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# LIFE CARE AGREEMENTS: A CONTRACTUAL JEKYLL AND HYDE?

Donna S. Harkness\*

*With every day, and from both sides of my intelligence, the moral and the intellectual, I thus drew steadily nearer to that truth by whose partial discovery I have been doomed to such a dreadful shipwreck: that man is not truly one, but truly two.<sup>1</sup>*

Ms. Oldaker is eighty years old, alone and in despair, and has come to see an attorney hoping for a miracle. Approximately ten years ago, knowing that she was getting older and fearing that she would face declining health, she spoke with her favorite niece, a much younger woman in her late thirties, about coming to live with her to take care of her. The niece did not agree to live with Ms. Oldaker all the time, but did agree to provide any personal care she might need in return for receiving outright ownership of Ms. Oldaker's home, valued at \$250,000. So, to consummate the deal, Ms. Oldaker executed a simple quitclaim deed, transferring her home to her niece, and the deed was duly recorded. The recitation in the deed describing the consideration states merely that the property was exchanged for a token ten dollars. There is no other writing memorializing the agreement between Ms. Oldaker and her niece.

For several years thereafter, the niece behaved as she always had, calling frequently to check up on her aunt and visiting her in person at least once a week. Ms. Oldaker became ill in 1994 and the niece came and stayed with her for several weeks until she recovered. During that stay, the niece provided personal care services in the form of housecleaning, laundry services, grocery shopping, food preparation, and assisting Ms. Oldaker with bathing.

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1. ROBERT LOUIS STEVENSON, THE STRANGE CASE OF DR. JEKYLL AND MR. HYDE 48-49 (Wordsworth Editions Ltd. 1993) (1886).

Then, in 1996, the niece got married, and gradually, over a six month period, the weekly visits stopped and the phone calls became farther and farther between, until the niece stopped calling as well. Ms. Oldaker was upset and lonely, but understood that the niece had her own life now. Ms. Oldaker had no present need for any services and believed her niece intended to honor the contract.

In July 2002, Ms. Oldaker was advised that she needed inpatient surgery, which would require not only a brief hospitalization, but also a significant nursing home stay for rehabilitation services. The discharge planner at the hospital told Ms. Oldaker that the rehabilitation services could be provided by a home health agency in her home rather than the nursing home IF she could find someone to stay with her. Not wanting to go to the nursing home, Ms. Oldaker immediately called her niece for help. To her dismay, the phone number she had for her niece had been disconnected with no forwarding number. Left with no other choice, Ms. Oldaker was forced to enter the nursing home. After she had recuperated and returned home, Ms. Oldaker was finally able to contact her niece. She told her niece she believed the arrangement was not working and that the niece should deed the house back to her. The niece's response was to laugh and hang up the phone. Ms. Oldaker now lives in fear that the niece will sell the house and evict her. All of a sudden, Ms. Oldaker has realized that the promised assurance of personalized, loving care that she contracted for has transformed into a hideous Mr. Hyde threatening to devour her and leave her destitute and homeless.

## LIFE CARE OR INDEPENDENT CARE AGREEMENTS

Ms. Oldaker's unfortunate circumstances are the result of her informal and unsophisticated attempt to fashion an individual "life care"<sup>2</sup> or "independent care"<sup>3</sup> agreement to provide her with personal care services in her home for the duration of her life, if circumstances so required. Although similar contracts are offered by institutional entities,<sup>4</sup> the focus of this article is on individual contractual

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2. Clifton B. Kruse, *Contracts to Devise or Gift Property in Exchange for Lifetime Home Care – Latent and Insidious Abuse of Older Persons*, 12 PROB. L. J. 1 (1994); Sue Shellenbarger, *Work and Family: Paying Family Members to Care for Elderly Relatives*, NAPLES DAILY NEWS, June 21, 2002, available at <http://www.naplenews.com/02/06/neapolitan/d796561a.htm>.

3. Margaret Isabel Hall, *Project on Legal Issues Affecting Elderly People: The Independent Care Agreement (A Canadian Perspective)*, NATIONAL ACADEMY OF ELDER LAW ATTORNEYS 2001 SYMPOSIUM ON ELDER LAW 11-1 (April, 2001).

4. LOUIS A. MEZZULLO & MARK WOOLPERT, ADVISING THE ELDERLY CLIENT

arrangements between an elderly person and someone known to them as a relative or a friend. Often used as a Medicaid planning device for the moderate-income elderly to accomplish transfer of the home without incurring any disqualification penalty,<sup>5</sup> these agreements have become increasingly prevalent among older people with limited income whose home represents the only asset of significance.<sup>6</sup> For many seniors, the home is the major asset, both in terms of economic and psychological value.<sup>7</sup> Thus, a contract that enables senior citizens to use the value of their homes to secure personal care services that will allow them to remain living at home is exceedingly attractive. Because the elderly person is dealing with friends and family members, the agreement itself is almost always vague, informal and unwritten.<sup>8</sup>

### **PROBLEM AREAS**

The problems with such contracts are many; this article will attempt to identify a few of the problem areas, explore means for crafting a contract that will address them, and then assess whether the benefits of such agreements outweigh the risks attendant upon them.

