

Caregiver Contracts

by Attorney Michael Hooker

September 11, 2016

Anyone who keeps abreast of the news can see that our federal government spends far more money than it earns in taxes and other sources. Many states have similar problems, including the inability to continue to pay for government employee pensions and health care benefits, for example, in Wisconsin. At the risk of sounding like Chicken Little, it is apparent that the post-war honeymoon is over in America. The sky is falling. We are broke. What does that spell for Medicare, Social Security, Medicaid and other programs? Bad news.

In 2006 the federal government tightened the rules about elders transferring assets and then trying to be eligible for nursing home or community Medicaid (also known as MassHealth). At that time it increased the so-called “look-back period” from 3 years to 5. Though I am not a soothsayer, it would seem to me that at some point they will increase it to 10 years. Some legislators and taxpayer advocacy groups have made it clear that if an elder has money, then that elder needs to plan for his or her care needs as they age, rather than expect the taxpayer to foot the bill after you have taken your name off of your CD’s or house.

The question then becomes, if you can’t give your money away, can you spend it on your daughter in law to care for you in the home? Maybe. If you later need nursing home care and seek Medicaid, that agency will take a very close look at what you have paid your caregiver and may very well deny eligibility. It certainly will deny eligibility for expenses paid for past care, or for future care. For example, transferring the house to your child with the promise from him or her that they will care for you for the rest of your life. If you have a stroke six months after the transfer and need long term nursing home care, I will bet the farm you will not get on Medicaid.

My colleagues in elder law throughout Massachusetts have seen care contracts time and again disallowed by Medicaid. MassHealth essentially views them as disguised gifting. The best way to defend them is to have the following in place:

- 1) a written contract for services as you go along
- 2) a clear understanding of the services to be provided
- 3) an hourly rate that is consistent with what local agencies charge
- 4) proof from your physician that you needed such care
- 5) documentation of hours spent by the caregiver.

Is it necessary to treat the caregiver as an employee and withhold taxes, pay into workmen’s compensation and unemployment? It does seem ridiculous but that is the safest course. But who wants to go through all that nonsense? Not average Joe. At the very least, what you want to do is pay the caregiver as you go along in life. Don’t wait until you need MassHealth and expect to be able to transfer large money retroactively for past care. It won’t work.