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Fulfilling our Estate Plan

Travis Finchum

Most of us think that when we update our **Last Will and Testament** we are covered. Or, if we have a **Revocable Trust** we think keeping it up to date with the laws and with our personal preferences covers us. Unfortunately, our family members and heirs find out later that we were wrong.

Similarly, we think that if we just get that **Living Will** in place we are covered medically if we become incapacitated or worse yet that a living will is the same as our Last Will and Testament. It's all pretty confusing. A lot of the terminology is very similar and that makes doesn't help.

First, let's clarify the different legal documents that make up a typical estate plan then we will need to **Coordinate the Estate Plan.**

A typical estate plan will consist of a **Last Will and Testament** as well as incapacity planning documents. The incapacity planning documents deal with two primary areas:

1. **Medical Decision-Making** – the two primary documents here in Florida are the **Healthcare Surrogate** (or Medical Power of Attorney) and the **Living Will**. The Surrogate document lets us designate someone else to make medical decisions for us if we are unable. This document should also provide for access to our healthcare information (from doctors, hospitals, pharmacies, nursing homes, etc.) in accordance with the federal HIPAA (Health Insurance Portability and Accountability Act of 1996) laws. We make our own medical decisions while we can. The Surrogate comes in when we cannot. The Living Will is a declaration of our wishes regarding end of life decisions, if we are unable to express those wishes when the time comes. In order for a Living Will to become effective we must be in one of three conditions: a. **Terminal**, b. **End-Stage** or c. **Persistent (Vegetative) State**. A Living Will ONLY APPLIES in one of these conditions. If we are just unconscious or temporarily incapacitated a Living Will does not apply (but a Surrogate would). We need both of these documents, the Surrogate and the Living Will.

2. **Financial Decision-Making** – the financial document is the Durable Power of Attorney. This document allows our "agent" to handle financial issues for us (the "principal") and it cannot be written to go into effect at some time in the future. It is either effective now or not at all. Contrast this with the Surrogate document that only goes into effect if we are incapacitated and we see some concerns. The "principal" can limit the *types of actions* the agent can take, but not necessarily *when* they can act.

Under all circumstances our agent must be acting in our best interest and for our sole benefit. *Durable* means the document stays in effect if we become incapacitated, otherwise the document cannot be used if we lack capacity. Under no circumstances does this document continue after the principal's death. We talked in past Forums about the changes that occurred in this law back in October, 2011 and any document done before that date should be reviewed.

These incapacity planning documents are generally coupled with a Will. This is our **Last Will and Testament**. Our Will has no legal effect while we are still alive. It cannot be contested while we are alive and only goes into effect after we die and after it has been ratified by the Court. The process of ratifying or "proving" our Will is the probate process. The term "probate" means to "prove the will." There are a few very important aspects to understand about our Will.

1. Our Will only addresses our assets after we die.
2. Our Will does not override beneficiary designations made on an investment.
3. Our will does not override joint tenancy.

Another way of saying this is:

"Our Will disposes of assets that we own at the time of our death that are solely in our name and that do not have a beneficiary named on the asset."

Tenancy. When someone dies, to determine where an asset goes we **first** look to the titling on the asset. If the asset is jointly titled with another individual, particularly as a joint tenant with rights of survivorship, then the asset will pass to the surviving owner or owners immediately upon our death. If the asset is a bank account (checking, savings, money market or CD) and it is titled with others, it is generally going pass to the other tenants, regardless of what our Will says.

Beneficiary. If the asset is titled solely in our name we next look to see whether a beneficiary has been designated with the financial or insurance institution. A beneficiary designation on a retirement account (IRA, 401k, 403b, etc.), on a life insurance policy or on an annuity will control the distribution of the asset, provided the beneficiary is still alive. What if the beneficiary named is a minor or a person with a disability? This will either cause court intervention or a disruption of benefits for the beneficiary.

Trust. Sometimes individuals establish a trust to help address incapacity as well as to distribute assets upon death. Trusts serve many purposes and a complete discussion here is beyond our scope today. However, the most important point to make today about trusts is they only cover and distribute assets that are either titled in the name of the trust at the time of our deaths or that flow into the trust as a result of our death (trust is the beneficiary). Trusts are often left, unintentionally, improperly funded.

