

ELDERLY COUPLES DIVORCING FOR FINANCIAL REASONS

BY CICILY CORBETT

Some Elderly Couples Forced to Divorce to Keep from Losing Assets.

Massachusetts Attorney Hyman G. Darling describes it like this: A husband and wife, unable to care for themselves, were in different nursing homes and expected to live for a long time. The wife, who was much wealthier than her husband, was paying \$9000 a month for her own long-term care, and \$8000 a month for her husband's. She made the tough decision to terminate the marriage. By doing so, she was only responsible for her own expenses. Medicaid would pick up the tab for him.

For the World War II generation, divorce is often shameful and traumatic. In some cases, however, it is the only answer. Attorney Darling is familiar with a half-dozen cases in the last two years in Massachusetts alone. He says it's the last resort when one of the partners needs nursing home care.

"It makes particular sense if it's a second marriage and there's a pre-nuptial agreement," he states. "Each partner may want their assets to go to children by an earlier marriage."

Why Divorce?

The lion's share of the tab for nursing homes is picked up by Medicaid, the jointly funded, Federal-State health insurance program for low-income people. Elderly individuals who qualify for Medicaid must have very few assets (\$2,000 for an individual and \$3000 for a couple, in most states). So anyone with more than that in the bank must use it first before Medicaid can begin paying bills.

A common financial planning strategy for older adults, according to Darling, has been to gift most of their assets to their heirs in order to qualify for government benefits.

In February 2006, however, Congress passed the Deficit Reduction Act of 2005. The new law makes it harder for individuals to qualify for coverage under Medicaid. One of the provisions of the act, for example, extends the "look-back period" for disclosure of assets to 5 years. Penalties in the form of a period of ineligibility, says Darling, may be imposed if money or property is transferred to another person in the 60 months preceding application for Medicaid.

With assets held jointly, and gifting discouraged, married couples risk losing everything when one spouse needs long-term care, which can cost \$110,000 per year, according to New Jersey Attorney Thomas D. Begley, Jr. Divorce, he says, can allow the "community spouse"—the one who's not institutionalized—to retain the house and enough money to maintain a decent quality of life.

Is This Just another Tool for the Rich to Beat the System?

“It’s a delicate balance—there are ethical issues,” says Karen Martin, community services director of the Greater Springfield Senior Services, Inc., a Massachusetts non-profit. “On the one hand, as a taxpayer, you’re saying, why should the government pay for people because they want to save money for their children? Or for a rainy day? The rainy day might be now.”

“That’s what everyone says until it happens to their family,” counters Begley. “In fact, it’s typically the lower-middle income people who suffer. The ones with a house and \$200K in assets. Many have vowed never to put their spouses in a nursing home. They just tough it out, but at a point they no longer can do it.”

“We’ve all been told we should save our money,” adds Darling. “But where’s the incentive, when the government is going to take it all away?”

So What’s the Answer?

“Long-term care is a risk we can quantify statistically, so we should be able to plan for it,” says Begley. “Only 20 percent in this country can afford long-term care insurance, according to a Kaiser Foundation survey. And many can’t get it because they’re already sick and don’t qualify. Maybe as a society we have an obligation to provide some sort of universal health care.”

Useful links:

The Kaiser Family Foundation is an independent source of facts and analysis about the major health care issues facing the nation. See their report “Kaiser Commission on Medicaid and the Uninsured” (Publication Number: 7671; Publish Date: 2007-10-05): <http://www.kff.org/medicaid/upload/7671.pdf>

Read the White House’s fact sheet on the Deficit Reduction Act here: <http://www.whitehouse.gov/news/releases/2006/02/20060208-9.html>

Hyman G. Darling, a member of the National Academy of Elder Law Attorneys, maintains an informative blog on estate planning at www.bwlaw.blogs.com.

Another NAELA member, Thomas D. Begley, Jr., is one of the nation’s foremost experts in elder law and Medicaid planning. He has authored many informative and readable articles, available online: <http://www.begleylawyer.com/news.htm>

What to do if your parent is in this situation? Lisa Beauvais, a member of the National Academy of Elder Law Attorneys, suggests some possible strategies to discuss with your lawyer:

Purchase an Annuity. Certain annuities may not be countable assets for Medicaid.

Set up a Trust. Certain kinds of trusts, such as irrevocable or special needs trusts, may not be countable assets for Medicaid.

Pre-pay a Funeral.

Invoke the Right of Spousal Refusal. Medicaid law states that the community spouse can keep all of his or her assets by simply refusing to support the institutionalized spouse. In practice, however, only New York generally upholds this right.