Legal Issues for Caregivers

Information and Resources

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OVERVIEW

Caregivers seldom have time to plan for the role. Often the job just happens without a great deal of warning, and it can feel like a crash course is needed to figure out what needs to be done first.

Today we will look at some of the critical legal issues caregivers need to understand. Any of the topics mentioned today could be the subject of the entire time we have for training today, so I will not be providing in depth training on all the issues raised. I do plan to offer resources that will help caregivers access more information.

IDENTIFYING DEMENTIA

Dementia is often revealed when bills are not paid, utilities are cut off, insurance lapses for failure to pay premiums, a scam is uncovered or some other damaging lapse in judgment becomes obvious.

For this reason it is imperative for couples to pay bills together or with joint participation and that individuals provide a trusted person (perhaps their agent under a power of attorney) the right to access and review online accounts. For the individual that will not automatically assure that lapses in abilities or judgment will be detected early, but it will allow some degree of review and access to information by trusted persons.

When serving as an agent for another it is important to see him or her on a regular basis or at least check in to see how someone is functioning. While encouraging participation in decision-making for a person in cognitive decline, protection is important. If you are an agent, do not look the other way and let a friend or relative with diminishing capacity go unsupervised and get into trouble. Often people who have appointed an agent to serve as attorney in fact still end up with devastating consumer problems without his or her agent knowing until the problem is severe.

AUTHORITY TO ACT FOR ANOTHER

While failure to make a will can create problems for relatives, failure to make an advance directive to document a person's wishes concerning the handling of his or her finances, medical care and end-of-life decisions can produce complicated situations for the individual as well as his or her caregivers.

Often, and particularly within families, everyone assumes that he or she will be able to act for a relative if necessary. Sometimes that is possible, and sometimes it is not. Caregivers are at risk of not being able to conduct the business they need to manage without having the authority to do so. ***In many respects, authority to act is the critical threshold issue for any caregiver***.

Issues of legal capacity to act for another come into play particularly in long-term care settings. Authority is needed to enter into contracts, sell property, set up income trusts for Medicaid, if needed, give liens to Medicaid, access money in bank accounts, handle day to day financial transactions, etc. When an individual cannot direct his or her own medical care, the medical agent takes over to make routine medical decisions, and when a person is in a terminal or permanently unconscious state, the health care proxy can direct end-of-life decisions that may need to be made. A person may name an individual or co-agents to serve in any of these capacities.

What all legal authority roles have in common is that a person or persons obtain authority to legally act for another as his or her agent(s) or surrogate(s). All states have agency laws to define who may act for another, but those state laws may vary significantly. Further, the ways that various agency authority arrangements can be made differ. Because of that, authority issues can be complicated and confusing.

DOCUMENTS TO PREPARE FOR DISABILITY AND DEATH

Get documents in order depending on the existing capacity of a person with dementia.

Possible Documents needed:

- Durable Power of Attorney (DPOA) for Financial Decision-making
- Health Care Directive (through DPOA, separate Healthcare POA or Advance Directive for Healthcare)
- End of Life Directive (through DPOA or Advance Directive for Healthcare)
- Last Will and Testament/Trust/proper beneficiary designations
- Trust
- Affidavit for Disposal of Remains

What these document have in common is they are documents a person can execute to select the individual(s) who will have authority to act for him or her when, or if, he or she becomes unable to make decisions.

Resources at www.janneallaw.com:

e-book entitled Guide to Alabama Advance Directives
e-book entitled Guide to Planning for Death

DURABLE POWER OF ATTORNEY

The most flexible and least expensive way to obtain authority to conduct financial business for another during his or her lifetime is to be named as agent in a durable power of attorney created by the person who will need his or her business conducted by another. In a power of attorney the person making the document (known as the principal) may make all the following appointments:

- an attorney in fact (agent) to conduct business and handle financial affairs
- a health care power of attorney (agent) to make routine health care decisions
- a health care surrogate (agent) to make end of life decisions.

These powers can only be given while the principal is still competent to give that authority to another person. In this way powers of attorney require pre-incapacity planning. Once a person is suffering from significant incapacity, a power of attorney cannot be signed, and, if one is, the power given can be challenged by others who may not want the power to be given to the agent.

The capacity needed to create a power of attorney is the same level of capacity needed to sign a contract because the maker of the directive must decide if he or she wants the agent to have highly specific powers.

CAPACITY TO MAKE DURABLE POWER OF ATTORNEY

The individual executing a power of attorney must have the necessary capacity to do so. When in doubt my office provides the following document to the individual or relative to have completed by a doctor familiar with the individual's cognitive abilities.

Request for Medical Opinion Concerning Capacity

Due to the complex and comprehensive nature of the Alabama Uniform Power of Attorney and the potential for exploitation through the use of a power of attorney, it is imperative that the person executing the document exhibit a level of capacity as high as that needed for the execution of any contract.

As such, the maker of the document must have the current **ability to receive and evaluate information and make and communicate decisions demonstrating the ability to manage property or business affairs**.

