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Elder Care
Committee Report

Elder Housing

by Michael Gilfix

Elder Housing

Even the ultra-rich should consider living in life-care facilities during their declining years. But advisors must perform due diligence before anyone makes a move

By **Michael Gilfix**, principal, Gilfix & La Poll, Associates, Palo Alto, Calif.

You've probably seen the brochures: beaming retirees with Hollywood looks and silver hair, some on bicycles, tennis courts or golf courses, others enjoying sumptuous meals in a tastefully decorated dining room. They present the perfect picture of health in a carefree environment.

This is the image continuing-care retirement communities (CCRCs), also known as life-care communities, try to convey to wealthy Americans. While 94 percent of CCRCs were run by religious or other non-profit organizations in 2001, new upscale, profit-seeking communities are visible everywhere, particularly in areas of concentrated retirement wealth.

But what is the reality behind the ads? What legal, financial and contractual issues require attention before a client antes up entrance fees that run up to $1.9 million and commits to spending as much as $100,000 a year for as long as residency continues?

What factors should a client consider before selling his residence and moving to this dramatically different living environment? Of course, there is the threshold emotional question, which seems to be particularly poignant for men: Is it not better to stay at home, no matter the cost? Surely, it can be comforting and comfortable to remain at home. And our clients are wealthy enough to do just that.

But particularly for those who are more social and are seeking stimulation, staying at home can be isolating and limiting—even for the ultra-affluent. Life-care communities offer retirees a sense of community and a level of care that can be health-giving. Indeed, countless studies remind us that we are healthier, live longer and recover from illness more quickly if we are part of a com-

munity, attend religious services, and/or have other sources of consistent, supportive social interchange.

Put bluntly, luxurious isolation can be hazardous to good health in old age.

CHOICES

What, exactly, do these continuing-care retirement communities offer?

They generally have three levels. Typically, the level at which healthy individuals or couples enter is called independent living. They reside in a fully equipped apartment where they have the option of taking their meals, though meals also are provided in a congregate dining area.

The second level is assisted living, where help with the activities of daily life is available. Assistance may be provided with personal hygiene, dressing and ambulation. In some facilities, the monthly fee increases significantly with each added element of care. In others, where larger entrance fees are paid, the fee is unchanged or increases only slightly.

Third is nursing-home care, with around-the-clock nursing. It is particularly attractive to a couple, given the likelihood that one will suffer a disabling illness before the other. If one spouse needs to be in the nursing unit, he will be on the same grounds and easy to visit; the partners still will be together. The reality of this promise is discussed later in this article.

BUYER BEWARE

Such communities are not without their problems. Some have failed fiscally and caused enormous financial difficulties for the unfortunate clients who paid substantial entrance fees and lost their savings in the facility's insolvency and bankruptcy.

There can be strict limits on one's ability to sell a particular unit if a decision is made to leave the community. There is often a significant gap between the flowery assurances on the company brochure and the proverbial fine print in the actual contract signed by every new resident.

Some standards exist. Ask if the facility is accredited by the Continuing Care Accreditation Commission (202-783-7286). This is an important indicator of quality, as the commission's standards are stricter than minimum standards created at the state level. But CCAC accreditation is not a guarantee. Be sure to do your due diligence.

AGREEMENTS

The following discussion flows in part from an evaluation of two mainstream, high-cost life-care community agreements. Consider it a checklist of issues to review and address.

1) ENTRANCE FEES: Entrance fees can vary from $50,000 to $1.9 million. There can be a vast range in the same facility, depending on the size, nature and location of one's unit.

A typical approach for the facility is to hold the entrance fee as a form of security for the payment of monthly fees. Monthly fees are typically separate from and in addition to the entrance fee. A typical agreement provides that 90 percent of the entrance fee will be returned to the resident or to the resident's estate upon termination of the agreement, departure from the facility or death.

The entrance fee may thereafter be characterized as a loan to the facility owner. It often serves as something of a safety net to ensure the resident's ability to make monthly payments, which are often substantial ($1,500 to $7,500 for a single person or $9,000 for a couple). If a resident becomes unable to pay the monthly fee, such fees can be effectively deferred if the resident signs a promissory note (at 10 percent interest, compounded annually) and assigns to the facility a portion of the entrance fee to guarantee payment of the amount deferred. If an individual becomes unable to make payments and exhausts his entrance fee or reserve account, eviction is the action of last resort. Some contracts may include guarantees of non-eviction (except for cause, such as behavior that endangers the resident or others).

Such loans are generally classified as below-market loans. Forgone interest on below-market loans is treated as interest income to the lender.[1] This rule does not apply, however, to loans to a qualified continuing-care facility pursuant to a continuing-care contract if the lender is age 65 or older.[2] The exception applies only to the extent that the outstanding amount of the loan does not exceed $148,000 for the year 2002.[3] This figure is adjusted annually for inflation.

Will entrance fees be refunded if a resident decides to move out? It depends on how long the person lives in the facility and the terms of the agreement.

Entrance fees can range from $50,000 to $1.9 million; monthly fees, $1,500 to $9,000.

Agreements typically allow an individual to terminate the contract within 90 days and receive a full refund. This is the requirement of state law in some jurisdictions, so the precise terms of termination and refunds will vary from state to state. If termination of the contract occurs early but after the trial period, the entrance fee is typically repaid less 1 percent or 2 percent for each month in which the individual resided in the community. There is often a cap on the amount of the entrance fee that can be retained by the facility.

Some states provide a cooling-off period of seven to 90 days.

