# A Guide To

# Long-Term Care

***What you need to know about long-term care and disability planning***

**Prepared by:**
***A. Mark Christopher***
***Attorney At Law***

Yates Campbell & Hoeg LLP
Wills • Trusts • Estates • Taxation • Elder Law

**4165 Chain Bridge Road**
**Fairfax, VA 22030**
**703-273-4230**
**703-383-1939 fax**
mchristopher@ychlaw.com

A. Mark Christopher
Best Lawyers Lawyer of the Year 2014
Elder Law – Washington, D.C.

Listed in
*Washingtonian Magazine*
**Best of Washington**

Super Lawyers

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**BASIC CHECKLIST, INCOME ANALYSIS AND INVENTORY FORMS ARE INCLUDED**

## Introduction

I am an elder law attorney who has practiced in the northern Virginia area for over 38 years. Many of my clients have voiced frustration in not being able to understand, before they see me, what they need to consider before a consultation. As a result, I developed checklists, information sheets, and various forms to help in the process of planning for long-term care expenses, incapacity, and the like.

I decided to pull many items together in a booklet form that anyone can use. I designed this booklet for use primarily at the time of placement in an assisted living facility. Many of my dealings have been with the adult children of residents of assisted living facilities or their spouses. However, I have also dealt directly with residents on a number of occasions.

This booklet is designed to provide initial guidance to families as they begin to plan for long term care. It is not designed to provide legal advice: you need to meet with a lawyer and explain your particular situation and needs. After that, the attorney can provide advice and prepare whatever documents or take other actions that may be appropriate.

Please feel free to call me with your questions and comments. I will continue to update the booklet from time to time.

A. Mark Christopher
Yates Campbell & Hoeg LLP
4165 Chain Bridge Road
Fairfax, VA 22030
Ph.: (703) 273-4230
Fax: (703) 383-1939
Email: mchristopher@ychlaw.com

Our firm has an excellent website that can be found at: www.ychlaw.com

## Getting Organized: Find Out What The Resident Owns, Receives and Owes

Whether you are preparing for your own placement, the placement of a spouse, or are taking over the finances of a parent, you must get organized. We have included a checklist of the types of information that should be gathered, as well as worksheets to assist you in organizing information. You may need to do this because you may be providing financial information to the facility at the time of placement. Some practical tips:

1. Go over the mail and find all the bank statements and other similar statements that you can and organize them by the issuer and account number. You can use a 'notebook' system: place the statements for each account behind a tab and update your notebook as subsequent statements are received. In this way, you can find out what data is current.

2. Find the most recent tax returns and try to match up the items shown on the returns to the materials that you have.

3. Review the checking account statements to see what income items are being regularly deposited electronically each month.

4. In many elder law cases there are few liabilities. However, we occasionally are visited with clients with a number of liabilities, credit card accounts, and the like. Our admonition of getting organized

applies to these items as well. Try to develop as accurate and as comprehensive a picture of the financial situation as you can.

5. Don't be afraid of asking for help. Your attorney or other services can be of assistance in this regard. If a financial planner has been engaged sometime in the past, much of this work may have been done. Some social workers and case managers will assist in organizing these materials and offer bill-paying services.

6. Remember that you should include any assets in which your resident has an interest, including jointly titled assets and savings bonds. If you can, please go to the safe-deposit box and retrieve the documents. You may need your Power of Attorney to do this.

7. Remember that paying for long-term care expenses is primarily a cash-flow issue. We suggest that you work with an elder law attorney or other professional to establish what the likely impact of a long-term placement will be on the resources of the resident as soon as possible.

## Determine the Type of Placement or Service that is Appropriate

There are various types of facilities that offer housing options for the elderly and those who require some assistance with their activities of daily living. The basic types of facilities and choices include:

- Active Adult Communities

- Continuing Care Retirement Communities (CCRCs)
- Independent Living Communities
- Assisted Living Facilities
- Small Assisted Living Facilities
- Nursing and Rehabilitation Facilities
- Alzheimer's Care Specialized Communities.
- Home Health Care Service Providers

(Source: Guide to Retirement Living-The Sourcebook)

Of course, many individuals and families will consult with someone who has expertise in advising them about the choices available and the benefits of a particular placement or move. You should avail yourself of the support available from private or governmental sources in making your decision about whether a move is appropriate and; if so, where.

## Assisted Living Facilities

A description of Assisted Living Facilities is often helpful in understanding the types of facilities and placements available.

- Assisted Living Facilities: Housing and services for individuals who cannot live independently, but who do not need skilled nursing care. The level of assistance may vary from one facility to the next and within a facility. The assisted living ('AL') facility may have a section that provides care for persons who have memory impairments. Usually, the payment of AL facility costs is made from the resident's funds on a private-pay basis. Some long-term care insurance policies will pay for the

costs of AL-facility care if policy definitions are met. These definitions usually have to do with the 'activities of daily living' discussed below. Medicare and Medicaid do not apply to assisted living situations. Some facilities provide subsidies for needy residents. The Virginia auxiliary-Grant program can provide assistance in these settings, but it is unusual in northern Virginia. This is because the Auxiliary Grant Program has an income-threshold test that most northern Virginians do not meet. The National Center for Assisted Living has reported that, according to a March 2001 survey, that 66.7% of all residents paid their costs of care from personal funds. 8.4% had their costs paid for by other family members, 1.5% from managed care, 1.8% from long-term care insurance, as well as other sources. The NCAL reports that there are over 36,000 AL facilities.