If a doctor familiar with the patient can document that, in his or her opinion, the patient has this level of capacity, it will assist in determining whether this law firm will be able to prepare a power of attorney.

Please present this statement to your doctor and ask if the doctor can provide a letter addressing this specific required standard.

DURABILITY OF POWER OF ATTORNEY

Originally the durable power of attorney legally required specific language in the document indicating that “this power of attorney shall not be affected by disability, incompetency or incapacity of the principal” or equivalent language (meaning the document was durable enough to survive the incapacity of the person who made the document). This special language remained a requirement in the law until Alabama passed The Alabama Uniform Power of Attorney Act effective January 1, 2012.

That law eliminated the special language requirement by making the presumption of durability for powers of attorney signed on or after January 1, 2012.

So before 2012 the law presumed that the power of attorney would **not** be durable (thus the special language requirement); after January 1, 2012, the law presumes that the power of attorney **is** durable.

Understanding this significant legal distinction, it is obvious that in order to determine whether a person has authority to act under a power of attorney for a person who does not have capacity to act for himself, it is essential to look at the date the document was signed. While older powers of attorney are still recognized as valid documents, if signed before January 1, 2012, the special language needs to be recited in the power of attorney to make it durable. If the document was signed on or after January 1, 2012, it is presumed to be durable with or without the special language.

STRUCTURAL PROBLEMS WITH ALABAMA FORM DPOA

The Alabama form power of attorney is somewhat confusing in the way powers are laid out. There are general powers that a person gives by signing his or her signature if he or she wants to include them all, or only initialing some of the powers if he or she does not want to give all of those powers.

Then there is a section section that indicates that the agent cannot perform certain acts unless the person making the power initials those specific items.

This can get tricky and can result in an agent being unable to do some important things like create a special needs trust or a Medicaid Qualifying Income Trust. For this reason some attorneys spell out these specific powers to be part of the document without specific need to initial the prohibited powers.

There is no HIPPA personal representative to access medical records named in the standard form, so that should be added.

POWERS INCLUDED IN THE DPOA

The Alabama Uniform Power of Attorney Act allows the principal to give general types of power to the agent that do not require an express grant in the document. In the statutory form these powers are listed, and the principal has the right to grant all these powers or choose those he wants to exclude. These powers include:

- real property;
- tangible personal property;
- stocks and bonds; commodities and options;
- banks and other financial institutions;
- operation of entity or business;
- insurance and annuities;
- estates, trusts, and other beneficial interests;
- claims and litigation;
- personal and family maintenance;
- benefits from governmental programs or civil or military service;
- retirement plans.

EXCLUDED POWERS UNLESS SELECTED

The Act further allows the principal to give specific authority for an agent to do specific things including:

- create, amend, revoke or terminate an inter vivos trust (a living trust created during life rather than a testamentary trust created in a will);
- create or change rights of survivorship;
- create or change a beneficiary designation;
- delegate authority granted under a power of attorney (name a successor financial agent upon his or her resignation or while temporarily unable to act);
- waive the principal’s right to be a beneficiary of a joint and survivor annuity including a survivor benefit under a retirement plan; or
- exercise fiduciary powers that the principal has authority to delegate

REAL PROPERTY

A critical distinction between the older and newer powers of attorney needs to be understood concerning whether an agent may sell real property belonging to the principal.

For powers of attorney signed before January 1, 2012, an agent would not have the authority to convey the principal's real property unless the power of attorney clearly granted the authority.

For powers of attorney signed on or after January 1, 2012, the agent does not need express authority to convey the principal's real property. In fact, the agent can even convey the property to the agent himself/herself with just a general grant of authority to handle real property.

TECHNICAL REQUIREMENTS

The Act states that “a power of attorney must be signed by the principal or in the principal’s conscious presence by another individual directed by the principal to sign the principal’s name on the power of attorney.”

While the power of attorney can be signed in this manner, it is not recommended. It is better for the principal to make a mark, even with the help of another.

When any legal document is signed, the witnesses and/or notary should not be interested parties (caregivers, family members, heirs, etc.).

Powers created on or after January 1, 2012, should be notarized to be considered valid.

PRACTICAL CONSIDERATIONS

It is important to name an alternate in a power of attorney so that a person is designated to serve if the primary agent should die or become incapacitated to serve.

An agent should always sign as follows:
Principal's name by Agent's Name, as Agent/Attorney-in-Fact or like designation.
Example (John is signing a nursing home admission contract for Mary):

Mary Jones by John Jones as Agent/POA
or Mary Jones by John Jones as Attorney in Fact

This is an important point to keep in mind to prevent the agent from incurring personal liability by making it clear that he or she is signing in a representative capacity.

A power of attorney does not need to be filed with the court unless there will be a real estate transaction performed by the agent under authority of that power of attorney. In that case the document should be filed to create a clean chain of title by showing that the agent had the authority to conduct the transaction.

