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Keith P. Huffman received his undergraduate education from Adrian College, his legal education from Indiana University, and was admitted to the Bar in 1980. Mr. Huffman is a member of the National Academy of Elder Law Attorneys and recently served as the President of the Indiana Chapter of the National Academy of Elder Law Attorneys. He is a member of the Elder Law Section of the Indiana Bar Association where he currently serves as chairperson of the Health Care Decision Making Committee. Mr. Huffman is a member of the Ethics Committee at Bluffton Regional Medical Center, a member of the Northeast Indiana Hospice Advisory Board, and a member of the Fort Wayne Lutheran Hospital Institutional Review Committee. Mr. Huffman is a frequent speaker on elder law topics and can be reached at huffman@dale-huffman.com. The firm's web address is www.dale-huffman.com, and the materials presented in this seminar are available on our website by opening the Seminars & Materials link and clicking on the October 2009, attachment.



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It Takes A Tribe

The economic downturn and increasing human longevity have resulted in the return to tribal basics. The extended family is often living under one roof. The roof may be owned by mom, by child, or by a combination of family members. This paper is a primer on the establishment of rules governing the living arrangements to try and preserve harmony within the extended family without adversely affecting Medicaid eligibility should mom or dad (mom, in this paper) eventually need Medicaid for nursing home care or for waiver services.

The financial arrangement for a combined living situation needs to be fair for the parties directly involved and for other family members. The financial arrangement should have a written financial structure from the very beginning.

The non-financial rules should also be carefully considered. We need to know the long term care needs of the senior and the wishes the senior has about medical treatments. We need to know what rules will apply so everyone is a good roommate. The consideration of these issues at the beginning can result in a very successful long term living arrangement.

Expense Sharing Agreement

Mom moves into her daughter's home. Mom agrees to pay daughter a certain amount per month as her share of the ordinary household expenses. This agreement needs to be documented in writing. A sample expense sharing agreement is attached as Appendix A.

The amount mom pays should be directly related to several factors. These factors are:

1. What is mom's income? The higher her income, the more she can afford to pay.
2. What are the total monthly household expenses? The higher they are, the more she should pay.
3. Where else could mom live and what would that cost her? If mom would need assisted living if not for living with the child, she could easily be paying \$3,000 per month. So she should pay more if she would otherwise be in a facility that would cost her more because of the additional services she would need.
4. What are mom's assets? The more she has, the more she can afford to pay.

These factors should all be considered when setting up the expense sharing agreement.

Expense sharing agreements establish a monthly payment at the very beginning when mom moves in. These payments are made pursuant to a written agreement and have not been considered as transfers by Medicaid.

Expense sharing agreements are also good to preserve the relationships among siblings. Family members should know what mom is paying to live with the daughter. When a child is being reimbursed for expenses, the child does not get as resentful at the other siblings who do not help, and the other siblings do not feel as bad about not helping. The same thing is true about personal service agreements.

Expense sharing agreements should not count as income to the child as long as the amount is reasonable. Mom is not paying rent, which is reportable as income, rather she is simply paying her share of the expenses—much like a child does in college. The taxpayers will have a written agreement so they each will report, or not report, the compensation consistently.

Personal Service Agreements

The Needs, Advantages, and Disadvantages of Personal Service Agreements

A Personal Service Agreement can be used when mom needs help with errands, chores, health care, etc. These services can be provided in the child's home, in mom's home, in assisted living, or an independent apartment. A Personal Service Agreement is an excellent way to transfer assets from one generation to the next while keeping mom out of a nursing home. Personal Service Agreements should not be used when mom is in the nursing home without careful consideration of the then-current Medicaid rules.

The Deficit Reduction Act of 2005 (“DRA”) penalizes the transfer of assets for less than fair market value for up to 5 years after the transfer. Personal Service Agreements allow a person to properly pay a caregiver for services without creating a period of ineligibility for Medicaid for nursing home care or waiver services.