Last Will and Testament. When we hear "will" we need to think "estate" or "probate estate." The Will distributes assets when we die. Again, they distribute those assets that are solely in our names and that do not have a beneficiary properly designated. A will is also where we appoint guardians for minor children and name someone to wrap up our financial affairs after we die.

Having an understanding of the interrelationships of all of the legal documents in this outline and also understanding how titling and beneficiary designations impact our estate plan is critical in having the outcome we desire.

House Bill 409: The Florida Legislature's

New Take on Elder Abuse

Charles F. "Charlie" Robinson, Law Office of Charles F. Robinson, P.A. Florida Board Certified Elder Law Attorney

and Robert C. "Bobby" Thompson, of Counsel

Two stories.

Story 1

A man in his 90s recently lost his wife. He lives alone and his children live out of state. He takes a walk in his South Florida neighborhood.

A woman in her thirties approaches him near his house and starts a conversation by asking for the location of the nearest hospital. She suggests that they meet somewhere for coffee. A week later she calls him although he doesn't remember giving her his phone number. She begins visiting him at his house, showing him attention and affection.

While at his house for a visit, she tells him she has cancer and needs surgery. She has no insurance and the hospital wants her to pay \$15,000 up front if she wants to have the surgery performed. The man starts to loan her money. She continues to ask for more money for her continuing medical treatment.

She tells him that she owns an apartment building in New York that is due to close at any time and that she will repay him from the proceeds but never provides an address for the building. She is now cancer free but needs money to help her ailing grandmother and her son. She is able to collect \$60,000 from the man who is living on Social Security.

Story 2

An 87 year old man has accumulated approximately \$1 million dollars in assets over his life. He lives alone and has no children of his own. He married later in life and has a stepdaughter who is in her sixties. He never had a good relationship with his stepdaughter, but she works her way back in and convinces him to sign a power of attorney naming her as his attorney-in-fact.

Soon after he signs the power of attorney, the stepdaughter makes changes to his portfolio and he is furious. Next, she attempts to put him in a nursing home. Having nowhere else to turn he goes to his church and asks for help. A member of the church who also works as a professional guardian offers to provide caregiver services and does. The caregiver does all of the right things and the elderly man flourishes. However, his relationship with his stepdaughter disintegrates and the elderly man contacts a lawyer and asks him to revoke his power of attorney and change his Will.

The lawyer meets with the elderly man who is lucid and seems perfectly competent to make his own decisions. The power of attorney is revoked and his Will is changed. The Will names his caregiver as his primary beneficiary. Over the course of the year that she provides caregiver services and charges a reasonable fee for her services. The man, without her knowledge or consent, set up an account in her name with \$30,000.

Re-enter the stepdaughter. The stepdaughter finds out and calls Adult Protective Services and law enforcement. The caregiver, who did not influence the elderly man in any way is now accused of financial exploitation. The law enforcement officer comes to the house, reads the Will and berates the caregiver and tells her that he will throw her in jail unless she gives the money to the stepdaughter.

Each of the scenarios is a version of what some of the literature refers to as a “Sweetheart Scam.” A person typically late 20s to late 40s approaches a senior 60 or older, strikes up a friendly conversation that leads to a date, seduction, makes the victim believe a relationship is developing, then opens up about a financial quandary, like a medical procedure or a tuition payment. The perpetrator not only ends up with the victim’s assets, but in the process breaks their heart, pride, and dignity. The first story is an actual Sweetheart Scam, but the second story has the appearance of being a Sweetheart Scam but clearly isn’t.

These stories and many like them form the backdrop for HB 409. In its June, 2011, publication “The MetLife Study of Elder Financial Abuse; Crimes of Occasion, Desperation, and Predation Against America’s Elders,” indicates that elder financial abuse continues to be the “Crime of the 21st Century.” The annual financial loss by victims is estimated to be at least \$2.9 billion dollars. Strangers comprised 51% of the perpetrators but family, friends, and neighbors came in second at 34%.