OTHER AUTHORITY GRANTING DOCUMENTS TO RECOGNIZE

Living Wills do not name an Agent. The Alabama's Living Will introduced into law in 1981 only allows a patient to give the physician instructions concerning artificial life sustaining procedures that should be used if the patient should be terminal. Originally there was no document authorized by Alabama law that would allow the patient to give instructions should he or she be in a persistent vegetative state. Even though Alabama law advanced over the years to provide agent designation, the old living wills were grandfathered in, and many people still rely on only this very limited document that is basically a direction made to a doctor.

Advance Directive for Health is the 1997 amendment of the Living Will that indicates the treatment and food and hydration preferences a person has if he or she should be terminal or permanently unconscious. An agent called the health care proxy may also be named with a designation that they should follow only your wishes expressed on the form, address issues not addressed on the form, or to make the final decision, even though it could mean doing something different from what is listed on the form.

When using this form a separate power of attorney is needed to address financial decision-making.

OTHER AUTHORITY GRANTING DOCUMENTS TO RECOGNIZE

Certification of Healthcare Decision Surrogate (Self Appointed Agent)

There is a procedure under Alabama law that permits a self-appointed surrogate (agent) to make end-of-life decisions when the patient failed to make an advance directive. This is The Certification of Healthcare Decision Surrogate (CHCDS). Under the law there are people named in a line of priority who may serve as the self-appointed surrogate.

The line of priority for appointment is:

- a court appointed guardian,
- the spouse,
- adult child,
- parent,
- sibling,
- other next of kin, or
- the ethics committee for the facility.

The person or committee can create the self appointing document certifying that:

- no advance directive exists of which he, she, or they are aware;
- contact either was made with one or more of the persons who are higher in priority, and they consented or expressed no objection; or
- no contact was made because the person or persons in higher priority could not be reached because their whereabouts are unknown or they are in a remote location and cannot be contacted, or the person in higher priority has been adjudged incompetent.

It is not likely that end of life decisions will be made with this document without court approval.

OTHER AUTHORITY CREATING ARRANGEMENTS

Agency appointed agents such as Social Security Representative Payee and VA Fiduciary

An Industry appointed agent, which is a pseudo-authority role, is that of Sponsor in a long-term care setting, but do not mistake Sponsorship for legal authority. A Sponsor is more of a long-term care industry term for "the person to contact in an emergency." To further complicate matters, Medicaid uses the term Sponsor as well and will accept applications from the person who fills out the application when the applicant cannot make the application himself or herself.

The Alabama Medicaid Agency also allows a person to become the representative for a person who cannot represent himself before the agency, and that form is available at the Alabama Medicaid Agency web site.

DO NOT ATTEMPT RESUSCITATION ORDER

A Do Not Resuscitate Order (DNR) or Do Not Attempt Resuscitation Order (DNAR) can be signed by a doctor instructing that resuscitative measures not be provided to a person under a physician's care in the event the person is found with cardiopulmonary cessation. DNARs can be issued either:

- with the consent of the patient, if competent; or
- pursuant to instructions in an advance directive if the patient is not competent or is no longer able to understand, appreciate and direct his or her medical treatment and has no hope of regaining that ability; or
- with the consent of a health care proxy designated under the Natural Death Act; or
- at the instructions of an attorney-in-fact under a durable power of attorney that grants the agent the power to make end-of-life decisions in accordance with the Natural Death Act.

For many years DNAR orders have been used in health care facilities, but those orders were valid only in the facility where ordered. If the patient left one facility and entered another, a new order had to be signed. In 2016 Alabama law addressed DNAR orders and provided for a "Portable DNAR" that will be valid across multiple health care settings. A form that meets the requirements of law to make it portable is provided at the State Board of Health Administrative Code 420-5-19 Appendix 2.

While health care providers may continue to make facility specific DNARs, to create a portable DNAR, the state prescribed form needs to be used.

COURT APPOINTED GUARDIANS

When a person fails to make an advance directive, and action needs to be taken, the family or the state (via The Department of Human Resources [DHR]) has no option other than to have a legal representative appointed by the court.

The Probate Court can appoint a person known as the guardian to have authority over the body of an "incapacitated person" defined in the Alabama Uniform Guardianship and Protective Proceedings Act as:

"any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions."

The law provides a priority list of those the court should first appoint as guardian. They include:

- a person named in a durable power of attorney,
- spouse or spouse's nominee,
- adult child,
- parent or parent's nominee,
- relative with whom the person has lived the prior six months, and
- nominee of the caretaker of the person.

COURT APPOINTED CONSERVATORS

The Court can appoint a conservator to manage the estate (finances) of a person in need of protection who is found to be:

"unable to manage property and business affairs effectively for such reasons as mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic intoxication, confinement, detention by a foreign power, or disappearance;" and whose "property will be wasted or dissipated unless property management is provided" or for whom "funds are needed for the health, support, education, or maintenance of the person or of those entitled to the person's support and that protection is necessary or desirable to obtain or provide the funds."

The law provides a priority list of those the court should first appoint as conservator. They include:

- conservator appointed in another jurisdiction,
- person selected by incapacitated person,
- person designated by incapacitated person's power of attorney,
- spouse,
- adult child,
- parent,
- relative with whom ward has lived the last six months,
- nominee of person caring for the incapacitated person,
- general guardian or sheriff.

