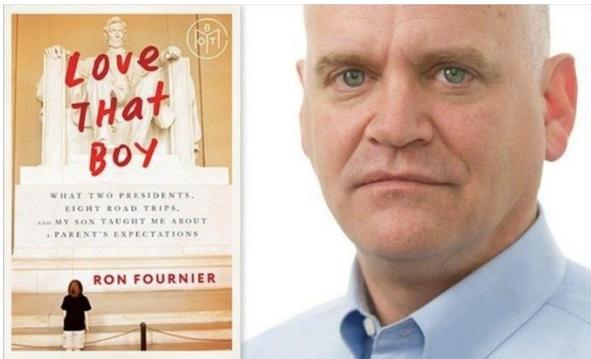


ELDRS Update

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This is a publication of the Elder Law & Disability Rights Section of the State Bar of Michigan. All opinions are those of the respective authors and do not represent official positions of the Elder Law & Disability Rights Section or the State Bar of Michigan. Comments or submissions should be directed to Christine Caswell, Editor, at christine@caswellpllc.com.

ELDRS 17th Annual Spring Conference is Next Month



ELDRS 17th Annual Spring Conference is March 15 at the Inn at St. John's in Plymouth from 8:30 a.m. to 4:30 p.m. This year's lunch speaker will be Ron Fournier, author of *Love that Boy*. Previously, Fournier was the publisher and editor of *Crain's Detroit Business*, worked for *Atlantic Magazine* and the *National Journal*, and was the Washington bureau chief at the Associated Press.

ELDRS is also offering sponsorship opportunities for the conference, including a table and a lunch sponsor. For more information on sponsorships, [click here](#) or contact [Harley Manela](#). For more information about the conference, pricing, and to register, click [here](#).

Personal Care Contracts

By James Schuster, Jim Schuster Certified Elder Law Attorney, Southfield

Under BEM 405 "the client" who has applied for Medicaid cannot pay another person for personal care or home maintenance without a notarized contract entered into before the service was performed. The contract must satisfy 10 requirements, including a written doctor's recommendation, otherwise the payments will result in a divestment penalty period. In total, the 10 requirements of BEM 405 violate federal law requiring that Michigan's program be compliant with Title XIX the Social Security Act.

Before we review the federal law, let's review three hypotheticals:

1. Mr. Jones, age 85, hires Bill Brown to plow his driveway as Mr. Jones has done for years. He pays a flat amount in advance. During the winter, Mr. Jones falls on the ice, breaks his hip, and enters a nursing home.

2. Mary Kelly is in the advanced stages of early onset Alzheimer’s disease. She wanders. Her husband still works, so he pays a neighbor to check up on his wife and take her out three days a week. The other two days, Mary is at an adult daycare facility. The neighbor is paid less than what a commercial agency would charge.
3. Two years before Alicia Green entered the nursing home and applied for Medicaid, her husband had long overdue maintenance performed by their grandson, who is a builder. Parts of the bathroom floor were soft due to rot. The grandson repaired the floor and refurbished the bathroom to remove fall risks. He took out the tub, relocated the sink, and put in a walk-in shower. Mr. Green obtained bids from other builders and paid the amount of the lowest bid.

Were the transactions divestment under BEM 405?

In the first example, the “client” only entered into an agreement. Is the second agreement for “companion” care by the neighbor, or is it care required to avoid wandering? Is the third covered under BEM 405? The work done was for maintenance but also for modifications to make the home safer.

Whether the DHHS would find the hypotheticals to be divestment, they are not transfers for less than fair market value as that term is commonly understood. And none of the transactions satisfy the 10 requirements of BEM 405.

Federal Law Does Not Support the Requirements of BEM 405

Neither Title XIX of the Social Security Act (the Medicaid program) nor the “guidance” by CMS—the federal agency that administers Medicaid—require the conditions imposed by the Michigan Medicaid Policy. Since Michigan policy is more restrictive than federal law, it is invalid under 42 USC 1396a(a)(10)(C)(i)(III). The policy provision also violates Michigan law because the program must conform to federal requirements. MCL 400.103, 105.

Divestment Means a Transfer of Resources for Less than Fair Market Value

Title XIX requires the imposition of a period of ineligibility where an applicant has transferred assets for less than fair market value. 42 USC 1396p(c) provides that if an applicant or spouse disposes of assets “for less than fair market value” within the five-year lookback, the individual is ineligible for medical assistance for a time. The statute does not define the term “fair market value” and *Black’s Law Dictionary* is an appropriate source for the definition. See for example:

The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the

owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property. Black's Law Dictionary 971 (6th ed. 1990).

