FINDING THE GOLD TO FINANCE THE "GOLDEN YEARS": OPTIONS FOR FINANCING LONG-TERM CARE IN ARIZONA

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"Old age is no place for sissies."—Bette Davis

I. INTRODUCTION

According to comedian Jerry Seinfeld, the only thing Americans fear more than death is being asked to speak in public.[1] While fear of public speaking is at the top of the list,[2] death is actually sixth.[3] Today, many Americans fear the process of dying more than death itself.[4] Many believe that as they grow older, they will be left destitute, sick, and alone.[5] Those who do not fear growing old alone, fear becoming a burden to family and friends.[6] Their fears are not unfounded. After all, Americans often hear about the escalating costs of health and long-term care ("LTC"),[7] the lack of affordable LTC insurance options,[8] the

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1. Jacqueline Kempton, *Putting the Fear of God into Us—Public Speaking*, INCITE MAG., Jan.-Feb. 2002, at 2, *available at* http://www.alia.org.au/incite/2002/01-02/public.speaking.html.
2. DAVID WALLECHINSKY ET AL., THE BOOK OF LISTS 469–70 (1977).
3. *Id.*
4. Beverly A. Tyler, *CRITICAL Conditions^{SM} Restores Dignity to Life's Final Moments*, SUPPORTIVE VOICE (Summer 2002), *available at* http://www.careofdying.org/Supportivevoice.html.
5. Nathalie D. Martin, *Funding LTC: Some Risk-Spreaders Create More Risks Than They Cure*, 16 J. CONTEMP. HEALTH L. & POL'Y 355, 355 (2000).
6. According to a 1996 Survey conducted by the Gallup organization and the National Hospice Organization, *available at* http://www.pbs.org/wnet/onourownterms/tools/quiz.html [hereinafter Gallup].
7. *See Spending on Hospital Care Drives Double-Digit Jump in Health Costs in 2001*, HEALTH CARE STRATEGIC MGMT., Nov. 1, 2002, *available at* 2002 WL 11863560.

impending insolvency of the Social Security and Medicare trust funds,[9] and stories of elder neglect, abuse, and abandonment.[10]

It therefore comes as no surprise that the biggest concerns weighing on the minds of America's elders today are identifying the means to finance their LTC needs[11] and finding someone to care for them when they are unable to care for themselves.[12] Even with careful planning, seniors risk losing control of their lives and finances when struck with either a catastrophic or chronic illness.[13]

The elderly, Americans age sixty-five and older,[14] are the fastest growing segment of the United States population.[15] In 2000, there were 34.8 million elderly people in the United States.[16] By 2020, 53.3 million people will be sixty-five and older,[17] and by 2040 that number will grow to 77.2 million.[18] In 2030, the elderly will comprise 20% of the U.S. population, as compared to 12.7% currently.[19] Arizona is expected to continue exceeding the national average, and State officials anticipate that 21.3% of Arizona's citizens will be age sixty-five and older by 2030.[20]

Two primary sources account for this dramatic growth in America's elderly population. First is the aging baby boom generation, children born between 1946 and 1964.[21] Second, advances in health care science and technology have

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8. *See* Elaine Alt Powell, *Taking a Hard Look at Long Term Care; Picking Insurance Can Be Difficult*, HARRISBURG PATRIOT, July 1, 2002, *available at* 2002 WL 3000246.

9. *See generally* DAVID M. WALKER, GEN. ACCT. OFF., LONG TERM CARE: AGING BABY BOOM GENERATION WILL INCREASE DEMAND AND BURDEN ON FEDERAL AND STATE BUDGETS, GAO-02-544T (2002) (discussing the demands that increasing numbers of eligible elderly beneficiaries are placing on the Social Security trust funds, as well as the declining ratio of individuals paying into the system to beneficiaries drawing benefits out of the system).

10. *See* SCOTT G. DAVIS, UNIV. OF ARIZ., NEW AGING, NEW GENERATIONS: POSITIONING PIMA COUNTY FOR THE 21ST CENTURY, at viii, 18 (Sept. 2001).

11. *See* Martin, *supra* note 5, at 355.

12. *Id.*

13. *See* Robert D. Hayes et al., *What Attorneys Should Know About Long-Term Care Insurance*, 7 ELDER L.J. 1, 2 (1999).

14. DAVIS, *supra* note 10, at iii. Mr. Davis refers to the baby boomers as the "new aging," and persons age fifty-five and older as "older adults." *Id*. Within the Social Security Act, the sixty-five and older subgroup of the population is referred to as the "aged." *See* 42 U.S.C. § 1382c(a)(1)(A) (2003). The term "elderly" is commonly used synonymously or as an alternative to "aged." *See e.g.*, CHRISTOPHER K, MRELA & TRENTHAM COE, ARIZONA HEALTH STATUS AND VITAL STATISTICS 2001, at 422 tbl. 10A-2 (Nov. 2002).

15. ARIZ. HEALTH CARE COST CONTAINMENT SYS. ET AL., LONG-TERM CARE: NOW AND THE NEXT GENERATION: FINAL REPORT 1 (2001), *available at* http://www.ahcccs.state.az.us [hereinafter FINAL REPORT].

16. WALKER, *supra* note 9, at 10.

17. *Id.*

18. *Id.* at 11.

19. DAVIS, *supra* note 10, at 1.

20. *Id.* at v.

21. FINAL REPORT, *supra* note 15, at 3.

increased life expectancy for Americans by nearly thirty years since the turn of the twentieth century.[22] Life expectancy will continue to rise as Americans learn more about staying healthy and translate this knowledge into action.[23] Arizona's elderly population has grown due to both of these factors and a third as well: migration into the state, especially by retirees.[24]

In 2001, nearly 700,000 Arizonans were elderly.[25] More than 10% of Arizona's elders live in poverty, and an additional 27% fall into the low-income bracket.[26] By 2040, Arizona's elderly population will increase to two million.[27] With continued medical advances, better nutritional habits, and healthier lifestyle choices, more of Arizona's seniors are apt to die from chronic, long-term illnesses rather than sudden heart attacks, deadly strokes, or quick-onset, quick-acting diseases.[28] In fact, experts project about 50% of seniors who reach age sixty-five will eventually require some form of LTC.[29] Thus, Arizona seniors are more likely to "wear out" than die quickly.[30] All these factors create additional demand for LTC products and services that government sources alone cannot fund.[31] Who, then, is going to pay for the boomers' LTC? The ability to supply and finance LTC services is critical to the future financial security and well being of all Arizonans.[32]

This Note provides an overview of some of the options available for financing LTC services that are, or may be, needed by elder Arizonans. Part II begins with a brief overview of what the term "LTC services" encompasses, and identifies the delivery settings for these services. Part III highlights the myth

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22. Hayes et al., *supra* note 13, at 5. When Social Security began in 1939, the average life expectancy at birth was sixty-three years. By 1997 the average rose more than thirteen years to seventy-six and a half. The upward trend is expected to continue along with rapid, innovative improvements in health care, prescription medications, and technology. DAVIS, *supra* note 10, at v.

23. Hayes et al., *supra* note 13, at 6.

24. PATRICIA GOBER, ST. LUKE'S HEALTH INITIATIVES, GEO-DEMOGRAPHICS OF AGING IN ARIZONA: STATE OF KNOWLEDGE 3 (2002), *available at* http://www.shli.org/ahf/studies/index.com. The elderly do not make up the majority of persons migrating into the state, but they are the most likely to put down roots and remain in Arizona permanently. *Id.* at 5.

25. MRELA & COE, *supra* note 14, at 422 tbl. 10A-2.

26. DAVIS, *supra* note 10, at 9.

27. FINAL REPORT, *supra* note 15, at 1.

28. Hayes et al., *supra* note 13, at 6.

29. Kelly S. Davis, *Long Term Care Insurance as a Planning Tool*, WYO. LAW., Oct. 2002, at 36.

30. Hayes et al., *supra* note 13, at 6.

31. Martin, *supra* note 5, at 356. Medicaid, the government program that contributes most of total government LTC spending, currently pays more than $62 billion annually for LTC costs; seven percent of the federal budget is used to pay for LTC. WALKER, *supra* note 9, at 4.

32. *See generally* FINAL REPORT, *supra* note 15 (discussing LTC for the next generation of Arizonans, the inability of government programs to bear the costs of anticipated future demand, and the lack of LTC planning by Arizona's baby boomers who have "convinced themselves they will never go into a nursing home or need other [LTC] services"); WALKER, *supra* note 9 (discussing the need to promote utilization of private LTC funding sources to ease the burden on federal and state budgets).

behind Medicare, the program most Americans erroneously believe covers LTC costs. The limited LTC coverage Medicare does provide is also explained, along with the very narrow circumstances in which Medicare will finance LTC services. Part IV explores Medicaid, the public assistance program that pays for most LTC services today.

The remaining sections of this Note explore the private alternatives elder Arizonans may want to consider when developing a LTC plan. Part V discusses informal delivery of LTC services by unpaid caregivers.[33] Many people rely on this option today, whether by choice or by necessity, for some or all of their LTC services. Part VI examines an option arguably open to only the wealthiest Arizonans: self-insuring against future LTC services through private funds, particularly savings. Part VII describes Continuing Care Facilities ("CCFs"), sometimes called Continuing Care Retirement Communities ("CCRCs").

For those individuals with substantial life insurance policies, Part VIII discusses two options, so called "living benefits," that may provide additional funds for LTC. For those with sufficient income or savings, particularly those who are younger and in good health, Part IX explores a relatively new insurance product, LTC insurance ("LTCI"). Those who own a home with a fully paid or a low mortgage balance may want to consider a reverse mortgage to access their equity in the home. Part X discusses reverse mortgages and the two most popular reverse mortgage products available in Arizona today. Seniors can employ these private funding options, alone or in combination, to develop a LTC plan that uses their resources, and protects their assets, most efficiently and effectively.

II. A BRIEF OVERVIEW OF LTC SERVICES

LTC encompasses all services a person with a physical or mental impairment or disability may need.[34] The need for LTC arises when an individual has a functional impairment,[35] a debilitating physical impairment,[36] or a cognitive impairment[37] from which recovery is not expected.[38] While the need for LTC can

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33. WALKER, *supra* note 9, at 12 (noting most unpaid caregivers are family members or friends delivering care to elders who have no means to pay for costly LTC services).

34. *See* Martin, *supra* note 5, at 357.

35. Hayes et al., *supra* note 13, at 7. An individual is considered functionally impaired when he/she requires assistance in performing two or more activities of daily living. *Id.* Activities of daily living ("ADLs") include eating, bathing, dressing, toileting, grooming, mobility, and transferring (moving from one location to another, such as from the bed into a chair). *See* ARIZ. ADMIN. CODE § R9-28-304(2)(a) (2002).

36. Hayes et al., *supra* note 13, at 7. Debilitating physical impairments are serious health conditions that result in a need for some form of continuing or on-going medical care and treatment, such as a stroke or cancer. *See* ARIZ. ADMIN. CODE § R9-28-304(4).

37. Hayes et al., *supra* note 13, at 7–8. Serious cognitive impairments include emotional conditions such as depression, as well as all forms of dementia, including Alzheimer's disease. *See* ARIZ. ADMIN. CODE § R9-28-304(3).

38. Hayes et al., *supra* note 13, at 8.

arise at any age,[39] this Note focuses on LTC services and funding options for the elderly.

LTC services are provided in a variety of forms and settings, including institutionalized care,[40] community-based services,[41] and home-based services.[42] Institutionalized care services are those delivered in skilled nursing facilities ("SNFs" or nursing homes) and hospices.[43] Community-based services include congregate meals and adult day care at supervised facilities for a portion of the day.[44] Community-based services also include those provided in an assisted living facility ("ALF") or adult foster care home.[45] Home-based services include personal care,[46] homemaker services,[47] habilitation,[48] home-delivered meals (Meals on Wheels),[49] home health,[50] and respite care.[51]

In 2000, our nation expended more than $137 billion on LTC services.[52] The federal government, through the nation's taxpayers, paid for more than 60% of those services.[53] Private insurance paid for 11% of the total,[54] with the remainder, about 23%, paid from private funds.[55] In 2000, Americans spent $31 billion of private funds on LTC.[56] Individuals who worked and saved all their lives contributed most of the private funding, watching as their life savings disappeared in a matter of months due to a chronic or catastrophic illness.[57] Unless steps are

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39. *Id.* at 7.
40. WALKER, *supra* note 9, at 3.
41. Hayes et al., *supra* note 13, at 8.
42. WALKER, *supra* note 9, at 3.
43. *Id.*
44. ARIZ. REV. STAT. § 36-2929(C)(5) (2003).
45. *Id.* § 36-2929(C).
46. *Id.* § 36-2929(C)(4) (assisting with essential physical needs).
47. *Id.* § 36-2929(C)(3) (assisting with household maintenance and care).
48. *Id.* § 36-2929(C)(6) (including services such as therapy, behavior intervention, and sensory-motor development).
49. *Id.* § 36-2929(C)(9) (delivering a nutritious meal that contains at least one-third of the recommended daily dietary allowance of the recipient).
50. *Id.* § 36-2929(C)(1) (nursing services, home health aide services, medical supplies, and supportive care provided on a physician's orders).
51. *Id.* § 36-2929(C)(7) (providing short-term care and supervision on a temporary basis, relieving regular caregivers of their responsibilities to allow for an interval of rest).
52. WALKER, *supra* note 9, at 2.
53. *Id.* at 3. The primary federal programs for elder Americans are Medicare, Medicaid, and the Older Americans Act. *Id.*
54. *Id.* at 5. This includes private medical insurance, supplemental insurance, long and short-term disability insurance, accident insurance and LTC insurance. *Id.* Of the total, LTC insurance accounted for only 2.5% of the expenditures. *Id.*
55. *Id.* at 4.
56. *Id.* at 5.
57. Powell, *supra* note 8.

taken to prepare financially for future LTC needs, many Arizonans could experience this same devastating loss of their hard earned savings.[58]

III. THE MYTH OF MEDICARE

An Arizonan developing a comprehensive LTC plan must begin by recognizing the limited role Medicare plays in financing LTC services. Medicare is a federal social insurance program that provides health insurance to Americans age sixty-five and older[59] and to all persons with permanent disabilities.[60] Medicare is available to all eligible beneficiaries without regard to need or income.[61] Medicare is administered by the U.S. Department of Health and Human Services ("HHS")[62] through the Centers for Medicare and Medicaid Services ("CMS").[63]

Currently, Medicare insures one in every seven Americans[64] and accounts for 12% of the federal budget.[65] Everyone eligible for Medicare receives Part A, hospitalization insurance, automatically without premium.[66] However, Part A is limited to hospital, hospice, part-time home health, and some post-hospitalization skilled nursing facility ("SNF") expenses.[67]

Medicare beneficiaries can elect Part B, medical insurance, which currently carries a premium of $58.70 per month.[68] Part B covers doctor's visits, outpatient care, some home health care, diagnostic tests, and medical equipment.[69] Under Part B, home health care is covered for homebound seniors who need a skilled nurse or therapist, but only when a physician prescribes those services.[70] The services are available on a part-time or intermittent basis, but Part B does not cover around-the-clock nursing care.[71] There is no co-pay required, nor is there a limit to the number of home health visits.[72] Under Part B, if a senior is eligible for

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58. Davis, *supra* note 29, at 36 (noting nearly 50% of the population will eventually require some LTC services).

