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*Issue Forum: Long-Term Care Planning*

# Private Sector Long-Term Care Planning

*America's long-term care future is fraught with risks and opportunities for a better old age. Elder law attorneys and financial professionals who understand this complex and evolving world will better serve their older clients. This author draws upon his forthcoming book to answer key questions about professional planning that will harness clients' resources to achieve private sector choice in long-term care.*

**By Timothy M. Vogel**

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*Timothy M. Vogel* is a shareholder in the Portland, Maine law firm Vogel & Associates, P.A., and is founder of the first Maine law practice in elder law. His main areas of practice are elder law, probate, trusts and estate planning. He is a member of NAELA and has presented many seminars, most recently at its 2002 meetings. He is past chair of the Maine State Bar Association, past chair of its Elder Law Section, and a columnist for *Maine Lawyer's Review*.

Most Americans, especially those in the middle class, have worked throughout their lives to care for themselves and plan for their future security. At the beginning of the 21st century, there is a crisis in long-term care services for older and disabled persons. These long-term care services range from home health care through community-based services, assisted living, general nursing home care, skilled nursing home and rehabilitation care, all the way up to acute-level hospital-based care. The crisis is most extreme in the area of government long-term care services, especially services subsidized and regulated through the two main benefit programs, Medicaid and Medicare.

For America's seniors, their families, and the professionals who advise them, this is a time of both good and bad news. The bad news is that the demographics of aging in America will continue to expand the need for long-term care services.

Currently, federal and state strategies for financing long-term care services are a combination of these approaches: Put some emphasis on Medicare reform, put some emphasis on the promotion of long-term care insurance, and continue to rely heavily on the federal-state financing of the Medicaid program through direct funding from federal and state general tax revenues. This last form of funding already consumes a large portion of the federal budget, as well as the budget of every state. As the need of America's elder and disabled citizens for long-term care services continues to increase, this dependence on direct federal and state tax funding will continue to make long-term

care services a topic of considerable political contention and program instability.

The trauma of September 11, 2001, is also a key factor in this situation. Your clients need to appreciate the unstable political and funding environment in which they will be planning their futures. Your older clients will be directly impacted by the increased military and anti-terrorist funding, decreased federal tax revenue, as well as the burden of the economic fluctuations. Reductions in Medicare and Medicaid funding—especially in the high-cost areas of nursing home, home health care, and assisted living subsidies—must be anticipated.

Many senior citizens facing long-term care issues are, or will be, affected by these increasingly stark circumstances. If they haven't already, you can be sure they will be asking elder law attorneys—as well as accountants, financial advisors, geriatric care managers, and long-term care insurance professionals—the hard questions that will arise in this climate.

The issue is clear: How will older Americans, as well as their middle-aged children, use the income, savings, and property they have acquired through lifetimes of hard work, to provide themselves with appropriate living conditions and access to quality health and long-term care for the remainder of their lives?

### **Planning Is Essential in Uncertain Times**

The good news is that a range of long-term care planning options is available to clients in these uncertain times. Elder law attorneys working with accountants, financial advisors, long-term care insurance professionals, geriatric care managers, and other planning professionals can provide answers for these individuals.

Private sector long-term care planning is the core of this article as well as a text I am co-authoring: *PRIVATE SECTOR LONG-TERM CARE PLANNING: BALANCING INSURANCE AND OTHER FUNDING STRATEGIES* (to be published in 2003 by Panel Publishers, a division of Aspen Publishers, Inc.). The text is for elder law attorneys and other professionals who advise clients on long-term care issues. The co-author is Carroll E. Harper, a long-term care insurance professional. He has over twenty-five years of experience designing long-term

care insurance policies to fit his clients' individual circumstances while ensuring that they receive benefits when they need them. Many of the ideas and planning approaches for *PRIVATE SECTOR LONG-TERM CARE PLANNING* were developed through the work and presentations that Carroll and I have produced together over the years.

### **What Is Private Sector Long-Term Care Planning?**

Private sector long-term care planning is a carefully considered mix of income, investment growth and earnings, family involvement, service availability, long-term care insurance benefits, and eligibility for long-term care programs such as Medicaid.

The assistance of an experienced elder law attorney, in combination with that of other long-term care professionals, is essential to create a realistic and balanced strategy for a client's future security. An individualized plan for private sector long-term care planning contains the tools for the client to achieve access to quality care at the right time through the exercise of individual responsibility and realistic goal-setting.

Beware of anyone who claims to be selling the proverbial "silver bullet" financial products that will solve all of any individual's long-term care problems in one fell swoop. It does not work that way. Effective planning and private financing of long-term care requires a thorough review of the client's personal and financial circumstances, as well as an individualized strategy that can be adapted for changing governmental, economic, and health care circumstances.

Because the long-term care environment will continue its unstable evolution, a flexible long-term care plan is essential. Furthermore, individuals will always live their lives with varying degrees of personal responsibility and preparedness; it's just human nature.

