

INTRODUCING ELDER LAW THROUGH F.A.Q.'S
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INTRODUCING ELDER LAW THROUGH F.A.Q.'S

Many attorneys are unfamiliar with the term "Elder Law." I was recently visiting with a lawyer that I had not seen in several years. He asked what area of law comprised the majority of my practice. When I replied that I had obtained my board certification in elder law, he inquired "What's that?" Clients often say that they had no idea that there are attorneys specializing in the legal matters of the elderly and disabled.

The State Bar of Texas CLE, as well as University of Texas CLE, South Texas College of Law CLE and Stetson College of Law in Tampa, Florida have been instrumental in providing elder law courses to enable lawyers to become more familiar and proficient in this area of the law. A more detailed list of resources can be found at question 5 below, as well as in the materials for past programs in the field of elder law presented by the sponsors named above.

There are many myths and misunderstandings concerning Elder Law-related topics which arise in meetings with clients on a daily basis. The answers to the various F.A.Q.'s included here are general and intended only to point the attorney in the right direction for further research. I hope that the "F.A.Q.'s" included in this brief overview will assist the reader to become more comfortable with the basics of Elder Law.

1. What is elder law?

"Elder Law" is devoted to addressing the legal problems faced by the elderly and disabled. The term "Elder Law" is not precisely accurate, in that a substantial part of this practice may involve disabled individuals who are children or adults of any age. The majority of issues usually involve estate planning needs of the elderly, guardianship issues, qualification for public benefits and maintenance of public benefits through specialize trust planning. The public benefits most widely involved are Medicare, Medicaid, social security disability insurance (SSDI) and supplemental security income (SSI).

2. What do elder law attorneys do?

Elder Law attorneys advise seniors and their families, disabled individuals and their families, attorneys, the courts and other entities to analyze the specific circumstances of the client and to provide assistance in addressing their specific needs. The objectives may be attained by estate planning or guardianship, may require filing of applications for public benefits, or attending hearings and filing appeals. Some elder law attorneys

specialize in litigation, such as contested guardianships, nursing home litigation or resident's rights litigation. Others specialize in obtaining or maintaining public benefits through implementation of specific trust, such as Qualified Income Trusts (QIT), Special Needs Trusts (SNT), Purely Discretionary Trusts or Court Created Trusts.

3. Is there a board certification for elder law?

Attorneys who are board certified in Elder Law are designated as "Certified Elder Law Attorneys" or CELA's. This designation is sponsored through the National Elder Law Foundation, located in Tucson, Arizona. The State Bar of Texas now recognizes this board certification and has adopted this area of specialty as one of its approved certifications. Accordingly, the board certification in Elder Law carries the same significance in Texas as any other board certification by the Texas Board of Legal Specialization.

4. What practice areas are included in elder law?

There are thirteen practice areas included in the Elder Law board certification exam. This list is a good point of reference which defines the scope of an Elder Law practice:

- Health and personal care planning
- Pre-mortem legal planning
- Fiduciary representation
- Legal Capacity Counseling
- Advice on Insurance Matters
- Resident Rights Advocacy
- Public Benefits Advice
- Housing Counseling
- Employment and Retirement Advice
- Income, Estate and Gift Tax Advice
- Tort Claims involving Nursing Homes
- Disability and Employment Discrimination
- Litigation and Administrative Advocacy

5. What are some good resources available to attorneys wanting to know more?

A short (but not comprehensive) list of materials would include the following:

- A. Texas State Bar CLE Annual Advanced Guardianship and Advanced Elder Law Courses
- B. University of Texas CLE Intermediate Estate Planning and Elder Law Course
- C. University of Texas CLE Special Needs Trust Course
- D. South Texas College of Law, CLE Annual Elder Law Conference
- E. Special Needs Trust Conference, Stetson University College of Law (Annually in Gulfport, FL)
- F. Clifton B. Kruse, Jr., *Third-Party and Self-Created Trusts, Third Addition* (ABA)
- G. Regan, Morgan and English, *Tax, Estate and Financial Planning for the Elderly* (Matthew Bender)
- H. Begley and Barrett, *Representing the Elderly or Disabled Client* ("Warren Gorham and Lamont)
- I. Stein and Chiplin, *Medicare Handbook* (published annually by Aspen Publishing)
- J. Choate, *Life and Death Planning for Retirement Benefits, Fifth Addition* (Ataxplan Publications)
- K. Abshire, Farrell, Sitchler and Wright, *Texas Elder Law* (Texas Practice Series, No. 51 - 2009, West Publishing)

