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Presented by

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Top 10 Rules for Getting Your Parents "Aging Ready"

Scott M. Solkoff*

As professional planners and counselors to our clients, we know a great deal about planning ahead and anticipating future needs. As an almost steadfast rule, however, we do not truly practice what we preach. In most cases, we put off our own family's planning in favor of the work we do for our clients. I have thrice given a talk at The Florida Bar's Annual Meeting to teach lawyers about planning for their own parents' long-term care issues. This article contains the Top 10 Rules for getting your parents "aging-ready."

1. **Talk to your parents about their long-term care future.** These are not easy or fun discussions to have but without such talks, you will not be sure how to help your parents in the future and you will lack the best tools. You can use this article as an excuse to get the conversation started. Good discussions result in an action list so that important planning opportunities are not lost. Ask your parents where they wish to live if they cannot care for themselves. Ask whether they have considered how to pay for the care that may be required? Ask whether they have considered what health care they wish to be provided if they are in a terminal, vegetative or "end-stage" condition. Ask them what they would like you to do to help them if they can no longer make decisions on their own. Ask whether they have any insurance that you should know about (i.e., long-term care insurance, catastrophic health care coverage or similar policies). Ask where they keep their important papers and whether they would feel comfortable with your having copies of key documents now. Explain that you will never meddle but that you care about them and want them to have what they need.

2. **A special long-term care Durable Power of Attorney is the single most important document your parents can sign.** A "power of attorney" document can allow your parents to pick a person or persons who can step in and do for your parents if they cannot do for themselves. Even regular "powers of attorney" can be immensely helpful but there is special language that can be added to powers of attorney for aging and long-term care issues. Some provisions to consider: specific authorization for the agent(s) to create trusts to protect income (general trust creation provisions are not sufficient); authorization (where desirable) for the agents to gift to themselves; authorization to sign admissions agreements for life care facilities; authorization to apply for health and long-term care insurance benefits and to make claims; authorization to apply for government benefits. Some general powers of attorney will work but some third-parties, including the government, will require specificity. Remember that the power of attorney does

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not give away any of your parents' rights. It simply appoints a helper, albeit one with great authority.

3. **Do a new Deed for the home.** In most cases, my office recommends a new Deed for the home both to avoid a probate proceeding and to plan ahead should we need to apply for Medicaid. In many cases, we advise the creation of a new deed whereby the home is owned by your parents for the rest of their lives and then, immediately upon death, the property automatically passes to the heirs. Unlike a traditional "life estate deed," however, there is no loss of Medicaid eligibility and also unlike a traditional "life estate deed," the parents retain total control. Your parents should NEVER transfer title to you or anyone else as joint owners or otherwise, without speaking to an Elder Law Attorney as this can cause a loss of Medicaid eligibility and a loss of the homestead creditor and property tax protection.

4. **Consider Long-Term Care Insurance**. While it is true that my office can most likely show your parents how to legally shelter their assets and qualify for Medicaid if and when they need it, long-term care insurance can still be important. Contact a reliable independent agent who will show you quotes, terms and ratings from more than one insurer. You may also contact "captive" agents who sell primarily for only one company but you should then check with others also. Have an Elder Law Attorney review the policy to make sure you buy what you need and nothing more. Talk to the agent about a policy for you as well.

5. **Even with significant assets, your parents may need to qualify for Medicaid.** Medicaid is the government program that pays for the cost of long-term care. Medicaid can pay for home care, assisted living, and nursing home care from even the Rolls Royces of providers. In order to qualify, your parents must have roughly less than $90,000 or $2,000 for a single person but THE GOVERNMENT CANNOT COUNT EVERYTHING. It is possible, through careful and time-tested planning, to legally convert "countable" assets to "non-countable assets." Why is this important? Because without planning, your parents will only qualify for Medicaid after spending all or most of their assets and will then have nothing left to pay for all that Medicaid does not cover. What was once a program for the very poor is now necessarily a program for the middle class as well. That is because nursing home care easily exceeds $6,000 per month for just one person in a semi-private room. Start planning now or, at the very least, get the documents in place that will allow for future asset protection planning.