BFP v Resolution Trust Corp, 511 US 531, 537-538 (1994)

The CMS guidance in the State Medicaid Manual 3258(1)(A) states that fair market value is an estimate of the “prevailing price” at the time of asset transfer. The Michigan Medicaid program definition of fair market value conflicts with the common definition and that of the CMS guidance in that it allows a higher or lower estimate of fair market value based on the consideration of necessities of the owner.

The amount of money the owner would receive in the local area for his asset (or his interest in an asset) if the asset (or his interest in the asset) was **sold on short notice, possibly without the opportunity to realize the full potential of the investment**. That is, what the owner would receive and a buyer be willing to pay on the open market and in an arm length transaction. BPG Glossary 7-1-2018.

In conclusion, neither federal law, CMS guidance, nor Michigan’s definition of fair market value require that a transaction be accompanied by a written contract.

Federal Provisions Concerning Agreements for Personal Care and Property Maintenance Agreements Allow Payment of Relatives Without a Contract Meeting the Requirements of BEM 405

42 USC 1396p(c) contains no provision for personal care contracts. There is nothing in the State Medicaid Manual (SMM) that authorizes the 10 requirements of BEM 405. The closest the SMM comes to the personal contract provisions of BEM 405 is in SMM 3258(1)(A). It states that the state Department may require a written payback agreement where services were not compensated at the time they were performed:

[R]elatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

Note that the agreement in writing only applies when a person is paid *after* performing the

service without contemporaneous compensation. It does not authorize the 10 requirements of BEM 405.

The Michigan Policy of BEM 405 Is Invalid Since it Imposes Eligibility Standards More Restrictive than Federal SSI Policy

A state's Medicaid program may not use a methodology in determining such eligibility that is "more restrictive than the methodology which would be employed under the supplemental security income program. . . ." 42 USC. §§ 1396a(a)(10)(C)(i)(III). This prohibition is repeated in 42 CFR 435.401(c)(2).

The supplemental security income program (SSI) allows agreements for services to be paid in advance without a written contract. The Social Security Administration administers the SSI program. Its program guidelines are stated in the Program Operation Manual System (POMS). POMS SI 01150.005 addresses the issue of fair market value. It provides hypothetical examples where the applicant paid for care or services. The POMS direct the inquiry to whether the person received fair market value.

One example involves a person who transfers assets worth \$185,000 in exchange for a lifetime of room and board. The example illustrates that if the value of lifetime care is less than \$185,000, then the applicant "is subject to a period of ineligibility."

Under POMS SI 01150.005, the case processor "determine(s) the value of services provided to the transferor based on the CMV of the services (monthly or annually) and their frequency and duration under the agreement." It gives an example of advance payment for property maintenance:

Example: In exchange for \$9,000 cash, the individual contracts for yard maintenance services for 5 years. The maintenance company charges \$150 per month (\$1,800 per year). Five years of maintenance at \$1,800 per year equals \$9,000.

Under POMS, SI 01150.001, an agreement need not be in writing but must be "legally binding." The POMS do not define the term legally binding. Since federal law does not and cannot provide a definition of what is legally binding, we resort to state law. In Michigan, a legally binding agreement for services may be made by oral contract:

In many cases of this character we have held it is not essential to allowance of a claim that an express contract should be proven; and we have so held even in cases where a family relation existed between claimant and decedent. 'It is not

essential to a recovery by a child for services rendered to a parent that a formal contract be established in relation thereto; but if the facts and circumstances attending the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous, and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable.’ In re Abel’s Estate, 173 Mich 93, 105.”

DeCaire v Bishop’s Estate, 47 NW 2d 601, 330 Mich 378, 384 (1951)

BEM 405 Conflicts with Federal law, Title XIX and with CMS Agency Guidance in Stating That Determining a Divestment Penalty Period Is Not a Part of the Determination of Eligibility

BEM 405 (1-1-2019) states that “Divestment results in a penalty period in MA, not ineligibility.” The policy conflicts with 42 USC 1396p, which provides “. . . the State plan must provide that if an institutionalized individual or the spouse of such an individual . . . disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B)(i), the **individual is ineligible for medical assistance** for services described in subparagraph (C)(i)” 42 USC 1396p(c)(A)(1). The point is repeated in 42 USC 1396p(c)(E)(i) “With respect to an institutionalized individual, the number of months of **ineligibility** under this subparagraph for an individual shall be” CMS Guidance on the implementation of the Deficit Reduction Act of 2005 advised the state Medicaid Directors that divestment resulted in ineligibility:

Section 6011(b) of the DRA amends section 1917(c)(1)(D) of the Act to change the start date of the penalty period, which is the period during which an individual is ineligible for Medicaid payment for long term care services because of a transfer of assets for less than fair market value.

New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005, Enclosure; Sections 6011 and 6016 July 27, 2006

The guidance is repeated in the State Medicaid Manual:

D. Restricted Coverage - Institutionalized Individual.--The penalty for an institutionalized individual consists of ineligibility for certain services for a period or periods of ineligibility

SMM 3258.5.