The need for Personal Service Agreements is enormous. Congress recognized this need in 2000 by creating the National Family Caregiver Support Organization (“NFC”). The NFC has five major goals:

1. Provide information to caregivers about available services.

2. Help individuals gain access to support service.
3. Organize individual counseling, support groups, and caregiver training.
4. Provide respite care.
5. Supplement the services provided by private caregiver.

The U.S. Supreme Court ruled in Olmsted v. L.C. in 1999 that a State violates the Americans with Disabilities Act when it fails to make reasonable accommodations for persons whom health care professionals determined are suitable for community living. The use of Personal Service Agreements supports the goals of NFC and helps states implement the Olmsted decision by providing a proper structured framework for family members to care for a loved one without running afoul of the DRA.

The National Alliance of Caregivers and AARP did a study in 2004 and found that 44.4 million adult caregivers, 21% of our population, provided unpaid care to an elderly parent or a disabled family member. The average time spent providing care was 21 hours per week for 4.3 years. These services were almost always provided without compensation and without a written agreement for reimbursement of expenses, a ticking time bomb under the DRA.

A study by the National Alliance of Caregivers and Evercare found the annual out-of-pocket cost of caring for an aging parent or spouse is \$5,531. This is more than the average American spends each year on health care and entertainment combined. The study found that the caregivers on average spent more than 10% of their income to help pay for the expenses of the care recipient. The study further found that 37% of

respondents had to quit their job or reduce their hours of employment due to caregiving responsibilities.

Family members are often unwilling to take a payment from a parent for the services they provide. This care is often 24-hour care that prevents a caregiver from having a job or engaging in many other activities. This paper strongly suggests that a written caregiver agreement be prepared, and the caregiver be properly paid for the services provided.

As elder law attorneys, we are constantly advising our clients on how to meet their personal goals. Seniors uniformly have the following three objectives:

- (1) They do not want to be a burden to anyone.
- (2) They want to be treated with dignity.
- (3) They want to see some of what they have worked hard for all their lives go to their children.

A properly drafted and implemented Personal Service Agreement can achieve each of these objectives. The payments made under a Personal Service Agreement keeps the money in the family, eliminates the worry that mom or dad is taking advantage of one child, increases the quality and quantity of care, and allows mom or dad to stay at home longer.

The Personal Service Agreement needs to be in writing. This paper includes several samples of Personal Service Agreements that can be modified for your clients. These Personal Service Agreements can be accessed electronically at our website at www.dale-huffman.com.

The recent case of Estate of Prickett v. Wormersley, 905 N.E. 2nd 1008 (Ind. 2009) should be carefully reviewed by anyone preparing a personal service agreement. The Supreme Court confirmed the long-standing rule in Indiana that personal services furnished by a family member are presumed to be gratuitously provided in the absence of an agreement to pay for such services.

The initial requirement for a written Personal Service Agreement is found in the HFCA Transmittal No. 64, amending the State Medicare Manual §3258.1 in November 1994. This Transmittal states:

Definitions. The following definitions apply to transfers of assets.

1. Fair Market Value. Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility.

NOTE: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value. **Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided (emphasis added).**

2. Valuable Consideration. Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

3. Uncompensated Value. The uncompensated value is the difference between the fair market value at the time of transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

The National Family Caregiver Association and Family Caregiver Alliance compiled information in November 2007 about the cost and amount of care being provided in Indiana. They used the average national rate for home health care of \$21.00 per hour and averaged it with the then minimum wage of \$5.15 per hour to get an average wage of \$9.92 per hour. Their calculation showed 720,000 caregivers provided services worth \$7,500,000,000 in 2006 in Indiana! Yes, that's right we are talking about a \$7.5 billion business opportunity in Indiana.

The Indiana Family Caregiver Chapter reports that in 2006 there were 720,000 caregivers in our State providing 780,000,000 hours of care at a market value of \$7.5 billion. This report shows that 12.5% of our population between ages 21 and 64 have disabilities, with this figure increasing to a 40.8% disability percentage for those over age 65.