6. **Procure detailed written directions about end-of-life decision making.** One to two page living wills just do not cut it. It takes that long for a good document just to define the terms. I have found that what works best is an integrated "package" which contains a heath care surrogate designation, living will and health care power of attorney and then explains how these documents interrelate. Great specificity is desired while also leaving enough flexibility to accomplish unanticipated goals. It is not enough to say "I do not want *artificial procedures,"* without then carefully defining what is meant by that term. Also, it is important that the document deal with such issues as relieving the surrogate/agent from liability for health care expenses, relieving the doctor of liability so long as the doctors honors the document and considering different procedures or scenarios. The package we use at Solkoff Legal, P.A. is about eight to ten pages long, not because longer is better but because it takes that long to explain one's wishes. A

good Elder Law Attorney will spend considerable time explaining the choices and the documents. Whether your parents have one of our thorough documents or a one-page form they got for free, it is important that you or your parents supply this document to their primary care physician now. You must also have a copy or know where to get to it quickly.

7. **Avoid Probate.** In most cases, we want our clients to avoid a probate proceeding. Probate is the legal process by which a person's estate is managed and then distributed. Under Florida law, there are circumstances when a person's estate must be probated. Probate is almost always necessary when a person dies owning any assets in that person's name alone. Probate can therefore often be avoided by placing other persons' names on your parents' assets as beneficiaries or co-owners or through the use of trust agreements or other entities. But beware ... trusts, beneficiary designations and especially joint ownership, have significant pros and cons. Consider, for example, what would happen if a joint owner gets sued or dies. Consider what would happen if the assets that exist now do not exist in the future and how that will affect the division of assets.

8. **Avoid Gifts**. Gifts can disqualify people from getting Medicaid when they need it. While we can often "fix" gifts, there are sometimes irrevocable consequences. If your parents wish to gift assets, consult with my office or another qualified Elder Law Attorney to find out how your parents may transfer assets without incurring Medicaid gift penalties. Generally speaking, the government "looks back" five years. It is better to therefore make exempt transfers rather than risk ineligibility later on.

9. **Consider Exempt Transfers.** Depending upon your parents' age and circumstance, it may be advisable for them to begin making changes to their assets now so that they may qualify for Medicaid if and when the need it. Transfers to children or to trusts can be very advantageous but there are also other methods to protect a family's life savings. Consider exempt transfers such as putting money into the home (an already exempt asset), paying off a mortgage, making monthly transfers below the penalty levels and transferring assets to children in exchange for fair value (so not a gift and not penalized).

10. **Be Realistic about the Future.** I have never met a client who was anxious to move into a nursing home. Most people tell me they do not want to enter a nursing home and yet there are waiting lists to get in. The goal should be to remain as independent as possible with as high a quality of life as possible. Usually this means staying at home until it just does not work anymore. Have a plan for moving into a facility. Without a plan, bad things happen.

3 Ways of Paying for Nursing Home or Assisted Living Care

Scott M. Solkoff, Solkoff Legal, PA

Nursing homes and assisted living facilities can be very expensive but there are ways to make your long-term care dollars stretch. There are three primary methods of paying for nursing homes or assisted living facilities:

1) Private-paying with one=s own dollars;
2) Using insurance that covers some or all of the cost of long-term care and
3) Need-Based Government Benefits, i.e. VA Benefits and the Medicaid program.

PRIVATE-PAYING FOR CARE often means total indigence. The cost of nursing homes in Southeast Florida range from about $4,000 to $12,000 per month. Assisted living facilities are about half the cost of nursing homes but still too much for many to pay without outliving their savings. Many people spend all of their savings in nursing homes and then have nothing left. Not a very good option!

LONG-TERM CARE INSURANCE works for some but most people considering nursing home care do not have long-term care insurance and either cannot qualify for the policies or cannot afford the premiums. Long-term care insurance is therefore often not an option.

NEED BASED GOVERNMENT BENEFITS - This leaves Veteran's Benefits and the Medicaid program. In Florida, Medicaid pays for almost all nursing homes including the finest of facilities (you sometimes need to know the tricks to getting in!) and Medicaid increasingly covers assisted living facilities as well. But in order to qualify for Medicaid, applicants must be below $2,000 in savings and below $2,022 in income (2011 figures).

