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, Managing Editor, at christine@caswellpllc.com.

ELDRS at Mackinac Island This Year

The annual Fall Conference and Annual Meeting will be held this year on Mackinac Island from October 17-19, 2018. You may go to the ELDRS site to get the latest information, including room registration. We hope to have registration for the conference open soon, so keep checking back.

Mackinac has been one of ELDRS most successful venues. However, because the costs are higher on the island, the Section raised prices slightly this year with the intent to reduce them in 2019 when we go back to Crystal Mountain. But early bird rates will be available, and the excellent speakers and programs still makes this conference a great bargain.

In the meantime, be on the lookout for e-blasts with more information.

ELDRS Introduces New Webinar Series

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

The Elder Law and Disability Rights Section (ELDRS) will be producing a series of interactive webinars for Section members, new lawyers, and anyone interested in honing their knowledge of Elder Law and Special Needs Planning.

“ELDRS Exchange: Midday Mentoring” webinars will include a short presentation followed by a collaborative question and answer session. Through these webinars, the ELDRS Section strives to provide a forum for mentoring on focused elder law topics.

The first of these webinars is slated for Thursday, May 24 at noon. Our speaker will address avoiding common pitfalls practitioners encounter when preparing a Petition for Guardianship. Bring your questions and war stories for this informative mentoring session.

Registration and more information can be found here.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Are Work Requirements for Medicaid Coming to Michigan?

In January, the federal government granted states the right to apply for a waiver to enact work requirements for Medicaid recipients. Since then, nearly two dozen states, including Michigan, have applied for the waiver. On April 19, the Michigan Senate passed legislation to implement such a program for Michigan Medicaid recipients.

The issue of work requirements for Medicaid is new, but work requirements for other types of government assistance have been around for decades. Pres. Bill Clinton received great acclaim for welfare reforms in the 1990’s that called for work requirements for other types of public benefits. Moreover, work requirements for public assistance received by able-bodied adults continue to be very popular among voters.

Senate Bill 897, sponsored by Sen. Mike Shirkey (R-Clark Lake), was introduced in March and would require work requirements for the nearly two-million Michigan residents who receive Medicaid. Individuals would have to work at least 29 hours per week to remain eligible, including the Medicaid Expansion plan (known here as Healthy Michigan). The bill has the potential to reduce Medicaid rolls in Michigan by hundreds of thousands of people.

As the bill worked through the committee and onto the floor of the Senate, it was amended several times to provide additional exemptions. Examples include caretakers of dependents younger than six-years-old; caretakers of dependents with a disability that requires full-time care; caretakers of incapacitated individuals; and pregnant women. More exemptions were included before the bill passed the Senate, such as persons designated as medically frail, those under age 21 who had previously been placed in foster care, and persons who had been incarcerated in the past six months. The bill also includes “good cause” temporary exemptions for people who have experienced the birth or death of a family member living with them, severe inclement weather, temporary illness or injury, as well as a family emergency, including, but not limited to a divorce or an incident of domestic violence.

Proponents of the bill, like Sen. Majority Leader Arlen Meekhof (R-West Olive), stated that the bill will help people become self-sufficient. Former State Rep. Pete Lund, who now is the Director for Americans for Prosperity-Michigan, compared the new work requirements to those implemented for other types of public assistance in the 1990’s and urged lawmakers to ignore the naysayers.

And, both here in Michigan and nationally, there have been plenty of naysayers.

First there are groups, like those who filed a lawsuit in Kentucky claiming that the state’s work requirements violate the original statutory intent of Medicaid and that of the demonstration project clause recently added to the law. They fear that work requirements could jeopardize health care access for millions of Americans. Dozens of scholars and deans of schools of public health at places like Yale, Columbia, and UCLA have filed an amicus brief arguing another point, that the loss of Medicaid eligibility could be devastating to the revenues that keep federally qualified health centers afloat.

