

# Overview of Elder Law

## Capacity to Care: Building Competency in Geriatric Mental Health Care

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# Learning Objectives

- Elder Law Overview for Individuals and Families
  - Important legal documents
  - Guardianship
  - Public Benefits
- Policy Considerations in the 2011 Georgia Legislature

# What is Elder Law?

- “Under this *holistic* approach, the elder law practitioner handles general *estate planning* issues and counsels clients about *planning for incapacity* with alternative decision making documents.
- The attorney would also assist the client in planning for possible *long-term care* needs, including nursing home care. Locating the *appropriate type of care*, coordinating *private and public resources* to finance the *cost of care*, and working to ensure the client's *right to quality care* are all part of the elder law practice.”

SOURCE: National Academy of Elder Law Attorneys (NAELA)

# Life and Estate Planning Goals

- “I want to control my property while I am alive and well.”
- “I want to provide for my loved ones and for myself if I become disabled.”
- “When I die, I want to give what I have...
  - To whom I want
  - When I want
  - The way that I want.”

# Wills

- Last Will and Testament or just “Will”
- Definitions:
  - A document that designates how a deceased person’s estate will be divided
  - Estate = all property: real property + personal property
- Only effective at death
- Most common “estate planning” device

# Features of a Will

- Name a personal representative (executor) to act for your Estate
- Name beneficiaries to receive your Estate property
- Distribute ALL of your property to named beneficiaries
- Designate a guardian for minor children

# Dying without a Will

- Confusion for loved ones during crisis
- State Law dictates who gets your property
- Intestate rules for heirs:
  - Spouse, no kids – spouse 100%
  - Spouse + 2 children – each 1/3
  - Children only – share equally
  - No spouse or kids – parents 100%
  - No spouse, kids or parents – siblings share equally

# Today's Reality: Shift the Approach

- From planning for death...
  - Joint tenancy, POD designations
  - Wills
- To planning for incapacity...life and longevity...
  - Trusts
  - Powers of attorney



# Trusts

- Definition
  - A legal arrangement where one party holds legal title to property for the benefit of another party
- Unlike a Will, a trust can be effective *immediately* and last beyond death

# Trusts

- Regulated by state law
- Separate legal entity
- Living or testamentary (in a Will)
- Revocable or irrevocable
- Trust Myths
  - Managed by a bank
  - All control over assets lost
  - Only for very wealthy people

# Common Trust Uses

- Manage financial affairs during a disability
- Protect assets until minors are old enough to use them wisely
- Shield assets from creditors
- Supplement needs of disabled family member without disrupting public benefits
- Limit or control how assets are used after death

# Common Trusts in Planning

- Revocable Living Trust
- Irrevocable Living Trust
- “Love and Protection” Trust
- Special Needs Trust
  - Self-settled – under age 65
  - Third party SNT

# Georgia Trust Act (2010)

- Pet Trusts officially permitted



# Powers of Attorney

- Definition:
  - A legal document that authorizes another person to act on your behalf as your “agent” or “attorney-in-fact”
- Financial affairs or health care matters
- Broad or limited in purpose and scope
- Why? Disability or incapacity
- Agent’s powers end at death

# Financial Power of Attorney

- Importance of “durable”
- Financial and property matters
- Typical powers for a broad, general POA
  - Business transactions
  - Financial accounts
  - Buy/sell property
  - Gifts by tax year
  - Revocable trusts

# Financial Power of Attorney

- Recommended powers
  - Create trusts of any kind
  - No limit on gifts
  - Apply for public benefits (e.g., Medicaid)
- Agent's duty of loyalty
- Co-agents
- Successor agents
- Triggering event such as a determination of incapacity



# Health Care Power of Attorney

- Agent appointed to make decisions when you are unable or choose not to
  - Consent, refusal or withdrawal of treatment
  - Autopsy, organ donation, burial
- Importance of choice of health care advocate

# Georgia

- Pre July 1, 2007: Living Will and HCPOA
- Now: Georgia Advance Directive for Health Care
- [www.gabar.org](http://www.gabar.org)
- Why change the law?
- Old living wills and documents outside GA

# GA Advance Directives

- Advance Directive for Health Care allows:
  - Appoint someone for health care decisions
  - State wishes for medical treatments at end-of-life
  - Nominate a guardian
- Goes into effect:
  - Unable or unwilling to make decisions or communicate
  - End-of-life

# GA Advance Directives

- End-of-life Conditions:
  - “Incurable or irreversible condition will result in death in a relatively short period of time”
  - “State of permanent unconsciousness”
- Additional consideration: progressive brain disorders

# Guardianship

- Public policy: to protect the persons and property of individuals who are unable to care for themselves
- Welfare vs. autonomy
- Probate court has jurisdiction in GA
- Guardianship over property (\$) = conservator

# Guardianship

- Reasons a guardian may be needed:
  - Lifelong disabilities
  - Victim of calamity
  - Coma, vegetative state
  - Advanced dementia
- Old GA law: Lists of diagnoses
- 2005 Code: Decision-making ability

# Guardianship Standards

## Regular Guardianship

- Adult lacks sufficient capacity to...
- Make or communicate significant responsible decisions about...
- His/her health or safety

## Emergency Guardianship

- Same factors for g-ship  
AND
- Immediate and substantial risk of:
  - Death or
  - Serious injury, illness or disease

# Guardianship Process

- First petitioner
- Second petitioner – interested party or physician, psychiatrist or social worker
- Nominate guardian and/or conservator
- Burden on petitioner to provide enough facts to warrant probable cause to set hearing
- Court will order an evaluation



# Probate Court Hearing

- Burden on petitioner to show clear and convincing evidence
- Rules of evidence and civil procedure apply
- Some judges want the proposed Ward to testify
- If contested, more evidence and discovery