What Elder Law Attorneys Do:

Among other services which enhance quality of life, Elder Law Attorneys help people to ethically and legally convert Acountable@ savings to Anon-countable@ savings, so that Elder Law clients can keep their savings and still qualify for Medicaid. This is done not out of greed but of necessity so that the Elder Law client is not left indigent at the cost of long-term care. In the words of one court, ANo agency of the government has any right to complain about the fact that middle-class people confronted with desperate circumstances choose [to do Medicaid asset protection planning] when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential medical treatment.@

Top Ten List on Protecting Savings from the Cost of Long-Term Care

- Medicaid pays for the best of nursing homes, assisted living and home care with the same quality as if you were spending down your own savings.
- There are legal strategies, approved by the government in thousands of cases, which allow you to qualify for Medicaid without giving away your money and without a "look-back" or penalty.
- The average cost of nursing home care in Southeast Florida nears $8,000/month (2015 figures)
- Medicaid will pay the entire bill at the nursing home less the patient's income.
- Assets can almost always be protected. Income can sometimes also be protected.
- For most Veterans who served during wartime, it is possible to qualify for up to $2,120 per month (2015 figures) in addition to Medicaid.
- In some instances, benefits can be postdated back to the date of application and so, getting an application filed as soon as possible can save tens of thousands of dollars.
- The home and other assets can be protected not only to qualify for Medicaid but to stop the government's effort to collect assets upon death.
- Even people with long-term care insurance usually need or benefit from Medicaid and/or VA benefits.
- Medicaid patients are treated the same as people not on Medicaid. It's the law!

Florida's Durable Power of Attorney
Scott M. Solkoff

Powers of attorney are among the essential documents for most people over the age of eighteen. Here's why:

I. Most Powerful Document Known to the Law: No other legal device grants such broad authority. With it the attorney-in-fact may access financial accounts, sell property, contract, sue, defend lawsuits, create or fund a trust, and countless other tasks that may be hard to anticipate on the date of execution.

In the wrong hands, the POA is little more than a license to steal. In the right hands, the POA is a great protection because the principal has designated somebody who can step in and do for them if they cannot do for themselves. And rather than representing a loss of the principal's control, my view of the POA is that is a tool of empowerment. It allows the client to control who is going to step in if they can no longer take care of things and it allows the client to put limitations on the authority. The maker of the power of attorney does not give up any of his or her rights and can cancel the document.

Without the POA, a guardianship or state action may be necessary and that can be a total loss of control. This is an important issue because, from time to time, we see clients who we know are going to require intervention but who are unwilling to give anybody any authority to act for them.

I have had to do guardianships for people to sell real estate or to bring a lawsuit or to create legal documents, all of which could have been avoided were there a POA.

So I feel it my responsibility to really explain to the reluctant client, the dangers of not having the document. If the issue is that the client does not trust anybody, I will never be the one to say "everything will be alright." And I do have clients who have no trusted family members or friends and for those clients, maybe there is no other option other than a professional or not doing one at all. But if the issue is "loss of control and authority" I explain the following:

1. While competent, you can revoke the power at any time.
2. There are strict civil and criminal penalties for any wrongdoing.
3. We can limit authority in the document; and
4. It is better for you to pick someone than for a court to pick someone.
5. You are giving up none of your rights.

But let's be clear, a POA is no guarantee that there will be no guardianship.

II. Avoidance tool for guardianship – not all the time but it can be. If you appoint your own agent, often the court will not need to appoint one. The guardianship law specifically

requires the court to defer to and recognize the power of attorney in most cases. A power of attorney cannot always stop a guardianship. Remember that the power can be revoked anytime and the principal (the maker) can still act. This means that I may create a Power of Attorney while I am competent but then later, with incapacitating dementia, I could also revoke the power and start giving away my money to strangers. In such a case, a guardianship can still be necessary and helpful. A power of attorney also does nothing with regard to placement decisions – a common call for guardianship. "Placement" problems arise when a person is a risk to themselves or others but refuses help in the home and will not move to a safe and appropriate community. While people are free to make their own decisions, the law can step in if the person is wandering into the street, starting fires in the kitchen and so on. A power of attorney may not help in such situations.

III. What should it contain? As hard as I try, I have not been able to come up with one form that answers every client's needs. Consider the following language to include in your powers as appropriate:

1. The legal description of any real estate subject to the power.
2. The authority to gift even to the attorney-in-fact.
3. The authority to create and fund a trust.
4. The specific authority (as can be required for Medicaid) to create a qualified trust to hold income.
5. The authority to convey homestead property or to exercise a joinder.
6. The authority to exercise powers of appointment.
7. The authority to enter into specific planning strategies to shelter assets to qualify for Medicaid and other benefits to pay for home care, assisted living and nursing home care.
8. The authority to self-deal.

