

—| *Spotlight* |—



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FINANCIAL ABUSE OF OUR AGING POPULATION

Part III

Editor's note: This article is Part III of a series of articles addressing the various facets of elder abuse as senior citizens have increasingly become targets of unscrupulous family, friends and scammers.

Working as a caregiver for a parent or loved one takes more than just time and energy. Caregivers must balance a career with taking care of their loved ones. Frequently, caregivers leave paid work to care for a parent, resulting in lost wages, social security and retirement contributions. Often times, the caregiver

is a nearby adult child, who is the care-giving relative by default. With the unwanted financial and psychological burdens, a child caregiver may feel justified taking money from a parent's account. There is no entitlement, however, for the caregiver to dip into Mom or Dad's bank account.

Entering into a caregiver contract (also called

personal service or personal care agreement) with family members is a good resolution to this problem. Having such a contract has many benefits. It rewards the family member doing the work, it can help alleviate tension between family members by making sure the work is fairly compensated, and it can be a key component of long-term planning for Medicaid eligibility by helping to spend down savings, if necessary.

U.S. Department of Health and Human Services projections estimate that 70 percent of Americans who reach age 65 will need some form of long-term care in their lives for an average of three years.¹ Forty-eight percent of surveyed Americans aged 40 years and over believe that just about everyone will require long-term care at some point as they grow older, even if they do not become seriously ill.² Even with this widespread concern about aging, most Americans have not translated those worries into effective planning strategies.

Ideally, a family meeting including adult children and their elderly parents(s) should take place to determine who will look after him or her physically and financially. Family members need to ensure that estate planning documents such as a durable power of attorney, patient advocate designation, will, and possibly a trust are in place, prior to infirmity or incapacity. Additionally, a financial analysis needs to be made including a comprehensive review of all income, expenses and investments. After meeting with an estate planning or elder law attorney and financial advisor and determining the level of care needed, a plan can be put in place.

Interestingly, although concern over the need for long-term care has increased, less than 25 percent of people surveyed correctly estimated the costs to live in a nursing home.³ The average monthly cost of a semi-private room in a nursing home in Michigan is \$7,315.00, while the average monthly cost of assisted living in Michigan is \$3,200.00.⁴ The misperception of the cost of long-term care and the sometimes limited role of Medicaid and Medicare paying for care can devastate a family's financial security.

Generally, Medicare only pays for medically necessary care in a skilled nursing facility or through home health care under very limited circumstances and for relatively brief periods of time. Medicare does not pay for the more common

¹ U.S. Department of Health & Human Services. *National Clearinghouse for Long-Term Care Information*. http://www.longtermcare.gov/LTC/Main_Site/index.aspx accessed April 10, 2012. ² *Survey The Associated Press-NORC Center for Public Affairs Research Long-term Care: Perceptions, Experiences, and Attitudes among Americans 40 or Older*, April 2013. ³ *Stet*. ⁴ *Genworth Financial Inc. Long Term Care Costs 2014* <https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/Michigan-040114.pdf> ⁵ A divestment is a transfer of a resource that is for less than fair market value within the 5 year look back period and is not listed under BEM 405.

types of long-term care services, like daily living assistance. Medicaid, however, furnishes medical assistance for long-term care needs to eligible individuals. Caregiver contracts are crucial to someone who may need to apply for Medicaid in the future, because payments to a caregiver are highly scrutinized by the state for divestments.⁵

Caregiver contracts can be a valuable tool in spending down a family member's estate, so that the elder might more easily be able to qualify for Medicaid long-term care coverage. Additionally, caregiver contracts can help establish a veteran's eligibility for certain federal benefits. However, strict formalities must be met to qualify for Medicaid and veteran's benefits. An elder law attorney may assist in drafting a caregiver contract, but generally the following guidelines should be followed.

- ♦ Services must be performed after a written legal agreement has been signed, dated and notarized. The length of the term of the contract is usually for the elder's lifetime, but should contain language that it can be terminated in writing by either party. The written agreement can help manage expectations, avoid miscommunications and facilitate communication with all family members. If the agreement does not address a particular issue that causes concern with family members, the agreement's terms may be modified to address the problem.
- ♦ Payment to the caregiver should be made in advance of the service and weekly payments are best. A lump sum payment for past services will likely be viewed as a divestment. Also, for Medicaid purposes, it is very important that the pay not be excessive as excessive pay could be viewed as a gift. The pay should be similar to what other caregivers in the area are making. If the elder does not have enough money to pay his or her caregiver, there may be other sources of payment. For example, a long-term care insurance policy may cover family caregivers.
- ♦ Specify the services rendered. The services can be for grocery shopping, paying bills, driving to doctor's appointments, and other services. A caregiver will make sure the floors are clear, bed is made, dishes are clean and put away and medications taken. But also very important to keep in mind is that there may be times when the only person a housebound individual may see is the caregiver. Social interaction is extremely important to people of all ages with physical and mental conditions and especially to those individuals who realize that they are

approaching end of life. The services specified in the caregiver agreement, however, can not include companionship services.

- ♦ Keep in mind that there are tax consequences, which can be tricky. Most obvious is that the caregiver will have to pay taxes on the income he or she receives. What is not so obvious is that a person hiring a caregiver (whether it is a family member, friend or trustee who pays the caregiver from a special needs trust) must exercise care in the hiring and paying of the caregiver. Besides the practical considerations such as the caregiver's competency and criminal background, the classification of the caregiver as an employee or an independent contractor for income tax purposes is very important. The classification as an independent contractor or employee affects how the federal income tax, Social Security, and Medicare taxes are paid. Additionally, the classification affects how she will pay her taxes and determines the worker's eligibility for employer Social Security contributions and Medicare benefits. If the caregiver is classified as an employee, then the employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay state and federal unemployment taxes on the wages paid to the caregiver.

Furthermore, anyone who accepts the responsibilities of a caregiver must also understand that there are a number of legal duties and liabilities that come with it. Michigan has passed elder abuse laws. Caregivers are bound by these laws in that they are not to abuse the elderly person (physically, mentally or monetarily) and must report any incidents of abuse or suspected abuse. Additionally, if the care giver is in charge of the elderly person's finances, money must be used to purchase necessary services for the benefit of the person to whom care is given. Failure to provide care, to get care, and to purchase care are all forms of abuse or neglect.

Finally, the welfare of the elderly family member depends on the caregiver. The role of caregiver is very demanding and includes many personal and legal responsibilities. It is important to maintain good communication with all family members and to work with an attorney who is knowledgeable and experienced in focusing on the needs of seniors. ●

For further information on this important issue or to schedule an appointment, please contact the Morello Law Group at 734-281-6464 or george.fekaris@morellolawgroup.com