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Elder Law
spring 2015

Legal Matters®

Nursing home residents should prepare financially in case their spouse dies first

Seniors who are relying on Medicaid to help pay for expensive nursing home care need to plan carefully for the possibility that their spouse will pass away before they do.

Unlike Medicare, not all seniors are eligible for Medicaid. Medicaid is designed for people with limited income and assets, and to be eligible, you must meet strict financial guidelines. Many people have to spend down their assets to almost nothing and/or exhaust their long-term care insurance before they become eligible.

Of course, this is a problem if a senior is married and his or her spouse does *not* need nursing home care. It would mean that the spouse would have to be reduced to living in poverty before the senior could be eligible for benefits.

To avoid this problem, most states allow the spouse of a Medicaid recipient to keep a fairly generous amount of assets to live on. Many also allow the spouse to continue

to receive some income without having to contribute to the senior's nursing home costs.

But what happens if the spouse dies before the nursing home resident?

If the spouse dies and leaves everything in his or her will to the senior in the nursing home, the senior will suddenly have a much larger amount of assets. The senior will then have to spend these assets on his or her own care before being able to continue receiving Medicaid benefits. This means that he or she will not be able to leave a legacy to any children or other heirs.

That's why, if you're considering relying on Medicaid to pay for nursing home care, it's critically important to review your estate planning and take this possibility into account. There may be ways to lessen the blow



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and preserve an inheritance for your family.

Of course, one possibility is for the spouse to revise his or her will to leave assets to someone other than the senior in the nursing home. But while this sounds easy, disinherit-

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New rules will limit benefits of reverse mortgages

The federal government has tightened the rules for reverse mortgages, making it harder for some seniors to get these types of mortgages and reducing the amount of a home's value that can be tapped.

Reverse mortgages allow elders who are house-rich but cash-poor to use their housing equity.

Homeowners who are at least 62 years old can obtain a loan that doesn't have to be repaid until the homeowner moves, sells, or dies. The homeowner receives a sum of money from the lender, usually a bank, based largely on the value of the house, the borrower's age, and current interest rates.

Homeowners can get the money in one of three ways (or in any combination): a lump sum, a line of credit, or a series of regular payments, called a "reverse annuity mortgage."

Seniors sometimes use the loans to pay for home

care while they remain in the home.

Almost all such loans are insured by the U.S. government. The government says that in recent years, default rates have been rising, and many seniors are losing their home when they are unable to continue paying for insurance and property taxes.

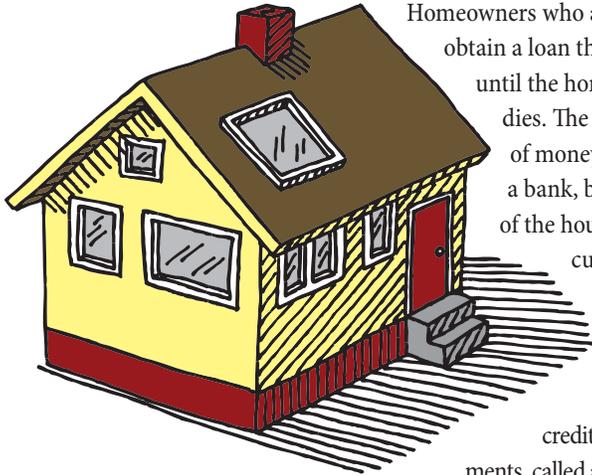
To address this problem, the government recently eliminated the most popular type of reverse mortgage, which was the "standard," fixed-rate lump-sum

mortgage.

This spring, the government is adding some new restrictions, including:

- Seniors must now undergo a financial assessment to make sure they can afford insurance and property taxes. If a lender determines that there's a risk of default, the borrower might be required to set aside money for these items.
- Until recently, homeowners had a choice of two programs: the "standard," which allowed for larger loans, and the "saver," which offered smaller loans and smaller fees. The government has now merged the two programs. The new maximum loan amount is about 10-15 percent less than in the standard, but slightly higher than in the saver.
- Previously, the upfront fee to take out a standard loan was 2 percent of the property's value, while the saver fee was .01 percent. The new fee is .5 percent. However, seniors who borrow more than 60 percent of a home's value will instead pay a 2.5 percent fee.
- During the first year of a loan, homeowners can withdraw a maximum of only 60 percent of the loan amount.

In general, proceeds from a reverse mortgage are not subject to income tax and generally won't affect your ability to receive Social Security or Medicare. However, it's possible that they could affect your eligibility for Medicaid.



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Nursing home residents should prepare in case their spouse dies first

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ing your spouse is a lot more complicated than it appears.

In some nine states, any property that a couple acquire during their marriage is considered a "community" asset, and one spouse is automatically legally entitled to it when the other passes away. This is generally true even if the spouse who dies would have preferred to leave it to someone else.

Virtually all other states have "elective share" laws. These laws say that even if you try to disinherit your spouse, your spouse can legally claim a percentage of your estate anyway.