There will always be the clients who, as individuals or within their families, live in serious denial of their eventual need for long-term care, no matter what their external circumstances. If it is hard to get a person to sign a last will and testament, it is even harder to get an individual to study, establish, and fund a realistic long-term care plan.

Certain economic conditions will keep the entire long-term care environment unstable. Labor market conditions, even in periods of economic recession, will continue to limit the availability of long-term care workers. Certified nursing assistant (CNA) work is difficult, to say the least. The pay is poor to modest, and the work is physically demanding, and potentially backbreaking. Many workers can earn higher wages in the fast-food industry than by providing care for elderly and disabled Americans.

Thus, wage rates are certain to increase. Because of this factor, among others, the rise on long-term care costs can be anticipated to increase more rapidly than inflation in the general economy. This has a spillover effect: cost-shifting from Medicaid to private pay recipients. Those persons who can pay their own way in nursing homes and other facilities are already subsidizing low Medicare and Medicaid reimbursement rates. If the Medicaid reimbursement rate paid to a nursing home is \$20 per day below actual costs, the facility will have to make up that loss from private pay residents. This situation is already happening—and it will get worse before it gets better. It is too tempting for politicians faced with skyrocketing federal and state Medicaid budgets to force the cost of long-term care onto someone else, in this case private pay residents.

### Timing Is Everything

As elder law attorneys are fond of saying, “Timing is everything.” It is important to educate older persons and their families to take action before a long-term care crisis strikes. With a long-term care plan in place, the client’s situation will have anticipated many (if not all) eventualities, and preserve realistic options.

A long-term care plan can stabilize the situation and preserve realistic options. A disastrous long-term care experience does not have to happen. A successful long-term care plan must balance ongoing developments with the client, the client’s income and assets, the spouse or partner, the family and step relations, federal and state government programs, health care strategies and funding, long-term care strategies and funding, performance of the economy, and demographic trends. This is an often complex mix, and the elder law attorney has

a central role in creating the long-term care plan for the client. For years elder law attorneys and their clients have talked about how to preserve the family assets in the context of achieving financial eligibility for Medicaid nursing home assistance. The concept of private sector long-term care planning broadens the scope of this discussion to a range of topics focused on how older and disabled persons may reliably access quality care.

The elder law attorney can offer an invaluable mix of services by focusing on access to quality care and realistic financial planning, while assisting the client with legal documents and planning tools to exercise personal responsibility. In doing so, the elder law attorney should act as the hub at the center of a client-focused team of professionals, which may include an accountant, financial advisors, long-term care insurance professional, geriatric care manager, and real estate agent, among others as appropriate for the circumstances. The attorney can also work effectively to recruit these “team members” as necessary.

### Clarifying the Term

It is essential to clarify the term “private sector long-term care planning.” No American lives entirely in either the private or the public sector. Private sector long-term care planning encourages older persons and their families to utilize available legal, financial, insurance, and geriatric care planning tools to continue their lifelong habit of providing for themselves. When it is necessary to rely on a government program, this is tempered with the knowledge that the program may not be dependable and may need to be supplemented with personal resources in the future.

Private sector long-term care planning is reasonable and appropriate for many individuals and families. It may, however, be more complex and extended than other long-term care planning strategies, especially those that focus on meeting Medicaid financial eligibility requirements.

In this article I discuss the various components of private sector long-term care planning that apply in some combination to most older clients and their families. An essential component here, of course, is long-term care insurance. Private sector long-term care planning does provide the context in which to evaluate whether long-term care insur-

ance is appropriate and practical for an individual.

However, it is important to note that private sector long-term care planning is much broader and deeper than determining whether a client should purchase long-term care insurance. Private sector long-term care planning can also be a practical direction in which to turn for those individuals who have been sold on the importance of purchasing long-term care insurance, only to have their application for such a policy rejected due to an adverse decision by medical underwriting.

### **The Crisis in Government Long-Term Care Programs: Budget Pressure and Waivers**

Medicaid is a joint federal-state program.<sup>1</sup> The federal statute is the central structure of the Medicaid program. This structure provides for several significant areas of state involvement in Medicaid, including administration, cost sharing, and the selection of a broad range of optional Medicaid services.

Due to increasing budgetary pressures and other factors, the variations in the program from state to state are increasing. The federal share of Medicaid expenditures varies from fifty to eighty percent as a function of state income. Even with the states paying only from twenty to fifty percent of the Medicaid expenditures, state responsibility for Medicaid costs is placing great stress on the budgets of many, if not every, state. The result is federal and state budget pressure and changing content and structure of the Medicaid program.

Several trends place ongoing federal and state financial support for long-term care services at great risk: the growing size of both federal and state Medicaid budgets; federal and state economic, tax, and health care policies that challenge such traditional areas of Medicaid expenditure as nursing home care; and federal encouragement of Medicaid "waivers" that encourage state experimentation in the scope of Medicaid covered health and social services, as well as individual eligibility standards.

This decreasing state and federal financial support for Medicaid means that professionals must be even more aware of the services covered and the eligibility requirements decreed in their state under a number of Medicaid waivers programs.

