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The Growth and Business of Elder Law

Brian Andrew Tully

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The foundation of elder law can be traced back to its legislative roots in 1965 when the Older Americans Act and the Social Security Amendments enacted numerous programs including the historic Medicare and Medicaid entitlements.[1] For our purposes, Medicare was established as the health insurance program for the medical needs of the aged and provided benefits for primary care, hospitalization, prescription drug coverage and rehabilitation services while Medicaid offered long-term care benefits for those with chronic or custodial needs provided the applicant met strict financial limitations.[2] The result of these divergent programs is two separate systems for financing care: one for acute medical needs of the aged of all financial means and the other for the chronic, long-term health care needs of only the impoverished.[3]

Since we do not yet have one government program that provides benefits for the medical and chronic long-term care needs of a financially stable and aging population, we are faced with the following two scenarios: A financially stable individual that develops cancer and has the cost of his acute medical needs met through his Medicare medical insurance versus that same financially stable individual developing a chronic condition such as Alzheimer's disease and having to privately pay for his own long-term care for the next 10 years.[4] The first has insurance coverage based on age and medical need and the second does not

* JD, CELA.

1 W. Andrew Achenbaum & L. Christian Carr, *A Brief History of Aging Services in the United States*, 38 GENERATIONS 9, 10 (2014), https://www.jstor.org/stable/10.2307/26556036 [https://perma.cc/N3Y4-VPJW]; *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/history/briefhistory3.html [https://perma.cc/X94G-2ERT].

2 Earl Dirk Hoffman, Jr. et al., *Overview of the Medicare and Medicaid Programs*, 21 HEALTH CARE FIN. REV. 4 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4194683/pdf/hcfr-22-1-175.pdf.

3 NAT'L ACADS., THE AGING POPULATION IN THE TWENTY-FIRST CENTURY 152-54 (Dorothy M. Gilford ed. 1988), https://www.ncbi.nlm.nih.gov/books/NBK217737/pdf/Bookshelf_NBK217737.pdf; *see What is the difference between Medicare and Medicaid?*. U.S. DEP'T. HEALTH & HUM. SERVS., https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html [https://perma.cc/S5HZ-PDZS].

4 Alissa Sauer, *Alzheimer's Care and Medicare: What You Need to Know*, ALZHEIMERS.NET (Jan. 28, 2019), https://www.alzheimers.net/10-27-14-alzheimers-care-medicare [https://perma.cc/GBH4-C6VX].

as his need is chronic in nature and he doesn't meet the impoverished financial criteria for Medicaid to pay. It appears that your diagnosis determines whether you have insurance coverage or not. These two classifications of illness and payment fostered the growth of the elder law field as the middle class had the need to employ attorneys to help them gain that sought-after financial eligibility for Medicaid should they be struck with a financially devastating chronic, long-term illness versus a defined medical condition covered by Medicare.

Long-term care is very expensive. In the New York metro area, home care costs can exceed $10,000 per month and a nursing facility can exceed $18,000 per month.[5] As Medicare does not have long-term care benefits, there are three ways in which an elder can pay these exorbitant costs: private payment with personal funds, a robust long-term care insurance policy, or finally, make themselves financially eligible for the Medicaid program.[6] This divestiture is often accomplished through asset protection strategies involving gifting and irrevocable income-only trusts. The complexity of the Medicaid transfer penalties combined with each state's related laws and regulations can make for a very complicated, stressful and cumbersome eligibility attempt. To exacerbate the situation, a patient with chronic, long-term care needs doesn't usually fit within the typical acute medical model of care which is familiar to all of us: illness onset, doctor visit, hospitalization, medication and recovery. The chronic, long-term care patient may follow this typical medical model trajectory but any complication such as dementia will certainly derail the best of efforts of the most willing clients, doctors and caregivers.

