

ELDRS Update

Fall 2025, Volume XII, Issue 3

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.

From the Chair

By Susan Lucile Chalgian, Chalgian & Tripp Law Offices, East Lansing



While we face uncertainty or outright detriments in what government programs will provide to our clients, I am energized by the amazing advocacy wins of our members in the last year. At our recent annual meeting, we were able to celebrate a few. Sarah Slocum was able to do what we have never seen before – an

increase of the long-term care Medicaid applicant's asset allowance to more than four times what it has been, with built-in cost-of-living adjustments. Attorney Michael Bartnik, with his client and ELDRS Council member Attorney Jill Babcock, settled a case funded by ELDRS against public institutions that failed to appropriately accommodate persons with disabilities. Jill's unexpected passing made this celebration even more important as we appreciate what she was willing to put in for so many who deal with those inconveniences daily. As I lead this Section through my term, I call to those experienced advocates as well as those passionate new members to help us make a difference to be celebrated in 2026!

Save the Dates

Council Meeting –
December 5, zoom

Council Meeting –
February 6, zoom

2026 Legislative Day
February 17, State Bar of Michigan, Lansing

2025 Spring Conference
March 6, Kellogg Center, East Lansing

2025 ELDRS Annual Meeting and 2025-2026 Council

At the ELDRS Annual Meeting on September 25, ELDRS announced the **2025-26 Council**:

Executive Committee

- Chair: **Susan Lucile Chalgian**
- Chair-Elect: **Sanford J. Mall**
- Secretary: **Terri Lynn Winegarden**
- Treasurer: **Erin Elizabeth Mortensen**
- Immediate Past-Chair: **Raymond A. Harris**

New Council Members with terms ending in 2028

- **Stephen Michael Balkema**
- **Laura Anne Carl**
- **Brianne Marie Gidcumb**
- **Arthur L. Malisow**

Renewing Council Member with a term ending in 2028

- **Charles F. Ofstein**

Renewing Council Member with a term ending in 2026

- **Amanda Necole Murray**

Current Council Members

Antonia B. Harbin, Nadia Dionne Vann, Kimberly Anne Parks, Howard H. Collens, Kelli Michelle King-Penner, Beth A. Swagman, Nicole Elizabeth Shannon, William E. Westerbeke, and Karen S. Willard

Thank you to outgoing members **Catherine Hodge Jacobs** and **Shannon Kathleen DeWall** for each serving six years on Council and as committee chairs.

Also at the Annual Meeting, the **Exceptional Service Award** was given to **Sarah Slocum**, and the first **Jill Babcock Disability Rights Award** went to **Jill Babcock** in memoriam.

In Medicaid, Gifting an Excluded Vehicle is Divestment - Or Is It?

By David L. Shaltz, Of Counsel

Chalgian and Tripp Law Offices PLLC, East Lansing

Elder law attorneys occasionally encounter clients seeking assistance with Medicaid eligibility for nursing home care, MI Choice, or PACE services, who report the sole vehicle they owned was gifted or transferred for less than fair market value within the sixty-month look back period. There may be good reasons for that decision. The client may no longer be able to drive safely because of age or disability. The expenses of maintaining and operating a vehicle may have become too high. Or the client may have decided to transfer the vehicle to a trusted family member or friend who uses the vehicle to provide transportation and to run errands for the client.

Was transferring the vehicle a divestment? Will the transfer result in a penalty period in which Medicaid will not pay for the client's long-term care costs? For the practitioner familiar with Medicaid policy issued by the Michigan Department of Health and Human Services (MDHHS), the answers seem straightforward. Bridges Eligibility Manual (BEM) 405, page 2, under the heading "TRANSFER OF A RESOURCE," gives examples of transfers that are divestment. The ninth bullet point in that policy states:

“• Giving away a vehicle (divestment).”

Moreover, the policy in BEM 405 pages 11-12, which describes when “transfers for another purpose” are not penalized states:

“• That the asset . . . is not counted for Medicaid does not make its transfer for another purpose.”

