ELDRS Update

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Sign up for Spring Conference

March 14, 2014

The 12th Annual Spring Elder Law and Disability Rights Section Conference will be held at the Inn at St. John's in Plymouth, Michigan, on Friday, March 14, 2014. Topics will include Developmentally Disabled Cases, Real Estate Law 2014, Counseling Clients Regarding Capacity, and Medicare and Medicaid Updates. Registration starts at 8:30 a.m., and the main program begins at 9 a.m. For more information, or to register, go to http://www.michbar.org/elderlaw.

Michigan Mental Health and Wellness Commission Releases Recommendations

By Todd Tennis, Capitol Services, Inc.

The Michigan Mental Health and Wellness Commission, chaired by Lt. Governor Brian Calley, presented its initial report to a joint hearing of the House and Senate Health Policy Committees on January 21. Lt. Governor Calley outlined the goals of the commission as follows:

1. Advancing opportunities for independence and self-determination.
2. Better access to high-quality, coordinated, and consistent care.
3. Measurable outcomes to determine effectiveness.

The Lt. Governor was joined at the committee hearing by fellow members of the Commission, which consisted of Department of Community Health Director James Haveman, State Senator Bruce Caswell (R-Hillsdale), State Senator Rebekah Warren (D-Ann Arbor), State Representative Matt Lori (R-Constantine), and State Representative Phil Cavanagh (D-Redford Twp.).

Director Haveman stressed that each recommendation from the Commission represented the unanimous consent of the bi-partisan members. He also pointed out that the work of the

commission was built on the back of previous work groups centering on mental health, long-term care, and other related areas over the past decade.

The Commission's full report is available at www.Michigan.gov/mentalhealth. The Commission's many recommendations centered on several common themes, including improved screening tools; more uniform policies, guidelines, and terms between different agencies; and streamlined information sharing, particularly between physical health and mental health systems. The Commission also recommended new housing programs for the mentally ill, with a goal of at least 500 more units statewide.

Each member of the Commission focused on different key issues relating to improving mental health, developmental disability, and substance abuse treatment systems:

- Senator Bruce Caswell highlighted the need for better data collection. He also called for efforts to de-stigmatize those who suffer from mental illness, developmental disabilities, and addiction. Senator Rebekah Warren focused on improving policies in the state's education programs and the need to adapt job training efforts to better suit M.I., D.D., and Substance Use Disorder populations.

- Representative Matt Lori's work focused on recipient rights and public safety with an eye toward more successful integration of affected populations into the community. Senator Caswell noted that the state will deal with these issues either on the front end through better treatment options, or on the back end in the correctional system. He argued that it was better for patients and society as a whole to tackle these issues on the front end.

- Representative Phil Cavanagh tackled perhaps the most daunting issue, that of integration of mental and physical health into a seamless system. Issues ranging from early assessment to billing will have to be addressed. Echoing earlier statements of his fellow Commission members, Representative Cavanagh lamented that far too many individuals with mental health issues are only identified when they enter the corrections system.

The Commissioners also noted that, because all of the recommendations in the report were unanimous, that meant that several things were left "on the cutting room floor." They maintained that this is not the end of behavioral health improvement. Instead, they hoped that the Legislature would view this as a good first step toward making the system better in Michigan.

Representative Gail Haines (R-Waterford), the chair of the House Health Policy Committee, stated that there would be at least one additional joint hearing of the House and Senate Health Policy Committees to further discuss the Commission report. It is expected that any potential legislation driven by the report will be taken up by each committee separately in the normal process.

Hospital Discharges: Improved Tools for Your Practice

Christopher W. Smith, Chalgian & Tripp Law Offices PLLC

Too often, hospital discharge planning has been about getting clients out of the hospital as soon as possible.[1] Last March, Sanford Mall, Norman Harrison, and I did an ICLE webinar dedicated to Medicare's hospital discharge planning benefit. Our hope is to encourage attorneys to start demanding what hospital discharge planning should be: a multi-disciplinary plan that ensures a suitable post-hospital setting with all appropriate services in place.