Besides attorneys' fees and filing fees, the court is required to appoint a different lawyer to serve as guardian ad litem to represent the person who may need a guardian or conservator.

Obtaining a court appointed guardian and conservator can take some time although there is a procedure that allows appointment on an emergency basis or for a limited duration or for limited transactions.

The conservator has to be bonded based on the value of the estate and account to the court at least every three years for all income and expenditures. As such, this can be an expensive alternative for acquiring authority to act for another.

PREPARING FOR LONG-TERM CARE

The challenge faced by many caregivers, especially those working full-time, is accessing information about the range of prices in their individual communities. Prices and options can vary dramatically county to county, and there is no single state database of available prices. As an example, some counties have no adult day care services available at all, and the disparity between costs of assisted living can be dramatic, rendering families with no other option than to move a care recipient out of county and to other parts of the state. This is a stark reality that caregivers need to face before placements are needed. A tentative plan needs to be in the works here and now, not when a situation turns into a full-blown emergency.

So learning now the cost of care and what is available in your area is critical for caregivers.

According to Genworth, Alabama average monthly cost of care in 2020 was:

• Homemaker Services	$3,432
• Homemaker Health Aid	$3,432
• Adult Day Care	$ 655
• Private One bedroom Assisted Living	$3,150
• Semi-private room Nursing Home	$6,540
• Private room Nursing Home	$6,911

LONG TERM CARE RESOURCES

Guide to Long-Term Care Planning ebook and Integrating Long-Term Care into Estate Planning PowerPoint presentation:

https://janneallaw.com/ebooks/

MEDICAID

Medicaid is the primary single insurer for long-term care in Alabama. According to Medicaid, the average cost of nursing home care in Alabama in 2020 was $6400 per month, and the cost far exceeded that amount in urban areas of the state. It is not unusual to see care over $7000 per month. At that rate a person will privately pay over $84,000 per year or more for nursing home care. Few people can afford an extended stay in a nursing home at private pay rates.

In order to qualify for Medicaid a person must have limited income and resources, and financial records are reviewed by the agency for the previous five years to determine whether assets were given away or sold for less than the value assigned by Medicaid. If that is the case, a person can be penalized by receiving no benefits for a period of time.

The look back is what trips up many people. They do not know the incredibly detailed rules imposed by the agency, and when the person needing care has no resources left, the penalty begins to run. This can be devastating for a family trying to find a way to fund the care their loved one needs.

It is critical to be aware generally of Medicaid's rules if a relative is in decline and may, in fact, need nursing home care within the next five years.

MEDICAID RESOURCES

The Medicaid Application Process PowerPoint presentation and Qualifying for Alabama Medicaid for Long Term Care ebook:

https://janneallaw.com/ebooks/

MEDICAID MISTAKES

There are many ways to run into a problem with Medicaid. Here are some of the ones I frequently see:

A transfer penalty can be assessed when a family member is paid for caregiving services without a caregiver contract meeting Medicaid's requirements being in place.

Gifts by the applicant or spouse during the five years prior to application are penalized (for every $6400 given away, one month of penalty is assessed).

Medicaid generally expects real property to be sold for the tax assessor's appraised value, and sales for less than that amount are subject to penalty (for every $6400 of uncompensated value, one month of penalty is assessed). Before selling property get advice on alternative ways to value.

Repaying money to someone who paid for moving or other expenses without a promissory note in place is considered a gift.

Selling your property and investing in improvements in the property of a relative or friend in exchange to live there is not an acceptable plan for Medicaid. Instead the relative should make the improvements, and a rental agreement put in place.

MEDICAID ESTATE RECOVERY

Federal law requires states to recoup money spent for some Medicaid services, and the rules implementing this required federal recoupment vary from state to state. The importance of understanding the rules of recoupment in Alabama comes into play in two situations:

- At application: when a person applies for any type of Medicaid he or she needs to understand the ultimate cost of those services to his or her estate.
- At death: When a Will is probated or an estate administered, Medicaid is considered an estate creditor and must be put on notice before any estate funds are disbursed, and notice to Medicaid is now required in all probate cases in the state. If property is disbursed without Medicaid's permissible recoupment, the person serving as personal representative (aka executor) can incur personal liability for failure to notify Medicaid of its right to reimbursement from the estate.

[Medicaid Estate Recovery](https://janneallaw.files.wordpress.com/2019/09/alabama-medicaid-estate-recovery_08-19.pdf)
https://janneallaw.files.wordpress.com/2019/09/alabama-medicaid-estate-recovery_08-19.pdf

SPECIAL NEEDS TRUSTS (SNT)

Special Needs Trusts are created for disabled persons to supplement means tested benefits (SSI and Medicaid) without the loss of benefits, solving the problem of resources being too high for public benefits. Transfer of money into the SNT does not incur a penalty with means tested benefits. A will may permit an inheritance to pass into a SNT.

