

# Elder Law Guide

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*Elder Law  
Estates & Estate Planning  
Real Estate  
Medicaid & Disability  
Wills and Trusts  
Guardianship*

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*“The Law is Friendly, and I can prove it.”*

*So you got your Social Security check and your pension—maybe!*

*What happens next?*

When someone says “Elder Law” to you, you may be unsure of exactly what they mean. Are they talking about wills, living wills, powers of attorneys, family and what happens after a life threatening illness? Or are they referencing Medicare and Medicaid? Are they alluding to long term care, or actual, realistic end of life decisions? Elder Law means all of this and more. This guide addresses many of the questions that arise for those over the age of 60 and more and more frequently, their children. So, what might you gain by perusing some details of what happens next? –after 65?

If you are scanning this guide, you have some interest in Elder Law issues—and, what happens next? Maybe as you approach retirement, someone you love does, considering some detail of what’s already on your mind, or details related to the years of someone you care about. Perhaps you have an aging parent or grandparent you care for and want to make sure that they understand government benefits available to them as well as their opportunities and rights as citizens of the United States. Even an elderly neighbor who perhaps has no one else who cares—could need some help and advice...you may be of some help! Regardless of what has sparked your interest in this guide, it is intended for you and should prove an aid in navigating the benefits, planning documents, and rights associated with your aging parent, neighbor friend, or even you!

This guide allows you to enter the world of tomorrow and the next day in a realistic but challenging roadmap to your future and that of someone you love. Everyone could be affected by everything this guide covers, so the more you read and gain a basic understanding of, the better prepared you are for what may lie ahead, making this guide a great planning tool! Think of every program as something you may be confronting at some time in the future, whether for you or someone you care about. Read what most interests you first. Determine what part on which you might want to initially focus.

Several of the topics discussed in this guide do have applications outside of Elder Law. Social Security Benefits and Medicaid are available to the disabled and other groups as well as to the Elderly. There are many possible uses of a Power of Attorney outside of decision making for an Elderly or loved one. This guide focuses on how these topics might apply to a situation in which you may come to be a decision maker or appoint one for yourself. Although it focuses on Pennsylvania Law, the material included may be true in most other states.

The material in this guide is not intended as legal advice; it is provided for informational purposes only. For advice you need to see a personal Elder Law Attorney. My hope is that this guide proves helpful to you and invites you to go further with your exploration and learning about Elder Law.

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## **I. Social Security Benefits**

For many retirees, Social Security payments represent much of their income. Most retirees who have earned 40 credits are eligible for Social Security at age 62. Up to four credits may be earned per year, based upon the wages on which you pay Social Security Taxes. The amount needed to be earned per credit is adjusted annually. Social Security Benefits are based upon your wages from your highest earning 35 years between age 22 and 62. **Full benefits** are received when a beneficiary reaches full retirement age. The full retirement age ranges from 65 to 67, depending on your birth date. If a beneficiary chooses to begin receiving benefits before reaching the full retirement age a **permanent reduction** in benefits will be applied. The earliest benefits may be received is typically age 62. Likewise, if a beneficiary elects to wait to receive benefits beyond the full retirement age, they will receive a **permanent increase** in benefits, which will accrue at age 70. Certain disabled people, regardless of age, or dependents of deceased beneficiaries may also qualify for Social Security Benefits.

A Social Security retirement benefit is a benefit that you can receive for life beginning at a given age—you may recall the monthly check is a “given” benefit; you need not much of an effort to get it, except to call the Social Security Office. The check is there for life, so unlike other money you may receive from other sources, all you need to do to get this one is a phone call and a routine Q and A!

### **A. Applying for Benefits**

To apply for benefits you may call the Social Security Administration at 1-800-772-1213 to make an appointment to apply in person at a local office or apply online at: [www.socialsecurity.gov/applyforbenefits](http://www.socialsecurity.gov/applyforbenefits).

## **II. Medicare**

Medicare is a federal health insurance program for people age 65 and older (and certain disabled groups—regardless of age). Qualification for Medicare is **not** means tested; this means that you can never have too much income or assets to qualify for benefits. Those eligible for Medicare are those aged 65 or older, who are eligible to receive Social Security or Railroad Retirement Benefits. The Government makes this distinction because Railroad Retirement Benefits are what Railway Workers receive instead of Social Security Retirement Benefits.

