



# Planning for Your Golden Years

## AN OVERVIEW OF OUR ELDER LAW SERVICES

**O'DIAM & ESTESS  
LAW GROUP, INC.**  
A LEGAL PROFESSIONAL ASSOCIATION

### The Golden Bubble

Ah, the Golden Years - what a dream to look forward to! We work hard our whole lives to save up for a time when we can focus on hobbies rather than jobs, grandkids rather than bosses, and leisurely travel rather than hectic schedules. But what happens when our Golden Years turn out to be not-so-Golden?

For far too many seniors, this golden bubble bursts very easily. In light of illness, mental incompetency, financial downturns and other unforeseen crises, the wonderful dream of one's Golden Years can turn into a nightmare.

Even in the face of a crisis, please remember there is always hope... and as long as we are around, there is always help. We are dedicated to honoring our senior population by helping them and their families through the difficulties that can pop up during the Golden Years.

### Pay It Forward

The legal counseling related to issues faced by senior citizens is collectively called "elder law." We believe that there are few areas of the law more rewarding than elder law. Sure, we may not see much dramatic litigation and we may miss the chance to play hardball with corporate tycoons... but we'd trade all of that a thousand times over for the relationships we get to build with the senior population and their families. Ok, we'll admit, the hugs and homemade cookies that come with the territory don't hurt either! It's like having dozens of grandparents, and our clients truly become like family to us.

This is our way of serving the generations that paved the way for the opportunities we so treasure. The issues that arise in this stage of life are complex and emotional, and it is our pleasure to be able to make such struggles



even just a little bit easier to handle. No one should have to do this alone.

### Elder Law Issues

So we know *who* we're talking about... but *what* falls under the umbrella of elder law? This overview will provide a closer look at some of the most common elder law issues, including Medicaid, VA benefits, asset protection, guardianship and estate planning for the elderly. Keep in mind that none of these issues have a one-size-fits-all fix, so this overview is not a substitute for good legal advice.

Elder law is extremely intricate and ever-changing, so it is important to get help. Moreover, make sure you get the right type of help. It is critical to seek guidance from an attorney who *focuses* on this area of law, rather than someone who just dabbles in it. If someone knows just enough about elder law to be dangerous... it can truly be *dangerous!* The laws change constantly, so be sure to choose an attorney who can keep up with the times.

Brittany O'Diam is a dually certified specialist in elder law, by the National Elder Law Foundation and the Ohio State Bar Association. All of the attorneys at O'Diam & Estess Law Group are dedicated to providing the best advocacy and guidance possible to seniors and their families. This is our focus, because it is our passion.

### The Basics

Of all of the elder law issues, Medicaid is probably the most common concern... and it is definitely the most complex. The regulations governing Medicaid change at least twice a year (but the agency's interpretations of those regulations can change several times daily). As a result, there is a LOT of misinformation floating around about Medicaid. So, the first step in understanding Medicaid is

# MASTERING THE MEDICAID MAZE

letting go of all of the myths! What was true for your father's neighbor's uncle's cousin may not be true for your family.

Medicaid is a federal program administered by the states, so it involves a complex maze of both federal and state law (and each state does it very differently). The goal of the program is to provide assistance for people who need help paying for their care. There are many different Medicaid programs, but we're only going to look at Medicaid for the Aged, Blind and Disabled. This is a program created to help people who are over age 65 pay for their long term care needs.

When people think Medicaid, they usually think nursing home. Under today's Medicaid rules, however, there are options. Medicaid can help with three main types of care: home care, assisted living and nursing home care. These options allow people to receive the type of care they actually need, rather than forcing everyone who needs financial help into a nursing home. As a result, we have a happier population *and* a healthier state budget!

Medicaid's home care program is called PASSPORT and it is designed to help pay for non-medical home care for someone who is still able to live safely in their home. The assisted living program is called Assisted Living Waiver, and it is designed to help pay for care at an assisted living facility when the individual doesn't need the skilled level of care that a nursing home provides. Traditional nursing home Medicaid is meant to help people who need skilled care around the clock.

