

The Law and You

Consider Compensation for Your Care Provider

In last month's column, I asked for your help with a small but important survey. It referred to HB 167. Through a typographical error, the title of the column referenced HB 107 instead of HB 167. But HB 167 failed to come out of committee during the legislative session that ended last month.

Nonetheless, I should still like to have your opinion on whether your child's legal fees should be paid from your estate in the event that you become incapacitated and your child is appointed your guardian. A similar bill to HB 167 will likely be considered during the next legislative session. Meanwhile, it is important to educate the senior advocate groups who now hold an erroneous view of guardianship proceedings.

This month's column has a similar but different theme. It relates to compensation of a child who provides care for you during the last few months or years of your life.

Most often your "final" provider is one of your children. But it could be another relative or a close friend.

Few of us consider what our life might be like during our final days, months or years. We hope that we will be relatively healthy until the very end. Most of us do not expect to be incapacitated or to be physically debilitated.

When we prepare our estate documents, our focus is most often on how our estate will be distributed upon our death. It has been my experience that most folks want their estate to be divided equally among their children. This distribution plan is also consistent with the way an estate is divided when there is no Will.

Until recently, I had never been requested to include in a Will a provision to compensate a care-providing child. While this request was unusual, it reminded me of a case this past year that I litigated.

In that case, three surviving children of their deceased father began fighting over his estate. As often is the case, there were several minor disputes. But the major dispute arose over one daughter's claim to compensation for the care she provided for her father during the last three years of his life.

The father became so ill that he could no longer fend for himself. He was moved into his daughter's home, and she provided care for him until he died.

She made substantial sacrifices in caring for him. In contrast, her sisters refused to help with his care.

The father had both a Will and a Trust. However, neither document included any provision for special compensation to a care provider. Since the Will and the Trust were silent on this issue, my client's sisters vigorously objected to paying any compensation to their sister who provided care to their father.

In fairness, there are two legitimate positions on this issue. First, a child has a duty to provide care to a parent and should not expect any compensation for doing so. Second, it is only fair and equitable to compensate the child who provided substantial care to a parent.

This issue arises more often than you might think. Even if it does not rise to the level of litigation in the courts, it frequently becomes a festering sore point between siblings. Sometimes the child who provided the care feels too guilty to request compensation, since the care was for a parent.

Regardless, to avoid contention between your children, you should consider this issue when preparing your Will or Trust.

In the recent Will mentioned above, I included a provision similar to the following:

“It is also my intent that ‘expenses’ include reasonable compensation to any of my children or grandchildren who provide substantial care for me in the final years or months of my life.”

A similar provision could also be included in a Trust. You can also be more or less specific. That is, you could define what is “reasonable compensation” or set minimum or maximum limits. You can also identify a specific individual to be compensated, realizing of course, that once you are incapacitated you may not know exactly who provides your care.

The point is, you need to expressly state in your Will or Trust your desires about compensation, if any, to a care provider. By doing so, you will likely avoid the kind of contention that far too often exists between siblings after your death.

In preparing a Will or Trust, you should consult with an Elder Law Attorney. To locate an Elder Law Attorney, check your local Yellow Pages or the National Academy of Elder Law Attorneys at (520) 881-4005, or on their web site at www.naela.com.