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Legal Matters®

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Is it legal to put a camera in a nursing home room?

Technological advances have made it easier to stay connected with family. That includes the ability to install cameras in a loved one's nursing home room, but these so-called "granny cams" have legal and privacy implications.

The benefit of the surveillance camera is the ability to monitor your family member's care. Being able to observe care from afar can give family members peace of mind that their loved one is being well taken care of, and can also serve as evidence if abuse is found. Even if there is no abuse, cameras can be helpful in learning if caregivers are using improper techniques that may injure a resident.

On the other hand, cameras raise privacy concerns for both residents (including roommates) and caregivers. Residents may not want to be monitored while in a vulnerable state, such as changing or bathing. If the recording device picks up audio, then even the resident's conversations may no longer be private.

All of that aside, do nursing homes have to permit families to install cameras? It varies depending on the facility. Some nursing homes may have language in their admission contracts banning cameras or imposing specific requirements for their use. However, concerns over elder abuse have led some states to pass laws allowing cameras in nursing homes. Illinois, Louisiana, Maryland, New Mexico, Oklahoma, Texas, Virginia and Washington have passed laws permitting families to install a camera in a nursing home if the resident and the resident's roommate have agreed. Utah permits cameras in assisted living facilities. New Jersey does not have a law specifically permitting cameras, but it has a program that loans surveillance cameras to families who suspect abuse.

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If you are considering installing a camera in a loved one's nursing home room, you should contact your attorney to discuss the legal and practical considerations.

For a fact sheet about nursing home surveillance from The National Consumer Voice for Quality Long-Term Care, go to: ltcombudsman.org/uploads/files/issues/cv-ncea-surveillance-factsheet-web.pdf

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Prevent mistaken Medicare denials

Have you or a loved one been denied Medicare-covered services because you're "not improving"?

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Many health care providers are still unaware that Medicare is required to cover skilled nursing and home care even if a patient is not showing improvement. If you are denied coverage based on this outdated standard, you have the right to appeal.

For decades, Medicare applied the so-called "improvement" standard to determine whether residents were entitled to coverage of particular care. The standard, which is not in Medicare law, only permitted coverage if the skilled treatment was deemed to contribute to improving the patient's condition, which can be difficult to achieve for many ill seniors.

In 2012, the federal Centers for Medicare & Medicaid Services (CMS) agreed to settle a related lawsuit and acknowledged that there was no legal basis for the "improvement" standard and that both inpatient skilled nursing care and outpatient home care and therapy may be covered under Medicare as long as the treatment helps the patient maintain her current status or simply delays or slows her decline.

In other words, as long as the patient benefits from the skilled care, which can include nursing care or physical, occupational or speech therapy, then the patient is entitled to coverage.

Medicare will cover up to 100 days of care in a skilled nursing facility following an inpatient hospital stay of at least three days and will cover home-based care indefinitely if the patient is homebound.

Unfortunately, despite the settlement, the word hasn't gotten out entirely to the care providers and insurance intermediaries that actually apply the rules. As a result, the plaintiffs from the suit and CMS recently agreed to a court-ordered corrective action plan. This includes a statement from CMS reminding the Medicare community that skilled nursing services should be covered "where such skilled nursing services are necessary to maintain the patient's current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided."

This doesn't change the rights Medicare patients have always had, but should make it easier to enforce them. If you or a loved one is denied coverage because the patient is not "improving," you should appeal.

Prenups as an estate planning tool

As more and more people marry more than once, prenuptial agreements have become an important estate planning tool. Without a prenuptial agreement, your new spouse may be able to invalidate your existing estate plan. Such agreements are especially helpful if you have children from a previous marriage or important heirlooms that you want to keep on your side of the family.

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A prenuptial agreement can be used in a second marriage when both parties have children. For example, suppose you get remarried and both you and your spouse have children from a prior marriage. You want your house to pass to your children, but without proper planning and an agreement in place, your spouse could inherit the house and then pass the house to her children when she dies. An airtight prenup agreement could prevent that from happening.

But it is important to make sure your prenuptial agreement is valid. To ensure this, the following requirements must be met:

- **Writing**. To be valid, a prenuptial agreement must be in writing and signed by both spouses. A court will not enforce a verbal agreement.
- **No pressure**. An agreement will be invalid if one spouse is pressured into signing it by the other spouse.
- **Reading**. Both spouses must read and understand the agreement. If a stack of papers is put in front of one spouse and he or she is asked to sign quickly without reading, the agreement can be invalidated.
- **Truthful**. Both spouses must fully disclose

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Use a lawyer for Medicaid planning

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Many seniors and their families don't use a lawyer to plan for long-term care or Medicaid, often because they're afraid of the cost. However, an attorney can help you save money in the long run and make sure you're getting the best care for your loved one.

