



The Pitfalls of Paying Family Members to Provide Care

This article for The Voice® was written by Courtney L. Fletcher, Esq., of Springfield, Missouri. Courtney is an attorney in the Estate Planning Practice Group of [Carnahan, Evans, Cantwell & Brown, P.C.](#) and has been practicing law since 1995. Her practice area include special needs planning, estate planning and administration, probate, trust and elder law, guardianships/conservatorships and Veteran's benefits. Courtney is a member of the Missouri Bar, past president of the Greene County Estate Planning Council, a member of the National Academy of Elder Law Attorneys, and a VA accredited attorney. She is a past director of the Missouri Chapter of the National Academy of Elder Law Attorneys and a past chairman of the Springfield Metropolitan Bar Association Probate & Trust Committee. She currently serves on the Elder Law Committee of the Missouri Bar and is also a member of the Estate, Trust and Elder Law Institute Planning Committee. Please visit her at www.cecb.com.

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Personal care contracts or caregiver agreements can solve a variety of problems because they allow an elderly or disabled individual the option to remain in their home while allowing funds to be paid out to that caregiver for assistance leading to a penalty-free transfer of assets and reimbursements for care provided.

In order for a care contract to be recognized and upheld by governmental agencies, the contract should be structured as a written employment contract setting forth the specific duties of the caregiver and the specific salary to be paid. Each state has different requirements that must be followed, so it is important to check on the requirements in advance. Generally, there must be (a) a written agreement in place between the individual providing services and the individual receiving care specifying the services to be provided which is signed and dated on or before the date the services began; (b) the services provided must not be duplicative of what is being paid to someone else; (c) the care recipient must have a demonstrated need for the personal services; (d) the services are necessary and essential; (e) compensation for the services must be made at the time services are performed; and (f) the fair market value of the services provided must be equal to the value of assets given for the services.

Funds should not be paid for caregiving assistance without a written contract in place since this will be viewed as a gift. Generally, it is not possible to pay for services rendered prior to the date of the written care contract. If there will be more than one

caregiver, separate caregiver agreements should be obtained. A doctor's letter should also be obtained establishing the need for the assistance.

Some states require that a caregiver log be maintained detailing the services provided under the personal care contract. If a caregiver fails to maintain such a detailed log, these states take the position that despite the fact that all of the other requirements have been met, the care provider cannot prove that the services were actually provided, and thus the care recipient cannot meet the burden that the payments were "transfers for fair market value." In these states, it is essential that the caregiver keep a log of services performed.

It is also important that the contracted rate paid to the caregiver for services provided be reasonable. A good rule of thumb is to make sure that the hourly rate paid to the caregiver does not exceed the hourly rate which would be paid to a professional caregiver. If the hourly rate is excessive, then Medicaid will likely claim a portion of the funds paid to be a "gift" or a "transfer of assets" resulting in a period of ineligibility.

If the elderly or disabled individual is a wartime Veteran who is homebound and has limited finances, a personal care contract may also assist the Veteran in obtaining additional assistance under the VA Aid and Attendance benefit provisions. The VA requires a detailed care agreement and a doctor's letter in order for such care agreement to be given consideration.

It is important that the contract detail the services to be provided by the caregiver, as well as the number of hours which the caregiver will work. Caregiver duties generally include assisting with activities of daily living, housekeeping duties, meal preparation and assisting with transportation of the care recipient, monitoring the recipient's mental and physical condition, and providing companionship and assistance on a general basis.

Given the level of control involved in the typical personal care contract, this arrangement is generally treated as that of an employer/employee and not an independent contractor and will be taxed accordingly. The caregiver and care receiver must review and be aware of the tax obligations involved in these agreements.

If the requirements are not followed, the transfer of funds will be considered a gift and a penalty will be imposed. Obviously, if the individual still requires care, a written care contract can be put in place for all services going forward; however, this does not correct the past arrangement. The safest course is to put the care agreement in place prior to any transfer or payment for services.

It is recommended that this type of contract be prepared by an experienced special needs/elder law attorney after consulting with the individual and the family regarding the

type of care needed, the funds to be paid for services, and the authority to be given to the caregiver.

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