Making Sense of Long-Term Care: Legal Issues[1]

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1. Long-term care refers to a broad range of care and support needed to mitigate the degenerative impact of serious illness or injury for persons of any age. It may include personal and health aide services at home, day placement in social or medical day programs, placement in alternative residential care facilities such as continuing care and retirement communities, assisted living facilities, short-term or intermittent placement in skilled nursing and rehabilitation facilities, and long-term custodial nursing homes. It also includes the geriatric care management services of a social worker or nurse, financial planning and legal services needed to plan and figure out how to pay for it all. Planning for long-term care involves the identification and planned utilization of personal resources, insurance and government benefits in a manner that is consistent with personal values and priorities. Critically, it also involves putting into place alternative means of decision-making in the event of future loss of capacity, to facilitate on-going adjustment and implementation of the plan to address changing financial, personal and legal circumstances, including those related to benefits. Since planning must take into account the extent to which, if at all, preservation of assets for the benefit of a surviving spouse or children, other relatives, or charities, is important to you, planning for long-term care cannot be completely disassociated from estate planning in general.

2. Are your affairs in order to deal with the financial impact of your **death**?

    a. Do you have a Will? If not, Massachusetts has a "Will" for you, meaning that your assets will be distributed to relatives based on a standard formula that may or may not be in keeping with your wishes.

    b. Do you have an APPROPRIATE plan for the distribution of your assets at death, taking into account any special needs of the surviving spouse and of your children?

        i. What if the surviving spouse is not able to manage her finances independently, or you fear may someday need long-term care? Trusts contained a will – testamentary trusts – are afforded special and favorable treatment under Medicaid law. You may want to consider leaving assets in trust, rather than outright.

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[1] Copyright 2013 by Rosenberg, Freedman & Lee LLP, Newton, Massachusetts. This paper was prepared to provide general background information, to be used in conjunction with the Boston College life-planning series, "Are you Financially Fit?" It is not intended to be and should not be taken as legal advice. For that, consult an attorney in your state who is knowledgeable about estate planning and elder and disability law, and who is thoroughly familiar with all the circumstances of your particular case. Updated May 15, 2013.

ii. What special provisions might you make for your children? If a child depends on public benefits due to disability, then a special type of trust may be appropriate, to manage resources on his behalf without interfering with eligibility. A trust may also be appropriate for a son or daughter who for whatever reason is not able to support himself independently or to manage his finances, or for one who is experiencing serious marital or legal problems.

iii. Parents sometimes consider making unequal distributions to children in their estate plans. A particular child with a physical impairment, mental illness or intellectual disabilities may have both special care needs and a diminished capacity to provide for himself through work. The demands of being a single parent or the effects of long-term unemployment may leave one child in far greater financial need than siblings. Sometimes, parents wish to reward or compensate a child for taking on added care responsibilities. Sometimes, disparate treatment is motivated by a desire to avoid benefiting a child who is estranged from the family. While such decisions are, as a legal matter, totally within the legal discretion of the parents, consider how such decisions may be perceived and affect relationships within the family – among the children and grandchildren -- after you are gone. Consider also that circumstances change. Children now perceived as financially secure may encounter reversals. Consider using vehicles OTHER than the Will to make disparate gifts – beneficiary designations on retirement accounts and life insurance.

iv. IRA's and other retirement accounts, life insurance and some annuities ordinarily do not pass under your Will, but according to "beneficiary designations" you make. Increasingly, banks and brokerage houses are allowing for "payable on death" or "transfer on death" instructions, resulting in direct distributions at death without probate. What ARE your designations? Are you sure? (Check with the financial institutions involved.) Do they reflect your current intent? Are they structured so as to take potential income tax complications into account? Are current arrangements consistent with your overall plan for disposition at death? If equality of benefit to your children is important, you have to plan accordingly with respect to each of your accounts and not only with assets passing under the Will.

c. Are you doing what you can to minimize estate taxes?