6. Is the preparation of Wills, powers of attorney and medical directives a part of elder law?

While estate planning is an important part of dealing with the needs of the elderly, many times simple Wills and standard "statutory" directives are not appropriate in order to adequately address the specific problems facing the elderly client. For example, the attorney can not assume that it is appropriate for the Wills of an elderly couple to leave all assets to the surviving spouse. If either spouse becomes a Medicaid recipient, the death of the other spouse passing all assets to the surviving Medicaid recipient could disqualify the individual from receiving further benefits. Conversely, having the assets pass to the children, or to a specialized trust for the Medicaid recipient, would allow the assets of the deceased spouse to be utilized for the benefit of the surviving spouse while not disqualifying that individual from receiving Medicaid benefits. The attorney

representing elderly clients must understand the consequences of the implementation of any document prepared for an elderly client.

7. What are the "Big Four" that I hear referred to by attorneys in elder law?

Much of the emphasis in elder law involves the following public benefit programs for the elderly and disabled:

- A. Medicare
- B. Medicaid
- C. Social Security Disability Insurance (SSDI)
- D. Supplemental Security Income (SSI)

8. What is the difference between Medicare and Medicaid?

Medicare is a federal program funded with federal money to cover the hospital and medical expenses of qualifying individuals. Medicare is not a "means tested program." Any individual who qualifies by having worked the required number of "quarters" or "units" and who has attained the age of 65 qualifies for this coverage irrespective of their level of assets.

Medicaid is a joint federal-state program funded by both federal and state money. Medicaid is a "means tested" program. Any Medicaid applicant must satisfy both an income requirement and an asset requirement. There is an additional medical definition which requires the recipient to be either elderly or disabled. Generally speaking, Medicare refers to meeting the emergency or short term medical need of the recipient, while Medicaid pays for long-term custodial care of the recipient.

9. What is the difference between SSI and SSD?

Supplemental Security Income (SSI) is a federal welfare program which pays benefits to the elderly, blind or disabled who qualify financially. SSI is a "means tested" program requiring successful applicants to have significantly low levels of income and assets. SSI benefits are paid to qualifying individuals who may be either adults or children. A successful SSI applicant will receive medical coverage through Medicaid. The laws governing Supplemental Security Income can be found at 42 U.S.C. §§1381 et seq. Social Security Disability (SSD) is a Social Security program which pays benefits to disabled workers who were fully insured and worked for twenty (20) of the preceding forty (40) quarters prior to the disability. SSD is not a "means tested" program. The amount of assets owned by the disabled worker is irrelevant. The amount of benefit payable to the

recipient is based upon the worker's employment history and how much was paid into the system on their behalf. The successful SSD applicant will receive medical coverage through Medicare after the expiration of a statutory waiting period.

10. Does Medicare pay for nursing home care?

Medicare does not pay for long term custodial care in a nursing home. There are some short term benefits available when entering a nursing home under certain circumstances. If the individual entering the nursing home is being discharged directly from a hospital after an in-patient stay of three (3) days or more, Medicare pays for the full amount of the first twenty (20) days in the nursing home. Thereafter, as long as it is determined that the individual qualifies for the Medicare coverage of their medical problem, Medicare will pay up to one hundred (100) days with a co-pay (for 2011 the co-pay equals \$137.50 per day).

11. Are simple wills adequate for most seniors?

Estate planning is not a forms practice. It is necessary for the practitioner to analyze the circumstances to determine the needs of each individual client. If all assets are left to the surviving spouse, that surviving spouse may be receiving Medicaid benefits at that time of the death of the first spouse. The receipt of those inherited assets could disqualify the surviving spouse from receiving public benefits. Medicaid rules do not allow a recipient to "disclaim" an inheritance without receiving a penalty. If it is determined that the best interests of the client would be to pass assets to someone other than the surviving spouse, it must then be determined whether an individual, group of individuals or a trust is the most appropriate form of beneficiary. As always, seniors with larger estates require estate tax advice as to whether or not the implementation of a "tax plan" is appropriate for their circumstance.

12. Are standard statutory durable powers of attorney adequate for most seniors?

I do not consider a standard Statutory Durable Power of Attorney adequate for any of my clients. The variation of the terms of the Power of Attorney selected for each client depends on their current needs, potential needs and those individuals being considered as agents. For instance, the Texas Statutory Durable Power of Attorney limits gifts to the annual exclusion amount. Additionally, no provision is made for the agent to make gifts to himself. In Medicaid planning, it may be

necessary for the agent to transfer substantially more assets than could be transferred under the annual exclusion. Additionally, the agent may need to transfer assets to himself or herself. These provisions must be specifically set out in the Power of Attorney. It may be appropriate to name one agent or multiple agents. This agent may serve independently or maybe required to serve jointly with other agents.