Equally important, interstate Medicaid planning for clients is substantially increasing in its complexity and significantly declining in its predictability. It is particularly difficult to advise a client about Medicaid-based long-term care planning if that client wants to move to another state to be near a child or to live in a warmer climate.

To appreciate the changing nature and increasing complexity of the Medicaid program, it is important to understand Medicaid waivers. Federal law established the Medicaid program with federal and state funding and state administration. The federal Medicaid statute also established program content requirements, as well as income, resource, and financial eligibility standards. The statute also includes a minimum of required Medicaid covered services in such areas as acute medical care, outpatient treatment, medications, and long-term nursing care.<sup>2</sup> Since its inception in 1965, Medicaid has provided medical coverage in almost every state, with a substantial commonality of eligibility regulations and covered services.

The Medicaid waiver process has been established under the federal Medicaid statute and allows the states to apply to the federal Medicaid agency, the Center for Medicare and Medicaid Services (CMS), for approval of new areas of Medicaid covered services with different eligibility requirements.

Since the mid-1980s, the Medicaid waiver process has served to dramatically change the scope of Medicaid covered services and eligibility requirements among the states and within various segments of the population in any one particular state. The Bush Administration has been approving almost all the "Medicaid waivers" that the states have been requesting. Almost 1,000 Medicaid waivers have been approved since 2001, an average of about fifteen waiver approvals per week. Thus, it seems likely that if a state applies for a Medicaid waiver, it will likely be approved by CMS.

A state may request a Medicaid waiver in two areas: Medicaid covered services or Medicaid financial eligibility requirements. In either case, the state's Medicaid waiver application may request changes on a permanent or a temporary "demonstration" basis. Medicaid waivers may diverge considerably from general Medicaid services as set out in the federal statute. Services covered under a

Medicaid waiver program are frequently health care and social services outside of the required Medicaid covered services of acute medical care, outpatient treatment, medications, and long-term nursing care.

Similarly, financial eligibility requirements established through the Medicaid waiver process are also likely to vary significantly from the federal statute's income and asset rules. For example, while the Medicaid statute requires that Medicaid covered services be offered to all eligible individuals throughout the state, under a Medicaid waiver application, a state may offer waiver services to only a limited number of persons and in only specified areas of the state.

The waiver process has dramatically changed the scope of Medicaid services and eligibility requirements for disabled and elderly persons with insufficient income to cover their medical expenses. In doing so, however, the Medicaid waiver process has almost eliminated whatever national uniformity there had been for Medicaid service coverage and eligibility requirements. This makes it much more difficult to plan for older persons who might move between states and need Medicaid home health, assisted living, or nursing home services in one or more locations over time.

Many factors are driving this increasing—and sometimes chaotic—diversity of Medicaid waiver services and eligibility requirements. These include federal and state budget pressures, changing societal views of populations worthy of Medicaid coverage, federal and state efforts to implement incremental changes in government-subsidized health care, and the availability of flexible Medicaid funding for the states to use—with a federal matching subsidy ranging from fifty to eighty-five percent—to address a variety of social needs.

In an address to the National Academy of Elder Law Attorneys (NAELA) in April 2002, Senator Jack Reed (D-RI) made several insightful comments on the Medicaid waiver process. He noted that since the defeat to President Clinton's broad health care initiative in 1994, federal and state governments have been willing to attempt only incremental changes in health care policy. The Medicaid waiver process is a noteworthy example of this syndrome.

Senator Reed described how he has been a

strong advocate in helping families and children—especially in urban areas—as to the hazards and control of lead paint. He told how Rhode Island authored and CMS approved a Medicaid waiver to fund removing and replacing windows in the homes of low-income families with children.

This is an example of flexible Medicaid waiver funding to address health-related projects—in this case eliminating the long-term impacts of lead paint poisoning. It also illustrates the dilution of Medicaid funding for traditional health care expenses such as nursing home care. One can argue that every dollar spent on lead paint remedies, while eminently worthwhile, is a dollar taken from Medicaid nursing home and other long-term care services.

The trend is for the states to creatively draft Medicaid waiver applications for a variety of health-related purposes. This places a significant burden on more traditional parts of the Medicaid budget—especially nursing home care.

Here's another example: Connecticut has recently filed a Medicaid waiver application to change the transfer-of-assets rules for Medicaid nursing home services. Under the general rule, there is a thirty-six month "look back" period prior to the date of the Medicaid application, during which the Medicaid applicant's transfers of assets are relevant to the individual's Medicaid eligibility. If CMS approves that waiver application, Connecticut will increase this period from thirty-six to sixty months.

The waiver application would also allow Connecticut to set the months of Medicaid ineligibility caused by an asset transfer to begin with the date of the individual's admission to a nursing home, instead of—as provided in the current federal Medicaid statute—from the date of the asset transfer. If Connecticut is able to use its Medicaid waiver application to drastically restructure the financial eligibility requirements for Medicaid nursing home assistance in that state, it must be anticipated that other states will attempt to implement a similar strategy.