Financial Exploitation

Section 825.103-the old statute.

Florida Statute Section 825.103 (2013) defined “exploitation of an elderly person or disabled adult” as

Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who stands in a position of trust and confidence with the elderly person or disabled adult; or has a business relationship with the elderly person or disabled adult;

Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person’s or disabled adult’s funds, assets, or property with the intent to

temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent; or

Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

Successful prosecutions of defendants under former Section 825.103 have been overturned because of the impossibility of proving "deception or intimidation" in a number of cases. See Bernau v. State, 891 So. 2d 1229 (Fla. 2d DCA 2005), and Guarscio v. State, 64 So. 3d 146 (Fla. 2d DCA 2011). That frustration resulted in a task force made up of representatives from the Department of Children and Families, Offices of the State Attorney, Law Enforcement and the Elder Law Section of the Florida Bar. The task force came together at a highly appropriate time as the victim of the first scenario above was Professor Andrew Jay McClurg's father.

Professor McClurg was a member of the law faculty at Florida International University and now serves as Professor and Herbert Herff Chair of Excellence in Law, University of Memphis Cecil C. Humphreys School of Law. His article titled "Preying on the Greying: A Statutory Presumption to Prosecute Elder Financial Exploitation" is published in 65 *Hastings Law Journal* 1099 (2014).

Representative Passidomo sponsored a similar bill to HB 409 in the 2013 legislature that had strong support but died on the floor. HB 409 passed both houses in the 2014 legislature unanimously and has received the Governor's approval. The effective date of the new legislation is October 1, 2014.

Section 825.103-the new statute

Section 825.101 is the definitions section. Definitions are stricken for the terms "deception", "misrepresenting or concealing a material fact," and "intimidation."

HB 409 amends paragraph (a) of 825.103, the definition of "exploitation of an elderly person or disabled adult" to eliminate the requirement that a person uses deception or intimidation to obtain or use a vulnerable adult's funds, assets, or property. This should make convictions stick on appeal in cases like Bernau and Guarscio cited above.

The bill expands paragraph (c) of the definition of "exploitation of an elderly person or disabled adult" to include trustees who are individuals rather than guardians and agents and specifies that an "unauthorized appropriation" occurs when the elderly person or disabled adult does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties:

For agents appointed under chapter 709

1. Commits fraud in obtaining appointment;
2. Abuses their powers;
3. Wastes, embezzles, or intentionally mismanages the assets of the principal or beneficiary;
or
4. Acting contrary to principal's sole benefit or best interest;

For guardians and trustees who are individuals and who are appointed under Chapter 736 or Chapter 744

1. Committing fraud in obtaining their appointments;
2. Abusing their powers; or
3. Wasting, embezzling or intentionally mismanaging the assets of the ward or beneficiary of the trust;

The bill creates paragraph (d) as an additional definition of “exploitation of an elderly person or disabled adult” as follows:

Misappropriation, misuse or transfer without authorization

Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer. This paragraph only applies to the following types of accounts:

1. Personal accounts;
2. Joint accounts created with the intent that only the elderly person or disabled adult enjoys all rights, interests, and claims to moneys deposited into such account; or
3. Convenience accounts created in accordance with s. 655.80;

The bill creates paragraph (e) as an additional definition of “exploitation of an elderly person or disabled adult” as follows:

Intentionally or negligently failing to effectively use an elderly person's or disabled adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence with the elderly person or disabled adult.

The bill creates paragraph (2), and creates a **permissive presumption** regarding inter vivos transfers. A permissive presumption is an inference that a jury is allowed, but not required to make under a given set of facts.

Any inter vivos transfer of money or property valued in excess of \$10,000 at the time of the transfer, whether in a single transaction or multiple transactions, by a person age 65 or older to a nonrelative whom the transferor knew for fewer than 2 years before the first transfer and for which the transferor did not receive the reasonably equivalent financial value in goods or services creates a permissive presumption that the transfer was the result of exploitation.

This subsection applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan, except that it does not apply to a valid loan evidenced in writing that includes definite repayment dates. However, if repayment of any such loan is in default, in whole or in part, for more than 65 days, the presumption of this subsection applies.