### **A. Enrollment**

You are eligible to enroll in Medicare during the three (3) months prior to the month of your 65<sup>th</sup> birthday, the month of your 65<sup>th</sup> birthday, and the three (3) months following your 65<sup>th</sup> birthday. If you do not enroll during this time, you may enroll later during the open enrollment period, but you will be charged a **permanent premium** on your coverage.

### **B. Applying for Benefits**

Medicare enrollment is handled through the Social Security Office. To enroll, call the Social Security Administration at 1-800-772-1213 or visit [www.ssa.gov](http://www.ssa.gov) for online enrollment.

### **C. Coverage**

There are several different coverage options for Medicare.

- (1) **Part A** is often referred to as “hospital insurance.” It covers hospitalization, skilled care in nursing facilities, some home care, and hospice.
- (2) **Part B** is also known as “supplementary medical insurance.” It covers out of hospital services such as: physician services, outpatient medical services and

supplies at a hospital, some home care, ambulance, physical and speech therapy, and durable medical equipment.

(3) **Part D** can be optionally purchased to help cover prescription drug costs.

(4) **Part C** provides a wide variety of privatized options for receiving benefits that can be beneficial depending upon your needs.

#### **D. Costs and Fees**

(1) **Part A** coverage does not have a monthly or annual premium as such, however there is a charge for most healthcare services. This charge comes from a deductible per benefit period (\$1260 in 2015). There is also a per day cost for hospital stays after 60 days per benefit period and a per day cost for skilled nursing facilities after 20 days per benefit period.

(2) **Part B** coverage has a monthly premium, annual deductible, and a 20% co-insurance obligation for most services. The deductible depends on your income and the 20% coinsurance will apply after the deductible is reached. This program has **voluntary enrollment**, so you may enroll in Part A without enrolling in Part B.

(3) **Part C** coverage supplements traditional Parts A and B coverage. This may be purchased from a variety of private companies and, as a result, the costs vary for these plans.

(4) **Part D** plans may be purchased from private companies to help cover drug expenses, and accordingly vary in cost. This is particularly valuable to individuals without other drug coverage, who have catastrophic drug expense, or who have low incomes.

### **III. Medical Assistance (Medicaid)**

Medicaid is designed as a program to assist elderly, and other, individuals in need of long term care who could not otherwise afford it. The system is complex with various requirements for Assistance.

#### **A. Eligibility**

Medicaid is a means-tested program. This means that an individual's resources and income are considered when applying for Assistance. There are **five (5)** federal eligibility requirements for Medicaid, **all** of which must be met to receive benefits.

**(1) Categorical Eligibility**-Though there are others (children, pregnant women, adults with dependent children, and the disabled), **age** is the most common category of people covered by Medicaid. The age requirement for this category is 65 years old. For purposes of Medicaid, an individual is considered to be 65 on the first day of the month of their 65<sup>th</sup> birthday.

**(2) Immigration Eligibility**-United States Citizens and *certain* qualified aliens are eligible, if they meet the other requirements.

**(3) Residency Eligibility**-Medicaid is administered at the state level; as a result a Medicaid applicant must reside in the state they are applying for coverage from. A person is considered a resident if they are living in a state with the intention of remaining there indefinitely. For someone who moves between states, the state in which they would enter an institution is considered the state of residence. There is **no** requirement for length of time having resided in a state to receive benefits.

**(4) Income Eligibility**-The income eligibility requirement varies depending on the category the beneficiary qualifies for Medicaid under. Generally, for individuals in a nursing facility, the eligibility requirements are tied to Social Security Standards, whether it is for retirement or disability.



**(5) Resource Eligibility-** To be eligible for Medicaid an individual's resources must fall below a specified amount. Resources are considered available, exempt, or unavailable. The limit of available resources varies depending upon how the individual became eligible. (For more information on Resource Determination for Medicaid, See Appendix I.)

If any of these requirements are not met, you will be expected to pay on your own for Long Term Care. If you fail to meet eligibility due to excess resources, you may become eligible once these resources are spent down. You are permitted to spend your assets on anything that gives you value without affecting Medicaid eligibility. You may improve your home, buy new household goods, buy new furniture, trade in for a new car—anything that is for **you!** The only limitation on how you spend your money is gifting—if you gift you will face a period of ineligibility for Medicaid. The look back period for gifting is five years from the date of application for Medicaid.