Compensation. The compensation received by the caregiver must be reasonable. All of us who attended Indiana University remember the words of Professor Oliver “When a pig becomes a hog he gets slaughtered”. The compensation paid to the caregiver must be reasonable for the caregiver. The reasonableness of the amount of pay depends on several factors, including the training and skills of the caregiver, the difficulty of care needed, the area you are in, and so on. There is no true safe harbor amount recognized by the State of Indiana as reasonable compensation for services rendered.

The compensation paid to the caregiver needs to be stated in a written contract. The contract should specifically state the services the caregiver will perform. The caregiver should complete a timesheet on a daily basis to document the services provided.

The amount paid the caregiver can range from the minimum wage to \$40 or more per hour. I generally use \$12 to \$15 per hour in the agreements I prepare. The hourly rate can be increased to a comparable market rate if the caregiver has professional skills. I recommend obtaining in writing the hourly rates for similar services provided in your area each year to be used as evidence if a caseworker objects to the hourly rate used in a caregiver agreement.

The payment received by the caregiver can be a lump sum payment or an hourly rate. I use the hourly rate agreement in all of the situations in which I am involved. However, the lump sum agreement has been recognized and accepted in Indiana and in other states. Several states, most recently New York, have held lump sum agreements are invalid.

The hourly rate agreement is more complicated to administer. The caregivers must keep a time sheet. The caregiver must document the services provided. The caregiver is generally paid each week. The taxes must be paid each year.

Many times mom or dad has something in writing to document the caregiver is to be paid in the future. This might be as simple as a note saying my daughter is to get \$1,000 per year for the care she has provided me, or my daughter is to get my home for the care provided me. You will need to carefully review any written documentation of a promise to pay for services to see if it rises to the level of a contract.

The case of Beverly Healthcare Brandywood v. Betty C. Gammon, 2005 Tenn. App. Lexus 502, decided by the Tennessee Court of Appeals in 2005, is a warning that not all personal service agreements will be accepted by the Courts. Mr. Leath was in a nursing home in 1999. He sold his home at the advice of Elder Law attorney, Tim Tackus. He then paid each of his three daughters \$5,000 for a “Services and Life Care Agreement.” The Tennessee Department of Human Services found these payments to be gifts and imposed a transfer penalty period. The nursing home sued the daughters when the nursing home bill was not paid after he left the nursing home for apparently not paying for the cost of his care while his Medicaid claim was processed. The Tennessee Court found the payments for future services were without consideration. The Court ruled the daughters had to pay the nursing home and the attorney fees incurred by the nursing home.

The simple fact that there are cases contesting the validity of caregiver agreements should be of concern to all of us. We need to focus our efforts on making sure mom or

dad receives the best care possible and not on the economic benefit to the children. The cases I have reviewed all have one thing in common, a large payment right before an application for Medicaid.

Our primary objective is to help families provide care for mom or dad, usually outside the nursing home. We need to provide resources to the family caregiver to allow them to perform their services in the best possible manner. There is a great deal of information on the Internet that we can refer families to so they can become educated on caregiving. One example is the excellent website found at www.caregiver.org and, in particular, their “Fact Sheet: Caregiver’s Guide to Understanding Dementia Behaviors.”

You should consider the use of a case manager to arrange and supervise the care given to mom or dad. You should network with local case managers and have information to give to your families about case managers. You can also call your local area agency on aging, and they will have information about local case managers.

The Dysfunctional Family

As elder law attorneys, we are always dealing with the emotional baggage of years of petty, and many times not so petty, disputes. This can lead to disputes about mom or dad’s care, especially when money is involved. The use of a Personal Service Agreement and time sheets can serve to reduce family tensions when one or more family members question the payments made to another family member. The simple fact is that family caregivers many times save the family far more than they are paid because mom or dad never has to go to the nursing home. The Family Caregiver Alliance reports that only 7%

of the elderly in institutional settings have a family caregiver that provides support. The Family Caregiver Alliance also reports on the average caregiver:

- 59% to 75% are women.
- The average age of the caregiver is 46, female, married, and working outside the home with an annual income of \$35,000.
- While men help with caregiving, on average women spend 50% more time providing care than their male counterparts.
- Are six times more likely to suffer from depression or anxiety.
- Suffer their own injuries and illnesses while giving care.

