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Legal Matters®

Elder Law
summer 2015

If you pay relatives to provide care, you might want to have a contract

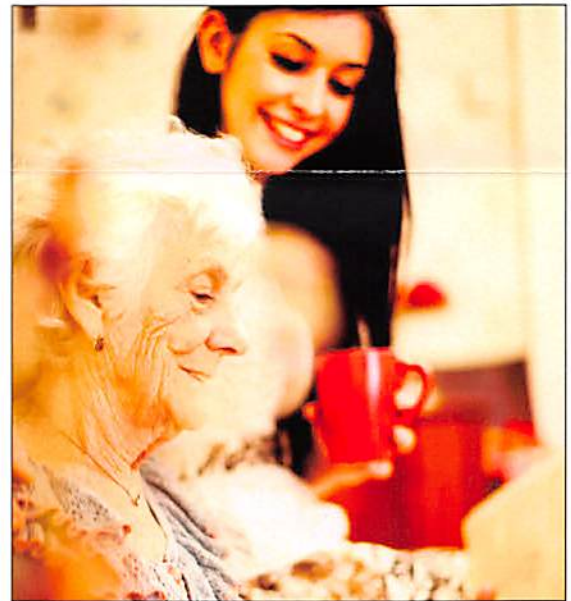
A growing number of seniors are providing a salary or other form of reimbursement to their family members who provide them with personal care. If you're thinking of doing so, it can be a very good idea to draw up a written contract. This can make it easier to qualify for Medicaid, and can help a family in other ways as well.

It might seem odd to sign a contract with your family. Many children feel awkward about asking for compensation, and many parents assume that the children should help them solely out of love. However, children often devote enormous time and resources to caring for an aging relative, and it's not unreasonable for them to be compensated in some way. And if there are several siblings and one is more involved in providing care than the others, a contract can be a good way to reward the child who is doing the work without having to divide family assets unequally in a will.

Here's a good example of how a written contract can be helpful: Widley David entered a Louisiana nursing home in 2008. Over the next two years, he wrote six checks totaling about \$50,000 to his nephew and his nephew's wife, who were his closest living relatives. Widley said the checks were to reimburse the couple for the care they provided him in the nursing home.

The couple visited Widley every day, drove him to appointments, paid bills, and provided other services. The nephew even quit his job so that he could devote himself to Widley's care.

After two years, Widley applied for Medicaid. But the state Medicaid officials found out about the checks, and said they were an improper attempt to reduce Widley's assets so he could qualify for benefits.



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According to the state officials, if Widley had signed a contract saying the payments were for personal care, that would have been fine. But since there was no written contract, there was no proof that Widley "owed" the

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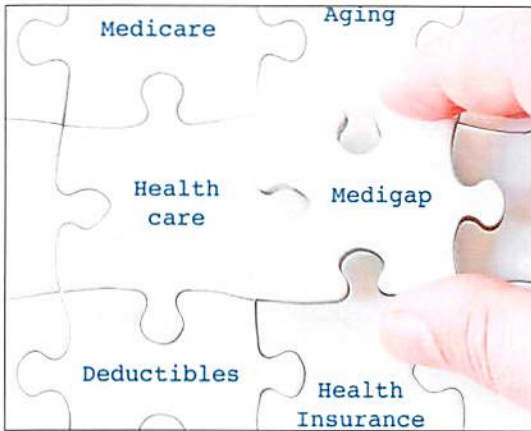
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Congress limits insurance for Medicare deductibles

Medicare beneficiaries often buy “Medigap” insurance policies that pay for many of regular Medicare’s deductibles and copayments.



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But as a result of a new law passed by Congress, starting in 2020 Medigap plans will no longer be allowed to offer coverage of the Medicare Part B deductible, which is currently \$147.

However, current Medigap policyholders and those buying policies before 2020 will still be eligible for the deductible coverage after that date,

so this is something to keep in mind.

The idea behind making Medicare beneficiaries pay the deductible themselves is that it will cause

them to think twice before going to a doctor – which might result in Medicare making unnecessary payments.

But critics of the law argue that if the change prompts beneficiaries to forego needed medical care, they might well require more expensive care later, which would cost Medicare more in the long run.

The change might encourage more seniors to join Medicare Advantage plans, which will still be able to cover the deductible.

In addition to the Medigap change, the new law will make affluent seniors pay higher Part B premiums. Starting in 2018, individuals with incomes between \$133,500 and \$214,000 (and couples with incomes between \$167,000 and \$428,000) will pay more. And the regular Part B premium will rise faster than it would have otherwise.

If you pay relatives to provide care, you might want a contract

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money, and therefore the checks were treated as a gift.

As a result, Widley was disqualified from Medicaid for nearly 15 months, during which time he had to pay out-of-pocket for his nursing home care.

Widley took the case to court, but the Louisiana Court of Appeals sided with the state. It said that while Widley might have intended the checks as a form of compensation, a “personal care agreement

was necessary to validate this alleged arrangement.”

Otherwise, without a contract, Widley lost.

Not only are personal care contracts helpful with Medicaid, but they can also smooth over issues between siblings if one is more involved in handling a relative’s care than others. It’s not uncommon, for instance, for a sibling who lives at a distance to suspect

that a caregiver sibling is mismanaging the senior’s affairs, taking advantage of the senior’s generosity, or being overcompensated in the senior’s estate plan. Putting everything in a contract creates transparency and can prevent such disputes.

