





HOW WILL WE PAY FOR A NURSING HOME?

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CHAPTER ONE

WHAT IS ELDER LAW AND HOW CAN IT HELP?

I have become very interested in and knowledgeable about the area of Elder Law. So what exactly is that?

Elder Law is defined by the clients who are served, generally, elderly and disabled persons. Elder Law typically includes the following subject areas: Medicare appeals, Medicaid (called TennCare here in Tennessee) planning and appeals, veterans' pension planning, special needs planning, conservatorships, social security disability, estate planning, and elder abuse.

The reader may wonder why the area is called "Elder Law," since it includes disabled persons. The reason is that the majority (but not all) of the persons with issues in these areas are 65 and older.

For example, Medicare is a program available primarily to people 65 years of age or older. But it is also available to people who have been found disabled for the purposes of Social Security Disability Insurance. About 13 percent of the population served by Medicare is under 65 and disabled.

Similarly, since Medicare does not cover long term care, a large portion of Medicaid benefits go to nursing home care. In 2009, Medicaid paid for 40 percent of all nursing home expenses in the United States. All nursing home care is by definition administered to the disabled, since well people of all ages prefer to live in their homes (and cannot qualify for Medicaid-reimbursed nursing home care). Among seniors generally, however, 15.4 percent depend on Medicaid.

Both Medicare and Medicaid are very complicated programs with complicated regulations. Conservatorships, social security disability, veterans' benefits, etc, are equally complicated.

But the need arises not just from the issues facing senior citizens, but also from the demographics themselves. There is a greater proportion of elderly persons on our planet than ever before.

In the United States, the 2010 Census showed the senior population increasing faster than younger groups. The nations median age rose from 35.3 in 2000 to 37.2 in 2010. Seven states have a median age 40 or older.

This rapid aging is due to the bubble in the population created by the "Baby Boom." Each year, more than 3.5 million baby boomers turn 55.

Finally, and sadly, although many seniors are living more healthy lives than ever, the incidence of Alzheimer's disease will create legal issues for single and married seniors. Millions of Americans have Alzheimer's and other forms of dementia.

One in eight people 65 years and older has Alzheimer's disease. Nearly half of those over 85 have the disease.

Because of these statistics, seniors and their families have legal issues that they need to address. The practice of Elder Law is about helping families find the right plan for those issues, one that will provide appropriate care, peace of mind, and preservation of assets to the greatest extent possible.

CHAPTER TWO

WHEN SHOULD CONSUMERS CONSULT AN ELDER LAW ATTORNEY?

Perhaps a story would help to understand when to consult with a lawyer. Ed and Samantha have been married for 50 years. He is 77 and she is 75. They have worked hard all their lives, own a home and have about \$100,000 in savings. They have two grown children who are doing well, one of whom lives close by. Last month, Ed had a stroke. The doctors have told Samantha that Ed can no longer live at home and should consider a skilled nursing facility, i.e., a nursing home. What should they do?

The monthly cost for nursing home care in Nashville, Tennessee is \$5,000 to \$7,000. For assisted living, the average monthly cost is about \$4,000. If Ed goes into a nursing home, his and Samantha's liquid assets could be gone in less than two years.

Ed and Samantha know very little about paying for long term care. They always thought Medicare would cover their medical costs after they turned 65. Their friends are busily giving them advice. Some friends have said that they need to spend everything except \$2,000 before Medicaid ("TennCare" in Tennessee) will pay for Ed's nursing home care. Other friends are telling Ed and Samantha to give everything away to their children NOW.

In fact "now" is the right time to consult a lawyer specializing in Elder Law. First, it's time to do some basic planning if it hasn't already been done. Both Ed and Samantha need wills. Each also needs to select an "attorney-in-fact," or someone who has the power to make financial decisions under a document called a power of attorney. Each needs a durable health care power of attorney so that an agent will be able to make health care decisions if either becomes unable. A living will or advance directive for health care planning can help Ed and Samantha make sure that their wishes about end of life issues, such as being kept alive by a ventilator or by tube feedings, is known to their family members and can be honored.