13. Do living trusts help seniors qualify for nursing home Medicaid?

Revocable Living Trusts are considered an "available resource" to the grantor for Medicaid purposes. Therefore, placing all of an individual or couples assets in a living trust will not help qualify a Medicaid applicant by rendering those assets "non-countable" under Medicaid rules. Additionally, under a 2006 ruling, the transfer of a homestead into a living trust causes the loss of "non-countable" status and allows the homestead to become a countable resource.

14. Why can't the clients just give away their asset in order to qualify for Medicaid?

Under most circumstances, "giving away" or transferring assets by a potential Medicaid applicant will result in the imposition of a transfer penalty. While there are exceptions to this rule, many clients believe that simply giving away the assets will assist in qualifying them for Medicaid benefits. All applicants must sign a sworn Medicaid application which includes the listing of all transfers made within the past sixty (60) months (this replaces the old "36 month rule look-back rule" under the newly implemented Deficit Reduction Act of 2005). There are exceptions for transfers made for the benefit of a disabled child and transfers made to children living in the home of a Medicaid applicant for at least two years prior to the time of application which enables the applicant to remain in the home. The transfer penalty is the number of days that the applicant will be ineligible to receive benefits based upon the amount of the transfers, applying the current Texas divisor. The penalty no longer begins at the time of the gift, but now does not begin until the client enters the nursing home and is "otherwise eligible for Medicaid services (this is a new ambiguous rule under DRA 2005 and how it will be enforced is under discussion).

15. Is it true that clients can't give away any assets without incurring a transfer penalty?

Uncompensated transfers for the purpose of acquiring Medicaid benefits result in the imposition of a period of disqualification from the program. These rules changed dramatically in 2006 with the implementation of the Deficit Reduction Act of 2005. These rules became effective in Texas on October 1, 2006 and apply to transfers made after the effective date of the law on February 8, 2006. The transfer penalty is the number of days that the applicant will be ineligible to receive benefits based upon the amount of the transfers, applying the current Texas divisor (\$130.88 per day for 2011, based upon the "average cost of long-term care" definition). The penalty no longer begins at the time of the gift, but now does not begin until the client enters the nursing home and is "otherwise eligible for Medicaid services.

16. What are the basic fundamentals for Medicaid qualification?

When clients speak of "Medicaid Qualification" they are usually referring to long term nursing home Medicaid. In order to qualify for these benefits, an applicant must have a qualifying medical need and meet both "income"

(\$2,022 per month for 2011) and "resource" (no more than \$2,000 of countable resources) tests. Eligibility requirements are set by federal and Texas law and can be found in the Texas Medicaid Eligibility Handbook. The handbook is currently located online at <http://www.dads.state.tx.us/handbooks/mepd>. A more detailed article discussing Medicaid eligibility can be found on my website at in the "Articles" section: www.texasstatelaw.com

17. What is an "income cap" state?

The state are allowed to select their method of Medicaid eligibility. Texas is one of the few states which has implemented an "income cap." The income cap in Texas is established each calendar year by taking the standard SSI individual amount times 3. For 2011 the income cap is \$2,022 (674 x 3 = 2,022). In income cap states, an individual will not qualify for Medicaid benefits if their income exceeds the income cap by even \$1 without the implementation of a Qualified Income Trust.

18. How do you define "income" for Medicaid purposes?

When addressing the problem of "income" for Medicaid qualification purposes, the elder law attorney is usually referring only to permanent income items such as Social Security, pension payments and Veteran's benefits. These are permanent income item which the individual will continue to receive irrespective of the amount of their assets. Other types of traditional income, such as interest on CD's or stock dividends are based upon assets owned by the individual. These assets would disqualify the individual based on the asset test. Since the applicants can have no more than \$2,000 in countable resources (assets), income derived from assets is usually irrelevant. The issue of owning the assets (which would be producing the interest or dividends) must be dealt with separately in order to qualify under the asset test.

19. How do you qualify for Medicaid if you have too much income?

In "income cap" states, there is a trust established under federal law, called a Qualified Income Trust (QIT) or "Miller Trust" which can be implemented to allow qualification of individuals who have income exceeding the income cap amount. A more detailed discussion of the Miller Trust can be found at my website at www.texasstatelaw.com in the "Articles" section.

20. Can a client qualify for Medicaid by putting all of their assets in a Miller (Q.I.T.) trust?

One of the myths surrounding Medicaid qualifications is that an applicant can set up a Miller Trust (QIT) and place all of their assets in the trust and thus remove those assets from being counted against them for qualification.