This subsection does not apply to:

1. Persons who are in the business of making loans.
2. Bona fide charitable donations to nonprofit organizations that qualify for tax exempt status under the Internal Revenue Code.

In a criminal case to which this subsection applies, if the trial is by jury, jurors shall be instructed that they may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in this subsection. The presumption of this subsection imposes no burden of proof on the defendant.

The bill creates paragraph (3) and lowers the property threshold amounts applicable to 825.103 as follows:

\$50,000 or more first degree felony (*previously set at \$100,000*)

\$10,000 but less than \$50,000 second degree felony (*previously set at \$20,000-\$100,000*)

Less than \$10,000, third degree felony (*previously set at (\$20,000)*)

Criminal Use of Personal Identification Information

Section 817.568

According to an article in the February 17, 2014, Ft. Lauderdale Sun Sentinel, Florida leads the nation in identity theft. Florida Statute 817.568 deals with criminal use of personal identification information. Prior to HB 409 the victim had to be under 18 years of age. The statute is amended to now deal with 18 or younger and 60 years of age or older. New section 817.568(11) reads as follows:

A person who willfully and without authorization fraudulently uses personal identification information concerning

- * an individual who is 60 years of age or older;
- * a disabled adult as defined in s. 825.01;
- * a public servant as defined in s. 838.014;
- * a veteran as defined in s. 1.01;
- * an individual who is employed by the State of Florida; or

* an individual who is employed by the Federal Government

without first obtaining the consent of that individual commits a felony of the second degree.

New Section 817.568 (12) also mandates a surcharge of \$1,001. The money is allocated as \$500 to the Department of Law Enforcement Operating Trust Fund for grants to local law enforcement to investigate offenses related to identity theft. \$250 goes into the State Attorneys Revenue Trust Fund to help pay for the costs of prosecuting identity theft cases. The remaining \$250 is to be deposited into the Public Defenders Revenue Trust Fund for the purpose of funding indigent criminal defense matters relating to identity theft. The last dollar goes to the Clerk of the Court as a service charge. The charge may not be waived by the court.

Section 943.0412

The bill also creates s. 943.0412 to establish the Identity Theft and Fraud Grant Program within the Florida Department of Law Enforcement to develop strategies and techniques that will assist in the investigation and prosecution of the criminal use of personal identification.

Hearsay Exception

Section 90.803

HB 409 also modifies s. 90.803(24) which deals with a hearsay exception when the statement is made by an elderly person or disabled adult. The court is required to conduct a hearing outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability, and the elderly person or disabled adult is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability must include a finding by the court that the vulnerable adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm.

This groundbreaking statute is appropriate to begin in Florida. According to the U.S. Department of Commerce, U.S. Census Bureau, Florida has more than 3 million residents 65 and older. Of that number, 34.6 had at least one disability. Law enforcement has a new set of tools to prosecute and convict the perpetrators of these awful schemes that are separating our seniors from their life savings.

This statutory scheme sets a new standard for fiduciaries whether agents under power of attorney, trustees, guardians and those added to bank accounts for convenience purposes.

Statewide Medicaid Managed Care
Linda R. Chamberlain, Florida Elder Lawyers, PLLC

Statewide Medicaid Managed Care has two program components:

1. **Long Term Care Managed Care Program** (Implementation began 7/12, all enrolled by 3/14)

http://ahca.myflorida.com/Medicaid/statewide_mc/pdf/LTC/SMMC_LTC_Snapshot.pdf
<http://ahca.myflorida.com/SMMC>

- Certain recipients will be required to enroll
- LTC plans only manage LTC services, medical services managed via MMAP provider (only Sunshine in Pinellas currently a provider for both—this is called a “comprehensive plan”).

Who has to enroll? Individuals who are:

- 65 years of age or older AND need nursing facility care
- 18 years of age or older AND are eligible for Medicaid by reason of a disability AND need nursing facility care
- Individuals who live in a nursing facility
- Individuals enrolled in:
 - Aged and Disabled Adult Waiver;
 - Consumer-Directed Care Plus for individuals in the A/DA waiver;
 - Assisted Living Waiver;
 - Channeling Services for Frail Elders Waiver;
 - Nursing Home Diversion Waiver.