After our webinar, the Centers for Medicare & Medicaid Services gave us even more ammunition to demand better discharge planning. Specifically, discharge planning is a condition of a hospital's participation in Medicare. 42 CFR 482.43. In May 2013, CMS substantially revised its interpretation of those regulations to further emphasize the importance of proper discharge planning in preventing hospital readmissions. State Operations Manual (SOM), Hospital Appendix A - Interpretive Guidelines for 42 CFR 482.43, Discharge Planning ("Interpretative Guidelines").

Briefly, here are some highlights:

Hospital Discharge Evaluations

Every inpatient who requests a discharge evaluation is entitled to a hospital discharge evaluation to determine if a hospital discharge plan is needed.

- A hospital discharge evaluation (which can be requested by any patient) includes an assessment of a patient's ability for post-discharge "self-care." This "requires the hospital, as needed, to actively solicit information not only from the patient or the patient's representative but also from family/friends/support persons." Interpretive Guidelines §482.43 (A-0799).

[1] The terms "transition planning" or "community care transitions" are increasingly preferred over "hospital discharge planning." However, the new terms have not been integrated into federal law and regulations.

- A discharge evaluation should start with "the preferred goal" of returning "to the setting from which he/she presented to the transferring hospital." The evaluation must consider the patient's ability for self-care in that setting or the availability of family and friends willing and able to provide such care. If the individual or family cannot provide the care that is required, the evaluation must consider the whole range of community services to provide that care. This not only includes traditional health services (e.g., home health, skilled nursing, and hospice), but also transportation, home modification, meals, and household services. Interpretive Guidelines §482.43(b) (A-0806).

- In performing the evaluation, "[h]ospitals are expected to have knowledge of the capabilities and capacities of not only of long-term care facilities, but also of the various types of service providers in the area where most of the patients it serves receive post-hospital care, in order to develop a discharge plan that not only meets the patient's needs in theory, but also can be implemented. This includes knowledge of community services, as well as familiarity with available Medicaid home and community-based services (HCBS), since the State's Medicaid program plays a major role in supporting post-hospital care for many patients." Interpretive Guidelines §482.43(b) (A-0806).

- Not only must the hospital identify appropriate services, it must take into account a patient's ability to pay for those services. "Included in the evaluation is coordination with insurers and other payors, including the State Medicaid agency, as necessary to ensure resources prescribed are approved and available." Further, the hospital should make the patient aware of what might be owed out of pocket and discuss the patient's ability to pay out of pocket expenses. Interpretive Guidelines §482.43(b) (A-0806).

- A patient (or his or her representative) must be an *active* participant in the evaluation and the results of the evaluation must be discussed with him or her. Simply doing the evaluation and putting it in the medical record *is not* sufficient. Interpretative Guidelines §482.43(b)(6) (A-0811).

Hospital Discharge Plans

The main difference between a hospital "discharge evaluation" and a "discharge plan" is that a hospital has certain obligations to implement a "discharge plan." The guidelines encourage hospitals to perform a discharge plan for everyone, but they are not required to do so if the evaluation does not call for it.

However, if a patient's physician requests it, a hospital must perform a hospital discharge plan. Interpretative Guideline §482.43(c)(2) (A-0819). Thus, it is wise to engage the physician as early as possible regarding a patient's desire to have a discharge plan. If all else fails, appeal.

- Discharge plans must be tailored to the individual and be written in plain English. Interpretative Guideline §482.43(c)(3) (A-0820). A patient's preferences and goals should be incorporated into a discharge plan. Although a hospital does not have an obligation to implement unrealistic goals and preferences, the fact that a patient's preferences are more time consuming to implement does not in itself make the plan unrealistic. Interpretive Guidelines §482.43(c) (A-0818).

- A hospital must disclose any financial interest it has in a home health agency or a skilled nursing facility. The hospital cannot limit the providers based on its financial interests. However, if the patient is enrolled in a managed care plan, the hospital must work to limit the list of possible facilities or agencies to those that are within the plan. If a hospital cannot make arrangements with a patient's preferred provider, the hospital must document the reasons it cannot. Interpretative Guideline §482.43(c)(6) (A-0826). The new guidelines also put greater emphasis on hospitals needing to know an individual's ability to pay for services and, if applicable, the community resources (such as Medicaid) that might be able to assist.