It is clear that the determination of a divestment penalty period is part of the eligibility determination process. It is not a separate function.

Jenkins v DHS

In an unpublished decision dated February 19, 2015, the Michigan Court of Appeals construed BEM 405 and found that it applied to personal care and property maintenance contracts performed by non-relatives. That conclusion is not particularly remarkable. However, in addition, the court relied on 42 USC 1396n(d) to support the BEM 405 requirement of a doctor's written recommendation. This section of the statute deals with client plans for care made as a part of a service plan for HCBS Medicaid waiver program (MiChoice) recipients. The section has nothing to do with the nursing home program. It is unclear how the court imported the standards for MiChoice waiver into the nursing home program. The parties did not brief the issue.

Conclusion

The DHHS policy on personal care and property maintenance contracts violates federal law. A court on appeal will uphold the agency's denial of benefits unless the applicant raises the issue that the policy fails to comply with the MCL 400.103, 105 since it imposes conditions of eligibility that are more restrictive than those used in the SSI program.

Legislative Updates

By Todd Tennis, Capitol Services, Inc.

The first month of the new Legislative session has closed. Aside from committee assignments and a few organizational meetings, it has been slow going. Part of this is due to the weather causing multiple cancellations of committees and sessions. Gov. Whitmer has completed her appointments of department heads and key staff, but we are still waiting on several other secondary positions to be named.

Key Leaders and Committees Named

One of the last department heads to be named was Robert Gordon, the new DHHS Director. Mr. Gordon previously was a member of the Obama Administration where he served as the acting deputy director at the U.S. Office of Management and Budget and also as the acting assistant secretary for Planning, Evaluation, and Policy Development at the U.S. Department of Education.

The House and Senate have named their committees and assigned legislators to them. Key committees for ELDRS issues will be the House and Senate Judiciary Committees, and the House and Senate Families, and Children and Seniors Committees. The Chair of the House Judiciary will be freshman Rep. Graham Filler (R-DeWitt), an attorney who spent the last six years working for the Michigan Attorney General's office. The Senate Judiciary Committee will be chaired by Senator Pete Lucido (R-Shelby Twp.) who just completed his second term in the

Michigan House. The Judiciary Committees will likely handle the bulk of legislation dealing with elder abuse, financial exploitation, and other criminal statutes. These committees will also handle the majority of issues related to probate and guardianship law.

Rep. Kathy Crawford (R-Novi) will chair the House Families, Children and Seniors Committee, while Sen. John Bizon (R-Battle Creek) will head up the similarly named Senate Families, Seniors and Veterans Committee. Both committees will see legislation dealing with programs and services for seniors and persons with disabilities.

Gov. Whitmer delivered her first State of the State address on February 12. Roads, infrastructure, and education were at the center of her speech, as she called upon the Legislature to work in a bipartisan way to solve those issues. She did not mention any goals related to seniors or disabilities, but there may be more details in her budget proposal that will be released in early March. This will be the first time in eight years the governor's budget proposal will be presented to a Legislature controlled by a different political party. It will be interesting to note how its reception will differ from the previous eight budgets. Gov. Whitmer will likely have more negotiating to do than the previous governor before the final budget is completed.

No-Fault Auto Insurance Reform Top of Legislative Agenda

While we are awaiting the governor's policy goals to be more fully outlined, Senate Majority Leader Mike Shirkey (R-Clark Lake) and Speaker of the House Lee Chatfield (R-Levering) have already indicated that their top priority for 2019 will be No-Fault Auto Insurance reform. Eight separate bills have already been introduced, including Senate Bill 1 and House Bill 4024, that provide vehicle bills for reform discussions. The House of Representatives has even created a separate standing committee, the Select Committee on Reducing Car Insurance Rates, whose only purpose is to hammer out legislation to reduce the cost of auto insurance in Michigan.

So far, the proposals issuing forth from the 100th Legislature are not too different from previous sessions. The focus is on reforms such as providing options to consumers for reduced medical coverage, capping fees for attendant care, and creating a fee schedule for medical services covered by no-fault auto insurance. The Mayor of Detroit and developer Dan Gilbert are pushing reforms that would be more geographically based but offer similar proposals – reduced medical coverage in exchange for lower premiums. Other legislators are pushing reforms that are more focused on insurance companies, such as the elimination of geographic rate structures and greater transparency for the Michigan Catastrophic Claims Association. It is unclear how much room for compromise there is at this point, since most of these ideas have been proposed before. However, there is a sense that legislators on both sides of the aisle, and the new Whitmer administration, are all committed to finally addressing high auto insurance costs in Michigan.