### **DURATION OF SERVICES**

The first major issue that needs to be addressed in the fashioning of a life care agreement is the length of time during which the caregiver is expected to render services. As the name implies, the expectation is generally that the elderly person will be served "for life," whether that means six months or the next sixteen years.<sup>9</sup> It is important that both the elderly client and the caregiver be realistic in deciding whether the

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§21:56 (2003). Although there is considerable overlap and interchange in terminology, these institutional "life care" arrangements are often called "continuing care retirement communities" or "CCRCs". Many of the same issues that arise in individual life care contracts also arise within the context of CCRCs, and have been addressed to some limited extent legislatively in approximately 30 states. *Id.* at § 21:58. See also Lawrence Leonard, *The Ties That Bind: Life Care Contracts and Nursing Homes in* LEGAL AND ETHICAL ASPECTS OF HEALTH CARE FOR THE ELDERLY 83 (Marshall B. Kapp, et al. eds., 1985).

5. TIMOTHY L. TAKACS, ELDER LAW PRACTICE IN TENNESSEE 158 (Supp. 2002).

6. Hall, *supra* note 3, at \*5; see also Lillian M. Jacquard, *Preserving and Planning for the Principal Residence*, 51 R.I.B.J. 11 (2003).

7. JOAN M. KRAUSKOPF, ET AL., ELDERLAW: ADVOCACY FOR THE AGING § 22.1 (1993); Lawrence A. Frolik, *The Special Housing Needs of Older Persons: An Essay*, 26 STETSON L. REV. 647 (1996).

8. Hall, *supra* note 3, at \*4-5.

9. Nathalie D. Martin, *Funding Long-Term Care: Some Risk-Spreaders Create More Risk Than They Cure*, 16 J. CONTEMP. HEALTH L. & POL'Y 355, 356-60 (2000).

agreement should be so open-ended.<sup>10</sup> Even a well-intentioned caregiver may prove unable to furnish services for the lifetime of the client due to the caregiver's own ill health, disability or death.<sup>11</sup> Caregivers are usually a spouse, son, daughter or daughter-in-law of the elderly person, and, as such, are often elderly or experiencing health problems themselves.<sup>12</sup> The job of caregiver is unexpectedly demanding for these family members, who often have to either quit or reduce outside employment, and takes its toll in terms of additional financial burdens and chronic stress-related fatigue and illness.<sup>13</sup>

### **TYPE OF SERVICES**

The next issue to be determined is the type of services the caregiver is expected to render. Assuming that the elderly person is in fairly good health and still able to live independently at the outset of the agreement, both parties to the contract may have widely divergent concepts of what services are to be expected, and both sets of expectations may differ drastically from the level of services that actually prove to be required.<sup>14</sup> Much of the disparity may arise from the fact that the elder and the caregiver are part of a relationship that precedes the contract and that adds an emotional component to the mix of expectation. In the case of parent and adult child, the expectation of a loving, sacrificial relationship makes it particularly difficult to think things through rationally.<sup>15</sup> Thus, the parent's expectation may be that the child should really be providing these services without receiving compensation in any form, and may be inclined to undervalue the time and effort required to perform unskilled personal services.<sup>16</sup> The child, on the other hand, may come to feel "put upon," particularly if the elder's health declines drastically and he or she lives in this deteriorating condition for a period that extends beyond what the child reasonably expected.<sup>17</sup> This may be especially true if there are other siblings who are not contributing to the effort on the grounds that the

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10. Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy*, 12 J.L. & POL. 195, 265-70 (1996).

11. Scott M. Solkoff, *Personal Services Contracts for the Elderly Revisited*, NATIONAL ACADEMY OF ELDER LAW ATTORNEYS 2001 SYMPOSIUM ON ELDER LAW 11-3 (April, 2001).

12. Rein, *supra* note 10, at 266.

13. *Id.* at 267.

14. Hall, *supra* note 3, at \*6; see also Kruse, *supra* note 2, at 38.

15. Hall, *supra* note 3, at \*6.

16. TAKACS, *supra* note 5, at 158.

17. Sana Loue, *Elder Abuse and Neglect in Medicine and Law*, 22 J. LEGAL MED. 159, 168-79 (2001).

caregiver child has been paid for these services. The elder person may exhibit personality changes as well, with increasing querulousness, nagging, suspicion and dependence that serve to further stress and irritate the caregiver, who now feels imprisoned by the situation. Such conditions provide a prime environment for abuse of the elder, who is now helpless, both physically and financially.<sup>18</sup>

### NATURE OF PAYMENT

As with any other contract, payment for life care contract services may be lump sum, either at the outset of the contract or at the end, or in installments as the services are rendered.<sup>19</sup> Where real property is transferred immediately as consideration for the services, the contract can be likened to an annuity.<sup>20</sup> Under an annuity contract, one initial lump sum payment may purchase life-time income for the annuitant,<sup>21</sup> while under the life care contract, the transfer of real property purchases life-time care and personal services.<sup>22</sup> Unfortunately, the inherent risks of relying on an immediate transfer of real property as consideration for long-term provision of services are often overlooked by the elder person.<sup>23</sup> What if the caregiver wants to move elsewhere and sells the home? What if the caregiver dies and his or her creditors attach the property? The elder can be left without shelter and with no means of support.<sup>24</sup>

