Dangerous Liabilities Lurk for Families and Advisors in Long Term Care Planning

Aggressive legal threats across the country have become a real concern to insurance agents and financial advisors, elder law attorneys, and families facing long term care funding questions.

White Paper

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Introduction

Unexpected and dangerous threats in the form of professional and personal liability have emerged in the wake of the growing LTC funding crisis. Law suits and mandated claw-back actions have been brought against families in attempts to recover monies spent on long term care. Insurance and legal advisors have also been sued by clients in response to fiduciary responsibility issues about options to fund long term care, or how to derive the highest value from a life insurance policy.

These aggressive legal actions take root from laws that have existed for decades. State Filial Responsibility Laws and federal Estate Recovery Mandates are now specifically being used as tools to help long term care companies and the government to pursue extended family members to recover dollars spent on long term care. Even more symptomatic of the heightening urgency and tensions in the world of long term care is the growing list of angry clients and life policy owners looking to punish advisors and insurance companies for not informing them of all their available financial options.

Laws to recover LTC expenditures

In 1993, the federal government passed a mandate in the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) that requires states to implement a Medicaid estate recovery program, and the Deficit Reduction Act of 2005 (P.L. 109-171,DRA) contained a number of provisions designed to strengthen these rules. OBRA gives states the authority, and the obligation, to sue families via probate court to claw-back Medicaid dollars spent on a loved one's long term care. In this law, states are required to sue the estates of Medicaid recipients, *"to recover, at a minimum, all property and assets that pass from a deceased person to his or her heirs under state probate law, which governs both property conveyed by will and property of persons who die intestate. Such property includes assets that pass directly to a survivor, heir or assignee through joint tenancy, rights of survivorship, life estates, living trusts, annuity remainder payments, or life insurance payouts".*

The government has had the authority to take legal action against families to recover Medicaid dollars for over two decades. In fact, Medicaid recovers hundreds of millions from families every year, but as budget pressures increase, estate recovery actions are becoming even more aggressive. Ironically, a high profile legal action recently taken against a family to recover costs spent on long term care was not initiated by the government, but was instead successfully undertaken by a nursing home company. In 2012, John Pittas, a 47 year old restaurant owner was sued by a nursing home company for $93,000 in expenses incurred by his mother over a six month period after she was denied Medicaid eligibility. The Superior Court of Pennsylvania *(Health Care & Retirement Corporation of America v. Pittas* Pa. Super. Ct., No. 536 EDA 2011, May 7, 2012) found in favor of the nursing home based on "filial responsibility law" (which is on the books in 28 states), and the son was forced to re-pay the entire costs for his mother's care. The court finding even granted discretion to the nursing home company to seek payment from any family members it wished to pursue. *(Forbes, 5/21/2012)*

Filial responsibility laws (filial support laws, filial piety laws) are laws that impose a duty upon adult children for the support of their impoverished parents and can be extended to other relatives. These laws can include criminal penalties for adult children or close relatives who fail to provide for family members when challenged to do so. 28 states and Puerto Rico have filial responsibility laws in place: Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia and West Virginia. *(Wikipedia) http://law.psu.edu/_file/Pearson/FilialResponsibilityStatutes.pdf*

This outcome of course has created great concern in the elder-law community that nursing homes and other providers of senior care services have become emboldened to take family members to court to address unpaid bills. Attorneys for nursing homes are testing the laws in other states by filing lawsuits "on behalf of" the indigent parents, to recover funds. In addition to the authority found in OBRA, could this become a new way for states to recover Medicaid dollars spent on a family member's care? "Just because they haven't done so yet doesn't mean that they won't," said elder-law attorney Michael Amoruso, a past president of the New York chapter of the *National Academy of Elder Law Attorneys*. "All the states are struggling for money."

Legal risks and exposure

But the legal exposure families' face is only the beginning of the danger as the threat assessment level continues to rise. Insurance agents and elder law attorneys are also at great risk for not providing adequate advice (and at a minimum not documenting their recommendations) about long term care planning to clients. Two leading experts on long term care planning published articles in the past where they sounded the alarm bell that this was coming, and shared stories of licensed professionals that were sued—or narrowly escaped legal action contemplated against them.

In an article published by elder-law and long term care expert Harley Gordon, President of CLTC entitled, *The Coming Wave: Professional Liability Lawsuits for Failure to Recommend a Plan for Long-Term Care*, he specifically points out that failure to talk with families about long term care planning issues, "may subject financial planners to a claim of breach of due diligence".

In Mr. Gordon's article, he tells the story of: Sheila Adams *(not her real name)***, a seasoned financial planner with a major mid-west insurance company. She is also one of its top producers. Like a growing number of professionals she takes the subject of long-term care seriously and talks about its consequences with clients. Apparently talking about it may not be enough. Ms. Adams received a call from a good client's son, a local attorney. He proceeded to tell her that his dad was in a nursing home and paying for it with his life savings. He then told her: "You have 15 minutes to produce evidence that you recommended a long-term care plan in general and long-term care insurance in particular." Fortunately, she had discussed the matter and had a letter recommending the sale of long-term care insurance. Without it, she believes she would have been sued.**

Center for Long-Term Care Reform president Steve Moses in a *Journal of Financial Planning* article titled *Long-Term Care Due Diligence for Professional Financial Advisors* emphasizes that, "financial advisors should be held professionally and legally accountable for giving bad advice about long-term care planning". Mr. Moses also presents a cautionary tale about professional liability and malpractice for advisors ignoring full disclosure of long term care funding options:

"A story in *Registered Rep* **detailed the travails of a registered advisor who recommended long-term care insurance to his clients. The problem is that he did not put it in writing assuming the clients would take note. They didn't, but the children did. They sued the advisor for malpractice after both parents were diagnosed with Alzheimer's. The article made a number of points that are relevant to financial service professionals, first among them is that failure to discuss a plan for long-term care…."**

Life Insurance to pay for Long Term Care

In these two examples, the legal actions center around a failure (perceived or not) to meet the fiduciary responsibility to the client by providing, and documenting, all available options to fund long term care for the family to consider. When these events occurred, they were really only talking about long term care insurance. But in today's world, long term care planning takes into account much more. "Professional advisors need to realize that the world we are working in has changed and become more dangerous for them," said Don Quante, President of America's First Financial Corp in St. Louis, MO. "I was in Florida recently where I saw attorney billboards advertising for people with long term care needs to call them. I placed a call only to discover that they were not providing planning services; what they were really doing is recruiting seniors in financial distress to sue their past advisors for insufficiently preparing them to pay for long term care."

Other funding options that are commonly used, and it would be expected that any licensed agent or attorney would be current on these options, must now be part of any long term care planning discussion. If an individual is a war time veteran (or their spouse) they could be entitled to Veteran's Aide and Attendance Benefits. Also, there are state specific voucher and waiver programs, as well as senior care specific and/or home equity based loan programs available to consider. And, if a person owns a life insurance policy they may be able to sell the policy into a Long Term Care Benefit Plan.

Millions of seniors own life insurance policies and have no idea that they can be "converted" or sold through a life settlement into a Long Term Care Benefit Plan. This has been a common practice for a number of years, and every senior care provider in the country accepts this form of payment. Once enrolled, the owner of a Long Term Care Benefit account can use it for their choice of home care, assisted living, memory care, nursing home care, or hospice. Stories about this option have been published in the New York Times, Wall Street Journal and numerous other print, online and broadcast outlets. Twelve states, so far, have introduced consumer disclosure legislation to make sure policy owners are being informed that they can covert a life policy to remain private pay as long as possible and that this option is a Medicaid qualified spend-down.

It's important that advisors and attorneys understand that this alternative use of a life insurance policy to pay for long term care has become a common practice around the United States. Converting an existing life insurance policy into a Long Term Care Benefit Plan is not to be confused with a long term care insurance policy, policy loan, accelerated death benefit (ADB) rider, annuity, or a hybrid life/LTCi product. This conversion option allows for the private, secondary market exchange of a life insurance policy at the time that care is needed. The benefit plan is a private market long term care funding option, and is not issued by an insurance company or restricted to life policies that contain a hybrid-conversion option or accelerated death benefit rider. Any form of life insurance can qualify for conversion: universal life, whole life, term life, and group life. The benefit plan makes monthly payments to cover all forms of long term care, and once a policy is converted by the owner (usually 30 days), the monthly long term care tax-free benefit payments begin immediately and the enrollee is relieved of any responsibility to pay premiums. Every benefit account provides a final expense benefit to help cover funeral expenses, and if the insured should pass away before the benefit amount is exhausted, then any remaining balance is paid to the family or named beneficiary as a final lump sum payment.

According to the NAIC, 153 million Americans own $27.2 trillion worth of life insurance policies—that is triple the amount of home equity in the United States today. According to Conning & Co., 88% of life insurance contracts issued will ultimately never pay a death benefit. The insurance industry prices, and makes profits from the fact that millions of people are paying billions of dollars in premium payments for policies that in the end will be abandoned. Too few policy owners' possess the knowledge of how insurance works, and when their original need for a policy has run its course, the vast majority of owners simply abandon what may be one of the most valuable assets they own—for nothing in return.

According to elder law attorney William G. Hammond of Overland Park, Kansas, "A perfect storm has arrived that is changing the way long term care will be delivered and financed in our country. Baby boomers are entering their retirement years at a time when the economy is struggling to regain its footing after the Great Recession of 2008. Couple that with a new sense of the virtues of personal responsibility extolled by many of our lawmakers; and forward thinking elder law attorneys and advisors will be smart to recognize that innovative planning techniques and strategies will be needed to protect their clients and themselves. The conversion or sale of life insurance policies to help pay for the cost of long term care is one of the strategies which can be utilized to help pay for the cost of care. Smart attorneys and advisors will be well-served to recognize this innovation and to use it to help their clients remain at home or in the community longer."

For families with the need to pay for long term care, but are unable or unwilling to keep their life insurance policy in-force by maintaining premium payments, converting it into a Long Term Care Benefit Plan is a much better choice than abandoning a policy. At this point, advisors not discussing this option with clients that own life insurance are exposing themselves to the potential of serious legal liability issues.

Policy owners attack

A very recent example of what can happen if alternative options to lapse, surrender, or benefit reduction for owners of life insurance can be found in California where a couple filed a law suit in January, 2014 against Lincoln National Life. For the first time, a law suit has been filed against an insurance company for "actively concealing" the policy owner's right to seek a life settlement as an alternative to lapse, surrender of reduction of death benefit. This is a first time ever situation that could establish a groundbreaking precedent when it comes to informing owners of life insurance policies about all of their rights and options to get the maximum value from their asset.

