

Estate Planning

Council of Greater Miami

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This is the Multidisciplinary Approach to 2nd Generation Planning for people with special needs and will discuss the role of the attorney, medical, social and financial professionals to ethically meet the needs of clients both now and in the future. This is an open discussion with the participants.

Introduction

Over a decade ago, the concept of “Therapeutic Jurisprudence and Preventative Law” was born and described best by Dennis Stolle, Bruce Winnick, and David Wexler as a way for lawyers and the judiciary to approach the way law is practiced (in all areas, but here as it relates to Elder Law and Special Needs Trust Law) from a holistic standpoint.¹ This holistic approach takes into consideration current needs, such as the clients personal circumstances, physical or mental conditions and how these items impact his/her planning needs. In addition, the needs of the individual client will change over time and an ethical attorney would look not only what is transpiring now for that person, but would also look at the dynamics involved and attempt to minimize any future problems from occurring. Knowledge is the key in developing that plan. Often times as you peel back the layers of planning needed, natural conflicts begin to appear. Consider this hypothetical:

- I. Ms. Smith is 78 year old widow (net worth of \$2 million liquid and \$500,000 house owned free and clear and monthly income needs of \$4,000) who has a 50 year old daughter, Angel Smith and no other children or close living relatives. Angel has a dual diagnosis of schizophrenia and multiple sclerosis. She has difficulty ambulating and often has to use a cane or wheelchair. Angel works part time at the movie theater, but comes home after work and rarely socializes.

Ms. Smith owns her house in “fee simple”, but the maintenance and upkeep of the property is an area of future financial concern with which Ms. Smith seeks assistance.

¹ See, D.P. Stolle, D.B. Wexler and B.J. Winnick, “Practicing Therapeutic Jurisprudence: Law as a Helping Profession”, 2000, Durham, NC, Carolina Academic Press, pages 327-355.

Ms. Smith wants to leave Angel her home for her to live in after her death along with enough assets to permit Angel to qualify for the maximum governmental benefits allowed. She does not want Angel disqualified from her source of benefits and assistance.

Currently, Ms. Smith pays for all of the needs for Angel. Although, Angel has been forgetting things lately and is having a difficult time in her personal daily needs, she wants her independence and want to move out of her mother's home and live on her own. Her medication has stabilized her schizophrenia, but when Angel is feeling well she fails or refuses to take her medication and has gone through this cycle several times in the last years.

Ms. Smith asks you to represent her to prepare her estate plan and to set up a third party special needs trust. Ms. Smith, Angel, and the attorney decide to have an in person meeting to continue the process of informational discovery.

II. Stage I – Planning Process – Initial discovery of information from a psycho-social standpoint and apply it to the law.

A. Current Issues that Lead to Finding Solutions to Prevent Future Problems

- Who is the client? Ms. Smith? or Angel?
- Who is the paying client? Does this create a conflict?
- Issues for Ms. Smith:
 1. Current medical issues for Ms. Smith? Current mental status for Ms. Smith? There could be a potential medical or mental capacity issue in the future for Ms. Smith. Based upon historic data there likely will be an issue of either or both in the future for Ms. Smith. What is the plan for Ms. Smith? Who will care for Ms. Smith if she did become incapacitated either physically or mentally? Does she have someone to help her with her personal needs and or financial needs (i.e. trust)? Does she

anticipate being able to live at home for the remainder of her life?

2. Will \$2 million in assets be able to sustain her in the community if she were to need in home care? She does not have long term health care coverage. She receives Medicare and has a supplemental plan through AARP.
3. She provides the main care for Angel and does not have other relatives that will be able to handle this after her death.

- Issues for Angel:

1. What is the current status of Angel's medical condition? What is the current status of Angel's mental health?
2. What is mental health history and diagnosis for Angel? What age did it?
3. Are there better social environments that would best be suited for Angel? Is living at home the best environment?
4. What, if any, benefits are Angel receiving? What is covered by those benefits? Has anyone prepared a life care plan to project the needs and medical costs of Angel? Should one consult with a financial professional to look at possible ways to use techniques to plan for this.

- Assuming no conflict, is there a disclosure and waiver of the disclosure (typically seen in representation of two spouses)? Can one ethically ask for a waiver if the attorney determines that there is a lack of capacity issue?

B. Incorporating the psycho-social factors into the estate plan:

- Determine estate planning needs of the client and the beneficiary as this will be integral to determining the right teammates to introduce and the approach of the meeting.

- What if parent and child disagree? For example, what if Ms. Smith wants to have a guardianship established for Angel should she become incapacitated, but Angel wants alternative planning including a durable power of attorney for property and health care surrogate instead? Are there adverse interests thereby creating a conflict for the attorney? Are there capacity issues as to Angel that prevent her from understanding or signing documents? Who is your client and can you protect your client adequately?
- If Angel and her mother agree upon least restrictive alternatives, who will be named as agent for Angel? Does Angel have sufficient capacity to explain to a named agent her intentions and needs for the future? Can that be accomplished now?
- Creation of a 3rd Party Special Needs Trust (SNT) for the benefit of Angel (Fund now or later and the ethical considerations). Establishing a trust? Will that trust contain third party SNT provisions? If so, will the trust have a continual obligation to support during the lifetime of Mrs. Smith? If so, is this a conflict if both the mother and adult child are your client?
- Trustee selection – after death of Ms. Smith does she have relatives or friends, or the need for a professional or corporation to be the trustee?
- Realistic living expectations?
- Benefits applications for Angel?

B. Implementation of Plan While Maintaining Ethical Considerations and Prevention Tactics

- Explaining provisions of documents to pertinent parties.
- Sharing information, with permission of the client, with successor trustees, beneficiaries, surrogates or agents.
- Making sure the designated surrogate and/or agent can carry out the intentions and wishes of Angel.

IV. Conclusion

Appendix A

BIBLIOGRAPHY

1. The Florida Bar Re: Rules Regulating Florida Bar 494 So.2d 977 (Fla. 1986), modified 507 So.2d 1366
 - 4-1 Client-Lawyer Relationship
 - 4-1.6 Confidentiality of Information
 - 4-1.7 Conflict of Interest; Current Clients
 - 4-1.9 Conflict of Interest; Former Client
 - 4-1.14 Client Under a Disability
2. Florida Attorney General Advisory Legal Opinion (formal 96-94, November 20, 1996).

Medicaid Considerations and Readings not covered in the outline

3. Timothy L. Takacs, *Is Medicaid Planning Ethical?* available at <http://www.tn-elderlaw.com/medicaidplanning.aspx>.
4. Donald D. Vanarelli, *Financial Exploitation of the Elderly: Impact on Medicaid Eligibility*, VI NAELA JOURNAL at 39 (2010).
5. Timothy L. Takacs, *Medicaid Planning: Can it be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111 (2002-2003).
6. Patricia F. Sitchler, *Cutting Edge v. Over the Edge: Ethics and Malpractice Issues for Medicaid Planning*, 2 EST. PLAN. & CMTY. PROP. L.J. 175 2009.