IV. Revocation

Notice of the revocation should be in writing and served upon the attorney-in-fact and should also be served on all third parties who might rely upon it (e.g., financial institutions). Service can be by any mail that requires a signed receipt or by formal service of process.

V. Multiple attorneys-in-fact:

I encourage my clients to name more than one attorney-in-fact so that if one is ill, out-of-town, dies, or is otherwise unavailable, another person of the client's choosing can step in. I usually do this by saying that only one signature is necessary because we generally don't want a situation where everybody has to sign or be present for anything to take place. Sometimes though, depending mainly on the family dynamics, we might want to require unanimity. If the power names multiple surrogates and does not specify how many signatures are necessary the law assumes the following:

1. If there are two agents, then both must agree.
2. If there are three or more agents, then a concurrence of the majority is necessary.

In real life, if there is no language to the contrary, banks and most other third parties will require unanimous consent.

With my clients, I discuss the pros and cons of using co-agents and successor agents.

VI. Durability

The term "durable" when used in powers of attorney does not have anything to do with how thick and sturdy the paper is. Rather, it means that the power of attorney is good whether or not the maker of the document is incompetent. Believe it or not, even though we really need the power of attorney when we do become incompetent, regular "non-durable" powers of attorney expire upon incapacity. This makes sense in the progression of the law but it does not make sense for most people. Most people should be doing a "durable" power of attorney so that it remains effective until death unless revoked by the maker.

There is much more on powers of attorney. I have written a whole chapter in a book and lectured often on the subject. I could not possibly cover it all here so know that this is an incomplete article but one that I hope helps you and/or your loved ones or clients to have a safe and effective power of attorney.

VII. New statute prohibits springing POA

SOLKOFF LEGAL
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Top 10 Tips and Treasures on Living Wills

We are a unique law firm solely dedicated to helping the elderly, the disabled, their caregivers and their families.

Our Areas of Expertise Include:

- Asset Protection & Medicaid Qualification Assistance
- Special Needs Planning for Disabled Adults & Children
- Estate Planning including Wills, Trusts, Powers of Attorney, & Health Care Advance Directives
- Estate & Trust Administration
- Guardianship & Incapacity Planning
- Probate Administration
- General Advice on Aging Issues

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10 Tips and Treasures on Living Wills

Scott M. Solkoff*

Your goal is to set to paper your health care directions in advance of needing them. You want your wishes to be honored and most want their surrogates and family to have as safe and easy a time of it as possible. Scott Solkoff has identified some easy and very important "drafting opportunities" to consider when people do Advance Health Care Directives. Advance Health Care Directives are health care decisions we make in advance of needing them and include such documents as Living Wills, Health Care Surrogate Designations and Health Care Power of Attorneys:

1. You are unique in your personhood. Examine your own wishes. Do not think you need to fit your own wishes into a form created by someone else. Some Elder Law Attorneys can help you ask yourself the important questions and then put it to paper in a manner most likely to be honored. If you must sign a "form," know that there are many forms out there and you should examine many to find the one that best approximates your own wishes.

2. Pain medications are sometimes deemed "artificial procedures" and are therefore sometimes withheld when a document mandates that no artificial procedures be used. Most people want to die in as painless a fashion as possible. Be specific to indicate that you want pain medications to be used if they will lessen your suffering even if those pain medications may dull your consciousness or indirectly shorten your life.

3. Consider a liability shield for the doctors and facilities. Some doctors and health care facilities are afraid of being sued when dealing with living wills and health care surrogates. One reason why these advance health care directives are not honored is because of fear of a law suit. Consider including language in your documents that "indemnifies" the health care providers, facilities and your surrogates from any liability incurred as a result of their obedience to your directions. Do not underestimate the importance of this provision. People and institutions will be much more likely to honor your wishes if they believe themselves to be protected from liability for doing so.

4. Depending on your circumstances, it is usually best not to require all surrogates to sign off on directions. When health care decisions need to be made, those decisions often cannot wait to get all of the surrogates in the same place at the same time. Your document should be crystal-clear on how many signatures are necessary. Scott Solkoff usually recommends that people allow only one signature to accomplish a health care decision even if other surrogates are available to act. There are pros and cons. Discuss this issue with the Elder Law Attorney.