- Hospitals are required to begin implementing a discharge plan, which includes education/training, and arranging transfers. It also includes referrals to other providers and suppliers, including community resources that can provide financial assistance, transportation, meal preparation, or other post-discharge needs. Interpretative Guideline §482.43(c)(3) (A-0820). When transferring, the hospital must provide sufficient medical information to the transferor and to the referring facility to ensure a safe transition. If the transfer is to the patient's home, the hospital must provide the information to the individual's physician. Interpretative Guideline §482.43(d) (A-0837).

While few hospitals currently follow these guidelines well, the increased pressure on hospitals to prevent readmissions makes it more likely that an advocate's insistence on quality discharge practices will be heard.

Further, while these guidelines appear as a "Condition of Participation" in Medicare and are primarily designed for state surveyors, advocates have successfully used these guidelines to appeal inappropriate discharges to Quality Improvement Organizations (MPRO in Michigan).

Attorneys have a key role to play in pressuring hospitals to meet these guidelines, which will improve the health care outcomes for our clients and everyone in Michigan.

Sixth Circuit Holds That an Annuity for the Sole Benefit of a Community Spouse Need Not Name the State as a Beneficiary

By Dolores M. Coulter

A recent decision of the U.S. Court of Appeals for the Sixth Circuit gives Michigan elder law attorneys an important Medicaid planning tool to assist married couples in preserving assets for a community spouse. In *Hughes v McCarthy*, (6th Cir, No. 12-3765, October 25, 2013), an appeal from the Northern District of Ohio, the Court of Appeals held that an annuity purchased for the sole benefit of the community spouse need not name the state as a remainder beneficiary in order to avoid a divestment penalty.

After paying privately for his wife's nursing home care for almost four years, plaintiff Harry Hughes used funds in his IRA to purchase an immediate, actuarially-sound, single-premium annuity for his benefit, naming his wife, Carole Hughes, as the primary beneficiary and the state of Ohio as the remainder beneficiary. Mr. Hughes then applied for Medicaid for his wife. Ohio Medicaid policy, unlike Michigan Medicaid policy, treated the portion of an annuity purchased for the benefit of the community spouse that exceeded the CSRA allowance as a transfer for less than fair market value and thus subject to a divestment penalty. The Ohio Department of Jobs and Family Services found Ms. Hughes eligible for Medicaid but assessed a 10-month divestment penalty. After an unsuccessful administrative appeal, the plaintiffs filed a lawsuit in federal district court.

The district court granted summary judgment in favor of Ohio. The district court relied on 42 USC 1396r-5(f)(1) which provides that after the date of the initial determination of eligibility an institutionalized spouse may transfer an amount equal to the community spouse resource allowance to the community spouse without incurring a divestment penalty. Since the annuity at issue exceeded the amount of the CSRA, the district court concluded that Ohio had properly assessed a divestment penalty.

The Sixth Circuit reversed the district court. The opinion dealt first with the applicability of 42 USC 1396r-5(f)(1) to the annuity at issue, which Mr. Hughes had purchased prior to a determination of his wife's Medicaid eligibility. The court rejected Ohio's argument that USC 1396r-5(f)(1), which refers to transfers after the date of the initial determination of eligibility, was applicable to an annuity purchased prior to a determination of eligibility.

The Court then considered whether the annuity was a transfer of assets for less than fair market value because it did not name the state as the primary beneficiary. Ohio argued that the state of Ohio had to be named as the primary beneficiary in order to avoid a divestment penalty, relying on 42 USC 1396p(c)(1)(F) which excludes annuities that meet specific requirements from divestment penalties. The plaintiffs argued that an annuity purchased for the sole benefit of the community spouse is not subject to the 42 USC 1396p(c)(1)(F) requirements because it falls under a separate exception from the transfer of asset rules in 42 USC 1396p(c)(2)(B). The Court of Appeals rejected Ohio's argument and held that the Hughes annuity did not have to satisfy the "state as primary beneficiary" requirement in 42 USC 1396p(c)(1)(F) in order to avoid a divestment penalty. The Court relied on the language of 42 USC 1396p(c)(2)(B)(i) which states that " an individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that the assets were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse." The reference to "paragraph (1)" is a reference to the transfer of asset penalty rules in 42 USC 1396p(c)(1). An annuity purchased for the sole benefit of the community spouse only has to satisfy the "sole benefit" requirement in paragraph (2) [42 USC 1396p(c)(2)(B)(i)] in order to avoid the transfer of asset penalties in paragraph (1). The Court of Appeals decision makes it clear that the exception from divestment penalties for a community spouse annuity that satisfies the sole benefit requirement in paragraph (2) is separate from the exception for other types of annuities which must satisfy the requirements in paragraph (1).