This is simply a myth. An individual's assets cannot be placed into a Miller Trust. The trust is an income trust and only income items can be deposited into the trust. The income goes into the Trust and out of the Trust in the same month. A QIT does not hold assets.

21. What is the "look-back" period?

The "look-back period" establishes the time during which assets transferred by a Medicaid applicant to a third party for less than fair market value will incur a transfer penalty. There is a specific question on the Medicaid application which requires the disclosure of all such transfers made within 60 months prior to the date of the application. Transfers made more than 60 months prior to the date of application are not counted. All transfers made within the 60 months prior to the application date must be disclosed and are analyzed to see if those transfers will result in a transfer penalty.

22. How are transfer penalties calculated?

Transfer penalties are calculated based on (1) the amount of the transfer and (2) the applicable figure for average cost of nursing care, which is now calculated on a daily basis. Generally, one can take the amount of the transfer and divide that amount by the daily cost of private pay nursing care (\$130.88 as for 2011). The result is the number of days of ineligibility, rounded down to the whole number of days. The penalty will be calculated from the first day of the month in which the transfer occurred. For example, a \$100,000 lump sum transfer will result in a 764 day transfer penalty.

23. What is a Special Needs Trust?

A Special Needs Trust is a trust designed specifically to allow benefits to be received and paid for the benefit of a disabled individual in a manner will not result in the disqualification of that individual from receiving public benefits. Generally, Special Needs Trusts are designated as either "d4A" Special Needs Trusts or Third-Party Special Needs Trusts.

24. What is a "third-party" Special Needs Trust?

A third-party Special Needs Trust is a trust that is funded with assets belonging to someone other than the beneficiary. For instance, if a parent establishes a testamentary or stand alone trust for the purposes of gifting to their disabled child or allowing their disabled child to inherit assets from them or from another third party such as a grandparent, then all of the assets in the trust originate from other individuals, i.e. the corpus of the trust does not include any assets owned by disabled individual. This type of trust does not require a payback provision to the state upon the death of the disabled individual.

25. What is a "d4a" special needs trust?

A "d4A" Special Needs Trust is established under federal statute. The name originates from the location of the statute: 42 U.S.C. 1396p(d)(4)(a). This trust must be created by either a parent, a grandparent, a guardian or a court for the benefit of a disabled person. This disabled individual must be under the age of 65 years when the Trust is established. The trust must contain a payback provision stating that the state agency supplying Medicaid benefits to the disabled beneficiary must be repaid for any Medicaid benefit paid to the disabled individual prior to any distributions to other beneficiaries.

26. What is a Pooled Trust?

A Pooled Trust allows assets to be transferred to a qualifying trust for the benefit of a disabled individual that would not otherwise be possible or be practical to pass into a d4A trust. For instance, the beneficiary may be more than 65 years of age. Additionally, the assets may be of a smaller amount that would not practically allow for the use of a corporate trustee. The pooled trust currently available in Texas is the ARC of Texas Pooled Trust.

27. What is the *Deficit Reduction Act of 2005* and why is it important?

In Questions No. 14, 21 and 22 above, references are made to the "look back" period with regard to determination of transfer penalties. It is imperative that the Elder Law Attorney be thoroughly familiar with the *Deficit Reduction Act of 2005*. This bill was signed into law by President Bush on February 8, 2006 after being passed in the Senate by a vote of 51 to 50 (tie vote broken by Vice-President Cheney). This new law became effective in Texas on October 1, 2006. The

DRA 2005 represents a complete overhaul of the Medicaid transfer penalty calculation process. The previous “36-month look back period” has now been extended to 60 months. Additionally, the transfer penalty period of ineligibility incurred as a result of transfers has been changed to commence at or around the date of qualification for benefits, rather than from the date of the transfer.

28. What are Veteran Benefits?

The Department of Veterans Affairs (VA) offers two major disability benefits programs for veterans: service-connected disability compensation (generally referred to as “compensation”) and non-service-connected disability pension (generally referred to as “pension”). In the world of elder law, our clients may receive benefits under a needs-based program (SSI) or a non-needs-based disability program (SSD). Similarly, veterans may qualify for benefits for service-connected disabilities (Compensation) or due to a total and permanent disability resulting in low levels of income and assets (Pension). There are also veteran health benefits which provides coverage for physician services, hospitalization and similar health-related expenses.