There are other areas that illustrate the practical effects of federal and state budget pressures on the long-term care services available to older and disabled persons. Among those who work in this area every day, there are many complaints that

Medicare and Medicaid regulations are being irrationally applied to limit both the number of persons who qualify for home health services, as well as the scope and frequency of those services to older and disabled persons in their homes.

Another pressure point is medical level-of-care standards for Medicaid eligibility. While the Medicaid statute has always mandated that Medicaid should not fund unnecessary care, an increasing number of states are implementing medical eligibility tests for Medicaid nursing home assistance. These level-of-care reviews have become a very popular tool to reduce the number of persons eligible for Medicaid services. Unless it is documented that the person's care requires a high level of professional involvement or significant deficits in a number of activities of daily living, then the person is denied all Medicaid nursing home assistance, regardless of the individual's financial need.

A final example is from the area of state-administered home health care. These programs frequently authorize too few home care hours per week to begin to meet the patient's needs. Staffing for the authorized hours is very difficult because program-sanctioned pay rates for home health care workers are substantially below area wage rates. Families cannot locate anyone to work in the home. There is a resulting high frustration level among individuals who are trying to staff home health care for older and disabled persons.

These are all examples of the impact on the current state and federal long-term care system of the growing numbers of older and disabled persons needing long-term care services. The system is not working well now, and cannot be anticipated to work any better in the future. If your clients can avoid utilizing these unstable federal and state long-term care programs, they will be able to more predictably plan their future access to quality care.

### **Keep Your Eye on the Prize: Access to Quality Care**

Private sector long-term care planning begins with a simple goal for the client: access to quality care. This is an essential human need in every circumstance. Long-term care planning can no longer be only about financial planning for eventual Medicaid nursing home assistance for a simple rea-

son: Long-term care is the most expensive direct health care expense for which older Americans have personal liability.

This focus on quality care provides the framework for all aspects of private sector long-term care planning, including the full range of services provided by a variety of delivery systems that are funded through a number of private and public sources. In the broadest sense, long-term care is a broad term that covers many levels of care that are funded by a variety of payment sources. Long-term care services include sub-acute hospital care, skilled nursing care, rehabilitation care, general nursing facility care, assisted living facility care, and a variety of home health care and community-based services. Quality-of-care issues arise all along this spectrum.

As recently as the early 1990s, the common long-term care options included limited family help at home, usually by a wife or daughter, in-patient hospital care for acute conditions, and nursing home care when the patient could not stay at home. No longer does this linear progression accurately reflect the long-term care environment of the early 21st century, or the long-term care reality from which our clients must locate and finance the long-term care services that are essential to their well-being.

There are increasing pressures across the whole range of long-term care services. Because of economic, regulatory, and staffing pressures, quality-of-care issues have fallen to the bottom of the list of priorities for long-term care providers. This factor is compounded by frequent shifts in government regulation and funding of long-term care services, which has led to variations and inconsistencies in payment sources, covered services, and service availability between and within geographic areas. The availability of services also varies greatly with changes in patients' conditions.

In this environment, private sector long-term care planning is more important than ever and provides realistic and flexible care options and financing strategies. Quality standards must be recognized throughout the full range of long-term care delivery and funding systems—including family caregivers, parents residing with family members, respite care, home health care agencies, multilevel facilities, eating and lodging facilities, assisted living facilities,

residential care facilities, boarding homes, continuing care retirement communities, adult family care homes, general nursing homes, skilled nursing facilities, rehabilitation facilities, sub-acute care facilities, and hospice care.

### **Key Questions to Ask**

Empowering your clients and their families to recognize and select quality long-term care services involves educating individuals and the families. Many needs must be assessed: What kind and how much care or assistance does the patient need? Where is the best place for services to be received? What payment options are available? How does the family view the situation?

Here are several key questions to ask when considering the quality of long-term care services for a particular client:

- How would you like to be treated in a similar situation?
- Are the patient's needs being met?
- Is the care provided harming the patient or causing the patient to deteriorate?
- What do the caregiver and the family need?
- Where can those services be obtained?
- What is working best, and what can be improved?
- What does the patient need that is not being provided?
- How can the family enable and help the service provider to recognize and address the patient's needs?

It is important that elder law attorneys and their clients be able to identify quality long-term care services. Especially with staff shortages, care provided even by facilities with strong reputations may be sub-par. If the patient is receiving less than quality care, it becomes critical to remedy the situation. If the patient has already experienced negligent or abusive treatment, quickly remedying such injuries is essential.

### **Addressing the Needs of the Caregiver**

The needs of the caregiver, who is frequently the wife or daughter, must not be ignored. A caregiver

who is strained to the point of collapse, of course, greatly complicates the situation. The caregiver must recognize the present value of quality long-term care services. She must address the guilt of allowing other persons to care for a loved one.