i. The "tax-free amount" is now $5,250,000. The tax-free level for the Massachusetts estate tax is effectively $1 million. If you individually, or you and your spouse jointly, have assets (including the proceeds of life insurance) in excess of these levels, your estate may face potential estate tax liability.

ii. Ask your attorney or accountant to help you understand the extent of the liability, and about the pro's and con's of actions, such as gifting, to lessen estate tax exposure, if that is important to you. But don't let the tail wag the dog on this. Make sure you understand what you are giving up, in lifetime control and flexibility, to gain a tax advantage that will not benefit either spouse during lifetime, but only the beneficiaries of your estate.

d. Are you doing what you can to minimize the costs of administering your estate and settling your affairs after your death?

   i. Probate is the procedure required by law to ensure that assets you own alone at death end up where you intended. The procedure often adds expense and time to the settlement of one's affairs although costs should be less under the recently enacted Massachusetts Uniform Probate Code. In any event, sometimes court supervision is necessary and advisable to make certain that all heirs are protected. Also, because Massachusetts MassHealth/Medicaid law provides special protection for trusts created and funded by Will, probate may be a necessary cost for protection of assets for the benefit of the surviving spouse in the context of long-term care.

   ii. You can avoid probate by holding assets in the form "joint with right of survivorship," with title passing automatically to the survivor at death, without probate. However, this potential advantage comes with serious risks. If you hold assets jointly with a child, the assets may be considered the child's as much as the parents. If the child gets into financial, personal, credit or marital problems, the assets may be reached by the child's spouse and creditors, despite the child's best intentions. Joint ownership of assets with children can also inadvertently result in unequal distributions of the overall estate, depending on the investment performance of different accounts and on the varying extent to which different accounts are used for care or other expenses during your lifetime.

   iii. Often a better alternative to joint ownership is a revocable or "living" trust. A trust can be used to avoid probate and facilitate the management of your estate in the event of incapacity, and can provide more control and protection than joint ownership. The use of trusts in the MassHealth context is very complicated and should be approached only with caution. Ask questions.

3. Have you taken appropriate steps to protect yourself in the event of **mental incapacity**? Who will manage your financial and legal affairs? Who will make medical care decisions for you? What standards will apply?

   a. The law enables you to choose an individual to manage your **legal and financial affairs**, through a "durable power of attorney." In the absence of a valid power of attorney, the court appointment of a conservator may be the only recourse, at great cost in terms of legal expense, delay, loss of privacy and loss of flexibility.

      i. With a DPA, you choose <u>who</u> will make decisions on your behalf, even the person who you want to serve as your legal guardian or conservator should the need arise. No one – including your spouse and children -- has the RIGHT to be named.

         (1) Choose carefully.

(2) Consider the financial skills, experience, trustworthiness, availability (time), proximity (distance) and personal, marital and financial stability of the person (and alternates) you name.

ii. You decide the powers to be included.

(1) A durable power of attorney is a very powerful tool, one that can and should be individualized and tailored to each individual's particular circumstances and preferences. There is NO "boilerplate" or standard instrument that is right for all purposes, relationships and preferences. Take control. Understand what you are signing.

(2) Elders have special needs that the instrument should ordinarily cover, e.g., Social Security, Medicare, supplemental ("Medi-gap") health insurance, prescription drug coverage, estate planning and alternative residential arrangements such as assisted living, continuing care retirement communities and nursing facilities.