On the other hand, if the real property transfer occurs at the end of the contract, the agreement may represent an undue risk for the caregiver. Failure of the client to will the property to the caregiver in accordance with the alleged agreement between the parties has generated a host of litigation.<sup>25</sup> Although real estate generally appreciates, the caregiver bears the risk of depreciation in value if the neighborhood is older in character or if the property is not being properly maintained. The caregiver must be concerned that the property is insured against the risk of loss or damage as well in order to

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18. *Id.*

19. TAKACS, *supra* note 5, at 160; Solkoff, *supra* note 11, at \*6.

20. TAKACS, *supra* note 5, at 160; *see also* Guthmann v. La Vida Llena, 709 P.2d 675 (1985).

21. MEZZULLO & WOOLPERT, *supra* note 4, at § 5:20.

22. TAKACS, *supra* note 5, at 160.

23. Hall, *supra* note 3, at \*6.

24. Kruse, *supra* note 2, at 3-4.

25. *See* Estate of McClanahan v. Jones, 471 S.W. 2d 555 (Tenn. 1971); Matthews v. Wolfe, 1999 WL 172677 (Tenn. Ct. App. 1999); Bozzo v. Jacobs, 130 Cal. Rptr. 524 (Cal. App. 1976); Laczynska v. Zebroski, 2003 WL 129208 (Cal. App. 2003); Messina v. Scionti, 406 So. 2d 529 (Fla. App. 1981); and Crossman v. Reeves, 825 P.2d 1330 (1992).

"protect the investment," but may have difficulty convincing the insurance company that he or she has the requisite insurable interest to do so.<sup>26</sup>

### *QUALITY OF CARE*

The very flexibility and range of services that can be provided under individual, independent life care contracts makes quality of care particularly difficult to address.<sup>27</sup> Because the services provided under independent life care contracts are usually unskilled and the providers generally unlicensed,<sup>28</sup> there are no existing recognized standards by which to measure or evaluate performance. As a practical matter, evaluation of performance is defined by the client's satisfaction or lack thereof.<sup>29</sup> Perhaps the client has always been a critical person, a perfectionist and difficult to please. In such a case, frictions can be expected to arise immediately when the client continuously finds fault with the caregiver, who may already feel somewhat resentful.<sup>30</sup> Disputes can arise if the client's expectations of demands are unreasonably high or the caregiver's standards are unreasonably low or are simply divergent from those of the client.<sup>31</sup> Disagreement may arise, for example, over such things as timeliness of tasks (is the mail picked up as it arrives or left to sit all day); priority (are the dishes washed and beds made before the caregiver leaves to do the grocery shopping); level of fastidiousness (are dust balls left behind the sofa, water spots on the glasses, etc.); and such intangibles as tone of voice, gentleness of touch, thoughtfulness, with which tasks are performed. Many of these things would constitute the best possible performance, but are difficult to monitor and enforce, particularly by a client who is disabled and dependent on the caregiver. As already noted above, emotional expectations and needs already present in the relationship between the client and caregiver add an additional dimension of difficulty and again give rise to neglect and psychological, if not

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26. 43 AM. JUR. 2D *Insurance* §§ 938, 941 (1982; Supp. 2002). See also *Dimmitt v. Progressive Casualty Insurance Co.*, 2003 WL 115231 (Mo. 2003). Since an insurable interest simply requires a showing that the insured will suffer real and ascertainable loss as a result of destruction of the property, a caregiver should have an insurable interest under these circumstances, but establishing the vest and existence of that interest may present a problem.

27. Solkoff, *supra* note 11, at \*4.

28. *Id.*

29. Hall, *supra* note 3, at \*7.

30. Loue, *supra* note 17, at 170.

31. *Id.* at 172-73.

outright physical, abuse.<sup>32</sup> And this may represent the best possible scenario – at the other end of the spectrum, the quality of care may deteriorate to the point where the elder's very life is endangered:

"The 91 year old widow was found comatose and all alone on a sweltering day. . .because she had trusted a home care worker with her life. . .this self-assured patrician, who grew up on Fifth Avenue in New York City, wound up a penniless prisoner in her Lincoln home. . .a cleaning woman found her alone and crying because she had not been cared for all day and had soiled her bedclothes. . .like many other widows in similar predicaments, she lost control of her beloved home through a desperate attempt to stay there forever. She gave it away to a health aide worker in exchange for daily care that she could no longer afford from a full-time nursing service costing \$72,000 a year. . .Specialists in elder care say that it is an increasingly common sign of the times, especially in suburban settings: infirm widows with mortgage-free houses and dwindling funds trade their homes for care and wind up with neither."<sup>33</sup>

### THE EMERGENCE OF DR. HYDE

As happened in Ms. Oldaker's situation, described at the beginning of this article, it is often the case that the first consideration of how disputes will be resolved or how the contract will end only occurs when the situation is already virtually irretrievable. On the face of the deed, Ms. Oldaker has relinquished her home without reservation of any rights in the case of breach by the caregiver, so she will now have the burden both of establishing the agreement and of proving the breach.<sup>34</sup> If the caregiver is able to successfully characterize the quitclaim as a gift, Ms. Oldaker will be out of luck entirely.<sup>35</sup> Even if she is able to prove the existence of the agreement, the vagueness and generality of "care for life" may make proof of breach inordinately difficult.<sup>36</sup> The niece may be able to argue that she is not in breach, that her contractual services did not rise to the level of nursing home care, and so, once

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32. Kruse, *supra* note 2, at 29-31.