Next, Ed and Samantha need to be guided in planning for how they will pay for a nursing home and at the same time maintain a good standard of living for Samantha. Fortunately, there are laws that will provide minimum standards of income to meet Samantha's expenses and allocate the assets between them in a way that is fair.

It is not a good idea to give everything away. (See the next chapter). TennCare will look back 60 months from the time of any application and will disqualify Ed from receiving benefit if he has transferred assets without receiving fair market value. The length of the disqualification is based upon the Tennessee's computation of the average cost of nursing home care. Right now, if Ed were to give away the entire \$100,000 in savings, he would be disqualified for about 20 months from receiving TennCare to cover the nursing home costs *from the time he applies and qualifies and not from the time he made the transfer.*

CHAPTER THREE

GIVING AWAY THE HOUSE

"We gave away our house last week to our two children. We want to be able to qualify for Medicaid without the government getting all our money." That's how my interview with two potential clients started.

Unfortunately, there is a common belief that the way to qualify for Medicaid (TennCare here in Tennessee), is to give away all your property to your children. There are many problems with that approach, and I want to detail a few here.

As I said in the last chapter, TennCare has a five year look back. The look back does not begin until you are otherwise qualified for TennCare (i.e., broke and sick). If you need to qualify for TennCare 4 years and 11 months after giving away the house (or any other property) for less than its fair market value, you will be disqualified for a number of months calculated by the uncompensated value of the property divided by \$4,567 (the average monthly cost of long term care in Tennessee).

Here's an example: If the house was worth \$150,000 and you applied for TennCare 4 years and 11 months after giving it away (and you are medically and financially qualified--broke and sick), you would be penalized and would have to pay privately for long term care for 32.7 months.

Even if you suppose that you make 5 years after giving away property before you need to try and qualify for TennCare, there are other drawbacks to this approach.

What if one of your children gets a divorce? What if one of your children has financial reversals and takes bankruptcy, or his or her creditors pursue a lawsuit and get a judgment. The house could be gone.

There are also gift tax complications. My potential clients could each give away \$28,000 (\$14,000 each) to each child without tax implications. But the value of the house is \$150,000. The clients will have to file a form with the IRS next April, IRS form 709, and the extra value of the house over the gift tax exemption will be deducted from the lifetime exemption of \$5 million.

There is one final problem, though. The children because they received the home as a gift, won't get a step-up in basis. That means, when they sell the house, they'll have to pay tax on the entire gain from the time their parents bought the house until they sold it. If they acquired the house on their parents' deaths, they would get the stepped up basis to the house's fair market value at that time.

It turns out that one of my potential clients handled his mother's estate years ago by being given all the property and then later dividing it up with his siblings after her death. I had to tell him, sadly, that things have changed.

The lesson is this: before you give away property to your children in an effort to someday qualify for TennCare, consult an elder law attorney. There are better ways to deal with your assets.

CHAPTER FOUR

GETTING THE CARE YOU NEED AT HOME

My mother wanted to live at home as long as possible. Fortunately for her, when that was no longer possible, she was able to pay some of the capital from the sale of her home for a spot in an assisted living facility that also provided memory care and, ultimately, nursing home care. She was lucky.

For many seniors, finding the care they need in the setting they want can be expensive and difficult. And most seniors want to age in place--in their own homes.

That problem will only get worse in future years. The number of Americans over 65 will double to 80 million people in the next 30 years. The fastest growing cohort are people 85 and older. By 2020, there will be about 6.6 million Americans in that age bracket, when the rate of debilitating ailments begins to skyrocket.

The problem is usually measured by the need for help in one or more "activities of daily living." According to TennCare, the Tennessee version of Medicaid, these are self-care tasks that enable a person to live independently in his or her own home, such as:

- Personal hygiene and grooming;
- Dressing and undressing;
- Feeding oneself;
- Transfers such to and from bed to wheelchair or to and from wheelchair to toilet;
- Bowel and bladder management; and
- Ambulation (walking without a wheelchair, walker, or cane).

If seniors are having difficulty with these activities of daily living (or others, such as medication management) they or their families may feel helpless to get needs met. Fortunately, there are many alternatives.