Traditional nursing home Medicaid is handled by the Department of Medicaid, while PASSPORT and Assisted Living Waiver are administered jointly by the Department of Medicaid and the Area Agency on Aging. Even though the procedures for these programs are slightly different than traditional nursing home Medicaid, the financial eligibility rules are roughly the same.

To qualify for Medicaid, an individual must pass four main tests: level of care, income eligibility, asset eligibility and the transfer test. The level of care needed

determines which Medicaid program is appropriate. The income eligibility test

essentially looks at whether the applicant's monthly income is enough to pay for the cost of care. In addition to the income, they look at the level of assets the applicant owns to see how much of those are available to pay for the care as well. Finally, the agency will evaluate the applicant's financial activity for the previous 5 years to make sure that nothing was given away in order to qualify for Medicaid (called the "look back").

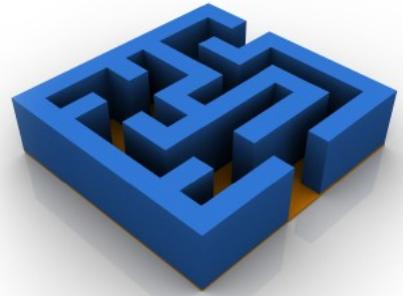
In assessing the applicant's eligibility under the above tests, there are certain assets that are treated as exempt (and not counted in the asset eligibility determination). If the applicant is married, there is a certain amount of income and assets that the agency will allocate to the spouse, rather than having that go toward the cost of the applicant's care. We aren't going to get into the specifics of the exemptions and the spousal allowances here, but we want you to understand two very important points: 1) there is an exception to almost every rule, and 2) there is an exception to almost every exception.

For more detailed information on Medicaid eligibility (and important tips on what *not* to do) check out our "Medicaid Made Simple" booklet. We know the title may be tongue-in-cheek, but we promise the information is seriously helpful!

## Confused? We Can Help.

One of the biggest mistakes that can be made when it comes to Medicaid is filing an application without first consulting with an elder law attorney. As a rule of thumb, you never want to file the application until you know you are *qualified*. There is no benefit to applying as soon as you need care, when you know you do not meet the eligibility criteria. And what if you only *think* you meet the eligibility criteria?

If you apply before you have spent down to the right levels, they will simply deny your application and tell you





to try again later — but there could be other consequences, like unintentionally extending the look back period. If you apply when you're at the right level of income and assets, but you didn't factor in the transfer test, the result can be absolutely devastating.

When the caseworker does his look back, he tallies up everything that is considered to be an improper transfer (which really just means a gift). In general, for every \$7,787 (2024) that was given away in the previous 5 years, Medicaid will impose a one month “penalty period” during which it will not help pay for care. The penalty period will not begin until the asset test and the income test are satisfied. So, if you are at the right levels of assets and income, but you apply before realizing that there were improper transfers... how will you pay for your care during the penalty period?

That's just one example of why seeking advice before applying is crucial. On top of unforeseen penalty periods, it is easy to fall into the trap of spending down more than required or not realizing that certain assets are exempt. It is not the caseworker's job to counsel you on how to protect what is yours to protect - that's like expecting advice on how to reduce your taxes from an IRS auditor. There is no replacement for the advice of a qualified elder law attorney. Worst case scenario, we tell you all your ducks are already in a row and send you on your way. Best case scenario, we save you a boatload of time, money and stress.

