ThompsonMcMullan
ATTORNEYS AT LAW
t-mlaw.com

Dangerous Elder Law Myths

1. **Myth: Medicare and Private Insurance will cover the cost of long term care when I go into a nursing home.**

   Medicare only pays for limited coverage in a nursing home and only after a hospital stay of at least 3 days. The care must be "skilled care" and the program only pays the full cost for the first 20 days. Days 21 through 100 of skilled care require payment of a deductible amount of up to $157.50 per day in 2015. However, in most cases, Medicare pays nothing because only "custodial" care, not skilled care, is required.

   While long term care insurance will pay for covered services in a nursing home (or, depending on the policy, for custodial or skilled services delivered in the home, or often in assisted living or adult care facilities), generally private health insurance will *not* pay for long term care services. A supplemental Medicare ("Medigap") health policy often pays for the deductible skilled care expenses during a Medicare approved spell of illness.

2. **Myth: If my spouse needs long term care, I have to lose everything before he becomes eligible for Medicaid.**

   When a couple separates because one must enter a nursing home, to prevent impoverishment of the "community spouse" (the spouse not entering the nursing home) the community spouse may keep a share of the parties' assets. The "protected resource allowance," or PRA, is one half of the "countable resources" the couple (and each member of the couple) owns as of the first day of the month in which the ill spouse is institutionalized, subject to a minimum amount $23,448 and a "maximum" amount $117,240 (as of January 1, 2014). The "maximum" amount can be increased when necessary to provide the community spouse with additional income or to prevent impoverishment. There is no cap on the amount that can be set.

   The home, most expensive automobile, most tangible personal property, and many burial arrangements are excluded from countable resources. They are protected for the community spouse and are not divided. For example, if a couple owned the farm on which the residence was situated, a car, and had an investment account worth $140,000, the community spouse would be entitled to retain the farm, the car, and $70,000 while the ill spouse receives Medicaid benefits to help pay for his care in the nursing home. The remaining $70,000 would have to be reduced to not more than $2,000. It need not only be spent on the ill spouse. It can be spent or converted for the benefit of *both* the community spouse and the ill spouse.

   In addition to the lump sum protection of the PRA, the community spouse is generally entitled to retain all of her monthly income. If her monthly income is less than $1,838.75, she is entitled to a supplement from the ill spouse's income to make up the difference. If

she is paying rent or a mortgage, under certain conditions she is entitled to up to $2,898 per month in income. If there are dependent relatives of the husband, in some cases they are also entitled to a monthly income supplement from the husband's income.

3. Myth: I could go to jail if I give away assets to become eligible for Medicaid.

In 1996 Congress made it a crime to transfer assets to qualify for Medicaid if the transfer triggered ineligibility for Medicaid benefits. In 1997, following criticism of this "Granny Goes To Jail" statute, Congress changed the law to eliminate any criminal penalty for these transfers. Under the changed version, only persons who for a fee counsel or assist in transferring assets when the transfer results in a period of ineligibility may be prosecuted. The "Granny's Lawyer Goes To Jail" law, as it has come to be known, was ruled unconstitutional in a federal case in New York, and the Justice Department (which admitted the law violated the Constitution) has been enjoined from enforcing it.

There are several ways in which a person entering a nursing home can lawfully transfer assets without becoming ineligible for Medicaid benefits. An applicant for Medicaid paid long term care can transfer *any* assets to a spouse, a dependent child, a disabled child of any age, or to a trust for a disabled person under the age of 65. In addition, he may transfer his *home* to a brother or sister who has lived in the home with the applicant for at least a year (and owns any interest in the home), or to a child who cared for the parent for two years immediately before the parent entered the nursing home, when the care kept the parent out of the nursing home for those two years.

4. **Myth: I have to be in a nursing home before I can receive long term care benefits under Medicaid.**

When a person needs nursing home care but wishes to remain at home, when the care can be delivered to the person in a cost effective, safe manner, he may qualify for benefits under the Virginia Community Based Care Medicaid Waiver program. This permits the resident to remain in his home with assistance provided by community based nurses.