The simple fact is that it is difficult to care for someone else. Family members who do not provide care do not realize how difficult it is. We should proactively address situations when one or more family members will not provide care, so they know services are actually being performed and they are not being cheated out of their share of the inheritance.

The fact that caregivers are paid usually increases the number of visits with the care recipient without either party doing so out of a sense of obligation. The more visits, the better care the family member receives. This also eliminates the feeling of resentment by a caregiver who is upset about being treated the same in the will with his or her siblings who provided little or no care for mom or dad.

The existence of caregiver agreements should be made known to all family members when they are entered into. These family members may be called upon to provide respite care occasionally and will be more likely to help if they expect to receive

similar payment. The issue of expense reimbursement should also be addressed in the agreement. The treatment of travel expenses should be spelled out.

Purchase Of Life Estate In Home

A person can purchase a life estate interest in another individual's home without penalty under the Medicaid rules provided the purchaser resides in the home for a period of at least one continuous year beginning immediately after the date of purchase. This permitted transfer does not require a family relationship. This will be an effective planning tool for non-traditional families. This will also encourage families (using the term in the tribal sense) to keep the ill person home longer – usually the goal of everyone. This concept is best explained by an example. Mom moves in with daughter. Daughter has a home she paid \$100,000 for and is now worth \$150,000 on which she owes \$75,000. She has a monthly mortgage payment of \$1,100. Mom is age 75. Mom purchases a life estate in daughter's home. The purchase price is \$78,223.50 based upon the 52.149% life expectancy mom has in the life estate/remainder tables set forth in the ICES manual (Section 2605.25.10.10).

The proceeds to daughter are tax free to daughter as the sale of part of her principal residence for a gain of less than \$250,000 for a single person. Daughter uses the funds to pay off the mortgage – drastically increasing her net worth. Mom also enters into a homeowner's shared expense agreement paying the daughter \$1,000 per month as her share of the monthly expenses.

The daughter must keep mom in her home for one year after the date of purchase. Mom has effectively given daughter \$87,000 tax free, without a Medicaid penalty

(\$75,000 purchase price plus \$1,000 per month). This can even be coupled with a Personal Service Agreement to allow for the care of mom while daughter is at work or to pay other family members to give daughter respite time.

The income tax consequences of these transactions must be carefully considered. We recommend having the client's accountant involved from the beginning when a decision is made to purchase a life estate in another person's home.

Section 121 of the Internal Revenue Code ("IRC") generally excludes from income tax gains on the sale of a principal residence of up to \$250,000 for a single individual. This exclusion can now be used every two years.

The regulations implementing Section 121 generally allow for the exclusion of a partial sale of an interest in the home if the purchaser owns an interest in the home when the sale is complete (Section 1.21-4 (e)(1)(i)). This permits daughter to exclude the sale to mom from daughter's taxable income. There are questions though, about the subsequent sale of the home following mom's death.

The documents for the sale of the life estate should include written permission for daughter to continue to use the real estate as her personal residence along with her mother. This is important should daughter and mother later sell the home since IRC 121 requires the seller excluding gain under this section to "use" the home as a primary residence.

Granny Addition/Handicap Modifications

The Granny Addition

When mom moves in, she may need more space which is specifically designed for her needs. This space is usually designed to provide her with privacy and to meet her handicap accessible needs. Mom usually is prepared to pay for such space but the family is concerned the payment for improvements to daughter's home may result in an imposition of a transfer penalty at a later date, should mom ever need assistance with nursing home care or waiver services.

We recommend you carefully document each step in the decision to build a granny addition. We have enclosed a form which should be used when a granny addition will be built. The form is in Appendix C and is creatively entitled "Agreement For Home Improvements".

The family should first secure quotes from a qualified builder. The quote should come with design plans for the specific area that will be used personally by mom or for specific handicap modifications necessary for mom.

The agreement should be accompanied by a doctor's letter stating it is reasonable to expect mom to be able to live in the addition for some period of time based on her current health. A sample letter to give to the doctor to sign is included in Appendix C. This shows mom had a reasonable expectation of actually occupying the addition for a reasonable period of time based upon the cost of the addition. It is very important to establish the period of time mom is planning to live in the addition to justify the

expenditure does not exceed her life expectancy set forth in the ICES tables in Section 2640.10.25.10.