In an article by The Street reporter Donna Horowitz entitled, "Lincoln sued over failure to tell couple about settlements", this very unique action against Lincoln National Life Insurance is analyzed.

Specifically, Horowitz reports: "A Rancho Mirage, Calif., couple filed a class-action lawsuit against Lincoln on Jan. 9 in U.S. District Court in Riverside, Calif., *(Larry Grill et al v. Lincoln National Life Insurance Company - California Central District Court)* **alleging that they may have been able to sell their policy rather than reducing their coverage if their agent had told them about the life settlement market (http://dockets.justia.com/docket/california/cacdce/5:2014cv00051/580333). Life settlement market players have long warned insurance companies that they were vulnerable to such litigation because of their refusal to allow their producers to tell customers about life settlements. They have said agents owe a fiduciary duty to their clients. The suit alleges fraud and deceit, financial elder abuse and unlawful and unfair and fraudulent business practices. It asks for the plaintiffs and their attorney to represent a damages class and injunctive relief class. It also seeks punitive damages, treble damages, restitution and an injunction ordering Lincoln to stop engaging in unlawful, unfair or fraudulent conduct."**

The ramifications for the world of insurance, financial services and long term care planning cannot be overstated—or underestimated. Today, many insurance agents are outright prohibited from discussing the life settlement option for fear of reprisals from insurance carriers. Yet, it is clearly the fiduciary responsibility of an advisor to inform a policy owner of this alternative option to consider. This puts advisors in a very precarious position. For policy owners in search of options to fund long term care, selling a life insurance policy into a Long Term Care Benefit Plan is ignored at great peril by those relied upon to know the market and give sage advice.

In the same article by Ms. Horowitz, Jule Rousseau, an attorney with the Arent Fox LLP law firm in New York, said he's not surprised to see such a suit and expects to see more of them because of the carriers' prohibition against agents discussing life settlements. More states should mandate disclosure of the option to sell policies, he said. Also, Kentucky State Rep. Robert Damron said he has supported the consumer-disclosure option in the states. A consumer-disclosure model act developed by the National Conference of Insurance Legislators was based on Kentucky's law, which passed in 2010. "I think any time we are more open and disclose to the consumer, it's better for the consumer and the life company," Damron said. "If an insurance agent is advising a client, you would think they would have some responsibility to the client," he said. "If they don't, they should disclose they're operating under what's in the best interest for the insurance company. "If courts rule that agents don't have a fiduciary relationship to their clients, we may need to get Congress to declare agents do have a fiduciary relationship."

No sooner said than done…

When the members of the Congressional Commission on Long Term Care held their first hearing during the summer of 2013 in Washington, DC, they discussed the funding crisis and the need for private market solutions. As part of the meeting transcripts, members of the Commission said:

"We know that 70 percent of people over the age 65 will need some form of long-term services and support," said Dr. Bruce Chernof, the Commission's chairman.

"Although government programs provide a significant portion of long-term care, none offer the full range of services people need", said Kirsten Colello, a health and aging policy specialist at the Congressional Research Service.

In addition, "using long-term care insurance to pay expenses is not an option for many Americans, as premiums rise and companies that can't make a profit leave the market", said Marc Cohen, an industry consultant. "Most of the long-term care policies available are sold by only 12 insurers", he said.

"The fact is that each of us will need these services and supports at some point in our lifetimes," said Sen. Jay Rockefeller, who added the Commission to the fiscal cliff compromise, said in a statement. "The question is whether most Americans can afford to pay for them."

"Medicare and Medicaid have become the major source of long-term care, and cannot continue at the current pace," said G. William Hoagland of the Bipartisan Policy Center. "Americans should be encouraged to increase their retirement savings so that these programs are relied on as a last resort".

By 2014, twelve states had introduced policy conversion consumer disclosure legislation to educate policy owners about the option to sell a life insurance policy to fund a Long Term Care Benefit Plan and remain private pay. It also codifies the Long Term Care Benefit Plan structure that protects the funds and ensures they will only be used to pay for long term care services in: California, Florida, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas, and Washington. Texas was the first to enact this consumer protection legislation into law in 2013, followed by Kentucky in 2014.

The point of the new disclosure law is to make sure people know they have the legal right in every state to use their life insurance to pay for long term care and remain private pay for as long as possible. The bill ensures that policy owners will be informed of this private pay option, and that they specifically use a Long Term Care Benefit Plan to protect the funds and make sure that they are only used to pay for the long term care services of their choice.

This new law does two things:

1. Grants authority to the Medicaid department to inform and educate citizens that they can convert life insurance policies into a Medicaid qualified Long Term Care Benefit Plan to remain private pay as long as possible, and choose any form of long term care they want instead of abandoning a policy to go straight onto Medicaid.
2. To qualify, the Long Term Care Benefit Account must be an irrevocable, FDIC insured account that makes payments directly to the care provider; the person must be able to choose the form of care they want; a funeral benefit must be preserved; and if there is any unpaid account balance when the person dies it must go to the designated account beneficiary.

State budgets have been impacted particularly hard by shrinking tax dollars and growing Medicaid enrollments brought on by economic shifts and an aging population. Over 10 million Americans now require long term care annually and Medicaid is the primary source of coverage. According to the Kaiser Family Foundation, Medicaid spent $427 billion in 2011, almost doubling since spending $240 billion in 2009.

