

Hot Issues in



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Elder Law and Medicaid in 2004

How attorneys can help the aging population in Michigan

A TIME OF CHANGE

Historically, clients come to elder law attorneys confused and, as a result, often frightened. Both are unfortunate. As a society we have not done well preparing people for the challenges that commonly arise as we and our loved ones age. Elder law attorneys have the privilege of being able to help clients make sense of words and concepts to which they have only recently been exposed but which, due to situations that have driven them to see an attorney, are now of paramount importance in their lives.

But this lack of public attention to aging issues is rapidly becoming a thing of the past. The question of how our society is going to deal with the care and cost of an aging population is taking center stage in Michigan and throughout the nation. How these issues are addressed will have huge social and budgetary implications.

For elder law attorneys¹ and attorneys offering advice on Medicaid planning,² 2004 is a time of trends and turbulence. Two obvious trends are: (1) there has been a dramatic increase in the awareness of elder law as a practice area among the public and the legal profession; and (2) the number of attorneys offering advice about Medicaid planning is growing exponentially. As discussed in this article, these trends—the coming of age of elder law, so to speak—combined with the growing awareness of the potential crisis in long-term care, has created turbulence in what for many years has been a relatively low-key area of the law.

By discussing several of the most topical issues in elder law and Medicaid planning, this article attempts to give the reader an understanding and appreciation for the dynamics driving the changes that are taking place in these areas of the law.

THE *EAGER* SETTLEMENT: THE BEGINNING OF THE END OF THE INSTITUTIONAL BIAS

When advising clients who need long-term care for themselves or a family member, the elder law attorney is often confronted with the problem that, in order to get both the medical and financial assistance he or she needs, the client will have to enter a Medicaid-certified nursing home. This may be true even if there is a support system in place that would allow the client to continue to live in a less restrictive setting if he or she could get a limited amount of assistance with his or her care needs in his or her personal residence. As a result, the “system” often forces people into nursing homes prematurely or unnecessarily, forcing the state to spend more providing for the individual’s needs than it would cost if the individual were able to get the care he or she needs in his or her existing residence.

This problem was the subject of a federal lawsuit initiated against the Engler administration and settled by the Granholm administration. The suit was called *Eager v Engler*,³ the plaintiff being one of a class of individuals forced to accept services in the nursing home, when the services could have been provided more desirably in a less restrictive setting. Among other things, the settlement of the *Eager* case mandated the reopening of the Home and Community Based Waiver Services Program (HCBWS).⁴ This settlement was an important step for clients facing this institutional bias. With HCBWS in place, some individuals who are medically and financially eligible for this form of assistance can now get some help in their homes if they are fortunate enough to be awarded a “slot” in HCBWS.

While the current HCBWS program has significant shortcomings, including limitations on where the assistance can be provided

and the level of assistance available, there is no question that in the future a significantly greater percentage of people needing long-term care will be getting that care outside of the nursing home setting. Elder law attorneys need to be out in front of this trend, and to work diligently with their clients and the agencies involved to make sure that in every case the threshold issue of whether the client can get the help he or she needs (both medical and financial) without entering the nursing home is explored.

MEDICAL ELIGIBILITY SCREENING SYSTEM

The unique aspect about Medicaid assistance in the nursing home and in HCBWS environments (as compared with other Medicaid programs) is the financial eligibility rules. Unlike other Medicaid programs, persons who seek Medicaid assistance in a nursing home or HCBWS are allowed to protect assets and income for their spouses, and to transfer assets to certain family members and to certain trusts without consequence. These unique financial eligibility rules are the very rules that make attorneys who offer knowledgeable advice on Medicaid planning valuable to their clients.

Historically, in almost all cases, the financial eligibility rules are the only rules the attorney needed to know because, as a practical matter, medical eligibility has not been an issue. Until November 1, 2004, Medicaid regulations provide that an individual is medically eligible for admission to a nursing home, and therefore for an HCBWS slot, if his or her doctor said so. This is no longer the case. As of November 1, 2004, Michigan adopted a so-called "screening tool," which will be used in lieu of the family doctor to decide who is medically eligible for Medicaid benefits in a nursing home or HCBWS.

The screening tool is intended to introduce objectivity to the process by attempting to establish a way to decide who is and is not medically eligible for Medicaid assistance. As the name suggests, the use of the screening tool will keep people, who under current rules would have qualified for these services, from being admitted to these programs in the future.

As a result, some people who, in the past, could have qualified for financial help through Medicaid with their long-term care needs, and who would have been able to protect assets and income for their spouses, will now either be ineligible for any assistance, or will only be eligible for assistance through programs in which the spousal protections and other special rules do not apply.

Elder law attorneys need to be prepared to address this change in their practice, recognizing that the loss of some of the more generous planning options in a significant number of cases will increase the sense of helplessness and despair among clients. It is not unrealistic to project that this development may result in divorce returning as a common Medicaid planning option.

ESTATE RECOVERY

"Estate recovery" is a program that would allow the state to recover the costs of medical services provided to individuals who receive Medicaid assistance in a nursing home or HCBWS.

FAST FACTS:

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Attorneys offering Medicaid planning advice may be targeted as having engaged in financial exploitation.