The Court further held that the "sole benefit" requirement means that the transfer must benefit only the spouse during his/her lifetime but may include contingent beneficiaries so long as the financial instrument is actuarially sound and payments are made only to the spouse during his/her life. The Court specifically rejected the CMS opinion in its July 27, 2006 letter that the rules regarding annuities in 42 USC 1396p(c)(1)(F) apply to annuities purchased by the applicant or the community spouse for the sole benefit of the community spouse.

Michigan Medicaid policy in BEM 401, "Transfers to an Annuity Effective 9-1-05" violates the holding in the *Hughes* case. BEM 401 requires all annuities purchased or amended after February 8, 2006 to name the state as primary beneficiary or as the secondary beneficiary after the community spouse or a minor or disabled child. It treats an annuity purchased for the sole benefit of the community spouse as a transfer for less than fair market value if it fails to name the state as the primary beneficiary. The Hughes decision is binding on the four states in the Sixth Circuit, which includes Michigan. The Elder Law and Disability Rights Section Council authorized the Section Chair to send a letter to DCH and DHS requesting that they revise BEM

policy to comply with the holding in the Hughes case. The letter was sent in January and no response has been received as of the publication of this newsletter.

Representing the Elder or Disabled Same-Sex Spouse

By Amanda N. Murray and Jane A. Bassett, Bassett & Associates PLLC

One of the biggest legal decisions of this century was decided this past summer by the Supreme Court of the United States. On June 26, 2013, in a 5-4 decision, section 3 of the Federal Defense of Marriage Act (1 USC sec 7) was deemed unconstitutional. *United States v Windsor*, number 12-307, 699 F3d 169, 570 US ___ (2013). Section 3 of DOMA defines marriage as "only a legal union between one man and one woman as husband and wife" and "spouse" as "a person of the opposite sex who is a husband or a wife." 1 USC sec 7.

The U.S. Supreme Court, citing due process and Fifth Amendment liberties, overturned section 3 of DOMA. This is the provision that required the Federal government to ignore the marital status of legally married same-sex couples. The Court did not overturn the section of DOMA that allows states to determine whether or not they will recognize same-sex marriages. After the decision was rendered, the Obama administration announced that it would be working with the Department of Justice to ensure swift and smooth implementation of the implications of the decision and to review federal statutes and regulations. We are starting to see these changes.

Each individual federal department and agency is now required to analyze the statutes and regulations to determine, sometimes program by program, what effects the *Windsor* decision will have. For all federal purposes, there must be a marriage that was valid under the laws of the state where it was celebrated. For some federal purposes, the test of whether or not the marriage will be recognized hinges on an additional requirement, such as where the applicant is domiciled or is a resident when seeking the federal benefit.

The following are some core areas that have already started to address this issue:

Social Security Administration

There are some core areas in which the SSA has given instruction on how to process claims involving same-sex marriages. The Program Operations Manual System (POMS) provides instruction for the processing of claims for the following:

- Benefits for Aged Spouses

- Children of Same-Sex Marriage
- Claims involving Transgender Individuals
- Lump Sum Death Payment
- Benefits for Surviving Spouses
- Same-Sex Marriages Celebrated in Foreign Jurisdictions

It is important to note that benefit instructions look at a number of items depending on the benefit, but the validity of the marriage and number holder's (NH) domicile are key. As it stands right now, a valid marriage is an obvious requirement; however, SSA is also looking to the NH's state of domicile to determine eligibility. SSA is to hold all claims, appeals, or post-entitlement actions that are dependent upon the existence of a same-sex marriage or legal same-sex relationship (except the ones noted above that have instructions).