It is MDHHS’s position that even though the vehicle is an excluded asset under policy in BEM 400, page 42, the value of which has no effect on the client’s eligibility for Medicaid, its transfer to another person is nonetheless penalized as a divestment.

In this scenario, the elder law attorney may counsel the client that one option is to “cure” the divestment penalty per the policy in BEM 405, pages 15-16. This can be done by transferring ownership of the vehicle back to the client. Another way is to have a third party pay the client the fair market value of the vehicle at the time of its transfer. These “cures” should be done *before* MDHHS imposes a divestment penalty. The other option is to incur the divestment penalty and adjust the Medicaid qualifying plan to make sure the client has resources available to pay privately for long-term care services during the penalty period. None of these options are very satisfying. For the client who wants to avoid a divestment penalty, is there a pathway for challenging this MDHHS policy?

Policy Background

To answer this question, one starting point is to examine the history of this policy. Prior to the introduction of the BEM on August 1, 2008, the State of Michigan issued Medicaid policy in its Program Eligibility Manual (PEM). The Medicaid policy on divestment in PEM 405, pages 6-7 in effect on January 1, 2008, said:

“Transfers of non-countable assets are not divestment.”

Under that policy, the gifting of an individual’s excluded vehicle or its transfer for less than fair market value was not penalized.

That all changed on July 1, 2008. PEM 405 was revised to include the same example of divestment in Medicaid policy today, i.e.,

“• Giving away a vehicle (divestment).”¹

Program Policy Bulletin 2008-007 dated 7-1-2008 explained the reason for the change as follows:

¹ BEM 405, page 2.

“List of transfers has been revised to highlight non-divestment and divestment transfers.

Reason: Local office request.

Old Policy: Clarification of existing policy.”

However, in 2008, there were no changes in federal Medicaid law, Michigan’s Medicaid State Plan, or the Supplemental Security Income (SSI) Program Operations Manual System (POMS)² requiring this “clarification” of existing policy. Neither did the reforms of the Medicaid asset transfer rules in the Deficit Reduction Act of 2005, P.L. 109-171. It appears this update was an arbitrary decision by MDHHS meant to achieve a policy objective inconsistent with the law governing the Medicaid program, i.e., penalizing the transfer of excluded resources.

Penalizing the Transfer of an Excluded Resource is Unlawful

Another change to PEM 405 on August 1, 2008, was the insertion of the following sentence on page 1. It is shown in bold lettering below:

“RESOURCE DEFINED

Resource means all the client’s and his spouse’s assets and income. **It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive.”**

This policy continues today in BEM 405, page 1.

Including “excluded assets” in the definition of “resource” is at odds with how federal Medicaid law defines that term. While 42 USC 1396p(h)(1) defines “assets” as all income and resources of the individual, 42 USC 1396p(h)(5) states:

“The term ‘resources’ has the meaning given such term in section 1613, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section.”

Section 1613 of the Social Security Act is 42 USC 1382b. It describes exclusions from resources in the SSI program. It states:

“(a) In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded:

² In its Medicaid State Plan, Michigan has elected to use the income and resource methodologies of the SSI Program.

(2)(A) household goods, personal effects, and **an automobile**, to the extent that their total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable;" (Emphasis added.)

The federal regulations governing the SSI program in 20 CFR 416.1218 state:

"One automobile is totally excluded regardless of value if it is used for transportation of the individual or a member of the individual's household."

The State of Michigan's decision to incorporate excluded assets in the definition of a resource and to penalize their transfer for less than fair market value violates federal Medicaid law.³

Barring the Transfer of an Excluded Resource from Qualifying as a Transfer Exclusively for a Purpose Other Than to Qualify for Medicaid is Unlawful

There is another reason why BEM 405 penalizing the transfer of an excluded vehicle is unlawful. Federal Medicaid law in 42 USC 1396a(r)(2) states the methodology used by State Medicaid agencies to determine the resource eligibility of aged, blind or disabled individuals "may be less restrictive, and shall be no more restrictive, than the methodology . . . under the supplemental security income program . . ." This requirement is repeated in the federal Medicaid regulations in 42 CFR 435.601(b)(2). In Attachment 2.6-A, pages 16a, 17, and 18 of its Medicaid State Plan, the State of Michigan states it complies with this federal law. However, the facts are otherwise.