    - Assisted living facilities are sometimes described as being for people who need assistance with the activities of daily living (ADLs) but who wish to live as independently as possible for as long as possible. Oftentimes, our clients enter an Assisted Living Facility.

- While the assisted living model is dynamic, and the range of services is varied, AL facilities typically provide or coordinate 24-hour supervision, with group dining, and a range of services that may include:

    - Personal care services
    - Various health care services
    - Social Services

- Supervision of persons with cognitive disabilities
- Social and religious activities
- Exercise and educational activities
- Arrangements for transportation
- Laundry and linen services
- Housekeeping and maintenance services

(Source: National Center for Assisted Living)

Assisted Living residences are not defined by their capacity for residents, but by the scope of services provided. Accordingly, AL facilities vary in size and are sometimes located on the same campus with other types of residences.

## What does the Social Worker mean when she speaks about an 'Assessment?'

An assessment usually refers to a comprehensive evaluation of the needs and capabilities of a resident. It is required to determine the appropriate setting for a newly placed individual. In northern Virginia, a "UAI" or Uniform Assessment Instrument is usually completed by a social worker. This assessment is a crucial building block in planning for long-term care. The Virginia Uniform Assessment Instrument was developed by the Virginia Long-Term Care Council, and reformatted in January 2001 by the Virginia Department for the Aging. The VDA works with 25 local Area Agencies on Aging (AAAs) as well as other organizations to help seniors find the assistance and information they need.

## What are the 'Activities of Daily Living' and Why Are They So Important?

The activities of daily living (ADLs) refer to a bundle of daily activities that are used to assess the level of assistance and the type of settings an individual requires or is best suited for. In 1997 the Internal Revenue Code ('Code') was amended to provide, for the first time, a definition of 'qualified long-term care expenses' which are applied to determine whether a care cost can be deducted as a medical expense. The activities of daily living listed in the Code parallel the ADLs used by most social workers. They are:

- Eating
- Toileting
- Transferring
- Bathing
- Dressing
- Continence

These terms are often used in other settings as well. For example, a long-term care insurance policy will often trigger benefits if the insured requires 'substantial assistance' with a set number of defined ADLs. While there is some variation in the ADLs used in a given context, they generally focus on these items. The IRS has provided guidance on what 'substantial assistance' means (See our section about taxes).

## Develop a Budget

Speak with the administration of the facility about approximate monthly costs of care. You should try to

develop the following items, whether you are trying to age in place in your home or move:

- How much is your rent?
- How much is your mortgage each month?
- How much is your condominium fee or cooperative maintenance fee?
- Do you pay insurance on your home? If so, bring a copy of your bill.
- Bring a copy of your most recent real estate tax bill.
- What are the predictable costs of care?
- Do you have long term care insurance that will pay for any expected costs?
- What are the cash flow and after-tax cash flow needs of the plan?
- How liquid are the assets that may be devoted towards costs of care, how will they be taxed if they are sold, and what assets should be sold first, if any?

## A Word About Long-Term Care Expenses and Income Taxes

There have been some important changes in the tax law regarding the deductibility of long-term care expenses. I wrote an article that appeared in the June 1989 edition of the *Journal of Taxation* entitled 'Ways to Reduce Tax Burdens of Nursing Home

Residents.' For example, at that time, there were no IRS rulings that used the terms 'Assisted Living'. In these areas the law was also somewhat inconsistent, and was not well developed. In January 1997, the *Journal* published another article that I wrote entitled "New Law Provides Ways to Reduce Tax Burdens Relating to Long-Term Care Expenses." In my 1997 article I addressed how recent revisions to the Internal Revenue Code included, for the first time, a definition of 'long-term care' expenses. This definition is important in not only determining whether a long-term care expense incurred in a facility or a particular type of facility is deductible, but also whether long-term care insurance premium payments can be deducted. The Code also now provides that qualifying long-term care benefits from policies will not be taxed.

The point of this discussion is to provide a reminder that the costs of care may be or may become deductible as a medical expense if the resident itemizes deductions. Because long-term care financing is largely a matter of cash flow, the reduction or elimination of income tax associated with the expenses can provide relief to the qualifying resident, spouse or other person paying for care. There can be significant benefits to selecting how to pay for long-term care and the timing of taxable transactions done to pay for care. This can translate to greater cash flow and can be of significant benefit to everyone concerned. We prepare the income tax returns for many of our clients and provide an analysis of these issues when we develop a long-term care plan.

To understand how these rules work, let's start by remembering that the Code allows deductions for

medical care. Within the Code section that defines medical care, the Code provides that payments made for qualified long-term care services or certain insurance, can qualify for medical deductions.

