

NATIONAL
HOME OF YOUR OWN
ALLIANCE

*A REPORT ON
LEGAL AND FINANCIAL PLANNING ISSUES
IN THE
HOME OF YOUR OWN PROJECT*

State Policy Review and Recommendations

Prepared on behalf of:

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IMPORTANT NOTE

FEDERAL LAWS AND REGULATIONS ARE CHANGING RAPIDLY. SIMILARLY, THE COURTS OFFER DIFFERENT INTERPRETATIONS OF THE REGULATIONS AND LAWS DISCUSSED IN THIS REPORT. ACCORDINGLY, AGENCIES AND INDIVIDUALS SHOULD CONSULT WITH LOCAL COUNSEL BEFORE RELYING ON THE OPINIONS AND STRATEGIES OFFERED IN THIS REPORT.



INTRODUCTION

As states move from a residential support model focused on a “provider” or “agency”, to options where an individual leases or owns his own home, significant legal and financial planning issues have emerged involving state and federal employment laws, IRS regulations and Medicaid eligibility.

This report will address some of the pitfalls that policy makers, providers of service, individuals with disabilities and their families may encounter.

I. PRESERVING ELIGIBILITY FOR AND MAXIMIZING THE USE OF MEDICAID BENEFITS

Medicaid participation is crucial for two reasons:

First - Medicaid is a comprehensive health insurance program which provides substantial in-patient and out-patient benefits for people with disabilities.

Second - The Medicaid “community care waiver” program can pay for a variety of services, including case management, home health aides, personal care, adult day care and habilitation services and respite care “which are cost-effective and necessary to avoid institutionalization.”

In many states the annual value of a community care waiver “slot” can range from \$30,000 to \$75,000 (or more), depending on the nature of one’s disability and the degree of community support required. This goes a long way towards paying for companions, up-keep on a home, education and vocational pursuits.

A. Resource and Income Limitations

One obstacle is that an individual on Medicaid cannot have “countable resources” or income above certain amounts established by the state and Federal governments. Although the rules may vary from state to state, in general, the liquid resource limitation (e.g. cash, annuities, bank accounts) is between \$1,500 and \$2,500, while monthly income typically cannot exceed \$500.00.

Certain resources, however, are not counted in determining eligibility for medical assistance or the community care waiver. An automobile (or van), personal property and furniture, burial plot or funeral plan are all exempt up to a certain value. Most important, a primary residence (i.e. home), regardless of the value, is exempt.

Thus, home ownership presents a unique opportunity for individuals with a disabilities to secure more independence and control, shelter resources and build up equity.

B. The Value of Trusts

Through the creative use of “special needs” trusts, individuals with disabilities and their families can also set aside funds for supplemental rehabilitation and education, home repairs and maintenance and other needs not covered by governmental benefits, while still preserving eligibility for medical assistance and community care waiver funds. Until recently, this estate planning tool had been largely reserved for the wealthy and upper middle class who sought to minimize Federal estate taxes and avoid nursing home impoverishment. For persons with disabilities, trusts are a particularly effective method of protecting inheritances, retroactive disability or personal injury awards or other financial “windfalls”. See generally, 42 U.S.C. Sec. 1396 p(d)(4)(1993).

The establishment of a special needs trust should be done by a lawyer who has some experience with estate planning for the elderly or persons with disabilities. The trust can be established as part of a will (called a testamentary trust), or while the grantor is alive, in which case it is called an *inter vivos* or “living trust”. A testamentary trust is typically set up by parents or grandparents to take effect upon their deaths for the benefit of a child or grandchild with a disability. An inter vivos trust can be set up and funded immediately.