What does "hold" entail exactly? Well, the answer is unknown. There are specific guidelines that direct SSA workers as to when to hold claims, appeals, and post-entitlement actions involving same-sex marriage. How long these items remain on hold is currently unknown. SSA states that it is working closely with the Department of Justice to develop policies that are legally sound and will implement additional policy and processing instructions in the coming weeks and months. One thing is clear, if you believe that your client may be eligible for benefits, even if domiciled in a non-recognition state, he/she should apply immediately. The application date will hold the date for any retroactive monies that may be owed.

Provisions relating to same-sex marriages are integrated into the POMs. For up to date information, go to the POMs Table of contents and search for "same sex." https://secure.ssa.gov/apps10/poms.nsf/partlist

Internal Revenue Service

The Internal Revenue Service (IRS) is clear when it comes to recognizing same-sex marriage for federal tax purposes. On August 29, 2013, the IRS ruled that all same-sex couples whose marriage was valid where celebrated will be treated as married for federal tax purposes, regardless of their domicile or residence (IR-2013-72). The IRS is permitting individuals in a same-sex marriage to amend previous tax returns to reflect this recognition, as long as the prior years are still open under the statute of limitations. As far as state taxes, it will vary from state-to-state.

However, Michigan still does not recognize such marriages. The Michigan Department of Treasury has determined that same-sex spouses must file Michigan state tax returns separately and must use the single filing status. Because of that, married couples cannot simply transfer their AGI figure from their Federal tax return to the Michigan return. A second Federal return

must be drafted, but not filed, to get the single filer information needed to put on the Michigan return. If using programs such as Turbo Tax with an e-filing feature, the filer must beware not to submit the Michigan return along with the Federal return.

U.S. Department of State

The U.S. Department of State has said that embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that they adjudicate applications for opposite gender spouses. If the marriage is valid in the state where celebrated, then it is valid for immigration purposes, regardless of domicile or residence. The Department has specifically stated that the protection also extends to step-children of a same-sex marriage and to visas for countries that do not recognize the marriage.
http://travel.state.gov/content/dam/visas/policy_updates/Next_Steps_On_DOMA_Guidance_For_Posts_August_2013.pdf

U.S. Department Of Labor

The Department of Labor has issued several different statements in regard to how same-sex marriages will be recognized; available programs may differ in the basis of eligibility. Here are three common acts and their basis for eligibility:

- Family Medical Leave Act (FMLA) – When determining eligibility, this programs looks to state law where the couple resides for the definition of a spouse. If the definition of spouse does not include a same-sex partner, then the couple is viewed as single for purposes of FMLA. That means if same-sex couples are legally married but live in a non-recognition state, FMLA will not be available in instances where an individual needs to care for his/her spouse. http://www.dol.gov/whd/regs/compliance/whdfs28f.htm
- Federal Employee Compensation (FECA) – Federal employees are entitled to compensation and benefits, including, but not limited to, augmented compensation, survivor benefits, death gratuity, and schedule awards unpaid at death. Benefits involving the employee's spouse will be available to same-sex spouses based on the validity of the marriage where celebrated, regardless of domicile or residence. http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/FECABulletins/FY2011-2015.htm#FECAB1401
- Employment Retirement Income Security Act (ERISA) - When evaluating benefit eligibility and status under ERISA, the definition of a spouse includes individuals married to a person of the same sex if the marriage was valid where celebrated. The state of domicile or residences does not matter for purposes of ERISA. Most employee benefits are governed by ERISA, including health insurance, life insurance, and pensions. http://www.dol.gov/ebsa/newsroom/tr13-04.html

Department of Defense

The Department of Defense (DOD) has announced the words "spouse" and "marriage" to include same-sex spouses and marriages. This recognition will follow the state of celebration and will not consider the state of domicile. The DOD is working to implement the DOMA decision and with the Department of Justice to change current policies and regulations. Some of the vital changes that we have seen so far include:

- Extended Military Benefits – The DOD has announced it will now recognize all married military personnel and civilian contractors. All benefits that are available to opposite-sex spouses will be available to same-sex spouses. For couples who were legally married before the DOMA decision, entitlements may be retroactive back to the DOMA decision but will not be granted prior to that. http://www.defense.gov/releases/release.aspx?releaseid=16203