33. Gerard O'Neil, *Elderly Face Peril in Trading Homes for Care*, BOSTON GLOBE, May 17, 1992, reprinted in Kruse, *supra* note 2, at 2.

34. 17A AM. JUR. 2D *Contracts* §6 (1991, Supp. 2002).

35. Charles C. Marvel, Annotation, *Unexplained Gratuitous Transfer of Property*, 94 A.L.R. 3D 608 (1979).

36. Hall, *supra* note 3, at \*9.



nursing home care became a medical necessity, it would have been neglectful for the niece to try to provide services that she was not adequately trained or equipped to provide. As to Ms. Oldaker's concerns about the niece's possible disposal of the home, nothing exists in the agreement to prevent or limit the niece from selling or mortgaging the home as she sees fit.

Finally, even if the niece's lack of effort to help the client remain in her home as long as possible is determined to be a breach, the niece has performed in the past, so presumably would be entitled to some compensation for those services.<sup>37</sup> If Ms. Oldaker seeks to recover her home, she will need to be prepared to pay the niece a fair price for the services already rendered. There are legal theories that may be efficacious in providing Ms. Oldaker with a remedy: a constructive trust may be imposed if the property has been acquired through actual or constructive fraud, duress or undue influence,<sup>38</sup> or a resulting trust establishing the true nature of the agreement between the parties may be asserted on the quitclaimed property in order to ensure that Ms. Oldaker's interests are protected.<sup>39</sup> Ms. Oldaker might also bring an action to set aside the deed on grounds of lack of consideration.<sup>40</sup> Finally, the niece may be subject to prosecution for elder abuse and/or exploitation under most state statutes.<sup>41</sup> But all of these remedies presuppose that Ms. Oldaker is assertive enough to pursue her rights or that she has someone who cares enough to assert those rights for her. In many cases, as suggested by the foregoing story involving the ninety-one year-old woman, the elderly person will be in a condition of total dependence on the caregiver and will have no means with which to contact help and no funds with which to retain an attorney.

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37. TAKACS, *supra* note 5, at 161.

38. Kruse, *supra* note 2, at 32-36.

39. *Id.* at 27-31.

40. *Ellis v. Sholar*, 133 So. 2d 340 (Fla. App. 1961).

41. All fifty states now have some form of legislation addressing abuse of the elderly. See THOMAS P. GALLANIS, ET AL., *ELDER LAW* 297 (2000). Definitions of abuse and exploitation vary greatly from state to state, however, and criminal liability for neglect would only arise in the instance where existing tort law would posit a duty of care on the defendant. See Joann Blair, "Honor Thy Father and Thy Mother" – But For How Long?: ADULT CHILDREN'S DUTY TO CARE FOR AND PROTECT ELDERLY PARENTS, *reprinted in* GALLANIS, ET AL., at 310. Of course, if the conduct rises to the level of actual assault and battery, criminal prosecution is available under traditional state criminal law, as well as through adult abuse statutes. Loue, *supra* note 17, at 195-97.

## ADDRESSING THE PROBLEMS OF LIFE CARE CONTRACTS

### *ASSESSING THE SITUATION*

If anything is clear from the foregoing discussion, it is that individual life care contracts are plagued by a lack of critical examination and consensus as to the terms of the agreement and by unrealistic thinking with respect to performance of those terms. The first step in addressing the host of problems outlined above is by meeting with the client to determine exactly what the needs are and how they can best be met in the client's situation. This will involve a frank and honest assessment of the client's circumstances with respect to current and projected health, life expectancy, familial and social support systems, assets and income, as well as the client's wishes concerning how he or she will live out his or her life, and how these wishes can best be achieved.<sup>42</sup> Therefore, the first advice that elderly clients should receive from an attorney concerning life care agreements is that some sort of familial or social counseling will be a necessary prerequisite to consideration of any such agreement. The counseling session can be conducted by the attorney alone or in conjunction with other professionals, such as ministers, social workers or case managers, who either are familiar with the client's circumstances or are knowledgeable in the area of gerontology, and who owe the client a duty of confidentiality comparable to that owed by the attorney. In preparation for the counseling the client should provide a comprehensive listing and valuation of all assets, identification of all close relatives (or persons who would be expected to be close relatives, such as spouse, children, parents, siblings, nieces and nephews), friends and any existing caregivers, and the results of a current health examination that addresses cognitive functioning as well as physical condition. With this information as a foundation, the attorney can begin to explore with the client whether or not a life care contract is appropriate at all.