(3) Sometimes, but not always, it is appropriate to give the person you name the power to transfer or make gifts of personal property, real estate or other assets, to other family members, including themselves, for estate planning purposes as a part of a strategy to protect assets from long-term care.

b. Also in the event of incapacity, the law gives you the power to designate others to make **medical-care decisions** for you, including (but not limited to) decisions about withholding or withdrawing life-sustaining care at end of life. The primary instrument is the **Health Care Proxy**, which can be tailored to individual preferences.

i. Make sure the instrument deals with laws otherwise limiting access to medical information, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

ii. Medical decision-making at the end of life poses special legal as well as emotional concerns. The Health Care Agent is supposed to make medical decisions, including those relating to life-sustaining care, based on your preferences, not those of the agent. Unless you have been clear about those preferences, the agent is left to guess, a situation that can result in delay, indecision, family conflict or needless guilt. For these reasons, we advise clients to approve a Medical Directive. Sometimes called a "living will," the intention of the document is to make explicit your personal preferences, shaped by your own personal, ethical or religious ideas, about decisions in the context of terminal illness, irreversible coma, late-stage Alzheimer's Disease and the like.

4. Have you taken appropriate steps to protect yourself and your spouse in the event of **long-term illness** and nursing home placement?

a. With the costs of long-term care steadily increasing, now often exceeding $130,000 per year in Massachusetts, the primary financial risk many elders face is that of long-term care, either at home or in a nursing home.

b. Recognize the limitations of Medicare and Medex or other "medi-gap" insurance coverage. Neither provides for long-term care.

   i. Medicare provides up to 100 days of skilled nursing facility care or skilled rehabilitation after an in-patient hospitalization (NOT hospitalization for observation) of at least three days.

   ii. You must require daily skilled care that can be provided only on an in-patient basis, and that is medically necessary to improve your medical or functional status, to maintain your current condition, or to prevent or slow further deterioration. THIS IS AN IMPORTANT CHANGE AND IMPROVEMENT IN MEDICARE COVERAGE. FORMERLY, MEDICARE COVERAGE ENDED IF THE PATIENT "PLATEAUED" – STOPPED IMPROVING.[2] Medicare pays the full facility rate for up to 20 days; the 2013 co-pay for days 21-100 is $148. In any event, custodial care in nursing homes is not covered by Medicare, but only by Medicaid (MassHealth).

   iii. At home, Medicare provides visiting nurse, physical therapy, home health and other services in the home to individuals who are "home-bound" and who need such services to improve their medical or functional status, to maintain the patient's current condition, or to prevent or slow further deterioration. THIS IS AN IMPORTANT CHANGE ALSO FOR HOME CARE SERVICES. See Footnote 2.

   iv. Medicare-supplemental insurance typically helps with co-pays and deductibles, but ordinarily does not add days or services beyond what is approved for Medicare.

c. Consider whether your income and resources are sufficient to pay for long-term care privately, taking into account the importance, if any, you attach to leaving your children an inheritance after you are gone.

d. If private-payment for long-term care is not feasible or desirable, consider:

   i. **Long-term care insurance**. Long-term care insurance ("LTCI") covers certain non-medical services when an insured is unable to perform certain specified everyday tasks – often called activities of daily living ("ADL's") - due to a chronic illness or cognitive impairment. ADL's can be defined in various ways, but most commonly are: *transferring* (eg between bed and a

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[2] Prior to an October 2012 settlement in a lawsuit filed by the Center of Medicare Advocacy, Medicare support for skilled nursing facility care and for home care was often discontinued upon a finding that the medical or functional status of the individual was no longer improving. In the settlement, Medicare agreed to continue care and services necessary to maintain or to prevent or slow further deterioration. Medicare beneficiaries whose claims for skilled nursing and therapy services were denied before Jan. 18, 2011, when the lawsuit was filed, will have an opportunity to have their claims re-examined.

wheelchair), *toileting*, *bathing*, *dressing*, *eating* and *maintaining continence*. Most policies require that the individual need direct or stand-by/cueing help with at least two ADL's to qualify for benefits, or that the individual have a severe cognitive impairment.

ii. While some older policies limited coverage to facility care only or home care only, an appropriate plan today would include home care, adult day care and assisted living, as well as long-term nursing home care. Some provide flexibly for alternative plans of care based on individual need.

