# 5 Common Elder Law Blunders

It is difficult, if not impossible, for the general practitioner to stay current on all aspects of the law that affect families. In other words, it's easy to blunder. Consider the following scenarios and how you might handle them:

**Blunder #1: Let's transfer the home to the children so the government or nursing home won't get it!** Transferring the home to the children is usually a mistake because the aging client may need nursing home or assisted living care within five years following the transfer. If that is the case, she will not be able to access Medicaid to pay for her care due to the transfer of the home. There are exceptions to this rule, but those exceptions are limited.[1] There are ways to preserve assets without jeopardizing the client's care needs such as using a pooled trust to set aside funds for the client. In the case of a married couple, transferring assets to the well spouse and planning for her disability through the purchase of long-term care insurance is another means to preserve assets, including the home.

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**Blunder #2: Let's give those kids some of their inheritance now while the folks are still alive and can see them enjoy it … and so the government or nursing home won't get it!** Making gifts of up to $13,000 for each child annually is fine for gift tax purposes, though let's be clear: an estate must exceed $1 million dollars to be taxable. Those clients should be planning to pay for their long-term care privately, or with long-term care insurance.

That same gift becomes a goof when a client needs to access the Medicaid program within the following five years to pay for long-term care. If she makes the annual gifts, then needs Medicaid in the five years following the last gift, she will be penalized. That penalty can be quite severe because the penalty period only begins to run when the applicant is "otherwise eligible" for Medicaid.[2] Rather than making annual gifts, those of more modest means should probably save their money to pay for long-term care, especially when there is no long-term care insurance. Having the resources to pay for care provides so many more options for meeting an elder's care needs.

**Blunder #3: Let's protect your disabled child from losing his public benefits by leaving your estate to big sister, and she will make sure he receives all the care and support he needs.** This heart warming blunder assumes that the well sibling will do the right thing and take care of the disabled child. Unfortunately even the most sainted "well child" may become unwell, suffer an early death, jointly title assets with spouse, endure a divorce, or file for bankruptcy. The disabled child's share of the inheritance would not be protected in any of these events.

A more effective estate planning strategy is to establish a special needs trust for the disabled child. This trust may be included in the parent's will or established as a stand-alone trust with the will directing a bequest to the special needs trust.

**Blunder #4: Let's create a prenuptial agreement so we can protect the well spouse from having to pay for the disabled spouse's assisted living**

**or nursing home care.** We advise our clients that a prenuptial agreement is helpful in the event of divorce or death, but what about disability? While spouses may agree that each will be responsible for his/her long-term care, the prenuptial agreement is useless if one spouse applies for Medicaid.

Medicaid is a joint federal and state program that pays for nursing home care when a client meets the medical and financial requirements. Medicaid does not consider a prenuptial agreement. Instead, the Medicaid program considers the resources of both spouses. While there are some protections for the well or "community" spouse, those protections are insufficient to truly protect the community spouse.

**Blunder #5: Let's keep things real simple, so just name spouses as sole agents on your powers of attorney and wills.** Failure to appoint a successor agent under a power of attorney is a blunder because often that lone agent dies, becomes disabled or refuses to serve. If the client has diminished capacity, a conservator may even be needed. When drafting estate planning documents such as wills and powers of attorney for finances and health care, appointing one or two successor agents, trustees and executors helps to avoid this legal quagmire.

Although we do not have a crystal ball, we do not need one to recognize that as we age, there is a very good chance we will all need more help and care. Positioning older clients to both assure they have optimal access to all resources available and to avoid unnecessary drama and expense will best serve their needs. Practically speaking, there may be less time, less money, and less ability for a "do-over" for these issues later. There is a great opportunity to create blessings instead of blunders for our elders.

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## Notes

1. "Securing Mama's Home," *Tennessee Bar Journal*, vol. 42, no. 2, February 2006, page 14. See also "Saving Momma's Home: 10 FAQs about Nursing Home Medicaid," which may be downloaded at http://monicafranklin.com/book.html.

2. "How the Deficit Reduction Act of 2005 affects Medicaid recipients," *Tennessee Bar Journal*, vol. 42, no. 5, May 2006, page 18.