Life Planning Guide

Life planning is
the thoughtful arrangement of assets
and preparation of legal documents
to organize your life and direct your affairs
according to your values and choices.

Life planning allows you and your loved ones
to navigate through emergencies
and predictable life changes with the least
stress, expense, and difficulty possible.

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Blackburn Law Firm PLLC • 727.826.0923
5230 Central Ave, St. Petersburg, Fl 33707

Published as a courtesy by —

Catherine E. Blackburn
Blackburn Law Firm, PLLC
5230 Central Ave
St. Petersburg, FL 33707
(727) 826-0923
www.lifeplanlaw.com

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A copy of this Guide is available for viewing and download at www.lifeplanlaw.com.

Second Edition

Why take the time and incur the expense of "life planning"?

The first answer to this question could be "because we have an emergency." Emergencies arise when someone suffers a sudden illness, accident, or injury. Emergencies do not wait for a convenient time or a specific age. Once people lose capacity to make their own decisions, it is too late to prepare and execute legal documents. Life planning – the thoughtful arrangement of assets and preparation of legal documents to organize your life and direct your affairs according to your values and choices – allows you and your loved ones to navigate through emergencies and predictable life changes with the least stress, expense, and difficulty possible. With a personalized life plan in place, you can relax and focus on living each day to the fullest.

Sometimes, an emergency arises when a loved one needs nursing home care and has not planned for it. According to statistics from 2015, 68% of people age 65 or older will become disabled in at least two activities of daily living. Thirty-five percent (35%) of people over age 65 will eventually enter a nursing home. Florida has the second-largest number of residents over age 65 in the nation.

Few people can pay the substantial cost of nursing home care for long. According to the Florida Agency for Health Care Administration, the average cost of nursing home care was $9,485 per month in 2019, up from $8,346 in

2015. Although government assistance is available, it has strict and complicated criteria. Fortunately, Elder Law attorneys are well versed in helping seniors preserve assets and meet Medicaid criteria, even if they initially appear to be ineligible. If you or a loved one are facing nursing home care, you should consult an Elder Law attorney for assistance. More information about Medicaid funding for nursing home care is available at www.lifeplanlaw.com or by calling (727) 826-0923.

Does it make sense to engage in life planning before an emergency strikes? Absolutely.

The goals for life planning are as varied and personal as the people reading this page. However, there are some common goals in life planning, and it is the relative importance of these goals that defines the type of life plan that works for each person. It truly is useful to think, right at the beginning, about —

What is important to me?

How important is it?

How much time am I willing to devote to planning?

How much can I afford, or am willing, to spend for life planning?

Goals for life planning

- Make daily activities easy to manage, such as home needs (mortgage, insurance, taxes), bank accounts, investments, health care, health insurance, etc.

- Efficiently use professional assistance, such as accountants, investment advisors, trustees, guardians, case/care managers, etc.

- Permit family, close friends, and/or professionals to assist with activities and needs.

- Make provisions in case help is needed with daily activities, such as financial matters, household activities, and personal care needs.

- Ensure that a trusted family member, friend, or professional can arrange financial and personal matters if an emergency arises.

- Protect myself and my assets from theft, undue influence, mismanagement, and creditors.

- Make immediate changes to financial assets in response to an emergency.

- ☐ Preserve assets to maintain quality of life.

- ☐ Provide for loved ones.

- ☐ Maintain as much autonomy as possible for as long as possible.

- ☐ Make certain that others know, respect, and follow personal preferences and choices.

- ☐ Direct funeral, memorial, and/or burial arrangements.

- ☐ Provide for the distribution of assets after death.

Other goals:

_____

_____

_____

Take a moment to note which goals for life planning are important to you, and how important they are. You might underline or circle some goals, number the most important ones, or label each as an "a, b, or c" priority.