States are quickly realizing the savings that can be found for their beleaguered budgets by delaying entry onto Medicaid through the use of life insurance policy conversions into Long Term Care Benefit Plans. State legislative leaders across the country are taking action with these consumer protection disclosure laws to encourage consumers to convert their life insurance to pay for long term care as an alternative to abandoning their policies. Policy owners excercise their legal right to convert an in-force life insurance policy into a Long Term Care Benefit Plan and direct tax-free payments to cover their senior housing and long term care costs.

According to the *Wall Street Journal* **article, States Ease Use of Life Policies to Pay for Elder Care (June 17, 2013): State lawmakers are encouraging elderly residents to use life insurance as a way to pay for long-term care—and lower the Medicaid tab in the process. The states hope to stop people from dropping their life-insurance policies in order to qualify for Medicaid. "This focuses on middle-class policyholders with coverage worth $100,000 on average," said** *Chris Orestis, chief executive of Life Care Funding*. **"They're not wealthy enough to pay for long-term care for a long time, and they're not poor enough to qualify for Medicaid right away." To keep policy owners from spending settlements frivolously, the bills require that the money go straight to an irrevocable bank account used solely to pay for long-term care.**

Insurance, financial and legal advisors need to be aware of this option and how to incorporate it into a long term care financial plan. Families with a life insurance policy that is abandoned, only to later discover it could have been used to pay for long term care now have the legal precedence behind them to hold their advisor responsible.

Where do we go from here?

The world of long term care planning is starting to resemble the Wild West where vigilante justice is being extracted by all sides impacted by the long term care funding crisis. Governments have the right to recover funds from families; courts are ruling in favor of corporate interests going after extended family members to claw-back long term care costs; and in turn, families are going after insurers and advisors years after receiving what they perceive to be actively "concealed", bad, or incomplete advice.

Advisors are dedicated to helping clients by finding solutions to their needs and problems. The best way to accomplish this is to provide as much information and access to options as possible. Information should not be withheld or solutions ignored – as they say, "ignorance is not an excuse for the law." It would be an insufficient defense if a doctor were to say that they were unaware of a possible life saving medicine in the market after their patient died. It would be the doctor's fiduciary responsibility to know about all available medicines in the market and advise their patient accordingly. It is no different for an advisor because that is what their "patient" relies upon—that their trusted advisor is aware of all options to cure what ails them.

Angry customers are coming back to sue advisors on the basis that it is the advisor's responsibility to know and inform them about all available options. Simply not knowing about or ignoring an existing market option will not protect an advisor against this growing trend of angry clients facing financial ruin because of long term care costs that they were unprepared to meet. Clients assume advisors are aware of all options in the market that can help them, and expect to be informed so they can make decisions about how to plan and fund their long term care.

The legal rights of a policy owner

The Supreme Court case of *Grigbsy v. Russell* (1911) established a life insurance policy owner's right to transfer or convert the use of an insurance policy. This ruling placed the ownership rights in a life insurance policy on the same legal footing as more traditional property such as real estate, stocks and bonds. As with these other types of personal property, a life insurance policy is an asset and can be converted to another use or transferred at the discretion of the policy owner.

Because a life insurance policy is legally recognized as an asset of the policy owner, it counts against them as an unqualified asset when applying for Medicaid. For Medicaid applicants, it has been standard practice to abandon a life insurance policy if it is within the legally required five year look back spend-down period. Billions worth of in-force life policies are regularly abandoned by uninformed seniors as they enter their "long term care years". Converting a life insurance policy into a Long Term Care Benefit Plan is a Medicaid qualified spend-down. By converting a life insurance policy instead of abandoning it, the policy owner's care can be covered as a private pay patient by the Long Term Care Benefit Plan over an extended time frame.

Long term care providers prefer private pay patients over Medicaid recipients. A report released by the American Health Care Association (AHCA) indicates that due to major state budget deficits and adjustments to Medicare and Medicaid reimbursements, long-term care facilities are seeing historically low Medicaid reimbursements. It is estimated that unreimbursed Medicaid funds to nursing homes exceeded $6.3 billion in 2011 – a $19.55 shortfall per patient, per day on average.

It is in the better interest of seniors and their families to convert a death benefit into a Long Term Care Benefit so that they can apply the maximum private market value of the policy towards their health care needs. If a policy can be converted into the means to cover the costs of senior care of any form for an extended period, and keep the insured off of Medicaid that much longer, it is in their best interest and that of the state's tax payers. The Long Term Care Benefit conversion option is a private sector solution that addresses the financial needs of the senior, and also helps stressed state budgets by extending the spend down period for a senior *before* they would go onto Medicaid.

There are three clear winners:

1. The policy owner and family win because they are able to obtain the fair market value for their life insurance policy and use the proceeds tax-free, and in a Medicaid qualified spend-down. Instead of throwing away an asset they have paid premiums on for years; they extend the time they are private pay before going onto government assistance and are able to choose the form and setting of long term care they want. This financial independence gives choice, dignity and quality of life back to the senior; and provides peace of mind and financial relief to the entire family.

2. The provider of long term care services wins because they are operating under extremely thin margins, and any private pay dollars they can receive translates to higher quality services for everyone under their care.

3. State Medicaid programs and tax payers all win because the longer a person can remain private pay before going onto Medicaid translates into critical budget savings.