It’s important to work with an attorney to draw up a personal care contract, to make sure it will pass muster with Medicaid or other agencies.

A good contract should specify what kinds of services the younger family member will perform – preparing meals, bathing, shopping, travel to appointments, paying bills, and so on – as well as roughly how many hours per week will be devoted to care.

A provider can be fairly compensated, but you should be careful not to pay too much, or the government might claim that the payments are really a disguised gift. A good rule of thumb is to pay an hourly rate roughly comparable to what a home health care aide would receive in the area.

Some people have offered to pay a child for a lifetime of care with a single lump sum. While this might work, and it quickly reduces assets for Medicaid purposes, it’s more likely to raise red flags with the state.

Ideally, the caregiver should pay Social Security, Medicare and other employment taxes, just like any other household employer. And if you want to make sure the arrangement isn’t challenged, it’s a good idea to keep a diary of services provided, and even have a geriatric care manager come in occasionally to verify that the senior is receiving the care set out in the contract.



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Patients may get more access to experimental treatments

Before it approves a medicine for human use, the federal Food and Drug Administration requires rigorous clinical trials to ensure that it is safe and effective. These clinical trials can take many years. But what about people who have life-threatening illnesses now, and who might benefit from an experimental treatment that is still a long way from approval?

Currently, such patients have two options. One is to enter one of the clinical trials, but this is often impossible due to the patient's geographic location or stage of illness.

The second option is to apply under the FDA's "expanded access" program. These requests are almost always granted; between 2010 and 2014, only 33 of 5,849 patients were turned down. The

problem is that the application process is burdensome and discouraging – the application alone can require more than 100 hours to complete.

Recently, five states have passed laws to give terminally ill patients greater access to experimental

drugs, and 25 more are considering such legislation. (The states that have passed the laws are Arizona, Colorado, Louisiana, Michigan, and Missouri.)

These laws might well be unconstitutional, because states can't pass laws that directly contradict federal laws. In addition, manufacturers are not allowed to ship an experimental drug across state lines without the FDA's approval. And health insurers are not required to pay for experimental treatments, which can often be prohibitively expensive.

However, the state laws have called attention to the issue, and other help might be on the way. The FDA recently announced that it would introduce a new

application form for its expanded access program, which it estimates can be completed in just 45 minutes. And a bill now in Congress, H.R. 5805, is aimed at improving the expanded access program in other ways.

It's not easy for people with a terminal illness to get access to experimental drugs and procedures – the Food and Drug Administration's application alone can take more than 100 hours to complete. However, help may soon be on the way.



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Another 'do-it-yourself' will leads to an unfortunate result

Here's yet another example of how people who try to create their own wills, using a form taken from a book or the Internet, often shoot themselves in the foot.

George Zeevering of Pennsylvania wanted his estate to go to two of his five children. He wrote a "do-it-yourself" will in which he left his pickup truck to his daughter Diane and his summer home to his son Wayne. He also stated that he was intentionally leaving his other three children out of the will.

The problem? The will never specifically stated what would happen to the rest of his property other than the truck and the summer home. While George

presumably wanted it to be divided between Diane and Wayne, he never spelled this out.

The rest of the property was worth \$217,000, and the children all went to court to argue about it. A judge eventually ruled that under Pennsylvania law, the \$217,000 had to be divided equally among all five children – even though George had deliberately tried to cut the other three children out of the will.

If George had consulted an attorney about his estate plan, he'd have gotten the result he wanted, and he would also have spent far less than his children ended up spending trying (and failing) to untangle his mistakes.

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Here's what you need to know about holding an estate sale

We accumulate a lot of things over a lifetime, and at some point – often because of the death of a loved one, or because a senior is downsizing and moving – we need to get rid of some or all of them. An estate sale is one way to dispose of possessions that you no longer want or need.

There are many companies that help families to sell furniture, jewelry, and other belongings. An estate sale company will take care of the entire process in exchange for a percentage of the proceeds – usually from 25 to 50 percent. The company will handle sorting the goods, staging the house, setting prices, promoting the sale, and hiring workers. There may be a separate fee for cleaning up. Goods that aren't sold are usually donated to charity.

To get ready for an estate sale, the first step is to ensure that you have the legal right to sell the property. There can't be any unresolved estate issues, and estate sale companies may request legal documentation showing that you have the

right to dispose of the goods.

There is no regulatory body that oversees the roughly 14,000 estate sale companies in the U.S., so before you hire one of them, you should do some research. You can search the website of the American Society of Estate Liquidators, a trade association that requires its members to meet certain education requirements and abide by an ethics code. You can also check with your local Better Business Bureau, ask for references, or attend a sale run by the company.

Estate sale companies should provide you with a written contract, and should carry insurance in case there are any accidents while buyers are at the sale. Among the questions you'll probably want to ask are how the company handles security, what happens to goods that aren't sold,



photoillustration

and what type of clean-up is included.

Many companies don't want families to be present while the sale is going on, because family members can become emotional during the process.

Make sure you remove anything you want to keep for yourself before the sale starts. And don't throw away too much in advance – remember, one person's idea of trash might be another person's treasure.