Example: The addition may cost \$60,000. Mom is 92 and in good health. You receive a quote from an assisted living facility she can move in for \$3,000 per month. The doctor gives you a letter saying mom can be expected to live at home for 2 years. Mom pays \$60,000 for the addition. The agreement state mom has the right to live in the addition for a minimum of two years provided she is physically able to do so.

Important—The zoning regulations should also be reviewed before home improvements are made. Many zoning boards will permit such improvements, provided the area is used in the future only by the immediate family and is not turned into a rental unit in an area zoned only for personal residences.

Gifting the Home

Once a week mom shows up in your office. She wants to give her home to her children. The home usually makes up the majority of her assets and she is scared to death the nursing home is going to take it. How do you advise her?

The first thing you need to do is to gather more information. Hopefully, you have had mom fill out an intake sheet and asked mom to show:

1. All of her assets.
2. All of her income.
3. Does she have a disabled child?
4. Was she or her spouse in the military during a war?
5. Does anyone currently live with her?
6. Does she have nursing home insurance?

You will need to obtain a copy of the current deeds for all real estate mom owns, the value of the real estate and the cost basis. You should never accept what the family tells you about ownership of real estate—always get copies of the current deeds. With this information we are now able to begin the conversation with mom.

The Pitfalls. The story is simple for mom. She wants to give the home to her child/children. When you tell her she will lose her homestead and senior exemptions, she quickly wants to know what other options are available.

Deed with retained life estate. You explain to mom she can deed the home to a child/children and keep a life estate. This sounds simple, but is not.

Benefits

Mom continues to live in the home and receives all property tax exemptions. Mom does not notice the difference between owning it outright and having a reserved life estate. Mom pays all the expenses and keeps any rental income. At mom's death, property included in Mom's estate so kids get a step up in basis to avoid capital gains tax on the sale. The home goes to the children outside of probate.

Detriments

Should mom decide to sell the home, she pays no capital gains tax but the children likely will unless the basis is high. The children's financial problems are mom's problems (i.e. should a child die, get divorced, be in an accident without enough insurance, lose their health insurance, etc.) No one is in charge after mom's death. The transfer will be penalized if mom needs nursing home care.

You must explain all of these items to mom in a way she understands it. She then wants to know what her alternatives are. This is greatly complicated when you attempt to explain the 5 year floating penalty created by the new DRA Medicaid rules.

You explain to the family mom is permitted to gift her home without incurring a Medicaid penalty if a child has lived with mom for more than two years before she enters a nursing home and provided care for her that allowed her to remain at home. When a Medicaid application is filed, you will need an affidavit from the child documenting the services the child has provided to help mom. You will also need a physician statement to document this care allowed mom to stay at home. Please see Appendix D for sample forms.

You explain to the family mom can make improvements to the home while the child is living in the home without incurring a penalty. The plumbing, electrical, appliances, etc. can all be upgraded as needed to make the home more marketable/habitable. The home can be deeded to the child without penalty under the Medicaid rules after the child has lived in the home for the required period and performed the required services. The child will receive mom's basis in the home until the child lives there for two more years when it becomes the child's principal residence, even if mom continues to live in the home.

You also explain mom can give the home without penalty to a spouse, a minor or disabled child, or blind child. These situations occur infrequently.

Use of Personal Service Agreements. The home presents an interesting planning option for PSA. The son may live with mom and perform services. Mom could pay the

son periodically by deeding a portion of the home to son. A home equity loan could be set up to pay the income taxes mom and son incur. Mom and son could own the home periodically by different percentages as joint tenants with rights of survivorship.

Should mom need to enter the nursing home, the portion transferred to son for fair market value for his services is protected. The home is also not available to mom under the provision of ICES Section 2605.10.05 if son refuses to sell his interest in the home. The interest in the home owned by mom may be subject to Medicaid estate recovery during the nine month period following mom's death.