

Late-Life Love, Part II

To Tie the Knot or Not: Planning for Long-Term Care



With the Baby-Boomer tsunami, almost 70 percent of people over age 65 will need long-term care. More than 40 percent will need care in a nursing home. With those statistics in mind, consider the couples contemplating marriage who often turn to their attorney for a prenuptial agreement.

“It is crucial to discuss these issues with the couple, explain the process and the ‘what ifs.’”

The couple usually believes that this agreement will “protect” each partner’s assets during the marriage as well as at the end of the marriage. When advising these clients, do we have a duty to inform the clients that a prenuptial agreement may not “protect” each partner’s assets when one spouse needs long-term care?

When discussing prenuptial agreements and marriage, we need to advise our clients that if one spouse needs Medicaid to pay for long-term care, the assets of both spouses will be considered by the Medicaid agency (Department of Human Services, DHS). However, if the couple chooses cohabitation, DHS only considers the assets of the disabled partner. This information is crucial for couples considering late-life marriage.

The following examples provide a general overview of the Medicaid eligibility process merely to determine the impact on married couples and cohabitants.

Medicaid and the Married Couple

Fred and Wilma, both 75, have been married for 10 years. They have a prenuptial agreement and wills leaving all assets to their respective children. Fred was recently diagnosed with vascular dementia. Wilma and Fred are concerned about paying for Fred’s care, especially if he needs nursing home care.

Fred was a mail carrier before he retired, and Wilma worked as a registered nurse. They live in Fred’s home, which is mortgage-free and worth approximately \$350,000. Wilma would like to continue to live in Fred’s home. Wilma has \$200,000 in nonretirement cash assets and \$100,000 in an individual retirement account (IRA). Wilma owns a condominium worth \$250,000. Fred has \$100,000 in cash assets titled to his name. Fred also has an IRA worth \$50,000. Fred and Wilma own a Toyota Camry worth \$15,000 and a Honda van worth \$10,000. Fred and Wilma own burial plots. Neither Fred nor Wilma served in the military. Fred and Wilma do not have long-term care insurance.

Assume that Fred falls and breaks his hip. He is in the hospital for five days, and then he is released to a nursing home for rehabilitation. Medicare will pay for the first 20 days of rehabilitation, and then Medicare will pay 80 percent up to the next 80 days, while Fred’s medi-gap insurance will pick up the co-payments, subject to a deductible. Medicare will pay for skilled care up to a maximum of 100 days. After that, Fred is “private pay” until he qualifies for Medicaid/CHOICES.

Medicaid CHOICES is a result of the Long-Term Care Community Choices Act of 2008, *Tenn. Code Ann.* §71-5-1402, et seq. The law also provided for the amendment of several other related statutes, 2007 Tenn. SB 4181. The goal

of CHOICES is to give disabled people who qualify medically and financially for Medicaid a choice as to where they receive Medicaid services — whether at home, in assisted living or in a nursing home. CHOICES has three groups.

CHOICES Group 1 is nursing home Medicaid. Medicaid *nursing home* benefits are an entitlement if the patient meets the medical and financial criteria. There are an unlimited number of slots for nursing home CHOICES. Once the client qualifies for nursing home Medicaid, Medicaid pays for the client's care. Generally, the client contributes most of his/her income toward the cost of care.

CHOICES Group 2 pays for some help at home and in assisted living. Group 2 is limited to a certain number of people for the entire state. Presently that limit is 11,000 slots. People in Group 2 must meet the same medical and financial criteria for nursing home placement. The client would be able to keep all of his income if he is receiving care at home or in assisted living. Most assisted living facilities do not participate in the CHOICES program.

CHOICES Group 3 provides limited assistance at home for people who do not meet the medical criteria for nursing home placement, but who are at risk of nursing home placement. Group 3 does not provide assistance in assisted living. Presently, there is no enrollment cap for Group 3 from July 1, 2012 until July 1, 2013. The client would be able to keep all of his income. Group 3 will pay up to \$15,000 per year in home and community based services.

In order for a married couple to eventually access Medicaid CHOICES, they (or their legal representative) must first obtain a "resource assessment" from DHS. The resource assessment is a snapshot of the couple's financial situation at the time Fred entered the nursing home or applied for CHOICES and was medically qualified for benefits. Assets are classified as countable or exempt. In this case, the

exempt assets are the home, for the lifetime of Fred and Wilma, personal property, irrevocable prepaid funeral and burial or cremation plans, and one vehicle. Wilma's IRA is also exempt since she is the "community spouse" (a spouse who is not in a nursing home). *The prenuptial agreement has no effect for Medicaid purposes.* The Resource Assessment for Fred and Wilma would look like the table below.

Wilma, the community spouse, is allowed to retain her IRA, one vehicle, the

Fred and Wilma's Resource Assessment	
Assets	Value for Medicaid purposes
Fred's home — \$350,000	Exempt as the homestead
Wilma's condominium	\$250,000
Wilma's \$200,000 in cash	\$200,000
Wilma's IRA — \$100,000	Exempt
Fred's \$100,000 in cash	\$100,000
Fred's IRA	\$50,000
Honda van	\$10,000
Toyota Camry	Exempt
Burial plots	Exempt
Total Countable Assets	\$610,000

personal property and the burial plots. Wilma may keep one-half of the countable assets up to \$115,920 (2013). The remaining funds, \$494,080 must be "spent down" to \$2,000 before Fred will qualify for Medicaid to pay for his nursing home care. These funds may be spent on anything that benefits either spouse.