Qualified long-term care insurance is insurance under a contract that meets the following rules:

Coverage. The contract must cover only "qualified long-term care services." These are defined as those "necessary diagnostic, preventative, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services" but only when required by a "chronically ill" individual. A "chronically ill" individual is someone certified by a licensed health care practitioner as being "unable to perform (without substantial assistance from another individual) at least 2 ADLs for a period of 90 days due to a loss of functional capacity.

The term "licensed health care practitioner" includes physicians, registered professional nurses, and licensed social workers.
The assistance the person may need to do an ADL may be "hands-on" ("physical assistance of another person without which the individual would be unable to perform the ADL"), or "stand-by" ("the presence of another person within arm's reach of the individual that is necessary to prevent, by physical intervention, injury to the individual while the individual is performing the ADL."). The IRS issued a Notice that included, as examples of stand-by assistance, someone who is ready to catch someone who might fall while getting into or out of a bathtub or shower, or being able to remove food from the individual's throat if the individual chokes while eating.

The individual is "chronically ill" if a licensed health care practitioner certifies if the individual cannot perform at least two ADLs for at least 90 days, due to lack of functional capacity. A person may also be chronically ill if the person is certified to have a level of disability that is similar to this test. The 90-day requirement does not establish a waiting period for the individual.

In addition, the individual may be chronically ill if the individual meets a Cognitive Impairment Trigger.

Severe cognitive impairment means a loss or deterioration in intellectual capacity that is comparable to (and includes) Alzheimer's disease and similar forms of irreversible dementia, and which is measured by clinical evidence and standardized tests that reliably measure impairment in the individual's (i) short-term or long-term memory, (ii) orientation as to people, places, or time, and (iii) deductive or abstract reasoning.
The IRS has indicated that substantial assistance means continual supervision (which may include cueing by verbal prompting, gestures or other demonstrations) by another person that is necessary to protect the severely cognitively impaired individual from threats to his or her health or safety. The IRS gives the example of someone who may wander.

Under the Cognitive Impairment Trigger, unlike the ADL trigger, one does not need to take into account the ADLs to determine deductibility.

(Source: IRS Notice 97-31, 1997-1 CB 417).

## What About Medicaid Planning and Compliance?

We have assisted many persons (nursing home residents) and; sometimes, their spouses, with regard to qualifying for Medicaid LTC benefits.
The rules concerning eligibility are complex and each case must be individually addressed.

However, as a general rule, we stress that a complete and accurate picture of the applicant's (and spouse, if married) financial situation must be made. The value and type of assets that exist as of the first day of the month in which the nursing home resident is hospitalized or institutionalized often has a great significance in determining eligibility.

For married persons in particular, there are a number of protections that are available to the community spouse, so that he or she can remain in the community. Since the Affordable Care Act was enacted Virginia now has the Medicaid Application available online. Online Applications are routed to the local City or County Department of Family or Social Services for processing. In addition to filing the Application the applicant needs to provide the verifications to show why and when the applicant became eligible for long term care benefits.

Further, there are special types of trusts that can supplement the needs of a Medicaid recipient, called "Supplemental Needs Trusts" or "SNTs". Consulting with a qualified attorney or advisor is highly recommended. SNTs can be funded with assets of the nursing home resident (or the spouse) if certain conditions are met. Third parties, like other relatives, who want to provide the extra protection

that a SNT can provide can also fund trusts for the benefit of a Medicaid recipient. These trusts typically benefit persons who are under age 65. SNTs are of two basic types: SNTs funded with the assets of the disabled individual, called "first-party SNTs" and SNTs funded with assets contributed by others, or third parties, called "third-party SNTs."

SNTs take the form of individual or separate trusts and Pooled Trusts. When a Pooled Trust is utilized the individual or third party joins the Pooled Trust by completing a Joinder Agreement. A separate account is created and funded for the benefit of the disabled individual in the Pooled Trust.

We can provide expertise and guidance about the choices that are made in establishing or joining trusts for the benefit of a disabled individual.

Some SNTs own real estate that is occupied by the disabled beneficiary; others do not. Your advisor should review the special rules and considerations regarding SNTs if ownership of real estate is contemplated.

There are also some types of transfers, and some types of expenses, that have no impact on the eligibility of an applicant. We encourage you to consult with a qualified advisor.

Effective February 8, 2006, the Deficit Reduction Act imposed significant changes to the policies regarding Medicaid eligibility and asset transfers. The DRA, as well as the technical rules surrounding eligibility, illustrate the need to consult with a qualified advisor. Again, a complete and accurate approach can provide protection in the appropriate setting. You can use our

Inventory and Income Analysis Forms to begin the planning process. Many of our clients come to us after a placement in a nursing home has happened for themselves, a spouse or relative. We provide support in all phases of planning and paying for Long Term Care, including an analysis of income and assets of the patient, spouse and others involved, the benefits and costs associated with eligibility, preparing and filing Medicaid Applications.

ABLE Accounts (Achieving a Better Life Experience-ABLE) were authorized by the Achieving a Better Life Experience Act of 2014 and incorporated into the Internal Revenue Code at Section 529A. Section 529 is the Code Section that authorized the establishment of Qualified Tuition Programs ("QTPs") by the States. Congress, in authorizing ABLE Accounts, included some similarities when it enacted Section 529A.