Another group of detractors warn that the administrative costs of implementing work requirements far outweigh any savings from reducing Medicaid rolls. Jeff Myers, CEO of Medicaid Health Plans of America, said that "rolling out new eligibility determination criteria will be administratively complex. For example, new information needs to be collected and tracked via new systems that need to be tested and installed, along with incurring new personnel costs to run them. The overall cost of this undertaking should be carefully considered by states before jumping on the bandwagon."

In Michigan, the Senate Fiscal Agency estimates that the ongoing annual costs of administering and tracking the work requirement would be $20-30 million. Officials within the Michigan Department of Health and Human Services have privately estimated that the one-time cost to create a new tracking system could be in the hundreds of millions of dollars. The Senate Fiscal Agency was not able to give a solid estimate of overall costs or savings to the state, but it did note that the state would probably receive a small net gain if caseloads were reduced after work requirements were implemented.

Senate Bill 897 passed on nearly a straight party-line vote. Sen. Margaret O'Brien (R-Portage) was the only Republican to vote against the bill, joining unified Democrats in opposition. Democrats offered a series of amendments, all of which failed. They tried to include veterans, seasonal employees, and caretakers for a child under 13. They tried to reduce the weekly hourly work requirement from 29 to 20. They also tried to add a cost/benefit analysis for the legislation. Sen. Curtis Hertel, Jr. (D-East Lansing) called the bill "terrible policy," and stated, "People don't choose to be poor," and that many low-income individuals "work a lot harder than many of us in this chamber." Sen. Joe Hune (R-Whitmore Lake) offered a counterpoint, saying, "What I think is truly disgraceful is trapping people in a cycle of poverty and victimhood so that they have no choice but to relinquish their God-given freedom to certain politicians who genuinely disdain them."

While it is not yet clear the exact impact the bill would have on the state budget, it is abundantly clear that opinions fall along more philosophical lines. Proponents feel that work requirements instill a work ethic that will lift people out of poverty, while opponents argue that such requirements are needlessly burdensome and will merely result in fewer people having access to health care.

The bill was referred to the House Appropriations Committee, but it is unclear when it might be taken up. Even if it were to pass both chambers, its fate before the governor is in doubt. Gov. Snyder's press secretary called the bill "neither a reasonable nor responsible change to the state's social safety net." The governor did say, however, that he would attempt to work with the bill's backers to see if the legislation could be improved before it came to his desk for consideration.

Notice Released by CMS Confirms Penalty Period Start Date

By Amir Elias-George Abu-Aita, Abu-Aita Law Firm PLLC, Flint; Of-Counsel, Shaheen Law Firm, Flint

Divestment penalties apply to long-term Medicaid eligibility as well as Home and Community Based Service (HCBS) eligibility. A divestment is when someone who is applying for Medicaid made gifts or transfers for less than fair market value within 60 months beforehand. When a divestment occurs, Medicaid will penalize the person for the value of assets gifted or transferred divided by that year's divestment divisor. During this penalty period, Medicaid will not provide long-term care or HCBS services. Until recently, however, the start date of the penalty for programs such as HBCS or "MI Choice Waiver" (Waiver) was ambiguous.

The Centers for Medicare and Medicaid Services (CMS) recently released a letter directed to the State Medicaid Director Letter named SMD #18-004 (April 17, 2018). The purpose was to clarify the starting date of the penalty period for recipients of the Waiver program. Previously, we had to turn to the State Medicaid Director for SMDL #06-018 from July 27, 2006. This original letter explained that the penalty start date for Waiver was "the date on which the individual is eligible for Medicaid and **is receiving** institutional level of care services" but for the penalty. In simple terms, the penalty would not start until the individual started receiving services; but **an individual could not receive services until the penalty period was complete**. With the new SMD #18-004 letter, these terms became less ambiguous. Now, rather than the impossibility of receiving services while on the penalty period, the rule states that the penalty starts when the applicant "would otherwise be receiving Waiver coverage based on an approved application for such care but for a penalty." It appears that CMS fixed the longstanding issue with its prior letter. This letter also states the requirements for an individual to receive Waiver services.