So what exactly is our role in Medicaid planning? We can take as much off of your plate as you want, and we do it for a flat fee (which depends on what you need). Here's how:

- Assess eligibility and planning options
- Help gather information needed for application
- Review 5 years of financial information to identify any red flags - and figure out how best to fix them
- Develop and implement a plan for how best to deal with excess assets and income
- File the Medicaid application, attend the interview with the caseworker and handle all of the follow-up

Applying for Medicaid is not easy, so our goal is to take away as much of the stress as possible. Yes, we will still need your help gathering the information, because your bank won't just hand it over to us. But we are on your side, helping you every step of the way, and making sure that this is as easy as possible for you. Don't risk your hard earned money (and your sanity) by going at it alone!



# ASSET PROTECTION - *Don't Wait Until It's Too Late!*

I think we can all agree that it doesn't sound fun to spend down your hard-earned money in order to qualify for needs-based benefits like Medicaid. But can it be avoided? You bet.

The key to avoiding having to spend down everything in order to get some help is to *plan ahead*. Don't wait until there is a health crisis on the horizon, don't wait until you're already 95 (though it's really never too late to plan). Plan early enough that you still have options.

How early are we talking about? Well, get out your crystal ball and find the date that is five years and one day before you will need any sort of long term care: that's your ideal planning date. Oh, your crystal ball is a little foggy?



Then your best bet is to plan now. Ok, maybe not right *now* - but if you are already retired or approaching your retirement years, it is very worthwhile to at least consult with an elder law attorney to see what your options are.

Asset protection plans are not plans to help everyone get on Medicaid. However, we do use the Medicaid rules as our framework, so that we can ensure we aren't doing something that will

*disqualify* you for Medicaid if you need it down the road. In order for an asset protection plan to work under the Medicaid regulations, it needs time to mature. That's where the five year rule comes into play.

The best method of asset protection planning is through the use of special irrevocable trusts. These trusts are designed to hold assets in a manner that makes them non-countable for Medicaid or VA benefits purposes. Holding the assets in a protected trust guards them from a required spend down, but also makes sure they are there to enhance your quality of life if you need them. In order to get the desired asset protection, the trust must have very specific features - but we keep as many strings attached as possible, so you do not lose access and control to the trust assets entirely. The grantor (the person who creates the trust) cannot be a named beneficiary or the trustee, so these plans work best when there are loved ones who are willing and able to help. The grantor chooses someone to serve as trustee who can manage the trust assets and handle all of the trust business. The grantor also chooses a few "lifetime

beneficiaries" who can help with the trust assets, in order to make sure that the trust can enhance the grantor's quality of life down the road. The trust also directs who will receive the assets after the grantor passes away, in any manner the grantor chooses (so, it is a good estate plan on top of being a good asset protection plan!).

The best part about planning early is the ability to qualify for good long term care insurance, which adds an extra layer of protection to your asset protection plan. Our firm does not handle insurance sales (we are busy enough on the legal side), but we would be happy to help you find a good LTCI agent or help you work with the one you already have. When you have a good LTCI plan, your overall elder plan quadruples in value! Many people are hesitant to look at LTCI because they think it is "too expensive" or they don't like that you "use it or lose it," but we are HUGE believers in the value of LTCI (and we don't even get paid for saying that). The industry has some creative solutions to help assuage some of those concerns, so you would be wise to explore your options.

You don't always need unlimited LTCI. When you couple LTCI with an asset protection plan, the two work together to provide lifetime benefits. For instance, if you have a policy that covers 5 years of care, that relieves your need for your crystal ball. When we have LTCI in the picture, we don't have to plan five years in advance - we have the luxury of waiting until there *is* a health issue on the horizon, because we already have LTCI in place to pay through the next five years. It's win/win!



# In Their Shoes: GUARDIANSHIPS AND POWERS OF ATTORNEY

Caregivers to the elderly are often faced with a very difficult decision: what to do when the person they are caring for can no longer make decisions on their own. When is the right time to place an elderly relative into assisted living or a nursing home? And what are the best ways to arrange for payment for such care?