Virginia529, which is the Virginia Agency that operates accounts established under Section 529 now administers ABLE Accounts. Virginia529 has had ABLE Accounts available since early 2017. We have had clients establish ABLE Accounts with Virginia529 and with other States. There are some very different features to ABLE Accounts. An ABLE Account can be established by a competent disabled individual or *an attorney-in-fact.* It can be established only for an individual who is disabled before age 26. All of the funds in an ABLE Account are subject to pay-back upon the death of the ABLE Account beneficiary. Contributions of up to $14,000 a year from all sources can be made. ABLE Accounts can only accept cash. The disabled individual can have only one ABLE Account. There are proposals to allow a disabled beneficiary to contribute income up

to $11,700 a year. Distributions from the ABLE Account that are to be spent on "qualified disability expenses" are not subject to income tax. Expenses such as transportation, housing, assistive technology, personal support services, legal fees and funeral and burial expenses are included in this definition.

An ABLE Account can be an important planning option for disabled individuals.

## What About Private Long-Term Care Insurance and the Virginia LTC Partnership?

The same basic rules concerning insurance claims under any type of policy apply here as well. First, locate the copy of the policy and learn what the 'triggers' for benefits and the benefits are. Typically, the claim forms are coordinated with the facility and the facility will receive the payments from the insurance company. This is usually done to ensure that the payments being made under the policy are going towards the costs of care and that the policy limits are being observed. If the costs of care are below the policy limits, the policy will pay for all of the costs. If the limits are below the actual costs of care the resident will pay whatever charges remain. Under many policies any premiums normally due are suspended once the policy goes into payout. Obviously, if the resident has long-term care insurance, understanding the policy is of critical importance.

In the summer of 2000, the *Washington Post* ran an article entitled "Long-Term Care Insurance a Timely Precaution." The *Post* article mentioned that Congress was moving to permit federal employees,

military retirees, and others to buy LTC insurance as part of their benefits.

The Office of Personnel Management contracted with John Hancock and New York Life to provide LTC insurance (the Federal Long-Term Care Insurance Program, or FLTCI). They formed Long-Term Care Partners, LLC, to provide the coverage to federal employees and their families.

According to OPM, about 20 million people are eligible to participate in the FLTCI Program. Because so many of our clients are affected, we wanted to make some initial comments.

You may want to visit the webpage http://www.opm.gov/insure/ltc/ that provides valuable information about this important program. As is indicated, with 265,000 applicants, the FLTCIP is on its way to becoming the largest employer-sponsored LTC program in the nation.

Federal employees, (including most Federal and U.S. Postal Service employees and active members of the uniformed services); annuitants (including retired members of the uniformed services); spouses and adult children of employees and annuitants; and parents, parents-in-law, and stepparents of employees are eligible.

Applicants must meet the underwriting requirements of the program. Visit www.ltcfeds.com. The website is excellent and includes a premium calculator and an explanation as to who is eligible to participate.

(Source: Office of Personnel Management)

The Virginia Long Term Care Partnership is designed to reward Virginians who plan ahead for future LTC needs. It is an alliance between private insurance

companies and the state government to protect Virginians from depleting all their savings and assets to pay for LTC. LTC partnership policies provide a "dollar for dollar" asset protection feature. For every dollar of benefit paid, a dollar of assets is protected. Accordingly, if you receive $100,000.00 in benefits, then $100,000.00 is protected and you can still apply for Medicaid. Annual compound inflation protection is required on policies issued to individuals under age 61. Existing policies are not "grand fathered". This program started September 1, 2007. Visit http://valtcpartnership.org.

(Source: Virginia Long Term Care Partnership)

The National Association of Insurance Commissioners (NAIC) has published a "Shoppers Guide" to long-term care. It is available through their website at http://www.naic.org/.

When the Internal Revenue Code was amended to permit the deductibility of long-term care expenses and, to an extent, premiums for long-term care policies, the IRS referred to standards adopted by the NAIC to determine what policies will qualify for preferred income tax treatment. Tax qualified (TQ) policies are sold by insurers who comply with certain consumer protections applicable to LTC insurance. Distribution of a shopper's guide is one of the requirements.

## What if I am the 'Responsible Party' on the Contract?

The term 'responsible party' has no set legal definition. It is intended to be mean what the contract or admissions agreement says that it is. Sometimes

the contract will explain that the responsible party is responsible for overseeing the financial accounts of the resident, paying bills, applying for assistance, and applying the funds of the resident towards the costs of care. You need to have a clear understanding of what these obligations mean. *Unpaid bills can become the financial responsibility of a 'responsible party' under certain circumstances.* Care providers oftentimes require that someone agree to sign as 'Responsible Party' at time of admission.