First Party vs Third Party SNT (whose money in the trust determines Medicaid payback). Medicaid payback is required for a first party trust (money belonging to the disabled person); no payback is required for a third party trust (money belonging to someone other than the disabled person). Beneficiaries are named for funds remaining after death (and, if applicable, after Medicaid payback)

Persons over 65 can establish Pooled Trusts through The Alabama Family Trust, and transfers of assets into the trust after age 65 to accomplish the Medicaid spend down will not be subject to a transfer penalty.

Examples of uses for SNT:

- A person on SSI and Medicaid inherits $50,000 (first party)
- Grandparents want to provide an equal gift to all grandchildren, but one child is disabled (third party)
- A person over 65 needs to spend down $100,000 before qualifying for Medicaid in the nursing home (pooled)

Either the individual creates the trust or the attorney in fact under a power of attorney if the power of attorney grants this power. If not, the probate court will need to grant the power in a single transaction conservatorship. Money in the trust can only be used for special needs.

HOW FUNDS IN SNT CAN BE USED

- Pre-need funeral/burial contracts limited to $5,000 for Medicaid cases and $1,500 for SSI cases for non-space items unless the contract is irrevocable. Space items include casket, vault, plot, monument, and opening/closing grave. These items must be purchased before death.
- Medical, dental care, vision not paid for by public benefits
- Sitter services for the beneficiary allowed by Medicaid and SSI in the beneficiary's particular case (SITTER MUST comply with AFT requirements)
- Education, including tuition, books and supplies
- Electronic equipment such as computers, television, video games
- Hobby supplies
- Telephone, cell phone service
- Cable service
- Clothing
- Personal hygiene products such as shampoo, lotion, adult diapers
- Differential for private room in nursing home
- Magazines/newspaper subscription, furniture, household goods, bedding, curtains
- Mileage for representative visits to the beneficiary: (1) to perform tasks specifically associated with the beneficiary's care; or (2) trips made with the beneficiary in the vehicle, for example, for treatments; or (3) trips to purchase/pick-up medication or supplies for the beneficiary.
- Mileage is not reimbursable for general visitation. Mileage is compensated at the federal IRS rate in force at the time
- For SSI recipients funds cannot be used for food, shelter and utilities

PASSING PROPERTY AT DEATH

We normally only think of wills or trusts as a way to pass property at death, but there are actually multiple ways, and all of those arrangements need to be considered and integrated into the estate plan when creating a will or trust.

These transfer methods include:
• By contract property may be left to beneficiaries (e.g. insurance, payable on death [POD] bank accounts, beneficiary of an investment account or IRA, Transfer on Death [TOD] registration for securities)*
• Types of joint ownership (joint owners on a bank account or real estate owned as joint tenants with right of survivorship
• Life estate deeds
• A trust funded during life
• Through the estate by probate of will, administration of estate when no will exists or small estate summary distribution for probate property
• By affidavit of car title to next of kin when probate is not necessary (Alabama Department of Revenue MVT 5-6)

* note that If you are married, federal law automatically makes your spouse the beneficiary of your 401k. To name a beneficiary other than the spouse, the spouse must sign a waiver.

PROBATE

Property that cannot be passed by beneficiary designation or held in payable on death accounts is probate property which is subject to court involvement. Many types of property can completely escape court intervention by proper titling and beneficiary designations, but some property is inevitably included in a probate estate. Examples include:

• assets titled to the deceased person (decedent) alone;
• assets the decedent owned as a tenant in common with one or more other persons where the deed does not specify that the property is held with right of survivorship;
• assets with the estate with no beneficiary or payable on death designation;
• money owed to the deceased person that will be paid after death (e.g. lawsuit proceeds, last paycheck, refunded deposits, etc.).

TYPES OF PROBATE

If a will exists it must be probated (filed with the court), within five years of the death, and property passes according to the will instructions after six months pass and all debts are satisfied.

If no will exists any interested party may file for administration of the estate, and property passes to the next of kin according to the laws of intestacy after six months pass and all debts are satisfied.

If a small estate exists with no real property and assets at or below $30,608 (for 03/21 – 02/22) a small estate summary distribution may be filed with or without a will. Several months following filing for distribution the property passes, after all debts are satisfied, to the next of kin (with no will) or as instructed in the will (when a will does exist).

LAW OF INTESTACY

Without a will to direct where property should pass, Alabama's law of intestacy will direct who receives the property. That includes the following:

• If there are no children and no parents, all to the spouse;
• If there are no children, but there are parents, the first $100,000 plus 1/2 of balance over $100,000 to the spouse and 1/2 of the balance over $100,000 to the parent or parents;
• If there is a spouse and a child or children by a previous relationship, 1/2 to the spouse and 1/2 to the child or children by the previous relationship (note that children of the marriage existing at the time of death take nothing);
• If there is a spouse and a child or children by the surviving spouse, the first $50,000 to the spouse plus 1/2 of the balance over $50,000 to the spouse and 1/2 of the balance over $50,000 to the child or children by the surviving spouse.
if there is no surviving spouse, then distribution will be in the following order:
• all to the child or children;
• all to the parent or parents;
• all to the siblings;
• all to the grandparents;
• all to the aunts and uncles;
• all to the cousins.