Now in theory, a spouse in a nursing home could simply refuse to claim his or her "elective share," and the assets would go to someone else. But if you do that, the government can generally still say that the amount of the elective share is an "asset" that was available to you – and it can deny you Medicaid

benefits for the same length of time that it would have taken you to spend down that asset. So if you don't take the elective share, you'll have no way to pay for your care.

The amount of the elective share is usually between a third and a half of the spouse's estate, but it varies from state to state, and may depend on a number of factors such as the length of the marriage and whether you have minor children. States also differ as to what types of assets "count" as part of the value of the estate – including trusts, joint accounts, payable-on-death accounts, prior gifts, life insurance, etc.

This is a technical area of the law, and it's wise to talk to an attorney. It's very difficult to completely eliminate this problem, but there are smart planning steps most people can take now to minimize its impact – and the sooner you begin taking these steps, the more effective they may be.

Seniors who aren't 'independent' can't be discriminated against

Can an apartment complex require elderly residents to prove that they can live independently? How about a retirement community that caters to both independent and assisted-living residents – can it designate certain apartments or activities as only for people who are independent?

The answer might be more complicated than you think.

Two federal laws – the Fair Housing Act and the Americans With Disabilities Act – protect people with disabilities against discrimination. Landlords who try to limit areas or activities to people who are independent might run afoul of these laws.

For instance, it's generally against the law for an apartment complex or retirement community to require residents to prove that they can live independently. As long as a resident can meet the basic requirements of tenancy – such as paying rent and not disturbing others – a landlord cannot discriminate just because a resident is dependent on medical equipment or receives help from private aides or family members.

In some cases, landlords may also have to provide reasonable accommodations for disabled tenants, such as wheelchair ramps.

Things get more complicated in assisted living and continuing care communities, which often cater to both independent seniors and those who need more help.

For instance, conflicts can arise when a facility wants to transition a resident from “independent” to “assisted” status – which often involves being uprooted and moved to another apartment – and the resident doesn't want to go. The resident might argue that he or she can still function in the “independent” area with the help of private aides.

The facility might have good reasons for the request, such as being worried that the resident will be a danger to himself or herself or to oth-

ers, or a need to comply with state regulations. But a resident might also have a valid claim under the discrimination laws.

What if a facility tries to limit certain activities or common areas to independent residents? That might be discrimination as well.

For instance, a continuing care facility in Norfolk, Virginia declared that a popular waterfront dining room was “independent only” and off-limits to residents in the assisted living and nursing units. As a result, a number of longtime friends and even some married couples could no longer eat together in the dining room. The facility eventually changed its policy after residents contacted a lawyer.



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Assisted living facilities have run into trouble when they tried to limit dining rooms and bingo games to 'independent' residents.

In Huntsville, Alabama, a similar conflict arose after residents in a nursing unit were barred from a facility's regular bingo games.

Of course, facilities sometimes have a good argument, too. For instance, a facility might be able to show that allowing walkers, wheelchairs or motorized scooters in certain dining rooms could pose a tripping or falling hazard for the residents.

As more and more facilities offer memory care services, there will likely be increasing conflicts as to whether residents

with Alzheimer's disease or dementia can be barred from certain activities, such as films and concerts. A facility can certainly take steps to bar residents from certain activities if the residents would be disruptive, but it's not always clear whether residents with memory issues will actually pose such a problem.

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LegalMatters | spring 2015

Elder mediation can reduce family strife

When a parent gets older and begins to need additional care, it can create a lot of stress within a family. Sometimes, it can create conflicts and misunderstandings between family members as well.

For example, siblings might argue over what's best for an aging parent. Or if one family member is doing the bulk of the care, it can lead to resentment within the family, especially if the person providing the care is also receiving compensation for the work.

One way to deal with these issues is with an elder mediator. A mediator doesn't make any decisions and doesn't take sides. Instead, the mediator listens to the issues, keeps the family focused on shared goals, encourages consideration of all the options, and helps clear up misunderstandings and address hurt feelings. Through this process, a family can often come up with new answers to problems or new ways of resolving conflicts.

The idea is not to have a winner or loser, but to have a solution that everyone is happy with.

Some typical scenarios addressed by elder mediators include:

- Should an older parent stay at home with help, move in with one of the children, or move to assisted living?
- If one sibling does all the work of caring for a parent, or if the parent moves in with the sibling, how should the sibling be compensated? What's fair?
- A parent wants to leave more assets to one child than another in his or her will – perhaps because one child has a larger family, or has been less financially successful. This can cause the child with the lesser inheritance to feel upset.
- Parents want their vacation home to stay in the family, but some children use it more than others and disagree about what should be done with it.
- When one parent dies, the other parent



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begins dating someone new. The children may feel resentment, and worry that they will lose their inheritance.

In family situations where there's conflict, parents often have a tendency to tell each child what the child wants to hear, in order to keep peace and reduce tensions. But doing so generally only increases the level of discord and hurt feelings in the long run. Addressing the issues in a non-threatening way with the help of an experienced mediator can clear the air and lead to long-term family harmony.