Consumer Awareness: The best defense is a smart offense

Consumers lack awareness and are unprepared for how they are going to cover the costs of long term care. It is a subject typically ignored until a loved one is in immediate need of care. Families requiring senior living and long term care are in a particularly difficult position if they have not planned with appropriate financial guidance. Unfortunately, that is how you would describe the vast majority of people who require Home Care, Assisted Living, Memory Care, Nursing Home and Hospice Care today.

People want to remain financially independent and in control of their long term care decisions for as long as possible. People do not want to go onto Medicaid. Millions of seniors who still own a life insurance policy are holding the potential solution in their hands today. Unfortunately they are unaware of their legal property ownership rights and available options such as the Long Term Care Benefit conversion option to pay for senior living and long term care. It is common sense that the best interest of clients and their families is served when they can make decisions based on full disclosure of their rights and financial options.

Middle class policy owners and their families suffer the most because they are caught in the ironically unfortunate position of not being poor enough to automatically qualify for Medicaid, but they are not wealthy enough to access the care they want and deserve. In America, the vast middle class market is financially punished for being caught "in the middle" when they reach the point that they or a loved one requires long term care.

Providers of long term care services such as nursing homes, assisted living communities and home health agencies have been quick to embrace the Long Term Care Benefit Plan and it is an accepted form of payment by every care provider in the United States. State governments too are realizing that there is tremendous value to be found by converting life insurance policies to help pay for the costs of long term care. Media attention, as well as legislative and market activities across the country clearly point to the growing realization that life insurance policies are an asset well suited to help pay for long term care.

The writing has been on the wall for a long time. The Baby Boomer crush coupled with the LTC funding crisis is starting to escalate this issue quickly. Consumers want to be private pay and choose the form and place of care that they want. They want to be in control and spare their families financial ruin. Political leaders want to see people remain private pay as long as possible and delay/avoid Medicaid. Providers of long term care services and supports prefer private pay. People with life policies need to be informed that they can turn their policies into a Long Term Care Benefit Plan instead of lapse/surrender. Clearly it is in the best interest of the consumer when they have an advisor that will make sure they are educated about planning for long term care, and that they understand their legal rights to take advantage of the Long Term Care Benefit conversion funding option. If not, unprepared families are facing possible legal action by the government, and advisors are facing possible legal action from unhappy families.

Exhibit A

Omnibus Budget Reconciliation Act of 1993 (OBRA ‘93)

The main features of the OBRA ‘93 Medicaid estate recovery mandate that required states to implement a Medicaid estate recovery program are described below.

Highlights of the 1993 Estate Recovery Mandate:

States must pursue recovering costs for medical assistance consisting of:

- Nursing home or other long-term institutional services;
- Home- and community-based services;
- Hospital and prescription drug services provided while the recipient was receiving nursing facility or home- and community-based services; and
- At State option, any other items covered by the Medicaid State Plan.

At a minimum, states must recover from assets that pass through probate (which is governed by state law). At a maximum, states may recover any assets of the deceased recipient.

OBRA ‘93 requires states to recover, at a minimum, all property and assets that pass from a deceased person to his or her heirs under state probate law, which governs both property conveyed by will and property of persons who die intestate. Such property includes assets that pass directly to a survivor, heir or assignee through joint tenancy, rights of survivorship, life estates, living trusts, annuity remainder payments, or life insurance payouts. At a minimum, states must recover amounts spent by Medicaid for long-term care and related drug and hospital benefits, including Medicaid payments for Medicare cost sharing related to these services. However, they have the option of recovering the costs of all Medicaid services paid on the recipient’s behalf. The majority of states recover spending for more than the minimum of long-term care and related expenses. http://aspe.hhs.gov/daltcp/reports/estreccol.htm

Since the enactment of the Omnibus Budget Reconciliation Act of 1993, Medicaid’s rules concerning eligibility, asset transfers, and estate recovery have been designed to restrict access to Medicaid’s long-term care services to those individuals who are poor or have very high medical or long-term care expenses, and who apply their income and assets toward the cost of their care. In an attempt to discourage Medicaid estate planning, (a means by which some individuals divest of their income and assets to qualify for Medicaid sooner than they would if they first had to spend their income and assets on the cost of their care), the Deficit Reduction Act of 2005 (P.L. 109-171, DRA) contained a number of provisions designed to strengthen these rules. Since 1993, Medicaid law has required states to recover, from the estate of the beneficiary, amounts paid by the program for certain long-term care, related services and other services at state option.

Look-Back Period

The DRA lengthens the look-back period from three years to five years for all income and assets disposed of by the individual after enactment. It does not change the look-back period for certain trusts, which was already five years prior to DRA’s enactment. Under this change, asset transfers for less than fair market value of all kinds made within five years of application to Medicaid would be subject to review by the state for the purpose of applying asset transfer penalties. DRA expands the types of assets that are counted for the purpose of Medicaid eligibility and asset transfer penalties. Under current law, states set standards, within federal parameters, for the amount and type of assets that applicants may have to qualify for Medicaid. In general, countable assets cannot exceed $2,000 for an individual.