Long-term care has always been and continues to be a significant woman's issue. While many husbands and sons make great efforts to care for family members, it is usually the wives and daughters who do the "heavy lifting" when someone in the family needs long-term care, especially home health care. Some families are motivated by this reality, and will plan for long-term care so the women in the family will not have their lives completely distorted by extended caregiver responsibilities. In other families, women will have to surrender their careers, independence, and their own health to care for family members. It is important to help your clients appreciate the severe impact long-term care responsibilities have on women.

Long-term care consumer support groups, such as the Alzheimer's Association, also provide essential support, education, and empowerment for the caregiver and the family. Sharing experiences can also strengthen the caregiver, leading to positive effects for the patient and a better focus on obtaining quality long-term care services.

### **Nine Steps to Long-Term Care Security**

Most Americans, especially those in the middle class, have worked most of their lives to plan and care for themselves. As noted earlier, in the 21st century, no American lives entirely in either the private or the public sector. Private sector long-term care planning encourages older persons and their families to utilize available legal, financial, insurance, and care planning tools to continue their lifelong habit of providing for themselves. When there is necessary reliance on a governmental program, it is tempered with the knowledge that the program, now and in the future, may not be dependable and may need to be supplemented with personal resources.

We must help our clients and their families appreciate the fact that private sector long-term care planning is prudent, responsible planning for many individuals. It may be more complex and extended than other long-term care planning strategies, especially those that focus almost entire-



ly on meeting Medicaid financial eligibility requirements. There are several primary components to private sector long-term care planning which will apply in some combination to many older clients and their families. I call these the “Nine Steps to Long-Term Care Security.”

The Nine Steps to Long-Term Care Security are applicable to a wide range of clients and professionals: older persons in general, individuals planning for retirement, their families and loved ones, as well as a full range of the professionals who advise them. These nine steps should be considered and implemented as appropriate for an individual's specific circumstances. Some of these steps are applicable to everyone, while others apply to fewer persons. The Nine Steps to Long-Term Care Security is the foundation upon which elder law attorneys can help their clients construct Long-Term Care Plans designed for their individual needs and circumstances.

Let's take a look at the nine elements of this plan:

**1. Income.** All older persons have income, even after retirement—most commonly from Social Security, pensions, fixed annuity payments, employment wages, or self-employment earnings. Most of the fixed income will have at best, small cost-of-living increases. For many post-retirement persons, wages or self-employment earnings offer a welcome method to increase income and funds available for investment—while adding routine and socialization to life.

**2. Investments.** Property and funds held for investment take many forms, including cash, bank accounts, CDs, IRAs and other retirement plans, life insurance, stocks, bonds, mutual funds, deferred annuities, investment real estate, and many other financial products. It is important to be able to refer older clients to a qualified financial advisor who is aware of their potential long-term care needs. The investment advisor must help analyze the individual's risk tolerance, as well as the client's appropriate balance of income and equity growth.

For many post-retirees the capital growth of investment—in combination with investment earnings—remains the only way at this time of their lives to improve their financial situation. It thus

becomes very important to have clients consult a qualified financial advisor aware of their investment need as they plan for their future livelihood and long-term care needs. The investment advisor needs to work closely with the client's accountant to maximize the individual's long-term care income tax deductions and set them off against income, especially capital gains.<sup>3</sup>

**3. Home.** Many persons are, understandably, emotionally attached to the homes they have worked hard to own and maintain. There are several ways in which individuals' homes are important for their future well-being. Besides being their residences, homes are frequently their most valuable investment. If they become infirm due to illness or accident, they are likely to receive home-health care. The functional usefulness of the home should be determined by the care, mobility, and transportation needs of both spouses, as well as the maintenance costs of the property.

Many persons underestimate the significant role of their homes for their future care and security. With declining government support for long-term care services, it is becoming more common for individuals to use home equity to fund essential care. The financial value of the home may become available through a home equity loan, a reverse annuity mortgage, or proceeds from the sale of the home.

Many persons want to leave their homes to their families through an immediate deed or passing through their estate after death. However, there are many financial, tax, and long-term care issues to consider when transferring the home to family members. Many older persons will have to use the value in their homes to fund adequate care for themselves and their spouses. It is important to structure your client's long-term care plan to address the advantages and challenges of planning around the home.

**4. Family Care and Assistance.** With declining government assistance, family help has become essential for many older persons. When family members live locally, such help may be in the form of caregiver assistance or coordinating home care providers. For some families, financial contributions from children or other family members are essential.

Under present tax law, children can claim a tax

deduction for financial support provided to a parent only if the child can claim the parent as a dependent by providing a majority of parents' income. This is uncommon, as very few children contribute enough to counterbalance the parents' Social Security, pension, and other income. Congress could improve tax law by providing children with a tax deduction for financial contributions they make to their parents.