In some instances, there are volunteer organizations that provide services. In Nashville, for example, the Meals on Wheels program run by FiftyForward provides nutritious weekday, weekend and holiday meals on a sliding fee scale. FiftyForward can also provide care management, adult day services, and other contracted services.

Our area also has a number of very fine private care management organizations. These companies provide a range of services and are run by some very compassionate and capable people.

Long term care insurance can help provide services to maintain the health of their policy holders who want to remain at home. The level of services provided will depend on the language of the insurance contract.

The TennCare Choices program can also provide services to help seniors remain at home, under the acronym of HCBS, or "Home and Community Based Services." There are three levels of the TennCare program, which go by the name of "Choices." Level one is for seniors and other disabled people in nursing homes. Level two is for seniors and other disabled persons who receive home care but would qualify for nursing home care. Level three is for those "at risk" for nursing facility care.

To qualify for these programs seniors must meet guidelines pertaining to their health needs and also must qualify based on income and assets. Families can get assistance in meeting those income and asset criteria by consulting with attorneys who specialize in Elder Law.

CHAPTER FIVE

WHAT ABOUT A NURSING HOME, DOESN'T MEDICARE PAY FOR THAT?

Many consumers are unaware of the limitation on Medicare payments for a skilled nursing facility. Often, they haven't faced the question until they, or family members, are in a crisis situation.

Acute Hospital Care.

If you or a loved one is hospitalized for acute 24-hour medical, rehab, nursing, multi-disciplinary care, Medicare Part A pays 100% after \$1,184 (all numbers in this chapter are for 2013) for the hospital costs in a dual occupancy room as well as medications, treatments and supplies. If the doctor orders a private room as a medical necessity, Medicare will pay for that also. The benefit period for this level of payment is 60 days.

For days 61 through 90, Medicare will pay 100% after a \$296 per day copayment. This is paid for each "benefit period."

For days 91 through 150, Medicare pays 100% after a \$592 per day copayment. These are "lifetime reserve days, 60 of which are non-renewable. In other words, you will only get this payment once, regardless whether you need more than 90 days of hospitalization in the future.

Nursing Home Care.

Payment of any stay in a facility for skilled nursing care and rehabilitation is dependent on a patient having a prior 3-day stay in an acute care hospital. Admission for "observation" does not count. The 3-day hospitalization has to be within 30 days prior to the doctor's orders for admission into a facility for skilled nursing care and rehabilitation.

Then Medicare will pay 100% for the first 20 days. For days 21-100, Medicare may will pay 100% over \$144.50 per day. For days 101 an beyond, Medicare pays nothing.

You noticed that I said in the prior paragraph that Medicare may pay a portion of days 21-100. Until recently, Medicare would deny funding if healthcare professionals found that there was no likelihood of improvement in the patient's condition. The settlement last year of a lawsuit against the federal government changed that standard. Medicare will now pay a portion of days 21-100 if the services will "maintain the [patient's] current condition or prevent or slow further deterioration."

Home Health Care

For medically necessary skilled home care after a hospital stay, Medicare will pay 100% if the services have been ordered by the doctor and are necessary to benefit the patient.

Medically Necessary Durable Medical Equipment.

Medicare will pay for 80%, leaving the patient liable for 20% of the cost of this equipment.

Hospice Services.

Medicare will pay for doctor prescribed pain control and support if a patient has been diagnosed as terminally ill. The doctor must certify that there is a need for the terminal care. There are cost limits on inpatient respite care and outpatient drugs.

All in all, the one that shocks many consumers is the limit on nursing home care. After 100 days, the patient is left to fund the entire cost, unless the patient can qualify for Medicaid.

CHAPTER SIX

SINCE MEDICARE DOESN'T PAY AFTER 100 DAYS, THEN WHAT?

People who enter a nursing home usually pay for it in one of three ways; (1) with their own resources, (2) with long term care insurance, or (3) with government assistance--Medicaid. Generally only the well-off can pay for an extended period of nursing home care with private resources, because nursing

home care can be very expensive. Nursing home care averages about \$5,000 a month in Tennessee.

Nevertheless, most people *start off* by paying for nursing home care with their money and savings.

