

# LAW OFFICE OF STEPHANIE L. SCHNEIDER, P.A.

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PROPER PLANNING MAY CREATE PEACE OF MIND



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## Negotiated Risk in Residential Agreements

**N**egotiated risk agreements are being used by assisted living facilities to retain residents with medical conditions that exceed the facilities' health care capabilities. As a result, the facility is insulated from liability for an injury to the resident that results from inadequate care. This leaves a resident unprotected and therefore should be considered void as against public policy. Elder law and trial attorneys working together as advocates should be aware of this pitfall when dealing with negotiated risk agreements.

Assisted living facilities do not provide 24/7 care as the resident must be able to perform activities of daily living and manage their own health care needs. A negotiated risk agreement attempts to notify the resident of the potential dangers in being responsible for their own health care yet allows them to accept the risk. Unfortunately, these residents may not be familiar with Florida Statutes 400.401 which identify the rights of residents of an assisted living facility.

In responding to a defense of liability waiver, one should determine if the resident was vulnerable at the time of signing

the contract or if it was an arms-length transaction. In many situations the older adult has not consulted with an attorney prior to signing. This may leave the unrepresented person at a disadvantage when bargaining with a facility.

To assist the resident, it is important to verify that any attempt to negotiate risk and waive liability should address specific known conditions such as: intervention for diabetes, a compromised skin condition, falls or wandering by a person with memory impairment.

The contract should also be written in a manner that clearly discusses risks and alternatives. If this is not done, the resident did not make a knowing and informed decision.

Another reason why such contracts may be unenforceable is that if it was foreseeable that harm could occur and the provider did not make an effort to intervene, the facility should be held liable. Lastly, as with any contract, it must be supported by consideration.

Our office is available to counsel residents and their families on their housing rights. This includes a review of the proposed residential agreement and advisement during the negotiation process.

***“Elder law and trial attorneys working together as advocates should be aware of why negotiated risk agreements should be considered void and unenforceable as against public policy.”***

### ANNOUNCEMENTS:

**Stephanie has been elected Chair of The Florida Bar Elder Law Section as of July 1, 2003.**

**Our firm is a proud Business Patron of the Eagle Program of the Academy of Florida Trial Lawyers.**

### Meet The Staff

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