BEM 405, pages 9-12 describe "transfers that are not divestment." They are transfers which are not penalized with a divestment penalty. One of those is "transfers for another purpose." BEM 405, page 11 states:

"As explained in this item, transfers exclusively for a purpose other than to qualify or remain eligible for MA are not divestment."

The policy goes on to state, "That the asset . . . is **not** counted for Medicaid does **not** make its transfer for 'another purpose.'"

The corresponding policy in the SSI program is POMS SI 01150.125. It is titled "Exceptions-Transfers for Purposes Other Than to Obtain SSI." Subpart A. states: "Section 206 of P.L. 106-169 (Foster Care Independence Act of 1999) provides an exception to the period of ineligibility

³ 42 USC 1396p(h)(5) includes a homestead in the definition of a resource for purposes of the transfer of assets provisions of Medicaid law even though 42 USC 1382b(a)(1) defines it as an excluded resource. This is because Congress carved out special conditions under which the transfer of a homestead is not divestment in 42 USC 1396p(c)(2)(A).

if the individual transferred the resource exclusively for a purpose other than to obtain SSI benefits.” Subpart C. provides the following example of convincing evidence the transfer of resources was exclusively for a purpose other than to qualify for SSI benefits:

- “• Documents establishing that, at the time of the transfer, the transferred resource would have been an excluded resource under SSI rules . . .”

As described above, an automobile is an excluded resource under SSI rules.

BEM 405 policy is unlawful because it is more restrictive than the corresponding SSI POMS policy. It stops the transfer of an excluded resource from being treated as a transfer for another purpose whereas the SSI program accepts such a transfer as convincing evidence it was exclusively for another purpose.

Summary

This article describes the legal arguments for challenging the imposition of a Medicaid divestment penalty for the transfer of an excluded vehicle or any other excluded asset, except the homestead.⁴ This is but one example of an MDHHS Medicaid policy that violates federal Medicaid law. More will be addressed in future articles of the *ELDRS Update*.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

State Budget Complete – Will it lead to more legislative volume?

The long and drawn-out 2025 state budget battle is finally over, as Gov. Whitmer signed both the omnibus state budget bill and the school aid bill into law on Tuesday, October 7. While the initial budget proposals from the House and Senate were miles apart, in the end the final product was something about which both sides expressed mixed feelings. The budget included \$1.8 billion in new money for transportation funding (mostly aimed at road and bridge construction) which was obtained through a mix of spending cuts and new revenues.

After nearly a year of press conferences, finger pointing, and a very brief state shutdown, Gov. Whitmer signed the Omnibus Budget into law that will provide funding for the 2025-26 fiscal year. It ended a standoff wherein House Republicans and Senate Democrats advocated for starkly different visions for state spending. It also included a road funding agreement that will

⁴ The circumstances in which the transfer of a homestead may avoid a divestment penalty are described in 42 USC 1396p(c)(2)(A) and in BEM 405, page 11.

add between \$1.5 and \$1.8 billion in new road and transportation funding depending on which analysis one reads.

Initially, the road funding issue and the budget had been argued separately. However, as the year wore on and the budget deadline loomed, it became clear that the two issues were inextricably linked. The governor and the House Republicans both proposed plans that would raise approximately \$3 billion for road funding. The governor's plan had relied on a few spending cuts and new taxes to pay for it. The House proposal paid for the plan entirely with budget cuts. By August, it was clear that neither plan was politically viable.

As the October 1 budget deadline loomed, leaders from the House and Senate met with the governor to work out a compromise plan that would include some budget cuts but also some new revenues. In the end, a scaled down road funding plan was passed, along with several tax bills that raised – or in some cases lowered – various taxes.

