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INSIGHTS ON ELDER LAW SPECIAL MEDI-CAL EDITION

By Stephen A. Anderson

Consider the following: John and Mary Smith have been happily married for 50 years. John just celebrated his 80th birthday and Mary is 78. John retired from IBM 15 years ago with a good pension after thirty years of service. Mary has always worked in the home. They own their home, free and clear, and have savings that total nearly \$100,000. Between their savings, social security and retirement pension, they have enough to enjoy a comfortable retirement.

Then John suffered a stroke which left him paralyzed over the entire left side of his body and unable to talk. Mary was unable to take care of him in the home any longer. Reluctantly, Mary placed John into a nursing home. Much to her surprise, Mary learned that neither Medicare nor their private health insurance plan covered his nursing home expenses.

Today, Mary pays John's annual nursing home bill of \$46,000 out of the couple's lifetime savings. At this rate, Mary and John will exhaust their \$100,000 in savings within a few years. The thought of divorcing John, after 50 happy years of marriage, to financially protect herself is unthinkable to Mary. Consequently, in a few years, Mary may have to sell or mortgage her home to pay for her husband's care. With the potential loss of their home and life savings, John and Mary are facing an uncertain future.

John and Mary are not alone. They are among the fastest growing segment of our society today. Between 1980 and 1990, the percentage of persons aged 65 and older increased by nearly 50%. This trend is expected to accelerate as the baby boom population ages. According to the U.S. Administration on Aging, the number of Americans aged 65 and older will more than double by the year 2030.

As the U.S. population grows older, there has been a corresponding increase in the number of Americans who need long-term nursing home care. According to the U.S. Government Accounting Office, more than 70 million Americans aged 65 and over are receiving some form of long-term care due to a chronic condition, trauma or illness that limits their ability to carry out personal care tasks such as feeding, bathing, or dressing themselves.

Today, over 50% of all Americans over age 65 and 65% of all Americans over age 80 (mostly women, because they live longer than men) are expected to reside in a nursing home for at least 2.5 years on average. According to the U.S. Administration on Aging, the number of

Americans needing long-term care is expected to double in size to 14 million persons in the next 25 years.

Unfortunately, the cost of long-term care, particularly nursing home care, has placed an enormous financial hardship upon many seniors and their families. In California, nursing home care costs exceed \$46,000 per year. Such enormous health care costs have caused many seniors to lose their homes and have forced many seniors to deplete their life savings. Once impoverished, most seniors must rely on Medi-Cal benefits to cover the cost of their nursing home care.

I am pleased to have an opportunity to speak with elder law attorney, James Berge, on this important topic. Mr. Berge is a certified specialist in estate planning, trust and probate law, who practices primarily in the areas of estate planning, charitable planning, federal estate and gift tax planning, trust and estate administration, conservatorships, and Medi-Cal and disability planning. Mr. Berge is a graduate of Santa Clara University School of Business (BSC '81) and School of Law (JD '86) and Golden Gate University School of Law (LLM Taxation '91). He is also a California certified public accountant and a member of the National Academy of Elder Law Attorneys and California Advocates for Nursing Home Reform. He is a sole practitioner with offices centrally located in the heart of Silicon Valley, and he frequently conducts seminars and in-service training programs for seniors, family caregivers, nurses, social workers, lawyers, financial planners, and other professionals and non-professionals who serve the elderly.

Accordingly, he is well acquainted with the heartbreaking realities that confront people everyday when dealing with the emotional and financial crises that an increasing number of seniors and their families are facing daily.

Insight: Jim, welcome. In my example, if John enters a nursing home, will traditional life insurance finance his cost of care?

Berge: No. Unfortunately, such plans do not usually cover long-term nursing home care.

Insight: If traditional health insurance fails to provide coverage, then who pays the cost?

Berge: Usually the patient or the patient's family. However, few elderly Californians can afford to pay this cost over an extended period without completely depleting all of their savings. In fact, many elderly Californians have lost their homes and depleted their life savings as a consequence of financing the cost of their nursing home care.

Some may be lucky enough to have long-term care insurance. The use of long-term care insurance is increasing as more people become familiar with the existence of these types of

policies. Unfortunately, the monthly premiums are cost-prohibitive for most elderly persons, many of whom are living on a fixed income. Moreover, the persons who are already in a nursing home, or will most likely need nursing home care in the immediate future, will not usually qualify.

For those who can't afford to privately pay for long-term care or don't have long-term care insurance, there are two public assistance programs that will finance the cost of nursing home care. These programs are Medicare and Medi-Cal.

Insight: What is Medicare?

Berge: Medicare is a federal health insurance program for the elderly and disabled. If one is eligible to receive Social Security, one is eligible to receive Medicare. There are no financial eligibility requirements to receive Medicare except for a small monthly premium that is required to receive certain outpatient services.

