Summer 2014

The Home: Where Our Heart Resides

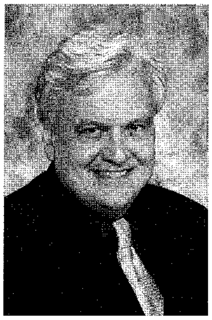
David M. English
University of Missouri School of Law, englishda@missouri.edu

The COLA Column

FROM THE ABA COMMISSION ON LAW AND AGING

The Home: Where Our Heart Resides

By David M. English



David M. English (englishda@missouri.edu) *is the William Franklin Fratcher Professor of Law at the University of Missouri School of Law and the chair of the Commission on Law and Aging, as well as a Uniform Law Commissioner and a member of the Executive Committee of the ABA Section of Real Property, Trust and Estate Law. He is co-author of a three-volume treatise,* Tax, Estate & Financial Planning for the Elderly, *and co-author of the books* Fiduciary Accounting and Trust Administration Guide; Wills, Trusts and Estates; *and* Principles of Wills, Trusts and Estates.

Home is the place your heart resides
Home is the place that you decide
Home is the womb that holds the soul
Home is the place where one is whole
—Aisha Patterson, *Home*

n our culture, the home generally resides at or near the center of our financial, social, and emotional universe. For an older individual, it may be the benchmark for achieving the American dream, the most valuable asset of the estate, and the principal legacy to leave behind for children. In the field of elder law, it almost always serves as a key focus of planning strategies to maximize one's security, autonomy, and quality of life.

Helping a client maximize the use of his or her home for these purposes is no simple task. It requires knowledge of options and resources across many domains. But stepping back and taking a broader look at these strategic opportunities and pitfalls is useful in appreciating the knowledge and skill set needed to competently counsel and represent aging clients.

This article looks first at a variety of consumer protection issues, examines the interrelationship between the home and a variety of government benefits, and concludes with a discussion of technology that may enable an elderly person to remain in the place where the heart resides for much longer than used to be possible.

Home Financing Scams

The recent recession left many seniors under water on their home mortgages and made them a favorite target of the many home financing scams that resulted. Common scams have included:

- Loan modification scams. A third-party "consultant" or company claims it will negotiate with the mortgage servicer to get a loan modification but in fact does nothing but keep the elder's money.
- Loan audits. Here a service, for a hefty fee, offers to review the individual's loan documents for violations that will help avoid foreclosure. Seldom does anything tangible come of this "audit."
- Short sale consultants. These characters claim they will convince the mortgage servicer to let borrowers sell their houses for less than the amount due on the loan. These transactions usually involve deception of both the elder and the mortgage holder and often lead to loss of the home.
- Sale-leasebacks. These are complicated, risky transactions often pitched as a way to save a house from foreclosure. Often the senior does not understand that he or she is transitioning from homeowner to tenant and may face the risk of eviction if a rental payment is missed.

A great resource for learning how to prevent and remedy these kinds of scams is the National Consumer Law Center. *See* http://www.nclc.org/issues/foreclosures-and-mortgages.html.

Home Repair Scams

Consumers living at home, especially those living alone, are prime targets for home repair schemes in which scammers offer a service—such as roof repair, gutter work, or tree work—that the consumer did not initiate and often for a low estimated cost that is increased later. After the consumer pays up front, the scammer either neglects to provide the service or does an inadequate job. Older homeowners may need help in seeking to get their money back and in contacting local and state agencies for help. The National Consumer Law Center is a very good starting point for learning. *See Home Improvement Scams Alert*, Consumer Concerns Newsletter (Nat'l Consumer Law Ctr. 2010), https://www.nclc.org/images/pdf/older_consumers/consumer_concerns/cc_home%20improvement_scams_alert.pdf.

Reverse Mortgages

Many seniors are "house rich and cash poor," so the concept of converting equity in the home into a cash benefit that doesn't have to be paid back as long as the elder lives there can be very attractive. Federally insured reverse mortgages are available from many lenders, and federal rules require at least some independent counseling before a loan can be transacted. While these loans can be enormously helpful for some, there are real risks. These loans are subject to very high up-front closing costs, including lender fees, origination fees, and mortgage insurance premiums, as well as annual fees. Because of the high up-front costs, a reverse mortgage needs to be a long-term solution. If the homeowners are unlikely to remain in the home for several years after the origination of the reverse mortgage or if the proceeds are only a short-term solution to the homeowner's financial needs, other options should be explored. The U.S. Department of Housing and Urban Development (HUD) is a good starting point for information on reverse mortgages. *See Home Equity Conversion Mortgages for Seniors*, HUD.gov, http://portal.hud.gov/hudportal /HUD?src=/program_offices/housing/sfh/hecm/hecmhome.