As government long-term care programs decline, many families are discovering the importance of sharing alternative and combined housing with their parents and other family elders. Families may be able to provide quality long-term care services for their parents for a number of months or years through an in-law apartment or by building an addition onto either the parents' or the children's homes. It is frequently easier to finance such lifestyle improvements when both the parents and children sell their existing homes and purchase a new residence specifically designed to accommodate everyone. When several generations of families pool their finances and efforts to create a combined housing arrangement to accommodate everyone's needs, an experienced elder law attorney should be consulted. It is common to prepare an agreement—frequently in combination with a promissory note, mortgage, and lease—to address the financial, long-term care, and estate-planning needs of all concerned.

**5. Legal Planning and Documents.** For older persons, individuals planning for retirement, and their families and loved ones, legal planning and documents are essential to arrange and properly manage personal, financial, and business matters—before and after death. An elder law attorney is the best professional to help prepare a long-term care plan and the necessary legal documents. Decision-making in the event that a loved one becomes incapacitated through illness or accident can be addressed through advance directives, such as a durable financial power of attorney and a power of attorney for health care.

Smoothly passing property after death is addressed through a last will and testament, testamentary trust, or a revocable living trust. A special-needs trust or a supplemental care trust can be used to manage funds for a disabled or impaired spouse

or family member. These legal documents—within the context of a long-term care plan—form the structure within which to provide long-term care services for both spouses, as well as sufficient financial support of the surviving spouse.

Many families have a disabled spouse or child who could greatly benefit for a number of years from a special-needs trust. For some families with an incapacitated person, guardianship and conservatorship may be necessary, especially when a valid power of attorney with adequate agents and terms is not available. An elder law attorney can be essential to craft these necessary steps.

When clients have a taxable estate, besides the steps for long-term care security, it is necessary to take action to reduce or eliminate estate taxes. The client's estate plan works best for the individual, spouse, and family when combined with a functional long-term care plan. An elder law attorney has a key role to play with legal planning and documents that focus on the client's needs. These legal documents—sensitive to family needs and circumstances—are the hub of the long-term care plan.

**6. Long-Term Care Insurance.** In the Nine Steps for Long-Term Care Security, the three primary financial supports are income, investments, and the home. For a growing number of persons approaching and past the age of fifty, long-term care insurance may be an appropriate fourth financial component. Long-term care insurance does not have to insure one hundred percent of a client's potential long-term care costs. However, the policy's benefits must provide an appropriate amount to be sufficient for the client's financial circumstances. It is important that the policy be "tax-qualified" under federal tax law.

Do not underestimate the importance of working with a qualified long-term care insurance professional to help the client select a financially sound insurance company, design appropriate policy components, and determine the correct premium for an individual's situation. Purchasing long-term care insurance is an important part of a long-term care plan. Do not trust someone who wants to sell a long-term care policy without taking the time to review the details of the prospect's financial situation. Also avoid insurance agents who try to sell long-term care insurance by pressuring a person to

rush into purchasing a policy, or to make a sizeable premium deposit.

It is a mistake to think of long-term care insurance as protecting a client until he or she is able to meet the Medicaid eligibility requirements. Federal and state budgets are forcing Medicaid to substantially change, ration care, and offer lower-quality services. If a client adopts a long-term care plan that relies solely on Medicaid eligibility, that person runs a substantial risk that he or she may have no chance of meaningful home health care, assisted living, or nursing home care that he or she will likely need during a lifetime. It is important to remember that the primary purpose of long-term care insurance is to provide the insured with access to quality long-term care services when such services are necessary; in the end, this purpose of long-term care insurance has a much higher value than simple asset protection.

**7. Medical and Health Insurance Coverage.** Most persons over the age of sixty-five have hospital, physician, and some skilled and rehabilitation care through Medicare Part A and B. It is essential to purchase a companion Medicare supplement insurance, known as Medigap insurance, to complete the Medicare coverage.

For long-term care security, make sure that the Medigap policy is at least Plan C or better so that it covers the skilled and rehabilitation care provided under Medicare. If at all possible, the Medigap policy should include pharmaceutical coverage. If your client is a federal, state, or municipal retiree with medical and health insurance coverage through a non-Medicare policy, review what limited long-term care coverage is included in that policy.

While both federal and state politicians have campaigned for years on the need to reform Medicare—most recently to establish Medicare prescription coverage—it is difficult to anticipate when meaningful Medicare reform will happen. It is important to realize that Medicare does not cover long-term care—meaning home health care, assisted living, or general nursing home care—except in very limited, uncommon circumstances. The client's long-term care plan cannot rely on Medicare to provide essential long-term care services.

**8. Geriatric Care Managers.** If a client or a client's

loved one becomes infirm through illness, accident, or aging, a geriatric care manager (GCM) may be one of the most important professionals to assist the family. A geriatric care manager—sometimes known as an elder care manager—serves older and disabled individuals by evaluating their care needs, referring to and coordinating care services, and advocating for appropriate medical and long-term care services. A geriatric care manager will be able to advise on the best facility to provide necessary care for the individual, for either a short-term or long-term stay.