Many methods of planning exist, such as carefully stating how assets are titled; special deeds to property; domestic contracts; personal services contracts; powers of attorney; health care surrogate designations; living wills; living trusts; converting assets to a different type; transferring assets; guardianships; wills; and "avoiding probate." Each planning method fulfills one or more goals and some emphasize one goal over another. For example, some people find flexibility and freedom to make changes important. Others place special value in consistency and predictability. Life plans should be personalized to fulfill the goals that are important to you.

Methods Of Life Planning

Asset titles: How an asset is titled defines who owns it, how it can be divided, and what happens to it upon the death of the owner. For example, assets titled in the joint names of husband and wife are owned by each and pass to the spouse upon death. An asset titled in the names of two or more unmarried persons is owned jointly, although not necessarily 50-50, and may or may not pass to the other upon death depending on how it is worded.

Sometimes, it may be important that the asset pass to a joint owner upon death, or it may be important that it <u>not</u> pass to a joint owner upon death. For example, it may be important that a bank account pass to a spouse or partner but equally important that it not pass to one child and exclude other children. Even if a will distributes assets

equally between children, an asset titled in name of one child will go only to that child. It is also important to consider that a joint owner has control over the asset and must be trusted.

Deeds: Deeds list the title owners of real property. They are recorded in the county records and available to the public. Ownership of real property has roots from the day this country was founded, and "chain of title" is of paramount importance to the ownership and, very importantly, the ability to buy and sell property. Without a proper chain of title, difficulties arise in attempting to buy or sell property. This is why it is very important that every deed be prepared properly. If a deed is not prepared properly, it can cause problems whenever a property is sold.

Titles on deeds define who owns the property. They can also define what happens to the property when an owner dies. Deeds in the name of husband and wife automatically pass title to the surviving spouse when one spouse dies. Deeds in the name of two unmarried people automatically pass title to the survivor **only** if the deed is written to "person one and person two as joint tenants with the right of survivorship."

Deeds in the name of one person alone do not pass title upon death. For this property, a probate estate will be necessary. The Florida Constitution contains unique provisions for "homestead" property. Under these provisions, a home **must** pass to a person's spouse for life

and then to the person's minor children, if a spouse and minor children exist. If a spouse and adult children exist, the property must pass to the spouse or to the spouse for life and then to the children.

If the person has a will, the Probate Court will authorize transferring property to the person named in the will, so long as the will does not conflict with the constitutional provisions. If the will conflicts with the constitutional provisions, the Constitution overrides the will. If the person has no will, the Probate Court will pass title according to the Constitution and, if the constitutional provisions do not apply, according to the "intestate" statutes.

You can see that passing real property, especially homesteads, in Florida can be complicated and can require a Probate estate. If you want to avoid a Probate estate, it is important to prepare deeds in a way that will pass title outside the estate. Joint and survivorship deeds are one way to pass title outside the estate. There are special types of deeds that can also pass title outside an estate, such as life estate deeds or enhanced life estate ("Lady Bird") deeds. Real property can also be titled in (owned by) a trust, land trust, or company (LLC, corporation, etc.).

Domestic contract: A domestic contract defines how each person contributes and shares in a household. It is similar to a partnership business contract and gives each household member certain rights and responsibilities. It

can avoid misunderstandings, be enforced in court, and help to clarify other planning documents.

Personal services contract: A personal services contract sets out specific services, who will provide those services, how much the provider will be paid, and how and when the provider will be paid. Personal services can be anything from paying bills to providing hands-on care. This type of contract is frequently used to preserve assets and qualify for Medicaid when a person needs nursing home care. With a personal services contract, one can pre-pay for services that Medicaid will not provide, still qualify for Medicaid benefits, and maintain a quality of life that would not be available without this planning device. It can be used with family members, friends, and professionals.

Power of attorney: A power of attorney (POA) gives another person (the "attorney in fact" or "agent") the right to act on behalf of, or instead of, the person who signed the power of attorney (the "principal"). Although a POA is a very common and useful planning document, it is important to understand some basic facts about the POA:

1. It is effective when signed. This means that, unless the agent does not have the original or a copy of the POA, the agent can take any action that is authorized in the POA, with or without the principal's separate approval.