59. AM. BAR ASS'N, LEGAL GUIDE FOR OLDER AMERICANS: THE LAW EVERY AMERICAN OVER 50 NEEDS TO KNOW 46 (1st ed. 1998).

60. *See id.*

61. Gregory C. Larson & Melissa Hauer, *Planning for Nursing Home Care in North Dakota*, 74 N.D. L. REV. 191, 199 (1998) (noting individuals become eligible for Medicare "by working and paying into the social security retirement program").

62. 20 U.S.C. § 3508 (2003).

63. Robert Pear, *Medicare Agency Changes Name In an Effort to Emphasize Service*, N.Y. TIMES, June 15, 2002, at A26 (discussing the renaming of HCFA—the Health Care Financing Administration—to CMS in an effort to project a more customer-service oriented organization to the American public).

64. Larson & Hauer, *supra* note 61, at 199.

65. *Id.*

66. 42 C.F.R. § 406.5 (2003).

67. 42 U.S.C. § 1395ww (2003) (stating, however, that Medicare will pay for SNF costs for a maximum of 100 days).

68. *Id.* Additional information on Medicare is available at the U.S. government's official website for Medicare, at http://www.medicare.gov.

69. Larson & Hauer, *supra* note 61, at 199.

70. AM. BAR ASS'N, *supra* note 59, at 51.

71. *Id.* at 51.

72. *Id.* at 57.

home health services,[73] Medicare will also fund limited home aide services to help with bathing, dressing, eating, and other basic personal care needs.[74] Medicare does not cover community-based programs, such as adult day care or home-delivered meals.[75]

Many Americans mistakenly believe that Medicare or private health insurance will pay for nursing homes or other forms of LTC.[76] In fact, Medicare provides little SNF coverage, and only when certain restrictive criteria are met.[77] No coverage is provided unless the insured has been hospitalized for at least three consecutive days prior to the date of discharge,[78] and unless the insured's attending physician orders SNF service.[79] Because more than two-thirds of individuals admitted to SNFs are not hospitalized prior to admission, Medicare will cover only thirty percent of the individuals who enter SNFs.[80]

If an individual satisfies the restrictive criteria, Medicare Part A will pay 100% of the cost for SNF care for the first twenty days.[81] If a longer stay is required, the insured must satisfy a daily co-payment, and Medicare will pay the balance for days twenty-one through one hundred.[82] After one hundred days, Medicare pays nothing and any additional SNF stay must be self-financed.[83]

Despite seniors' strong preference for in-home or community-based care,[84] Medicare currently does not cover any custodial services provided in either the home or assisted living facilities.[85] Given the continued escalation of medical and LTC costs,[86] and the projected number of individuals who will become Medicare-eligible in coming years,[87] the Medicare Hospital Insurance Trust Fund cash flow is expected to turn negative in 2017 and run out of funds entirely by 2041.[88] Thus, individuals who depend solely on Medicare to meet future LTC

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73. *Id.* at 51. To be eligible for home health services, an individual must: 1) be under the care of a physician who certifies that home health services are needed; 2) be homebound; 3) require some form of therapy or skilled nursing services; and 4) receive services from a Medicare certified agency. *Id.*

74. *Id.*

75. Martin, *supra* note 5, at 357 n.11, *citing* Erick J. Bohlman, *Financing Strategies: Long-Term Care for the Elderly*, 2 ELDER L.J. 167, 171 (1994).

76. Powell, *supra* note 8.

77. Larson & Hauer, *supra* note 61, at 199.

78. 42 C.F.R. § 409.30(a) (2003).

79. *Id.* § 409.31(a)(1).

80. Martin, *supra* note 5, at 373.

81. 42 C.F.R. § 490.85 (2003).

82. *Id.* In 2003, the Medicare co-payment amount is $105 per day. For additional information about Medicare, see the U.S. Centers for Medicare and Medicaid ("CMS") official website, at www.medicare.gov. Since nursing home care averages $153 a day in Arizona, about two-thirds of the cost for days 21–100 will be borne by the individual. *See* DAVIS, *supra* note 10, at 22.

83. AM. BAR ASS'N, *supra* note 59, at 56.

84. *See* Martin, *supra* note 5, at 364–65.

85. Hayes et al, *supra* note 13, at 11.

86. WALKER, *supra* note 9, at 6.

87. *Id.*

88. *Id.*

needs are in a dangerous financial position.[89] If LTC needs exceed the coverage Medicare provides, and the senior does not have the income or the resources to cover additional LTC costs, Medicaid may be the only potential option.

IV. MEDICAID: THE LTC SAFETY NET

Medicaid is the major source of LTC financing in the United States today.[90] Medicaid paid for 45% of the total LTC spending in 2000.[91] At the federal level, Medicaid is administered by the CMS.[92] More than forty million individuals currently receive services through the program,[93] including nearly four million elderly enrollees nationwide.[94] Almost one-third of the total Medicaid budget finances LTC services for elderly enrollees.[95]

States receiving federal Medicaid funds are required to designate a single state agency to oversee the state's Medicaid plan.[96] In Arizona, the Arizona Health Care Cost Containment System ("AHCCCS") administers the state's Medicaid program.[97] The Arizona Long-Term Care System ("ALTCS") is part of Arizona's Medicaid program and currently serves more than 19,000 elderly Arizonans.[98] While the elderly represent 4% of total ALTCS enrollment, Arizona's elderly enrollees consume 30% of Arizona's entire Medicaid budget.[99]

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89. Larson & Hauer, *supra* note 61, at 200. GAO reports that, if spending continues at its current pace, by 2030 Medicare, Medicaid and Social Security payments to qualified individuals will consume 75% of the annual federal revenues from all sources. WALKER, *supra* note 9, at 7.

90. WALKER, *supra* note 9, at 4.

91. *Id.* (noting that in 2000, the federal government expended more than $62 billion dollars to fund Medicaid).

92. *See* 42 C.F.R. §§ 430.0 to 430.48 (2003).

93. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 100 tbl. 139 (2001), *available at* http://www.census.gov/statab/www/.

94. *Id.*

95. *Id.*

96. 42 U.S.C. § 1396a(a)(5) (2003); 42 C.F.R. § 431.10 (2003).

97. ARIZ. REV. STAT. §§ 36-2901 to 36-2974 (2003).

98. ARIZ. REV. STAT. § 36-2932 (2003); ARIZ. ADMIN. CODE § R9-28-101(B) (2002); FINAL REPORT, *supra* note 15, at 1.

99. FINAL REPORT, *supra* note 15, at 1 (discussing the distribution of ALTCS funding between the elderly, and physically and/or mentally disabled adults who receive care throughout their adult lives, starting at age twenty-one.) The Medicaid budget for Arizona includes both AHCCCS and ALTCS. While small in number, the elderly require more care than young, poor, predominately healthy individuals who make up the bulk of Medicaid enrollees in Arizona. ST. LUKE'S HEALTH INITIATIVES, THE COMING OF AGE: THE FUTURE OF AGING, HEALTH AND CAPACITY TO CARE 45 (2002), *available at* http://www.slhi.org [hereinafter COMING OF AGE]. Health care for elders is costly, especially when institutionalization is required. The average annual health care expense for an elder in 1996 was $6,360 if the elder lived independently, versus $38,906 if the elder was institutionalized. *Id.* at 38. The amount spent on health care also increases dramatically as elders age, from $5,864 annually for those age sixty-five to sixty-nine, to $9,414 annually for those age seventy-five to seventy-nine, and to $16,465 annually for those eighty-five and older. *Id.*

Medicaid, AHCCCS and ALTCS in Arizona, is a public assistance program designed to assist individuals at all ages who lack sufficient financial means to obtain health and LTC services.[100] Unlike Medicare and Social Security, which are social insurance programs available to all elderly Americans,[101] Medicaid is a welfare program.[102] The Medicaid program is authorized under Title XIX of the Social Security Act,[103] and is jointly funded by the states and the federal government.[104]

Arizona was the first state to offer a capitated[105] Medicaid program providing both health and LTC services for eligible Arizona residents.[106] ALTCS is an innovative program based on maximizing the use of home and community-based services ("HCBS"), rather than institutionalized care, to lower LTC costs.[107] Under ALTCS, program contractors are paid a fixed rate for each ALTCS member within the geographic region the contractor serves.[108] Rates are set to cover all program enrollment expenses, LTC service costs, and administrative expenses, as well as contractor profit.[109] While program contractors are paid on a per capita basis,[110] case managers can allocate funds among program participants as needed to address the LTC needs of each recipient.[111]

While each state has different eligibility standards, federal Medicaid provisions require that an adult without dependents must be at least sixty-five,[112] blind,[113] or disabled[114] to qualify for LTC services.[115] In addition, an individual

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100. *See* AM. BAR ASS'N, *supra* note 59, at 77.

101. *See* JOSEPH L. MATTHEWS & DOROTHY MATTHEWS BERMAN, SOCIAL SECURITY, MEDICARE AND PENSIONS 12/6 (7th ed. 1999).

102. *See id.*

103. 42 U.S.C. §§ 1396–1396u (2003); 42 C.F.R. § 430.0 (2003).

104. ARIZ. REV. STAT. § 36-2932(I)(2) (2003) (requiring that the ALTCS program Director apply to CMS for all federal funding the state is eligible to receive).

105. ARIZ. REV. STAT. § 36-2931(2) (2003). Under a capitated program, service providers who contract with the State to deliver medical or LTC services receive a flat reimbursement rate per member per month in the service area the contractor covers. *Id.* In 1999, for example, the capitation rates for members receiving LTC services were $2,105.47 per month for a member, and $8,931.43 per month for a ventilator-dependent member. JOINT LEGIS. BUDGET COMM., STATE OF ARIZONA APPROPRIATIONS REPORT; FISCAL YEAR ENDING JUNE 30, 1999, at 55 (1998) [hereinafter APPROPRIATIONS REP.].

106. William G. Weissert et al., *Cost Savings from Home and Community Based Services: Arizona's Capitated Medicaid LTC Program*, 22 J. HEALTH POL. POL'Y & L. 1329, 1329 (1997).

107. *Id.*

108. *Id.* at 1334.

109. *Id.*

110. ARIZ. REV. STAT. § 36-2931(2) (providing the contractor a fixed rate per month for each enrolled member in the service area the contractor serves).

111. Weissert et al., *supra* note 106, at 1334.

112. 42 U.S.C. § 1382c(a)(1)(A) (2003); ARIZ. ADMIN. CODE § R9-28-402(A)(1) (2002).

113. 42 U.S.C. § 1382c(a)(2); ARIZ. ADMIN. CODE § R9-28-402(A)(2).

114. 42 U.S.C. § 1382c(a)(3)(A)–(E); ARIZ. ADMIN. CODE § R9-28-402(A)(3).

115. AM. BAR ASS'N, *supra* note 56, at 78.

must need LTC services to qualify for ALTCS.[116] The medically needy[117] include those seniors eligible for Supplemental Security Income ("SSI") or Temporary Assistance for Needy Families ("TANF") benefits,[118] seniors residing in a SNF or other medical facility,[119]and seniors who reside at home or in a community-based setting and receive LTC services.[120] Additionally, because Medicaid is a means-tested program,[121] individuals must also be financially eligible.[122] In determining financial need, ALTCS considers income,[123] resources,[124] and asset transfers.[125]

A. Income

An ALTCS applicant's average countable monthly income includes income from all sources.[126] Income includes an individual's social security benefits, wages, interest or dividends, rent, pension or annuity disbursements, gifts, and inheritances.[127] Certain funds, such as scholarships, property tax refunds, and utility assistance payments are excluded from countable income.[128]

To be eligible for ALTCS services in 2003, countable monthly income cannot exceed $1,656,[129] and an applicant must be a medically needy individual who has received LTC services for at least thirty consecutive days either in an institutional setting,[130] at home, or in a community-based facility.[131] Special provisions apply for determining the income limits for a married applicant.[132] An

116. *Id.* at 78–79.

117. *See* ARIZ. ADMIN. CODE §§ R9-28-301 to R9-28-306 (2002) (describing the process for screening applicants to determine if they satisfy the ALTCS program requirements for coverage).

118. 42 C.F.R. § 435.210 (2003); ARIZ. ADMIN. CODE §§ R9-28-402(B)(2), R9-28-406(A)(1) (2002). Under the 1996 federal Welfare Reform Law, the TANF program replaced the Aid to Families with Dependent Children ("AFDC") program. APPROPRIATIONS REP., *supra* note 105, at 32.