## **Who Will Help?**

Many people mistakenly believe that their spouse or children can automatically take over for them if they become incapacitated. However, that is not actually the case. Without taking steps to appoint someone as your legal representative, your loved ones will not automatically be able to help you when you can no longer help yourself. The rationale behind this is simple: we want to avoid elder abuse, exploitation and theft, and we want to protect you.

The best way to plan ahead is by creating a Durable General Power of Attorney (for finances) and a Durable Power of Attorney for Health Care. Even when these are in place, however, sometimes they aren't enough. For instance, you may have a financial POA, but if you develop dementia and don't want to relinquish control, your Agent under your POA cannot act against your will without a court order, in many cases.

## **Guardianship**

Ohio law has a process called guardianship to help take care of mentally incompetent adults ("wards"). Absent valid Powers of Attorney, this is the only alternative for appointing someone to make decisions on your behalf. Guardianships are administered through the Probate Court of the county where you live.

Guardianship can be a long, expensive process. The person who wants to apply to be the guardian (the "applicant") hires an attorney and usually must post a bond. With the application, they must file a doctor's determination of incapacity on a "Statement of Expert Evaluation." They also have to submit a criminal background check on the applicant. After the application is filed, the court sets a hearing date and sends its own investigator to the ward's home for another evaluation before the hearing. At the hearing, the applicant, the ward,



witnesses and attorneys appear before the judge. The judge evaluates the written opinions and questions the applicant, the ward and any witnesses. Afterwards, the judge makes a decision on the need for the guardianship.

If a guardianship is found to be necessary, then the guardian must account to the court for everything he does with the ward's person and assets (and in many cases must ask permission before acting). The guardian must also attend special training on an annual basis, and file continuing reports with the court.

## **Types of Guardianship**

There are three types of guardianships: guardian of the person, guardian of the estate, or both. Any of these can be limited or ongoing. If, for instance, there is a valid Health Care POA, then guardianship of the person would not

be necessary because the POA grants authority for those decisions. Likewise, if a General POA exists, and then guardianship of the estate wouldn't be necessary. If both POAs are in place, but the Agent needs a court order to act against the prospective ward's will (or to enforce the POA), then we usually only need a limited guardianship of the person. In any case, the court will always attempt to choose the least intrusive route, to protect the ward's liberty as much as safely possible.

## **WHAT ABOUT MY RIGHTS?**

What happens if someone claims you are incompetent... but you aren't? Remember that the purpose of a guardianship hearing is to make sure that the prospective ward's best interests are protected. So, if the prospective ward isn't actually incompetent, the court wants to know!

The prospective ward has the right to a lawyer and the right to present evidence that he or she is mentally competent and doesn't need a guardianship. The court weighs the credibility of the prospective ward's evidence against the Statement of Expert Evaluation, the Investigator's Report and the contents of the prospective ward's testimony. If it is on the fence, the court will require further evaluation. The court takes this decision very seriously, but it is important to have good counsel to advocate for the prospective ward.

# ESTATE PLANNING *Essentials*

Some people consider estate planning to be nothing more than signing a few legally binding documents. But an estate plan is more than just a bunch of expensive paper! A well thought out, well executed plan takes into account all the factors that make up your life's values and goals. For many people, these values involve the ability to take care of one's family.

Those values are the cornerstone of an effective estate plan, which will be embodied in documents that express your wishes. Our firm believes in first finding out as much about your goals and values as possible. Is your family a cohesive unit, or divided by distance or fighting? Do you support a charity during your life that you'd also like to remember when you're gone? Do you want to avoid probate and guardianship?

## What Are My Options?

Wills and Trusts make up the core of estate planning documents. Both serve one primary purpose: they allow you to give what you have to whom you want. But how they get you there varies considerably.

A Will can only divide your estate after you've passed. A Trust on the other hand also satisfies that objective, but has the added value of helping you maintain control while you're still alive but unable to manage your assets. A Trust does this by appointing someone who would serve as your decision-maker in place of going through a guardianship hearing, which allows you to avoid probate during your life. A Trust also allows you to avoid probate upon your death and gives you far greater flexibility in how your property is distributed.