2. The agent owes specific duties to the principal and will be legally liable for violating those duties. In general, the agent must act on behalf of, for the

benefit of, and in the best interests of the principal. A POA is not permission for an agent to take advantage of the principal or use the principal's assets for themselves.

3. A POA can be revoked, but it is important to make sure that third parties are informed that the POA was revoked.

4. An agent can be removed by a court, but this may be expensive and not necessarily easy.

On October 1, 2011, Florida substantially changed the law governing powers of attorney. The new law defined how and when POA's are effective, created qualifications for agents/attorneys in fact, listed how and when a POA terminates or is revoked, prescribed how co-agents or successor agents may act, permitted only "qualified agents" to be compensated, specifically described an agent's duties, created a method for court intervention, allowed third parties to challenge a POA before accepting it, and**, importantly, required that certain powers be stated very specifically and separately signed or initialed by the principal.** The powers that require separate initials are the powers needed to preserve assets while applying for Medicaid nursing home benefits. It is **very important** that the power of attorney include the items.

The Florida legislature amended the power of attorney statute again in 2013. This amendment allows the agent to access the principal's digital accounts, such as online banking, Facebook, email, and the like. This power must be specifically stated and separately initialed.

Although a POA signed before October 1, 2011, or in another state, will usually be effective, it may or may not permit the agent to do what the principal actually wanted. In addition, Medicaid authorities, banks, brokerage firms, institutions, or third persons, may or may not challenge the "old" POA. The author of this Guide recommends that all existing plan documents, and especially powers of attorney, be carefully examined to make sure they still accomplish the goals for which they were drafted. In addition, the author recommends against using pre-printed or computer/internet generated powers of attorney.

Powers of attorney are one of the most effective and useful life planning documents. A properly-drafted POA allows an agent to take actions on behalf of a principal <u>after the principal can no longer act for himself or herself</u>. This is often very important when the principal becomes temporarily or permanently incapacitated or needs nursing home care and can allow the agent to preserve the principal's assets, even if the principal must apply for Medicaid benefits. A living trust, if properly prepared and funded, can also be used in this way (see "living trusts"). Everyone should consider preparing a POA and/or living trust and consult with a qualified attorney about the risks and benefits of these devices for their specific circumstances.

Once the principal's mental abilities decline, it may be too late to prepare or modify a POA. However, there are few hard and fast rules about when a person "has capacity" to prepare or modify a POA (or a contract, will, or other

document). A person with dementia, for example, may still have capacity to create or modify a POA. Do not assume it is too late. Rather, consult a qualified attorney about what can be done.

Because mental and physical abilities often diminish with age, seniors are a prime target for unscrupulous people and businesses. If you believe that an agent, a professional, a business, a family member, a caregiver, or someone else has or is taking advantage of a senior, do something about it. There are special laws protecting seniors. You can consult an attorney about what is and is not appropriate or call Florida Adult Protective Services at 1-800-96 ABUSE.

Health care surrogate designation: A surrogate designation is a document that formally appoints one or more persons to make health care decisions for another if the other is temporarily or permanently unable to make his or her own decisions. It usually permits the surrogate to obtain medical records and can be personalized to incorporate provisions of a living will or even combined with a living will.

Health care surrogate designations are important in minimizing confusion and stress that frequently accompany a serious illness or injury. They ensure that the person you choose will make decisions if you are not able. A surrogate designation avoids searching for a family member to make emergency decisions and places decision-making clearly in the hands of a named person.

Many authorities strongly recommend that all persons prepare a health care surrogate designation.

The Florida health care surrogate statute was amended in October, 2015, to add provisions you may very well desire. After October, 2015, your surrogate designation can authorize your surrogate to speak with your health care providers and obtain your records ***immediately***. You need not be incapacitated.

In addition, after October, 2015, your surrogate designation can authorize your surrogate to provide informed consent and sign for you ***immediately***. If you activate this provision, your health care will not be delayed while providers perform a mental examination to determine your capacity. If health care providers are uncertain about your mental capacity, they can accept your surrogate's signature to authorize care and treatment.