# Loss of Rights

- To marry
- To make, change or terminate contracts
- To consent to medical treatment
- To decide where to live
- To defend any action at law (except the guardianship)

# Conservatorship

- “Guardianship” over property and financial matters
- Court permission required after sufficient facts proving best interests of Ward for
  - Selling property
  - Estate planning or Medicaid planning

# Scope of Powers

## Guardianship

- Basic rights as a person
- Marry, make contracts
- Where to live
- Medical procedures
- NOT for enforcement of Rx

## Advance Directives for HC

- Health care proxy
- Consent, decline medical procedures
- End-of-life wishes

# Scope of Powers

## Conservatorship

- Sell property
- Disposition of property for public benefits planning
- Set up trusts
- **Review and oversight by the Court**
- Bond required

## Financial POA

- Depends on scope of powers
- POA might be revoked
- No oversight by Court, no bond/insurance required

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SOURCE: National Academy of Elder Law Attorneys (NAELA)

# VA Aid & Attendance

- War-time veterans, 90 days service, other than dishonorably discharged
- Permanently and totally disabled veteran + dependents
- Max benefits:

Veteran: \$1,644/month

Veteran and spouse: \$1,949/month

Widow/widower: \$1,056/month

# VA Aid & Attendance

- Asset (resource) test:
  - \$50,000~ for single veteran or widow/widower
  - \$80,000~ for married couples
  - Certain assets are exempt
  - Currently NO penalty for transferring assets
- Income test:
  - Income minus expenses = < \$0 (IVAP)
  - Expenses include home care, assisted living, etc.



# ABD Medicaid Basics

- Asset (resource) test:
  - \$2,000 for single person
  - \$4,000 for married couples both institutionalized
  - Community spouse resource limit : \$109,560
  - Certain assets are exempt
- Income test:
  - \$2,022 maximum income in 2010 for Medicaid applicant... but...
  - Income diversion to community spouse: \$2,739

# Quality of Care

- Many people who move into long-term care communities actually feel homeless...
- Dependency, loss of control, loss of dignity, powerless, no privacy, you lose yourself, no choices, uncertainty, insecurity, loss of hope

*“I long, as does every human being, to be at home wherever I find myself...”* Maya Angelou

# Recommendations

- Make best possible decisions
  - As to protecting family
  - Planning for long term care needs
  - Choosing fiduciaries
- Consider shifting the planning approach
  - From planning for death
  - To planning for longevity

# Public Policy

- Senior Citizens Advocacy Project: serves The Georgia Council on Aging, the Area Agencies on Aging in GA, and the Georgia Gerontology Society
- Georgia General Assembly meets for 40 days beginning each January



# Georgia Council on Aging



## Call for Volunteers!

The Georgia Council on Aging is seeking volunteers!

We need volunteers in the following skill areas:

- Clerical staff, especially with computer skills
- Advertising and publicity
- Website
- Event set-up and clean-up
- Senior Week at the Capitol
- Event preparations, phone calls to participants
- Research

Most clerical staff volunteers will work in the Georgia Council on Aging office during normal business hours.

However, if you would like to contribute your talents remotely, please let us know!

Which weekdays & hours work best for you:

- ☐ Mon ☐ Tues ☐ Wed ☐ Thurs ☐ Friday  
☐ Mornings ☐ Afternoons

Comments: \_\_\_\_\_

How many hours per day would you like to volunteer?

- ☐ 1-2 hours ☐ 3-4 hours ☐ 5-6 hours

Please check the committees you are interested in:

- **Clerical Staff** (typists, other office computer skills, copies, stuffing mail-out packets)
- **Advertising & Publicity** (graphic artists, page layout, marketing experience, writers)
- **Website** (writers to create and update content for the site, maintaining the links page)
- **Event Staff** (setup and cleanup, etc)
- **Senior Week at the Capitol**
- **Event Preparations** (phone calls to participants, etc)
- **Research**

Please list any special experience, skills or equipment you have: \_\_\_\_\_

## Annual CO-AGE Participation

I understand and agree to the terms of participation in the Coalition of Advocates for Georgia's Elderly (CO-AGE) as outlined in the CO-AGE participation handout. I accept these responsibilities.

Please enroll me as:

- ☐ An individual participant  
☐ An organizational participant  
 (enclose any additional addresses)

My voluntary contribution is:

- ☐ \$15 Student/Senior  
☐ \$25 Individual Participant  
☐ \$100 Organizational Participant  
☐ Other

## Senior Issues Newsletter Subscription Form

Please enter my subscription to the Senior Citizen's Advocacy Project's Senior Issues Newsletter at the following rate:

- ☐ \$10 Student  
☐ \$10 Retiree  
☐ \$15 Individual  
☐ \$25 Group (up to 5)

- ☐ Please check here if you prefer to receive your newsletter by Email

## Subscription Form

Name: \_\_\_\_\_

Organization: \_\_\_\_\_

Address: (Street) \_\_\_\_\_

(City, State, Zip) \_\_\_\_\_

☐ Business ☐ Home

Phone #s: (Home) \_\_\_\_\_

(Work) \_\_\_\_\_

(Cell) \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_

Contact Preference: ☐ home ☐ work ☐ cell ☐ email

## Payment

Please make check payable to Georgia Council on Aging:

Total Amount Enclosed \$ \_\_\_\_\_

## Return this Form

Return this form and/or make your check payable to:

The Georgia Council on Aging (GCoA)  
 2 Peachtree Street, NW, Suite 32-263  
 Atlanta, GA 30303-3142

Fax: (404) 657 - 1722

If you have any questions, please contact the council office at (404) 657 - 5343

# Questions?



# Thank you!

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