5. Myth: If my spouse needs long term care and qualifies for Medicaid, the state will take my house after his death.

It is true that Virginia has the most aggressive policy of estate recovery (taking assets from the estate of a deceased Medicaid beneficiary) permitted under the federal law. However, estate recovery is permitted against the estate of the *beneficiary*, not the spouse of the beneficiary. As long as the home (and other assets) are titled in the name of the wife, the state cannot take it to satisfy its claim for *him*.

Suppose the wife dies first? If the home was jointly owned with her husband, then it will immediately become his *sole* property. In most cases, this will cause the husband to be made ineligible for Medicaid, and cause him to sell the house to pay for his nursing home bills. Any funds left from the sale at the time of his death will be subjected to estate recovery. To avoid this outcome, the home could have been transferred to the wife, and her will written to leave her assets in a way that does not cause the assets to be "counted" in determining her husband's eligibility.

6. Myth: No matter how much property I give away, I have to wait at least 3 years before applying for Medicaid.

Substantial changes have been made regarding Medicaid eligibility pursuant to the Deficit Reduction Act of 2005 (DRA 2005), which went into effect on February 8, 2006. Medicaid requires that all transfers of assets made within five years before the application be reported. When a non-exempt transfer is made **within five years of the Medicaid application** (examples of exempt transfers include transfers to a spouse, a minor child, a trust for a disabled person under the age of 65, etc.), **regardless of whether it is made to a person or to a trust**, an ineligibility period for Medicaid payment of nursing home care will be imposed. **The ineligibility period will not begin to run until the time of the Medicaid application, or when the person would otherwise have been eligible for Medicaid, whichever is later**.

However, not all transfers that trigger a period of ineligibility cause the *same* period of ineligibility. The ineligibility period is designed to be for the same time that the person in the nursing home could have paid for nursing home care if he had simply used the asset to pay for his nursing home care. To determine the period of ineligibility, Virginia divides the value of the asset given away by the average monthly cost of nursing home care in Virginia. **Under prior law, the resulting ineligibility period was rounded down the nearest whole number. Under DRA 2005, the ineligibility period is not rounded down, resulting in partial months of ineligibility.**

The Virginia Department of Social Services publishes what it calculates as the average monthly cost of nursing home care in its Medicaid Manual. According to the Manual, except in northern Virginia, the state claims that the monthly cost is $5,993.00; in northern Virginia, it claims it is $7,734.

Thus, Grandmother's payment of Grandson's $10,000 medical school tuition in August, 2011, would incur a 1.67 month period of ineligibility in Central Virginia, and a 1.29 month period of ineligibility in Northern Virginia, but the penalty would not begin to run until Grandmother either applied for Medicaid or was otherwise eligible for Medicaid, whichever is later.

7. Myth: There's no Medicaid disqualification if I sell my house to my child for $1.00 and apply for Medicaid to help pay for my nursing home bills.

Virginia uses the tax assessed value of the real estate to determine its value for Medicaid purposes, regardless of the over-valuation or under-valuation.

If the parent's house has a tax assessment of $60,000 and is sold to the child for $1.00, then the "uncompensated value" of the transfer would be $59,999. Unless the transfer met an exception to the anti-transfer rules (i.e., the child was disabled, under 21, or provided care to the parent, etc.), the transfer would cause a period of 10.01 month period of ineligibility for Medicaid long term care benefits (7.76 months in Northern Virginia).

8. Myth: I can transfer all my assets to an irrevocable trust and as long as I wait 3 years, I'll be eligible for Medicaid.

The lookback period for all transfers is now **five years**.

If there are any circumstances under which the trustee may deliver assets to the trust creator and funder, even when the trust was created more than five years before applying, Medicaid can attribute the assets or income that *could* be distributed to the creator or funder, even if the trustee does not *actually* distribute anything!

These rules do not apply when the funder is disabled and under 65 and the trust is a "special needs trust" in which he has an interest, or when the creator / funder is not the beneficiary of the trust created *and* the beneficiary *is* disabled and under 65, *or* is a disabled child of any age. In these cases, the lookback period does not apply.

9. Myth: The only way to let my disabled child or spouse keep public benefits is to disinherit them in my will.

Disinheritance in the will can be an effective means of retaining public benefits for a disabled child and, to a lesser degree, for an institutionalized spouse at the death of a parent or community spouse. The trouble is that disinheritance means that the assets which the parent / spouse wishes used for the loved one pass to someone else in the family who, because of illness, divorce, or financial trouble may fail to apply them to help the disabled child or spouse.