iii. Although almost all such coverage is guaranteed renewable once issued, companies do medically underwrite policies and may turn down an applicant who does not meet underwriting criteria. Consequently, those buying LTCI plans are generally healthy and may hold their policies for decades before ever receiving plan benefits. LTCI policies are not standardized and purchasers can choose plans based on the types of services covered (*e.g.*, nursing home, home health or chore care), the level of coverage (usually a fixed dollar amount per day or month), the duration of coverage (usually categorized by the number of years of covered benefits) and an elimination period (waiting period) before carrier payments begin. In addition to these features, consumers can add inflation protection, non-forfeiture benefits and additional services. The premium for the coverage will change depending on the level of coverage the insured chooses. Insurance carriers sell LTCI coverage either on an individual basis or through group policies sponsored by employers or associations. Group policies are not subject to Massachusetts LTCI regulations, but individual policies are required by the Massachusetts Division of Insurance to meet certain standards, including that they:

(1) Are guaranteed renewable or non-cancelable;

(2) Provide at least 730 days (or a comparable dollar amount) of coverage;

(3) Not include an elimination period (waiting period) of more than 365 days;

(4) Provide benefits based upon a showing of deficiencies in not more than two Activities of Daily Living (ADL's);

(5) Include alternate care provisions allowing coverage for unspecified services if agreed to by the insured, insurance company and health care practitioner;

(6) Offer the opportunity to buy inflation protection and nonforfeiture benefits.

(7) Offer at least one policy with home health care benefits and one that qualifies for certain MassHealth (Medicaid) exemptions;

(8) Limit any pre-existing condition limitations to no more than six months after the policy's effective date; and

(9) Not limit benefit payments because an individual develops Alzheimer's Disease, mental illness, alcoholism or other chemical dependency after the policy is issued.

iv. **Group LTCI policies are NOT subject to these state requirements.** In fact group LTCI policies are not subject to ANY state or federal regulation. Therefore, you must be very cautious in reviewing them. Also, rate increases on group LTCI are NOT subject to state approval. Even though the state regulations do not technically apply, I advise using them as a benchmark in reviewing group insurance, since the state regulations are considered to be very consumer-protection oriented.

v. Some policies are advertised to be "MassHealth-Qualified." If you receive MassHealth and have a LTCI policy that meets certain requirements, you MAY be exempt from certain estate recovery rules relating to MassHealth reimbursement claims for reimbursement after your death, most often involving the former residence. The rules in this regard are technical and changing. *Don't purchase a policy because it says it is MassHealth-Qualified without advice from your attorney.*[3]

vi. Some policies are advertised to be "federally tax-qualified." Such policies offer certain federal income tax advantages. Most notably, premiums may be deductible as medical expenses. It is true also that benefits are generally, and within limits, excluded from income, but that is the case also for most non-tax-qualified plans. To be qualified, policies must meet certain standards. However, it is not always to your advantage to choose a federally-tax-qualified policy. Benefit triggers may be more restrictive than with non-qualified plans. Also, depending on your specific financial circumstances, you may NOT be able to take advantage of the federal tax breaks. *Don't purchase a policy because it is federally tax-qualified without consulting with your accountant.*

vii. Refer to an excellent pamphlet published by the Massachusetts Division of Insurance entitled "Your Options for Financing Long-Term Care: A Massachusetts Guide," from which much of the foregoing discussion was drawn. It is available on-line at:

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[3] A very recent change in the law warrants attention. Until a law change on October 27, 2012, to qualify for the exemption the individual must have had, "at the time of nursing home admission," at least two years of coverage at a minimum of $125 per day. Under the amendment, the policy will qualify as long as it meets these minimum standards only "when purchased." Under the old law, people risked loss of the exemption by making claims under the policy for care at home or in other community settings. Under the new law, people will be able to make claims for home- and community-based care based solely on their needs, without holding back to protect the exemption. This is plainly a change for the better, and will help many achieve their goal of being cared for at home for as long as possible. Other requirements for the exemption apply, including some relating to the MassHealth application, itself. Consult an elder law attorney.