119. 42 C.F.R. § 435.236; ARIZ. ADMIN. CODE §§ R9-28-402(B)(3), R9-28-406(A)(2)(a).

120. 42 C.F.R. § 435.217; ARIZ. ADMIN. CODE §§ R9-28-402(B)(4), R9-28-406(A)(2)(b).

121. Larson & Hauer, *supra* note 61, at 201.

122. ARIZ. ADMIN. CODE §§ R9-28-407, R9-28-408 (2002).

123. ARIZ. ADMIN. CODE § R9-28-408.

124. ARIZ. ADMIN. CODE § R9-28-407.

125. ARIZ. ADMIN. CODE § R9-28-409 (2002).

126. 42 U.S.C. § 1382a (2003).

127. *Id.*; ARIZ. ADMIN. CODE § R9-28-408.

128. 42 U.S.C. § 1382a(b); ARIZ. ADMIN. CODE § R9-28-408(B)(1).

129. *See* 67 Fed. Reg. 65620 (Oct. 25, 2002) (setting the maximum monthly SSI benefit rate for 2003 at $552 for an individual; the amount stated is 300% of the monthly SSI benefit rate).

130. 42 C.F.R. § 435.217 (2003); ARIZ. REV. STAT. § 36-2934(A)(5) (2003) (defining the 217 coverage group).

131. 42 C.F.R. § 435.236; ARIZ. REV. STAT. § 36-2934(A)(4) (defining the 236 coverage group).

132. ARIZ. ADMIN. CODE § R9-28-410 (2002).

applicant who is "over income" will be denied ALTCS coverage.[133] Applicants must provide all information and documentation needed by ALTCS to verify countable income.[134]

Even under ALTCS, a senior may still be responsible for a portion of the monthly LTC services received.[135] This amount is called the "share-of-cost,"[136] and the rules governing its computation are complex and varied.[137] Expenses that are deducted from an ALTCS member's share-of-cost include a personal benefit allowance,[138] a spousal allowance if applicable,[139] expenses owing for medical and remedial care received prior to ALTCS enrollment,[140] and the amount necessary to cover Medicare and other health insurance "premiums, deductibles, or coinsurance."[141] An allowance for health or medical services not covered by ALTCS may be deducted from the share-of-cost as well.[142] This latter deduction includes items such as hearing aids and batteries, eyeglass prescriptions and eye exams, and chiropractic services.[143] If an applicant satisfies the income eligibility limits, ALTCS next considers the applicant's resources.[144]

B. Resources

While income will rarely bar individual eligibility for ALTCS enrollment,[145] resources often create problems and can delay eligibility for enrollment.[146] When countable resources exceed \$2,000 for an individual, or \$3,000 for a couple, eligibility is denied.[147] Medically needy applicants are required to "spend down" excess resources until their remaining countable resources are beneath the ALTCS resource cap.[148] In most cases, applicants should spend according to priority, first paying bills and debts already incurred.[149] Next, applicants should consider funding any needed home repairs or remodeling not

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133. *See* Michael Wytychak III, *Payment of Nursing Home Bills Through the Medicaid Program*, 36 IDAHO L. REV. 243, 248 (2000).

134. ARIZ. REV. STAT. § 36-2934(G)(2).

135. ARIZ. REV. STAT. § 36-2932(L).

136. *Id.*

137. *Id.*; 42 C.F.R. § 435.725 (2003); ARIZ. ADMIN. CODE § R9-28-408(G) (2002).

138. ARIZ. REV. STAT. § 36-2932(L)(1); ARIZ. ADMIN. CODE § R9-28-408(5)(a).

139. ARIZ. REV. STAT. § 36-2932(L)(2); ARIZ. ADMIN. CODE § R9-28-408(5)(b).

140. ARIZ. ADMIN. CODE § R9-28-408(5)(d).

141. *Id.* § R9-28-408(5)(f).

142. ARIZ. REV. STAT. § 36-2932(L)(3); ARIZ. ADMIN. CODE § R9-28-408(6).

143. ARIZ. ADMIN. CODE § R9-28-408(6).

144. ARIZ. ADMIN. CODE § R9-28-407.

145. *See supra* text accompanying notes 124–37 (illustrating that most ALTCS applicants will either have incomes below the ALTCS limits, or will fall below the ALTCS limit once their expected share-of-cost is taken into account).

146. Wytychak, *supra* note 133, at 249.

147. ARIZ. ADMIN. CODE § R9-28-407(G)(1).

148. HARVEY L. MCCORMICK, 2 MEDICARE & MEDICAID CLAIMS AND PROCEDURES § 24:77, at 258 (3d ed. 2001).

149. James Schuster, *Medicaid and the Practice of Law*, MICH. B. J., Feb. 2002, at 26, 29.

covered by ALTCS.[150] Finally, a newer car for the healthy spouse or a prepaid funeral might be considered.[151]

The following assets are among those exempt from the countable resource calculation: the applicant's home;[152] household goods and personal effects;[153] one automobile of reasonable value;[154] value of oil, timber and mineral rights;[155] prepaid funeral and burial insurance or arrangements;[156] term insurance;[157] and small life insurance policies.[158] There are conditions and limitations regarding these assets' exempt status.[159] Trusts also present special issues and are evaluated based on federal and state law.[160] In addition, special rules apply to spouses in community property jurisdictions.[161] Nevertheless, an individual can qualify for ALTCS coverage while retaining a sizeable estate.[162]

An applicant must provide information on all assets with documentation sufficient to allow ALTCS to verify resource values.[163] Once enrolled, ALTCS members must report any changes in financial, marital, resource, health, or residency status to ALTCS,[164] as eligibility is re-determined at least annually.[165] If an applicant satisfies the resource eligibility requirements, ALTCS will next determine whether the applicant made any asset transfers in order to become ALTCS eligible.[166]

C. Asset Transfers

ALTCS applicants may incur a penalty if non-exempt property is gifted or transferred for less than fair market value during a three-year period[167] prior to

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150. *Id.* ALTCS will cover the cost of "medically necessary, cost effective" physical modifications to a member's home designed to make the home safer and more accessible for an elderly resident. *See* ARIZ. HEALTH CARE COST CONTAINMENT SYSTEM, MEDICAL POLICY MANUAL, 1240-20 to 1240-22 (last revised Oct. 1, 2001), *available at* http://www.ahcccs.state.az.us [hereinafter AHCCCS MANUAL].

151. Schuster, *supra* note 149, at 29 (recommending purchase of exempt assets with non-exempt funds to facilitate "spend down").

152. ARIZ. ADMIN. CODE § R9-28-407(B) (2002).

153. *Id.* § R9-28-407(D)(2).

154. *Id.* § R9-28-407(B).

155. *Id.* § R9-28-407(D)(3).

156. *Id.* § R9-28-407(D)(4)(a),(c) & (e).

157. *Id.* § R9-28-407(D)(4)(a).

158. *Id.* § R9-28-407(D)(4)(d).

159. *See generally id.* § R9-28-407 (noting all assets that are exempt from ALTCS resource calculations).

160. *Id.* § R9-28-407(F).

161. ARIZ. ADMIN. CODE § R9-28-410 (2002).

162. Wytychak, *supra* note 133, at 250.

163. ARIZ. REV. STAT. § 36-2934(G)(1) (2003); ARIZ. ADMIN. CODE § R9-28-407(H).

164. ARIZ. ADMIN. CODE § R9-28-411 (2002).

165. 42 C.F.R. § 435.916 (2003).

166. ARIZ. ADMIN. CODE § R9-28-409 (2002).

167. 42 U.S.C. § 1396p(c)(1)(B) (2003). This is called the "look-back period," and a special five-year period is imposed for assets transferred into trust. *Id.*

ALTCS application.[168] Some transfers, such as birthday, anniversary, or holiday gifts are permitted.[169] Gifts of exempt property, other than a home, and gifts to a spouse are also allowed.[170] The applicant's home may be gifted without penalty to: 1) a minor dependent child, 2) a disabled child, 3) an adult child who lived in the home and provided care for the applicant for two years prior to the date of ALTCS application, or 4) a sibling who has an equity interest in the home and resided there for at least one year prior to the date of ALTCS application.[171] ALTCS presumes all other transfers for less than market value were made to establish ALTCS resource eligibility and treats them as unauthorized.[172]

Unauthorized transfers within the look-back period can result in a disqualification period from ALTCS coverage.[173] The disqualification does not apply to acute medical care services if the individual would otherwise be ALTCS eligible.[174] Additionally, the disqualification period may be waived if failure to waive would cause undue hardship to the applicant.[175] An applicant is responsible for supplying ALTCS with all information necessary to verify asset transfers during the look-back period.[176] Once the income and resource tests are satisfied, if no disqualifying asset transfers have been made, the applicant qualifies for ALTCS coverage.[177] When the ALTCS member dies, however, ALTCS may file a claim against the member's estate to recover monies paid for the member's LTC services.[178]

D. Estate Recovery

At common law there is no obligation to reimburse the government for financial support and services received while impoverished.[179] Congress changed this rule in 1993 by enacting legislation requiring states to recover monies paid on behalf of elderly ALTCS (Medicaid) enrollees for LTC assistance.[180] Arizona law provides that when an ALTCS member dies, ALTCS must file a claim against the

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168. ARIZ. ADMIN. CODE § R9-28-409.

169. *See* 42 U.S.C. § 1396p(c)(2)(C).

170. *See id.* § 1396p(c)(2)(B).

171. *Id.* § 1396p(c)(2)(A).

172. ARIZ. ADMIN. CODE § R9-28-409(F).

173. *Id.* § R9-28-409(D). The disqualification period is determined by dividing the total uncompensated value for the transferred assets by the average monthly cost for private SNF services in Arizona at the time of ALTCS application. *Id.* § R9-28-409(E). The result, disregarding any fraction, is the number of months of ineligibility. *Id.*

174. *Id.* § R9-28-409(D). Acute care includes services such as physician fees, surgery, and short hospital stays. Hayes et al., *supra* note 13, at 11.

175. ARIZ. ADMIN. CODE § R9-28-409(H).

176. ARIZ. REV. STAT. § 36-2934(G)(3) (2003).

177. ARIZ. REV. STAT. § 36-2931(5) (2003).

178. 42 U.S.C. § 1396p (2003); ARIZ. REV. STAT. § 36-2935 (2003).

179. 79 AM. JUR. 2D *Welfare Laws* § 93 (2002).

180. OBRA '93 § 136111(a), 42 U.S.C. § 1396p(a)–(b) (amending the statute to make estate recovery a mandatory, rather than optional, requirement for states to receive matching federal funds for the state's Medicaid program).

deceased member's estate for the total amount of LTC benefits[181] paid on the member's behalf after age fifty-five.[182] No claim may be filed, however, until the member's surviving spouse dies,[183] and then only if the member has no surviving child who is under the age of twenty-one, blind, or disabled.[184] In addition, no lien can be filed against a deceased member's home if either 1) a sibling with an equity interest in the home, who resided there at least one year before the deceased member enrolled in ALTCS,[185] or 2) a son or daughter who resided in and provided care for the deceased member for at least two years prior to ALTCS enrollment, resides in the home.[186]

Arizona uses a broad definition of "estate" that includes all real and personal property in which the deceased had any interest at the time of death.[187] This includes any assets held by "joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement."[188] ALTCS also has authority to pursue its claim against any property gifted during the three-year look-back period[189] by filing an action to set aside such transfers.[190] ALTCS claims are equal in priority to debts and taxes.[191] ALTCS claims are payable after estate administration expenses,[192] reasonable funeral expenses,[193] and reasonable expenses of the deceased's last illness are paid.[194]

Federal law requires that estate recovery be waived in cases of undue hardship.[195] In making an undue hardship determination, when an estate includes real and personal property, ALTCS will consider whether the estate assets are income-producing for the heirs, whether attachment of the assets would result in the heirs losing their sole means of livelihood, and whether the heirs reside in the home and have no other residence.[196] When the estate includes only personal property, ALTCS will consider other assets the heir already owns and the heir's annual income.[197] In all cases, ALTCS may compromise or waive a claim on a case-by-case basis if financial or medical hardship would result.[198]

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181. 42 U.S.C. § 1396p(b)(1)(B) (specifying that only costs for SNF or HCBS services will be recovered).

182. 42 U.S.C. § 1396p; ARIZ. REV. STAT. § 36-2935 (2003).

183. 42 U.S.C. § 1396p(b)(2).

184. *Id.* § 1396p(b)(2)(A).

185. *Id.* § 1396p(b)(2)(B)(i).

186. *Id.* § 1396p(b)(2)(B)(ii).

187. ARIZ. REV. STAT. § 14-1201(16), (41) (2003).

188. 42 U.S.C. § 1396p(b)(4)(B).

189. ARIZ. REV. STAT. § 36-2935 (2003). This includes any transfer classified as "unauthorized," whether it actually resulted in a period of ineligibility for ALTCS benefits. *Id*.

190. 42 U.S.C. § 1396p(b)(4); ARIZ. REV. STAT. § 36-2935.

191. ARIZ. REV. STAT. § 14-3805(A)(5) (2003).

192. *Id.* § 14-3805(A)(1).

193. *Id.* § 14-3805(A)(2).

194. *Id.* § 14-3805(A)(4).

195. 42 U.S.C. § 1396p(b)(3).

196. ARIZ. ADMIN. CODE § R9-28-906(B)(1) (2002).

197. *Id.* § R9-28-906(B)(2).

198. *Id.* § R9-28-906(C).

