

MICHAEL GILFIX  
MYRA GERSON GILFIX \*  
FRANCIS A. LA POLL  
PETER TRUMAN  
BARBARA M. LOEBNER  
MELISSA L. CAMPBELL  
JESSICA T. TONEY  
JANET L. TALLETT  
\* OF COUNSEL

GILFIX & LA POLL  
ASSOCIATES LLP  
Legal and Consulting Services

---

2300 Geng Road  
Suite 200  
Palo Alto, CA 94303  
Telephone: (650) 493-8070  
Gil-Fax: (650) 493-4668

SAN JOSE OFFICE  
Suite 1113  
950 South Bascom Avenue  
San Jose, CA 95128  
(408) 971-7292

---

STEPHEN M. VERNON  
OF COUNSEL

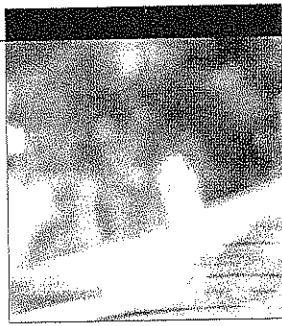
Compliments of  
Gilfix and La Poll  
Associates, L.L.P.

**ESTATE PLANNING**  
***Magazine***

November, 2005

***ESTATE PLANNING FOR CLIENTS  
WHO WANT TO STAY  
OUT OF A NURSING HOME***

**by Michael Gilfix, Esq. and  
Leonard M. Tillem, Esq.**



# Estate Planning for Clients Who Want to Stay Out of a Nursing Home

Many elderly clients want to stay at home and are willing to exhaust their assets in doing so. Practitioners must be as ready to plan for these individuals as we are for the client who is primarily devoted to protecting and preserving assets.

MICHAEL GILFIX AND LEONARD M. TILLEM, ATTORNEYS

“I want to stay at home,” states 83-year-old Leona J. with intensity and a straight look in my eye. “No nursing home for me.”

Assume that Leona owns her own home, which is valued at \$500,000, and has another \$300,000 in invested assets. Her fixed monthly income is \$2,200 from Social Security and a private pension. How would I advise her? How can we help her achieve her goals?

We have advised many elders about the cost of long-term care and asset preservation planning. We have also advised elders about *avoiding* nursing home care and staying at home. Given some of the planning presumptions in our system, this can be a tremendously challenging—and rewarding—area of law.

## Types of care

### *Will she need nursing home care?*

Although there is some variation in the data, a 2001 study concluded that individuals who are 65 years of age or older face a 40% risk of

entering a nursing home and spending some time there.<sup>1</sup> The data are nevertheless elusive and seemingly contradictory—*Consumer Reports* states that only 1% of those age 65-74 are in a nursing home, 4% of those between 75-84, and 9% of those 85 and older.<sup>2</sup> The odds are, therefore, that my client will not be in a nursing home more than a few months, if at all. But hers is a very real fear. Most importantly, she does not want to “play the odds” and hope for the best. She wants to act affirmatively and pro-

---

MICHAEL GILFIX is a member of the law firm of Gilfix & La Poll in Palo Alto and San Jose, California. He is also co-author of the treatise, *Tax, Estate and Financial Planning for the Elderly: Forms and Practice*, published by Matthew Bender. Mr. Gilfix is a Fellow of the National Academy of Elder Law Attorneys and a Certified Specialist in Estate Planning, Trust & Probate Law. LEONARD M. TILLEM is a partner in the law firm of Len Tillem & Associates in Sonoma, California. He is a Fellow of the National Academy of Elder Law Attorneys, and a member of the California Advocates for Nursing Home Reform. The authors, whose practices focus on elder law, are frequent writers and lecturers.

tect her self-proclaimed right to remain at home.

*Can she afford to stay at home?* An individual of wealth, unlike my hypothetical client, can afford to stay at home. If full-time care at home is needed, the cost will average \$26,640 per month for a licensed practical nurse (also known as a licensed vocational nurse) or \$12,960 per month for a home health aide.<sup>3</sup> Hourly rates vary from city to city for home health care. In Miami, the average is \$29.53 per hour; in Boston, it is \$35.83 per hour; and in New York City, it is \$41.78 per hour.<sup>4</sup>

Few clients can absorb such costs without asset exhaustion. Fortunately for Leona, 24-hour care is rarely needed. She is far more likely to need part-time assistance. Even then, her assets may or may not prove to be adequate.