### *ASSESSING THE CAREGIVER*

If the client determines that a life care contract is appropriate, the next step will be to ascertain the fitness of the proposed caregiver. How well does the client actually know this person? The question is obvious if the proposed caregiver is someone who the client only recently became acquainted with, but if the proposed caregiver is an adult child

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42. Hall, *supra* note 3, at \*14-15.

or long time friend, the client may dismiss such an inquiry as absurd. Yet, the fact is that there is a wealth of information many parents don't have about their adult children, let alone their friends. Has the child ever been convicted of a crime? Any drug problems? Is his or her credit good? Has he or she been fired from a job? How frequently do the parent and child visit? Is the child always asking for money or loans of objects without repayment or prompt return of things borrowed? Does the child currently perform any errands or odd jobs for the parent? Are there little things that might indicate a lack of respect or an incipient problem with boundaries, such as continual interruption of the parent by the child, expressions of exasperation by the child at the parent's perceived slowness, ignorance, etc.? Honest examination of these things at the outset can eliminate much heartache later.<sup>43</sup> If the attorney feels the client is downplaying any frictions in recounting the relationship, then a request to the client for names of persons who have observed how good the adult child is in responding to the parent's needs is in order. Letters of reference, a credit check and an adult abuse background check are imperative if the client is contemplating a life care contract with a non-relative.<sup>44</sup>

## CRAFTING THE AGREEMENT

### DEFINING REASONABLE SERVICES

If it is determined that the caregiver is suitable and willing to serve, then the task of crafting the agreement begins. The nature, type and duration of services needs to be defined with enough specificity to make enforcement of the contract meaningful and yet with enough adaptability to preserve the unique flexibility afforded by the life care concept. Again, as previously discussed, the notion that life care contracts are all encompassing is part of the unrealistic thinking that undergirds both their appeal and their high probability of failure. For such contracts to be reasonable, the definition of services must exclude the sorts of services that rise to the level of "long term," or nursing home, care. To expect one unskilled caregiver to provide long-term care services around-the-clock for a lifetime is at best unreasonable and

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43. Loue, *supra* note 17, at 167-72.

44. See Seymour H. Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 210 (2001); see also Jennifer Marciano, *Mandatory Criminal Background Checks of Those Caring for Elders: Preventing and Eliminating Abuse in Nursing Homes*, 9 ELDER L. J. 203, 204 (2001). Ms. Marciano focuses on background checks for nursing home employees, but acknowledges that virtually all the concerns she raises would be applicable to a non-institutional home setting as well.

at worst dangerous.<sup>45</sup> Counsel should emphasize this point with both client and caregiver that unless the caregiver happens to be a health care professional, it is simply not realistic to assume that he or she can provide adequate nursing services to some one in need of long term-care.<sup>46</sup> In addition, unless there is more than one caregiver involved, the provision of such services on a twenty-four hour basis is clearly impossible. So, if the client wants to avoid institutional nursing home care altogether, he or she would have to contract with at least two licensed caregivers, because one person is simply not equal to the task. If the client's home represents the only source of compensation, dividing it between two caregivers may not be attractive to them at all unless they are closely related to each other, such as a husband and wife. The bottom line is that a client with moderate income and assets generally cannot afford the luxury of around-the-clock in-home nursing care unless the client has close relatives willing and able to provide it without payment, because even the value of the client's home will usually not be sufficient to provide adequate compensation for such care.<sup>47</sup>

So the client **MUST** be advised that the life care contract is **NOT** a guarantee that he or she will never be placed in a nursing home. If and when long-term care is necessary, personal services under the contract should either cease or, if they continue, be defined as only those that are supplementary to the long-term care services provided either by a long-term care facility or under a program of community based long-term care.<sup>48</sup> As home-based community care initiatives become more widespread, providing home health professionals to those requiring long-term care who would otherwise be in nursing homes, continuance of the personal services may be the best option, since the personal services provided by the caregiver may be critical to the feasibility of

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45. Hall, *supra* note 3, at \*6.

46. *Id.*

47. A simple calculation using \$3,000 (or roughly \$100 a day) as the average monthly cost of nursing home care illustrates the problem for Ms. Oldaker: at seventy years of age, when she first entered the contract, her life expectancy was approximately fifteen more years. Assuming she should live out this entire life expectancy and should require nursing home care for all of those years, her bill for services would equal \$540,000, or double the value of her \$250,000 house. And the \$3,000 figure is actually probably low, because institutions can spread the higher cost of licensed health care professionals among all the residents and can allocate the time of those professionals solely to the tasks where licensure is necessary. On average, the services of a home health care aide for a daily eight hour shift equal \$40,000 annually; at that figure, having to hire two full time home health care aides (and possibly three, if twenty-four hour care is truly necessary), would use up the value of Ms. Oldaker's house in three years or less. Robert D. Hayes, et al., *What Attorneys Should Know About Long-Term Care Insurance*, 7 ELDER L.J. 1, 9 (1999).