Enrollment Process:

- Call the local ADRC (Aging and Disability Resource Center) and complete 701S assessment
- CARES assesses for clinical eligibility (DCF for financial, financial eligibility unchanged by these programs)
- Individual has 30 days to determine which provider to use (choice counseling: www.flmedicaidmanagedcare.com; or call 1-877-711-3662 to talk to a choice counselor; in-person visit can be requested)
- If individual does not select a provider, they are assigned a plan
- 90 days to switch (or must remain in plan for the rest of the year unless have “good cause”)

2. **Managed Medical Assistance Program** (Implementation begins 1/1/13, full implementation 10/1/14, with all enrolled by 4/15)

http://ahca.myflorida.com/Medicaid/statewide_mc/pdf/mma/SMMC_MMA_Snapshot.pdf

- All Medicaid recipients will be required to enroll in a managed care plan unless specifically exempted (see below)
- Recipients will receive all healthcare services except LTC through this provider (providers consist of HMOs, Provider Service Networks, and Children’s Medical Services Network).

Medicaid recipients not required, but may choose to enroll:

- Recipients who have other (creditable) comprehensive health care coverage, excluding Medicare*

*dual eligibles (those with Medicare, Medicaid as secondary payor) must enroll (those in a full benefit Medicare Advantage Plan won't be required to enroll until Jan 2015) *Individuals with the following Medicare eligibility categories are excluded from participation in the SMMC program: • Qualified Individual (QI) • Qualified Medicare beneficiary (QMB); and • Special low-income beneficiaries (SLMB). *In addition, the SMMC program contains a provision that allows recipients with access to employer sponsored insurance programs to opt out of all managed care plans and to use Medicaid financial assistance to pay for the recipient's share of the cost in their employer-sponsored coverage

- Recipients residing in residential commitment facilities operated through the Dept. of Juvenile Justice or mental health treatment facilities
- Recipients eligible for refugee assistance
- Recipients who are residents of a developmental disability center, including Sunland Center and Tacachale
- Recipients enrolled in a Developmental Disabilities Home and Community Based Waiver and recipients on the waiting list for DD waiver services
(Also: The following individuals are NOT eligible to enroll: women who are eligible only for family planning services, women who are eligible through the breast and cervical cancer services program, persons who are eligible for emergency Medicaid for aliens)

Enrollment Process:

- Eligible recipients will receive a letter with enrollment information (approx 60 days prior to their region's start date).
- Eligible recipients who must enroll will have 30 days to choose a managed care plan from the plans available in their region (Choice counselors available, by phone. In-person visits are also available by request for recipients with special needs. Recipients can also enroll online at: www.flmedicaidmanagedcare.com.)
- If not, AHCA will automatically enroll individual in a plan.
- 90 days to switch plans (or must reaming in for the remainder of the year unless meeting certain criteria)
- Enrollees can change primary care providers within their managed care plan at any time
- Transition protections are in place (providers required not to cancel appointments/treatment up to 60 days after process and the providers will be paid for previously authorized services during this time, prescriptions will be honored)

Choosing a Plan:

MMA Standard Plans available in Region 5 (Pinellas/Pasco): Amerigroup, Prestige, Sunshine, Staywell
Consider:

- What services do I think I need? Doctor's Visits? Home Health Services? (Note: These are also known as direct service providers and must be in the plans' network.)
- What plan do my doctors take?
- What kind of doctors do I need? Pediatrician? Family Doctor?

- What extra benefits meet my needs?
(<http://www.flmedicaidmanagedcare.com/MMA/PlanInformation.aspx> shows plans in your area with chart of the extra benefits offered)

<http://www.flmedicaidmanagedcare.com/MMA>:

- Each plan offers the same core benefits. For the listing of the basic Florida MMA Medicaid benefits you may refer to the [Program Information](#) tab.
- Look at the [Plan Information](#) tab to see what extra services are offered by each plan.