### **B. Medical Assistance Estate Recovery**

The Federal Government requires every state to have programs that recover funds given to Medicaid recipients from their “probate estates.” The part of the estate considered to be probate is all real and personal property that is subject to administration by a personal representative. Property passed to an individual, not the recipient's estate, is not subject to Medical Assistance Estate Recovery, such as a property held in Joint Tenancy with Rights of Survivorship, assuming this status was created prior to the look back period for gifting (5 years before entering a skilled care facility). This falls upon the family to complete after the recipient's death. In cases of undue hardship, the recovery can be waived by the state. Estate recovery **does not** create a debt for a recipient's heirs; however it **does** create a lien that must be paid by the estate before any heirs may inherit from the estate.

Though Medicaid so place a lien against a Medicaid recipient's estate, it is

not the first claim that needs paid. Pennsylvania law has defined an order of payment for all claims against an estate. The order of payment is as follows:

- (1) The costs of administration
- (2) The family exemption
- (3) The costs of the decedent's funeral and burial, costs of medicine, medical and nursing services, and hospital services from within the last six (6) months
- (4) The cost of a grave marker
- (5) Rents for the decedent's residence for the past six (6) months
- (5.1) Claims by the Commonwealth (Medicaid claims)
- (6) All other claims

### **C. Claim Postponement**

A claim will be postponed until:

- (1) the death of a surviving spouse;
- (2) the death of any child who is blind or totally and permanently disabled;
- (3) the date a surviving child turns 21; **or**
- (4) the death of, property transfer by, or vacating of a home by a sibling with an equity interest in the property who has been living in the home for at least a year.

These scenarios do not remove a claim against an estate. They do however postpone the collection of the lien until a later time for the benefit of the parties listed above.

### **D. Spousal Rights**

When it becomes necessary for a spouse to enter a long term care facility, there are concerns for the community (non-institutionalized) spouse. Understanding the rights of the community spouse to help prevent their impoverishment can help make the process easier. A common concern is that the

community spouse will lose all of their assets and income supporting the institutionalized spouse. This is not the case! The community spouse is entitled to keep **all** of their income and it **cannot** be deemed as available to care for the institutionalized spouse. However, the institutionalized spouse may be able to divert some of their income to the community spouse to help them maintain a minimum income set by the state called a minimum monthly maintenance needs allowance, which is equal to 150% of the federal poverty level for a family of two, plus an excess shelter allowance. These amounts vary by year. Additionally, the community spouse is entitled to one-half (1/2) the joint resources of the couple. This prevents the depletion of all of the community spouse's assets. Should the institutionalized spouse pass away before the community spouse, Medicaid Estate Recovery will be postponed until the death of the community spouse.

If a couple believes that one of them will need to enter a long term care facility in the foreseeable future beginning to plan ahead can greatly benefit the community spouse. As explained in the eligibility section, you may improve your home without penalty. By doing this, you spend down assets that may otherwise make you ineligible for Medicaid **and** provide your spouse with a better home to live in. If neither spouse ends up needing Medicaid, the couple is able to leave their family a house that will be taxed at a far lower rate than if they were left money.

### **E. The Elective Share**

A potentially problematic situation may arise if a community spouse passes away before an institutionalized spouse. In Pennsylvania, a spouse is permitted an elective share of their spouse's property, regardless of the spouses' will. This amount is equal to one-third (1/3) of the estate. The potential problem arises because these additional funds will be considered available for paying long term care bills, and may disqualify the institutional spouse from receiving Medicaid.

## **IV. Power of Attorney**

A Power of Attorney grants someone authority to act on your behalf. The authority given in a Power of Attorney can vary based on the wishes of the principal (or person granting the authority). There are several components in a Power of Attorney that are often of great consequence.

### **A. Powers**

The powers granted to the attorney-in-fact (or person to whom the powers are granted) should be explicitly stated to remove any ambiguity. By having the powers of the attorney in fact stated explicitly, it allows the attorney-in-fact to act with authority. Powers of Attorneys typically give financial powers to the attorney-in-fact so if any limits are to be placed on this it needs stated. Gifting is another crucial power of an agent.

### **B. Gifting**

A Power of Attorney often gives the attorney-in-fact authority to gift on behalf of the principal.