5. Make sure your Surrogate has all necessary credentials. The health care advance directive law is found in Chapter 765 of the Florida Statutes but there are other state and federal laws that affect your surrogate's ability to act for you. For example, your documents should take into consideration Chapter 470 of Florida Statutes which allows for a "legally authorized person" to be designated to make funeral arrangements. Without this, your funeral arrangements might be made by a person not of your choosing. Your documents should also take into account new federal privacy laws. Many lawyers have reported that hospitals and nursing homes have refused to allow a Health Care Surrogate to access clinical records unless the documents explicitly point to HIPAA and related privacy laws.

6. Experimental medical procedures are sometimes desired and your documents should specifically authorize your surrogate to consent or withhold consent to experimental medical procedures if that be your wish.

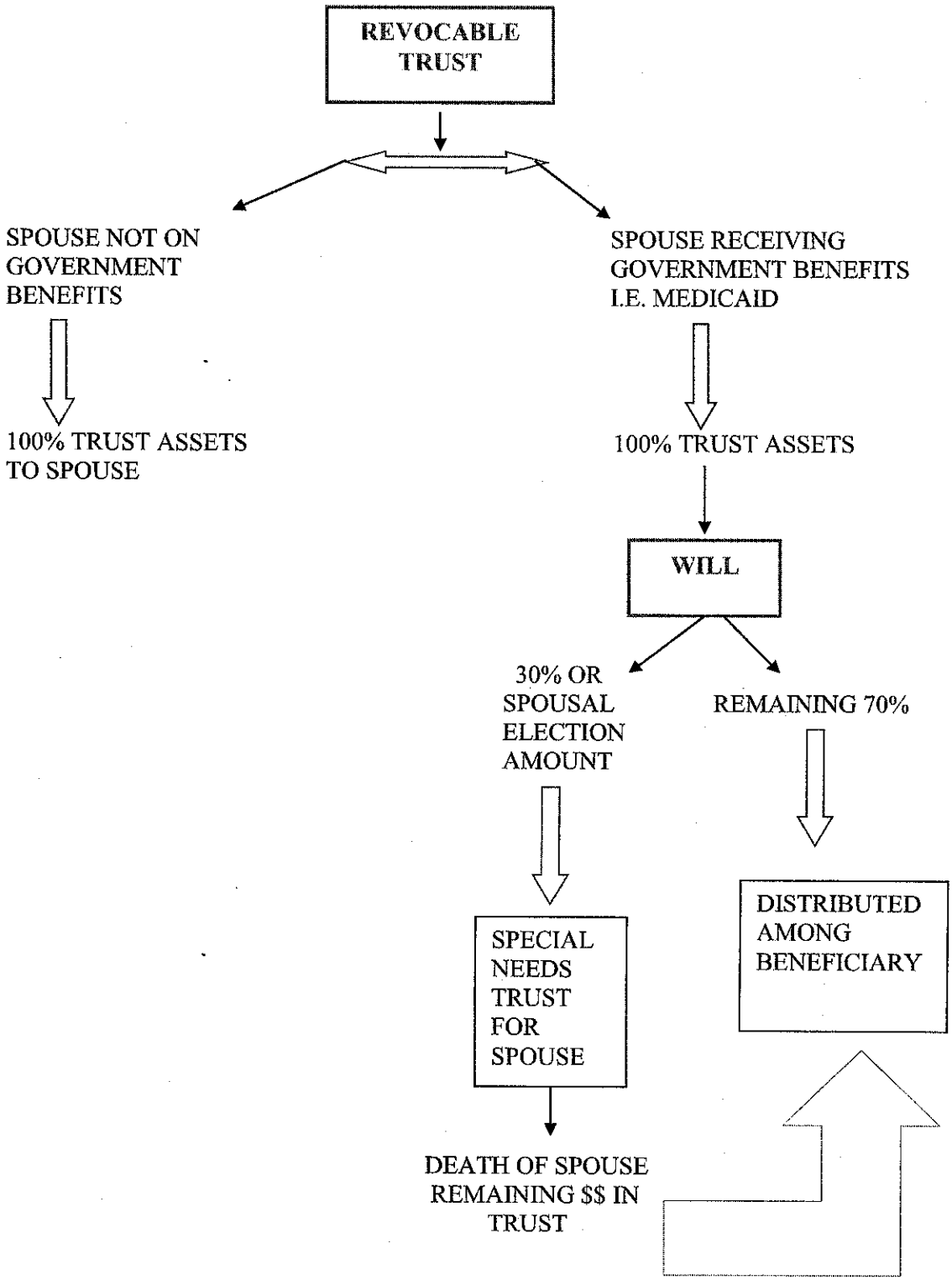
7. If hospitals or other health care providers do not get full payment for your care, they might go after your Surrogate who authorized the care. Your documents should explicitly state that "My Surrogates shall not be liable or responsible for any costs or expenses of my medical treatment or care and a Surrogate's signature on admissions papers shall not make that Surrogate liable for any costs and expenses incurred for my care, it being understood that the Surrogate acts for me and in my stead and I alone would be liable or responsible for such costs and expenses." This one provision can save great grief and a considerable amount of money.