How a professional advocate can help:

1. Assessing comprehensively for overall program/benefit eligibility and fitting with other resources (not agency-specific: state-funded, private-pay options, non-profit options)
2. Ensuring you understand the process and have what is needed for program eligibility, don't miss key dates, know your rights
3. Helping you research information on plans, get more detailed picture of how plans fit with your needs (more individualized choice counseling, able to give opinions on providers and share experiences from navigating the system)
4. Advocating when you have problems, helping you understand how to make appeals, when/how you can make changes
5. Continuity of care (managing transitions, knowing your needs, ensuring information gets communicated)

Additional Information:

<http://www.firstcoastadvantage.com/wp-content/uploads/13-AHCA-MMA-FAQ-Customer-Service.pdf>

<http://www.platinumbenefitplanning.com/resources/pdf/More%20FAQ.pdf>

Will Medically Needy clients be included in MMA plans?

Recipients in the Medically Needy program are not exempt from MMA. The State of Florida was directed by Section 409.975(7), F.S. to provide 12 months of continuous eligibility to Medically Needy recipients and enroll these recipients into a managed care plan once they meet their share of cost, contingent upon Federal Approval. The Agency for Health Care Administration (Agency) submitted a section 1115 Research and Demonstration Waiver application for the Medically Needy Program to the Federal Centers for Medicare and Medicaid Services (CMS) on November 21, 2012 that would allow the Agency to implement the new Medically Needy program, as directed by Florida Statutes. The Agency is in the process of negotiation with CMS on this waiver application. Until that waiver is approved, individuals who are in a Medically Needy eligibility category will receive their services fee for service.

The existing list of performance measures required for Florida health plans can be viewed on the following webpage: http://ahca.myflorida.com/medicaid/quality_mc/index.shtml. Managed care plan performance measure results are available for public viewing on the Agency's website, <http://www.floridahealthfinder.gov/>

Answer received from AHCA regarding Creditable Coverage:

Thank you for your inquiry regarding the Statewide Medicaid Managed Care (SMMC) program. Medicaid would consider creditable coverage to be any public or private health insurance or health benefit plan, whether insured or self-insured, including:

- 1. A group health benefit plan;*
- 2. Individual or group health insurance coverage;*
- 3. Medicare - Part A or Part B of Title XVIII of the Social Security Act;*
- 4. Medicaid - Title XIX of the Social Security Act;*
- 5. Medical and dental care for members and certain former members (and their dependents) of the armed forces, the Commissioned Corps of the National Oceanic and Atmospheric Administration, and the Public Health Service under Chapter 55 of Title 10, United States Code;*
- 6. A medical care program of the Indian Health Services or of a tribal organization;*
- 7. A state health benefits risk pool;*
- 8. A health plan offered under the Federal Employees Health Benefits Program (FEHBP) Chapter 89 of Title 5, United States Code (U.S.C.);*
- 9. A public health plan established or maintained by a state, a foreign country, the U.S. government, or other political subdivision of a state, the U.S. government or foreign country that provides health insurance coverage;*
- 10. A health benefit plan provided under the Peace Corps Act (22 U.S.C. 2504(e)).*
- 11. A State Children's Health Insurance Program (CHIP) whether it is a stand-alone separate program, a CHIP Medicaid expansion program, or a combination program, and whether it is provided through a group health plan, health insurance, or any other mechanism.*

*Medicaid **would not** consider creditable coverage to include:*

- 1. Accident-only or disability income insurance;*
- 2. Coverage issued as a supplement to liability insurance;*
- 3. Liability insurance, including general liability insurance and automobile liability insurance;*
- 4. Worker's compensation insurance;*
- 5. Automobile medical-payment insurance;*
- 6. Coverage for on-site medical clinics;*
- 7. Other similar insurance coverage under which benefits for medical care are secondary to other insurance benefits;*

- 8. Insurance offered separately and not as part of larger health coverage:*
 - a. limited scope dental or vision benefits;*

- b. *long-term care coverage, nursing home care coverage, home health care coverage, community-based care coverage or any combination of these;*
 - c. *prescription drug benefits only; or*
 - d. *other similar, limited benefits;*
-
- 9. *Insurance offered as independent, non-coordinated benefits:*
 - a. *specified disease or illness benefits; or*
 - b. *hospital or surgical indemnity benefits.*

We hope this is the information you are seeking. Please let us know if you have any additional questions.