SMALL ESTATE SUMMARY DISTRIBUTION

When there is an estate to pass and the value of the property does not exceed $30,608 and no real property, a process known as Small Estate Summary Distribution may be used to close out the estate.

The amount allowed to use a Small Estate Summary Distribution is adjusted every March. The process can be accomplished in 2-3 months, making it much faster and less expensive than a full probate or administration of an estate.

You see this procedure used when someone has a bank account under $30,608 with no joint owner or payable on death designation for the account.

END OF LIFE PLANNING/PROBATE RESOURCES

Documents and Property Arrangements to Prepare for Death and Disability PowerPoint presentation: https://janneallaw.com/ebooks/

ELDER ABUSE AND NEGLECT PREVENTION

There are a number of federal and state initiatives in recent years aimed at coordinating efforts to protect seniors at risk of being abused, neglected and financially exploited. There are several statues in Alabama that seniors and caregivers needs to be aware of.

The primary tool for years to protect seniors was The **Adult Protective Services Act of 1976**. That act authorizes any interested individual to petition the circuit court for a protective placement or other protective services for a person in need of protection. This act requires The Department of Human Resources (DHR) to receive and investigate reports of suspected abuse, neglect or exploitation. DHR must also arrange services, petition in an emergency situation and report to the court.

An interested party is any adult relative, friend, or guardian of a protected person, or any official or representative of a public or private agency, corporation, or association concerned with his or her welfare. The moving party is, most often, The Department of Human Services (Adult Protective Services), but other interested parties are given access to petition the courts under this act.

A person in need of protection is defined as a person 18 years of age or older whose behavior indicates that he or she is mentally incapable of adequately caring for himself or herself and his or her interests without serious consequences to himself or herself or others, or who, because of physical or mental impairment, is unable to protect himself or herself from abuse, neglect, exploitation, sexual abuse, or emotional abuse by others, and who has no guardian.

Before ordering the protective placement of any person, the court shall direct a comprehensive evaluation of the adult in need of services, including a medical, psychological, social, vocational and educational evaluation and review where necessary.

When DHR is ordered to have protective supervision, the agency is required to evaluate and submit a written report to the court every six months covering the physical, mental and social condition of the person subject to protective supervision.

Placement may be made in an appropriate alternative living arrangement such as a licensed nursing home, licensed personal care facility, or approved foster care home, but no person shall be committed to a mental health facility under the Act. A guardian, conservator, or both, may be appointed by the court if it is agreeable to the person to be served, and if not, the court shall follow the procedures set forth under the *Alabama Uniform Guardianship and Protective Proceedings Act.*

No civil rights are relinquished as a result of any protective placement under the Act, and nothing in the Act shall be construed to authorize or require medical care or treatment for a person in contravention of his or her stated or implied objection upon the grounds that the medical care and treatment conflict with his or her religious beliefs and practices.

All protective services under this act shall be in conformity with the wishes of the person to be served unless the person is unable or unwilling to accept such services, and if the person is unable or unwilling to accept such services, the court may order services it deems necessary.

Criminal penalties are defined for abuse, neglect, exploit, or emotionally abuse any protected person.

In 2013 Alabama passed the Protecting Alabama’s Elders Act which defined criminal penalties for elder abuse, neglect and financial exploitation without the need for a finding that the victim was a protected person. Those criminal penalties are listed on the following slides.

CRIMINAL PENALTIES FOR ABUSE AND NEGLECT

Abuse and Neglect 1st **Degree**	Intentional abuse or neglect that causes serious physical injury	Class A felony punishable by 10 years to life in prison
Abuse and Neglect 2nd Degree	Intentional abuse or neglect that causes physical injury Reckless abuse or neglect that causes serious physical injury Abuse neglect or emotional abuse after previous conviction for 3rd degree elder abuse and neglect	Class B felony punishable by 2 to 20 years
Abuse and Neglect 3rd Degree	Reckless abuse or neglect that causes physical injury Reckless emotional abuse	Class A misdemeanor punishable up to one year

CRIMINAL PENALTIES FOR FINANCIAL EXPLOITATION

Financial Exploitation 1st Degree	Value of property taken exceeds $2500	Class B felony punishable by 2 -20 years
Financial Exploitation 2nd Degree	Value of property taken exceeds $500 but does not exceed $2500	Class C felony punishable by 1 to 10 years
Financial Exploitation 3rd Degree	Value of property taken does not exceed $500	Class A misdemeanor punishable up to one year

Alabama’s Elder Abuse Hotline

1-800-458-7214

ELDER ABUSE PROTECTION ORDER AND ENFORCEMENT ACT

This law permits the filing of a petition for a restraining order specifically related to abuse of a person 60 or older. That abuse includes arson, assault, criminal coercion, criminal trespass, emotional abuse, financial exploitation, harassment, kidnapping, menacing, reckless endangerment, sexual abuse, stalking, theft, and unlawful imprisonment.

Relief may be in the form of

- a restraining order, injunctive order, or order of release from custody issued by a circuit, district, municipal, or probate court that seeks to protect an elderly person, or
- an order issued by a circuit, district, or municipal court that places conditions on the pre-trial release of a defendant in a criminal case, which may include provisions of bail pursuant to Section 15-13-190 that seeks to protect an elderly person.