A surprising number of reverse mortgage borrowers receive a lump sum, spend it all within a relatively short period of time, and face financial difficulty when their fixed income is insufficient to maintain the home. Careful consideration and budgeting is essential to assure that a reverse mortgage is a long-term solution. Even though the elder is free of monthly payments to a lender, default can still occur (and thousands have) if the owner falls behind on property taxes, homeowner's insurance, homeowner association fees, or maintenance obligations. Other options should be considered as an alternative to a reverse mortgage, including simply reducing payments by refinancing at a better rate or with a longer-term mortgage, downsizing to a new home, or perhaps private loans from family. There is no simple solution for everyone.

The Home and Public Benefit Eligibility

Federal means-tested programs generally exempt the home from resource tests that determine eligibility for benefits, albeit with some limits. This includes Medicaid, Supplemental Security Income, veterans benefits, food stamps (now called the Supplemental Nutrition Assistance Program), and others.

Medicaid impacts more than six million seniors, many of whom receive long-term care services. *See* Henry J. Kaiser Family Found., *The Medicaid Program at a Glance*, (Mar. 4, 2013), http://kff.org/medicaid/fact-sheet/the-medicaid-program-at-a-glance-update. That number will more than double by 2050. *See* Henry J. Kaiser Family Found., *A Short Look at Long-Term Care for Seniors*, 310 JAMA 786 (2013), *available at* http://jama.jamanetwork.com/article.aspx?articleid=1733726. The catastrophic cost of long-term care drives many middle-income couples and individuals into Medicaid when their income and assets become unable to pay for care. However, the treatment of the home and options for protecting it are complex and vary from state to state.

Medicaid has a complex set of rules, known as spousal impoverishment guidelines, that provide modest protections to the spouse of a person in a nursing home. Key among the spousal impoverishment rules is an exemption for the home, as long as it is occupied by a spouse or dependent child of the nursing home resident.

Many states allow a Medicaid beneficiary in a nursing home to keep a home if the individual intends to return home, even if it is not occupied by a spouse, a blind or disabled child of any age, or other child under age 21. Federal law imposes limits on the amount of protected equity in a home under these circumstances. For 2014, the limit is $543,000 (though a state may increase the limit up to $814,000 in high-cost areas). There are various reasons why a person may want to maintain the home while in a nursing home; chief among them is a hope of getting well enough to return home.

Generally, gifts within five years of a Medicaid application result in a period of ineligibility. But, recognizing the importance of the family home, Congress created limited exceptions for the transfer of a home to certain family members. The home transfer rules are complex but important to comprehend. The exact rules and documentation required to establish the exempt nature of the transfer vary from state to state.

Federal law requires states to recover Medicaid monies spent on care from the estates of certain Medicaid beneficiaries after their deaths, specifically beneficiaries who were either permanently institutionalized or over the age of 55. Expenditures recoverable are those for long-term care, home and community-based services (HCBS), and related hospital and prescription drug services. However, states have the option to expand recovery to include any other Medicaid services received. Federal law provides an exemption from estate recovery if there is a surviving spouse, surviving children under the age of 21, or surviving children of any age who are legally blind or disabled. Three things vary from state to state: the definition of estate subject to recovery, how exemptions are made available, and how recovery is pursued. One thing all have in common is that the family home is protected when the exemptions apply.

Life Estates

Life estates can sometimes be used in creative ways to free up cash, allow for continued residence in the home, provide a legacy to heirs, or maintain eligibility for public benefit programs such as Medicaid. Life estates are generally exempt assets under Medicaid. However, the liabilities and advantages of life estates are defined differently depending on state law, so both caution and research are in order. On the death of the life owner, title passes automatically to the remainder owner, so the property may escape the claims of the life tenant's creditors and recoupment demands from Medicaid agencies. But again, Medicaid rules vary substantially and some states do recover from life estates.

Another variation is to sell one's home outright and purchase a life estate in an adult child's home who uses all or part of the proceeds to build an accessible home addition for the elder. One caveat is that the life estate owner must live in the property for at least one year to receive favorable treatment from Medicaid.

Life estate arrangements can have considerable downsides. During the life tenant's lifetime, the agreement of the remainder owner must be obtained to sell or mortgage the house. The remainder interest will also be subject to the claims of the remainder owner's creditors, which could result in the loss of the home. Before entering into any such arrangement, the income, gift, and estate tax consequences should also be carefully assessed.

State/Local Housing Assistance for Homeowners

Paying real property taxes can be a significant burden for older homeowners on a limited income. Some jurisdictions provide special tax exemptions or reductions based on age, disability, income, or a combination of these factors. Other jurisdictions offer tax deferrals, delaying the due date of taxes until the home is no longer owner-occupied or is sold. These programs may provide that unpaid taxes accrue interest but do not require payments as long as the home and owners comply with the terms of the program. Finally, some jurisdictions offer housing grants to qualified older homeowners. Some of these programs are created by state law, and some are very local. Anytime you are working with a low-income homeowner, it is helpful to be aware of the options available in your area.

Home repairs and modifications needed to keep the home accessible can also be impossible for older and disabled homeowners on a limited income. There are a variety of programs that offer loans for home improvements and modifications to address this need. Generally, these programs defer payment, with or without the accrual of interest, as long as the homeowner occupies the home. These programs are very local. They are frequently run by local government, area agencies on aging, community action agencies, or the state unit on aging. Local senior centers can help you contact these agencies. Applicants for these programs frequently need the assistance of an attorney to clear up title or complete probate to satisfy the lender that the applicant owns the home (a good pro bono opportunity for an attorney who does real property and probate work).