48. KRAUSKOPF, ET AL, *supra* note 7, at §§ 12.50 – 12.56.

the home health care plan. If the agreement specifies that the services are not sufficient to rise to the level of long-term care, this should serve to preserve eligibility for Medicaid as well. The need for long-term care is established by reference to whether one meets the criteria of a "chronically ill individual" as defined by federal law.<sup>49</sup> The life care contract should incorporate this definition as a trigger for temporary cessation of the contract or as a limiting factor delineating the boundaries of personal services, which the caregiver is obligated to perform.<sup>50</sup> Otherwise, since Medicaid is payor of last resort, the contractual obligation of the caregiver to provide services may be deemed a third party payment source,<sup>51</sup> which would obviate any entitlement by the client to Medicaid payment for the services, despite the fact that it is manifestly unrealistic to expect that an unskilled caregiver will actually be able to perform these services.<sup>52</sup> Because the house itself is an exempt resource for purposes of Medicaid eligibility,<sup>53</sup> transfer of the house and creation of the life care agreement without a definitional limit excluding long-term care could leave the client without a source of adequate care in the event that long-term care is needed. Thus, rather than have the contract terminate at the point where the client is deemed to be in need of long-term care, it may be preferable to have the services be modified when that point is reached so as to differentiate them from the kind of nursing services that must be provided in nursing homes.<sup>54</sup> This should also help document and strengthen the argument that the caregiver's obligations constitute full and fair consideration for the value of the home being transferred. Otherwise, if the client requires institutional care within thirty-six months after the agreement is signed, and the caregiver's obligations cease altogether, the state Medicaid agency may raise the issue that the transaction is for less than fair market value, which could

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49. 26 U.S.C. § 7702B(c)(1) defines a "chronically ill individual" as one unable to perform at least two out of a list of at least five "activities of daily living," (ADLs) which generally include such basic things as eating, bathing, dressing, toileting, continence, and transferring, or one who suffers from a cognitive impairment severe enough to require "substantial supervision to protect such individual from threats to health or safety." See 26 U.S.C. § 7702B(c)(2)(A)(iii).

50. TAKACS, *supra* note 5, at 160, 170.

51. *Id.* at 160.

52. *Id.* at 162. See *Cornue v. Department of Public Aid*, 354 N.E.2d 359, 360-61 (Ill. 1976) (denying public benefits to residents of a home for the aged on grounds that they had entered into "lifetime care contracts" which were supposed to meet all their needs for life, when the contract provider could not provide the services due to the costs incurred in abiding by a court order to build a new infirmary).

53. MEZZULLO & WOOPERT, *supra* note 4, at § 29:79.

54. TAKACS, *supra* note 5, at 170.

result in disqualifications for Medicaid benefits.<sup>55</sup> A few states, like Florida<sup>56</sup> and Washington<sup>57</sup> have adopted rules specifying certain criteria for determining whether transfer of assets in return for a personal services contract will be considered as having been for fair market value.<sup>58</sup> In addition to stating whether or not the services will still be expected and on what basis in the event the client requires nursing home care, the duration of the contract should also be correlated with the client's life expectancy.<sup>59</sup>

Within these parameters, definition of the personal services to be provided should be as flexible as possible and generally should be on an "as needed" basis.<sup>60</sup> Personal services can include personal assistance in accomplishing whatever tasks the elder client may choose to delegate, such as setting doctor's or hairdresser's appointments, providing transportation, grocery shopping, preparing meals, housekeeping, etc. The contract should enumerate the specific categories of services that are expected. For example, "personal errands," "housekeeping," "advocacy," "health care oversight and management," etc., so that the parties will be aware of expectations and can better substantiate the fair market value of the services by reference to actual providers in the community.<sup>61</sup> The contract should specify whether or not the caregiver will have any responsibility for financial management, and if so, whether such responsibility extends beyond simple collection of information and preparation of paperwork for the client to sign to actual authority to act on the client's behalf. If the latter arrangement is desired, a power of attorney should be drafted as well to delineate the caregiver's additional fiduciary relationship to the client.<sup>62</sup>

## VALUATION OF SERVICES

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55. 42 U.S.C. § 1396p(c)(1)(B). It should be noted that the Medicaid rules do regard as exempt a transfer of the home to an adult child who has been residing in the home with the elderly parent for a period of at least two years prior to the transfer, providing care to that parent that enabled him or her to remain in the home as opposed to having to enter a nursing home. MEZZULLO & WOOLPERT, *supra* note 4, at § 29:112.

56. Solkoff, *supra* note 11, at \*16.

57. TAKACS, *supra* note 5, at 162.

58. *Id.* The Washington rules require that the care agreement be in writing, that the contract state the fair market value of the services, that compensation will be paid from the assets of the person receiving the services and that the compensation will not exceed the fair market value of the services. WASH. ADMIN. CODE § 388-513-1365.

59. Solkoff, *supra* note 11, at \*8.

60. *Id.* at \*7.