This can be:

- (1) limited to certain amounts,
- (2) limited to certain people to whom to gift,
- (3) made unlimited, **or**
- (4) not given at all.

It is important that the desires of the principal are fully understood and recorded in the document.

### **C. Effective Date**

When drafting a Power of Attorney, how the power comes into effect is an important consideration. The four options are:

- (1) It may become effective immediately,

- (2) It may become effective upon the decision of the principal at a later date,
- (3) It may become effective at the discretion of a third party (such as a lawyer), **or**
- (4) It may become effective with a “springing effect,” which is upon the disability or incapacity of the principal.

Whatever the principal decides, it needs to be recorded in the document.

#### **D. Witnessing**

A Power of Attorney needs witnessed by two individuals and be notarized if it was created after January 1, 2015. Prior to this date, it need only be witnessed by two individuals.

#### **E. Acknowledgement**

A separate form should be completed by the agent designated in the Power of Attorney stating that they understand and accept their responsibilities as agent/attorney-in-fact.

#### **F. Recording**

A Power of Attorney may be recorded in a County Courthouse to ensure its safekeeping. Should you make changes to an existing Power of Attorney that is recorded, you need make sure you record these changes with the Courthouse as well.

#### **G. Without a Power of Attorney**

If a power of attorney is not created and you are in a situation where your ability to receive and evaluate information effectively and communicate decisions is in any way is impaired to such a significant extent that you are unable to manage your financial resources or to meet essential requirements for physical health and safety, a court can appoint a guardian to make decision on your behalf. This process is often costly and time consuming, making a Power of Attorney an important part of every estate plan!

## **V. Healthcare Power of Attorney**

A Healthcare Power of Attorney designates an individual to make decisions for a principal, should the principal lack capacity. This is a valuable planning tool for several reasons. Primarily, it allows a principal to select someone who is familiar with their desires for end of life care to make decisions for them. It also provides an opportunity to expressly state end of life care desires in a document, giving the agent a guide to help ensure that the principal's desires are fulfilled, with some flexibility in case of unforeseen circumstances.

### **A. When Operative**

Unless otherwise stated, a Healthcare Power of Attorney becomes effective once a copy is provided to the attending physician and the attending physician determines that the principal is unable to make healthcare decisions.

### **B. Witnessing**

A Healthcare Power of Attorney needs witnessed by two individuals to be valid. It need not be notarized, though this does add to the authority of the document, should it be called into question.

### **C. Acknowledgement**

A separate form should be completed by the agent designated in the Healthcare Power of Attorney stating that they understand and accept their responsibilities as agent.

### **D. Without a Healthcare Power of Attorney**

Not having a healthcare power of attorney will in no way prevent you from receiving treatment. Should something happen to you, you may continue to make healthcare decisions or opt to create a healthcare power of attorney as long as you are competent. If you are incompetent or unconscious, Pennsylvania has a hierarchy of those able to make decisions for you in your stead (behind a person

appointed by you or a court to make such decisions):

- (1) A spouse (unless divorce is pending),
- (2) An adult child,
- (3) A parent,
- (4) An adult brother or sister
- (5) An adult grandchild,
- (6) An adult familiar with your preferences and values.

Additionally, a doctor will never treat you contrary to what is in your best interest.

## **VI. Living Wills**

A living will is often used either as a description of the point at which an individual no longer desires to receive life-prolonging treatment **or** as a documentation of an individual's desire for continuing treatment. Though useful for describing desires for end of life care, the ambiguity that can arise makes a living will less preferred than a Healthcare Power of Attorney, which designates someone to speak for you in the case of ambiguity.

### **A. Witnessing**

A Living Will needs witnessed by two individuals to be valid. It need not be notarized, though this does add to the authority of the document, should it be called into question.

### **B. When Operative**

A Living Will has the same requirements for being operative as a Healthcare Power of Attorney (a copy is provided to the attending physician and the attending physician determines that the principal is unable to make healthcare decisions); with the additional requirement of the attending physician determining the principal has an end stage medical condition or is permanently unconscious.



## **VII. Filial Support Obligations**

Filial Support is the legally enforceable obligations among adult family members to provide financial support to one another. This is often used to describe the support given by adult children to indigent parents, and less often to describe the support given by parents to indigent adult children. Those responsible to support an indigent person include the spouse, a child, or a parent. There are two exceptions to this law. The first is for financial inability and the second is for a child whose parent abandoned them and left them abandoned for a period of ten years in the child's minority.