Instead of proceeding based on what you've heard from others, doing nothing, or enlisting a non-lawyer referred by a nursing home, you can hire an elder law attorney. Here are a few reasons you should at least consider this option:

• **No conflict of interest.** When nursing homes refer families to non-lawyers to assist in preparing the Medicaid application, the preparer has dual loyalties, to the facility that provides the referrals and to the client applying for benefits.

To the extent everyone wants the Medicaid application to be successful, there's no conflict of interest. But it's in the nursing home's interest that the resident pay privately for as long as possible before going on Medicaid, while it's in the resident's interest to protect assets for care or for the resident's spouse or family.

An attorney hired to assist with Medicaid planning and the application has a duty of loyalty only to the client and will do his or her best to achieve the client's goals.

• **Saving money.** Nursing homes can cost as much as $15,000 a month in some areas, so it is unusual for legal fees to equal the cost of even one month in the facility. It's not difficult to save this much in long-term care and probate costs, and most attorneys will consult with new clients at little or no cost to determine what might be achieved before the client pays a larger fee.

• **Knowledge and experience.** Professionals who work in any field on a daily basis over many years develop the experience and expertise to advise clients on how to achieve their goals, whether those are maintaining independence and dignity, preserving funds for children and grandchildren, or staying home rather than moving to assisted living or a nursing home. Less experienced advisers, however well intentioned, can't know what they don't know.

• **Malpractice insurance.** Though we should expect that every professional we work with will provide outstanding service and representation, sometimes things don't work out. Fortunately, there's a remedy if an attorney makes a mistake, because almost all attorneys carry malpractice insurance. This is probably not the case with other advisers.

• **Peace of mind.** It's possible that an elder law attorney you consult with will advise you that there's not much you can do to preserve assets or achieve Medicaid eligibility more quickly, but the consultation will provide peace of mind that you haven't missed an opportunity.

Medicaid rules provide multiple opportunities for nursing home residents to preserve assets for themselves and their spouses, children and grandchildren, especially those with special needs. There are more opportunities for those who plan ahead, but even at the last minute there are almost always steps available to preserve some assets. Talk to an attorney in your area to find out your options.

We welcome your referrals.
We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

Prenups as an estate planning tool

Continued from page 2

assets and liabilities. If either spouse lies or omits information about his or her finances, the agreement can be invalidated.

• **No invalid provisions**. Though the spouses can agree to most financial arrangements, a prenuptial agreement that modifies child support obligations is illegal. If an agreement contains an invalid provision, the court can either throw out the entire agreement or strike the invalid provision. Similarly, if the terms of the agreement are grossly unfair to one spouse, the agreement may be invalid.

• **Independent counsel**. Some states require spouses to seek advice from separate attorneys before signing a prenuptial agreement. Regardless of whether it is required by state law, it is the best way to make sure each spouse's interest is protected.

Though a prenuptial agreement is signed before marriage, sometimes similar agreements can be made after the wedding (called a post-nuptial agreement). To find out if one of these agreements is right for you, contact your attorney.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

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Charitable giving under the new tax law

The new tax law makes it harder to claim a tax deduction for charitable contributions. Charitable giving should not be only about getting a tax break, but if you want to reap a tax benefit from your contributions, there are a couple of options.

The Tax Cuts and Jobs Act, enacted in December 2017, nearly doubled the standard deduction to $12,000 for individuals and $24,000 for couples. This means that if your charitable contributions along with any other itemized deductions are less than $12,000 for the tax year, the standard deduction will lower your tax bill more than itemizing your deductions. For most people, the standard deduction will be the better option.

If you still want to maximize the tax benefits of charitable giving and you have the financial means, one option is to double your charitable donations in one year and then skip the donation the following year. For example, instead of giving $10,000 a year to charity, you could give $20,000 every other year and itemize your deductions in that year.

Another way to concentrate charitable giving is to establish a donor-advised fund (DAF) through a public charity. A DAF allows you to contribute several years' worth of charitable donations to the fund and receive the tax benefit immediately. The money is placed in an account where it can be invested and grow tax-free.You can then make donations to charities from the account or add to it at any time.

As with any investment, you need to do research before establishing a DAF. Make sure you understand the fees involved and whether there are any limits on the contributions you can make. You should consult with your financial advisor before taking any steps.

If you are age 70 and a half or older and taking required minimum distributions from an IRA, another option is to donate those distributions directly to charity through a qualified charitable donation. The distributions won't be included in your gross income, which means lower taxes overall. The donation must be made directly from the IRA to the charity, and different IRA custodians have different rules about how to make the distributions.

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