E. Advantages of ALTCS (Medicaid)

Medicaid provides coverage for the poor[199] and those who voluntarily become impoverished by spending down their resources.[200] For a senior who meets all the eligibility requirements,[201] ALTCS pays nearly 100% of LTC expenses that Medicare does not cover.[202] If carefully planned, this may give some elders the opportunity to leave an inheritance for their spouse and children while still receiving needed care.[203] Voluntary impoverishment to become eligible for ALTCS is accomplished primarily in two ways.[204] First, and most common, individuals convert non-exempt assets to exempt assets before applying for ALTCS.[205] Second, individuals make pre-application gifts to third parties at least three years before applying for ALTCS.[206] Another advantage of ALTCS is that the recipient's family and friends will not be liable for any portion of the ALTCS debt that the deceased recipient's estate cannot pay.[207]

F. Disadvantages of ALTCS

Unfortunately, LTC services paid for by ALTCS (Medicaid) may well be inferior to private care.[208] Because of the capitated rates negotiated by ALTCS, each SNF may have limited beds available to ALTCS members.[209] Additionally, some high-quality facilities elect not to participate in ALTCS because of low reimbursement rates.[210] Thus, an individual who is already in a SNF as a private pay patient may be required to move to an ALTCS-certified facility once becoming eligible for ALTCS benefits.[211] In addition, ALTCS may restrict home-based health care services or assisted living options due to cost.[212] In general,

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199. ARIZ. ADMIN. CODE § R9-28-402(B)(2) (2002). The poor are, in general terms, those individuals eligible to receive SSI or TANF benefits. *Id.* These individuals are considered categorically needy. AM. BAR ASS'N, *supra* note 59, at 78.

200. WALKER, *supra* note 9, at 4 (discussing the resource "spend down" process).

201. ARIZ. REV. STAT. § 36-2931(5) (2003) (meaning a senior who satisfies the ALTCS income, resource, and asset transfer tests).

202. AM. BAR ASS'N, *supra* note 59, at 81. A small co-pay may be required for some medical services, such as prescription drugs, that are needed by the individual. MATTHEWS & BERMAN, *supra* note 101, at 16/9.

203. Lisa Schreiber Joire, Note, *After New York State Bar Association v. Reno: Ethical Problems in Limiting Medicaid Estate Planning*, 12 GEO. J. LEGAL ETHICS 789, 800 (1999).

204. *Id.* at 797.

205. *Id.* at 798. Exempt assets include the home, a car, household goods, prepaid funeral arrangements, etc. *See supra* text accompanying notes 152–58.

206. Joire, *supra* note 203, at 798 (noting this avoids having the gift transfer disqualified by making it prior to the ALTCS "look-back" period).

207. Wytychak, *supra* note 133, at 258.

208. KENNEY F. HEGLAND & ALLAN D. BOGUTZ, FIFTY AND BEYOND: THE LAW YOU AND YOUR PARENTS NEED TO KNOW 71 (1st ed. 1999).

209. *See* AM. BAR ASS'N, *supra* note 59, at 81.

210. Schuster, *supra* note 149, at 27.

211. *Id.*

212. Martin, *supra* note 5, at 368.

HCBS services will be available to ALTCS members only if such services can be delivered at the same or a lower cost than SNF services.[213]

For others, the expense and difficulty in becoming ALTCS (Medicaid) eligible may not be worthwhile.[214] Medicaid application, referred to as a "nightmare of paperwork and capricious rules,"[215] is too traumatic for many elders experiencing the effects of aging and illness.[216] Finally, many Americans do not want to be associated with a "welfare" program.[217] Giving up control, independence, and financial autonomy to qualify for benefits is simply too much.[218] There are also many who think it is immoral, unethical, or even illegal to gift away their assets to take advantage of a government program designed for the poor.[219] What, then, are the options for individuals that do not want to rely on Medicaid? One option relied upon by many seniors is informal care.

V. INFORMAL CARE

Many Arizona elders rely on unpaid caregivers, usually family members or friends, to assist with their LTC.[220] Informal caregivers deliver 80 to 85% of all non-institutional LTC services.[221] This is due to familial desire to respond to their elder loved ones, 86% of whom desire to remain in their own homes.[222]

In coming years, however, fewer Arizonan elders may have the option to receive informal care.[223] Family sizes have decreased,[224] and in many families both spouses must work full-time to pay bills.[225] To gain employment, many families

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213. *See* AHCCCS MANUAL, *supra* note 150, at 1620-8 to 1620-12.

214. Schuster, *supra* note 149, at 28.

215. Wytychak, *supra* note 133, at 262.

216. *See id.*

217. Diana Conway, *Cheating Uncle Sam for Mom and Dad; Why Do So Many Otherwise Honest Citizens Think It's OK to Take Medicaid Money They Don't Deserve?*, NEWSWEEK, Jan. 27, 2003, *available at* 2003 WL 8638229.

218. Joire, *supra* note 203, at 799; Martin, *supra* note 5, at 368.

219. Conway, *supra* note 217.

220. WALKER, *supra* note 9, at 3. In 1994, for example, more than 60% of all the elderly relied exclusively on unpaid caregivers for their LTC services. *Id.*

221. Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV., 311, 319 (1998). Seventy percent of the elderly receive informal care exclusively, while another twenty-seven percent receive some combination of both formal and informal care. Rose M. Rubin, *The Economic Costs of Informal Caregiving*, BUS. PERSPECTIVES, Oct. 2002, at 22, *available at* 2002 WL 19634534.

222. Jean Reilly, *Reverse Mortgages: Backing Into the Future*, 5 ELDER L.J. 17, 18 (1997). In addition to elder preference, economic and substantive barriers such as inequitable distribution of LTC services, and language and cultural differences also influence an elder's choice and use of informal care services. Joanna K. Weinberg, Book Review, *The Past, Present, and Future of Long-Term Care—A Women's Issue?*, 25 J. HEALTH POL. POL'Y & L. 566, 568 (2002).

223. WALKER, *supra* note 9, at 12.

224. DAVIS, *supra* note 10, at 1. Fertility rates, which peaked in the 1950s at 3.8 children per woman, are now down to 2.1 children per woman. *Id.*

225. *See generally* Binstock, *supra* note 221, at 319 (discussing the changing demographics, composition and values of American families).

must relocate away from elder family members.[226] The result is a shrinking pool of family caregivers who can provide elders in-home care.[227] By 2020, an estimated 1.2 million elders will be living alone, with either no living spouse, sibling(s) or children, or with sibling(s) and children who live too far away to provide regular care.[228] In addition, the burdens and costs associated with informal caregiving affect family members' and friends' ability and willingness to care for elderly loved ones.[229]

Currently, about 72% of unpaid caregivers suffer from mild disability themselves.[230] Twenty percent of people caring for the elderly leave their jobs, at least temporarily, because of the demands of providing quality care.[231] According to a study completed by MetLife, American businesses lose between $11 and $29 billion annually because of employee absences related to informal LTC.[232]

In 1999, informal caregivers spent an average of twenty unpaid hours each week providing care,[233] and more than one-third of caregivers struggled to balance their work and care-giving demands.[234] Many of those providing care are members of the so-called "sandwich generation."[235] They are primarily women

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226. *Id.* Decreasing fertility rates, increasing longevity, and the increasing numbers of divorces and remarriages "will result in future caregivers having more parents than children." DAVIS, *supra* note 10, at 22.

227. AGING & ADULT ADMIN., DEP'T OF ECON. SECURITY, ARIZONA STATE PLAN: THE OLDER AMERICANS ACT FOR FISCAL YEARS 2001 THROUGH 2003, at 13 (2000) [hereinafter AZ PLAN]. In 1990 there were eleven potential caregivers for every elder needing care; by 2050 the ratio will decrease to 4:1. DAVIS, *supra* note 10, at 22.

228. DAVIS, *supra* note 10, at 22.

229. Binstock, *supra* note 221, at 319. For example, 60% of children who care for one or more elders suffer from depression. DAVIS, *supra* note 10, at 22. Currently, 77% of employed women providing care report experiencing conflicts between their work and caregiving demands. Robert E. O'Toole, *Baby Boomers, Elder Care and the Next 20 Years*, TREAS. MGMT. ASS'N J., Mar. 2002, *available at* 2002 WL 19859584. Many also report family conflicts, and loss of friends and leisure activities because of the need to provide care. *Id.*

230. AZ PLAN, *supra* note 227, at 13 (noting that an estimated twenty-five million caregivers are themselves limited in their ability to perform at least one ADL without assistance).

231. Maggie Jackson, *Companies Adding Benefits for Care of the Elderly*, N.Y. TIMES, July 7, 2002, *available at* http://www.nytimes.com/2002/07/07/business/yourmoney/07ELDE.html.

232. AZ PLAN, *supra* note 227, at 13. Categories of expense include replacement costs for employees who leave due to caregiving responsibilities, absenteeism, lower productivity on the job due to workday interruptions, early retirements, and increased supervision costs. Rubin, *supra* note 221; O'Toole, *supra* note 229.

233. AZ PLAN, *supra* note 227, at 13. Caring for an elderly family member is not only time-consuming, it is costly. The cost of caring for one individual, supplying food, transportation, medical care, and supplemental home health care, averages $19,500 per year. COMING OF AGE, *supra* note 99, at 40.

234. AZ PLAN, *supra* note 227, at 13.

235. *Id.* at 12. Working women, ages forty to fifty-nine, currently provide the bulk of informal caregiving, and have provided care for one to four years, seven days a week. O'Toole, *supra* note 229.

providing for both their children and one or more elderly relatives.[236] The estimated economic value of the unpaid LTC provided in the United States during 1997 was $196 billion.[237]

Arizona has taken some small steps to assist those who willingly provide informal LTC services for an elder. AHCCCS applied for, and received, permission from CMS to remunerate individuals who provide informal home care services under ALTCS.[238] ALTCS also reimburses informal caregivers for some respite care.[239] Respite care provides short-term care and supervision by a professional caregiver to give an informal caregiver an interval of rest.[240] Respite care should allow many family caregivers to tend to matters previously neglected.[241] Unfortunately, these provisions apply only to informal caregivers providing services to elders enrolled in ALTCS.[242]

Arizona also allows individual taxpayers who provide in-home care for an elderly parent, or an ancestor of a parent, a $10,000 exemption for the elder on the caregiver's Arizona income tax return.[243] To qualify, the elder must require assistance with two or more activities of daily living ("ADLs"),[244] and the taxpayer

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236. AZ PLAN, *supra* note 227, at 13.

237. *Id.*

238. AHCCCS MANUAL, *supra* note 150, at 1240-3. The remuneration is modest, $13.96 per hour currently, but it may make a significant difference to an informal caregiver who has quit work or reduced work hours in order to provide LTC. For current rates see AHCCCS, AHCCCS FEE-FOR-SERVICE RATES: HOME AND COMMUNITY BASED SERVICES FY02–03, *available at* http://www.ahcccs.state.az.us/publications/rates/FFS/hcbs.html.

239. AHCCCS MANUAL, *supra* note 150, at 1250-6. The 2000 amendments to the federal Older Americans Act earmarked $125 million to support family caregivers by allocating funds to the states for the establishment of respite care services. COMING OF AGE, *supra* note 99, at 40. The law provides that those with the greatest family and financial need receive first priority for respite care assistance. *Id*. Arizona receives close to $2 million annually under this program, known as the National Family Caregivers Support Act. *Id.*

240. ARIZ. REV. STAT. § 36-2939(B)(2)(g) (2003).

241. AHCCCS MANUAL, *supra* note 150, at 1250-6 to 1250-8.

242. *Id.* at 1240-12, 1250-6 to 1250-8 (noting family members and other informal caregivers may only be used to provide services that do not require licensing or certification, such as homemaker services or personal care).

243. ARIZ. REV. STAT. § 43-1023(C) (2003). At the federal level, legislation has been introduced to allow eligible caregivers a $3000 tax credit for each elder cared for by the taxpayer or the taxpayer's spouse. Long-Term Care Tax Credit, S. 1031, 108th Cong. (2003). A less generous proposal, phasing in the credit in increasing amounts over five years beginning with a $1000 credit in 2004, has also been introduced. Long-Term Care and Retirement Security Act of 2003, S. 1335, 108th Cong. (2003); H.R. 2096, 108th Cong. (2003). Also under consideration is a measure to allow eligible caregivers a refundable credit for caregiving related expenses. Family Caregiver Relief Act of 2003, S. 1214, 108th Cong. (2003). Finally, a measure was introduced to credit, prospectively, individuals serving as caregivers of dependent relatives with Social Security deemed wage credits for up to five years of service. Social Security Caregiver Credit Act of 2003, H. R. 473, 108th Cong. (2003).

244. ARIZ. REV. STAT. § 43-1023(C). ADLs include eating, bathing, dressing, toileting, grooming, mobility, and transferring (moving from one location to another, such as from the bed into a chair). *See* ARIZ. ADMIN. CODE § R9-28-304(2)(a) (2002).

must provide more than half of the elder's total support.[245] If these conditions are met, the taxpayer is entitled to one $10,000 exemption for each elder cared for by the taxpayer.[246]

Elder Arizonans who remain in their homes,[247] are over age seventy,[248] and have resided in their home for six years,[249] or in Arizona for at least ten years,[250] are also eligible to defer their property taxes.[251] The home may not have a cash value greater than $150,000.[252] Additionally, the home may not be subject to any mortgage, reverse mortgage, or other lien recorded five years before the deferral claim is filed.[253] This deferral allows an elder Arizonan's modest income to go further, enabling current funds to be used for immediate care needs, while deferring property taxes until after death or until the residence is sold.[254]

While many elders rely on informal LTC, this option will be available to fewer Arizonans in the future for the reasons discussed above. Thus, to prepare a comprehensive LTC plan, Arizonans must explore other financing options. One potential alternate source is the use of private savings.