Whichever route you choose, giving your family the peace of mind of knowing your wishes have been expressed in a plan is a gift.

This gift not only has the potential of benefitting those people and charities you name as your beneficiaries, but more importantly, this gift gives a sense of relief, peace of mind, and the time and space to grieve the loss of a beloved family or friend. When someone passes away, the myriad details that families and other loved ones must sift through increases their pain and yes, it costs them more time and money than if they already knew what to do.

## It's More Than Just A Death Plan!

Your estate plan is not all about planning for after you die. Some of the most important factors in your plan

actually work only while you are alive. Every estate plan we do automatically includes life planning documents to go with your Will or your Trust. Creating your Power of Attorney for finances and one for health care, as well as a Living Will, will leave you with papers that are worth their weight in gold. Not only do these help you appoint people to help you with your health and finances (in conjunction with your trustee, if you have a Trust), but these documents also allow you to spell out your wishes for end-of-life decisions, organ donation and other sensitive subjects. Taking those decisions off of your family's shoulders by clearly expressing your wishes is invaluable.

## Let Us Help You Plan

We offer advice and assistance in making decisions about structuring an estate plan to fit your goals. It is far more than just filling out forms and setting up documents. We strive to meet the diverse needs of families, whatever unique issues each may present - from educating you about your planning options, to helping you design the plan that best meets your goals, to titling your assets properly to coordinate with your plan.

Whether you are enjoying your Golden Years, or you are a caretaker for an elderly loved one, we encourage you to get an updated plan in place. Take note that mental competence is required to create any estate planning document, so there's really no time to waste. As necessary, we are even available to come to you (though an additional charge may apply), as we are sensitive to the physical limitations of some members of the elderly community. Whatever your needs, we look forward to serving you.



# Experience the O'Diam & Estess Difference



## Brittany O'Diam

Brittany is a Certified Specialist in Estate Planning, Trust & Probate Law by the Ohio State Bar Association, and she is a dually Certified Specialist in Elder Law by the National Elder Law Foundation and the OSBA. She focuses her practice on all levels of estate planning, elder law, and estate administration. She is passionate about helping her clients craft plans to address the unique aspects of each client's circumstances. There is no one size fits all plan here! Brittany is licensed to practice law in both Ohio and Florida (so she is officially a snow bird... in training).

Brittany graduated *cum laude* from University of Akron School of Law, after getting her BS in journalism from the E.W. Scripps School of Journalism at Ohio University, *cum laude*. She was a fifth generation graduate of Beavercreek High School and a second generation estate planning attorney. She is now happily settled in Beavercreek with her husband, Adam Horseman, and their two children, Camden & Jake.



## Kim Cullman Estess

Kim is a Certified Specialist in Estate Planning, Trust & Probate Law by the Ohio State Bar Association, and she is a dually Certified Specialist in Elder Law by the National Elder Law Foundation and the OSBA. She believes providing great service requires more than just excellent legal work—it also involves taking the time to establish a strong relationship with each client in order to truly understand their unique goals. Kim was selected as a Dayton Business Journal Forty Under 40 Award recipient in 2022, and was a member of the Leadership Dayton Class of 2022.

Kim graduated from the University of Dayton School of Law, where she was a member of the moot court team and the law review. She earned her BA in Journalism from Indiana University. Kim was born and raised in Centerville, where she now lives with her husband, Adam, and their daughters, Cece and Abby. In her spare time, Kim enjoys long distance running and playing golf.



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*O'Diam & Estess Law Group is located about 1/2 mile east of I-675 (Exit 2 - Yankee Street), on Washington Village Drive (off of Yanks Ct., next to Fairfield Inn & Suites).*

*For your convenience, we have ample free parking right at our front door.  
Our parking lot and office are handicap accessible.*