Unfortunately, Medicare only pays for the type of care that is needed by a small minority of long-term nursing home patients. Under the laws regulating the program, Medicare will only pay for the cost of nursing home care for patients who need "skilled care." Skilled care is a level of care that requires the expertise of a doctor, nurse, or therapist. Examples of skilled care include physical therapy or rehabilitative therapy. Nursing home patients who are in a facility for longer than three months typically do not need skilled care. Rather, they need "custodial care."

Custodial care is health care that involves ordinary activities of daily living, such as feeding, bathing, or dressing. Custodial care is particularly needed by patients who suffer from dementia such as Alzheimer's Disease. For example, an Alzheimer's patient can be physically healthy, and therefore would not need skilled care such as physical or rehabilitative therapy. However, the degenerative brain condition caused by the disease renders him or her unable to care for himself or herself. Medicare only pays for nursing home care for a limited time. This is because Medicare only covers the costs of nursing home care while the patient needs skilled care. Therefore, Medicare, as a practical matter, covers only a small portion of most long-term patients' nursing home costs.

Not only is Medicare assistance limited to nursing home patients who need skilled care, the program will finance the cost of this care for only a limited period of time. Medicare will only pay the daily cost of care from the third through the twenty-first day in which the patient resides in the nursing home and needs skilled care. From the twenty-second day to the hundredth day, the patient (or the patient's family) must pay approximately \$90 per day. Medicare will pay the additional costs. The daily payment which the patient is responsible for is known as "co-payment." For those lucky enough to have it, Medicare supplemental insurance (so-called "Medi-gap" insurance) will finance this co-payment. However, after the

hundredth day of skilled care per calendar year and illness, the patient (or the patient's family) is responsible for the entire cost of nursing home care.

Insight: What is Medi-Cal?

Berge: Medi-Cal is the California version of federal Medicaid. Medi-Cal will finance the cost of nursing home care as long as a patient meets certain financial eligibility criteria. Under Medi-Cal regulations, a patient must attempt admission to (or already reside in) a skilled nursing facility or an intermediate care facility, and the facility itself must be Medi-Cal certified (and not all are).

Unlike the Medicare program, the Medi-Cal program will finance the cost of custodial nursing home care for patients who qualify financially. As a consequence, Medi-Cal is the most common method of financing nursing home care. In fact, Medi-Cal finances the cost of care for half of all nursing home patients in California.

Insight: Who qualifies for Medi-Cal?

Berge: Adults who are "medically indigent" and reside in either a skilled nursing facility or an intermediate care facility. The determination of "medically indigent" depends on whether the person is married or single. If the patient is married, he or she may qualify for Medi-Cal benefits if the value of the married couple's "countable" assets does not exceed \$86,120 in 2000. This asset limitation is adjusted each year for the cost of living. A single person is "medically indigent" if the value of his or her "countable" assets does not exceed \$2,000.

Insight: You said "countable" assets. What are "countable" assets?

Berge: It's a term of art. "Countable" assets are all assets other than "exempt" assets. "Exempt" assets include a principal residence as long as the patient intends to return to his or her home or has a spouse that lives in the home. "Exempt" assets also include one family vehicle, retirement plans, fixed annuities, term life insurance, clothing and personal jewelry, household items, property used in a trade or business, burial plots, burial funds, and prepaid burial trusts. And, in the case of a married couple where one spouse is healthy and lives in the home, an additional \$86,120 of other assets can be treated as "exempt" to prevent spousal impoverishment. This is called the Community Spousal Resource Allowance (CSRA) and the figure adjusts annually with inflation.

Insight: That sounds like a lot. What's left?

Berge: All other assets, including cash, checking and savings accounts, certificates of deposit, stocks and bonds and mutual funds, and rental property.

Insight: So, if I understand you correctly, a person will not qualify for Medi-Cal if they have any “countable” assets, such as cash, CDs, stocks or mutual funds in excess of \$2,000, or \$86,120 if the couple is married and only one spouse is in the nursing home?

Berge: That’s correct. So the goal of the elder law attorney is to find ways to reduce “countable” assets, while, at the same time, preserving or enhancing the value of “exempt” assets. The folks at Medi-Cal call it “spend-down.” Spending down one’s resources to the exemption limits. But that’s just one way to qualify someone for Medi-Cal. Instead of spending down assets, I prefer to convert assets from a “countable” resource to an “exempt” asset. For example, taking cash (a “countable” resource) and paying down a mortgage on a family residence (an “exempt” asset), or using cash to make a home improvement, such as removing handicap barriers or adding a room to the home, or building a “granny shack” in the back of the home, or buying an SUV modified with a wheelchair ramp.

Insight: How about other ways to protect assets from Medi-Cal spend-down?

Berge: It’s also possible to give away assets in order to qualify for Medi-Cal.

Insight: I thought that gifts were illegal and that any gifts made within 36 months would result in denial of benefits by Medi-Cal. Am I right?