Order Code RL33593 Congressional Research Service (CRS) Report January 31, 2008

Exhibit B

Supreme Court Ruling on Life Insurance as Personal Property

The Supreme Court case of Grigbsy v. Russell (1911) established the policy owner's right to transfer or convert an insurance policy. Justice Oliver Wendell Holmes noted in his opinion that life insurance possessed all the ordinary characteristics of property, and therefore represented an asset that a policy owner could transfer or convert without limitation. Wrote Holmes, "Life insurance has become in our days one of the best recognized forms of investment and self-compelled saving." This opinion placed the ownership rights in a life insurance policy on the same legal footing as more traditional investment property such as stocks and bonds. As with these other types of property, a life insurance policy could be transferred to another person at the discretion of the policy owner or converted to another use.

This decision established a life insurance policy as personal property that contains specific legal rights, including the right to:

- Name the policy beneficiary
- Change the beneficiary designation (unless subject to restrictions)
- Assign the policy as collateral for a loan
- Borrow against the policy
- Sell the policy to another party
- Convert the policy to a Long Term Care Benefit Plan

"…life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. …the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. … it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself."

Exhibit B (Cont.)

U.S. Supreme Court

GRIGSBY v. RUSSELL, 222 U.S. 149 (1911)

222 U.S. 149

A. H. GRIGSBY, Petitioner, v. R. L. RUSSELL and Lillie Burchard, Administrators of John C. Burchard, Deceased. No. 53.

Argued November 10 and 13, 1911. Decided December 4, 1911.

Messrs. Montague S. Ross, John A. Pitts, and K. T. McConnico for petitioner. [222 U.S. 149, 153] Mr. George T. Hughes for respondents. [222 U.S. 149, 154]

Mr. Justices Holmes delivered the opinion of the court:

This is a bill of interpleader brought by an insurance company to determine whether a policy of insurance issued to John C. Burchard, now deceased, upon his life, shall be paid to his administrators or to an assignee, the company having turned the amount into court. The material facts are that after he had paid two premiums and a third was overdue, Burchard, being in want and needing money for a surgical operation, asked Dr. Grigsby to buy the policy, and sold it to him in consideration of $100 and Grigsby's undertaking to pay the premiums due or to become due; and that Grigsby had no interest in the life of the assured. The circuit court of appeals, in deference to some intimations of this court, held the assignment valid only to the extent of the money actually given for it and the premiums subsequently paid. -- L.R.A. --, 94 C. C. A. 61, 168 Fed. 577.

Of course, the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. And [222 U.S. 149, 155] although that counter interest always exists, as early was emphasized for England in the famous case of Wainewright (Janus Weathercock), the chance that in some cases it may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose. The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.

But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case. In the present instance the policy was perfectly good. There was a faint suggestion in argument that it had become void by the failure of Burchard to pay the third premium ad diem, and that when Grisby paid, he was making a new contract. But a condition in a policy that it shall be void if premiums are not paid when due means only that it shall be voidable at the option of the company. Knickerbocker L. Ins. Co. v. Norton, 96 U.S. 234 , 24 L. ed. 689; Oakes v. Manufacturers' F. & M. Ins. Co. 135 Mass. 248. The company waived the breach, if there was one, and the original contract with Burchard remained on foot. No question as to the character of that contract is before us. It has been performed and the money is in court. But this being so, not only does the objection to wagers disappear, bur also the principle of public policy referred to, at least, in its most convincing form. The danger that might arise from a general license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. The law has no [222 U.S. 149, 156] universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death. It shows no prejudice against remainders after life estates, even by the rule in Shelley's Case. Indeed, the ground of the objection to life insurance without interest in the earlier English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming. Stat. 14 George III., chap. 48.

On the other hand, life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. This is recognized by the bankruptcy law, 70,1 which provides that unless the cash surrender value of a policy like the one before us is secured to the trustee within thirty days after it has been stated, the policy shall pass to the trustee as assets. Of course the trustee may have no interest in the bankrupt's life. To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands. The collateral difficulty that arose from regarding life insurance as a contract of indemnity only (Godsall v. Boldero, 9 East, 72), long has disappeared (Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. ed. 501). And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith.

Coming to the authorities in this court, it is true that there are intimations in favor of the result come to by the circuit court of appeals. But the case in which the strongest of them occur was one of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once. Warnock v. Davis, 104 U.S. 775 , 26 L. ed. 924. [222 U.S. 149, 157] On the other hand, it has been decided that a valid policy is not avoided by the cessation of the insurable interest, even as against the insurer, unless so provided by the policy itself. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U.S. 457 , 24 L. ed. 251. And expressions more or less in favor of the doctrine that we adopt are to be found also in Aetna L. Ins. Co. v. France, 94 U.S. 561 , 24 L. ed. 287; Mutual L. Ins. Co. v. Armstrong, 117 U.S. 591 , 29 L. ed. 997, 6 Sup. Ct. Rep. 877. It is enough to say that while the court below might hesitate to decide against the language of Warnock v. Davis, there has been no decision that precludes us from exercising our own judgment upon this much debated point. It is at least satisfactory to learn from the decision below that in Tennessee, where this assignment was made, although there has been much division of opinion, the supreme court of that state came to the conclusion that we adopt, in an unreported case,-Lewis v. Edwards, December 14, 1903. The law in England and the preponderance of decisions in our state courts are on the same side.

Some reference was made to a clause in the policy that 'any claim against the company, arising under any assignment of the policy, shall be subject to proof on interest.' But it rightly was assumed below that if there was no rule of law to that effect, and the company saw fit to pay, the clause did not diminish the rights of Grigsby, as against the administrators of Burchard's estate.

Decree reversed. Mr. Justice Lurton took no part in the decision of this case.

