

# THE BEGLEY LAWYER ALERT

***Begley, Begley &  
Bookbinder, PC***  
ATTORNEYS AT LAW  
COMMITTED TO EXCELLENCE  
Specializing in Elder & Disability Law

September 26, 2008

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## ***MEDICAID PLANNING WITH CARE AGREEMENT*** ***By Thomas D. Begley, Jr., Esquire***

Care agreements are discussed in HCFA Transmittal 64.<sup>1</sup> The pertinent section reads in part: “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.”<sup>2</sup> The presumption is rebuttable. States may require that a payment arrangement had been agreed to in writing at the time services were provided. The three requirements for a valid care agreement are: (1) that the agreement be in writing, (2) that the payment be made for care delivered *after* the date of the agreement, and (3) that the compensation be reasonable.

### **Home Modification**

Often, children bring a parent into the home of the child until such time as the parent is ready to enter a nursing home. In many cases, the child must modify his home in order to make it adaptable to the needs of the frail parent. In drafting a care agreement, reimbursement for expenses made by the child to modify the home should be covered.

### **Home Maintenance**

Expenses in maintaining the home may also be included. Presumably, Medicaid will accept any reasonable formula. One formula would be to total the cost of operating the home, including real estate taxes, water, sewer, utilities, homeowner's insurance premium, condominium fees, and any other shelter-related expenses, and divide that total by the number of persons living in the home, including the client. Food, medical, and other expenses could be paid directly by the client.

### **Services**

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<sup>1</sup> HCFA Transmittal 64 §3258.1A.

<sup>2</sup> *Id.*

A child may provide care for a parent and charge for those services. For example, a potential Medicaid recipient is single and frail, but would be able to stay out of a nursing home with assistance. His son agrees to move him into the son's home and care for him. The level of care will be similar to that provided by an assisted living facility. Therefore, the potential Medicaid applicant may pay the son a reasonable amount for care (i.e., \$3,000 per month). To avoid violating the "pig principle," pay the child 80% of what a third party would charge for the service being rendered. A portion of the payment is for care; a portion is for rent. Other services might be less intense, such as driving a parent to doctor's visits, doing laundry, maintaining a checkbook, etc. It may be more appropriate to charge hourly for this type of service.

The contract should clearly spell out the types of services to be rendered by the caregiver child. These services typically include the following:

- Transportation
- Shopping
- Laundry
- Checkbook
- Insurance
- Medications
- Health Assessment
- Secure Health Care
- Monitoring Health Care
- Personal Needs
- Entertainment
- Personal Shopping
- Taxes

## **Living Arrangements**

There are five circumstances under which a care agreement might be appropriate. One is where the child cares for the parent in the child's home. Another is where the child cares for the parent in the parent's home. And a third is where the child provides care to the parent although each live in separate homes. The fourth situation is where the child coordinates care provided by third parties. A fifth situation would be where a child provides services for a parent already residing in a facility to supplement the services provided by the facility. These might include management of a checking account, transportation to doctors, laundry and other services. The care agreement must be carefully drafted to reflect the actual situation.

The Missouri Court of Appeals upheld a care agreement for care provided after the Medicaid recipient had entered the nursing home. On July 25, 2003, Eileen Reed entered a nursing home. In September, she signed a care agreement with her daughter, Sandra Teson, providing that Teson would prepare nutritious, appropriate meals; laundry; assistance with grooming, bathing, dressing, and personal shopping, including the purchase of clothing, toiletries, and other personal items; assistance with purchasing goods for Reed's use and enjoyment; monitoring Reed's physical and mental condition and nutritional needs in cooperation with health care providers; arranging for transportation to health care providers and to physicians of Reed's choice, as well as arranging for assessment, services, and treatment by appropriate health care providers for Reed; assisting Reed in following the instructions and directives of Reed's health care providers; arranging for social services by Social Service personnel; visiting at least weekly and encouraging social interaction;

arranging for outings and walks, if reasonable and feasible for Reed; and interacting with and/or assisting any agent of Reed in interacting with health professionals, long-term care facility administrators, Social Service personnel, insurance companies, and government workers in order to safeguard Reed's rights, beneficiaries, and resources as needed. The court held that an \$11,000 payment to Reed was in exchange for a binding and enforceable personal services contract and was fair and valuable consideration. Essentially, the contract provided that Teson would provide a communication link between Reed and her doctors and nurses regarding the status of her health, as well as interact with facility personnel to safeguard Reed's rights and benefits. These services supported Reed's independence, autonomy, well-being, and care and enhanced her life in ways that the facility did not and was above and beyond the care provided by the facility.<sup>3</sup>

A Louisiana court also upheld a care agreement. In that case, Louise Carpenter moved in with her daughter in 1989. She moved to a nursing home on February 5, 2004. Mrs. Carpenter transferred \$29,339.68, the balance of her Legg Mason brokerage account to her daughter at a point in time close to her entering the nursing home instead of when she moved in with her daughter. They claimed that the \$29,339.68 was in consideration for the care she provided for 15 years. The Administrative Law Judge doubted the credibility as to the reasons why Mrs. Bergeron did not accept payment until after her mother entered the nursing home. The court held that agreement to be valid and compensation to be reasonable.<sup>4</sup>

## **Life Care Contract**

It may be possible for a parent to transfer his assets to a child in exchange for lifetime care by the child for the parent.<sup>5</sup> One alternative would be to take the position that, at the time the contract was entered into, the parties had no idea as to the length of time for which the child would care for the parent and, therefore, the entire value of the assets transferred from the parent to the child would be “for value.” A more conservative approach would be to argue that the child is entitled to monthly compensation at a rate similar to that charged by an assisted living facility in the area. The assets would be transferred from the parent to the child, and the child would earn those assets in accordance with the monthly rate established in the care agreement. The rate must be reasonable. If the parent entered a nursing home prematurely, the child would retransfer any excess assets to the parent.

## **Taxable Income/FICA/FUTA**

Payments from the parent to the caregiver child are taxable income to the child and, depending on whether the child is an employee or an independent contractor, would be subject to withholding for FICA and FUTA or subject to payment of self-employment tax. If the parent is being cared for in the child's home, the agreement may provide that the parent pay a pro rata share of expenses attended to operating the home, such as real estate taxes, insurance, utilities, etc. It could be argued that these are simply reimbursement of expenses and not taxable income.

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<sup>3</sup> Reed v. Mo. Dep't of Soc. Servs., Missouri Court of Appeals, Eastern District, Case No. ED87348 (Jun. 20, 2006).

<sup>4</sup> Carpenter v. La. Dep't of Health & Hosp., Louisiana Court of Appeal, 2005 CA 1904, (Sept. 20, 2006).

<sup>5</sup> See Thomas v. Florida Dep't of Children & Families, 707 So.2d 954 (Fla. Dist. Ct. App. 1998).



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## Speakers

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## Begley, Begley & Bookbinder

Begley, Begley & Bookbinder, P.C. is an Elder & Disability Law Firm with offices in Moorestown, Stone Harbor and Lawrenceville, New Jersey and Huntington Valley, Pennsylvania and can be contacted at 800-533-7227. The firm services southern and central New Jersey and eastern Pennsylvania.

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