Medicaid is a joint program of the Federal and State governments that pays for nursing home care for people with limited income and resources. Tennessee is an "income cap" state, and residents theoretically cannot qualify for TennCare if they receive income of more than \$2,094 per month. Furthermore, an individual must have \$2,000 in assets or less to qualify.

Like all government programs, however, TennCare is complicated. There are exempt assets, ways to legally transfer or purchase some assets, and ways to limit income by using a "Miller Trust." Use of these legal strategies and others can help people qualify for TennCare sooner. You may not have to spend all of your money (except \$2,000) on the nursing home before you can qualify.

Nationally, Medicaid pays for about 7 of every 10 nursing home patients. If you find that you must use TennCare to pay for nursing home care for yourself or a family member, you will not be alone.

CHAPTER SEVEN

CAN THE SPOUSE AT HOME BE PROTECTED?

In 1988, as part of the Medicare Catastrophic Coverage Act, Congress enacted a law that has become known as the Spousal Anti-Impoverishment Law (which I'll call "the Act" in this Chapter). It is designed to allocate income and resources between the Institutionalized Spouse and the Community Spouse.

Here's how it works. A married client, Bob, enters a nursing home because of dementia. We'll call him the "Institutionalized Spouse." His wife of many years, Sarah, remains at home. We'll call her the "Community Spouse."

The cost of nursing home care in Tennessee can range from \$3,000 to

\$6,000 depending on the services needed. Bob and Sarah have some assets, mainly a home and some savings. But Sarah is rightly worried that she will be required to spend all her money taking care of Bob, leaving her with nothing if she outlives him.

As we saw in previous chapters, Medicare, beyond a very limited time period, is not going to cover the cost of nursing home care.

Another program, Medicaid (TennCare in Tennessee), will pay for nursing home care, but it is "means tested." In order to qualify for Medicaid, the Institutionalized Spouse is limited to \$2,130 (numbers in this book are from 2013) per month of income and \$2,000 in assets.

Income

Assume Bob receives \$1,500 a month from Social Security and Sarah gets \$1,000 per month. Sarah is concerned that if all of Bob's money goes to the nursing home, she will not be able to meet her expenses.

The Act establishes minimum and maximum monthly maintenance needs allowances for Sarah, the Community Spouse. As of 2013, the minimum allowance is \$1,892 and the maximum is \$2,898. Since Sarah's income, \$1,000, is less than the minimum allowance, she's entitled to receive income from Bob to bring her up to the minimum. Sarah can also receive an excess shelter allowance, presently up to \$567.60 per month, to cover higher housing costs.

With this money going to Sarah, Bob's income will clearly bring him below the limit of \$2,022 per month and will qualify him for Medicaid.

Assets

What about the assets that Bob and Sarah own and the requirement that Bob have no more than \$2,000 in assets? Sarah will need to gather up all the information about the value of the assets and in whose name they are titled. She then will need to make an appointment with the Tennessee Department of Human Resources to complete a Resource Assessment Form (also called a "snapshot") of the couple's resources as of the date Bob was admitted to the nursing home.

After backing out certain exemptions, such as the house and a vehicle, Sarah will then be able to keep one-half of the resources up to a maximum of \$115,920. All of the expenses of the nursing home will come out of Bob's share of the assets until he has spent down to \$2,000 and can qualify for Medicaid.

This is a very simplified discussion of the ins and outs of the Act. Anyone in Bob and Sarah's situation needs to consult with a lawyer to try to protect the income and assets of the spouse in the community. It is a legitimate goal to prevent the community spouse from becoming utterly impoverished by the nursing home admission of her husband.

CHAPTER EIGHT

THE IMPORTANCE OF PLANNING

"Planning is bringing the future into the present so that you can do something about it now." Alan Lakein, American author and Time Management Expert

We plan to go on vacation. We plan to have dinner with friends. But when it comes to planning for how we will be taken care of as we advance in age, many of us prefer not to think about it, believing it will somehow all work out. Unfortunately, when it comes to long term care planning, including finding the appropriate care and figuring out how to pay for it, those who fail to plan are clearly the ones who risk losing the most.

Consider the two scenarios below that contrast the different outcomes of planning early and choosing the "wait and see" approach for long term care.