Footnotes

[Footnote 1] U. S. Comp. St. 1901, p. 3451. United States Supreme Court

Exhibit C

TABLE http://law.psu.edu/_file/Pearson/FilialResponsibilityStatutes.pdf – Prof. Katherine Pearson's Website
The Pennsylvania State University • The Dickinson School of Law

FAMILY (FILIAL) RESPONSIBILITY/SUPPORT STATUTES in the UNITED STATES

Updated March 5, 2012

STATE	STATUTE	MOST RECENT CASES REGARDING ADULT CHILD LIABILITY FOR SUPPORT OF PARENT
Alabama	No Current Statute	
Alaska	Alaska Stat. § 25.20.030 Alaska Stat. Sec. 47-25-230 Alaska Stat. § 11.51.210 (Crime)	
Arizona	No Current Statute	
Arkansas	Ark. Code Ann. § 20-47-106	Alcorn v Ark. State Hospital, 367 S.W.2d 737 (Ark. Supreme 1963)
California	Cal. Fam. Code 4400-4405 Cal. Fam. Code 4410-4414 Cal. Welf. & Inst. Code § 12350 Cal. Penal Code § 270(c) (Crime)	Swoap v. Superior Ct. of Sacramento Co., 516 P.2d 840 (Cal. 1973) Gluckman v. Gaines, 266 Cal. App. 2.d 52 (1968)
Colorado	No Current Statute	In re Marriage of Sendinsky, 740 P.2d 521 (Colo. 1987)
Connecticut	Conn. Gen. Stat. Ann. § 53-304 (Crime, for refusing reasonable necessary support to parent under age 65)	
Delaware	Del. Code Ann. Tit. 13 § 503	Helen B.M. v Samuel F.D., 479 A.2d 852 (Del. Fam. Ct. 1984)
Florida	No Current Statute	
Georgia	GA. Code Ann. § 36-12-3	Citizens & S. Nat'l Bank v. Cook, 185 S.E. 318 (Ga. 1936)
Hawaii	No Current Statute	
Idaho	No Current Statute	Idaho Code § 32-1002 was repealed effective 7/1/11
Illinois	No Current Statute	
Indiana	Ind. Code Ann. §§ 31-16 -17-1 thru 7 Ind. Code Ann. § 35-46-2-7 (Crime)	Pickett v. Pickett, 251 N.E.2d 684 (Ind. App. 1969) Davis v. State, 240 N.E.2d 54 (Ind. 1968) Lanham v. State, 194 N.E. 625 (Ind. 1935)
Iowa	Iowa Code Ann. § 252.1 Iowa Code Ann. § 252.2 Iowa Code Ann. § 252.5	
Kansas	No Current Statute	In re Erikson, 180 P.263 (Kan. 1919) (no statute; no duty)
Kentucky	KY. Rev. Stat. Ann. § 530.050 (Crime)	Wood v. Wheat, S.W. 2d 916 (Ky. Ct. App. 1928)
Louisiana	La. C.C. Art 229 La. C.C. Art 239 La. R.S. 13: 4731	Tolley v. Karcher, 200 So. 4 (La. 1941)
Maine	No Current Statute	
Maryland	MD. Code Ann. Fam. Law §§ 13-101 thru 13-109	Corby v. McCarthy, 840 A.2d 188 (Md. 2003)(father's duty to support adult disabled child)
Massachusetts	Mass. Gen. Laws Ann. ch. 273, § 20 (Crime)	
Michigan	No Current Statute	
Minnesota	No Current Statute	
Mississippi	Miss. Code Ann. § 43-31-25	Lee v. Lee's Estate, 191 So. 661 (Miss. 1939) Holsomback v. Slaughter, 171 So. 542 (Miss. 1937)
Missouri	No Current Statute	Roth v. Roth, 571 S.W.2d 659 (Mo. App. 1978) (no statute; no duty)
Montana	Montana Code Ann. § 40-6-214 Montana Code An. § 40-6-301	Kelly v. Grainey, 129 P2d 619 (Mont. 1942)
Nebraska	No Current Statute	

Exhibit C (Cont.)