Bill Introduced Regarding Electronic Monitoring in Nursing Homes

Senate Bill 77, introduced by Sen. Jim Runestad (R-White Lake), would allow electronic monitoring of nursing home residents under certain circumstances. The bill spells out that if a resident (and the resident's representative, if necessary) voluntarily requests the use of an electronic monitoring device that could be monitored by the resident's representative, a nursing home shall make reasonable accommodations to install such a device. The device would also have to be placed in a way that protected the privacy of other residents.

The bill was likely introduced in response to hidden camera videos that show abuse or neglect of nursing home patients. Some nursing home operators have forbidden the use of electronic monitoring devices on their premises, but SB 77 would require nursing home operators to allow such devices if they meet the criteria spelled out in the bill. The bill was referred to the Senate Committee on Health Policy and Human Services.

Back to Basics Webinar Series

By Maria R. Messina Wiersma, Chalgian & Tripp Law Offices, PLLC, Southfield

Our Back to Basics Webinar series continues as an exclusive benefit to ELDRS Section members. Adding even more to the value of your membership, **this benefit extends to your assistants and paralegals as well**. Tune in to the upcoming webinars listed below:

02-15-19 PEME: Covering Pre-Eligibility Medical Expenses

Noon Kelly J. M. Quardokus, Q Elderlaw, PLC, Portage and Arden Martin, MDHHS, Lansing
<https://attendee.gotowebinar.com/register/3856418683501476355>

Bonus Webinar from the Administrative Policy Committee

02-21-19 Recent Medicaid BEM Changes: Answered and Unanswered Questions

Noon Gregory Kish, John A. Scott, P.C., Traverse City, and Sara Schimke, Chalgian & Tripp Law, Southfield
<https://attendee.gotowebinar.com/register/7547085592808883202>

03-21-19 SENIOR DEBT SOLUTIONS

Noon Erma Thomas, Elder Law and Advocacy Center, Redford
<https://attendee.gotowebinar.com/register/5065532929160973313>

04-15-19 PREPAID FUNERALS

Noon Rosemary H, Buhl, Buhl Little Lynwood & Harris PLC, East Lansing
<https://attendee.gotowebinar.com/register/1155853199318443778>

05-23-19 CONTESTED GUARDIANSHIPS

Noon Harley D. Manela, Mall Malisow & Cooney PC, Farmington Hills
<https://attendee.gotowebinar.com/register/5446663241853852162>

06-20-19 Petitions for Appointment of Guardian - Developmentally Disabled Individual

Noon Arthur L. Malisow, Mall Malisow & Cooney PC, Farmington Hills
<https://attendee.gotowebinar.com/register/1591054195243398914>

07-11-19 Medicaid Application Procedural Odds & Ends

Noon Susan Meier, Miller Johnson, Grand Rapids
<https://attendee.gotowebinar.com/register/7432508784966191618>

08-15-19 SPECIAL NEEDS TOOLBOX

Noon Christopher W. Smith, Chalgian & Tripp, Southfield
<https://attendee.gotowebinar.com/register/1912008236461036034>

09-09-19 VA AID & ATTENDANCE BASICS

Noon Robert D. Mannor, Mannor Law Group PLLC, Grand Blanc
<https://attendee.gotowebinar.com/register/2149153103363033346>

Looking for more topics? Interested in presenting? Contact Maria R. Messina Wiersma at messina@mielderlaw.com with your request.

Calendar of Events

By Erma S. Yarbrough-Thomas, Neighborhood Legal Services Michigan Elder Law & Advocacy Center, Redford

ELDRS – www.michbar.org/elderlaw

- March 2 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.
- March 15 - ELDRS - 17th Annual Spring Conference, Inn at St. John's, Plymouth
- April 6 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.
- May 4 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend Street, Lansing at 10 a.m.

NAELA – www.naela.org

- May 9-11, 2019 - 2019 Annual Conference, Dallas/Ft. Worth, Texas

MINAELA – Webinars for MINAELA members only

- Feb. 13, 12 p.m. - Probate Court (Nathan Piwowarski)
- April 23, 12 p.m. - POST (Bob Anderson)
- June 4, 12 p.m. - Explaining the Difference Between MIChoice Waiver and Nursing Home Medicaid (Michelle Biddinger)
- Real Estate (TBA)
- Nov. 5, 12 p.m. - Special Needs Planning (Chris Smith)

ICLE/SBM – www.icle.org

- Feb. 26 - Drafting Estate Planning Documents, 28th Annual, Plymouth (Live)
- March 14 - Drafting an Estate Plan for an Estate Under \$5 Million, Plymouth (Live)
- March 19 - Microsoft Word Academy for Lawyers and Legal Staff, Plymouth (Live)
- May 15 - Building your Future Estate Planning Practice Today, Acme (Live)
- May 16-18 – Probate & Estate Planning Institute, 59th Annual, Acme (Live)