61. *Id.*

62. For an excellent sample life care contract, see TAKACS, *supra* note 5, at 163-65.

Research into the market rate for unskilled sitters, housekeepers, senior services aides, etc. should be performed to come up with a reasonable "hourly" rate for the various services to be provided under the contract, in order to establish the fairness of the contract for all concerned. Reference can also be made to the average monthly rate charged for boarding homes, or homes for the aged, which provide comparable personal care services.<sup>63</sup> Since the caregiver will presumably be living with the client, the fair rental value of the house should be factored in as compensation as well, in order to reflect the full benefit to the caretaker.<sup>64</sup> The contract should also address who will be responsible for paying for maintenance of the home, property taxes, utilities, etc. if the client's life expectancy is such that the value of the home will be depleted well before the client can be expected to die, inclusion of such items as part of the client's cost may be necessary in order to ensure that the caregiver is not unfairly treated in the bargain.

On the other hand, life expectancy is only a projection, and the elderly person may die well before the projected date, and perhaps well before any substantial services are even provided under the contract. Will this mean that the caregiver is not entitled to the entire value of the house? The answer to this question will depend on what the parties deem to be fair; the point is to be sure that the question is asked and that the ramifications of the decision are fully considered. The payment structure of the agreement will then need to be tailored to reflect the parties' decision. If it is decided between the parties that the possibility of a windfall to the caregiver is an acceptable risk, then the annuity model, or immediate "lump sum" transfer of the house may be appropriate, so long as a life estate is retained, allowing the elder person to have continued use of the premises for life. An annuity contract will be upheld against challenge, even if the annuitant dies immediately after payment of a substantial lump sum premium, so long as the agreement was "actuarially sound" (i.e., reasonably based on the client's life expectancy).<sup>65</sup> Likewise, to pass muster for Medicaid

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63. Referring again to Ms. Oldaker, if the existing hourly rate for sitters is \$8.00 an hour, the annual cost for such services on a twenty-four hour basis would be \$70,000. At that rate, Ms. Oldaker will be getting a VERY good deal for the value of her home if she actually receives the services and lives more than four years.

64. Thus, if the fair rental value of Ms. Oldaker's home is equal to \$12,000 a year, her niece would receive at least half that additional value if she resided in the home, sharing it equally with Ms. Oldaker.

65. TAKACS, *supra* note 5, at 160-61. See also *Guthman v. La Vida Llena*, 709 P.2d 675 (N.M. 1985), where the court refused to set aside a life care contract between a nonprofit retirement center and a seventy-nine year-old purchaser with a life expectancy of between seven and nine years but who died six months after paying a lump sum entry fee of \$36,950 to the facility for life-time care. *Id.* at 682-83.

eligibility purposes, projection of the elder's life expectancy must be actuarially sound and of sufficient duration (based on the actuarial projection) to make the agreement substantively equivalent to the fair market value of the property.<sup>66</sup> If these criteria are met at the time the contract is made, the agreement will constitute a valid transfer for value.

If the parties instead want to structure the agreement to permit adjustment depending on what actually occurs, a "periodic payment" model can be used, whereby the real property is deeded to the caregiver, but remains subject to a sort of "inverse" reverse mortgage equal to the value of the house, with the services to be provided constituting a sort of line of credit that the elder can continually access over the remainder of his or her life. As the services are performed, the amount of equity accruing to the caregiver increases, while the "balance owed" to the elder mortgagee correspondingly decreases. By its terms, however, the mortgage will only expire or be extinguished upon the death of the elder mortgagee, so the caregiver cannot sell or otherwise dispose of the house prior to the elder's death. To allow for adjustment in the event of a windfall to the caregiver as a result of the premature death of the elderly person, the mortgage can be tailored so as to provide that only that percentage of the property's value which corresponds to the value of the services provided will accrue to the caregiver upon the elder's death. Thus, if the caregiver has provided six months' worth of services, valued at \$30,000, and the elder's house is worth \$100,000, the caregiver's interest in the home will be subject to a \$70,000 "mortgage" owed to the elder's estate.

Other payment structures are possible – if the caregiver is willing to defer payment, the life care agreement can contain a contract by the elder to leave the real property to the caregiver in a will.<sup>67</sup> If the caregiver is in need of cash, a loan could be obtained using a home equity conversion (or reverse) mortgage,<sup>68</sup> the proceeds of which could then be held in escrow by a third party for payment to the caregiver in installments as services are rendered.<sup>69</sup> The main goal is to ensure that

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66. Solkoff, *supra* note 11, at \*8.

67. In those jurisdictions that have adopted the Uniform Probate Code, such agreements must be in writing, either contained within the will itself or "established by a writing signed by the decedent evidencing the contract." [UNIF. PROBATE CODE] § 2-701; Kruse, *supra* note 2, at 5.

68. See Jean Reilly, *Reverse Mortgages: Backing Into The Future*, 5 ELDER L.J. 17 (1997).

69. Solkoff, *supra* note 11, at \*11. However, establishing an escrow account with the reverse mortgage loan proceeds does entail the risk that the proceeds will then be considered an available resource in the event that the elder person requires nursing home care and applies for Medicare. Under Medicaid rules, the borrowed funds will not be considered



whatever agreement is made does not compromise the elder's right to continued use and enjoyment of the premises for the remainder of his or her life, unless knowingly relinquished by the elder for reasons that will inure to his or her benefit.