*Managing home care—the danger of isolation.* Even if an individual

can afford the cost of home care, the management of care presents challenges on numerous levels. If an elder is isolated at home, someone must ensure that she receives quality services, quality nutrition, stimulation, and interaction. We are all aware of instances where a wealthy dowager receives no visitors, may have alcohol problems, and becomes utterly dependent on a privately-hired caregiver. Some of these cases devolve into vicious disputes between family members who expect an inheritance and caregivers who win the hearts and minds—and estates—of elders to whom they provide care in the elder's final years.

Oversight and accountability are absolute necessities. Individuals named as trustees, attorneys-in-fact, and agents in health care decision-making documents have presumptive responsibility for overseeing the quality of life enjoyed by the isolated elder, as well as paying the bills. This need not be done exclusively by the trustee or fiduciary herself. Social workers, geriatric care managers,<sup>5</sup> and other professionals can be hired to routinely visit, monitor care, and ensure the highest quality of life. Companions can be hired to maximize stimulation.

### Paying for care

*The role of long-term care insurance.* Generally, long-term care insurance may be a good idea for my client. Many companies reject new applications for persons age 84 and over, so she may still be able to obtain coverage. Her policy would cover only home care and perhaps assisted living. Her policy would exclude nursing home coverage, thereby possibly reducing her annual premium. Her goal is to stay out of a nursing home, and she may be flexible with regard to the setting—assisted living may be just as acceptable as being at

home. Policies covering only home and non-nursing home care environments are decreasingly available, but can be obtained.

Benefits would become payable if she needs assistance with at least two “activities of daily living” (“ADLs”). Typical ADLs include food preparation and eating, transferring from bed to a chair or wheelchair, and providing for one's personal care and hygiene.

*Self-financing the cost of home care.* Home care can be even more expensive than nursing home care, which averages \$66,000 per year. Having a “live-in” caregiver who provides companionship and relatively informal assistance could cost as little as \$1,500 per month. Having 24-hour nursing care could cost \$26,000 per month.

Leona has \$300,000 in invested assets. If we assume a 5% rate of return, this would generate \$1,400 per month to supplement her fixed monthly income of \$2,500. If her income is insufficient to pay for home care plus the ordinary cost of living, she will have to dip into her assets. Even then and assuming even \$5,000 per month for home care and for other costs of living, she must invade her principal assets by as much as \$4,400 per month.

Even a modest invasion of principal can cause a worried older client to panic. Extraordinary care must be taken in explaining the benefit (staying at home) and in reassuring her that she is still solvent. This issue is often more emotional than rational.

*Using home equity.* There are many ways to use home equity. Very well known are reverse mortgages or “reverse annuity mortgages” (“RAMs”).<sup>6</sup> Reverse mortgages involve an arrangement with a lending institution whereby the lender sends the elderly homeowner a

monthly check. The amount of the check is based on the value of the home and the age of the elder. The greater the value of the home and the older the resident, the larger the monthly check.

With my client's home value of \$500,000, and in light of her age, she may be able to borrow up to \$300,000. In all likelihood, she will be undisturbed in her home and have no repayment responsibilities for as long as she is able to live there safely. This assumes that she has a normal life expectancy. If she defies the odds and lives for 20 more years, reverse mortgage payments would no doubt cease. She would no longer have income needed to pay for home care services. She may even be compelled to sell her home to satisfy the terms of her loan.

Standard home equity loans are available, but not ideal. These generate immediate loan repayments, which are just the type of worry Leona needs to avoid. Other creative arrangements, such as sale lease back and sale subject to a life estate, can yield high levels of equity, but are difficult to implement.