(a) http://www.mass.gov/ocabr/consumer/insurance/health-insurance/consumer-guides/long-term-care-guide/

viii. Carefully assess the quality of the issuing company, and the affordability of different policies and of different options within policies. Compromising on the waiting period, for example, should make a policy less costly. Carefully assess the impact of premiums, potentially for years, on your budget, and proceed only if you are confident that you can afford coverage. Remember that while most policies protect you against increases in premiums based on your claim history, virtually all allow for annual increases for broad classes of insureds. In evaluating a policy, ask for information on premium increases by the company for its LTCI policies in prior years, and take the likelihood of premium increases into account in assessing affordability.

e. **Medicaid planning**, particularly if you do not have sufficient financial resources to pay for care privately, and cannot afford or do not qualify for long-term care insurance. Medicaid (called MassHealth in Massachusetts) provides comprehensive coverage for nursing home care, and also quite extensively for home- and community based health and personal care supports. When used thoughtfully, the MassHealth system is far more workable and protective than most people think, particularly if the individual is married or has other family members with special medical or disability-related needs. However, eligibility is limited by complex regulations relating to income, assets, transfers (gifts), and trusts. The following are some basic ideas to bear in mind in Medicaid planning.

i. With married couples, one of whom is in a nursing home, the "community spouse" is automatically entitled to retain the principal residence and a "**community spouse resource allowance**" of $115,920 (in 2013) in savings, retirement accounts and other assets. Beyond that, however, the regulations allow approaches to conserve more marital assets and in some cases these may be appropriate to consider. For example, if both spouses have low income and/or the community spouse has significant special care needs of her own (e.g., needs assisted living), a higher community spouse resource allowance is authorized. Also, within limitations, **immediate annuities** can be effective in some circumstances.

ii. **Transfers** should be used in Medicaid planning only with care and a full appreciation of the consequences. Depending on the circumstances, transfers (gifts) even in modest amounts may effectively foreclose eligibility for Medicaid nursing facility services (and even home- and community based services in some cases) for five years or longer. There are exceptions, however. The following, for example, are not disqualifying if specific requirements are met: transfers to the spouse, to a disabled child (of any age) or in trust for such a child, transfer of the principal residence to a "care-providing child," transfers solely for purposes other than to establish MassHealth eligibility and transfers to certain kinds of trusts.

iii. Certain types of **trusts** may be appropriate in Medicaid planning. For example, a "testamentary trust" (the provisions of which are contained in a Will) for the benefit of the surviving spouse, if meeting certain requirements, is not subject to the five-year look-back and need not interfere with the Medicaid eligibility of the surviving spouse. A trust for a disabled son or daughter is permitted (including "special needs trusts") if certain requirements are met. Even some trusts for the elder nursing home patient funded with his own assets are permitted (e.g., "pooled trusts"). An "income-only trust" may sometimes be useful, while other common types of trusts, such as funded revocable "living" trusts seldom are. In short, the use of trusts may be appropriate to consider in Medicaid-related planning, but only with great care.

iv. When considering any plan involving transfers of assets, take into account:

(1) Your loss of access to and control over the assets involved,

(2) The risk to the assets in the hands of other family members who may now have or later develop financial, marital or legal problems of their own,

(3) The usually applicable the five-year waiting period for MassHealth for nursing home coverage and sometimes for home- and community-based services as well, and

(4) Income, gift and estate tax considerations.

v. When planning for long-term care:

(1) First, learn all you can about how to protect yourself, your spouse and your family.

(2) Second, understand that there is no single course of action that is right for every person and every circumstance. Strive to find the right balance between self-protection and loss of autonomy and control. ASK QUESTIONS.

(3) Third, PLAN AHEAD. To be most productive, planning for long-term care should be undertaken as much in advance of need as possible. Waiting periods for eligibility <u>may</u> apply. However, it is usually never too late to take protective actions that will be at least partially effective.

(4) And lastly, DON'T PANIC.