The most controversial of these was a new proposed tax on marijuana. The 24% wholesale tax was loudly opposed by the marijuana industry, and it narrowly passed the Senate over that opposition. (Note: The Michigan Cannabis Industry Association is suing the state over the new 24% wholesale tax.) Other bills were also passed to increase revenue, or more precisely, to prevent the loss of revenue. The Legislature passed legislation that uncoupled the Michigan Corporate Income Tax from the federal tax so that it would not automatically be reduced at the end of the year. The House and Senate also passed legislation reauthorizing the Insurance Provider Assessment that is used to match federal Medicaid funds. The Corporate Income Tax and Insurance Provider Assessment bills prevented the loss of hundreds of millions of dollars to the state general fund and to state Medicaid support.

As for the Omnibus Budget, the final version contains the elimination of approximately 2,000 full-time employees for state departments. Gov. Whitmer stated that these positions are currently unfilled and will not result in layoffs. However, in areas such as state psychiatric hospitals and corrections facilities, those unfilled positions represented staffing needs that now go unmet. The budget did include funding for state employee wage increases that had been approved by the Civil Service Commission. It also included an additional \$17 million in the Michigan Department of Corrections for a 5% wage increase to corrections officers for all steps.

The ongoing fight over state spending consumed the bulk of 2025, the first year of the two-year 2025-26 state legislative cycle. It drowned out nearly all other legislative efforts. For example, by this stage in previous legislative sessions, the House and Senate typically have sent nearly 200 bills to the governor's desk to be signed into law. This year, prior to the passage of the budget and the implementation bills attached to it, the governor had only signed 12 bills into law.

While there has been some movement on issues such as guardianship reform, senior protection legislation, and Medicaid eligibility, none of these bills have moved into position to be passed by both chambers. Many advocacy groups had hoped that once the budget was complete, the flood gates would open to addressing the hundreds of policy bills that have been waiting in the wings. It is not clear that those floodgates will open, however, as leaders in the House and Senate continue to reach an understanding to allow bills to move through the process. Partisanship is at an all-time high in Lansing, and it appears the gridlock will continue through the end of 2025 and into 2026. It is a frustrating time to be a legislator, advocate, or lobbyist in Lansing.

Scenes from the 2025 Conference



Incoming Chair Susan Chalgian with Outgoing Chair Ray Harris.



Lunch before the annual meeting on Sept. 25.



David L. Shaltz gives the ELDRS Exceptional Service Award to Sarah Slocum for her work on increasing the asset limit for Medicaid.



Jill Babcock's family and Disability Rights Committee members in attendance for the posthumous Jill Babcock Disability Rights Award.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

Council Meetings

- December 5, 2024, 12 pm, zoom
- February 6, 2025, 12 pm, zoom
- March 6, 2025, 12 pm, zoom
- April 3, 2025, 12 pm, zoom
- May 1, 2025, 12 pm, zoom
- June 5, 2025, 12 pm, zoom
- August 7, 2025, 12 pm, zoom
- September 4, 2025, 12 pm, zoom

ELDRS Events

- Legislative Day, 10 am – 3 pm, State Bar of Michigan, Lansing
- Spring Conference, Friday, March 6, 2025, Kellogg Center, East Lansing

NAELA – www.naela.org

- October 29 & November 4 - NAELA Online Annual Conference 2025 - Webinar - 1-4:30 pm EST
- November 5 - Lunch & Learn Webinar- Supplemental Needs Trusts Fundamentals - 1-2 pm EST
- February 25, 2025, Lunch & Learn Webinar - How to Keep Fiduciary Clients Out of Hot Water - Free to Members, 1-2 pm EST

ICLE/SBM – www.icle.org

- November 6 - Fundamentals of Estate Planning, Livestream, 9 am – 4:30 pm
- November 13 - Medicaid & Health Care Planning Update 2025, Livestream 9 am – 12:20 pm
- January 15, 2026 - Planning Techniques for a Taxable Estate, Livestream 9 am – 1 pm
- March 19, 2026 - Drafting an Estate Plan for an Estate Under \$5 Million, Livestream