



ELDER LAW FOR ESTATE PLANNING

Abstract

Estate Planning clients may have or develop incapacity and long-term care issues requiring the protection of income and assets. Without incorporating drafting and practice principles that have traditionally been the province of the Elder Law Attorney, clients may lose valuable options.

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Elder Law Power of Attorney Drafting Principles
Scott Solkoff, B.C.S.¹

Caveat: These provisions should not be included in all powers of attorney but are presented here for your discretion in drafting.

1. Greater preference for co-agency
2. Qualified Income Trusts
 - a. Necessary when an applicant is over the income cap (\$2,205 in 2017)
 - b. To prepare, sign and amend a Trust Agreement on my behalf as Settlor and/or Trustee, on terms my attorney-in-fact decides to be appropriate, and act as a Trustee for my income from Social Security and pensions so as to comply with dictates of the Florida Department of Children and Families or successor agency to enable me to obtain Medicaid benefits.
 - c. To change bank and/or credit union account titles and/or create new bank accounts so as to place my income from Social Security and/or pensions or other income in one or more accounts (by automatic deposit or otherwise) in the name of a trust created pursuant to paragraph ____ above and to deal in said accounts as Trustee pursuant to said Trust Agreement.
 - d. To sign any and all forms and documents necessary to have all of my Social Security and pension benefits automatically deposited in the account or accounts created pursuant to paragraph _____ above.
3. Gifting and Self-Dealing
 - a. Whether or not I have established a pattern for doing so, my attorney-in-fact shall have the authority to make gifts of any or all of my assets, intangible or tangible, whether below or above the federal gift tax exclusion amount

¹ Scott Solkoff is a Florida Bar board certified elder law attorney practicing with the firm of Solkoff Legal, P.A. in Delray Beach, Florida. See last page for more.

under 26 U.S.C. §2503(b) including homestead property, [to any person or entity] [to my lineal descendants] [to the beneficiaries named in my Last Will and Testament] whom my attorney-in-fact decides to be appropriate and reasonable and in my best interest including the right in my attorney-in-fact to make gifts to my attorney-in-fact or to my attorney-in-fact's family.

- b. I hereby expressly authorize my attorney-in-fact(s) to enter into transactions with themselves, including gifting my assets and other transactions which otherwise would be seen as self-enriching or a conflict of interest.
4. Funding of special needs trusts
 - a. Transfer any and all assets of mine, including, but not limited to, bank accounts, settlement proceeds, securities and real estate, to a special needs trust created for my benefit pursuant to 42 U.S.C. 1396p(d)(4) and/or to a third-party special needs or supplemental needs trust created for another person.
 - b. To create, on my behalf, a special needs trust or to enroll in a pooled special needs trust for my benefit pursuant to 42 USC 1396p(d)(4).
 5. Facility admission agreements
 - a. To sign all contracts, obligations and admissions papers for life care facilities, assisted living facilities, hospitals, medical care, residential care and if necessary, nursing home care.
 6. Spousal refusal
 - a. To refuse to make my assets available to my spouse should my spouse enter residential care in an assisted living or skilled nursing facility
 - b. To make, execute and deliver assignments of any right of support I may have against my spouse to any agency of the State if my attorney-in-fact deems it necessary for me to obtain government benefits.
 7. Caregiver Agreements/Personal Service Contracts
 - a. To enter into a transaction which secures caregivers or health care services or advocacy services on my behalf, even if this transaction is with my attorney-in-fact and/or his or her family members.

Qualified Special Needs Trusts

Thinking steps

- a. Under Medicaid laws, assets held in testamentary SNTs f/b/o spouse are exempt
 - b. Under Florida law, assets in such trusts, upon court approval, are also 100% credited to elective share even though there be no qualifying invasion power. 732.2025(8); 732.2095(2)(c)
 - c. However, QSNT only helpful if there is a surviving spouse so how can we allow client to use a revocable trust and get those benefits?
 - d. Take the case where there is a well-spouse and an ill spouse, well spouse's trust is funded and ill spouse's trust is not created
 - e. Well spouse performs spousal refusal
 - f. Ill spouse qualifies with no assets
 - g. If the well spouse predeceases, then there is no loss of benefits and no estate recovery and money is still there f/b/o surviving ill spouse.
- A QSNT can also be created without the extra step of a trust. This may be used, for example, when death is imminent and the desire is to have the QSNT created for the surviving spouse
 - Planning can also be done without knowing who is ill and assets can be moved into the well spouse's trust prior to death.
 - Can also allow for surviving spouse to not elect a share and bypass the spouse if no concern for Medicaid.

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SCOTT SOLKOFF is a Florida Bar Board Certified specialist in Elder Law. The firm he founded, Solkoff Legal, P.A., is based in Delray Beach, Florida. Solkoff Legal, P.A. is a law firm which exclusively represents the elderly, people with disabilities and their caregivers. Scott and his father, Jerome Solkoff (of blessed memory), are the co-authors of Thomson West's Florida Elder Law, a one thousand page two-volume book, updated each year, now in its 20th print edition. Scott is a Fellow of the American College of Trusts and Estate Counsel (ACTEC). Scott has served as Chair of The Florida Bar's Elder Law Section, President of the Academy of Florida Elder Law Attorneys and has actively served on the Board of Directors of the Florida State Guardianship Association, the National Academy of Elder Law Attorneys, the Academy of Florida Elder Law Attorneys, Alpert Jewish Family and Children's Services, the JCC of the Greater Palm Beaches and a Trustee of the Florida Council on Aging. Scott was appointed by Florida's Governor and the Speaker of the Florida House of Representatives to serve on the 18-member Purple Ribbon Task Force, charged with developing a state plan and report on Alzheimer's Disease and related dementias. Scott is the founder and current director of "Elder Concert" (www.elderconcert.org), a statewide multidisciplinary elder care educational program developed in partnership with the Florida Department of Elder Affairs, Florida Atlantic University, The Florida Bar, the Academy of Florida Elder Law Attorneys, the Florida State Guardianship Association, the National Association of Social Workers (Florida State chapter), the Florida Assisted Living Association and the Aging Life Care Association. He is also a co-founder and faculty member of Elder Law College (www.elderlawcollege.com) which provides attorneys with the tools to transition into a successful Elder Law practice.

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