A geriatric care manager will coordinate their services with other professionals who are helping the family, such as an elder law attorney, financial planner, or trust company. When a family member assumes responsibility for a loved one—through the authority of a power of attorney, a guardian, conservator, or trustee—a geriatric care manager may provide essential assistance to implement a workable long-term care delivery system. The care manager can also advocate for the patient who is caught in the “patient shuffle” as he or she is moved from hospital, to skilled care, to a nursing facility, to home, to a hospital, to an assisted living facility, to home, and so on. A geriatric care manager might help to limit the effects and risks, including a significant risk of increased mortality, to those patients caught in this shuffle.

When family members live far away, the geriatric care manager can be a bridge for meaningful information and service referrals. A geriatric care manager can help avoid a situation where a child who lives at a distance takes a leave from work, purchases a plane ticket to visit the parent, and then arrives without knowing anything about local services or how to help their parent access the care they need.

It is important to note that geriatric care managers are not primary care providers. They are not home health care agencies that will directly place companions and attendants in a home setting.

A geriatric care manager may be the most essential professional to help develop and maintain an adequate delivery system of quality long-term care services. Some geriatric care managers operate independent businesses, while others are employees of a home health care agency or an agency on aging. You can locate a geriatric care manager in your

area through the Web site of the National Association of Professional Geriatric Care Managers, [www.caremanager.org](http://www.caremanager.org).

**9. Avoiding Federal and State Long-Term Care Programs.** Although Medicare and Medicaid have similar names, they are very different programs. Medicare—the federally funded medical insurance program for most Americans over the age of sixty-five—covers a very limited amount of skilled, rehabilitation, and home health care. Medicare does not have financial eligibility requirements. Medicaid—the federal state funded program administered by the state—does provide a range of long-term care services for low-income persons. When middle-income persons need an emergency nursing home placement they may qualify to receive Medicaid if they satisfy the medical criteria, the financial eligibility requirements, and the transfer-of-asset rules.

For most middle and upper-class persons, Medicaid is not a desirable option for any long-range planning for nursing home, assisted living, or home health care. The Nine Steps to Long-Term Care Security encourages clients to balance their income, investments, home equity, and private long-term care insurance. There will always be persons with low income and few assets. There will also be some persons who have not made sufficient legal, financial, and long-term care plans before they suffer an abrupt illness or accident. However, if a client has any chance to plan, he or she should not rely on future Medicaid eligibility.

Individuals with low income and few assets might see Medicaid as their only option for long-term care funding. However, it may be appropriate to advise persons with only Social Security income and savings of \$50,000 or less to consider ways to maintain flexible financial plans and try to access quality care while avoiding the risks of Medicaid.

With the ever-present possibility of federal and state legislative or regulatory changes, the future of Medicaid is too uncertain for rational financial planning. Congress and the courts will continue to transfer major aspects of Medicaid eligibility, coverage and funding responsibility to the states. Medicaid waivers are a prime example of this trend. This has resulted in a great variation

among the various state Medicaid programs and more restrictive Medicaid eligibility. As important, managed care rationing of Medicaid services will increase, regardless of the Medicaid applicant's financial circumstances or advance financial restructuring.

Medicaid managed care can be seen in the increasing number of states implementing medical eligibility tests for Medicaid nursing home assistance. These level-of-care reviews have become a very popular tool to reduce the number of persons who are eligible for Medicaid services. Unless it is documented that the person's care requires a high level of professional involvement or significant deficits in a number of activities of daily living, then the person is denied all Medicaid nursing home assistance, regardless of his or her financial need.

There are several other reasons to avoid applying for Medicaid, if possible. State Medicaid agencies, under a federal mandate, are increasingly aggressive in collecting from the estates of anyone who received Medicaid while they were alive.<sup>4</sup> These "estate recovery" programs are in place in all fifty states, and at a minimum require recovery for the probate estates of deceased Medicaid recipients. Some states also attempt to collect from assets passing outside the probate estate.

Clients should be made aware that Medicaid is no longer free. At best, it can be seen as a loan to be repaid from assets that outlive the Medicaid recipient.

Several years ago Congress considered, but did not pass, legislation to permit states to impose liability on children for the Medicaid assistance their parents received. This could still happen, given federal and state Medicaid budgetary pressures.

Federal and state budget pressures on Medicaid will continue, and Medicaid will become a less and less desirable method of funding nursing home and other long-term care services. Medicaid's political uncertainty, the program's instability, restrictive eligibility, reduced coverage, and increasing cost recovery are all clear messages that older persons and their families should avoid planning and applying for Medicaid if at all possible. A thoughtfully constructed long-term care plan will help individuals depend on their own legal, financial, and long-term care plans much

more than they can ever rely on Medicaid.

### **Creating the Long-Term Care Plan**

Lawyers commonly prepare estate plans for their clients. Generally, such a traditional estate plan includes will, trusts, and estate legal documents designed to pass property after the client's death, support the surviving spouse and dependents, sometimes place restrictions on future use of property, as well as reduce or eliminate estate taxes.