VI. PRIVATE FUNDS—SELF-INSURING AGAINST LTC

LTC private funding is a "pay as you go" plan.[255] Using accumulated savings, seniors pay for services as they are utilized, and for as long as necessary.[256] The hope is that savings will meet all their care needs. For the wealthy, this is not a problem, and private funding is probably the best way to finance long term care.[257] At present, however, home-health care costs range from

245. ARIZ. REV. STAT. § 43-1023(C).
246. *Id.*
247. ARIZ. REV. STAT. § 42-17302(B)(2) (2003).
248. *Id.* § 42-17302(B)(1).
249. *Id.* § 42-17302(B)(3)(a).
250. *Id.* § 42-17302(B)(3)(b).
251. ARIZ. REV. STAT. §§ 42-17302 to 42-17313 (2003). The ability to defer property taxes is not restricted to seniors in need of LTC; any senior meeting the requirements of title 42, section 17302 of the Arizona Revised Statutes may request deferral. The tax benefit is discussed here since its use can assist elders looking to save their limited incomes in order to pay for LTC expenses. *See id.*
252. ARIZ. REV. STAT. § 42-17303(3).
253. *Id.* § 42-17303(4).
254. ARIZ. REV. STAT. § 42-17311.
255. Martin, *supra* note 5, at 365.
256. *Id.*
257. HEGLAND & BOGUTZ, *supra* note 208, at 70.

$20,000 to $40,000 per year.[258] Assisted living costs average $26,000 per year in Arizona,[259] and nursing home costs average $55,000 per year.[260]

In today's market, SNFs may cost four times as much per day as home care.[261] Persons entering a SNF stay an average of two and one-half years, but stays for five years or more are not uncommon, especially for women.[262] With costs as high as $55,000 per year, two and one-half years of LTC can run more than $137,000 for one elder. Thus, private funding may not be a viable option for most low and middle-class Arizonans who require LTC. Another private LTC planning option that more Arizonans may be able to afford is a continuing care facility ("CCF") contract.

VII. CONTINUING CARE FACILITIES—"AGING IN PLACE"

CCFs are all-inclusive residential complexes that provide all levels of elder assistance and LTC.[263] CCFs include independent living wings with private apartments as well as skilled nursing facilities providing full-time care.[264] Thus, CCF residents can live as independently as possible for as long as possible and need not relocate to a different facility as their care needs increase.[265] This concept is referred to as "aging in place."[266] CCFs also allow seniors to insure against the risk that their health care needs will exceed their resources.[267] These features make CCFs a valuable and attractive option for many seniors.[268] Unfortunately, despite

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258. Martin, *supra* note 5, at 365. Much of the cost depends on the type, and frequency, of the services needed. *See* Hayes et al., *supra* note 13, at 9. At the low end of the range, an individual would receive homemaker or personal care attendant services two or three times a week; at the high end of the range are individuals who require skilled nursing care several hours per day. *Id.* In Arizona, home health workers average $15 per hour. DAVIS, *supra* note 10, at 22.

259. *Assisted Living Averages $2,159 per Month in the U.S. MetLife Mature Market Institute Study Finds*, BUS. WIRE, May 29, 2002, *available at* http://biz.yahoo.com.bw/020529/2922592.html (noting that the average annual cost for ALFs is about $24,400 in Arizona; average monthly cost is $1,705 in Phoenix, AZ and $2,365 in Tucson, AZ).

260. UNUM Provident Ins., *Providing Employees LTC*, MONT. LAW., May 2002, at 21.

261. DAVIS, *supra* note 10, at 22.

262. HEGLAND & BOGUTZ, *supra* note 208, at 69–70.

263. SYLVIA SHERWOOD ET AL., CONTINUING CARE RETIREMENT COMMUNITIES 2 (1997). As such, CCFs are a good choice for elders who anticipate a possible increase in their need for assistance and health care as they age. Lawrence A. Frolik, *Housing Choices and Older Clients*, PA. LAW., Nov.-Dec. 2002, at 28.

264. Martin, *supra* note 5, at 362.

265. SHERWOOD, *supra* note 263, at 2.

266. *Id.*

267. Martin, *supra* note 5, at 377.

268. SHERWOOD, *supra* note 263, at 2. There is some loss of privacy and autonomy associated with moving into a CCF, but for those willing to trade off some privacy for caring protection and assistance when needed, CCFs can be ideal. Frolik, *supra* note 263, at 28.

the insurance they provide, CCFs remain expensive.[269] Thus, CCFs are a viable option primarily for Arizona seniors in the upper- or upper-middle class.[270]

CCFs require an up-front "buy-in" payment as well as a monthly fee.[271] The up-front payment, which may range from $20,000 to $200,000 or more, covers all future nursing care that may be required during the resident's life.[272] An individual's eligibility and "buy-in" payment amount are based on a number of factors including age, financial resources, income level, and physical health and mobility at the time of application.[273] Monthly fees cover the cost of lodging[274] and incidentals like meals and housekeeping.[275] Monthly charges remain relatively level throughout the individual's life because all future nursing services are purchased in advance.[276]

Continuing care facilities, also known as continuing care retirement communities ("CCRCs"), are long-term contractual arrangements between the facility and its residents.[277] Individuals are expected to enroll while they are still independent and able to care for themselves.[278] Residents remain in private apartments, with assistance provided as needed, until they are no longer capable of caring for themselves or they require more supervision than a private setting allows.[279]

Because of the CCFs prepaid structure, CCFs are susceptible to insolvency if not well managed.[280] In response to stories about elders who lost everything, including their life savings and their homes, the Arizona legislature enacted legislation that regulates CCFs in a manner similar to the insurance industry.[281] The regulatory process provides some security, but care must be taken

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269. Martin, *supra* note 5, at 362.

270. *See* SHERWOOD, *supra* note 263, at 17 (reporting that most residents of CCFs had annual incomes in excess of $30,000 per year prior to entering a CCF).

271. Martin, *supra* note 5, at 362.

272. Nancy A. Peterman et al., *Protecting Residents of Continuing Care Retirement Communities*, AM. BANKR. INST. J., Mar. 2003, at 18. A CCF resident signs a life-care contract, which promises lifelong care if and when the resident becomes increasingly dependent. Frolik, *supra* note 263, at 18.

273. Nathalie D. Martin, *Insolvent Life Care Provider: Who Leads the Dance Between the Federal Bankruptcy Code and State Continuing Care Statutes?*, 61 OHIO ST. L.J. 267, 275 (2000) [hereinafter Martin *CCFs*]. A portion of the entry fee may be refundable if the elder dies or decides that CCF living is not the right arrangement. Frolik, *supra* note 263, at 18. Refunds of entry fees vary, but are usually available as a percentage of the fee paid, decreasing in proportion to the length of the elder's stay at the CCF. *Id.*

274. Martin *CCFs*, *supra* note 273, at 273 (stating that the lodging CCFs provide is either in a private apartment, or in a bed in the facility nursing wing).

275. *Id.* At some facilities, monthly fees also include transportation services and some recreational activities. Frolik, *supra* note 263, at 28.

276. Martin *CCFs*, *supra* note 273, at 275.

277. HEGLAND & BOGUTZ, *supra* note 208, at 52.

278. Martin *CCFs*, *supra* note 273, at 273.

279. SHERWOOD, *supra* note 263, at 148.

280. Martin, *supra* note 5, at 381. Peterman, *supra* note 272, at 18.

281. ARIZ. REV. STAT. §§ 20-1801 to 20-1812 (2003) (defining an arrangement to enter and reside in a CCF in Arizona as a "life care contract").

to thoroughly investigate a prospective CCF's financial health and management competency.[282] Elders should seek the advice of both a trusted financial advisor and an attorney before signing a CCF contract.[283] Because of the high cost and potential risks, CCFs may not be a viable or attractive option for some Arizonans. Individuals with life insurance policies may want to explore the possibility of using "living benefits" from their policies as part of their LTC plan.

VIII. LIFE INSURANCE AND "LIVING BENEFITS"

Arizonans with substantial life insurance policies may have additional options to cover some LTC expenses.[284] New options, called "living benefits," have emerged in the life insurance industry over the last two decades.[285] Living benefits enable terminally or chronically ill insured individuals to access some or all of their policy's benefits before death.[286] Two primary living benefit mechanisms are viatical settlements and accelerated death benefit riders.[287]

A. Viatical Settlements

The AIDS crisis of the late 1980s led to a new industry that assisted terminally ill individuals in meeting their financial obligations.[288] Viatical settlements are agreements between a viatical settlement provider ("VSP")[289] and a life insurance policyholder, called the "viator."[290] In exchange for assigning the life insurance policy's death benefit to the VSP, the viator receives a lump-sum cash payment.[291] Viatical companies typically purchase a life insurance policy for 50% to 80% of the policy's face value.[292]

The amount a viator receives depends primarily on the viator's life expectancy.[293] Most viatical settlement companies deal only with individuals who

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282. *See* Martin, *supra* note 5, at 385 (discussing the steps seniors considering a CCF should take to protect against future loss due to insolvency of the community); Peterman, *supra* note 272, at 18.

283. HEGLAND & BOGUTZ, *supra* note 208, at 52.

284. Carole C. Lamson, *Legal Introduction in Living Benefits in Life Insurance: New Perspectives and Developments*, N.Y. ST. B. J., Nov. 1993, at 16.

285. *Id.*

286. *Id.*

287. *Id.*

288. Liza M. Ray, Comment, *The Viatical Settlement Industry: Betting on People's Lives is Certainly No Exacta*, 17 J. CONTEMP. HEALTH L. & POL'Y 321 (2000) (explaining this is primarily due to medical expenses accruing when the HIV-infected individual lost health insurance benefits by becoming too ill to continue working).

289. Larson & Hauer, *supra* note 61, at 197. A VSP is an investor or a broker who agrees to purchase a life insurance policy from a terminally or chronically ill individual at a discount. *Id.*

290. *Id.*

291. *Id.*

292. Mona L. Flowers, *Viatical Settlements: A Healthy Alternative for the Terminally Ill*, 21 LAW & PSYCHOL. REV. 181, 183 (1997).

293. Jennifer A. Lann, Note, *Viatical Settlements: An Explanation of the Process, an Analysis of State Regulations, and an Examination of Viatical Settlements as Securities*, 46 DRAKE L. REV. 923, 925 (1998).

expect to die within twenty-four months.[294] Once the payment is made and the policy assigned, the viatical provider assumes responsibility for paying the premiums on the policy for the remainder of the viator's life.[295] When the viator dies, the viatical provider receives the policy proceeds from the life insurer.[296] Viatical settlements allow investors to profit from another's death,[297] but they can be beneficial for viators afflicted with terminal or chronic illnesses.[298] The money a viator receives can finance additional living expenses, or health and LTC services, the viator may not otherwise be able to afford.[299]

Viatical settlements are part insurance, part securities, and often fall between the regulatory "cracks."[300] Unlike life insurers, viatical settlement providers are neither highly nor closely regulated in Arizona.[301] Arizona regulates the viaticated settlement transaction as a "sale of a security."[302] The net effect is to provide protection to individuals who invest in viatical settlements, rather than the viators who sell their policies.[303] While many viatical settlement companies legitimately offer fair and valued benefits to terminally and chronically ill persons,[304] fraud and deceit unfortunately exists within the industry.[305]

An Arizona senior considering a viatical settlement contract should seek offers from several providers with proven track records.[306] This will help ensure that an insured receives a fair settlement in exchange for the policy.[307] The insured considering a viatical settlement agreement should also consult with a trusted financial planner, accountant or attorney.[308] Finally, before viaticating, an insured Arizonan should first verify whether an accelerated benefit option is offered directly by the insured's life insurance company.[309]

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294. *Id.*

295. Ray, *supra* note 288, at 322.

296. Lann, *supra* note 293, at 926.

297. *See* Ray, *supra* note 288, at 325 (noting this is a result typically disfavored in the law, and viewed by some as "ghoulish," unethical, and immoral).

298. *Id.* at 325–26.

299. *Id.* at 326.

300. *Id.* at 324.

301. Lawrence A. Frolik, *Insurance Fraud on the Elderly*, TRIAL, June 2001, at 48, 50 (stating that, to date, Arizona has not joined the thirty states that have adopted legislation based on the National Association of Insurance Commissioners ("NAIC") model act for regulating viatical settlements) [hereinafter Frolik *Insurance*].

302. ARIZ. REV. STAT. §§ 44-1801, 44-1850 (2003).

303. *See generally* Ray, *supra* note 288, at 338–39 (distinguishing between the protection provided by NAIC's model legislation regulating VSP like insurers from state legislation regulation viatical settlements as security sales).

304. Frolik *Insurance*, *supra* note 301, at 50.

305. *Id.*

306. Ray, *supra* note 288, at 327 (explaining that the National Viatical Association ("NVA") is a good resource for checking information on viatical settlement providers).

307. *Id.* at 335.

308. *Id.*

309. James M. O'Reilly, *Acceleration of Life Benefits: An Alternative to Viatical Settlement*, NEV. LAW., Feb. 2002, at 23 (explaining that the heavy discounts taken by VSP

B. Accelerated Benefit Options

Accelerated benefit ("AB") options are a relatively new innovation of the life insurance industry.[310] AB provisions allow terminally and chronically ill insured individuals to access life insurance benefits while alive.[311] Initially, accelerated benefits were available only to holders of whole or ordinary life policies, but today many insurers offer an AB option on their term life policies.[312] If a policy does not have an AB option, the insured should check with their insurance company to determine whether one can be added. The AB option may require an additional premium, but this is generally not a high-cost option.[313]

In 1990, Arizona enacted legislation authorizing life insurers to provide accelerated benefits to policyholders who become terminally ill, experience a catastrophic illness, or become eligible for LTC services.[314] A typical AB option allows an eligible policyholder to access a percentage of their policy's face value during life.[315] The percentage can range from 25% to 100% of the policy.[316] The amount available to the insured depends on the insured's life expectancy and whether the entire policy proceeds can be accelerated.[317]

Companies may limit the total amount considered for accelerated payout, either as a maximum percentage of the policy[318] or as a maximum amount of insurance proceeds.[319] The insured can elect to have the proceeds paid in a lump sum or in a series of installments.[320] In most cases, the money accessible to an insured under an AB option is greater than the amount that would be available if the policy was surrendered for its cash value, or if the insured took out a policy loan.[321]

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along with the lack of strict regulatory environment on viatical settlements in most states makes an accelerated benefit rider potentially more advantageous to an insured).

