

COMPENSATING RELATIVES FOR CAREGIVING SERVICES

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The Department of Labor estimates that by 2010 over 40 million baby boomers will be age 65 or older and by 2030, this population segment will increase to 71.5 million. In addition, the age 85 or older segment of the U.S. population is the fastest growing elderly age group, growing 274% between 1960 and 1994. It is estimated that those 85 or older will compose 5% of the U.S. population by 2050. As the baby boomers continue to age, their healthcare costs will continue to increase. In addition, the growth of the elderly population will increase the strain on all systems that touch their lives from retirement policies and pensions to healthcare, Medicare and other systems. As a result, many baby boomers will find themselves burdened with their own healthcare issues and/or the healthcare issues of their aging parents.

In many Asian cultures children are viewed as owing their parents comfort and aid throughout the parents' lives. Further, the children have a moral obligation to respect and care for their parents. The foundation of this tradition demands the respect and care of the elderly with affection, responsibility and gratitude. Cultural mores require that the adult child provide care in all aspects for the aging parent, including inviting the elderly parent to live in his or her home. It is further expected that the child will provide care to the parent until death. In these cultures, a daughter or son who refuses to care for an elderly parent brings dishonor to his or her family.

By contrast, the elderly in the United States typically reside in retirement communities and multi-level care facilities where their medical care and material needs are provided. If the elderly are unable to afford the costs of such a facility through private insurance, the costs may be covered by the Medicaid system. However, given the economic downturn, the current uncertainty of the Medicaid system and the fact that a healthcare reform may be years away, family members may very well have to provide care for an aging parent.

Some probate courts in Colorado, faced with a barrage of requests by relative caregivers for compensation for care services provided to family members, deny compensation absent a written agreement for such services. The basis for this refusal stems from a presumption by some judges that relative caregivers should offer assistance to their elderly family member not for money, but gratuitously out of love and affection. However, the reality for many relative caregivers is that providing care to a loved one can come at an enormous sacrifice, placing tremendous strain both financially and emotionally on the caregiver and his or her family. In order to ensure that the relative caregiver is compensated, a written care agreement should be put in place prior to the rendering of such services. These agreements create enforceable contracts between the relative caregiver and the elderly family member which should be recognized by both the courts and Medicaid.

Impact on Medicaid Eligibility

Absent a written caregiver agreement, Federal Medicaid regulations treat any payments made by a care recipient to a relative caregiver as a "gift." Pursuant to Medicaid regulations a gift could trigger a five-year penalty period. Under the Deficit Reduction Act (DRA) of 2005,

signed into law on February 8, 2006, the look-back period for transferring away assets for less than fair market value, including making gifts, was extended from three years to five years. Any gifts made within a five year period prior to the Medicaid application can be counted against the applicant and potentially disqualify the individual from receiving Medicaid coverage. In contrast, payments made pursuant to a caregiver agreement will not be considered by Medicaid to be a "gift." Since these agreements can affect Medicaid eligibility, it is important to make sure that one consults with a knowledgeable attorney to assist in drafting the caregiver agreement.

Creating a Complete Agreement

First, an effective caregiver agreement must be in writing and should be witnessed by one or more parties unrelated to the caregiver or care recipient. Second, the agreement should be executed before the relative caregiver begins to provide services or receives compensation. Third, the agreement should include the amount of compensation and payment schedules. Fourth, the agreement should spell out the nature of the services to be provided, as well as the days and times that the services are to be provided to the care recipient. Finally, the agreement should not include provisions for advance payments for anticipated future services because Medicaid may treat unearned compensation as a gift. When determining the amount of compensation the relative caregiver is to receive for his or her services, one should consider consulting with a geriatric care professional to determine reasonable compensation based on fees charged by other professionals and non-professionals for similar services.

Powers of Attorney

Generally, medical powers of attorney are limited to advance directives by the principal to his or her agent regarding healthcare decisions. Typically, medical powers of attorney only take effect upon the principal's disability, incapacity or incompetency. Under current Colorado law, agents under medical powers of attorney are not entitled to compensation; however, agents under financial powers of attorney are entitled to compensation if it is expressly stated in the document. Under the new Uniform Power of Attorney Act, effective in Colorado January 1, 2010, an agent under a financial power of attorney is entitled to "reasonable compensation," unless otherwise provided in the power of attorney. If a financial power of attorney includes compensation for care services, the document should provide a detailed description of the type of services the agent will provide and the compensation the agent will receive.

Reducing Potential Conflict

Caregiver agreements can also help reduce post mortem intra-family conflict. Often, well intended family members provide care services to an elderly parent for years only to end up in drawn-out and costly court proceedings with siblings or other family members at the time of the parent's death. These disputes frequently involve claims against the estate for compensation, actions to set aside inter-vivos transfers of property to the relative caregiver or challenges to the deceased parent's will which may favor the relative caregiver. A caregiver agreement can eliminate the intra-family conflict by creating an enforceable contract that should be recognized by both the courts and Medicaid. Disclosure of the caregiver agreement to other family members

during the care recipient's lifetime may further reduce possible conflicts at the time of the care recipient's death.

Other Benefits

For an aging parent, care given by a trusted family member can provide tremendous peace of mind. Additionally, the aging parent and other family members may find comfort in knowing that the parent will receive proper care and attention. In many cases, paying a relative to provide care services may also be less expensive than hiring outside professionals. Further, by providing the relative caregiver with compensation for his or her services and ensuring reimbursement for out-of-pocket expenses such as food, fuel and medical supplies, the caregiver is relieved of any financial burden.

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