A trust helps in these cases. While most trusts can cause a period of Medicaid ineligibility, the law specifically excludes from the trust rules a trust created under a will. If the parent's or spouse's assets are transferred under the will of the parent or spouse to a discretionary trustee, the trust assets are not counted in determining the eligibility of the spouse or child.

10. Myth: I don’t need a will because I don’t have enough money / it’s too expensive.

Many people think that they are too poor to need or afford a will. However, there can be a number of unintended consequences if you die without a will.

If you die without a will, the Commonwealth of Virginia will determine who receives your estate, based on the law in force at the time of your death. While Virginia’s current statutory distribution scheme might seem reasonable, that law could change. Having a will allows *you* to determine who will be the beneficiaries of your estate, and under what conditions.

Second, Virginia’s intestacy laws might not adequately provide for special circumstances, such as the minority or incapacity of a beneficiary. Having a will allows you to specify how and when a beneficiary is to receive their inheritance.

Third, Virginia law does not specify who will receive custody of a minor child in the event that both parents die. However, Virginia does allow the last surviving parent to designate a guardian for the minor child. If you have any minor children, you should have a will if for no other reason than to designate who you would want to be the guardian of those minor children.

Having a will also allows you to designate your own personal representative, i.e. your executor, to settle your estate. A will also allows you to give your executor all of the administrative powers necessary to settle your estate, (e.g. the power to sell your real estate), whereas an administrator (i.e. the personal representative appointed by the court when you die without a will) might have to go to the considerable time and expense of petitioning the court to grant them those same powers.

11. Myth: I don’t need an advance medical directive or power of attorney, since I have a spouse or child whose name is on all my accounts and property.

The most heartbreaking myth of all when there’s a stroke or other incapacitating illness is that because property is jointly titled with a spouse (or adult child), the spouse can “take care of everything.”

In the first place, it’s difficult to know whether your spouse’s name is on all of your property: what about that little bank account you’ve forgotten about? What about the property you inherit from your mother - the one who couldn’t stand your husband - *after* you become incapacitated?

Then there’s always the possibility that your spouse is as human as you are - he could die, fall prey to dementia, or even divorce you. What happens then?

In most cases (excepting *some* joint bank accounts), the mere fact that a spouse or child is "on the title" with you doesn't mean that he can deal with *your* interest in the property: after you become incapacitated, the couple who wants to buy your jointly titled home won't accept your husband's signature for *your* interest in the home.

How you own your property, of course, has no impact on who can make health care decisions for you. When you're in a coma and the doctor needs to make the decision to maintain you on life support (or to let you go), you will want to have given specific directions and unmistakable authority to someone to make these decisions for you. It was because Hugh Finn didn't sign a medical power of attorney that he and his family experienced the financially draining and humiliating agonies of guardianship, appeals and legislative fights for so long.

The way to avoid these kinds of problems is to give a general <u>*durable*</u> power of attorney to your spouse (or anyone else you trust), naming an alternate agent in case the first one falls ill or resigns. The power of attorney can include health care powers, or a separate writing can be used for that purpose.

Virginia law now permits a "protest" advance medical directive. This allows a person to designate an agent to make decisions which are protested by the grantor, when the protests are due to a mental impairment. They are extremely useful in avoiding civil commitment and guardianship proceedings in many cases.

In the absence of a durable power of attorney or health care power of attorney, it is likely that a conservatorship, a guardianship, or both will be necessary, and this will leave the decisions about your life, your marriage, and your finances in the hands of a judge who never knew you.

Copyright, 2014.
R. Shawn Majette
Paul G. Izzo
Joley L. Eason
***Thompson*McMullan, P.C.**
804.649.7545
www.t-mlaw.com
100 Shockoe Slip, Richmond, Virginia 23219

About This Document: This work is of general application, and is not intended as a substitute for legal advice. It is distributed with the understanding that if you need legal advice, you will seek the services of a competent Elder Law attorney. While every precaution has been taken to make this document accurate, we assume no responsibility for errors or omissions, or for damages resulting from the use of the information in this document.