Finally, the requirements for an individual to receive Waiver include the following:

1) The financial asset test for waiver and LTC are the same, but the income limits for waiver are different.
2) The "person-centered service plan" must include two services. One of the services must include support coordination.

3) The requirement about an identified available waiver slot for the individual’s placement might be misleading. Although there might be an available spot, the individual might be on a wait list for that slot for quite a while. When someone is on the "waiting list," he or she is waiting to be assessed by the waiver agency to determine eligibility to receive services, and, if eligible, the level of care eligibility. Until eligibility is determined, the penalty period does not start.

To see a copy of the CMS letter, click here.

Florida’s Elective Share for the Surviving Spouse and its Impact on Non-Florida Beneficiaries[1]

By Raymond A. Harris, Buhl, Little, Lynwood & Harris, PLC, East Lansing

Editor’s Note: Mr. Harris is licensed to practice law in both Michigan and Florida

In 2014, Florida surpassed New York as the third most populous state in the country behind California and Texas.[2] Everyone is familiar with the term “snowbird” and many Michigan estate planning attorneys have clients who live in Florida for at least part of the year. However, the increasing number of people declaring Florida as their permanent residence presents traps for the unwary due to Florida's treatment of the elective share for the surviving spouse.

Compared to Michigan, Florida has a very broad elective share scheme. Whereas Michigan residents can disinherit their spouse by using joint property, beneficiary designations, and revocable trusts,[3] it is much more difficult to disinherit spouses in Florida.

This article will briefly explore the history and operation of Florida's elective share and the impact that it can have on beneficiaries who reside outside of Florida.

Background

In 1975, Florida abolished dower and curtesy for surviving spouses. Florida law provides that the surviving spouse of a Florida resident has the right to a share of the estate of the decedent, known as the “elective share.”[4] The elective share is expressly for caring for the surviving spouse. There is no distinction made between a surviving husband and a surviving wife. The elective share is equal to 30% of the elective estate.[5]

There are 10 categories of assets that compose the elective estate:[6]

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[1] This article originally appeared in the Summer 2015 *Michigan Probate and Estate Planning Journal*, Volume 34, Issue 3. It has been updated to reflect minor changes in the Florida elective share laws.

[2] http://www.census.gov/newsroom/press-releases/2014/cb14-232.html

[3] MCL 700.2202; *Soltis v First of America Bank—Muskegon*, 203 Mich App 435; 513 Nw2d 148 (1994).

[4] FS 732.201.

[5] FS 732.2065.

[6] FS 732.2035(1)-(10).

1. The decedent's probate estate. This includes all property that is subject to estate administration in any state.
2. Property that constitutes the protected homestead of the decedent.
3. Joint bank accounts, pay on death and transfer on death accounts, and Totten trusts.
4. The fractional interest in property held in joint tenancy and tenancy by the entireties, other than accounts and securities.
5. Revocable trusts and revocable transfers.
6. Certain irrevocable transfers by the decedent.
7. The net cash surrender value of life insurance policies immediately before the decedent's death.
8. Pensions and retirement plans.
9. Transfers made within one year of the decedent's death, including certain gifts.
10. Property transferred in satisfaction of the elective share.

Because the elective estate is so broad, it is helpful to know what is not included. The following are excluded from the elective estate:[7]

1. Irrevocable transfers of property made by the decedent before October 1, 1999, and irrevocable transfers made on or after October 1, 1999 but before the date when the decedent married the surviving spouse.
2. Transfers of property for which the decedent received adequate compensation.
3. Transfers of property made by the decedent with the spouse's written consent.
4. Proceeds of an insurance policy on the decedent's life, however payable, in excess of its net cash surrender value.
5. Life insurance on the decedent's life maintained under a court order.
6. The decedent's half of community property.
7. Property that the decedent held in a qualifying special needs trust for the surviving spouse on the date of the decedent's death.
8. Property included in the decedent's gross estate for federal estate tax purposes solely because the decedent possessed a general power of appointment.