29. What is Veterans Compensation?

“Service-connected compensation” is a monthly payment made by the VA to a veteran with a physical or mental disability that was incurred in or aggravated by service. In a manner similar to workman’s compensation, the veteran is assigned a percentage of disability (i.e. 10% disability rating for loss of hearing). Each rating level is assigned an amount of monthly compensation. The veteran may have several concurrent disability rating for different injuries. Additionally, the disability ratings may increase as the injury grows worse over the years.

30. What is Veterans Pension?

VA pension benefits are designed to supplement the income of disabled veterans who had to forego career opportunities while they served their country during a time of war and were unable to advance their careers or accumulate enough resources to support themselves adequately after they became disabled. Unlike Compensation, the Pension benefit does not require that the disability be connected to the time period during which the veteran was on active duty. Much like the SSI program, the Pension benefits program is “needs-based.” Generally, there are five threshold eligibility criteria:

- The veteran must be discharged under other than dishonorable conditions;

- The veteran must have served during wartime;
- The veteran must be permanently and totally disabled;
- The disability must not be due to the willful misconduct of the veteran; and
- The veteran must have limited income (the “income test”) and a net worth that does not provide adequate maintenance (the “needs test”).

31. What is the VA Regional Office?

The VA level where the initial claim is filed is called the “Regional Office” (“RO”). Each state has one or more regional offices. In Texas, we have a RO in Houston and one in Waco. Each veteran’s claim is first adjudicated at the RO level. The VA has a statutory duty to assist the veteran in acquiring the information and records necessary to fairly determine the merits of the case. The veteran is entitled to a hearing before the RO. Once a decision is made by the RO, a written decision is issued called the “VA Decision Letter.” If the veteran decides to appeal, he must first file a “Notice of Disagreement” with the RO stating that he does not wish to accept the RO decision. In response, the RO will write the “Statement of the Case.” This is a comprehensive history of the claim and the basis of the RO’s determination denying the benefits requested. If the veteran chooses to appeal, the appeal must go to the Board of Veteran Appeals (the “BVA”) in Washington, D.C.

32. What is the Board of Veteran Appeals?

The BVA is a panel of administrative judges who hear appeals from the various RO’s around the country. Veteran’s “C-File” is sent to the BVA for consideration on appeal. There is typically a substantial backlog of cases to be heard at the BVA level. The veteran is entitled to a hearing before the BVA. The veteran must choose whether to travel (at personal expense) to Washington, D.C. or whether to wait until a BVA judge travels to his local RO. The BVA can either (1) decide the entire case; (2) remand the entire case back to the RO for reconsideration; or (3) decide part of the claim and remand part of the claim. The decision of the BVA is considered “final.” From there, the veteran can (1) choose to ask for reconsideration at the BVA; (2) reopen the claim with new and material evidence; (3) file an appeal with the Court of Appeals for Veterans Claims (CAVC); (4) appeal to the CAVC and reopen the case at the RO at the same time; or (5) make a CUE claim; that is, that the BVA or RO decision contains “clear and unmistakable error” (“CUE”).

33. What the Court of Appeals for Veterans Claims?

The CAVC is located on Indiana Street in Washington, D.C. The Court is housed in the same building as the VA General Counsel's Office. Accordingly, the Court and the VA attorneys are in the same location. At this level, the VA is represented by an attorney. The veteran should also have his own counsel. The general steps involved at this level include (1) determination of the record on appeal (the "Designation of Record" ("DOR") by the VA General Counsel and the "Counter Designation of the Record" (the "CDOR") by the Appellant; (2) determination of the issues by a telephone conference; (3) filing of briefs; and (4) oral argument. An appeal from the decision of the CAVC must go to the Court of Appeals for the Federal Circuit, also located in Washington, D.C.

34. What are the requirements for representing veterans?

As of 2008, an attorney representing a veteran must be "certified" in order to make an appearance. The rules were issued in June. Rather than take an exam, as originally considered, the attorney must file a detailed application and attend a certain number of hours of CLE devoted to veteran matters. Based upon my personal experience, the application will be acted upon in less than one month. The determination of eligibility must be renewed each year and proof of CLE must be submitted.

35. What are veteran survivor benefits?

When a veteran dies as a result of a service-connected disability, the surviving family is entitled to compensation called "Dependency and Indemnity Compensation" ("DIC"). There are a number of rules which define who may be entitled to DIC. However, generally the spouse, minor or disabled children and dependent parents may qualify to receive these benefits.

36. What are the sources of veteran law and practice?

The generally accepted "bible" of veterans practice is the *Veterans Benefits Manual* which consists of 1,999 pages. Its companion volume, entitled *Federal Veterans Laws, Rules and Regulations* covers 1,971 pages. These volumes are updated and printed annually by the National Veterans Legal Services Program.