Berge: No. It’s not illegal to give away assets to qualify for Medi-Cal provided it’s done correctly, following Medi-Cal rules and regulations. The worst thing that can happen to someone who fails to follow the rules is that a “period of ineligibility” may result, not outright denial. The best thing that can happen is no period of ineligibility results and the assets are safely transferred to other family members. And, by the way, the “look-back” period to which you refer is 30 months in California, not 36 months.

Insight: In other words, if the gift is not done properly, the possible Medi-Cal recipient might not receive Medi-Cal benefits for a fixed period of time, effectively forcing his or her family to “cough up” enough money to pay for his or her nursing home care, but if done properly, it’s actually possible to protect that same money from Medi-Cal spend-down?

Berge: That’s correct. And that’s the job of the elder law attorney to put together a Medi-Cal Plan that qualifies the individual for Medi-Cal and effectively protects his or her assets from Medi-Cal spend-down. It’s also important that the attorney understand the impact of gift and estate tax, income tax, and property tax laws before recommending asset transfers.

Insight: So nursing homes really can be free given proper counsel and good planning?

Berge: Absolutely. It’s even possible to protect all of the income and all of the assets of a married couple through an administrative fair hearing or a court proceeding. With the help of an elder law attorney, of course.

Insight: I've also heard about Medi-Cal liens. What are they and can they be avoided?

Berge: Yes and no. Liens against property (like mortgages on a house) don't generally arise until a Medi-Cal recipient and his or her spouse, if any, die. Of course, liens can also arise if a Medi-Cal recipient (or his or her family) foolishly declares on the Medi-Cal application his or her intention not to return to the home. Since "intent to return home" is subjective (it doesn't matter whether the person has the actual ability to return home or not), nobody should declare on the Medi-Cal application that he or she will *not* return to their home.

There are exceptions to the lien law. Transfers of property to a surviving spouse, a disabled child, a qualified caregiver, or another co-owner of the property (under certain circumstances) may be exempt from the lien law.

It should be noted that only property in the Medi-Cal recipient's or his or her surviving spouse's estate at death is subject to possible lien. Therefore, most elder law attorneys will advise the Medi-Cal recipient to give away his or her home during his or her lifetime (usually to his or her children or the healthy spouse) to avoid the lien. Again, it's not advisable for the family of a Medi-Cal recipient to make such transfers without the advice of a qualified elder law attorney, because an improper transfer could result in just such a lien, as well as Medi-Cal disqualification and/or dire income, gift, estate, and property tax consequences.

Insight: What if the person is incompetent and unable to make such gifts?

Berge: In that event, hopefully, the person has left someone (called an "agent") with a general durable power of attorney that authorizes the agent to make gifts, and in particular, gifts to the authorized agent who is often an heir to the estate.

Insight: And what if there is no power of attorney or the power of attorney doesn't mention gifting?

Berge: In that event, we need to seek the permission of a judge to make the gifts.

Insight: Well it seems obvious to me after our discussion: everyone needs estate planning, particularly Medi-Cal planning, and the time to do it is now, before the need for it arises.

Berge: Exactly. And here's something you may not have thought about. Suppose the ill spouse, in an effort to avoid Medi-Cal liens, gives away his or her property to the healthy spouse during his or her lifetime. The technique works if the healthy spouse outlives the ill spouse. But, what if the healthy spouse, dies before the ill spouse? Without further estate planning by the healthy spouse, odds are that the ill spouse will be the beneficiary of the healthy spouse's estate or living trust, and the property will "boomerang" back to the ill

spouse and again be subject to Medi-Cal liens upon the ill spouse's death. I call this the "living trust trap" because most living trusts are set up that way. There are a couple of ways to avoid the living trust trap. First, the healthy spouse can set up a special needs trust through his or her Will for the benefit of the ill spouse, managed by someone other than the ill spouse, usually the couple's adult children. And, since most people with estate plans now hold title to property in a living trust, provisions need to be included in the living trust which "pour-over" trust assets into the probate estate, so that they can pass through a Will. Yes, and that means probate, the awful "P" word. Or, the healthy spouse can leave everything to his or her adult children with the verbal understanding from them that they will take care of the ill spouse. Fewer legal protections for the ill spouse, and not a method I usually prefer. After all, what if the adult children who agreed to take care of the ill spouse die without an estate plan of their own? It's likely the property will pass on to their heirs who may not feel the same obligation to take care of the ill spouse.

Insight: You're right. I wouldn't have thought about that.

Berge: With professional help, anyone can qualify for Medi-Cal. It's true that Medi-Cal rules and regulations are stringent. If you're sailing a rough sea, you need someone with a steady hand at the helm. We help our clients navigate the confusing process of applying for and receiving Medi-Cal assistance. If necessary, we go to court to protect income and assets. We also help people with their estate planning, giving them peace of mind, knowing that they have done everything possible to protect their loved ones, their life savings, and their futures.

If you, or someone you know, are facing mounting healthcare costs and would like more information, contact Mr. Berge by telephone at 1-800-583-2060. Stephen A. Anderson is a freelance writer from Palm Desert, California.