## Powers of Attorney

As a matter of introduction, you should always satisfy yourself about the resident having a General Durable Power of Attorney that is appropriate for the resident. The resident must be competent to sign a Power of Attorney. We use the term 'general' to refer to a Power of Attorney that is designed to permit the Attorney-in-Fact to act as agent for the Principal (the resident) with regard to a variety of actions. Courts have defined the role of the Attorney-in-Fact as an agent who is empowered to do whatever the Power of Attorney describes. Typically, the Attorney-in-Fact can have access to the financial accounts, negotiate checks, pay bills, and generally handle the resident's legal affairs. As long as the power of attorney is 'durable', it will remain in force even after the resident becomes incapacitated or incompetent. In Virginia, this is referred to as being under a 'disability.' Typically the Power of attorney will have a clause something like, "This Power of attorney shall not terminate on [the] disability of the principal." The Power of Attorney may also have a number of other clauses designed to address the tax, financial and health care needs of the resident. Some residents will

have more than one Power of Attorney, including 'Special' or 'Limited' Powers of Attorney which concern real estate or accounts in specific banks. Some practical tips:

- Simple form documents that do not address the Resident's needs may prove to be inadequate. Review any existing power of attorney with an Attorney.

- Virginia has adopted the Uniform Power of Attorney Act ("UPOAA"), effective July 1, 2010, with some modifications that were incorporated by the General Assembly. Effective October 1, 2012 the provisions of the UPOAA were re codified. Some of the significant changes and items addressed include:
  - A power of attorney can now be signed by someone other than the principal at the principal's direction.
  - A signature is presumed genuine if acknowledged before a notary public.
  - The UPOAA allows for co-agents to exercise their authority independently. If you want to name two agents and require that they work together, then your power of attorney should say so.
  - There are now 6 major duties that apply to attorneys in fact. These include the duties of acting loyally, avoiding conflicts of interest, acting with care, competence and diligence, and keeping records.
  - The new law refers to the attorney-in-fact as the "agent."
- Remember that the Attorney-in-Fact (agent) must be trustworthy. We look to the Attorney-in-Fact to be honest, in fact. An attorney-in-fact is an un-

bonded agent of the principal. Virginia has a statute that provides that an attorney-in-fact shall, on reasonable written request made by a person interested in the welfare of a principal who is unable to properly attend to his affairs, disclose actions taken within the past five years from the date of the request and shall permit reasonable inspection of records unless such disclosure or inspection is specifically prohibited by the terms of the power of attorney. A statute extends this right to require disclosure to family members, co-attorneys-in-fact and successors. Family members include parents, siblings, nieces, nephews, children or other descendants, spouses of a child of the principal, and spouse or surviving spouse of the principal. Virginia Law recently buttressed the statute regarding Powers of Attorney and made it clear that an Attorney-in -Fact is a "fiduciary".

A 1999 Virginia case held that a former Attorney-in-Fact had to pay back "gifts" that he made to himself. The court noted that the Attorney-in-Fact owed the highest degree of fidelity to his principal.

There have been two publicized cases reported in the newspapers in 2010, both involving convictions in Montgomery County, Maryland. The two cases involved criminal convictions of persons who gained the trust of their principals and took their funds. In both cases the defendants received 30 year sentences.

On October 1, 2010 the Maryland General and Limited Power of Attorney Act took effect. It is sometimes referred to as "Loretta's Law" because some of its provisions are designed to prevent opportunities for financial abuse that were reported in a case where a "Loretta" was a victim to a niece who had her Power of Attorney. The niece was eventually

convicted of felony theft. Maryland Powers of Attorney must now be signed before a Notary Public and two witnesses, all of whom must sign in each other's presence. If you are a Virginian with property in Maryland or have other ties to Maryland, the Maryland law may be a concern.

Be sure the documents are adequate. A Special Power of Attorney for each real estate holding may prove to be invaluable. Review by an attorney is recommended. A durable power of attorney, like a will, is a very important legal document. You should locate the original copy (ies) or, if none are found, try to find out if the power of attorney was ever recorded in the land records of the County where the resident resided before moving to the facility.

## What Virginia Courts Have Said About Competency

The question of competency or capacity often arises when asking whether someone can sign legal documents, such as a Power of Attorney or Will, or engage in transactions, such as changing title to property on a Deed. This subject is very complex. The issue of competency arises in a number of areas in the law. Consult with an attorney about the question of competency if it is an issue. The attorney may recommend a consult with a geriatric psychiatrist or request input from other health professionals.

In Virginia, there have been several reported cases that focus on the legal tests applicable to someone who has some diminished capacity, and whether documents the person executed should be set aside. These cases are very fact-specific. In 2000, there was a reported Circuit Court opinion from a circuit in

northern Virginia that involved a decedent who had suffered from Alzheimer's disease. The individual signed her documents about 15 months before she died. Her documents included a Will, a Power of Attorney, and a Deed of Gift. The Court found that she had capacity to execute the documents. The Court also found that there was no undue influence; however, the case involved four days of testimony. The case illustrates some of the difficulties that are encountered in these situations.

In 2002, another circuit court case involving cognitive impairment was decided. The individual and his wife had signed a Deed of Gift in the spring of 1994. Later, other parties disputed the validity of her Will and the Deed. The lawyer made "post-meeting notes" that were reviewed by the Court. The Court concluded, after a very careful review of the facts, that the individual understood the nature of the transactions and had the capacity to agree with them.