310. O'Reilly, *supra* note 309, at 23. Accelerated benefit riders were first offered in the 1990s as the life insurance industry response to the viatical settlement industry. Flowers, *supra* note 292, at 195.

311. O'Reilly, *supra* note 309, at 23.

312. Lamson, *supra* note 284, at 19.

313. *See id.* (discussing AB option premium alternatives used by insurers).

314. ARIZ. REV. STAT. § 20-1136(A) (2003).

315. Lamson, *supra* note 284, at 18.

316. *Id.*

317. *See* O'Reilly, *supra* note 309, at 23. Some policies require that some portion of the death benefit be reserved, so that the beneficiary will receive payment at death. *Id.*

318. Lamson, *supra* note 284, at 19. Policies generally require that 50% of the death benefit payable on the policy be preserved for the beneficiaries, leaving the remaining 50% available for accelerated benefit payments. *Id.*

319. *Id.* Policies alternatively set the maximum policy benefit amount available for acceleration between $200,000 and $250,000. *Id.*

320. *Id.* at 18.

321. *Id.* In addition, with a policy loan the policy beneficiaries cannot realize the full amount of the death benefit until the loan is repaid with interest. Ray, *supra* note 288, at 45.

The primary advantage of an AB provision compared to a viatical settlement is that there is no discounting with the AB option.[322] Thus, there is no need to deduct an amount from the proceeds payable to the insured before the third party VSP can profit.[323] If the senior needs a great deal of money, however, it may be better to viaticate.[324] This is true primarily if the AB option on the insured's policy only allows a portion of the policy proceeds to be accelerated or sets a maximum AB amount far lower than the policy's face value.[325] Whether a senior with a life insurance policy decides to viaticate or accelerate, the money received from the policy will, in most cases, be tax-free.[326]

C. Living Benefits—Tax Advantages

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[327] codified in part at § 101(g) of the Internal Revenue Code ("IRC"), excludes from gross income the amount of accelerated life insurance proceeds received by a terminally[328] or chronically[329] ill individual.[330] The exclusion applies whether the money is received from the insurer through an AB option or from a "qualified" viatical settlement provider.[331] A "qualified" provider under the IRC is one who regularly purchases life insurance policies on the lives of terminally or chronically ill persons.[332] In addition, a qualified provider must either be licensed by the state in which the insured lives, or meet the specific requirements of the National Association of Insurance Commissioners ("NAIC") Viatical Settlements Model Act and corresponding regulations.[333] Individuals who satisfy the IRC's definition of "chronically ill"[334] may also receive living benefits tax free if the payments are a reimbursement for costs incurred for qualified LTC services,[335] or made on a per diem or periodic basis in amounts that do not exceed the annual maximums specified by the Code.[336]

The tax rules are complicated but generous when applicable. The savings to the insured senior who is terminally or chronically ill are substantial. For example, under I.R.C. § 101(g), a chronically ill senior needing LTC services can effectively "cash out" his/her life insurance policy on a tax-free basis up to

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322. O'Reilly, *supra* note 309, at 23.
323. *Id.*
324. *See* Ray, *supra* note 288, at 345.
325. *Id.*
326. I.R.C. § 101(g) (2003).
327. Pub. L. No. 104-191, § 310, 110 Stat. 1936, 2041–42 (1996) (codified, as amended, in scattered sections of 26 U.S.C. and 42 U.S.C.).
328. I.R.C. § 101(g)(4)(A) (2003).
329. I.R.C. § 7702B(c)(2) (2003).
330. I.R.C. § 101(g).
331. *Id.*
332. Gary J. Gasper, *Viatical Settlements: Cashing Out Life Insurance*, PROB. & PROP., Mar.-Apr. 1997, at 20.
333. *Id.*
334. I.R.C. §§ 101(g)(4)(B), 7702B(c)(2).
335. Gasper, *supra* note 332, at 21 (noting exact reimbursement for costs incurred is known as "indemnification").
336. *Id.*

$80,300 annually.[337] If a terminally ill senior viaticates a $200,000 life insurance policy for 70% of its value, the senior may realize tax savings of $39,200 since the proceeds are considered non-taxable.[338] Those Arizonans who do not have a life insurance policy, or who want to preserve the policy for their heirs, will want to consider the role another insurance product, LTC insurance, might play in their LTC plan.

IX. LTC INSURANCE

LTC insurance ("LTCI") is a complex, but flexible insurance product designed to help individuals cover the cost of LTC services.[339] Policies vary greatly among providers, and any provider may offer a number of complex policy options such that it becomes difficult to evaluate and understand the coverage offered.[340] LTCI is still a relatively new product that continues to evolve over time as insurers gain experience.[341] Unfortunately, it remains too expensive for most Americans, with annual premiums ranging between $2,600 and $7,000 for a typical policy purchased at age sixty-five.[342] Even as LTCI becomes more affordable, most experts estimate only 20% of Americans have the necessary financial wherewithal to purchase a quality policy.[343]

Nevertheless, the LTCI market is growing faster than other types of insurance products,[344] and the number of carriers providing this product has increased dramatically to meet consumer demand.[345] The market remains largely untapped, however.[346] Despite the seventy million baby boomers who will reach age sixty-five in the next ten to fifteen years,[347] only about eight million LTCI policies have been sold to date.[348] Less than one percent of all Americans,[349] and only about six percent of America's elders,[350] have LTCI to protect them in the event of chronic illness or disability.[351]

In general, LTCI is designed to provide "assistance over an extended period of time for persons with disabilities."[352] It is distinctly different from health insurance, which is intended to cover acute care, corrective medical treatment, and

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337. O'Reilly, *supra* note 309, at 23 (noting the eligible amount is indexed annually for inflation). The per diem limitation under I.R.C. § 7702B(d)(4) in 2003 is $220 per day. Rev. Proc. 2002-70, 2002-46 I.R.B. 845.

338. *See* Gasper, *supra* note 332, at 23 (assuming the taxpayer is in the 28% tax bracket).

339. Powell, *supra* note 8.

340. Martin, *supra* note 5, at 370.

341. WALKER, *supra* note 9, at 17.

342. Martin, *supra* note 5, at 370.

343. Binstock, *supra* note 221, at 320.

344. Hayes et al., *supra* note 13, at 18.

345. *Id.*

346. Powell, *supra* note 8.

347. *Id.*

348. *Id.*

349. Hayes et al., *supra* note 13, at 18.

350. *Id.*

351. *Id.*

352. *Id.* at 2.

rehabilitation services.[353] LTCI is meant to compensate individuals for expenses incurred to obtain assistance with tasks they are no longer able to manage.[354] Under current law, LTCI policies begin paying benefits once a physician or other licensed health care provider certifies the insured is eligible.[355] Certification is made when an insured can no longer perform two or more ADLs without some assistance, or develops a severe cognitive impairment.[356]

Sixty-seven percent of men and 48% of women who are now age sixty-five or older will never need to be in a nursing home.[357] Nevertheless, there is a 50% chance the average person will need LTC services during their lifetime.[358] Those who enter a nursing facility will stay an average of two and a half years.[359] Individuals who do not want to depend on government benefit programs,[360] do not want to depend on or burden their families,[361] or wish to pass an inheritance to their children[362] are all well advised to consider purchasing some form of LTCI.[363]

Most LTCI companies price their policies relative to the applicant's age and health condition.[364] It is advisable to seek LTCI coverage while in good health,[365] and at the youngest age feasible to secure the lowest premiums.[366] When considering a policy, it is important to remember that while the annual premium may be low, premiums will need to be paid for the rest of the insured's life, or at least until the policy begins paying benefits.[367] A policy that will cost a fifty-five year old an average $1,500 per year, will cost more than $5,000 per year if purchased at age seventy-five.[368] Since almost all policies provide for termination upon non-payment of premiums,[369] when evaluating coverage options it is critical that applicants estimate the total cost of the policy over the policy's expected

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353. *Id.*

354. AM. BAR ASS'N, *supra* note 59, at 92–93.

355. Hayes et al., *supra* note 13, at 2–3.

356. Davis, *supra* note 29, at 36. Cognitive impairments include dementia, chronic, severe depression, and Alzheimers disease. *Id.*

357. AM. BAR ASS'N, *supra* note 59, at 84.

358. Davis, *supra* note 29, at 36.

359. Hayes et al., *supra* note 13, at 3. At an average cost of $55,000 per year in Arizona, an individual would have to have assets worth more than $137,000 to cover a SNF stay of this length. DAVIS, *supra* note 10, at 22.

360. *See* AM. BAR ASS'N, *supra* note 59, at 81. This includes individuals who do not want to see themselves reduced to penury by selling off all their assets to pay for their LTC expenses in order to become eligible for ALTCS (Medicaid). *Id.* It also includes those who consider it unethical to gift away assets in order to become ALTCS-qualified and those who want to control where they receive LTC services. Conway, *supra* note 217.

361. Gallup, *supra* note 6.

362. Conway, *supra* note 217.

363. Larson & Hauer, *supra* note 61, at 195.

364. AM. BAR ASS'N., *supra* note 59, at 93.

365. *Id.* at 92–93 (noting that since medical screening is required, many applicants with health problems are generally denied coverage).

366. *Id.*

367. Tina Adler, *Long-Term Thinking: Federal LTC Insurance Raises Profile, Questions*, WASH. POST., Sept. 24, 2002, *available at* 2002 WL 100084385.

368. AM. BAR ASS'N, *supra* note 59, at 93.

369. HEGLAND & BOGUTZ, *supra* note 208, at 70.

duration to ensure enough financial resources are available to keep the policy in force.[370] It is also important to keep in mind that while an individual policyholder's premium may not be raised, most insurers retain the right to raise rates for all policyholders simultaneously.[371]

A. General Features and Options

Insurers quote prices on LTCI policies based on the method under which policy benefits are paid.[372] LTC policies are structured to pay a maximum dollar amount per day or month,[373] under either an indemnity or a reimbursement methodology.[374] Under the indemnity method, the maximum daily or monthly benefit is paid according to the policy terms.[375] The insured can use amounts over actual costs of care to pay other expenses or purchase incidental services.[376] Under the reimbursement method, the policy pays the greater of the care costs actually incurred, or the maximum daily or monthly benefit.[377] If actual costs are less than the maximum benefit, the excess is "carried over" into subsequent periods, but is not distributed to the insured.[378] When available, policies using the reimbursement payment methodology usually cost less than comparable indemnity method policies.[379]

Because policies are available with widely varying benefits, individuals should consider the difference in premiums for different coverage levels, the average costs of LTC in their area, and their realistic ability to self-insure against some portion of their anticipated LTC costs.[380] Some insurers offer discounts if another policy is purchased for a spouse or another family member.[381] Another recent innovation is the pooled benefits policy for spouses and/or up to four family members.[382] Pooled benefits essentially provide a flat amount of coverage to the pool.[383] Any member(s) of the pool can use the benefits, in whole or in part, until those benefits are exhausted.[384] Cost savings for a pooled policy versus a number of individual policies can be significant.[385]

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370. *Id.*
371. Adler, *supra* note 367. Insurers explain this is due to a lack of sufficient underwriting and claims experience with LTCI policies since they are still relatively new. Powell, *supra* note 8.
372. Hayes et al., *supra* note 13, at 19.
373. *Id.*
374. *Id.* at 20.
375. Adler, *supra* note 367.
376. Hayes et al., *supra* note 13, at 20.
377. Adler, *supra* note 367.
378. *Id.*
379. Hayes et al., *supra* note 13, at 20.
380. *Id.*
381. Adler, *supra* note 367.
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*

Another way to save money on LTCI premiums is to select a longer waiting period.[386] The waiting period is the LTC equivalent to a health insurance deductible,[387] and is the number of days that an insured must be eligible to receive benefits before benefits are paid under the policy.[388] Typical waiting periods are zero, thirty, and ninety days; the longer the waiting period, the lower the annual premium.[389] The waiting period is measured by days of service, not calendar days.[390] Because all LTC costs will need to be covered by the insured out of savings during the waiting period, careful financial planning is necessary to ensure adequate funds are set aside to pay for services until the policy begins paying benefits.[391]

In Arizona, LTCI policies must cover at least twenty-four months of service.[392] Longer coverage periods are available at a higher cost, and some policies even offer a lifetime coverage option.[393] Since most people require between three and five years of care, however, lifetime coverage may not be cost-effective.[394] The average coverage period selected on policies sold today is three years.[395] Because women tend to live longer than men, and average longer SNF stays, women who do not want to rely on ALTCS (Medicaid) may want to consider a longer LTCI benefit period.[396] For individuals who are not averse to going on welfare, and who plan to transfer their assets to their children, a three-year benefit period may be sufficient.[397] Since the ALTCS look-back period is three years for most assets, a policy covering LTC costs for three years will enable the individual to transfer assets as desired before applying for ALTCS.[398]

The best LTCI policies cover all categories of care, allowing the individual to select where they want to receive care.[399] The most comprehensive policies cover all forms of skilled nursing care, community-based services and home care.[400] In Arizona, no LTCI policy written today can provide significantly more coverage for SNF services than for lower levels of care.[401] Additionally, insurers selling LTCI policies in Arizona cannot condition eligibility for home care

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386. *Id.* (noting that some insurers also use the term "elimination period").
387. Hayes et al., *supra* note 13, at 24.
388. Nkiru Asika Oluwasanmi, *Parental Guidance*, SMART MONEY, Dec. 1 2002, *available at* 2002 WL 2191750.
389. Hayes et al., *supra* note 13, at 24.
390. Oluwasanmi, *supra* note 388. A policy with a ninety-day waiting period means the insured must receive (and pay for) LTC services for ninety days before payments begin under the policy. *Id*. Thus, if an insured needs home-health care services two days per week, the policy may not begin paying for those services until 45 weeks elapse. *Id*.
391. *See* Larson & Hauer, *supra* note 61, at 195.
392. ARIZ. REV. STAT. § 20-1691.03(C) (2003).
393. Adler, *supra* note 367.
394. *Id.*
395. Powell, *supra* note 8.
396. Hayes et al., *supra* note 13, at 25.
397. Davis, *supra* note 29, at 36–37.
398. *Id.* at 37.
399. Martin, *supra* note 5, at 371.
400. Powell, *supra* note 8.
401. ARIZ. REV. STAT. § 20-1691.03(H) (2003).