### OTHER CONSIDERATIONS

In addition to the basic elements of the life care contract outlined above, the client should also consider whether or not the agreement should contain a requirement that the services be provided in the client's home for the duration of the contract (subject to the need for long-term care as discussed above) or whether the caregiver can relocate the client to his or her home, for example, if that is more convenient for all concerned.<sup>70</sup> The parties may also want to consider whether the services must be provided by the caregiver personally or whether the caregiver is simply responsible for seeing that the services are provided. Periodic opportunities for respite or relief of the caregiver should definitely be a part of the contract, perhaps addressed with a specified "vacation" clause.<sup>71</sup>

The agreement should also allocate financial responsibility for expenses associated with caregiving. Normally the client will remain responsible for his or her own living expenses, etc., and this should be made explicit in the agreement. Liability for loss, damage, or theft of personal property, belonging either to the client or to the caregiver should be discussed, as should liability for personal injury, and whether the contract should contain any waiver of such liability.<sup>72</sup>

### BREACH AND TERMINATION

Finally, what about breach and termination? These issues are the most difficult to deal with because they force the parties to admit the possibility of a breakdown, not only in the agreement, but in the relationship between them. The elderly client may be the one most resistant to the discussion, insisting that everything will be all right,

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income to the elder borrower, but can be considered a resource if not spent during the quarter in which received. MEZZULLO & WOOLPERT, *supra* note 4, at §16:304. The burden will then be on the elder to demonstrate that the agreement between the elder and the caregiver is such that the loan proceeds are not "actually available" to the elder as a resource for paying for nursing home care because the funds are already committed to the caregiver, who could sue for breach of contract if other use is made of the escrow funds. *Id.* at § 29:41.

70. TAKACS, *supra* note 5, at 164.

71. *Id.* at 166.

72. Solkoff, *supra* note 11, at \*15.

that this is her daughter or son, after all, and nothing will go wrong. It is important for the attorney to stress that the thing that may go wrong may not be anyone's fault. If the daughter should die, or become disabled herself and unable to perform the contract, what happens? If full payment has been tendered to the caregiver up front, the caregiver's inability to perform may be catastrophic for the elderly person, unless the contract provides for a refund or return to the elder of any amounts or value unearned as of the date of the caregiver's death or disablement. Such a clause would still not address the situation that would arise in the event that the elderly person outlived his or her life expectancy, so that all value had been earned. The inverse reverse mortgage concept might be especially helpful in dealing with this contingency as by its terms it does not expire until the death of the elderly person. As with all the other problem areas, the means of solution is limited only by the imagination of the parties, appropriately guided by counsel so that they seriously consider the issue and determine in advance how these contingencies will be handled.

#### **ARE THE BENEFITS OF LIFE CARE CONTRACTS EVER WORTH THE RISKS?**

Although admittedly whimsical, comparison of life care contracts to the tale of Dr. Jekyll and Mr. Hyde is apposite in the sense that these contracts truly possess a dual nature. The very features that make the contracts so appealing—the flexibility, unique tailoring of services and interpersonal nature—render them inherently susceptible to overreaching and abuse. Such contracts can result in very positive estate planning benefits by preserving assets within the family grouping if the caregiver is a relative<sup>73</sup> and by rewarding and financially supporting those family members who might otherwise jeopardize their own health and economic security taking care of elderly relatives on a voluntary basis without compensation.<sup>74</sup> On the other hand, the situation presented by Ms. Oldaker and her niece is all too prevalent and is indicative of the sort of exploitation and overreaching that can occur when such contracts go awry. Experts disagree as to whether such contracts can ever, in the long run, be a good thing,<sup>75</sup> although all agree that having the agreement reduced to

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73. *Id.* at \*4.

74. Rein, *supra* note 10, at 266-70; TAKACS, *supra* note 5, at 158-59.

75. See Hall, *supra* note 3, at \*5-8 (aware of the "pitfalls," but hopeful that clear contractual language can be a sufficient preventive measure); Solkoff, *supra* note 11, at \*4

writing is better than not having any memorandum of understanding to which the parties can refer. Certainly, the prospects are best if the client is already being assisted voluntarily by caring family members. In such circumstances, the life care contract will simply serve to support the family's efforts, rather than provide the major motivation for caregiving.<sup>76</sup> Ultimately, only the client can determine whether the benefits of preserving the home and continuing to live in it with a familiar and presumably loving caregiver are worth the risks that may cause the arrangement to break down. In making this decision, the client should at least have the full benefit of all the background information that it is possible to have, along with counseling, in depth examination of all the available options and a critical consideration of all the potential outcomes in the event of a "worst case scenario." If the client decides to pursue the life care agreement, the attorney can then draft a contract that anticipates the contingencies and attempts to address them, so that the client will have some protection against the Mr. Hyde that may lurk within even the best-intentioned of such agreements.

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(an advocate of well-drafted agreements); TAKACS, *supra* note 5, at 158-59 (advocate of well-drafted agreements) and Kruse, *supra* note 2, at 4-5 (preferring contracts to devise of property rather than transfer property during the elder person's lifetime).

76. TAKACS, *supra* note 5, at 158-59.