In 2011 the Virginia Supreme Court upheld the validity of a Will that was executed by an Alzheimer's patient who had a guardian and conservator. Of course, that case, as is the case in all these matters, was decided on the facts and circumstances surrounding the patient's understanding of the documents.

These cases illustrate some of the difficulties encountered in this area. For example, in the second case, the documents were signed six years before the Court reviewed them. The key test seems to be whether the person is able to understand the nature and consequences of the transaction and has the capacity to consent to them. A person can have 'good' and 'bad' days. Mental capacity is not stagnant. In one case, where capacity was at issue,

the Court found that capacity might occur on a date after a period in which the person may have been incompetent (and, presumably unable to sign).

In another recent case a 100 year-old person had executed a Power of Attorney. The court noted that even though the person was of advanced years and that the hospital records from the prior year, as well as for the year of execution, noted diagnosis of 'mild dementia' and 'dementia,' that the individual's later-signed Power of Attorney and Deed were valid. The Court cited a case that stands for the concept that neither sickness nor impaired intellect is sufficient, standing alone, to render a [Will] invalid. (The court applied this standard to the Power of Attorney and Deed case). The key consideration seems to be whether, at the time of the execution of the instrument, the individual had sufficient mental capacity to understand the nature of the transaction being entered into and assenting to the provisions of the documents. There was testimony of a witness that supported the vailidity of the documents.

As you can see, the issue of capacity is a difficult one. Each case must be dealt with individually. The law may require a higher degree of understanding in one context when compared to another context or transaction. However, do not assume that because someone suffers from memory impairments or has been diagnosed as suffering from Alzheimer's disease or dementia that the person cannot sign any legal documents.

A case was decided in 2000 by the Virginia Supreme Court that upheld changes made to the way some CDs were to pass at death by an elderly person. Evidence showed that the elderly decedent was forgetful and often misplaced important papers,

checkbooks, and her safe deposit key. However, there was also testimony that she was close with her family and she apparently made the changes at the bank with a bank employee. The question can be one of timing. If the impairments that exist are such that the person still understands his or her documents and appreciates their consequences then he or she should be able to enter into them.

A case decided in a local Circuit Court in 2009 set aside a Trust and conveyances made by a wife of the principal. In that case, a wife, who died before her husband died, used a general power of attorney to create a separate trust for her and a separate trust for him. Husband suffered from a massive heart attack and she had assumed the management of his general affairs. The Power of Attorney included the general authorities but no specific authority to create and fund a trust. After the wife's death the husband discovered the trust and the conveyances and made demand for the termination of the trust and reversal of the conveyances of 3 properties. The Court ruled that the Trust was void and of no effect and invalidated all the transfers. The Virginia Supreme Court upheld this decision in 2010.

In 2009 the Virginia Supreme Court remanded a case to the Fairfax County Circuit Court involving allegations of breach of fiduciary duty and other allegations. The opinion reviewed the transfer of large sums of money by a son who was Attorney-in-Fact into joint bank accounts held jointly with his elderly mother, and subsequent transfers of large amounts to bank accounts owned by him and his wife. The opinion described the use of a home equity line of credit (HELOC) and a reverse mortgage, as well as

transfers of large amounts of cash from financial accounts of the principal to the attorney-in-fact.

A 2008 case reported by a Pittsylvania County Circuit Court was nothing short of incredible. The case involved a retired farmer. One of his daughters and her husband transferred large amounts of property to themselves. They engaged in a number of tactics to prevent contact with his other children, friends, and so forth. Incredibly, the gentleman was held as a prisoner in his own home, and escaped to a 7-11 by prying open a door at night and walking 10 miles to safety. The court ordered recovery of the funds and $100,000 in compensatory damages and $50,000 in punitive damages for the outrageous conduct of the defendants.

## What is a Guardian or a Conservator?

A Guardian refers to someone appointed by the Court to be responsible for someone's person-his care, safety, place of residence and the like.

A Conservator refers to someone appointed by the Court to be responsible for someone's assets and income. A Conservator may have the authority to sell real estate and to manage literally all the income and assets of an individual. Oftentimes people will refer to both offices of Guardian and Conservator with the same label of Guardian. However, in Virginia they are distinguished in the statutes that explain what they are.

In many cases the same person or persons serves in both offices. The Guardian and Conservator must file a series of reports with the Court and is typically subject to a number of other requirements.

While individuals may take steps to avoid the appointment of a Guardian or Conservator, sometimes the only solution in a case is to seek appointment in one or both of these offices. Even though a Guardian and Conservator are subject to a number of requirements that do not apply in a private context, there are advantages to these offices. For example, a guardian is normally empowered to direct where an individual will live, how he or she will be cared for, and determine the other day-to-day arrangements for the care and safety of someone. This may be particularly helpful where the individual is confused and unwilling to accept a course of treatment or a place of residence that is recommended as most beneficial in the circumstances by care experts. Another advantage to the appointment is that the guardian and conservator serving will be subject to the jurisdiction and requirements of the Court. In addition, during the proceeding that considers whether a Guardian or Conservator should be appointed for someone, an attorney, who is appointed by the Court, represents the interests of the alleged incapacitated person. This person is called the guardian *ad litem.* The guardian *ad litem* investigates the case and reports to the Court. The report of the Guardian *ad litem* is often very helpful in framing the need for a Guardian or Conservator. Thus, the process of being appointed and the work done by the Court, the guardian *ad litem,* guardians and conservators often significantly benefits the individual and those interested in his or her welfare. I have served as a guardian, co-guardian and am counsel to many guardians and conservators.