benefits on prior receipt of higher levels of care,[402] nor can they require that the insured be hospitalized before benefits are payable.[403]

Another LTCI option that can affect policy cost dramatically is inflation protection.[404] In Arizona, all policies must offer the individual the option to purchase some form of inflation protection.[405] If purchased, inflation protection increases the benefits payable under the policy each year at the protection rate selected by the policy owner.[406] At medium rates of inflation, a 5% inflation protection rider on a policy purchased today would cover approximately 70% of an insured's future SNF costs, and 90% of future home care service costs.[407] Historically, SNF rates have risen 6% annually, so this protection is especially important on policies purchased by individuals under age seventy.[408] After age seventy, however, it might be more cost effective to insure against inflation by purchasing a policy with a larger daily benefit than to purchase an inflation rider.[409]

In Arizona, insurers cannot terminate, cancel, or fail to renew LTCI policies solely on grounds of age or a decline in the insured's physical or mental health.[410] Further, the coverage exclusion period for pre-existing conditions may not exceed six months if the LTCI policy is issued to an insured age sixty-five or older,[411] and twenty-four months if the LTCI policy is issued to a younger individual.[412] In an effort to encourage more Americans to purchase LTCI, Congress has taken steps to reduce net policy costs by enacting tax incentives for LTCI policyholders.[413]

B. Tax Advantages

To encourage individuals to purchase LTCI policies, HIPAA provides federal income tax benefits for some "qualified" private LTCI premiums.[414] A "qualified" LTCI policy is one in which benefits are triggered when an insured becomes physically disabled,[415] or requires supervision due to a severe cognitive

402. *Id.* § 20-1691.05(B)(1).

403. *Id.* § 20-1691.05(A).

404. Adler, *supra* note 367.

405. ARIZ. ADMIN. CODE § R20-6-1005 (2002).

406. Adler, *supra* note 367. To illustrate, if a policy is purchased in 2003 with a $150 per day indemnification rate, and 5% inflation protection, in 2004 the daily indemnification rate will rise to $157.50 ($150 x 1.05%).

407. ENID KASSNER, AARP PUB. POL'Y INST., PAPER NO. 2002-09, INFLATION PROTECTION AND LTC INSURANCE: FINDING THE GOLD STANDARD OF ADEQUACY 7 (2002).

408. Hayes et al., *supra* note 13, at 22.

409. Adler, *supra* note 367.

410. ARIZ. REV. STAT. § 20-1691.03(A) (2003).

411. *Id.* § 20-1691.03(D).

412. *Id.*

413. Joshua M. Wiener et al., *Federal and State Initiatives to Jump Start the Market for Private LTC Insurance*, 8 ELDER L.J. 57, 62 (2000).

414. Hayes et al., *supra* note 13, at 15–16.

415. Wiener et al., *supra* note 413, at 64. An individual is considered physically disabled when unable to perform two or more ADLs without assistance. *Id.*

impairment.[416] Qualified policies must also meet the 1993 NAIC model regulations for LTC policies.[417] Almost all policies sold today are qualified.[418]

HIPAA provides that, for owners of qualified LTCI policies, premiums are "medical expenses" and can therefore be deducted to the extent they exceed 7.5% of the taxpayer's adjusted gross income, if the taxpayer itemizes deductions.[419] There are maximum limits on deductibility, however, that vary by age.[420] These limits are indexed annually for inflation.[421] In addition, HIPAA provides that LTC benefits paid by qualified policies are not taxable income up to certain amounts,[422] also indexed for inflation.[423] Given the tax advantages, LTCI can be an appealing option in the LTC plan of many seniors.

C. Who Should Buy LTC Insurance?

The best candidates for LTC insurance are middle income individuals who have too many assets to qualify for ALTCS (Medicaid),[424] but who do not have enough resources to finance four or five years of LTC with personal savings.[425] No more than 7% of an elderly individual's or couple's household income should be used to pay LTCI premiums.[426] Experts recommend elderly couples who have an annual income of $35,000, and net assets between $50,000 and $2 million,[427] purchase some LTCI coverage.[428] Individuals with a net worth less than $50,000 quickly qualify for ALTCS coverage.[429] Those with more than $2 million in assets can generally afford to self-insure.[430] For Arizonans who do not have enough wealth to risk self-insuring, but who do not want to purchase LTCI, a reverse mortgage may be the ideal LTC planning tool.

416. *Id.*

417. *Id.*

418. Hayes et al., *supra* note 13, at 16 (stating that 80% of policies currently being written satisfy HIPAA requirements for tax "qualified" policies).

419. I.R.C. §§ 213(d)(1)(C), 7702B (2003). Federal legislation that would offer more generous deductions for LTC premiums is under consideration. Long-Term Care Retirement Security Act of 2003, S. 1335, 108th Cong. (2003); H.R. 2096, 108th Cong. (2003). This proposed legislation also allows employers to include LTC insurance in their cafeteria plans and flexible spending programs. *Id.*

420. I.R.C. § 213(d)(10)(A). In 2002, the allowable deduction ranged from $240 for an individual age forty or less, to $2,990 for an individual over seventy. Rev. Proc. 2001-59, 2001-52 I.R.B. 623.

421. I.R.C. § 213(d)(10)(A).

422. I.R.C. § 7702B.

423. *Id.*

424. Oluwasanmi, *supra* note 388.

425. Hayes et al., *supra* note 13, at 28–29.

426. Oluwasanmi, *supra* note 388 (noting the advice of the U.S. Health Cooperative, a non-profit agency that advocates for the elderly).

427. Hayes et al., *supra* note 13, at 29 (noting that the value of the family home should be excluded in computing net worth).

428. *Id.*

429. Oluwasanmi, *supra* note 388.

430. *Id.*

X. REVERSE MORTGAGES—LIVING "ON THE HOUSE"

The primary asset for most seniors is their home, and 80% own their homes outright.[431] Reverse mortgages provide a unique option for elder Arizonans who have limited disposable income, but who have a great deal of equity in their homes.[432] If organized properly, a reverse mortgage may give these "asset-poor, house-rich"[433] elders the opportunity to remain in their homes[434] and receive additional money to help with home upkeep, health and LTC, vacations, and other expenses.[435]

Reverse mortgages are available to homeowners age sixty-two and older who own their homes outright or have very low outstanding mortgage balances.[436] The equity a homeowner can access through a reverse mortgage varies by lender, but as much as 80% of the home's value may be available.[437] With a reverse mortgage, a lender buys the homeowner's equity in the home in exchange for a mortgage against the property.[438] Unlike the traditional mortgage, where the homeowner pays the bank, with a reverse mortgage the bank pays the homeowner.[439] Loan amounts are determined based on a number of factors including the value of the home, the borrower's age, the lender's loan policies, and the interest rate in effect at the time of application.[440]

Reverse mortgages have several attractive features. In most circumstances, the reverse mortgage loan is not repaid until the homeowner dies.[441] These mortgages are non-recourse loans, thus "the borrower can never owe more than the house is worth."[442] Further, the lender cannot force the homeowner to vacate the home as long as the terms of the agreement are met.[443] Thus, even if the periodic payments the homeowner has received amount to more than the equity in the home, the lender must continue to make the payments until the loan is due.[444] Title remains in the homeowner who is free to bequeath the property as desired.[445] If the loan balance is outstanding at the time of the homeowner's death, the

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431. Gretchen W. Corbell, *Protecting Senior Citizen's Homes Against Real Estate Fraud*, EXPERIENCE, Fall 2002, at 16.

432. Oluwasanmi, *supra* note 388.

433. DAVIS, *supra* note 10, at x.

434. Reilly, *supra* note 222, at 17.

435. Corbell, *supra* note 431, at 17.

436. NAT'L REVERSE MORTGAGE LENDERS ASS'N, JUST THE FAQS: ANSWERS TO COMMON QUESTIONS ABOUT REVERSE MORTGAGES 3 (3d ed. 2002) [hereinafter NRMLA].

437. Larson & Hauer, *supra* note 61, at 197.

438. AARP, HOME MADE MONEY: A CONSUMER'S GUIDE TO REVERSE MORTGAGES 3 (8th ed. 2002).

439. *Id.* at 14.

440. Reilly, *supra* note 222, at 18.

441. AARP, *supra* note 438, at 18.

442. NRMLA, *supra* note 436, at 10.

443. AARP, *supra* note 438, at 18–19.

444. Reilly, *supra* note 222, at 19. Typical triggering events are borrower dies, moves, sells, or defaults on the loan terms, for example, by failing to keep the property in good repair, or not paying property taxes. *Id.*

445. NRMLA, *supra* note 436, at 7, 11.

devisee will be responsible for paying off the loan.[446] Alternatively, the reverse mortgage can be repaid at any time before it is due without pre-payment penalty.[447]

Every lender that offers a reverse mortgage must comply with the requirements set forth in the federal Truth in Lending Act ("TILA"), Regulation Z.[448] The primary purpose of Regulation Z is to make it possible for homeowners considering reverse mortgages to compare offers from multiple lenders.[449] Regulation Z requires that lenders disclose good faith estimates of the annual loan costs to the borrower,[450] and all the costs and charges that will be incurred over the life of the loan.[451] If an adjustable rate reverse mortgage is selected, the lender must base disclosures on the loan's initial interest rate.[452]

Reverse mortgages are offered by private lenders, banks, and the federal government.[453] At the end of 1999, only 60,000 reverse mortgage loans existed in the United States.[454] In the last three years, however, the demand for reverse mortgages has increased 63%.[455] Numerous lenders throughout the country offer a reverse mortgage product.[456] The most popular reverse mortgages available to Arizonans are the federally insured Home Equity Conversion Mortgage and Fannie Mae's Home Keeper.[457]

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446. *Id.* at 11.

447. *Id.* at 10. A borrower may elect to repay the reverse mortgage loan balance, in part or in full, in order to preserve equity in the property, or to increase the monthly payment amounts. FANNIE MAE, MONEY FROM HOME: A GUIDE TO UNDERSTANDING REVERSE MORTGAGES 27 (2002). By lowering the loan balance, more principal is available again to borrow against. *Id.* This benefit can allow an elder with a reverse mortgage to maintain a higher standard of living while remaining in the home. When and if the elder's care needs increase to the point they require full-time custodial care, the elder can sell the home and repay the reverse mortgage without penalty from the sales proceeds.

448. Reilly, *supra* note 222, at 31–32.

449. *Id.* at 34–35.

450. 12 C.F.R. § 226.33(b)(2) (2003).

451. *Id.* §§ 226.33(b)(3)–(4), 226.33(c).

452. *See id.* § 226 app. K(b)(10) (noting that lenders should prepare disclosure statements based on the assumption that the adjustable interest rate will not increase).

453. *See generally* Reilly, *supra* note 222 (discussing various reverse mortgage products and the institutions offering such loans).

454. AARP, *supra* note 438, at 3.

455. Kay Lazar, *Reverse Mortgages on Rise; A Blessing or Curse for Seniors Who Need Cash*, BOSTON HERALD, Jan. 26, 2003, *available at* 2003 WL 3014699.

456. NRMLA, *supra* note 436, at 11. To locate reverse mortgage lenders by state, see the NRMLA website, www.reversemortgage.org, or call NRMLA at 1-866-264-4466. *Id.*

457. A third reverse mortgage offered in Arizona is the Cash Account plan, a jumbo reverse mortgage offered by Financial Freedom Senior Funding Corp., a subsidiary of Lehman Brothers Bank FSB. See the NRMLA website, at http://www.reversemortgage.org/financia.html. The Cash Account is available to owners of larger, more expensive homes who wish to access more equity than either the HECM or Home Keeper reverse mortgage allows. *Id.* For additional information on the Cash Account, call Financial Freedom Senior Funding Corp. at 1-800-500-5150. *Id.*

A. The Home Equity Conversion Mortgage

Congress created the Home Equity Conversion Mortgage ("HECM") in 1987 to help seniors access the equity in their homes.[458] The HECM program is administered by the U. S. Department of Housing and Urban Development ("HUD"), and is a federally insured private loan.[459] Unlike many other reverse mortgage products, HECM loans depend on the borrower's age and home ownership, not their credit history, assets, or income.[460] For most seniors a HECM loan generally is the lowest cost, highest benefit reverse mortgage option available.[461] A record number of HECM loans, more than 13,000, were closed last year.[462] About 95% of all U.S. reverse mortgages are HECM loans.[463]

To be eligible for a HECM loan, an individual must be a homeowner and be at least sixty-two years of age.[464] Multi-family dwellings of four units or less are eligible for a HECM loan if the applicant occupies at least one unit of the owned residential complex.[465] The applicant must own the dwelling free and clear, or must have a very low outstanding balance.[466] Further, the applicant must be able to service the mortgage properly by adequately maintaining the home, maintaining adequate insurance on the property, and paying the property taxes.[467] Finally, HECM requires that every applicant receive advice and a thorough explanation of the reverse mortgage loan terms and costs from a HUD-approved counselor.[468]

The loan amounts available to a HECM borrower depend on the location of the home and the interest rate in effect.[469] Loan amounts currently range from $154,896 on a single-family dwelling, to $297,840 for a four-home dwelling.[470] The Federal Housing Authority ("FHA") insures both the HECM lender and borrower.[471] If the property value declines and falls below the loan balance, FHA will make up the difference when the loan is repaid.[472] Likewise if the lender is

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458. 12 U.S.C. § 1715z-20 (2003).