Updated March 5, 2012 STATE	STATUTE	MOST RECENT CASES REGARDING ADULT CHILD LIABILITY FOR SUPPORT OF PARENT
Nevada	Nev. Rev. Stat. Ann. § 428.070 Nev. Rev. Stat. Ann. §439B.310	
New Hampshire	N.H. Rev. Stat. Ann. § 167:2 N.H. Rev. Stat. Ann. § 546-2:2	
New Jersey	N.J. Stat. Ann. §§ 44:4-100 thru 44:4- 103 N.J. Stat. Ann. §§ 44:1-139 thru 44:1-142	Terenzio v. Nelson, 258 A.2d 20 (N.J. Super. Ct. App. Div. 1969)
New Mexico	No Current Statute	
New York	No Current Statute	Matter of Will of Surut, 535 N.Y.S. 2d 922 (N.Y. Sur. 1988) (daughter had no duty to support mother) In re Mintz, 280 N.Y.S 2d 1007 (N.Y. Sup. 1967)(declining to enforce out-of-state filial law against in-state child)
North Carolina	N.C. Gen. Stat. § 14-326.1 (Crime)	Shealy v. Associated Transport, Inc., 114 S.E.2d 702 (N.C. 1960)
North Dakota	N.D. Cent. Code § 14-09-10	Trinity Medical Ctr. v. Rubbelke, 389 N.W. 2d 805 (N.D. 1986)
Ohio	Ohio Rev. Code Ann. § 2919.21 (Crime)	State v. Flontek, 693 N.E.2d 767 (Ohio 1998) St. Clare Center, Inc. v. Mueller, 517 N.E.2d 236 (Ohio Ct.1986)
Oklahoma	No Current Statute	
Oregon	OR. Rev. Stat § 109.010 Or. Rev. Stat. § 163.205 (Crime)	In re Estate of Hines, 573 P.2d 1260 (Or. 1978) Oregon v. Nolen, 2010 WL 6432473 (Or. Ct. App. Sept. 8, 2010)(Brief on appeal discusses application of civil statute)
Pennsylvania	23 Pa. C.S.A. §§ 4601 thru 4606	Savoy v. Savoy, 641 A.2d 596, 600 (Pa. Super. 1994) Presbyterian Med. Ctr. v. Budd, 832 A.2d 1066 (Pa. Super. 2003)
Rhode Island	R.I. Gen. Laws §§ 15-10-1 thru 15- 10-7 R.I. Gen. Laws §§ 40-5-13 thru 40-5-21	Landmark Med.Ctr. v. Gauthier, 635 A.2d 1145 (R.I. 1994)
South Carolina	No Current Statute	
South Dakota	S.D. Codified Law § 25-7-27 S.D. Codified Law § 25-7-28 S.D. Codified Laws § 28-13-1.1	Prairie Lakes Health Care Sys. v. Wookey, 583 N.W.2d 405 (S.D.1998) Americana Healthcare Ctr. v. Randall, 513 N.W.2d 566 (S.D. 1994)
Tennessee	Tenn. Code Ann. § 71-5-103 Tenn. Code Ann. § 71-5-115	
Texas	No Current Statute	Missouri-Kansas-Texas R. Co. v. Fierce, 519 S.W.2d 157 (Tex. Civ. App. 1975)(Son had no legal obligation to parent)
Utah	Utah Code Ann. § 17-14-2	
Vermont	VT. Stat. Ann. Tit. 15, §§ 202 VT. Stat. Ann. Tit. 15, §§ 203	
Virginia	VA. Code Ann. § 20-88	Peyton v. Peyton, 8 Va. Cir. 531, 1978 Va. Cir. Lexis 19 (1978)
Washington	No Current Statute	
Wisconsin	No Current Statute	
Wyoming	No Current Statute	
West Virginia	W. VA. Code § 9-5-9	
Puerto Rico	8 L.P.R.A. § 712	
District of Columbia	No Current Statute	

Exhibit D

Is a Long Term Care Benefit Plan Tax Advantaged?

In many cases, the proceeds received from converting a life insurance policy insuring the life of a chronically or terminally ill individual into a Long Term Care Benefit Plan will not be subject to U.S. federal income tax. As a general rule, proceeds from the sale of a life insurance policy are subject to U.S. federal income tax; however, the Internal Revenue Code provides special exemptions for sales of life insurance policies insuring the lives of individuals who are terminally ill or chronically ill. In the case of a terminally ill insured, the proceeds from the sale of the policy will not be subject to U.S. federal income tax regardless of how the proceeds are used. And, if the insured is chronically ill, the proceeds will not be subject to U.S. federal income tax so long as they are used solely to pay for qualified long-term care services.

In addition, the current estate and gift tax exclusion is more than $5 million. Therefore, unless the insured has an estate in excess of the exemption, any residual amount of the Long Term Care Benefit which remains in the account when the insured dies may pass to the account beneficiary(-ies) tax free. If the policy owner and insured are not the same person then, in the case of a chronically ill insured who passes while funds remain in the Long Term Care Benefit Account, the policy owner will be required to pay U.S. federal income tax on any residual amounts remaining in the account.

Please note that the actual tax treatment of the proceeds from the sale of a life insurance policy will depend on many factors, including but not limited to who owns the policy, the health of the insured, the use of proceeds, the size of the estate and the state in which the policy owner lives (for purposes of state taxation). This material does not constitute tax, legal or accounting advice, and neither Life Care Funding, LLC nor any of its agent, employees, or representatives are in the business of offering such advice. The information above cannot be used by any taxpayer for the purpose of avoiding any IRS penalty. Anyone interested in selling a life insurance policy in order to fund Long Term Care Benefits should seek professional advice based on his or her particular circumstances from an independent tax advisor.

About the Author

Chris Orestis is CEO and co-founder of Life Care Funding; a nationally known senior care advocate and 18-year veteran of both the life insurance and long-term care industries. He is the author of the book "Help on the Way", and is a legislative expert, featured speaker, columnist and contributor to a number of insurance and long term care industry publications. His blog on senior living issues can be found at www.lifecarefunding.com/blog. He can be reached at (888) 670-7773 or corestis@lifecarefunding.com.

About Life Care Funding

Founded in 2007, Life Care Funding (LCF) specializes in converting the death benefit of an in-force life insurance policy into a Long Term Care Benefit Plan to cover the costs of Homecare, Assisted Living, Memory Care, Skilled Nursing, and Hospice.

LCF is the originator and market leader of this innovative approach to funding Senior Living and Long Term Care. Thousands of Senior Care providers and advisors offer the LCF program to families' across the United States. LCF's national education campaign has brought awareness about the important financial options for long term care to millions of people across the country.

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