The Facts

Hank is 72 and Ellen is 69. They have been retired for several years and have started traveling a few times a year to visit their children and grandchildren who live in nearby states. During a recent visit, their oldest child asked them whether they had made any plans in the event one of them suddenly got sick. Hank and Ellen had not thought much about this since both of them were in good health.

However, they agreed to seek some advice upon returning home to see what their options were.

Hank and Ellen own a home that they have lived in since their marriage 45 years ago, and they have checking, savings and CD accounts that total \$325,000. They both worked most of their adult lives, carefully watching their expenses and never spending money on extravagant items they didn't feel they needed.

Scenario #1 - Hank and Ellen planning ahead. Hank and Ellen spoke with an elder law attorney, as they knew they should update their will and their powers of attorney. While there, they were surprised to learn that they could actually plan now to avoid running out of money in the future should they need long term care either at home or in a facility. With the help of their elder law attorney, they placed \$200,000 and their home into an irrevocable trust, and named their children as beneficiaries of the trust. If needed, their children would be able to take a distribution from the irrevocable trust rather than using their own money for Hank and Ellen's needs.

The remaining \$125,000 would be kept in a revocable trust that Hank and Ellen would use for their living and travel expenses. Ellen would apply for a long term care insurance policy to provide further protection for them should her health fail (Hank had applied previously but was denied). The \$200,000 placed into the irrevocable trust would not be counted against them after 5 years, should either of them need long term care and the assistance of state benefits to pay for it.

Unfortunately, six years later Hank had a severe stroke and ended up in a nursing home unable to use his right side arm or leg. Ellen had tried caring for him at home but was simply unable to. Ellen went back to see the elder law attorney for help. Because they had planned ahead and had set up an irrevocable trust, Ellen was able to keep all of the remaining cash assets in their revocable trust, and Hank was able to qualify immediately for state Medicaid benefits. The irrevocable trust which had now grown to \$215,000) remained in place but did not count against Hank since more than 5 years had passed and neither Hank nor Ellen had any direct access to the trust assets.

Ellen was incredibly relieved to know that she did not have to worry about paying for Hank's care and could instead focus on visiting him and providing as

much support as possible to him. Although Ellen was not able to obtain long term care insurance, she has piece of mind knowing their children continue to manage the irrevocable trust and are ready to help both Ellen and Hank as needed.

Scenario #2 - Hank and Ellen without planning ahead. Let's assume Hank and Ellen did not plan ahead. When Hank had a stroke at age 78, the couple had \$300,000 in checking, savings and CDs. Under the Medicaid regulations in place at the time, Ellen was able to keep about \$115,000 of the assets, but most of the remaining assets had to be used for Hank's care. While their home is protected since Ellen is still living there, if she dies first, the home might be recovered by the state of Tennessee to the extent that Medicaid seeks repayment.

It took nearly two years to get Hank qualified for Medicaid, and the process was incredibly stressful for Ellen and her children. Furthermore, no planning has been done for Ellen and if her health fails, their remaining assets are at risk.

What If Hank Was Not Married?

Let's assume Hank was not married, but had the same assets. If Hank planned early, all of the assets he put into an irrevocable trust (including his home) would be protected. Any assets left outside the trust could be transferred or turned into an income stream to pay for his care, should his health fail and he would need to qualify for Medicaid. Just as above, the Medicaid application process would go smoothly and quickly. In addition, an enhanced power of attorney would avoid the need for a guardianship in the event Hank was unable to make the transfers or sign the Medicaid application himself.

If Hank did not plan ahead, more than half of his liquid assets may have had to be used in order to protect Hank's home, depending on the Medicaid rules in effect at the time. This would leave very little to transfer to the children (or to an irrevocable trust). And, if Hank did not have capacity to make any transfers or to establish an irrevocable trust, a conservatorship proceeding would have to be initiated before any transfers could be made. Furthermore, the conservatorship court would have to grant permission for such transfers to be made.

Conclusion

The scenarios above have highlighted the importance of seniors and their loved ones planning early for the possibility of needing long term care. There are

not only financial benefits to doing so, but also numerous non-financial benefits, including reduced stress on the family and peace of mind knowing that the family's needs are taken care of regardless of any health care crisis that may occur.