Elder law attorneys have creative ideas about spending these funds in order to benefit both spouses. However, that usually means shifting assets to or for the benefit of the community spouse. How will Fred's children feel about this shift of assets to Wilma? Has Fred signed a durable financial power of attorney that authorizes transfers to the spouse? (For Medicaid purposes, there is no transfer penalty for transfers to a spouse.) If the attorney-in-fact is Fred's child, will he/she be willing to make

these shifts to Wilma? Will Wilma agree to change her will and estate plan to benefit Fred and then all of the children?

It is crucial to discuss these issues with the couple, explain the process and the "what ifs." Then, include language in the prenuptial agreement acknowledging that if a spouse needs long-term care and access to Medicaid, assets may be spent for the benefit of either spouse, and assets may be retitled to the community spouse. The prenuptial agreement may include requirements

regarding the community spouse's will, so that the disabled spouse's children receive a benefit after the death of both spouses. It is also important that each spouse has an updated power of attorney that contains the authority to make gifts.

Medicaid and Cohabitants

Barney and Betty are 70 and contemplating marriage versus cohabitation. Barney has been diagnosed with a "mild cognitive impairment." They are concerned about paying for long-term care, if they were to marry. They live in Barney's home, which is mortgage-free and worth approximately \$350,000. Betty would like to continue to live in Barney's home, if Barney needs long-term care. Betty has \$200,000 in nonretirement cash assets and \$100,000 in an individual retirement account (IRA). Betty owns a condominium worth \$250,000. Betty rents the condominium for extra income. Barney has \$100,000 in cash assets titled to his name. Barney also has an IRA worth \$50,000. Barney owns a Honda van worth \$10,000. Betty owns a Toyota Camry worth \$15,000. Barney and Betty own burial plots. Neither Barney nor Betty served in the military. Barney and Betty do not have long-term care insurance.

In a cohabitation scenario, should Barney need nursing home care, there would be no "resource assessment" because he is not married. His home-

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Barney's Assets for Medicaid Purposes

Assets	Value for Medicaid purposes
Barney's home: \$350,000	Exempt as his homestead
Barney's \$100,000 in cash	\$100,000
Barney's IRA	\$50,000
Honda van	Exempt
Burial plots	Exempt
Barney's Total Countable Assets	\$150,000
Barney must spend the \$150,000 down to \$2,000 before he will qualify for Medicaid.	
Betty retains all of her assets.	
Betty's condominium: \$250,000	
Betty's \$200,000 in cash	
Betty's IRA: \$100,000	
Toyota Camry: \$15,000	
Burial plot	
Betty retains \$515,000	

stead and contiguous property are

The Law at Work *continued from page 28*

is a 'fact' or a 'conclusion' is fine, blurry, and hard to detect.”).

14. *Id.* at 434.

15. *Id.* at 434-35.

16. *Id.* at 435. It is important to note that the concept of “access to justice” has become a focal point for Tennessee’s highest court. In Dec. 2008, the Court made access to justice its number one strategic priority and formally announced its Access to Justice Initiative. In Apr. 2009, the Court formed the 10-member Access to Justice Commission. See Access to Justice, Tennessee Administrative Office of the Courts, <http://www.tncourts.gov/programs/access-justice>.

17. *Webb*, 346 S.W.3d at 435-36.

18. *Id.* at 426.

19. 42 U.S.C. § 2000e et seq.

20. 29 U.S.C. § 621 et seq.

21. *Veasy*, 868 F. Supp.2d 688, 2012 U.S. Dist. LEXIS 53627 at **20-21.

22. *Id.* at *22.

23. *Id.*

planning. *Betty retains all of her assets.*

24. *Id.* at *24.

25. *Id.*

26. *Id.* at **22-24.

27. See *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938).

28. *Hanna v. Plumer*, 380 U.S. 460 (1965).

29. *Felder v. Casey*, 487 U.S. 131, 151 (1988).

30. 270 S.W.3d 1 (Tenn. 2008).

31. 320 S.W.3d 777 (Tenn. 2010).

32. *Tenn. Code Ann.* § 20-16-101 (adopts the federal standard that a summary judgment is proper, in addition to the Hannan standard, where the defendant can establish that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim); and *Tenn. Code Ann.* § 4-21-311 (which amended the Tennessee Human Rights Act to apply the *McDonnell Douglas* paradigm to all stages of a state law employment discrimination/retaliation claim, including at summary judgment).

33. See 28 U.S.C. § 1441.

exempt for eligibility purposes for his lifetime. His van, personal property and burial plot are exempt. His cash must be spent down to \$2,000 before he will qualify for Medicaid benefits. There are several ideas for spend-down that will benefit Barney, such as an irrevocable funeral and burial/cremation plan, a “pooled trust” 42 U.S.C. §1396p(d)(4)(C), or possibly a “gift” plan, sometimes called “half a loaf”

Obviously, it is in Betty’s financial best interests to cohabitate, if Barney needs to access Medicaid, as illustrated in the table on the left.

There is much to consider when deciding how to go forward as a couple in later life. The romance, the companionship, the mutual help and support, and the social, familial and religious/spiritual “correctness” of cohabitation are all factors that must be worked out between the players. However, the likelihood and cost of long-term care, access to public benefits, and the long-term care “math” should be a part of the conversation as we advise our clients who are considering marriage in mid to late life. ^{41A}

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Demonstrative Evidence

erect.” At that moment he pressed the trigger. There was a flash and the half-suppressed sound of a shot. “My God, I’ve shot myself!” Vallandigham exclaimed in shocked dismay as he reeled toward the wall and tried to hold himself up.

Clement L. Vallandigham died the next morning, Saturday, June 17, 1871, at age 50. His grave is in Dayton’s Woodlawn Cemetery.

McGehan was acquitted after being tried thrice. He was murdered in 1875. ^{41A}

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