Housing Assistance for Older Renters

Low-income older renters, as well as homeowners, have felt the brunt of the recession and may end up spending a substantial portion of their limited income for rent, putting a squeeze on spending for food and medical care. Multiple federal, state, and local programs offer assistance to older renters. Public housing aims to provide decent and safe rental housing for eligible low-income families, elders, and persons with disabilities. HUD administers federal aid to local public housing agencies that determine eligibility for public housing based on HUD guidelines and manage the housing for low-income residents.

HUD also provides financing to nonprofit sponsoring organizations for the construction or rehabilitation of affordable, supportive housing specifically for older people. The HUD Section 202 program provides very low-income elders the opportunity to live independently in an apartment in a building with supportive services such as meals, transportation, and cleaning. The Section 202 program provides rent subsidies to the buildings to help make them affordable. The program benefits low-income residents age 62 or older. Even though such housing sometimes is known as "independent living," many residents age in place and over time may require increasing services as they become more frail.

Not all low-income elder renters live in subsidized housing. Some instead benefit by housing choice vouchers that allow them to choose any housing unit that meets program requirements. HUD Section 8 is a federal program administered locally by public housing agencies, providing rental vouchers to help very low-income families, elders, and people with disabilities afford decent, safe, and sanitary housing in the private market. A subsidy is paid to the landlord, and the older renter pays the difference between the actual rent and the amount subsidized. In general, the elder's income may not exceed 50 percent of the median income for the county or metropolitan area. The U.S. Department of Agriculture, Office of Housing and Community Assistance, also supports some housing assistance for older renters.

In addition, state, local, nonprofit, and charity rental assistance programs help fill the gap for older people needing help in paying the rent. Some localities have emergency rental assistance programs available for short-term crisis situations.

Many states allow Medicaid beneficiaries in nursing homes to keep their homes, even those unoccupied by a spouse or child, if an individual intends to return.

The Home as Focal Point of Long-Term Care Services and Supports

Nationwide, government programs and older adults themselves are seeking ways to "age in community" rather than in institutions. "Community living" policies are finding creative ways to tip the balance away from residential care programs such as nursing homes toward initiatives that support people who remain at home.

The federal-state Medicaid long-term care program traditionally has been focused largely on nursing homes, but it also covers home health care, and states have the option of including personal care services as well. Additionally, Medicaid HCBS waivers allow states to use Medicaid funds for community services for individuals who otherwise would qualify for nursing home care. Under these "waivers"—which are outside the package of services each state sets out in its Medicaid state plan—states can waive certain rules and open doors to aging in place at home, providing a range of in-home services and supports. Some waivers are "consumer directed," allowing individuals to choose and manage their service providers (and to thereby possibly become employers, with all the resulting obligations that entails). In 2010, the Affordable Care Act included new options for states to use Medicaid funds for HCBS, infusing federal and state dollars so that people can more easily stay at home as they age.

The Older Americans Act has for years covered, through state and area agencies on aging, a range of community-based services that include home-delivered and congregate meals, transportation, in-home personal care, senior centers, adult day programs, and more. The Department of Veterans Affairs increasingly provides community-based services for veterans and their dependents. It is, therefore, increasingly possible for older people to stay where they are and receive services to live independently at home or in the community.

Meanwhile, in a burgeoning grassroots movement called "villages," older people in particular neighborhoods are developing options to allow them to remain in their own homes as they age. A "village" is an independent, self-governing, not-for-profit, community-based organization providing older residents an array of supports and services, social networks, and opportunities for civic engagement. Generally, members pay a fee for information, in-home services, cultural and educational programs, health and wellness activities, and volunteer support. Villages directly confront the threat of isolation that older people living at home might otherwise experience. According to the Village to Village Network, 120 villages have sprung up across the country and more are underway, with real potential to change the face of "living at home."

> In a burgeoning grassroots movement called "villages," older people in neighborhoods are developing options for remaining in their homes as they age.

Technology and the Home

According to surveys, aging in place—i.e., in one's own home—is the overwhelming preference of older Americans. Elders are very open to assistive devices that enable them to remain independent in their homes. A multitude of simple technologies have been around for a long time and can make a major difference in functioning at home:

- ramps,
- hands-free, illuminated magnifiers,
- print enlargement systems,
- extendable grabbers,
- jar openers and other kitchen aids,
- one-hand button aids,
- bather transfer benches;
- chair risers and "toilevators," and
- power-assisted wheelchairs.

Technology today is making a quantum leap beyond the old standbys to change the calculus of living independently at home. Among the new horizons in assistive technology are:

- personal emergency response systems that go way beyond pushing a button for help, these having evolved into GPS tracking systems with fall detection, wandering alerts, waterproof functionality, and nurse call systems;
- medical management devices that can track vital signs, provide

Continued on page 12