Florida law is designed to make surrogate designations easy to prepare and use, and blank forms can be obtained from many medical providers, office supply stores, and on the internet. Some forms even include living will provisions. Even a simple form is better than none. If you wish to personalize your designation, a qualified attorney can easily assist.

Health Care Power of Attorney: A health care power of attorney is a hybrid of a POA and surrogate designation. While a surrogate designation usually permits the surrogate to make decisions only when the principal is incapacitated, a health care POA permits the agent to make decisions even if the principal could make his or her own decisions. This document can be combined with a general POA or surrogate designation, or separately prepared. Consult your attorney about whether a health care POA is appropriate for you.

Living Will: Living wills express personal wishes for end of life care. They state what life-prolonging measures an individual desires, and what measures the individual chooses to refuse. Perhaps more than any other document, a living will is deeply personal and requires that one consider the end of life.

At Blackburn Law Firm, PLLC – LifePlanLaw.com, we provide each of our clients with a card – printed in color on plastic (like a driver's license) that states "I HAVE A LIVING WILL" and lists the names and telephone numbers of your health care surrogates along with our telephone number and email address. The author suggests that you keep this or a similar card in your wallet, with your driver's license, so that first responders will know who to call if you are ill or injured.

If you want medical providers to use all available means to prolong your life, then you do not need a living will. This would include resuscitation ("CPR"), use of a ventilator, artificial nutrition ("feeding tubes"), and artificial hydration

("IVs") for as long as you live. If you do not want one or more of these procedures, or other end-of-life care, it is best to prepare a living will.

The Florida laws governing "advance health care directives" attempt to balance the individual's right to refuse treatment with society's goal of preserving life. To achieve that balance, Florida law requires living wills be executed with certain formalities and provides a mechanism to challenge in court a surrogate's decision to refuse or withdraw treatment.

Florida significantly changed its statutory living will form in 2001 and added new provisions in 2015. Living wills executed before Florida amended its laws in 2001, or prepared in another state, are effective, but medical providers may hesitate to honor them. Therefore, if expressing your right to refuse treatment is important to you, it is best to prepare a living will that meets Florida's 2001 criteria.

With or without a living will, your health care surrogate, family, friends, and medical providers can support you best if you tell them about your desires. It may seem morbid or insensitive to talk about end-of-life preferences, but no one knows when a catastrophic injury or illness may strike. If we talk about these matters, then we can live every moment of life to its fullest without worrying about what remains unsaid. The common wisdom to "live each moment as if it were our last" is wisdom indeed.

In addition, the author recommends that you tell your surrogate **about your pets**. If you are ill or injured, your surrogate can make arrangements to care for your pets.

Living Trust: A living trust is nothing like a living will. In general, a trust is a place where people ("grantors") place assets to be managed by trustees. There are many kinds of trusts and most, but not all, are created by a written document and the transfer of assets to the trust. Some trusts are permanent and cannot be changed (irrevocable trusts). Some arise from a will after death (testamentary trusts). A living trust is revocable, changeable by the grantor during his or her life, and then managed by a named trustee after the grantor's death. While the grantor lives, he or she can add assets to the trust, take assets away from the trust, change the beneficiaries of the trust, change the trustee, or change any provision of the trust. A living trust is a private document and, unless challenged, is not presented to any court.

A living trust provides a great deal of flexibility and assistance in managing assets. The grantor can create the trust, provide for his or her lifetime support from the trust, provide support for others (especially disabled children) during the grantor's lifetime and/or after the grantor's death, provide for distribution of assets after the grantor's death, and choose the trustee(s). If a co-trustee is named or added, that person can step in at any time to assist the grantor in managing most or all financial affairs. A living trust can also include a "trust protector" who oversees the trust administration to avoid abuse and make changes if the law or circumstances change.

The Florida Trust Code was enacted in 2007 to codify and, in some ways, strengthen the law governing trusts. Trustees must fulfill specific duties and act for the benefit of the trust beneficiaries (including the grantor). They must keep records and account to the beneficiaries for what they do. The actions of a trustee can be challenged in court, but it is up to the beneficiaries to bring the challenge. A court does not automatically review trust activities as it does a will.

A living trust is one of the most commonly used devices to "avoid probate," in other words, to provide for the disposition of assets after death, without reference to a will, and without court involvement.

Converting assets to a different type: As discussed earlier, assets can be titled in different ways to achieve different results. Some people choose to manage assets by adding a joint owner to the asset. This allows the joint owner to manage that asset (such as a bank account or home ownership), but it also gives the joint owner full rights to the asset, subjects the asset to the joint owner's creditors, may complicate or prevent eligibility for Medicaid nursing home benefits, and shuts off all others' rights to the asset before and after death (no matter what the will says). The duties of joint owners to each other are poorly defined, if at all, and court enforcement, if available, is expensive and difficult. Nonetheless, using a senior's assets for oneself may constitute the crime of exploitation and can be reported to Adult Protective Services at 1-800- 96 ABUSE.

There are more effective ways than using joint accounts to manage assets while also protecting the primary owner's interests, fulfilling all of the primary owner's goals, and ensuring flexibility to respond if circumstances change.

Although obvious, it also bears mentioning that almost any asset can be converted to a different type of asset. Anyone who pays even a little attention to the news knows that it is sometimes beneficial to sell stock. It can also be beneficial to buy or sell real estate, insurance, annuities, retirement accounts, certificates of deposit, cars, boats, businesses, jewelry, gold, and anything else that has value. Converting assets can be an important part of life planning.

Transferring assets: Transferring assets is closely related to converting assets and is essential when funding a living trust. In fact, a living trust can only manage or control assets that are titled in the name of the trust.

The author often suggests thinking about a living trust like a filing cabinet. No one would buy a filing cabinet to put it in their living room – it is not attractive furniture. A filing cabinet, however, is very useful if the drawers are labeled, folders are placed in the appropriate drawers, and all important documents are organized in and managed from the filing cabinet. A living trust is similar – title appropriate assets in the name of the trust and manage all of them from the trust.

It is important for seniors to consider carefully any transfer that could be considered a gift. A gift is usually defined as the transfer of an asset for less than its market value. The IRS, bankruptcy courts, and Medicaid authorities use this definition and closely scrutinize such transfers. Attempting to make oneself eligible for bankruptcy or Medicaid by giving assets away will have very negative consequences. The bankruptcy court or Medicaid authorities may insist that the gift be returned or, if not possible, declare the person ineligible for benefits.

It is tempting to help children or grandchildren by giving them money, cars, or houses, or paying debts for them. Unfortunately, Medicaid authorities will look back 5 years and question every gift within that time period. If you or your spouse may need Medicaid benefits for nursing home care within 5 years, you may wish to consult an Elder Law attorney for ways to help without jeopardizing possible Medicaid benefits. If you made gifts within 5 years and find yourself needing Medicaid benefits, you should consult an Elder Law attorney before applying for benefits. Under these circumstances, Elder law attorneys can often help obtain benefits.

Guardianships: Guardianships are a formal, court supervised process of appointing a representative ("guardian") to manage the needs of an incapacitated person (the "ward"). The ward may be physically or mentally incapacitated, or both, and the guardian may be appointed to care for the ward's financial needs (guardian of the property), personal needs (guardian of the person),

or both (plenary guardian). Guardianships can be established for minors or adults who lack capacity to manage their own affairs.

Except for a voluntary guardianship of the property, guardianships apply only to persons who are completely incapacitated (by age as with minors or by mental capacity as with adults). They require court and attorney involvement, remove the ward's legal rights, and can be expensive. The court will supervise a guardianship until the ward regains capacity, if ever, and the guardian must file periodic reports.

For many reasons, it is often preferable to use other life planning tools than resort to a formal guardianship. However, there are times when a guardianship is necessary. If you are concerned about a person's mental or physical capacity, you should consult a Life Planning attorney as soon as possible in order to avoid the need for a guardianship.

Wills and probate: A will is a formal document that directs how a person's assets will be distributed after death. Probate is the court process of administering a person's assets (the "estate") according to the will.

Many people think a will "avoids probate." On the contrary, a will is your ticket to probate. It can only be administered under the supervision of the court.

A will appoints someone to gather and distribute assets (the "personal representative"), defines who will receive the assets (the "beneficiaries"), and directs how the process will proceed. The process begins after the will has been "admitted to probate" and is supervised by the Probate Court.

Many people ask, “do I need a will?” If a person owns assets in his or her name alone and dies without a will (dies "intestate"), state statutes dictate how the person's assets will be distributed. In general, Florida statutes distribute assets according to marital and blood relations, and not necessarily in the order you would choose. In today's world, intestate distribution can be complicated if the deceased person (the "decedent") is or was married, has or had children, or has a business. It can also be complicated if any of the decedent's spouse(s), children, parents, or siblings have died or if the decedent has or had step-children.

It is important to know that intestate distribution is not automatic. It requires court intervention, can result in challenges and litigation, and can be expensive. If a Florida resident dies with only limited assets, the estate may be eligible for a simplified court proceeding ("summary administration") or even no administration. However, making use of the summary administration or no administration procedures usually requires the advice or assistance of a lawyer.

Only you can decide whether the cost and difficulty of distributing assets through intestate procedures is better than the cost of preparing a will. It is relatively inexpensive to prepare a simple will and often advisable, even if you believe you "have nothing" or you put your assets in someone else's name.

“Avoiding Probate": Some people prefer to “avoid probate” (i.e., distribute assets after death without using the court process).

Method to avoid probate include putting all assets in joint names, in another person’s name, or by naming a beneficiary on every asset. This can be effective if you are very careful to "title" all your assets, every single one, in a specific legal way. However, this process requires precise consistency. Even professionals such as bank officers, real estate agents, and title insurance agents often misunderstand the specific meaning of title and beneficiary conventions, and human beings can make mistakes when preparing documents. Life does not hold still and assets are almost always changing in some way.

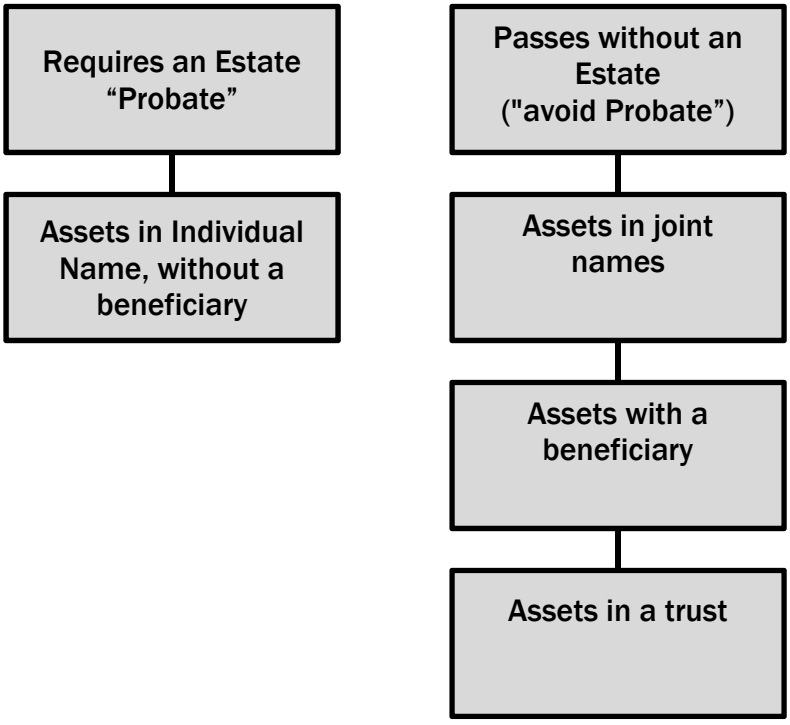
In addition, putting your assets in someone else's name can have unintended consequences. For example, putting a bank account in your name and the name of a joint owner will usually prevent anyone else from sharing in the account after your death.

Creating a living trust is another way to distribute assets after death without probating a will in court. It can be very

effective, but it, too, requires creating the document and titling all assets in the name of the trust. There are many benefits to using a living trust for this purpose and some risks. Talk to a qualified attorney about using asset titles or a living trust to avoid probate.

Whether or not they use asset titles or a living trust to avoid probate, trust and estate lawyers usually include a will with estate plans. This is a good idea "just in case" something arises outside the estate plan.

Following is a chart of methods to “avoid probate”:



Some Comments About Protecting Assets, Exploitation, And Accountability

One cannot live in today's world without hearing stories about scammers, thieves, their schemes, and their victims. It is easy to believe "this can't happen to me," but the sheer number and diversity of victims proves everyone is vulnerable. Exploitation and theft is not limited to strangers. Unfortunately, family members, friends, and even professionals all too often use another's assets as their own.

Once the assets are gone, getting them back can be difficult or impossible. It is critically important to prevent exploitation and theft – or catch it quickly, before substantial assets have been lost. The author strongly recommends incorporating accountability provisions into any life plan. Accountability can include requiring two persons to serve as agents under a power of attorney or trust, or appointing another person (perhaps a professional accountant, financial planner, geriatric care manager, or guardian) to review monthly bank or investment statements.

If agents stray outside their duties, effective action **can be taken**. The Florida power of attorney and trust statutes contain provisions to remove an agent who abuses his or her power. In 2019, the Florida legislature passed a law designed to stop or remedy exploitation of the elderly. Theft and civil theft laws can be used, as can traditional

legal and equitable remedies. If you believe an agent has misused or abused his or her position, please contact a qualified attorney immediately. Do not delay.

Many abuses by agents constitute a crime in Florida. Of course, theft is a crime and takes many forms. Tricking people out of their assets is a crime. Misusing a senior's assets is a special crime known as "exploitation of the elderly." If you believe a crime has been committed, contact the police. If you believe a senior is or has been exploited, call the Abuse Hotline at 1-800-96 ABUSE.

CONCLUSION

Life planning effectively serves many goals and avoids many difficulties as we age, if illness or injury strikes, or when we need assistance. Very few of us avoid all illness and injury, or keep the mental and physical capacity, stamina, and desire to manage all of life's activities alone. Spending a little time and money now to create a life plan may be far preferable to losing large sums if innocent actions create unintended consequences, a loved one proves untrustworthy, or unpredicted circumstances make the best planning impossible. For those without planning in place, changed circumstances may call for immediate or emergency intervention, such as qualifying for Medicaid benefits. In all instances, an Elder Law, trust, or estate attorney can provide a valuable service.

If you believe life planning is right for you, do not delay. Call a life planning attorney now and schedule an appointment. Many life planning attorneys, including the author of this Guide, offer a complimentary consultation to find out what kind of plan will achieve your personal goals.

Catherine E. Blackburn graduated with High Distinction from the University of Kentucky College of Pharmacy in 1978 and practiced pharmacy before entering law school. She graduated with Honors from The Ohio State University College of Law in 1982 and practiced in Columbus, Ohio before joining the faculty of the University of Louisville College of Law in 1987. In 1992 she moved to the Tampa Bay area and practiced catastrophic personal injury law until 2011. After decades of litigation practice, Ms. Blackburn turned her attention to legal life planning with a focus on ensuring that singles, couples, and persons with specific concerns, such as seniors needing long term and nursing home care and LGBTQ persons, receive legal advice and services directed to their needs and circumstances.

If you found this Guide helpful, or have suggestions, please visit www.LifePlanLaw.com. Additional copies and information are also available on the website or by calling (727) 826-0923.