Still another approach envisions the sale of the residence—with the hope that all or most capital gains can be avoided. However, Leona is

<sup>1</sup> *Long Term Care Planning—A Dollar and Sense Guide*, United Seniors Health Council, Washington, D.C. (Jan. 2001). This publication is available for purchase from its publisher, United Seniors Health Cooperative at [www.unitedseniorshealth.org](http://www.unitedseniorshealth.org).

<sup>2</sup> “Do You Need Long-Term-Care Insurance?,” *Consumer Reports*, pp. 20, 21 (Nov. 2003). This article also reports that only 10% stay over five years and that the average stay is approximately 2.5 years.

<sup>3</sup> *MetLife Market Survey on Nursing Home and Home Care*, p. 4 (Oct. 2002), Mature Market Institute, Metropolitan Life Insurance Company.

<sup>4</sup> *Id.*, pp. 7-8.

<sup>5</sup> The National Association of Professional Geriatric Care Managers can provide a list of professional care managers for any state or region. The NAPGCM is based in Tucson, Ariz., and can be reached at (520) 881-8008.

<sup>6</sup> Information about reverse mortgages can be obtained from the National Center for Home Equity Conversion, an entity that has no relationship with lenders. See [www.reverse.org](http://www.reverse.org).

likely to have some unprotected capital gains, as she can protect only \$250,000 from exposure to income tax.<sup>7</sup> If Leona is typical, she bought the house 50 years ago for \$20,000. In any event, the net proceeds of sale can then be used to pay for a smaller, more modest residence, assisted living, or even a life care community or "Continuing Care Retirement Community" ("CCRC").<sup>8</sup>

*Life care and personal care agreements.* Some elders have entered into life care agreements, whereby they promise their residence or other assets to the individual or individuals who care for them for their remaining years. Such agreements must be airtight, comprehensive, and realistic.

For example, and despite best intentions, it may be impossible for a very ill elder to receive caregiver

assistance at home. What if professional—and expensive—health care services are needed? If the elder suffers a stroke, receives acute care, and is placed in a nursing home, is the life care contract void? If the caregiver becomes ill or is otherwise unable to provide care, how is that caregiver to be compensated for partial performance?

More positively, elements of a life care agreement can provide for the involvement of a social worker or care manager who is paid on an annual basis to visit the home, ensure that quality care is being delivered, and certify that the care provider is carrying out terms of the agreement. Supervision, follow up, and quality control are at the heart of these agreements if they are to be effective.

Far more typical are arrangements whereby care services are provided to the elder at an identified rate of compensation, sometimes including room and board. Duties are ideally specified in a written personal care agreement, though home care services are too

often provided by non-professionals who may be untrained, inattentive, or affirmatively dishonest.

An agreement should also identify the person who has oversight responsibility. Even if a home health agency is engaged to provide such services, on-site supervision is essential. Particularly because such services are provided in the privacy of the elder's home, physical, financial, or psychological abuse can be difficult to detect and occurs all too often. The estate planning attorney can draft an agreement that addresses these and other issues that exist in a particular home care setting. For example, such an agreement<sup>9</sup> would identify:

1. Services to be provided by the caregiver;
2. Services to be provided by other caregivers or professionals;
3. Who is to have supervisory responsibility and how that responsibility is to be discharged—including the expectation of random visits and private meetings with a

<sup>7</sup> IRC Section 121.

<sup>8</sup> Gilfix, "Elder Housing," 142 Tr. & Est. 50 (Apr. 2003). This article extensively discusses Continuing Care Retirement Communities from the estate planner's perspective.



## The legacy that loves back.

Since 1948, Morris Animal Foundation has been funding veterinary studies for companion animals and wildlife. Our work has brought them milestones like vaccines for canine parvovirus and feline leukemia. One hundred percent of each donation goes directly to studies, so you can be sure that every estate gift will truly make a difference to generations of animals—and the people who love them.

### MORRIS ANIMAL FOUNDATION

45 Inverness Drive East  
Englewood, Colorado 80112-5480

800.243.2345

[www.MorrisAnimalFoundation.org](http://www.MorrisAnimalFoundation.org)



- social worker or private geriatric care manager;
4. Who is to arrange for supplemental or short-term replacement services;
  5. Hours and location of services to be provided;
  6. Compensation, including inclusion or exclusion of health care and other benefits;
  7. Who is to be allowed to visit the caregiver, and how many can visit at any one time;
  8. Restrictions on the use of the elder's telephone and Internet service;
  9. Privacy rights of the elder; and
  10. Grounds for termination.

