

ELDER LAW PLANNING
PROTECTING ASSETS BY PROVIDING CARE

The cost of assisted living, personal care, and indeed nursing home care continues to rise and, according to published reports, the rate of increase is higher than average inflationary levels.

In the legal practice of the Steckel and Stopp Law Firm, it is a regular occurrence for older individuals and their families to express strident concerns with respect to the cost of such care. Discussions on the subject generally then lead into what steps can be taken to assure appropriate care will be provided to the individual needing increased assistance and, at the same time, adopting strategies to protect hard earned family assets.

From a macro/more global point of view, the federal and state governments find themselves fiscally challenged by the potential costs of governmentally funded nursing home costs. The federal and the state government have created programs known as Medical Assistance or otherwise known as Medicaid, which covers the cost of basic skilled nursing home care for individuals whose income and/or asset situation is such as to qualify for governmentally assisted care.

Individuals who are concerned about the depletion of family assets for care costs, have, for years engaged in various strategies to attempt to preserve as many family assets as possible and to qualify for governmentally funded care. Individuals often attempt to avail themselves of available strategies to protect family assets; however, as more individuals avail themselves of available asset protection techniques, the more governmental resources become challenged which often leads to a governmental tightening of the available planning techniques. That circumstance has prevailed in the Medicaid/Medical Assistance arena for decades.

Rather recently, governmental regulations became further limited as to the type and breadth of asset protection strategies.

There remain a number of asset protection strategies that can be invoked for the benefit of the protection of family assets recognizing that each family's asset mix is unique just as each individual's potential need for care, both the length of care and the intensity of care, varies considerably.

This public interest article is to highlight an asset protection/care furnishing technique that is increasingly employed as one of several available techniques to protect and preserve family assets. The planning technique is generally referred to as "Family Care Agreements" or, otherwise as "Personal Service Contracts".

The planning technique is based upon the premise that while a person in need of care is restricted as to the type and manner of "transfers without fair consideration" (translation, gifts to family members), an individual requiring care, is certainly allowed to "purchase" care, typically in an institutional setting from a personal care home or a skilled nursing facility. Payments made to such facilities are viewed under the applicable regulations as "transfers for consideration", namely the individual requiring care is making a substantial transfer, in the form of a payment

which payment, however, is made for consideration as opposed to a gift which is made without the individual requiring care receiving consideration in return.

It is recognized that an individual requiring care (hereinafter I.R.C.) need not purchase care from an institutional provider but can purchase care from a variety of other providers who typically provide service in a desirable at home setting. Nearly universally, given a choice, I.R.C. express a desire to receive care in the individual's familiar and comfortable at home setting.

Conclusion – If an I.R.C. can “purchase” care from professional providers or institutions, is there anything which should prohibit such an I.R.C. from purchasing similar services from family members? The answer is no, there is nothing that prevents that from occurring however, the reviewing authorities are generally thought to have a tendency of examining those circumstances somewhat more carefully than when the I.R.C. employs the institutional technique or the professional caregiver technique.

Nevertheless, if approached properly, and if documented by an appropriate agreement, I.R.C. can in fact pay family members fair amounts relative to the level of care needed by the I.R.C.

The agreements are called Family Care Agreements or Personal Service Contracts. The general requirements require the agreement to be in writing, supported by a consideration, specific as to the purpose, inclusive as to all details, the consideration must be “fair” consideration, and the documents are required to be signed by the applicable parties.

Some of the items generally covered in Family Care Agreements provide for living space, use of common areas, the providing of meals, transportation for medical care, financial management, cleaning services, laundry and general transportation.

There are formulas that prevail to establish consideration to be paid within an acceptable “fair” consideration range. Agreements can call for periodic payments (preferred) or, lump sum, up front payments (which can be acceptable, but can be scrutinized more carefully). The care can be provided by one individual or a series of individuals so long as the circumstances relating to the payment and the care provided are fair and appropriate. As the costs an I.R.C. would likely be required to pay in an institutional setting are viewed by most to be on the higher cost end of the scale, payments made to family members at a level which is somewhat less than the comparable institutional costs, can hardly be viewed as excessive or inappropriate.

There are certainly a number of other details and circumstances that have to be considered in preparing a carefully drafted Family Care Agreement. The concept of a Family Care Agreement/Personal Service Contract is certainly an available technique which assists families dealing with the dilemma of needing increased care yet wanting to preserve family assets.

There are certainly other techniques which can be employed in correct circumstances. The purpose of this article is to inform the public of how the technique of a Family Care Agreement can be applied to address elder law planning goals of our aging population.

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