This obligation can be very important if a parent passes after making a large financial gift to their child, and received Medical Assistance. The government is permitted to pursue the child for the parent's Medicaid Restate Recovery, for the value of the gift.

## **VIII. Guardianships**

A Guardian is appointed for an individual when a court determines that the individual's ability to receive and evaluate information effectively and communicate decisions is in any way impaired to such a significant extent that they are unable to manage their financial resources or to meet essential requirements for physical health and safety. If the individual has selected an agent in a Power of Attorney, the court may, but does not have to, appoint them guardian. If no Guardian is appointed, the court will select a Guardian to represent the principal. Often, a Power of Attorney can alleviate the need for a Guardian to be appointed if no files for such. If a principal designated an agent in a Power of Attorney, it is often easier, less stressful, less costly, and ultimately in the principal's best interest, to allow the agent to act and not file for a guardianship.

### **A. Forthcoming Changes**

To address the ever growing amount of elderly citizens, the Pennsylvania Supreme Court recommended the creation of a Task Force to address issues in Elder Law and how to deal with them. This task force made 130 recommendations, some of which applied to Guardianships and will likely soon be implemented. These recommendations create new and better forms that provide more information to the courts to allow for better selection and retention of guardians and collect more information to ensure that they are acting in the best interest of the principal.

## **IX. Investments**

When preparing for retirement, there are many investment opportunities to ensure a stable income in retirement. There are also investments you may make in retirement to benefit your family. This section addresses both types of investment opportunities.

### **A. Annuities**

Annuities are offered by insurance companies or other investing entities. You provide a large sum of money to the company. They then invest the money in a variety of securities until your retirement. Once you retire, you will be paid over a specific time, which you elect, your investment plus earning.

### **B. IRA's**

An IRA is a retirement fund that works through your employer and requires contributions throughout your working years. The account gains value through investments. You must start withdrawing from your IRA at 70 ½ at a minimum amount that would divide the value over your life expectancy. There are several options for a type of IRA, each with its own tax benefits. The types are:

- (1) Traditional**-Contributions to a traditional IRA are tax deductible. Withdrawals are then taxed as income during retirement.
- (2) Roth**-Contributions to a Roth IRA come from after tax assets. The withdrawals during retirement are then tax free.
- (3) SEP**-An SEP IRA works in the same way as a traditional IRA, except that the contributions are made by the employer instead of the employee.
- (4) Simple**-With a Simple IRA an employer matches employee contributions made to the account.
- (5) Self-directed**-With a self-directed IRA an employee is allowed to direct the investments made with their retirement account.

### **C. 401k's**

A 401k is a retirement savings account offered by employers. This type of savings uses a tax deferred account and allows employees to choose which mutual funds to invest in, depending on current salary.

### **D. 529 College Savings Plans**

A 529 College Savings Plan allows you to invest in a student's future education. This is an excellent option for someone who is already retired and has young family members they want to leave something to. Contributions, gains, and qualified withdrawals are all tax free. The investment also creates a return that will increase the savings for your student's future education.

## **Appendix I. Medicaid Resource Determination**

Available resources include: Real Property (other than Primary residence), investment accounts, bank accounts, stocks, bonds, mutual funds, certificates of deposit, IRAs, Keogh accounts or other pension and retirement plans owned by the applicant, motor vehicles, boats, and other vehicles, joint bank accounts (to the extent of the applicant's net contribution), cash surrender value of life insurance policies in certain limits, elective share rights of a surviving spouse, an entrance fee paid to a Continuing Care Retirement Community or life care community, and all other real or personal property that the applicant has or can make available for partial or total support, including equitable interests and partial interests.

Exempt Resources Include: Primary residence (in which applicant has no more than a \$500,000 interest (adjusted for inflation)), household goods and personal effects, one motor vehicle, revocable burial reserve (\$1500 reduced to the extent the applicant has excluded life insurance), burial spaces, irrevocable burial reserves, life insurance policies (up to a face value of \$1500), property essential to self-support, and property excluded by federal statute.

Unavailable Assets Include: Nonresidential real estate with multiple owners (this is counted as unavailable initially and for up to six months as long as a good faith effort is being made to liquidate interest), personal property with multiple owners (proportional to net contributions), and nonresident real property.