be valid and perhaps even well written, it was probably prepared by an attorney who does not practice in Florida.

The document might not accurately reflect your wishes and might not address issues, such as taxes, that a client would not know themselves.

3. Do I really need any planning documents?

Everyone should have a valid, comprehensively written Durable Power of Attorney and Health Care Surrogate Designation Form. Most people also need a Last Will & Testament.

5. If I am married or my parents are still alive, do I need a Power of Attorney or a Health Care Surrogate Designation Form?

Often even a parent or a spouse does not have the authority to make medical decisions and/or access the finances of their child or spouse without a power of attorney and health care surrogate designation form.

6. I have a Power of Attorney and/or a Will that I executed 20 years ago – are they still good?

Everyone should have their estate planning documents reviewed periodically and certainly when he has a change in his life/circumstances or if there has been a change to the laws.

A Will appropriate when written 15 years ago may no longer be appropriate. For example, a Will that leaves everything in trust to minor children should be changed if the children are now adults.

If a child is getting divorced, thought should be given to leaving that child his share in a trust. Bequests to children with disabilities should go to a special needs trust for their benefit.

7. When I bought my house, my real estate attorney prepared a Power of Attorney for me. Is that sufficient?

Probably not. Many people think of powers of attorney as very simple documents—they are not simple.

Accordingly, they should be prepared by a qualified elder law attorney. An elder law attorney can prepare a document that contains specific and necessary provisions to permit the principal to qualify for Medicaid and other government benefits.

8. Since my family knows my wishes about artificial life support, do I need anything else?

Decisions about refusing and/or discontinuing artificial life support can be made for another person, including a spouse, only if that person has a Health Care Surrogate Designation Form or obtains an Order from the Court.

9. I have a DNR (Do Not Resuscitate) Order, do I need a Health Care Surrogate Designation Form?

Do not resuscitate orders expire after a certain time period. If you are no longer capable to request such an order, there is a statute that allows certain people, in order of priority, to make that decision. That is not so in regard to any other medical decisions. A Health Care Surrogate Designation Form is needed.

10. My child is disabled. Do Elder Law attorneys help plan for disabled children?

A large part of an Elder Law attorney's practice consists of planning for disabled children: establishing Trusts for them, protecting and/or obtaining government benefits for them and/or seeking a Court Order appointing a Guardian for them.

12. My husband had a stroke and is in a nursing home. Will I be responsible to pay for his care? Should I get a divorce?

A spouse is not legally obligated to pay for the support of the other. As such, if one spouse requires nursing home care, the healthy spouse is not responsible for that bill. One way to protect the family is to obtain Medicaid benefits for the spouse in the nursing home. Divorce is never the only option and is actually rarely used.

13. I heard I am allowed to give away \$13,000 per recipient per year. Will that be a problem if I enter a nursing home?

Although the IRS allows each of us to gift annually \$13,000 per recipient, Medicaid in Florida does not allow gifting of any amount if you seek Medicaid to pay the costs of a nursing home. Gift to patient's spouse is the primary exception.

14. I want to be sure my children get my house but I want to be sure I won't be thrown out. How do I do that?

Title to the home can be to the children with the parent retaining a life estate interest in the home. Keeping the life estate protects the parents and preserves all

exemptions. In Florida, an Elder Law attorney can prepare a lady bird deed for this purpose

15. My wife is going into a nursing home. Will I lose all my assets?

No. If one spouse needs nursing home care, there are many options an Elder law attorney can often use strategies to protect the assets of the spouse remaining in the community, the stay-at-home spouse.

16. My wife is going into a nursing home and they told me I have to sell my house. Is that true?

No, the house does not have to be sold. This assumes patient intends to return. Be careful to follow legal advice only from an experienced elder law attorney and not from a neighbor, friend or other professional.

17. Dad is about to go to a nursing home. I am joint owner on all of his bank accounts. Is that okay?

There is a presumption in Florida that each joint tenant is the lawful owner of one-half of his share of the account.

At any time, he can withdraw the entire amount. This presumption can be rebutted by evidence that the asset was really contributed solely by one of the joint tenants.

Medicaid is now looking at joint accounts with more scrutiny in terms of whose funds created the account. Medicaid treats a withdrawal by either joint account holder as a transfer by the Medicaid applicant.

18. My daughter is disabled. How do I ensure that she is protected?

Gifts and inheritances for a disabled child should always be through a Special Needs Trust. An Elder Law attorney can prepare this document.

19. Mom and dad have done no planning; both have Alzheimer's disease. How do I pay their bills?

Mom and Dad are still presumed to be competent even with a diagnosis of Alzheimer's disease. As such, they should meet with an elder law attorney who will make a determination as to their mental capacity.

If the attorney feels that they have sufficient capacity to sign a legal document, a Power of Attorney and a Health Care Surrogate Designation Form should be prepared and signed immediately.

If the attorney finds them to lack capacity, the recourse would be to petition the Court to appoint a Guardian who can act for them.

20. If I die without executing a Will, will the State of Florida get all my assets?

If someone dies in Florida without a Will, he dies intestate. The laws of intestacy determine who inherits from the decedent.