THE PERSONAL SERVICE CONTRACT

The personal service contract is a legally binding and enforceable agreement between the elder and a trusted care provider. The elder, through a personal service contract, would actually hire an individual, such as their child or a trusted friend, to become the elder's caregiver. While we know that most of our clients' children are not charging their parents for such services, there is no legal obligation for them to provide care. As a result, the law places real value on these services and we are able to charge and transfer a calculated sum of money from the elder to the provider for fair market value. Since it is a "fair market value" transaction, the government cannot count it as a gift and since the applicant ultimately has no right or access to the money, the transferred funds are not counted as an "asset" for eligibility purposes.

Unfortunately, the contract cannot apply to services already rendered, it only works prospectively.

When funds are transferred from the elder to a trusted care provider, the money will be out of the elder's name and into the provider's. This creates certain results, including: (1) the elder now has the guarantee of lifetime care; (2) if the elder applies for Medicaid, the assets will not be counted by Medicaid; (3) the money will be entirely out of the elder's name and in the provider's; (4) if the provider is sued, goes bankrupt, or begins to have other financial difficulties, the money could be subject to the provider's creditor claims; (5) if the Provider (or sometimes certain of the providers family members) are receiving or will be applying for any benefit which is based on financial need, receipt of this income may impact eligibility for such aid (e.g. scholarships, early retirement, SSI); and (6) the receipt of this money by the provider may be considered taxable income.

The taxable income issue is often the biggest concern in this transaction. Elder Needs Law, PLLC. is not an accounting firm and we are not tax lawyers. While we believe we are very good at what we do, we know there are people who specialize in the nuances of ever-changing tax laws. We are not qualified to render tax advice and because the personal service contract is a nuanced and complicated transaction, we have heard different views over the years. Tax laws are often not black and white and the taxpayer should therefore consult with his or her own tax advisor, based on his or her own overall circumstances, in order to assess the tax consequences.

We can however, delay any tax-impact by putting the lump-sum payment in an annuity to pay the caregiver over a period of years (thereby spreading out the income tax consequence over a period of years). Some of these annuities are free. Please let us know if this is of interest to you.

The method of paying for care under the Personal Service Contract can be tailored to different situations, but we most often design the contract to be "payable on demand." This method allows for the care provider's payment as and when it makes sense to do so. This allows for flexibility in planning where payment can be made over time, in one lump-sum or when it is advisable to create a legal debt.

We usually use this method of payment in our Medicaid Planning, because, in addition to other reasons, we want our clients to retain dignity, independence and control of their assets. Using the "payable on demand" method allows the elder to retain full control of his or her assets (subject to the demand for payment) right up to the point where the assets are transferred. From a Medicaid standpoint, the assets do not need to be transferred until right before applying for Medicaid. This means that the elder can retain full control right up until the eve of Medicaid application (subject to the demand for payment), often when the person is too ill to manage finances anyway.

<u>The Care Provider Must Keep Track of Their Time</u>

It will be your provider's responsibility to provide services to you on an "as needed" basis and to track the services that they provide. **<u>DCF will ask for timesheets to prove that the services are actually being rendered</u>**. Therefore, your care provider should maintain all records of the time they spend doing things relating to your care. If the personal service contract says that a provider, on average, puts in 25 hours a week toward the medicaid-recipient's care, the timelog should reflect approximately 25 hours per week (some weeks might be more, some weeks might be less). Time can be tracked as a type of "log" or "diary" and should contain the date, amount of time, and a short description of the service performed. This way, in the event the Department conducts an audit of this contract your providers will be able to demonstrate that they provided the services that you paid them to do – even if the Personal Services Contract is payable on demand via a lump sum.

The Personal Service Contract drafted by the firm is a detailed agreement which lays out not only the services to be provided but limitations on the responsibility and liability of the care provider and a formula for determining the "fair market value" of the transaction. Personal Service Contracts differ from client to client and yours is drafted particular to your goals and circumstances. We use personal service contracts in different ways for different people. For example, sometimes there is one provider, sometimes there are multiple providers, sometimes there is a corporate provider. Sometimes a payment arrangement could be made with an escrow agent.

<u>Who Should **NOT** be a Caregiver Under a Personal Services Contract?</u>

- Caregivers who, themselves, receive Medicaid or other needs-based government benefits may not want to receive money as part of a personal-service contract as it may put their own benefits at risk.

- Caregivers who receive SSDI will need to consult with their disability attorney before accepting this paid caregiving role.

A personal service contract is not a simple transaction. Especially when done with an eye toward preserving eligibility for Medicaid, the Personal Service Contract is a complex agreement based on state and federal rules and laws, all of which change from time to time.