If the person being victimized cannot file the petition himself or herself, the following persons can file:

- a court-appointed guardian or temporary guardian;
- a court-appointed conservator, which is someone who is legally responsible for someone else's financial or medical decisions;
- someone acting under power of attorney (must include the specific power to prosecute or defend legal actions on behalf of the plaintiff or otherwise granting general authority with respect to claims and litigation;
- a health care proxy; or
- an "interested person," which is defined as someone who asks the court to
  safeguard your money and property (estate);
  use your estate to take care of your needs; or
  do something else for your benefit.

There are two types of elder abuse protection orders: ex parte orders and final orders.

Ex parte orders are temporary orders that do not require the abuser to be notified beforehand. They last **until the court hearing on a final order**. To get a temporary ex parte order, you must show that you are in danger of likely, future harm.

A judge issues a **final order** after notice to the accused abuser and a court hearing. A final order is **permanent** unless the judge directs otherwise.

The court has broad power to order what it believes necessary to protect the petitioner in an ex parte setting (where the alleged offender is not present) if it finds "a risk of imminent potential harm to the victim." Relief may include:

- Ordering the offender to stay away from the victim's residence
- Removing the offender from the victim's residence, regardless of ownership
- Ordering possession and use of an automobile or other essential personal effects, regardless of ownership
- Ordering law enforcement to accompany the victim to the residence or other location for protection
- Prohibiting the offender from transferring or otherwise disposing of mutually owned or leased property in which the victim had an ownership interest within the last 12 months
- Enjoining the offender from committing acts of elder abuse

- Enjoining the offender form harassing, stalking, contacting or communicating, directly or indirectly, with the victim or engaging in conduct that would place the victim or any other individual designated by the court in reasonable fear of bodily injury
- Prohibiting the offender from transferring funds or property belonging to the victim to any person other than the victim
- Directing the offender to refrain from exercising control over the funds, benefits, property, resources, belongings or assets of the victim
- Requiring the offender to provide an accounting of the disposition of the victim's income and other resources and the victim's debts and expenses
- Restraining the offender from exercising any powers the offender has been granted as the victim's agent under a power of attorney
- Requiring the offender to comply with the instructions of the victim's guardian, conservator or agent under a power of attorney
- Ordering other relief as it deems necessary to provide for the safety and welfare of the victim and any individual designated by the court

After the offender appears and a hearing is held, in a final order the court may require the offender to return custody and control of property, order restitution, prohibit the offender from possessing a firearm unless necessary for employment, and order the offender to pay attorneys' fees and court costs.

Forms to file for a protective order are located at http://eforms.alacourt.gov/civil-forms/protection-from-abuse/.

PROTECTION OF VULNERABLE ADULTS FROM FINANCIAL EXPLOITATION ACT

This law passed in 2016 gives financial professionals the ability to report suspected financial abuse or exploitation of vulnerable adults to the Alabama Securities Commission, the Department of Human Resources, and a reasonably associated individual other than the suspected financial exploiter without incurring civil liability, A vulnerable adult is defined as one 65 or older or a protected person pursuant to the Adult Protective Services Act.

The law permits a broker-dealer or investment adviser to delay a disbursement from the vulnerable person's account when investigating any suspected financial exploitation. It requires that a written notice be given within two days to provide the reason for the delay to any party authorized to transact business on the account except the suspected exploiter, and it requires that a report be submitted to Securities Commission and DHR. A completed report must be made within seven days, and the account freeze ends when there is a finding of no exploitation or 15 day, or up to 25 days if the commission or department so requests.

A court can extend the delay or order other protective relief if petitioned by the commission, department, broker dealer or investment advisor who initiated the delay, or other interested party.

