

**TOP ISSUES FOR EVERY
PRACTITIONER – HOW TO
SPOT PITFALLS AND CREATE
ELDER LAW SOLUTIONS**



Andrew H. Hook, CELA, CFP[®], AEP[®]

Hook Law Center

Virginia Beach & Suffolk, Virginia

www.hooklawcenter.com

Pitfalls

- Failure to Understand Duties under Power of Attorney
- Filial Responsibility Laws
- Failure to Safeguard Documents and Have Them Available
- Financial Elder Abuse
- Marriages Later in Life
- Family Dynamics
- Failure to Consider Tax Consequences
- Failure to Include Pets in Estate, Disability and Long-Term Care Planning
- Failure to Consider Social Security-Claiming Strategies
- Long-Term Care Expenses
- Impaired Capacity
- Medicaid Estate Recovery
- Sale of Home for Less Than Assessed Value



Failure to Understand Duties under POA

- Natho v. Texas, 2014 Tex. App. LEXIS 1427
- 25 years in prison for agent under DPOA for misapplication of principal's assets.
- Agent had power to act with regard to Medicaid issues but no power to make gifts (must be expressly stated).
- Agent consulted with elder law attorney to discuss qualifying principal for Medicaid.
- Accomplice liability?
- **Solution:** POAs are not forms. Draft for the needs of the particular client. Educate agents.



Filial Responsibility Laws

- Filial responsibility laws are laws that impose a duty upon adult children for the support of their impoverished parents.
- *HC&RA of America v. John Pittas*, 2012 Pa. Super 96 (May 7, 2012)
- Thirty States, including Virginia, have filial responsibility laws. (See Va. Code § 20-88.)
- **Solution:** Develop Long-Term Care Plan for Parents



Failure to Safeguard Documents and Have Them Available

- Family members who struggle with dementia unwittingly destroy important estate planning documents.
- Estate planning documents can be stolen or destroyed by relatives of the client who know the contents are advantageous to some but a disadvantage to others.
- Agents typically do not carry around estate planning documents. In emergency situations, while traveling, on holidays, on weekends and after hours, it is important to have these documents readily accessible.
- **Solution:** Safeguard estate planning documents and make available at all times. Examples: ABA App “My Health Care Wishes,” DocuBank, VA Advance Health Care Directive Registry.



Financial Elder Abuse

- Widely believed to be under-reported by the victims.
- MetLife Mature Market Institute estimates that the financial loss by victims of elder financial crimes and exploitation exceeds \$2.9 billion dollars annually. Such crimes are in part due to the use of alternatives to court supervised estates and guardianships.
- Va. Code § 18.2-178.1
- **Solution:** Incorporate Safeguards into Estate & Long Term Care Plans. Consider appointment of joint agents, trustees, and trust protectors. Require surety bonds. Require accountings and do not always avoid court supervision.



Marriage Later in Life

- An estimated 500,000 Americans 65-years-old and older remarry each year.
- There are potential liabilities for older married couples, e.g., liability for partner's long term care.
- Following the death of one spouse, frequently the survivor's estate plan is revised to exclude the children of the first to die.
- **Solution:** Financial Plan, Long-Term Care Insurance, Marital Trusts and Pre-Marital Agreement (Va. Code §20-147 et seq.)



Family Dynamics

- When an elderly person's capacity declines, there is frequently a shift in the family "power" structure.
 - Rivalries
 - Competition
 - Arguments
- **Solution:** Family meetings and conversations – early and often; carefully chosen and educated agent(s)/ trustee(s).



Failure to Consider Tax Consequences

- Many common Elder Law techniques have tax consequences and require the filing of returns.
- For Example:
 - Gifts: Carryover Basis and Gift Tax Return
 - Care Giver Agreement: Payroll Taxes & Ordinary Income
 - IRAs: RMDs and IRD
 - Irrevocable Trusts: Compressed rates, NIIT, & form 1041
 - Payment of LTC expenses: deduction
- **Solution:** Incorporate tax advice as part of the Plan.



Failure to Include Pets in Estate, Disability and Long-Term Care Planning

- Pets can reduce depression, keep seniors on a regular eating schedule, and give them greater self-esteem.
- “Seniors for Seniors” Program through Norfolk SPCA
- If not planned for properly, pets can delay transition to assisted living facilities or be abandoned by family members with no interest in or financial means to care for the pet.
- **Solution:** Create care and support instructions to protect pets in estate, disability and long-term care planning. See Va. Code §64.2-726.



Failure to Consider Social Security - Claiming Strategies

- Males have a life expectancy of 85 at age 65. For females, it is age 88.
- 25% of males will reach age 92. 25% of females will reach age 94.
- However, 74% of retirees claim a reduced benefit
- Improved claiming strategies can significantly increase lifetime benefits.
- AARP offers a free SSA benefits calculator.
- **Solution:** Implement a planned claiming strategy – discuss with estate planning clients well before retirement age.



Failure to Plan for Long-Term Care Expenses

- 70% of 65-year-olds will require Long-Term Care assistance.
- Average period of assistance is 3 years.
- Medicare and Medicare supplements do not pay for Long-Term Care.
- Median net worth of families at age 65: \$206k
- Medicaid pays for 60% of Long-Term Care in the United States.
- **Solution:** Develop a Long-Term Care Plan.



Impaired Capacity

- 4 million Americans currently suffer from dementia.
- 10 % of all people over age 65 and up to one-half of those over age 85 have dementia.
- **Solution:** Develop a comprehensive incapacity plan, carefully select fiduciaries, and hold a family meeting.



Medicaid Estate Recovery

- In 2010, Medicaid paid for 60% of Long-Term Care Services in the United States.
- Virginia treats a home as a countable resource, if not occupied by the spouse for six (6) months.
- Virginia has the right to recoup Medicaid costs from a deceased person's assets. See 12VAC 30-20-141.
- **Solution:** 1) Create and transfer personal home to Trust five (5) years before Long-Term Care services are needed; or 2) Plan for an exempt transfer.



Sale of Home for Less Than Assessed Value

- Medicaid provides assistance with the payment of Long-Term Care expenses, but has financial eligibility rules.
- Medicaid penalizes sales of assets for less than fair market value.
- Sale of home for less than assessed value will be considered a sale for less than fair market value.
- **Solution:** Reduce assessment, document and apply for hardship waiver, list at assessed value, or plan for penalty period.



HOOK

LAW CENTER

Virginia Beach:

Suffolk:

Telephone:

Facsimile:

Website:

295 Bendix Road, Ste 170

5806 Harbour View Blvd, Ste 203

(757) 399-7506

(757) 397-1267

www.hooklawcenter.com

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