- Non-Chargeable Marriage Leave – The "Leave and Liberty Policy and Procedures" authorize non-chargeable leave to a service member who is part of a same-sex couple and is stationed in a location more than 100 miles away from a U.S. state that allows same-sex marriage. This allows service members to leave their base and travel to another jurisdiction for the purpose of obtaining a valid marriage and then returning to their base. http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf and http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf

- Survivor Benefit Plan – In September 2013, the DOD issued guidance extending Survivor Benefit Plan (SBP) coverage to same-sex military members and retirees. Same-sex marriages that are valid in the state where performed will be recognized as valid for eligibility purposes in this plan. The guidance states that, effective June 26, 2013, any person who is married to a same-sex partner may participate in the SBP in the same manner as any other married person. A person who may be eligible to participate should review the guidelines carefully because many changes have an election deadline of June 26, 2014.

Department of Veterans Affairs

The Department of Veteran Affairs (VA) states that it is no longer denying spousal benefit claims because a "spouse" is not a person of the opposite sex. The VA website states that it is

working with the Department of Justice to offer guidance on how to process same-sex spousal benefits. It refers the reader back to the U.S. Supreme Court general website.
http://www.justice.gov/opa/pr/2013/September/13-ag-991.html

The VA has also stated that there may be certain situations in which current statutes and variations in state law may preclude the VA from providing spousal benefits to same-sex married couples. What are these situations? Well, the VA considers a marriage valid if 1) the state where the couple lived when they married recognizes the marriage, or 2) the state where the couple lived when the veteran's right to benefits began recognizes the marriage as legal. From this determination, it would follow that a same-sex couple living in Michigan who traveled to another stay to marry would not have a valid marriage for purposes of VA benefits. This situation would fit the precise situation that may preclude a same-sex spouse from receiving benefits.

Home Loan Guarantee Program: As of September 26, 2013, the VA has issued a statement that it will be recognizing same-sex marriages for purposes of the Home Loan Guarantee Program "to the extent legally possible." Pending further direction from the Department of Justice, the loan applications will be reviewed on a case-by-case basis.
http://www.benefits.va.gov/homeloans/documents/circulars/26_13_18.pdf

Alcohol, Tobacco, and Fireams
A same-sex spouse of a decedent who held a license as an arms or explosive dealer has the right to continue business until the expiration of that license. The marriage will be recognized based on the state of celebration.
http://www.atf.gov/content/may-same-sex-spouse-deceased-licensee-including-special-occupational-taxpayer-carry-licensed

Department of Health and Human Services
The Department of Health and Human Services (HHS) has announced that it is working swiftly to implement the Supreme Court's decision regarding DOMA and recognize same-sex spouses in HHS programs. In the coming months, HHS will provide clarification and guidance on programs that are affected by the ruling. We are already seeing some of these changes taking effect. Some guidance has been offered in particular areas, including these:

- Medicare and Skilled Nursing Facility Benefits – Medicare Advantage Enrollees who are in a legal same-sex marriage will now have the benefit of being entitled to care in a skilled nursing facility where his/her spouse resides, regardless of domicile. Before this

change, if same-sex spouses needed skilled nursing, they could be forced to receive care in different facilities. http://www.hhs.gov/news/press/2013pres/08/20130829a.html

- Medicaid & Children's Health Insurance Program (CHIP) – HHS has offered guidance to state health officials in regard to recognizing same-sex marriages in these programs. HHS has encouraged states to recognize legal same-sex marriage for these programs, but it permits states to apply their own choice-of-law rules. What does this mean for Michigan Medicaid and CHIP? It means that if the State wanted to include same-sex spouses in these programs, it could do so if there was a legal marriage in any state. So, although Michigan does not recognize same-sex marriage, it is permitted (not required) to adopt a different policy in regard to the administration of these programs. Currently, Michigan is choosing not to use the federal guidance and is opting to use State law.

