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## MEDICAID PLANNING WITH CARE AGREEMENTS - UPDATE

BY  
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The April 11, 2003, issue of the *Elder Law News* discussed Medicaid planning with care agreements. The Circuit Court of Spotsylvania County, Virginia, recently rendered an opinion regarding a transfer of the parents' home to their daughter pursuant to a 1997 oral care "agreement" that was reduced to writing in 2003. The case is *Moss v. Lemoine, Director*, (No. CH03-776, July 29, 2004). In this case, the elderly couple transferred their home to their daughter in August 2002 in exchange for the daughter agreeing to provide care to the parents. The elderly couple's daughter provided documentation that she had spent \$32,308.25 on behalf of her parents. The administrative hearing officer held that the couple was ineligible for Medicaid long-term care benefits because the asset transfer was an uncompensated transfer. The hearing officer said that the 1997 "agreement" was not valid because it violated the Statute of Frauds, and because it did not show that adequate compensation was provided in exchange for the asset transfer. The hearing officer also found that the asset transfer was not exclusively for purposes other than Medicaid long-term care eligibility. The circuit court affirmed the agency's decision and specifically said with regard to the funds the daughter spent for the benefit of her parents:

Proof that a child has spent money for her parents is not necessarily proof that she did so pursuant to an agreement. Many children spend money on their parents without being beholden to do so by a binding agreement.

The court was not unsympathetic to the family's plight, however, as revealed in the opinion's final paragraph:

The court reaches this conclusion reluctantly. It is impossible not to be sympathetic toward petitioners. There would seem to be few citizens more worthy of public assistance than this elderly, underprivileged couple. Perhaps the Medicaid “uncompensated transfer” rules are too harsh, but that is beyond the province of this court. Perhaps other safety valves should be established because, as the hearing officer correctly found, the “Hardship” exception does not apply in this case because the transferred property is recoverable. But that, too, is beyond the province of this court.

Although this opinion is not binding on other courts, it does illustrate the need for timely and properly written care agreements in order to comply with the Medicaid transfer rules. The transfer of a Medicaid applicant’s resources within the applicable lookback period (generally 36 months before the application, unless a trust is involved in the transfer) for less than fair market value may result in period of ineligibility for Medicaid long-term care services. The penalty period is determined by dividing the value of the gift by the average nursing home expense (currently \$4060 per month, and \$5,403 per month for certain areas in Northern Virginia) and rounding down to the nearest whole number. The result is the number of months of ineligibility. The period of ineligibility begins on the first day of the month in which the gift is made, unless there are overlapping periods of ineligibility due to multiple gifts. (M1470.702)

The State Medicaid Manual developed by the federal Center for Medicare and Medicaid Services defines a transfer for fair market value as follows:

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, CMS 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. (M1450.003(D))

CMS State Medicaid Manual § 3258.1: [www.cms.gov/manuals/pub45/pub\\_45.asp](http://www.cms.gov/manuals/pub45/pub_45.asp).

Frequently a Medicaid asset protection plan will include transfers to a family member for services or assistance provided to the applicant. The State Medicaid Manual clearly provides that the state may require that an arrangement with a family member for payment for services must be in writing at the time the services are provided. Therefore, services provided without a contemporaneous or prior written agreement will not support a payment by the applicant, as the recent Spotsylvania County Circuit Court opinion illustrates.

Oast & Hook recommends that Medicaid asset protect plans include Family Care Agreements. These agreements are between the parent and the child(ren) or grandchild(ren). The parent agrees to pay the child or grandchild for services provided. The agreement should include a description of the services to be provided and the compensation to be paid. In addition to services that are known to be needed by the parent, we frequently recommend the inclusion of a broad description of potentially required services. This broad

description could be care management or care coordination. Generally, Oast & Hook recommends payment for services based on an hourly billing rate and the time required to provide the services. In these cases, we recommend that the child or grandchild maintain detailed and accurate records concerning the date, description and time required for the provision of services. In some cases, however, we recommend a flat monthly charge or a prepayment for services based on the parent's projected needs. The compensation paid the child or grandchild is taxable income for income tax purposes to the child or grandchild and should be reported on his or her income tax return.

In addition to Family Care Agreements, Oast & Hook frequently recommends the inclusion of a provision in durable powers of attorney that the parent will compensate his or her agent for services rendered by the agent. With these agreements, the parent may pay significant amounts to his or her child(ren) or grandchild(ren) without incurring a period of ineligibility for Medicaid long-term care services.

Oast & Hook is experienced in assisting clients in qualifying for Medicaid long-term care services while protecting their life savings. Please contact us if you need assistance with the preparation of a Medicaid asset protection plan, including a Family Care Agreement.

### **Oast & Hook**

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