## Advance Medical Directives

The term 'Advance Medical Directive' ("AMD") is used to refer to documents that define the courses of medical treatment, which will be made available to a person if a terminal condition arises. In addition, the AMD will typically appoint someone to act as medical agent for the principal. Because we are all empowered with the authority to consent to our own medical treatment, the agent's authority will not become effective until and unless a procedure is followed. In Virginia this requires that two physicians, or a physician and a licensed clinical psychologist, after personal examination of the patient, have diagnosed and certified that the principal is not able to make an informed decision about providing, withholding or withdrawing a specific medical treatment or course of treatment.

This agent is typically vested with broad powers by reason of the document and should be familiar with the values, beliefs and wishes of the principal.

The 'AMD' is durable. That is, its legal effectiveness survives the disability of the resident or principal.

The 'AMD' typically will include a 'living will' section. Virginia was the first state in the country, in 1983, to enact a 'living will' statute. The statute authorized 'living wills' which spoke to the issue of discontinuation of medical treatment in the event of a terminal condition. These types of statutes were known as 'natural death statutes.' Articles that appeared in the popular and legal press in the late 1980s and early 1990s made it clear that there was a general lack of understanding about these documents.

In June 1990, the Supreme Court decided the famous Cruzan decision, which found that a patient has a

right to refuse unwarranted medical treatment under the due process clause of the Constitution. Then, effective in December 1, 1991, the Congress enacted the 'Patient Self-Determination Act' ('PSDA'), which requires all Medicare and Medicaid eligible facilities, including hospitals and nursing homes, to do various things with regard to 'advance medical directives.' Following the passage of the PSDA, Virginia revoked its prior statutes that separately addressed living wills and medical powers of attorney in favor of a comprehensive AMD law. You may have been provided with a form at entry that is a statutory form for an AMD.

There are some new provisions that can be incorporated into an AMD that permit an agent to admit a principal to certain facilities, even against the will of the principal, if certain conditions are met. This is an important development that can be appropriate in some plans. This same type of power can be given to a guardian in certain cases. Virginia now enables one to address mental health issues in an AMD.

There are some additional items the principal may want to consider mentioning in an updated AMD. Sometimes we have seen forms that have options for the principal to choose which have not been completed. The document is only as good as its terms. You may want to refer questions and specific needs to an attorney. Be sure that there are an adequate number of original documents so that one will always be available. Typically, the document is copied or left in the patient's chart.

Virginia is still in the process of developing a registry for Advance Medical Directives. Once it is operational, the registry will accept Medical

Directives but they must have been notarized. We encourage our clients to carefully review the terms of their directives and to observe these requirements, so that they can be most useful.

Recently, Virginia's statutes have been modified to allow or address mental health decision making as part of an advance directive. An agent can be empowered to admit the principal to a facility, even if the admission is against the will of the principal, if certain conditions are met. In addition, the statute now makes it clear that the principal may give his or her agent the authority to determine who may visit him or her in a hospital or facility. These are the types of changes that can prove very important to individuals in various settings.

## What About a Living Trust?

A living trust is usually a revocable trust created by someone (the 'settlor') during his or her lifetime. Often the living trust will provide that the assets of the trust are to be maintained and applied for the benefit and support of the settlor during lifetime and, upon death, direct their distribution much like a will. After the trust is created, the settlor will typically transfer title to his or her assets into it. Many types of assets can be held in the trust, including brokerage accounts, stocks and bonds, bank accounts and real estate. In many plans the living trust is utilized to *avoid probate* of the will of the settlor altogether. Probate is the process of proving and administering a will under the jurisdiction of the court. It can be a time-consuming and expensive process.

Within the context of managing the affairs of someone who has or may eventually suffer from diminished

capacity, the living trust can provide a number of key functions:

The trust may name a successor trustee who will oversee the administration of the assets if and when the resident is incapacitated. Often the trust will define a procedure to follow to determine when this should occur. The successor trustee then acts as the legal owner of the assets for the benefit of the incapacitated settlor. This is a different role than an attorney-in-fact because the attorney-in-fact is not an owner of the assets of a principal.

The Virginia Code adopted the Uniform Trust Code, effective July 1, 2006. These provisions were also recodified effective October 1, 2012. The law regarding trusts is complex. However, one should be aware that, when discussing a trust, that trusts involve ongoing duties to care for the property of someone for someone's benefit. The trustee, the person who creates the trust, and the beneficiaries, including persons who may benefit from the trust in the future, may have rights or obligations that apply to them. These obligations may include reporting requirements and disclosure requirements, as well as tax requirements.

Living trusts are popular solutions to the issue of addressing incapacity and probate-avoidance.