Conclusion

This report includes only a portion of the changes that have started to occur. We will see many more in the coming months. While the goal of the Administration is to ensure that same-sex couples are treated the same as opposite-sex couples, it is equally clear that terminology and definitions interwoven into the statutes and regulations makes equality a difficult goal. It is apparent that many additional laws and regulations will need to be addressed. Some changes will be made willingly and with great speed, and others will be more difficult and may require more litigation before they come into compliance. In the meantime, a careful reading of the law and secondary policy type publications will help to guide the professionals who are advising their clients.

Many issues remain unresolved, and the interplay between states remains a difficult checker-board to navigate. For example, if the result of a regulation change is that a same-sex spouse can collect federal benefits (perhaps Social Security) from a program while living in a recognition state and the recipient moves to a non-recognition state, does the spouse lose the benefit? What happens if the spouse moves back to the recognition state? Is that restricting the liberty to travel and reside wherever we chose? What happens if a legally married same-sex individual is domiciled in a recognition state but owns a vacation home in a non-recognition state and passes away while there? Or, moves from a recognition state to live with an adult child during the last years of his or her life, but remains resigned to returning home if possible? Will the rights of his/her spouse be recognized? What if a person applies for Long-Term Care Medicaid in Massachusetts, and the spouse is afforded the benefits of the spousal impoverishment rules, and then the couple moves to Michigan within the 12-month presumed eligibility period? Is the eligibility lost, or do they have to spend down the remaining money? Is there a divestment if the money is transferred to the non-recognized spouse? What about a

decedent's estate in a recognition state but with vacation property in Michigan? Does Michigan's definition of spouse apply or does the recognition of the marriage by the domicile state extend to Michigan property? There are more questions than answers at this point.

One thing that is certain is other issues of constitutional rights need to be addressed. We can all count on more changes being made. From Medicaid to estate planning and everything in between, the LGBT Elder Community will be affected by these changes. The important takeaway is that when dealing with any matter that may involve same-sex marriage or a same-sex spouse, you must be up-to-the minute on the issues, as these concepts are changing at a rapid pace. Be aware of the issues and reach out to a colleague who is familiar with this area of law.

Taxpayers Can Check Off Support of Alzheimer's Association

Gov. Rick Snyder signed legislation allowing a check-off box on Michigan tax forms for funds to go to the Alzheimer's Association.

According to the Alzheimer's Association, Alzheimer's disease is the sixth leading cause of death in the United States and currently the only disease in the top 10 causes of death without a way to prevent it, cure it, or even slow its progression. One in every three seniors over age 65 who die this year will do so with Alzheimer's or another form of dementia. In Michigan alone, there are more than 180,000 people living with Alzheimer's disease and about 507,000 caregivers providing 577 million hours of unpaid care at a value of more than $7 billion each year. However, the Alzheimer's Association has a mission to eliminate Alzheimer's disease through the advancement of research, to provide and enhance care and support for all affected, and to reduce the risk of dementia through the promotion of brain health.

The Association provides services in all 83 Michigan counties through a 24/7 Helpline, caregiver support groups, educational programs, early memory loss programs and other community specific programs and services. More than 27,000 Michigan residents were served last year through the work of this organization. One caregiver recalled, “When my mom was first diagnosed with Alzheimer's, I realized how little I knew about the disease and how to care for her. After meeting with a trained and knowledgeable Association staff professional, I had a better understanding of the course of the disease and a feeling of total support. I didn't feel as if I was alone as a caretaker any longer but had a caring individual and organization ready and able to assist me.”

This year the Association is encouraging Michigan residents to “check off” their support of the Association’s critical mission and services. With the support of the Michigan Legislature, the Association has been added to the list of organizations that taxpayers can quickly and easily contribute to through their annual Michigan income taxes. Tax Form 4642, 2013 MICHIGAN Voluntary Contributions Schedule, can be completed to donate $5, $10, or more from their Michigan tax return directly to the Association.

Giving to the Association through the tax check off is one thing Michigan residents can do to help meet the needs of people with Alzheimer’s and their families. The Association is Michigan’s champion for finding a cure and supporting those affected by this disease. Thank you for checking off your support for the Alzheimer’s Disease Fund on your 2014 Income Tax Return form.