**Maximize available public benefits and community services.** For qualifying individuals, there are some programs that can provide assistance in the home. The New York Medicaid program provides home care coverage, although most state Medicaid plans do not. There is the In-Home Support Services ("IHSS") program, which can play an important, if incomplete, role in home care.

Designed to provide assistance at home with an older or disabled person's ADLs, IHSS is a chronically under-funded program that typically does not provide enough support to keep an individual out of nursing home settings. For qualifying individuals, IHSS can provide workers—at little more than the minimum wage—to assist with activities of daily living.

To qualify for IHSS and similar home-based programs, an individual must satisfy the same eligibility criteria as for Medicaid. This typically means that a person can have no more than perhaps \$2,000 or \$3,000 of countable assets. Significantly, many assets are exempt and are not counted when assessing eligibility. Such exempt resources include a residence of any value,

furniture and personal property, and funds to pay the cost of burial.<sup>10</sup>

On a more positive note, IHSS programs often allow an elder to hire her own caregivers. Family members, who may already be providing personal care services, can then be modestly compensated.

There are "Meals on Wheels" and other programs available through community centers and church groups. Many senior centers offer "home repair" programs for elders. Adding a ramp or a grab bar to a bathroom can play a critical role in staying at home.

Home care can also be supplemented by "senior day care" programs in most communities. Offered through senior centers, community centers, and church groups, these programs are analogous to child care services. They provide activities, meals, and a degree of supervision for elders who are functional, but who need structure and support. Use of such services assumes that there will be a child or other concerned caregiver available to coordinate day care services with home care.

**Life expectancy plus three years.** How much money will be enough? While there is no magic formula, life expectancy tables provide some guidance. We recommend a plan that assumes life expectancy of at least three years in excess of the average. If my client's life expectancy is seven years, I would recommend that she plan for ten years.

It is also possible that she would outlive the assets necessary for home care by several years. Simply stated, this is a risk that she will have to take. If she is to safely stay at home, she must pay for the cost of care even if her assets are exhausted at a rate that exceeds her original expectations. *Quality of care and security at home cannot be compromised.*

In the unlikely event that an elder's private resources are exhausted, the Medicaid and IHSS programs will be available. Such programs are not likely to provide the quantity and quality of health and personal care needed to ensure uncompromised services. Nursing home placement, which is paid by Medicaid programs for financially depleted elders and disabled persons, may then prove inevitable. As is so often the case, and by way of understatement, the retention of wealth is the only guarantor of uninterrupted, typically expensive, home care services.

### Estate planning documents

My client's estate planning documents will have some extraordinary provisions, all of which will reinforce her desire to remain at home.

1. **Durable power of attorney.** Her durable power of attorney will include language specifically empowering her attorney-in-fact to use her assets and to enter into all appropriate agreements to ensure that her desire to remain at home for her entire lifetime is respected. Her attorney-in-fact can be prohibited from taking any steps to protect assets and qualify her for such programs as Medicaid unless such programs provide home care services.

2. **Revocable trust and will.** My client's trust will include language very specifically noting her primary goal, which is to remain at home. It will emphasize the fact that the rights of remaindermen (her children and others that might inherit) will be secondary, or perhaps tertiary to her desire to stay at home. She will say this explicitly and assertively. For example, a provision might state the following:

<sup>9</sup> For a discussion of and a model personal services contract, see Regan, Gilfix, Morgan, and English, *Tax, Estate and Financial Planning for the Elderly: Forms and Practice*, § 1:6[2] (Matthew Bender 2004).

<sup>10</sup> See, e.g., 20 C.F.R. § 116.1212.