In the case of either a testamentary or living trust the Grantor will nominate a “trustee” who will manage the “trust or estate” for the “beneficiary” (person with a disability). Unlike a typical support or discretionary trust, the special needs trust limits the trustee’s powers so that the assets of the trust are used to “supplement”, rather than replace, governmental assistance such as SSI and Medicaid. For example, trust assets can not be used for the beneficiary’s primary means of support (i.e. room and board) unless governmental assistance is not available. However, the trustee can use trust assets for supplemental education and rehabilitation services not covered by Medicaid, so-called “luxury” items like televisions and vacations, as well as certain “noncountable” resources, such as the purchase of a home or car.

Because of changes in Federal law which went into effect on October 1, 1993 (OBRA '93), special rules apply when establishing inter vivos trusts with funds of or for a person with a disability. The 1993 amendments to the Federal Medicaid law actually expanded the use of trusts to protect excess resources for Medicaid recipients.

By way of illustration, assume that a fifty (50) year- old individual with mental retardation lives in a home supported under the community care (Medicaid) waiver program and suddenly receives a \$25,000 inheritance from a relative. Without a trust into which this inheritance can be placed, the individual could lose Medicaid and SSI until a "spend down" brings the amount down to \$2,500 or less.

Under OBRA '93, however, a trust can be used to protect the \$25,000 inheritance while maintaining Medicaid eligibility, providing:

1. It is established by a parent, grandparent or legal guardian of the person with a disability;
2. the beneficiary (person with a disability) is under the age of 65; and
3. the trust provides that upon the death of the beneficiary the state will receive all amounts remaining in the trust up to the total Medicaid assistance paid on behalf of the beneficiary.

With this special needs trust in place all of the \$25,000 inheritance (or other windfall) can be protected during the beneficiary's lifetime to be used for a variety of purposes, including the purchase of or downpayment on a home.

C. Medicaid "Liens" and Recoupment of Benefits

The issue of liens for benefits provided by the state or Federal government is complicated and often misunderstood. In general, a state may place a "lien" on a recipient's home for public assistance provided during the recipient's lifetime. In fact, the Federal government requires that states have in place a procedure by which the state can recoup its contribution to medical assistance paid under Medicaid from the recipient's estate. Likewise, most states require recovery of APTD (Aid to the Permanently Disabled), State SSI supplement and OA (Old Age assistance) benefits. Some states, like New Hampshire, even recoup for state institutional care, such as confinement to a state hospital or "developmental" center.

For parents or relatives interested in assisting with a downpayment for a home, it may be possible to protect their investment from Medicaid recovery with a second mortgage. This should be discussed in detail with the bank or lender. Above all, it is important to remember, that these “liens” do not materially affect the individual’s ownership or enjoyment of a home during his/her lifetime. The state will only seek recoupment for benefits correctly paid after the recipient’s death. And while individuals with disabilities and their families should be cognizant of these recovery laws, the social and economic benefits of home ownership during the individual’s lifetime should clearly outweigh any post-mortem concerns about liens. In short, you can’t take it with you!

In sum, it is important that policy “makers”, case managers, persons with disabilities and their families have at least some familiarity with Medicaid eligibility and resource limitations, as well as techniques for protecting “excess” resources, in order to maximize the use of Medicaid and related benefits.

II. DEPARTMENT OF LABOR AND IRS ISSUES IN SUPPORTING PEOPLE WITH DISABILITIES IN THEIR HOMES

A. Is the Companion, Roommate, or Respite Care Provider an Independent Contractor or Employee?

It has been commonplace for agencies and vendors to treat live-in companions, roommates and respite care providers as “independent contractors” rather than employees. This has the appeal of excusing the agency or vendor from providing certain insurances (e.g., health, workers’ compensation and unemployment), as well as responsibility for federal withholding and compliance with complicated wage and hour laws. Unfortunately, both the IRS and DOL (Department of Labor) apply rigorous tests in determining whether the employment relationship is really one involving an independent contractor or employee. The IRS uses a comprehensive 20 point test, focusing on a number of factors, including who exercises control, the nature of the business, length of employment agreement and payment method. DOL, on the other hand, employs a broader standard. Under the Fair Labor Standards Action (FLSA), an “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee . . .” In determining whether an employer/employee relationship exists, the courts generally do not focus on “isolated factors”, but rather, upon the circumstances of the “whole activity.” In particular, the courts and DOL use an “economic reality test” to decide on a case-by-case basis whether the service provider is an independent contractor or employee.