Each spouse can waive his or her right to the elective share through pre- or post-marital agreements.[8] A spouse may also specify in his or her will or trust how the elective share will be paid at death. Absent such a provision, the order in which property is used to satisfy the share is provided by statute.[9] First, property that passes to the surviving spouse is used to satisfy the elective share. If those assets are insufficient to satisfy the elective share, then the balance is apportioned among the recipients of remaining elective estate assets in the following classes:[10]

<u>Class 1</u>: The decedent's probate estate and revocable trust.

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[7] FS 732.2045(1)(a)-(h).
[8] FS 732.702.
[9] FS 732.2075(1).
[10] FS 732.2075(2).

Class 2: Property held in joint back accounts; pay on death and transfer on death accounts; joint tenancy and tenancy by the entireties; property that passes by beneficiary designation; and previously transferred property.

Class 3: All other property interests in the elective estate other than protected charitable interests.

Class 4: Recipients of protected charitable lead interests, but only to the extent and at such times that contribution is permitted without disqualifying the charitable interest in that property for a deduction under the United States gift tax laws. For purposes of this subsection, a protected charitable interest is any interest for which a charitable deduction, with respect to the transfer of the property, was allowed or allowable to the decedent or the decedent's spouse under the United States gift tax laws. A protected charitable lead interest is a protected charitable interest where one or more deductible interests in charity precede some other nondeductible interest or interests in the property.

Example

Assume that a Michigan resident ("Grantor") creates a valid estate plan consisting of a pourover will and revocable living trust which leaves most of his property to his children from his first marriage. Grantor and spouse, his second wife, then move to Florida and declare Florida as their domicile. Grantor passes away after two years without ever updating his estate planning documents. Approximately six months prior to Grantor's death, he gifted $50,000 to each of his two adult children. Both children reside in Michigan.

Following Grantor's death, spouse notifies the personal representative that she intends to take her elective share of his estate. The gifts to the children would fall into category 9 of the elective estate assets and Class 2 of the contribution order. Under the Florida elective share statutes, the children could be liable for a certain amount of contribution if the elective estate is not sufficient. Though practical problems exist for the personal representative to establish that the children are subject to a Florida probate court's jurisdiction, the personal representative would be able to file suit in Michigan against them. The spouse would also be able to pursue contribution if the personal representative decided that it would be impractical to do so.[11]

If the personal representative or spouse did file suit in Michigan, the children would most likely argue that Florida's elective share laws do not apply to Michigan residents who received valid lifetime gifts from the decedent. While an analysis of the conflict of laws between Michigan and Florida is beyond the scope of this article, the children could be mired in litigation even if they do ultimately prevail.

This problem could have been avoided had Grantor updated his documents after he changed his domicile to Florida. His revised documents could have specified how the elective share would

[11] FS 732.2145(4).

be paid to his spouse. Grantor also could have created an elective share trust for his spouse or executed a postnuptial agreement. Finally, Grantor could have simply made a joint gift with his spouse to each of the children, which then would have excluded the gifts pursuant to FS 732.2045(1)(c).

Conclusion

Florida's broad elective share for the surviving spouse can cause unintended consequences, especially for practitioners familiar with Michigan's comparatively narrow elective share for a surviving spouse. Michigan attorneys whose clients move to Florida should encourage them to update or revise their documents to meet their goals while minimizing the impact of Florida's elective share on beneficiaries. This would be especially crucial in second-marriage situations where the surviving spouse might be more likely to pursue out of state beneficiaries for contribution.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- June 2 - ELDRS Council Meeting, State Bar of Michigan Office, 306 Townsend Street, Lansing, MI, 10 a.m.
- July 2018 - No Meeting
- August 4 - ELDRS Council Meeting, Steward & