

# What keeps you up at night?

## Top 10 11 Rules for Getting Your Parents “Aging Ready”

Scott Solkoff\*



It is human nature to avoid thinking about incapacity, sickness and death. Avoiding these difficult topics does not make them go away but instead creates anxiety and

fear which rises to the surface from time to time. People with a solid plan to do not feel this anxiety. People who plan have peace of mind and a higher quality of life.

This article contains Scott Solkoff’s Top 10 Rules for getting your parents “aging-ready.” Some people are reluctant to discuss these issues but you can use this article as a reason to get the conversation started.

### **1. Talk to your parents about their long-term care future.**

These are not easy or fun discussions to have but without such

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talks, you will not be sure how to help your parents in the future and you will lack the best tools. You can use this article as an excuse to get the conversation started. Good discussions result in an action list so that important planning opportunities are not lost.

- Ask your parents where they wish to live if they cannot care for themselves.
- Ask whether they have considered how to pay for the care that may be required?
- Ask whether they have considered what health care they wish to be provided if they are in a terminal, vegetative or “end-stage” condition.
- Ask your parents what they would like you to do to help them if they can no longer make decisions on their own.
- Ask whether they have any insurance that you should know about (i.e., long-term care insurance, catastrophic health care coverage or similar policies).
- Ask where they keep their important papers and whether they would feel comfortable with your having copies of key documents now.
- Explain that you will never meddle but that you care about them and want them to have what they need.

**2. A special long-term care Durable Power of Attorney is the single most important document your parents can sign.** A “power of attorney” document can allow your parents to pick a person or persons who can step in and do for them if they cannot

do for themselves. Even regular “powers of attorney” can be immensely helpful but, in Florida, there is special language that can be added to powers of attorney for aging and long-term care issues. Language such as “anything I can do I allow my agent to do” is not enough. Some special power of attorney provisions to consider:

- Specific language authorizing the agent to protect income and assets against the cost of long-term care. This means, for example, authorization to take steps to legally protect assets and qualify for Medicaid and/or V.A. benefits.
- Specific authorization for the agent(s) to create trusts to protect income (general trust creation provisions are not deemed sufficient by the government);
- Authorization (where desirable) for the agents to gift to themselves
- Authorization to sign admissions agreements for life care facilities without the agent being held liable for payments
- Authorization to apply for health and long-term care insurance benefits and to make claims
- Authorization to apply for government benefits.

Powers of attorney can be a generic form but forms will not take advantage of all that the law has to offer, such as the above.

Remember that the power of attorney does not give away any of your parents’ rights. It simply appoints a helper, albeit one with great

authority. Your parents retain all rights including the right to revoke the power of attorney while legally competent.

3. **Consider a “Lady Bird” deed for the home.** In most cases, it is advisable to do a new deed for the home both to avoid a probate proceeding and to protect the home against long-term care costs, Medicaid and creditors. Your parents can do a new deed whereby the home is owned by your parents for the rest of their lives and then, immediately upon death, the property automatically passes to the heirs. Unlike a traditional “life estate deed,” however, there is no loss of Medicaid eligibility and also unlike a traditional “life estate deed,” your parents retain total control. This technique is often preferable to having a trust own the home. Your parents should NEVER transfer title to you or anyone else as joint owners or otherwise, without speaking to an Elder Law Attorney as this can cause a loss of V.A. and Medicaid eligibility and a loss of the homestead creditor and property tax protection.
  
4. **Consider Long-Term Care Insurance.** While your parents may be able to legally shelter their assets and qualify for V.A. or Medicaid to pay for home care, assisted living and nursing home care if and when they need it, long-term care insurance can still be helpful. Contact a reliable advisor who will show you quotes, terms and ratings from more than one insurer. You may

also contact “captive” agents who sell for only one company but you should then check with others also. Have an Elder Law Attorney review the policy details to make sure you buy what you need. Talk to the agent about a policy for you as well.

- 5. Procure detailed written directions about end-of-life decision making.** Recent studies show that living will forms are often not honored by health care providers. While they may be legally valid, one to two page living will forms often do not cut it. Vagaries create liability and enforceability problems. It takes much longer just to define the terms. What works best is an integrated “package” which contains a health care surrogate designation, living will and health care power of attorney. Great specificity is desired while also leaving enough discretion to the agent. It is not enough to say “I do not want *artificial procedures*,” without then carefully defining what is meant by that term. Also, it is important that the document deal with such issues as relieving the surrogate/agent from liability for health care expenses, relieving the doctor of liability so long as the doctor honors the document and considering different procedures or scenarios. Once signed, it is important that the document be accessible when needed. Supply one copy to the primary care physician ahead of time. Make sure each designated agent has a copy. Keep a digital copy that can be printed and accessed as and where needed.

6. **Avoid Probate.** In most cases, we want our clients to avoid a probate proceeding. Probate is the court process by which a person's estate is managed and then distributed. Under Florida law, a probate is often necessary regardless of how much money there is. Probate is almost always necessary when a person dies owning any assets in that person's name alone. Probate can therefore often be avoided by placing other persons' names on your parents' assets as beneficiaries or co-owners or through the use of trust agreements or other entities. But beware ... trusts, beneficiary designations and especially joint ownership, have significant pros and cons. Consider, for example, what would happen if a joint owner gets sued, divorced or dies. Consider what would happen if the assets that exist now do not exist in the future and how that will affect the division of assets. The Lady Bird deed can be helpful in avoiding probate on real estate while trusts are often helpful in avoiding probate on other assets.
  
7. **Avoid Gifts.** Gifts can disqualify people from getting Medicaid and other government assistance when they need it. While we can often "fix" gifts, there are sometimes irrevocable consequences. If your parents wish to gift assets, consult with a qualified Elder Law Attorney to find out how your parents may transfer assets without incurring Medicaid gift penalties. The government "looks back" five years to penalize gifts. It may be

better to make exempt transfers rather than risk ineligibility later on.

8. **Discuss whether a family caregiving agreement may help your family.** According to Kiplinger's Magazine, the Wall Street Journal and other sources, aging parents should consider family caregiver agreements as part of their plan for aging. Even from afar, whether planned or not, children end up taking on a multitude of different responsibilities. A family caregiver agreement puts to paper the role each child (or others) will have in taking care of their parents and can even create a plan for compensating the caregivers. Such an agreement can be a great part of an overall aging plan. By setting forth a list of caregiving responsibilities, who is responsible for what and whether and how much compensation or reimbursement is due, family squabbles can be avoided. Also, a Florida appellate court has ruled that monies transferred pursuant to a family caregiver agreement can be exempt from gift penalties for government benefits. Most Elder Law Attorneys know how to draft these agreements for greatest effect. These agreements are very detailed and usually contain pages of responsibilities and protections. Here are just a few necessary tasks to consider in the Agreement:

- Payment of bills and financial management
- Coordination of home health care

- Receiving and reading mail
- Advocacy with health care providers
- Working with the parents' lawyer, accountant and/or financial advisor.
- Investigating and securing appropriate living arrangements at home, in assisted living facilities and, if necessary, in nursing homes.
- Maintaining or disposing of the home or other real estate
- Coordinating and advocating with insurance

9. **Encourage your parent to create a notebook with all necessary information.** It can be very costly and difficult for a child to step in for a parent if the child does not know where to find everything and what the parent's wishes are. Do not let the perfect be the enemy of the good. Even if your parents don't have all of the desired information at the ready, it is best to start the notebook. Consider doing one yourself and showing your parents by example. Here is a list of some of the items to include in the notebook:

- Legal documents including wills, codicils, trusts, amendments to trusts, powers of attorney, health care advance directives (living wills, health care surrogate designations and health care powers of attorney) and deeds.
- The name and contact information for the financial advisor, accountant and lawyer.

- A list of life insurance policies
  - Pre-need funeral plans
  - A photocopy of Medicare and other insurance cards
  - A list of assets. This does not have to be a formal accounting but enough information so that the children or other agents can be made aware of and locate accounts, safe deposit boxes and other assets.
  - Any special directions about care, assets and wishes.
10. **Be pragmatic about living arrangements.** People wish to remain as independent as possible for as long as possible. Some will say that they never want to move out of their home. In fact, however, most people will find it better or necessary to leave their home at some point in the future. The statistics are overwhelming. For example, most people state that they will not go into a nursing home but they are plenty full. The goal should be to remain as independent as possible with as high a quality of life as possible. Often, though some do not recognize it yet, a move to an assisted living or independent living community can be affordable and provide greater safety and a better quality of life. Also, some will need nursing home care because that it is the only place to get around-the-clock skilled care. Even when a parent is steadfast in not wanting to move out of the home, a good plan should include finding the best community should it become desired or necessary in the future.

Often, the desire or need for a move can happen very quickly. Without a plan, and having to make quick decisions, it is much more difficult to end up in the right community. A good plan includes the following steps:

- Talk to professionals in the community about which independent, assisted living or skilled nursing facilities have the best reputation.
- Depending upon the condition of your parents, tour independent, assisted living or skilled nursing facilities now, in advance of need.
- If your parents are staying in their own home for now, examine ways of preventing falls and making the home safer and more aging-friendly. Consider personal emergency response systems.
- Make yourself aware of social service agencies and care management resources now, in advance of emergencies. Consider consulting with a geriatric care manager or aging life care professional. Find one at [aginglifecare.org](http://aginglifecare.org), the website for the leading geriatric care manager association.

11. **Consult with an Elder Law Attorney.** This may sound self-serving because I am one but I am one for a reason. Elder Law Attorneys focus on the lifetime needs of the client, not just an estate plan for after death. Elder Law is

the fastest growing area of the law because of the practice focus on such matters as incapacity planning, long-term care asset protection planning, planning for “aging in place” while assessing the benefits of independent and assisted living, hospital and nursing home resident rights, working with Medicare, Medicaid and V.A. benefits, preventing elder exploitation and then tying all that together with the most efficient and effective estate plan. Like all professionals, attorneys vary greatly in terms of cost and effectiveness. How do you find the right Elder Law Attorney?

- STEP 1: Is the attorney certified as a specialist by The Florida Bar? Only about 2% of the attorneys in Florida are certified as specialists and they don’t necessarily cost any more. Attorneys who are certified as specialists must go through a testing and audit process by The Florida Bar and must have greater continuing education. Only attorneys who have complied with The Florida Bar rules can legally use the words “certified” or “specialist.” To find a Florida Bar Board Certified Elder Law Attorney, check The Florida Bar website at [flabar.org](http://flabar.org) and select “+more options” on the Attorney search page.
- STEP 2: Is the attorney a Fellow of the American

College of Trusts and Estate Counsel (ACTEC)? ACTEC lawyers are elected to fellowship by leading attorneys throughout the country. ACTEC Fellows go through a vigorous vetting process. Not all ACTEC Fellows practice Elder Law but almost all of those who do are also certified as specialists in Elder Law. For more information and a directory of attorneys, go to [actec.org](http://actec.org). Compare those names to the Elder Law specialists found on The Florida Bar website above.

- STEP 3: Do an Internet search with the names received from Steps 1 and 2. Read reviews and check out the attorney's website for biographical information. Does the attorney write and lecture for The Florida Bar and other reliable attorney groups? Has the attorney served in positions of leadership in credible Bar groups? These are indicators that the lawyer has the respect of other attorneys.

Not all of these factors are determinative. To be sure, there are many good lawyers who have not gone through the vetting process to become certified and who have not yet been identified or elected as deserving of ACTEC membership. Still, these are very good indicators of a lawyer's regard in the legal community. Some people think their legal needs are simple but there is no reason not to seek out

the most highly regarded. Fees are not necessarily any higher and many Elder Law specialists provide services very affordably and may well identify planning opportunities you will otherwise never have considered.