Based upon recent experiences of providers in New England, I think it is fair to say that treating paid companions or roommates as independent contractors is a risky venture, at best. If a court or regulating agency ultimately determines that the companion or roommate is really an “employee”, there are significant financial consequences which potentially follow, including interest, penalties, back pay and attorneys fees.

B. The use of the “Companionship Services” Exemption under the Federal Fair Labor Standards Act

1. An Overview

If a companion, roommate or respite care worker is not an independent contractor, then DOL will require strict compliance with state and federal wage and hour laws.

The Fair Labor Standards Act (FLSA), 29 U.S.C. Section 201 et seq., contains the federal standards regulating minimum wage and overtime pay. It was designed to protect certain groups from substandard wages and excessive hours. When enacted, the FLSA did not apply to all employees. It specifically exempted private household employees (i.e. “domestic employees”). In 1974 Congress amended the FLSA to cover domestic workers. The Act now provides that “any employee who ... is employed in domestic service” shall be paid the prevailing minimum wage, 29 U.S.C. Section 206(f), as well as receiving overtime pay for working more than forty hours per week, 29 U.S.C. Section 207(1).

At the same time that Congress expanded the coverage of the FLSA, it created exemptions for certain sub-categories of domestic employees. The most important of these is the exemption for providers of “companionship services”. It provides that the minimum wage and overtime provisions of the Act shall not apply to “any employee . . . employed in domestic service employment to provide companionship service for individuals who (because of age or infirmity) are unable to care for themselves . . .” 29 U.S.C. Section 213(a)(15).

Congress, when amending the statute in 1974, did not include a definition of “domestic service” or “domestic employment”. However, in the legislative history it is clear that they were using the term in its traditional, broad sense. “The generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed.” House Report No. 93-913 (reprinted in U.S.C.C.A.N. 93rd Cong. 2d Sess. 2811, 2845); See also, *Marshall v. Cordero*, 508 F.Supp 324 (D.C.P.R. 1981) (By “domestic service”, Congress meant those employees who did household tasks which are traditionally done by family members themselves without formal pay).

The federal regulations adopted under the FLSA follow the language of the House Report and give “domestic service” a broad definition — “services of a household nature performed by an employee in or about a private home” including (but not limited to) such workers as “cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms and chauffeurs”. 20 C.F.R. Section 552.3.

Given these passages, it is fair to assume that live-in companions or roommates are domestic service employees. They perform general household tasks in a private residence which would otherwise be performed by the resident and/or his family. The regulations promulgated under the Act define “companionship services” to mean “those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs”. 29 C.F.R. Section 552.6.

Domestic workers who provide companionship services are excluded from the minimum wage and overtime requirements unless they fall within one of the two exceptions under the “companionship services” exemption. *McCune v. Oregon Senior Services Division*, 894 F.2d 1107, 1108 (9th Cir. 1990). First, services provided by trained personnel, such as nurses do not count as companionship services, 29 C.F.R. Section 552.6; and second, workers who spend more than 20 percent of their total work-hours doing general household work do not fall under the companionship exemption. *Id.*

General household work does not include “household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services”. *Id.* “Household work related to the care of the individual [should] not be counted towards the twenty percent threshold”. *McCune* at 1111. Thus, there is no limit on the amount of time that can be spent on household work related to the care of the client. Only general household work is limited by the regulations. “The regulations . . . [allow] a “companion” to work up to twenty percent of work hours doing general household work, and to spend an apparently unlimited amount of time doing more personal tasks such as meal preparation, bed making, and washing of clothes.” *McCune v. Oregon Senior Services Division*, 643 F.Supp 1444 (D.C.Or. 1986).

