PUT IT IN WRITING: AVOID MEDICAID TRAPS AND FAMILY DISPUTES WITH A CAREGIVER CONTRACT

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About 22 million Americans currently care for their ailing parents, other relatives or friends, according to the National Alliance for Caregiving.

If you are among those giving or receiving care, placing your arrangement in writing may save family asset from Medicaid and help avert future intrafamily disputes. Here's how:

Caregiving traps

Most people who provide care for their parents (or other family members) do so without any thought of receiving compensation in return.

Typically, a parent suffering deteriorating health simply moves in with an adult child (or vice versa) so the child can look after him/her. This setup leaves the family exposed to dangerous traps:

- If the parent later is forced to turn Medicaid for costly nursing home care, his assets will be considered available to pay for such care.
- When one child provides the care for a parent, but the parent bequeaths his estate equally among all the children, the caregiver-child may feel unfairly exploited.
- If family circumstances change so that the caregiver-child no longer can provide the care, other family members may be unwilling or unable to do so, leaving the parent in the lurch.

A formalized "caregiver contract" helps avoid these traps.

The Medicaid Problem

If a parent in declining health will require nursing home care in the future, Medicaid will cover those costs only after most of the parent's own assets have been exhausted.

Example: in New-York State, the parent can keep only the maximum "resource allowance" of $3,800. Medicaid will provide assistance only after amounts in excess of that figure have been spent.

Giving away assets to qualify for Medicaid is a strategy with only limited effectiveness. That's because eligibility for Medicaid is delayed by the value of any assets given away during the prior three years, divided by the monthly cost of care.

Example: A parent transfers $225,000 of assets to a child. Two years later, the parent requires nursing home care and the average monthly cost of care in the area is $7,500. The parent will be ineligible for Medicaid for 30 months ($225,000 divided by $7,500).
Better way: if the parent is being cared for by a child, a caregiver contract that compensates the child for providing the care can remove the parent's assets from the reach of Medicaid.

Example: a contract provides that the child will receive $5,000 per month for caregiving services (that being the fair value of the services). In this way, assets will be moved from the parent to the child without resulting in a penalty period that would delay the parent's future eligibility for Medicaid.

Trap: in the absence of a written contract, Medicaid assumes that the caregiving services of a child are provided free. The parent's assets cannot be transferred after the fact to the caregiver-child (other than for limited exceptions and exempt amounts), even if actual services can be shown to have been provided.

Thus if caregiving services are being provided by a child, but no contract is in place, the family risks losing assets simply because of a lack of paperwork.

FAMILY MATTERS

Even though there may be more than one sibling, caregiving typically falls to one child - either entirely or primarily.

That child can be compensated for services by receiving a larger inheritance than the others. But doing so has major drawbacks:

- The child may be undercompensated if the parent fails to revise his will appropriately - or if Medicaid files a claim against the parent's estate to recover previously paid Medicaid benefits.
- Other siblings may view an "extra" inheritance as disproportionately large, engendering resentment and jealousy within the family.

A caregiver contract addresses both of these concerns by providing fair compensation to the child during the lifetime of the parent, while allowing the parent's remaining assets to be divided equally among siblings at death.

When a child moves into a parent's home to provide care, disposition of the home often becomes a key issue. The caregiver contract can provide for this - such as by compensating the child with ownership of the home rather than with payment from the parent's general assets. The contract can contain specific provisions relating to transfer of title, and to the financing of modifications to the home (ramps, safety rails, etc.) needed to allow the parent to continue living there.

When drafting the contract, the family should engage in "contingency planning" - what will occur if the child who initially provides care becomes unable to do so.
The contract should also include terms relating to other family members in the agreement.

Other siblings, who knew they will be compensated fairly if called upon to provide care, may be more willing to agree to do so in advance. The whole family then can plan accordingly, with the parent feeling more secure.

A GOOD CONTRACT

A caregiver contract spelling out the rights and obligations of both parent and child should be drafted by an attorney as a legal document. For maximum effectiveness:

- **Write the agreement as soon as possible.**

A contract can be signed only by a parent who has legal competence to do so.

Example: if a parent is diagnosed with Alzheimer's disease, the contract should be drawn up right away - even if no care will be required for several years. By the time care is required, the parent may no longer be legally competent to sign a contract.

- **Fix the caregiving child's compensation at a reasonable rate.**

It should be what would be paid to a third party doing the same work. A higher rate could be challenged by the government as being a "gift", and also create resentment among other family members.

- **Live up to the terms of the agreement**

Have the parent actually agreed upon sums to the child. And treat the child as an employee (that is, pay employment taxes if required). The failure to pay employment taxes (an IRS issue) is not automatically fatal to a Medicaid claim, but paying the taxes certainly indicates a true employer-employee relationship rather than a wealth transfer device.

If you don't live up to the terms of the contract, Medicaid authorities could later dismiss it as a sham.

**Caution**: while caregiver agreements should be recognized as legally binding contracts, challenges may arise - Medicaid eligibility is easier to obtain in some localities than others.

Work with an elder law attorney and be ready to pursue legal action if Medicaid initially rejects a claim because it views the contract as invalid and the asset transfers as mere gifts. To find an elder law attorney, visit [www.naela.org](http://www.naela.org).