Can we assume, therefore, that since we have two types of patients (medical and chronic) and two types of financial payment systems (Medicare and Medicaid), that we also have two independent models to deliver the necessary care? Unfortunately, the general answer is no. The above medical model of care for the long-term care patient is often extended to include a rehabilitation facility and discharge with short-term intermittent home care creating a cycle that can occur for years usually leaving the elder and family confused and frustrated as chronic illnesses often do not fit into nice, neat boxes as easily as an oft-predictable medical condition might.

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[5] *Protect Your Clients' Assets. Improve Their Quality of Life*, TULLY L. GRP., https://tullyelderlaw.com/Resources/referral-sources-protect-clients-assets/ [https://perma.cc/3HZX-BL2K]; Scott Witt & Jeff Hoyt, *Nursing Home Costs*, SENIOR LIVING, https://www.seniorliving.org/nursing-homes/costs/ [https://perma.cc/X4JZ-N6HK].

[6] *Paying for Care*, NAT'L. INST. ON AGING, https://www.nia.nih.gov/health/paying-care [https://perma.cc/K2SW-XF9B].

I have seen in my practice over the last twenty years that the medical model of care is not adequately equipped to assist the elder suffering from long-term chronic issues such as Alzheimer's disease, depression, and Parkinson's disease. As such, there are deficiencies in this current medical model of care, i.e. a lack of care coordination and active follow-up and patients and caregivers being inadequately trained to manage the illnesses. In essence, an acute medical model is neither designed to support the elder in the day-to-day self-management of their chronic, long-term illnesses nor is it "designed to coordinate or advocate for good chronic illness care on an on-going basis."[7] A helpful way to visualize the differences is that the care needed under the medical model is usually received in medical facilities, such as the doctor's office, hospital or rehabilitation facility and there are set protocols for the health care team, the patient and the caregivers to follow whereas the chronic, long-term patient and her caregivers may face their toughest challenges outside of those trusted medical environments and in between those visits.

Through the years there have been attempts by federal, state and private initiatives to improve the chronic care delivery system. Most notably is The Chronic Care Model as developed by the Improving Chronic Illness Care Initiative.[8] This model calls for the transformation of health care from a system that is "reactive – responding mainly when a person is sick – to one that is proactive and focused on keeping a person as healthy as possible."[9] The goal of this model is to have an "informed, activated patient" working with a "prepared, proactive practice team" and between the two there are "productive interactions" which results in "improved health outcomes."[10] To achieve this, the delivery of chronic care services will require a systematic approach that emphasizes self-management, care planning with an inter-disciplinary team, ongoing assessment and follow-up; and finally being proactive and focused on keeping a person as healthy as possible no matter where she lives (home, assisted living or nursing home).[11]

As the US population ages, the number of people needing long-term care and chronic care services will certainly rise. On average, according to the U.S. Department of Health and Human Services, nearly 70% of the people who turn 65 years of age today will need some type

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7 Life Care Plan. L. Firms Ass'n, *Life Care Planning: The Interdisciplinary Elder Law Approach to Managing Chronic Care Issues for Seniors* (on file with author).

8 *The Chronic Care Model*, IMPROVING CHRONIC ILLNESS CARE, http://www.improvingchroniccare.org/index.php?p=The_Chronic_Care_Model&s=2 [https://perma.cc/HC6J-RPQT].

9 *Id.*

10 *Id.*

11 Life Care Plan. L. Firms Ass'n, *supra* note 7.

of long-term care services.[12] Due to the complicated, unknown paths that these chronic illnesses may take, chronic, long-term care raises a tremendous amount of issues best summarized by these three questions:

1. How does one get the best-quality care no matter where he is living and thereby maintain or improve his quality of life?
2. How does one access all benefits available and understand which coverage or benefit pays for which service?
3. How does one protect the maximum resources and income so that expensive long-term care costs do not consume life savings, thereby allowing for provision of a spouse and children if necessary?[13]

The practice of elder law has evolved to help seniors and their caregivers answer these questions. Our daily practices can be consumed with typical estate planning concerns but they can, from telephone call to telephone call, change on a dime to home care, wandering and placement issues. As such, I have found there are four different business models that elder law attorneys utilize. The first is what I will call the "Medicaid Planning Attorney" model where the focus is asset protection and applying for Medicaid benefits. In this fee-for service transactional model, the lawyer will undertake the legal and financial work while the family will cobble together their own long-term care needs. This attorney only answers the third question above.