Sincerely,

SMMC Inbox

Questions: Call Linda Chamberlain, 727.443.7898, extension 1



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Exploitation of the Elderly through Undue Influence and Active Procurement

Steven E. Hitchcock

Professionals whom assist elders must always be on the lookout for self-serving individuals who are attempting to exploit and take advantage of the elder or their situation for their own personal gain. This may be an outsider or a member of the elder's own family.

Tradesmen, caregivers, friends or family members may take financial advantage of an elder. Many times family will have a sense of entitlement to the elder's financial assets, even while the elder is still alive.

Exploitation can be used to create legal or financial documents or transactions thru "active procurement", creating documents or transactions that are not in line with the individual's true feelings or expectations.

These exploiters exert "undue influence" to engage in "active procurement" of legal and or financial documents or transactions to divest the elder of their financial assets.

Individuals may prey on the elder's good will, trusting nature, or the frailties that many elders suffer such physical impairments or mental impairments such as diminished capacity or dementia.

Documents "Actively Procured" can include:

- Powers of Attorney,
- Changes to Wills or Trusts,
- Deeds to Real Property,
- Transfer of Title to vehicles,
- Changing beneficiary designations of accounts or life insurance,
- Convincing the elder to write checks, give cash, or transfers of funds to the exploiter or other accomplice,
- Adding the exploiter's name to bank accounts

The Florida Supreme Court described undue influence as "overpersuasion, coercion, or force that destroys or hampers the free agency and will power of the testator." The person creating the Will, known as the Testator, must be subject to the control or persuasion of another to the point that the Testator cannot act voluntarily at all. In the event of this sort of influence, the Will does not represent the Testator's wishes but rather the wishes of the person influencing the Testator.

Understanding and recognizing the "indicia" of exploitation can help professionals ward off these exploiters and better protect our vulnerable population.

The following factors can be used to help determine if a client in any context, not just in the context of creating a will, is being influenced by someone.

The “Carpenter Case” identified factors for the court to use in determining the existence of undue influence or “active procurement” of a document or empowerment. We can use these factors to attempt to identify a situation where a person is exerting undue influence, and potentially prevent it from happening

Carpenter factors:

- 1) Presence of the beneficiary at the execution of the will;
- 2) Presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
- 3) Recommendation by the beneficiary of an attorney to draw the will;
- 4) Knowledge of the contents of the will by the beneficiary prior to execution;
- 5) Giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
- 6) Securing of witnesses to the will by the beneficiary; and
- 7) Safekeeping of the will by the beneficiary subsequent to execution

In re Estate of Carpenter, 253 So. 2d 697 (Fla. 1971)

In addition to the seven Carpenter factors, Florida law has recognized at least three other indicators of active procurement:

- a) isolating the testator and disparaging family members;
In re Baldrige’s Estate, 74 So. 2d 658 (Fla. 1954)
- b) mental inequality between the decedent and the beneficiary; and
In re Estate of Reid, 138 So. 2d 342 (Fla. 3d DCA 1962)
- c) the reasonableness of the will or trust provisions
Peacock v. Du Bois, 105 So. 2d 321 (Fla. 1925)

What you can do if you suspect Elder Exploitation:

The Florida Department of Elder Affairs works in conjunction with the Department of Children and Families (DCF) Adult Protective Services and the Aging Network to protect disabled adults or elderly persons from further occurrences of abuse, neglect or exploitation. Services provided may include protective supervision, placement and in-home and community-based services.

How To Report Elder Abuse, Neglect and Exploitation: call Florida Abuse Hotline at 1-800-96-ABUSE (1-800-962-2873).

Elder financial exploitation is a CRIME, whether it is committed by fraud, deceit or under the “color” of authority such as a Power of Attorney etc. Recent changes to the criminal statute regarding Elder Exploitation will be discussed by Mr. Thompson in his presentation.