Historically, problems with entrance-fee repayments arise when a resident dies shortly after entry. It will come as no surprise that heirs are unhappy about $200,000 entrance fees that are completely lost after only six months—particularly if the decedent also was paying a monthly fee. Unambiguous terms in the agreements mean that the facility will be allowed to keep the money; ambiguity favors the heirs who choose to sue.

2) INCREASES IN MONTHLY FEES: While some residence agreements limit increases to one per year, others do not. Virtually all agreements delineate the criteria to be relied upon and the purposes to which increased fees may be put. Given the high monthly cost of life-care-community living, fee increases sometimes can effectively cause eviction. Those who do not have a significant cash reserve must be wary, as such facilities have been known to increase fees more often than annually.

Other agreements provide a specified amount of care for a fixed monthly fee, adding charges for services that exceed the specified minimum. Contracts in upscale CCRCs are far more likely to include all services for a fixed monthly fee.

Significantly, such facilities rarely accept Medicaid to pay for the cost of nursing-home care, but exceptions do exist.

3) LIMITATIONS—DECORATING, TRADING AND VISITOR POLICIES: Most residency agreements allow a resident to furnish his own unit, but there may be limitations or advance approval may be required if interior decoration is to take place or if the unit is to be modified in any way. There may also be limits on the opportunity to move from one unit to another. Some agreements give unlimited authority and discretion to the facility, a term that is to be avoided whenever possible.

> Despite the ads, there's no guarantee a resident will be able to stay in the same life-care community when a different level of care is needed.

Consider the resident who wants or needs to move to a smaller unit in a facility where smaller units are readily available. Particularly if the facility still has unsold units and is contractually empowered to sell all of its units before a resident can place hers on the market, a resident's ability to sell and trade down may be illusory. In such cases, transfers may be effectively impossible.

Moreover, in light of how important it is to have visitors, agreements must be scrutinized to identify any limitations on the duration of overnight stays and on how many people are allowed to do so at a time. Such provisions underscore the fact that an independent apartment in a life-care community is not just like home.

4) TRANSFERS BETWEEN LEVELS OF CARE: Every agreement must be carefully scrutinized to identify the terms and conditions that pertain to forced or voluntary transfer from one level of care to another. When a resident and/or a resident's family disagrees with a decision to move the person to the nursing-home level, for example, disharmony is inevitable.

Residency agreements typically provide that the facility itself has authority to transfer the resident to different levels of care. They are careful to identify criteria, although some are pointedly ambiguous. Many advocates feel that management discretion to make such profound changes in a retiree's/elder's life is excessive.

Agreements typically and only provide that the facility must consult with the resident, the resident's family members and the resident's physician as they make these decisions. There is often a care team or transition team that plays a central role in determining the time and nature of transfers. Team members are employees of the facility and offer diverse expertise. None will be privately hired by the resident.

These agreements rarely give any real power or authority to the resident or his advocates. Such provisions are often the heart and soul of life-care agreements, where living independently for as long as possible reflects health and long life while relegation to a nursing-home bed is tantamount to the "dwindles": the slow, relentless decline where hope is abandoned as quality of life ebbs away.

5) PLACEMENT IN THE NURSING-HOME LEVEL: Will it really happen? One seeming attraction of life-care communities is the advertised fact that you will never have to leave the manicured grounds, never leave your spouse and the friends that you have made. As with most advertisements, hyperbole abounds here.

Virtually every life-care communi-

ty acknowledges that the nursing-home level may be full when a particular resident needs to move in. Agreements typically give the facility full authority to place the resident in different facility in a different location that will provide the designated level of care. Every life-care community maintains a contractual relationship with one, two or three other nursing homes in the same geographic area.

In summary, there is no guarantee that the resident will be able to stay in the same life-care facility when a different level of care is needed.

The problem isn't always that nursing-home beds are taken by facility residents moving from one level of care to another. The economics of long-term care being what they are, empty nursing-home beds are often filled by non-residents. An empty nursing-home bed does not generate revenue. Most facilities feel that they do not have the luxury of keeping large numbers of beds vacant. They are, above all, a business.

FACILITY'S SOLVENCY

While difficult to ferret out, the solvency of the facility and/or parent company may be critical to confirm. Too many CCRCs have failed after a number of luckless elders invested all or most of their life savings.

Financial-disclosure statements are required in many states and should be reviewed. Ideally, such information will include earnings statements and balance sheets for three to five prior years as well as actuarial projections. Many new CCRCs are created by nationally known entities, such as Classic Residence by Hyatt, necessitating a different solvency analysis from smaller, independent CCRCs. Most that are affiliated with a national company are likely to be self-contained entities, such as limited liability corporations—so do not assume that a healthy parent company guarantees deep pockets and solvency for the independent offspring.

STILL A GOOD THING

CCRCs are increasingly popular because they offer security and community. Notwithstanding the caveats I have listed, these benefits are very real and are enjoyed by those who enter the more expensive, well-managed communities. Social calendars are full, trips are plentiful and intellectual stimulation is often at the core. For these and other reasons, life-care communities offer great appeal to better educated, wealthier individuals who eschew isolation.

In counseling clients about housing choices late in life, trusts and estates attorneys will be drawn to an analysis of tax and other similarly objective criteria. Such issues must be explored, but we should not lose sight of the fact that most elders focus on quality of life and view tax considerations as secondary. ▮

Endnotes
1 IRC Section 7872.
2 IRC Section 7872(g).
3 Rev. Rul. 2001-64.