*Settlor's Desire to Remain at Home and Instructions to Trustee:*

The trustee is to utilize all trust assets, including equity in settlor's residence, to pay for all items and services required to enable settlor to remain in her own home. In saying this, the settlor understands that there may come a time when her physician and family feel that she will be better off and better protected in an alternative living environment, such as a skilled nursing facility. It is the settlor's instruction that all of her assets are to be utilized to avoid this outcome, even to the point of the exhaustion of her assets.

Other provisions must be harmonious with this objective.

3. *Prohibition of inheritance.* My client, Leona, has two children. She names her daughter as the first trustee and her son as the alternate. They are to inherit any assets remaining in her estate at the time of her death. My client's trust will expressly provide that any trustee or family member who places her in a nursing home will forfeit her or his right to any inheritance.

With this goal in mind, her trust may adopt an approach used by a Texas testator where the same objective was pursued in estate planning documents. In that case, Homer Baldwin was concerned about his wife's care if he predeceased her. Because she was totally incapacitated, he executed a codicil to his will that imposed a creative restriction on his beneficiaries. His codicil provided that any beneficiary who attempted "to place my wife in a nursing facility and defeat my plan to continue home care . . . before all of the Trust has been used for her care" would forfeit his or her share of any inheritance.<sup>11</sup>

Despite this explicit caveat and direction, Mrs. Baldwin's nephew placed her in a nursing home after a hospitalization. This step was taken on the recommendation of Mrs. Baldwin's physician. Although the well-intentioned nephew was Mrs. Baldwin's court appointed guardian and acted on medical advice, the court held that the decedent had every right to stipulate his wife's ongoing home care as a condition of inheritance. The nephew was denied any inheritance.

It is possible, of course, that medical and other circumstances can be so compelling that nursing home placement is unavoidable. A trust, envisioning this possibility, might identify the extraordinary circumstances that might allow the waiver of this provision. Otherwise, a child or other caregiver who refuses nursing home placement may find herself accused of elder abuse by her local office of Adult Protective Services.

For example, nursing home placement may be allowed "only when 24-hour medical care and monitoring are needed and the elder is completely unaware of her care environment due to dementia or other medical circumstances." Placement may also be allowed for rehabilitation purposes, and then for only a limited period of time.

4. *Advance health care directive.* My client's advance directive will further reinforce her desire to stay at home—and to die at home. It will be explicit in stating that she is not to be placed in a nursing home and that hospice services are to be provided in her own home. The advance directive may specifically state that no power is given to place her in a nursing home.

5. *Irrevocable trust.* To ensure that the stringent terms of her trust will not be undone or modified by a substitute judgment or other court petition—filed by well-meaning or avaricious children—her trust might be

irrevocable. Further reinforcing her wishes could be the exclusion of her children or other family members as trustees. A professional trustee might be employed to more dispassionately respect terms of her trust.

6. *Obtaining family support.* Leona will be encouraged to communicate with her children about her wishes. Specifically, Leona may write a letter to her family members explaining her desires and her wishes.

My client might also write a letter to her prospective caregivers, particularly if she enters into a life care agreement. If she becomes unable to communicate, she wants them to know such things as the type of food she likes, what activities she adores or abhors, and the music that she would like to have played in her home.

## Conclusion

Leona is not alone in her desire to avoid a nursing home as her final destination. As estate planners and elder law attorneys, we must avoid the automatic assumption that every older person wants to preserve assets and accept long-term care for which the public benefits system can pay. Many elders want to stay at home and are willing to exhaust their assets in doing so. We must be as ready to plan for them as we are for the client who is primarily devoted to the protection and preservation of assets. ■

## Need to sell oil and gas properties?

For over 20 years, we have worked with attorneys, trust companies, trusts, banks, and estates. We buy large inventories and small single tracts. We buy mineral inventories that contain working interests, overrides, and surface. If you have properties to sell, contact us:

**KALKMAN HABECK COMPANY**  
AN OKLAHOMA PARTNERSHIP  
P.O. BOX 2518  
ARDMORE, OKLAHOMA 73402  
580-223-8121  
FAX: 580-223-8125  
E-MAIL: MHABECK@CABLEONE.NET

<sup>11</sup> *Marion v. Davis*, 106 S.W.3d 860, 863 (Tex. App., 2003).