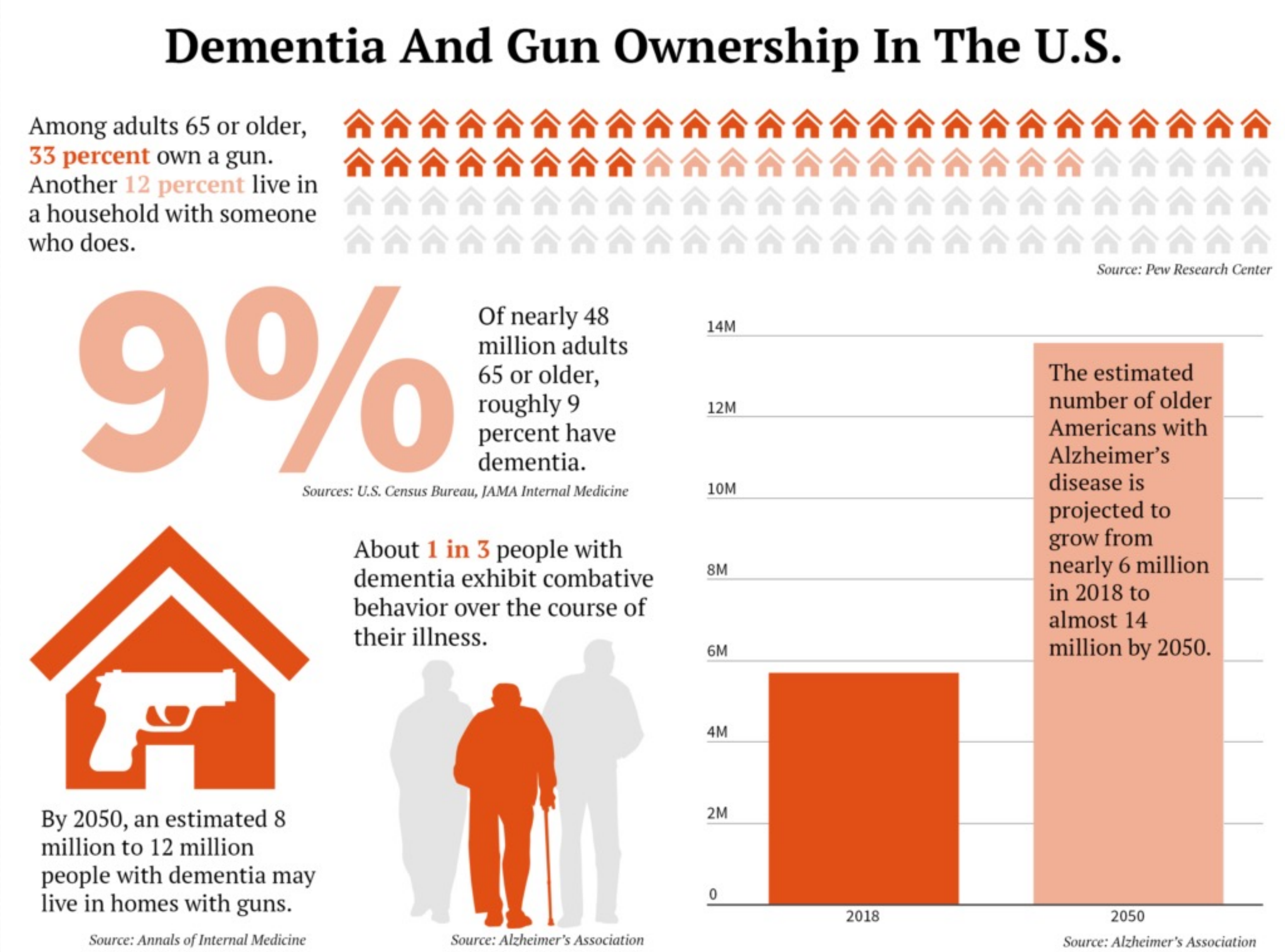
SAFETY ISSUES
GUNS, CARS AND STOVES

Many caregivers who cannot provide round the clock supervision for a cognitively impaired person know the danger of leaving the care recipient with access to a stove. We scan the environment to be sure there are safety features needed and steps are manageable. That Is very important for the safety and well-being of the person receiving care.

And almost all caregivers eventually have to take away the car keys, which is another very good thing when the liability of hurting oneself or others is at stake.

But frequently an overlooked safety concern is guns. An excellent article dealing with this issue Can be read at

https://www.pbs.org/newshour/nation/unlocked-and-loaded-families-confront-dementia-and-guns


Dementia And Gun Ownership In The U.S.
Among adults 65 or older, 33 percent own a gun. Another 12 percent live in a household with someone who does.
Source: Pew Research Center
9%
Of nearly 48 million adults 65 or older, roughly 9 percent have dementia.
Sources: U.S. Census Bureau, JAMA Internal Medicine
14M
12M
10M
8M
6M
4M
2M
0
The estimated number of older Americans with Alzheimer's disease is projected to grow from nearly 6 million in 2018 to almost 14 million by 2050.
2018
2050
Source: Alzheimer's Association
About 1 in 3 people with dementia exhibit combative behavior over the course of their illness.
Source: Alzheimer's Association
By 2050, an estimated 8 million to 12 million people with dementia may live in homes with guns.
Source: Annals of Internal Medicine

CAREGIVER STRESS

First conducted in 1997 by the National Alliance for Caregiving and AARP, *Caregiving in the U.S.* 2020 update presents a portrait of unpaid family caregivers.

The report highlights the nearly 48 million caregivers caring for someone over the age of 18. Key findings include:
Nearly one in five (19%) are providing unpaid care to an adult with health or functional needs.
More Americans (24%) are caring for more than one person up from 18% in 2015.
More family caregivers (26%) have difficulty coordinating care up from 19% in 2015.
More Americans (26%) are caring for someone with Alzheimer's disease or dementia up from 22% in 2015.
More Americans (23%) say caregiving has made their own health worse up from 17% in 2015.
Family caregiving spans across all generations, including Boomers, Gen-X, Gen-Z, Millennials.
61% of family caregivers are also working.

These are statistics all professions need to keep in mind when working with disabled seniors and caregivers, recognizing that the challenges often feel insurmountable for caregivers, putting their health, and, subsequently, the health of those to whom they provide care, at risk.

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