Since live-in companions or roommates are not “specially trained” and the amount of general household work performed can be narrowly construed, they would appear to fall comfortably within the Federal companionship exemption. The value of the companionship exemption is enormous. It allows the parties involved to negotiate a reasonable and flexible formula for support without running afoul of rigid wage and hour rules.

2. The Availability of the Companionship Exemption Ultimately Depends on State Law.

When Congress enacts laws to regulate certain areas, such as retirement benefits and occupational safety, the federal legislation often “preempts” (replaces) any existing state law in that field.

However, the FLSA contains a provision commonly known as a “savings clause” which permits states to establish a higher minimum wage or a lower maximum workweek than that established by the FLSA. It reads:

“[n]o provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . .”
29 U.S.C. Section 218(a).

In this way Congress indicated that it was not exclusively occupying the field of wage and hour laws, and thus state laws affording more protections for workers were not preempted. See *Webster v. Bechtel*, 621 P.2d 890, 899 (Alaska, 1980) (“savings clause . . . makes clear that state statutes establishing a higher minimum wage or lower maximum workweek are not preempted”); Michael Moberly, *Fair Labor Standards Act Preemption of State Wage Payment Remedies*, 23 *Arizona State L. J.*, 991, 994.

This means that parties interested in the companionship exemption must carefully examine their individual state employment (wage and hour) laws to determine whether it is available to them. If your state includes domestic employees under its wage and hour laws, then an explicit state-law exemption is required. If domestic employees are not covered, then the Federal exemption should apply without need for any change in State law.

For example, New Hampshire wage and hour laws do not contain an explicit companionship services exemption. At first blush, this might appear to be a problem. N.H. RSA 279:21 (Supp. 1993) establishes the minimum hourly wage in New Hampshire. It says: “Unless otherwise provided by statute, no person, firm, or corporation shall employ any employee at an hourly rate lower than . . . the federal minimum wage or . . . [\$3.95/hr-state minimum wage], whichever is higher.” The statute goes on, however, to provide certain exceptions, including employees engaged in household labor, domestic labor, and farm labor. RSA 279:21, I.

If New Hampshire did guarantee a minimum wage for domestic help (like Michigan does), then a state-law companionship exemption would be necessary (this is because the state would provide greater protections for workers — something states are allowed to do by the savings clause). But because New Hampshire law exempts domestic employees from wage and hour protection, no further enactment is required.

As a cautionary note, employers relying on the Federal companionship exemption cannot ignore other state and federal mandates which typically accompany an employer/employee relationship, including:

- FICA (social security)
- Federal withholding
- Workers' compensation
- Unemployment compensation

Finally, issues of health and liability insurance also need to be considered, although these decisions will largely depend on the type of work performed, who the employer is and how the employee is classified (e.g. part-time, full-time, or as a separate category).

C. Section 131 of the Internal Revenue Code

Many providers of services are aware of this provision under the IRS Code. See generally, 26 U.S.C. Sec. 131. Section 131 states that payments to providers who provide support (“qualified foster care” and “difficulty of care”) for a person with a disability in the provider’s home, are not considered gross income under the Internal Revenue Code. This means that an agency and provider are exempt from federal withholding and FICA requirements because the “payments” are not considered wages. The income to the foster care provider is essentially “tax free”. This provision has been widely used (and liberally construed) by agencies and vendors throughout the country. Unfortunately, this is not an alternative when the individual with a disability either leases or purchases his/her own home.

CONCLUSION

Home ownership offers significant social and economic opportunities for people with disabilities. Many of the barriers to homeownership, including concerns about recovery liens, medicaid eligibility and protection of resources, can be addressed by exercising a little creativity and basic estate planning techniques. State planners, providers of service, and individuals with disabilities need to be familiar with DOL, IRS and Medicaid laws and regulations which directly impact on homeownership and support arrangements.

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