The State of Michigan budgets for this recently concluded fiscal year and for the fiscal year just beginning have each included projected revenues of millions of dollars from estate recovery. So far they have collected \$0. In fact, as this article is being written, Michigan has yet to adopt a law that would allow for the implementation of such a program—making Michigan the last state in the Union to comply with a federal mandate to impose Estate Recovery. This mandate is now more than 10 years old.

Competing forces are at work. Each state faces a tremendous budget shortfall, attributable in large part to ever-increasing Medicaid expenses. But finding an elected official who is willing to vote for, let alone sponsor, a bill that would allow the state to make a claim against the home of a deceased citizen unfortunate enough to need long-term care is not an easy task. As a result, at the time of this writing, any effort to predict what, if any, legislation will finally be passed would be pure speculation. The only certainty is that the passage of any such legislation will drive more clients to seek qualified advice as to how this development impacts their estates.

FINANCIAL EXPLOITATION VERSUS MEDICAID PLANNING

Medicaid planning faces a public relations problem. Consider the following factors:

- Along with an increased public awareness of elder law and Medicaid planning, there is a growing perception that Medicaid planning has more to do with saving assets for greedy children than with providing for the best interests of the aged. While every elder law attorney is well prepared to punch holes in the assumptions that underlie this inaccuracy, the perception has survived and prospered nonetheless.
- Medicaid planning can be dicey business. Almost every case involves family members with conflicting interests, and often the attorney providing advice is not meeting with the individual whose assets and care are at issue. Sometimes these conflicts put the attorney in a position where the best advice may not be what the client (or at least the person sitting at the other side of the desk) wants to hear. Especially now, as the

number of attorneys holding themselves out as qualified to offer Medicaid planning advice grows, and as more attorneys use mass marketing to promote their specialized knowledge of Medicaid eligibility rules, the expectation of clients for simple answers and positive results is increased beyond what can reasonably be delivered in every case.

- At the same time, law enforcement agencies are finally coming to appreciate the significant amount of financial exploitation that is taking place involving senior citizens. Several counties and the Michigan Office of Services to the Aging have made identification of financial exploitation of vulnerable adults a top priority. As a result, police officers, prosecutors, and adult protective services workers (who happen to work within the same agency as the caseworkers who process Medicaid applications) are on heightened alert for situations in which senior citizens are losing control of their assets through improper means.

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The potential risk is obvious. Attorneys offering Medicaid planning advice may be targeted as having engaged in financial exploitation. This is not a novel concept. Several years ago the U.S. Congress passed 42 USC Section 1320a-7b[a], which made it a felony for attorneys to give some types of Medicaid planning advice to their clients. That law remains on the books, although it has not been enforced and at least one federal district judge has concluded that the law is unconstitutional. More recently however, in other states, there have been new efforts to criminally prosecute under state laws attorneys offering Medicaid planning advice, including one incident in which an attorney's files were seized as part of a criminal investigation of that attorney for his role in alleged Medicaid fraud.

ANNUITIES

It is almost impossible to discuss elder law, and certainly Medicaid planning, without addressing the "annuity problem." Although annuities have a place in Medicaid planning, the improper sale of annuities to elderly clients of modest means can hardly be overstated. The improper sale of annuities is perhaps the single largest form of financial exploitation of elders in Michigan today. These sales often occur in the context of high pressure seminars in which misrepresentations about the benefits of these products in the Medicaid-eligibility context are grossly exaggerated (or completely fabricated). Attorneys who offer advice about Medicaid planning will meet clients who have been sold "Medicaid Annuities."

Two years ago, Michigan's Insurance Commissioner under then-Governor Engler issued a bulletin essentially banning the sale of annuities that are marketed as having benefits in the context of Medicaid eligibility. While the current Insurance Commissioner has expressed an awareness of this bulletin, as of the date this article is

written, no action has been taken and the sale of these products has reemerged.

Attorneys asked for advice regarding these products should be prepared to explain to their clients:

- (1) Annuities frequently pay high commissions to those that sell them and as a result are often pushed on elderly clients who would be better served with alternate investments;
- (2) Although under current Medicaid regulations commercial annuities may, in some limited situations, provide a benefit for individuals seeking Medicaid assistance, there is never a situation in which the purchase of an annuity prior to the time the individual or their spouse is actually in, or about to enter, a nursing home or HCBWS, provides any benefit for Medicaid eligibility. Further, in the majority of situations where annuities are a legitimate planning option, there are other options that provide the client with equivalent or better results.

CONCLUSION

As with all things, change is both rewarding and challenging, and growth often includes some awkwardness. In 2004, both the practices of elder law and Medicaid planning are growing, changing, and facing challenges. This environment of change is likely to continue until the social issues driving these trends—the rapid growth of the elder population, and the high cost of caring for aging citizens—have been resolved through the political process. ♦



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Footnotes

1. This author would define elder law as the subsection of estate planning that focuses on the legal and financial issues that arise in the context of aging in general, and cognitive decline in particular.
2. Medicaid planning primarily involves offering advice to clients about preserving assets and qualifying for Medicaid assistance in a nursing home, or through the Home and Community Based Waiver Program.
3. *Eager, et al. v Engler et al.*, U.S. District Court, Western District of Michigan, File 1:02-CV-44.
4. Which, to be fair, the Granholm administration had already reopened voluntarily.