8. Make the Advance Health Care Directives "self-proving." In Florida, all Last Wills & Testaments can be made self-proving. This means that the witnesses do not actually need to come to court to prove that the person actually signed the Will. A Last Will & Testament is made self-proving with the addition of an affidavit (a sworn statement) attached to the Will. It is not the custom to use these affidavits for advance health care directives but it is a smart idea. The inclusion of the "self-proving affidavit" makes the document look more official because the witnesses are making a statement that the rules of signing have been followed. If ever the document requires to be proved in court, this affidavit may prove helpful. There is no disadvantage other than that it takes the attorney a little more time.

9. Consider organ donations and your wishes regarding an autopsy. Including your wishes regarding organ donations and autopsy in your advance health care directives will better ensure that your wishes are made known. Most people are unaware that a Surrogate can donate your body or make organ donations even if you never consented to same during your lifetime. If you do not want this to be a possibility, you want to make that clear. If you do want to donate part or all of your body, then you also need to make your wishes known.

10. Make sure people know about your Advance Health Care Directives. Your Elder Law Attorney can create the best, most customized document in the world but if nobody knows about it, it does not help you. Immediately upon signing the documents, you should deliver one copy to each of your surrogates and one copy to your primary care doctor and whatever other specialists you are seeing. If you are not giving your Surrogate the original document, tell the Surrogate where you keep the original and make sure it is accessible. Talk to your Elder Law Attorney about other ways to keep your document available. If you update your document, make sure you send the new one to at least all of the people to whom the prior copy had been provided. Make sure you tell them that this new version replaces the older one.

REVERSE POUR-OVER SPECIAL NEEDS ESTATE PLANNING



707 So.2d 954

District Court of Appeal of Florida,
Fourth District.

Minerva THOMAS, Appellant,
v.
FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, Appellee.

No. 97-1433.

March 25, 1998.

Applicant sought medicaid benefits for nursing home pursuant to state's institutional care program. The state department of children and families denied application, and applicant appealed. The District Court of Appeal, Stevenson, J., held that fact that applicant had entered into lifetime contract with her daughter for health care and personal services did not warrant denial of benefits.

Reversed and remanded.

Nicola Jaye Boone of McCarthy Summers Bobko McKey Wood & Sawyer, P.A., Stuart, and Scott M. Solkoff of the Law Office of Jerome Solkoff, Deerfield Beach, for appellant.

Richard E. Doran, General Counsel, and Herschel C. Minnis, Assistant General Counsel, Tallahassee, and Colleen Farnsworth, Assistant District Legal Counsel, West Palm Beach, for appellee.

STEVENSON, Judge.

Minerva Thomas, the appellant, challenges a decision of Florida's Department of Children and Families denying her application for Medicaid benefits pursuant to Florida's Institutional Care Program ("ICP"). Prior to applying for these nursing home benefits, Thomas entered into a lifetime contract with her daughter, whereby her daughter agreed to supervise appellant's health care and to provide personal services to her mother in exchange for $67,725. The Department's denial of Thomas' application for ICP benefits was based on its determination that Thomas had received less than fair market value for the $67,725. We reverse.

Both federal law and the Department's own regulations provide that a transfer of assets shall not render a Medicaid applicant ineligible for benefits, if he or she can establish that "the individual intended to dispose of the assets either at fair market value, or for other valuable consideration." 42 U.S.C. § 1396p(c)(2)(C)(i); *see also* Florida Department of Children & Families Resource Manual § 1630.20.00. During the proceedings below, the only evidence presented was that Thomas had in fact paid fair market value for the services contract; thus, the hearing officer's finding that Thomas had not received fair market value for the exchange is without record support. We, therefore, reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

GLICKSTEIN and SHAHOOD, JJ., concur.