459. Reilly, *supra* note 222, at 39. Additional information about the HECM reverse mortgage is available at the U.S. Department of Housing and Urban Development website, http://www.hud.gov, or by calling 1-800-217-6970.

460. AARP, *supra* note 438, at 32.

461. *Id.*

462. Chris O'Malley, *Many Seniors Cash in on Home's Equity to Get Needed Funds*, KNIGHT-RIDDER TRIB. BUS. NEWS, Jan. 10, 2003, *available at* 2003 WL 4555457.

463. *Id.*

464. 12 U.S.C. § 1715z-20(b)(1), (d)(2)(A) (2003).

465. *Id.* § 1715z-20(d)(3).

466. Reilly, *supra* note 222, at 40.

467. 12 U.S.C. § 1715z-20(d)(8).

468. *Id.* § 1715z-20(d)(2)(C); NRMLA, *supra* note 436, at 5–6. Information about options besides reverse mortgages is also provided at counseling sessions to ensure a senior considering a reverse mortgage selects the product and payment option that best fits that senior's needs and goals. *Id.*

469. AARP, *supra* note 438, at 18.

470. Current FHA Mortgage Limits (203-b limits) by state and county are available at http://entp.hud.gov/idapp/html.

471. AARP, *supra* note 438, at 18.

472. *Id.*

unable to honor its commitment to the borrower, FHA will make promised payments under the HECM contract to the borrower.[473]

HECM borrowers have five options for receiving the loan proceeds.[474] With the (1) tenure option, the borrower receives monthly installments for life, or as long as he/she remains in the home.[475] Alternatively, using the (2) term plan, the borrower can receive periodic payments over a fixed term, such as ten years.[476] Under the (3) credit plan, a borrower can elect to have the loan proceeds converted to a line of credit that can be accessed at will for any amount, up to the maximum loan amount, that the borrower needs.[477] One of the most attractive features of the HECM loan is that the credit line grows larger over time.[478] Any amount of the credit line that remains unused grows at the same interest rate that is being charged on the borrower's loan balance.[479]

The (4) modified tenure plan combines the tenure and credit line options.[480] Under this option the borrower receives a monthly fixed sum, but can also draw down his/her line of credit to cover extra expenditures.[481] Finally, the (5) modified term plan gives the borrower access to a line of credit for a fixed term.[482] Borrowers can change payment plans at any time, at a cost of $20 per change to cover administrative costs.[483]

HECM loans are offered with either an annually or monthly adjusting interest rate.[484] The initial rate, established at the time of loan closing, is tied to the one-year U.S. Treasury bill rate.[485] If an annually adjusting rate is selected, the rate cannot increase more than 2% in any year, and cannot increase more than 5% over the life of the loan.[486] With a monthly adjusting HECM loan, there is no maximum monthly adjustment limit, but the interest rate cannot increase more than 10% over the life of the loan.[487]

A HECM borrower is also obligated to pay a mortgage insurance fee of two percent of the loan amount when the loan is made, plus one-half percent of the loan amount annually for the life of the loan.[488] Mortgage insurance payments are

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473. *Id.*
474. 12 U.S.C. § 1715z-20(9) (2003).
475. *Id.* § 1715z-20(9)(D).
476. *Id.* § 1715z-20(9)(B).
477. *Id.* § 1715z-20(9)(A).
478. AARP, *supra* note 438, at 37.
479. *Id.*
480. 12 U.S.C. § 1715z-20(9)(C).
481. AARP, *supra* note 438, at 33.
482. 12 U.S.C. § 1715z-20(9)(C). For an estimate of HECM cash benefits based on an individual borrower's age, home value, 203-b limit, and current interest rates, see the online calculator available on AARP's website, at http://www.aarp.org/revmort.
483. FANNIE MAE, *supra* note 447, at 19.
484. AARP, *supra* note 438, at 42.
485. Reilly, *supra* note 222, at 41.
486. AARP, *supra* note 438, at 42.
487. *Id.*
488. *Id.* at 41.

not refundable.[489] In addition, closing costs for the mortgage include an application fee, an origination fee, an appraisal fee, and a title report fee, among others.[490] There is a $30–35 monthly servicing fee for a HECM loan.[491]

Finally, the HECM statute allows the lender to share in any appreciation in the home's value during the loan.[492] The lender's share of the appreciated value will automatically be added to the loan balance at the time of repayment.[493] While the HECM loan is the best option for many seniors, for elders with home values exceeding the HECM maximums, the Home Keeper mortgage may be an attractive alternative.

B. Home Keeper

The Home Keeper reverse mortgage is one of the newer products in the reverse mortgage market.[494] Home Keeper is a product of the Federal National Mortgage Association, popularly known as Fannie Mae.[495] Under this program, a lender offers a Home Keeper mortgage to a borrower, and after closing the loan, sells it to Fannie Mae.[496] Fannie Mae then makes payments to the lender as loan servicer, and the original lender issues payment checks to the borrower.[497] Because Fannie Mae has recently entered the reverse mortgage market, the demand for the Home Keeper reverse mortgage is expected to grow.[498] In particular, as more of Fannie Mae's 2,000 nationally approved lenders begin to offer the Home Keeper, elders will find it possible to secure a reverse mortgage from their favored bank or credit union.[499]

The Home Keeper is a non-recourse adjustable rate reverse mortgage tied to the Federal Reserve index for certificates of deposit.[500] The rate is reset monthly, and there is no specified maximum allowable monthly increase.[501] However, the loan interest rate can never increase more than twelve percentage points over the initial rate.[502]

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489. 24 C.F.R. § 206.116 (2003). Once the American Homeownership and Economic Opportunity Act of 2000 takes affect, the 2% FHA insurance fee will be waived if the borrower uses the loan proceeds to pay for LTC services. Oluwasanmi, *supra* note 388.

490. Reilly, *supra* note 222, at 41.

491. AARP, *supra* note 438, at 41 (noting that the monthly fee is $30 for loans with annually adjusting rates, and $35 for monthly adjusting loans).

492. 12 U.S.C. § 1715z-20(d)(5) (2003); 24 C.F.R. § 206.23 (2003).

493. 12 U.S.C. § 1715z-20(d)(5); 24 C.F.R. § 206.23.

494. Reilly, *supra* note 222, at 51 (stating that the Home Keeper reverse mortgage was introduced by Fannie Mae in January, 1996).

495. FANNIE MAE, *supra* note 447, at 31.

496. Reilly, *supra* note 222, at 51.

497. *Id.*

498. *Id.*

499. *Id.*

500. FANNIE MAE, *supra* note 447, at 40.

501. *Id.*

502. *Id.*

The costs of a Home Keeper loan include an origination fee that may run as high as two percent,[503] as well as traditional mortgage closing costs.[504] A monthly servicing fee, ranging between $15–$35 depending on the lender, is charged to cover costs of loan paperwork and payment processing.[505] Closing costs may be added to the loan balance[506] or may be paid out-of-pocket at the time of loan closing.[507]

As with other reverse mortgages, there are several payment options available to the Home Keeper borrower. The (1) tenure option pays a fixed amount on a monthly basis for the duration of the loan.[508] Home Keeper also offers (2) a line of credit option, but unlike the HECM, the Home Keeper credit line does not appreciate over the life of the loan.[509] The (3) modified tenure option allows the borrower to divide the loan proceeds so as to receive a fixed monthly payment amount,[510] and also have an available line of credit when additional funds are needed.[511] Like a HECM, Home Keeper allows the borrower to change payment plans at any time for an administrative fee of up to $50.[512] Home Keeper also offers borrowers electing the tenure payment plan the option to suspend payments for a period of time.[513] Interest continues to accrue on the outstanding loan balance even when the monthly payments to the borrower are suspended.[514]

The Home Keeper reverse mortgage is only available for homeowners with single-family dwellings.[515] Applicants must attend a financial counseling session to be considered for a loan.[516] Family members are encouraged to attend this session with the applicant whenever possible.[517] The maximum amount that can be borrowed is a function of the number and age of the borrowers, and the

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503. *Id.* at 41. The maximum origination fee is $2000 or 2% of the property value, whichever is greater. *Id.* The origination fee is assessed to cover the costs of processing the loan application and doing work necessary to underwrite the loan. *Id.*

504. *Id.* at 41–42. Closing costs vary by jurisdiction but include services such as home appraisal, title insurance, credit reports, and recording fees. *Id.*

505. *Id.* at 42.

506. *Id.* If this option is elected, the borrower should be aware that interest accrues on the closing costs throughout the life of the loan. *Id.*

507. Reilly, *supra* note 222, at 52–53.

508. *Id.* at 53.

509. FANNIE MAE, *supra* note 447, at 37.

510. *Id.* at 38.

511. *Id.*

512. *Id.* at 36.

513. *Id.* at 38 (noting borrowers may want to suspend payments if they become eligible for ALTCS (Medicaid) benefits, or if they have no immediate need for the loan funds).

514. *Id.*

515. FANNIE MAE, *supra* note 447, at 32–33.

516. *Id.* at 33.

517. Reilly, *supra* note 222, at 54.

adjusted value of the property.[518] Currently, the Home Keeper loan limit is $322,700.[519]

C. Summary of Reverse Mortgages

The advantages of a reverse mortgage are numerous. An eligible senior can access their home equity and continue living at home until repayment is required.[520] Because the payments are considered loan proceeds, they are not taxable income to the recipient.[521] Reverse mortgages are a relatively new product offering, however, and seniors should proceed cautiously before relinquishing any portion of ownership in their homes.[522]

While the disadvantages are not as obvious, they can be devastating if not fully understood.[523] As with any mortgage product, there are costs and fees associated with a reverse mortgage loan.[524] Reverse mortgages may also affect the senior homeowner's eligibility for public benefits.[525] Because Social Security and Medicare are social insurance programs, these benefits will not be affected by a reverse mortgage.[526] Eligibility for SSI or ALTCS, however, may be affected since these programs are based on financial need.[527]

A Medicaid applicant's home is generally considered an exempt asset for purposes of determining financial eligibility.[528] If the home is subject to a reverse mortgage, however, the home may lose its exempt status.[529] Payments received from the reverse mortgage may raise the individual's income above the eligibility limits set by ALTCS.[530] As a result, eligibility for ALTCS benefits could be delayed, or if benefits are currently being received, taking a reverse mortgage may reduce or terminate current benefits.[531] Seniors considering a reverse mortgage should consult with the local Area Agency on Aging[532] to fully understand the impact a reverse mortgage may have on eligibility for any other federal or state assistance programs offered for seniors.[533] Reverse mortgages are complex and can

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518. FANNIE MAE, *supra* note 447, at 33.
519. Annual reverse mortgage lending limits for the Home Keeper mortgage are posted on Fannie Mae's website, at http://www.fanniemae.com.
520. HEGLAND & BOGUTZ, *supra* note 208, at 46.
521. Reilly, *supra* note 222, at 56.
522. HEGLAND & BOGUTZ, *supra* note 208, at 46–47.
523. Larson & Hauer, *supra* note 61, at 197.
524. Oluwasanmi, *supra* note 388. For example, on a $150,000 reverse mortgage, the origination fee is $6,000, and closing costs can run in excess of $10,000 in some location. *Id.*
525. Larson & Hauer, *supra* note 61, at 197.
526. AM. BAR ASS'N, *supra* note 59, at 100.
527. *Id.*
528. 42 U.S.C. § 1396p (2003); ARIZ. ADMIN. CODE § R9-28-407(B) (2002).
529. Larson & Hauer, *supra* note 61, at 197.
530. *See* Reilly, s*upra* note 222, at 60.
531. Larson & Hauer, *supra* note 61, at 197.
532. To locate the local Area Agency on Aging in your area, call 1-800-677-1116, or search on-line, at http://www.aoa.dhhs.gov/agingsites.state.html.
533. NRMLA, *supra* note 436, at 6.

involve difficult personal and financial decisions.[534] Before taking on a reverse mortgage, seniors should consult with a trusted advisor, accountant or attorney.[535]

XI. CONCLUSION

LTC services can be financially catastrophic to families.[536] Today, most LTC decisions are made reactively, rather than in a proactive, informed planning mode.[537] Since most Arizonans mistakenly believe that Medicare or private health insurance will cover all LTC costs, assistance with locating and financing LTC is not sought until an elder is either in immediate need of LTC, or discovers that the need for LTC is inevitable.[538] As a result, families in the midst of crisis are making LTC decisions,[539] often while mentally unprepared to deal with the complexities of locating and financing quality LTC care.

The primary goal of this Note is to inform Arizonans who are nearing retirement, or who have parents nearing retirement, about the necessity of advance planning for LTC. The options currently available for developing comprehensive LTC plans were introduced in an effort to: 1) dispel myths and misconceptions about public programs like Medicare, and 2) provide Arizonans with the information necessary to make informed LTC choices before the need for care arises. The public and private options available for financing LTC today are numerous, and each must be considered carefully for the role it might play in an individual Arizonan's LTC plan.

Every effective LTC plan will recognize the *limited* role Medicare plays in financing LTC services. Likewise, every LTC plan will recognize the need to rely, at least in part, on private savings, unpaid care, or some combination thereof. Beyond that, for Arizonans with limited financial means, ALTCS is likely sufficient to cover remaining LTC needs. Arizonans with great wealth will be able to self-insure against LTC. For the large group of Arizonans in the middle-class, however, options such as CCFs, living benefits from life insurance, LTCI, reverse mortgages, or some combination thereof, will play a major part in an effective LTC plan. Only by proactively planning can elder Arizonans effectively ensure access to LTC services that will enable them to maintain their quality of life, preserve their individual dignity, and satisfy their lifestyle preferences.

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534. AM. BAR ASS'N, *supra* note 59, at 101.
535. HEGLAND & BOGUTZ, *supra* note 208, at 47.
536. WALKER, *supra* note 9, at 12.
537. FINAL REPORT, *supra* note 15, at 6.
538. Wytychak, *supra* note 133, at 244.
539. *Id.* at 262.