## What about an EMS Bracelet?

Emergency Medical Service ('EMS') personnel must act quickly and decisively when summoned to provide aid. The resident may want to discuss with his or her attending physician obtaining a special bracelet that provides notice to EMS personnel.

## Time is Money

After the many elder law cases that we have managed we truly understand the adage 'time is money.' In addressing long-term care expenses, in whatever context, the daily and monthly costs of care or residence often dictate the options and appropriate choices for individuals. By addressing these matters directly and promptly you will benefit both yourself and your family.

## About our Practice

We strive to provide comprehensive legal services to residents and families in all types of settings. We offer a broad range of legal services concerning all facets of issues concerning the elderly and the disabled. We also provide help to persons planning for retirement and to others, regardless of their health status. We have provided advice to residents, concerned family members, adult children and other relatives. We have represented attorneys-in-fact, trustees, and executors in local courts, including Banks. We have also represented some care providers.

## About the Author

A. MARK CHRISTOPHER, a partner in the Fairfax, Virginia law firm YATES CAMPBELL & HOEG LLP, has prepared this booklet. Mark has written a number of articles which have been published in publications such as *The Journal of Taxation, The Virginia Lawyer's Weekly, the American Journal of Alzheimer's Care and Research,* and *The Elder Law*

*Advisory.* Mark contributed to the treatise, *Advising the Elderly Client.*

Mark has presented at a number of conferences such as the Joint Conference on Law and Aging, the Northern Virginia Respite Care Consortium, The Prince William County Area Agency on Aging, the Department of Agriculture, and has presented at educational sessions sponsored by the Virginia Bar, the Fairfax and Arlington Bar Associations, the National Academy of Elder Law Attorneys and the Virginia Academy of Elder Law Attorneys.

Mark has served on the board of directors and has been the President of several local non-profit groups that provide services to the elderly and the impaired.

Mark assists various groups, ministries, care providers and other organizations, participating in presentations and other activities to help care givers, seniors and their families.

Mark has been selected as a "Super Lawyer" and Lawyer of the Year for 2014 in the field of Elder Law by "Best Lawyers" in America, which was a selection by his peers. He has been selected as a top lawyer by Washingtonian Magazine and The Washington Post, as well as other publications in the fields of Elder Law and trust and Trusts and Estates.

Again, we would appreciate your input and the opportunity to be of service.

## BASIC CHECKLIST

1. **Legal Documents** Wills, Trusts, Powers of Attorney, Advanced Medical Directives, Deeds to Property, etc.

2. **Income Tax Returns** (Used to identify sources of income, appreciated assets and other tax matters). We usually need only the most recent returns. If returns are not available, please provide Social Security Numbers.

3. **Financial Planning Documents** If you have had a Financial Plan prepared, please provide us with a copy. Many of the items on this checklist will be addressed in your plan.

4. **List of Heirs** Names, Relationship to Client, dates of birth, addresses and telephone numbers.

5. **Insurance Policies** (Sample List) Please provide the checked items.

___ a. Life, including "FEGLI" and "VA" policies;
___ b. Automobile;
___ c. Health (including pharmaceuticals);
___ d. Disability;
___ e. Former Employer-provided insurance;
___ f. "Mortgage" Insurance;
___ g. Hazard Insurance on Home. Be sure policy limits are appropriate;
___ h. Long-term Care Insurance.

6. **List of Assets**, including tax cost, current value and how held, and list of liabilities.
*A form is provided for your use.*

7. **List Sources of Income**, including pensions, social security benefits and other retirement plans. This should include any Survivor Benefit Pension ("SBP") amounts which have been elected, and any amounts payable under any Joint Survivor Annuities.
*A form is provided for your use.*

8. **Projected Costs of Care**, for clients who need long-term care planning assistance.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This list is not intended to provide legal advice on specific subjects, but rather to provide insight into legal matters that we feel could be useful to our clients and friends.

## CONFIDENTIAL CLIENT INVENTORY

| No. | Asset Description | Who Owns It (How Titled) | Current Fair Market Value | Encumbered Amount if Any | Tax Basis | Beneficiary | Other Notes |
|---|---|---|---|---|---|---|---|
| 1. | | | | | | | |
| 2. | | | | | | | |
| 3. | | | | | | | |
| 4. | | | | | | | |
| 5. | | | | | | | |
| 6. | | | | | | | |
| 7. | | | | | | | |
| 8. | | | | | | | |
| 9. | | | | | | | |
| 10. | | | | | | | |

Name:
Address:
Date:
Contact:
Phone:

**CONFIDENTIAL INCOME ANALYSIS**

| No. | Income Item | Who Receives Income | Amount and Frequency | Tax Status | Effect of Death of Recipient | Beneficiary (If Applicable) | Other Notes |
|---|---|---|---|---|---|---|---|
| 1. | | | | | | | |
| 2. | | | | | | | |
| 3. | | | | | | | |
| 4. | | | | | | | |
| 5. | | | | | | | |
| 6. | | | | | | | |
| 7. | | | | | | | |
| 8. | | | | | | | |
| 9. | | | | | | | |
| 10. | | | | | | | |

Name:
Address:
Date:
Contact:
Phone:

# NOTES

# NOTES