NAELA and ELDRS Support the Special Needs Trust Fairness Act

The National Academy of Elder Law Attorneys (NAELA) strongly endorsed the introduction of the Special Needs Trust Fairness Act by Sens. Bill Nelson (D-FL), Chuck Grassley (R-IA), Jay Rockefeller (D-WV), and Mike Enzi (R-WY) (S.B. 1672). At its December 7, 2013 meeting, the ELDRS Council agreed to support this federal legislation as well. The bill addresses a problem facing many capable persons with disabilities: the inability to create their own special needs trust (SNT). Under the current law, the SNT must be established by a parent, grandparent, legal guardian of the individual, or a court. The Special Needs Trust Fairness Act will help empower people with disabilities to be responsible for their own decisions. The House companion is H.R. 2123, introduced by Reps. Glenn Thompson (R-5th-PA) and Frank Pallone (D-6th-NJ).

According to NAELA, the current law is based on an incorrect assumption that a person with disabilities lacks the mental capacity to enter into a contract. The disparity in the law creates a fairness and disability rights issue. Congress recognized the use of SNTs in the Omnibus Budget

Reconciliation Act of 1993 (OBRA 1993). SNTs allow assets to be held in trust to supplement daily living expenses when government benefits alone are insufficient, thus protecting the individual against the risk of complete impoverishment. However, the law stipulates that an SNT can only be created by a parent, grandparent, legal guardian of the individual, or the court.

"The Special Needs Trust Fairness Act is a common-sense solution that will save individuals with disabilities from unnecessary legal costs and time spent in petitioning the courts and gives them back their dignity and constitutional right," stated NAELA Board Member Michael Amoruso. "Without this bill, I, a blind and moderately deaf attorney who regularly drafts SNTs for clients, would not be able to sign my own SNT in the future."

NAELA President Howard S. Krooks, CELA, CAP, called upon Congress to "make this important and cost-neutral change to USC§1396p (d)(4)(A) that will allow individuals to create their own special needs trusts by inserting the phrase 'the individual' into the statute so that people with disabilities can enjoy the dignity they deserve and remove the misplaced presumption that they lack capacity due to their disabilities." Other groups supporting this proposal include Easter Seals and the American Association of People with Disabilities.

Calendar of Events

NAELA – www.naela.org

Feb. 21-23	PA-PAELA 2014 Winter Conference, Omni Hotels & Resorts, Bedford Springs, PA
Feb. 23-24	VA-NAELA Chapter 2014 UnProgram, Charlottesville, VA, Boar's Head Inn, Charlottesville, VA
May 2-3	WA-WAELA UnProgram 2014, Embassy Suites, Tukwila, WA
May 15	NAELA-2014 Annual Conference, JW Marriott Scottsdale, Camelback Inn Resort & Spa, Scottsdale, AZ

ICLE/SBM – www.icle.org

Feb. 13	Drafting Estate Planning Documents, 23rd Annual, Plymouth (Live)
Feb. 26	Drafting an Estate Plan for an Estate under $5 Million, Plymouth (Live)
March 6–7	Health Law Institute, 20th Annual, Plymouth (Live)
March 21	Recommended Care Options for Older Adults & People with Disabilities, On Demand Webcast
April 3	Medicaid & Health Care Planning Update 2014, Grand Rapids (Live)
April 22	Medicaid & Health Care Planning Update 2014, Plymouth (Live)
May 8-10	Probate & Estate Planning Institute, 54th Annual, ACME (Live)
June 13-14	Probate & Estate Planning Institute, 54th Annual, Plymouth (Live)

June 25	Drafting an Estate Plan for an Estate under 5 Million, Plymouth (Live)

Other Events

March 1	ELDRS Council Meeting, Chalgian & Tripp Law Offices PLLC, 1019 Trowbridge Road, East Lansing
March 14	ELDRS 12th Annual Spring Conference, the Inn at St. John's, Plymouth
April 5	ELDRS Council Meeting, Caroline Dellenbusch PLC, 2944 Fuller Avenue NE, Suite 100, Grand Rapids
May 3, 2014	ELDRS Council Meeting, Barron, Rosenberg, Mayoras & Mayoras PC, 1301 West Long Lake Road, Suite 340, Troy