A long-term care plan broadens the tradition of the estate plan to provide for access to quality care for the client, spouse, partner, or dependents, and to establish a strategy to fund that care. There are many areas in which a long-term care plan will overlap and be combined with a client's estate plan and the associated legal documents. In almost all cases, however, the long-term care plan will have a broader scope because it must cover a larger number of personal, financial, and care variables while the client is alive.

The material covered by the long-term care plan will vary depending on the client's financial, family, and health care circumstances. The contents will also vary depending on the number of professionals who contribute to the planning process: elder law attorney, accountant, financial advisor, geriatric care manager, or long-term care insurance professional.

The long-term care plan can be developed into a service of great value for older clients and their families. It is not a case of "overloading professionals" on the client. The plan is a coordinated effort among professionals who are dedicated to serving elders. Whatever the professional fees necessary to create a long-term care plan, the price is much less than the personal and financial dislocation that will be visited on a family that suffers a catastrophic accident or illness without a long-term care plan.

Here are several items to consider including in the client's long-term care plan:

- **Detailed client financial, family, and professional advisor information.** This can be a useful collection of information about clients, their plans, finances, and who will assist them.
- **Legal documents.** These include advance directives, such as a durable financial power of attorney, power of attorney for health care and living will, testamentary and trust documents such as a last will and testament, revocable living trust, and estate planning documents such as a credit shelter trust.
- **Evaluation of care needs.** This can include the geriatric care manager's evaluation of care needs, whether one or several members must receive a range of long-term care services, where those services might be available, and determination of what role family members and friends can be expected to play in providing a portion of these long-term care services.
- **Professional financial analysis.** This should include a financial planner's analysis of the client's income and investments, an estimate of the client's risk tolerance at the present time, whether long-term care services will be needed in the future, and a determination of how the investment strategy will change if the client has large medical expense income tax deductions.
- **Tax evaluation.** This entails an accountant's evaluation of tax issues related to income, capital gains, sale of the home and other real estate, and medical expense deductions for long-term care expenses.
- **Suitability for insurance.** This is a written determination as to the suitability of the client for long-term care insurance. This document should address the client's suitability for medical underwriting; the role of long-term care insurance—given this client's personal, family, and financial circumstances—in providing this client with access to quality care; and the suggested mix for this client between long-term care insurance benefits and personal funds to cover long-term care expenses.
- **Role of the home.** This is the role for the client's home as a residence, source of future long-term care services, as well as a source of equity. Will combined housing with family members be feasible for this client?
- **Appropriateness of the client's current Medicare, Medigap, and other health insurance coverage.** Can the client's Medigap coverage be upgraded without problems of medical underwriting? Does the client have health, accident, or

other insurance products that should be dropped given their premium costs and likely benefits?

- **Financial management capabilities.** What is the client's current financial management abilities and assistance? Who is available to help the client manage money if the client becomes incapacitated by accident or illness? Is the client living within his or her current budget? What sources of income, assets, and insurance benefits would be utilized if the client's budget needed to include substantial long-term care expenses? How does the client want to balance finances to accommodate current financial needs, future long-term care needs, and potential bequests to family, charities, and others?

- **Need to abandon existing products.** Does the client own financial or insurance products that are not a good value because of their cost and likely payout? Should some of these products be abandoned because of their low value? Did the client purchase those products as the result of unprofessional sales pressure, fraud, or undue influence? If so, what remedies are available to the client?

- **Negative service experiences.** Has the client received long-term care services that were of low quality, negligent, or abusive? If so, what remedies are available to the client?

- **Home services issues.** If the client directly hires individuals to provide services in the home—depending on whether the client treats the person as an employee or an independent contractor—what are the associated supervision, tax, insurance, and liability issues?

- **Due-diligence statement on the appropriateness of Medicaid eligibility for the client.** If, in the future, the client or a family member needs a number of months or years in a nursing home or

an assisted living facility, can Medicaid be anticipated to cover any of those services at that time? What would be necessary for the person to qualify for Medicaid? Could the person meet Medicaid's medical level-of-care eligibility standards? If the person were to be able to meet the Medicaid financial eligibility requirements, how significantly would the person's income and assets have to be liquidated, transferred, or otherwise given away?

What would be the financial impact of the spouse or partner if the person applied for Medicaid? If the person dramatically changed assets, and Medicaid no longer covered the service, would the person still have the ability to access quality care? If the person does qualify for Medicaid, what will be the impact of the Medicaid estate recovery on the surviving family members? What conclusion can be reached for this person about his or her access to quality care with or without Medicaid?

## Conclusion

The value of the long-term care plan is its ability to inspire, educate, and enable clients to control their futures before and after retirement, plan for quality care, maintain flexibility, and experience the resulting peace of mind. Elder law attorneys, and all other elder advisors, should use private sector long-term care planning to achieve those ends.

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## Endnotes

1. Medicaid Law is codified at 42 U.S.C. § 1396 *et seq.*
2. 42 U.S.C. § 1396a (a)(10)(A).
3. I.R.C. § 7702B(c).
4. 42 U.S.C. § 1396p(b)(1)(B).