The second model is what I call the "Elder Law Attorney." Here, the attorney will undertake the asset protection and Medicaid benefits like above but she recognizes that the need for care coordination is a concern and will refer the family to an outside business that offers care management services. This attorney is still only answering the third question in this transactional model but they have referred the family to a service that will help with the first two questions.

The third "Elder Law Attorney Hybrid" model is an outgrowth of the preceding model due to the recognition that care needs are usually the primary driver for most elder law engagements. This attorney desires to help and provide a service that's more comprehensive than just focusing on the "documents and the dollars" as I often say. They will offer isolated care management services on a transactional basis either in-house or with an outside company. This hybrid can help the firm to address all three of the questions for the client but due to its transac-

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12 U.S. Dep't Health & Hum. Servs., *How Much Care Will You Need?*, LONGTERMCARE.GOV, https://longtermcare.acl.gov/the-basics/how-much-care-will-you-need.html [https://perma.cc/89YG-AGDD].

13 Life Care Plan. L. Firms Ass'n, *supra* note 7.

tional and sometimes fractional nature it can leave the client and family wanting.

The final business model is one where all three questions are answered by the law firm and it's called the "Life Care Planning" model. Life Care Planning (LCP) is an innovative and "holistic, elder-centered approach to the practice of law that helps families respond to every challenge caused by chronic illness or disability of an elderly loved one."[14] The LCP firm is generally engaged for a year versus a transaction which allows the firm to work with the family through the unknown twists and turns that their loved one will undoubtedly face. In addition, Life Care Planning is interdisciplinary which means an Elder Care Coordinator will be on staff working under the attorney's supervision. This allows, among other benefits, for a unified approach to the law and care goals.

In a LCP law firm, "an inter-disciplinary team of elder law attorneys, care coordinators and others work together to develop an estate plan, protect assets, qualify for public benefits, coordinate care, provide education and decision-making support, advocate for high-quality care and intervene if there are problems with care providers."[15] In essence, the LCP law firm is designed to be that "prepared, proactive practice team" described above in The Chronic Care Model and the goal is that "informed, activated patient." The most efficient way for a firm to become that prepared, proactive practice is by having the care advocate in-house working side by side with the elder law attorney.

Through the evolution of my own twenty-plus years of practice, I have been that Medicaid Planning Attorney just focusing on the assets and I have also been the Elder Law Attorney benevolently pointing others to outside help. However, the most rewarding business model by far, both financially and professionally, has been serving my clients as the Life Care Planning attorney.

As a practice, elder law has matured through legislation, evolving regulations and the resulting quagmires which have all been compounded by the harsh realities of aging, illness and the financing of the care. Benjamin Franklin stated that "in this world nothing can be said to be certain, except death and taxes."[16] However, before the death typi-

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14 *What Is Life Care Planning: A New Approach to Elder Law,* LIFE CARE PLAN. L. FIRMS ASS'N, https://www.lcplfa.org/about-life-care-planning [https://perma.cc/U7YJ-QNZW].

15 *There Is a Better Way to Practice Elder Law,* LIFE CARE PLAN. L. FIRM ASS'N, https://www.lcplfa.org/better-way-practice-elder-law [https://perma.cc/Y8WP-DZ2N].

16 BENJAMIN FRANKLIN, *Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789)*, *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 68, 69 (Albert Henry Smyth ed., 1907).

cally comes the illness and the elder law attorney will always be there to guide and assist his aging clients through some of the toughest times they will ever face. Gratefully, the business of elder law, just like the hardiest of my clients, shows no signs of slowing down.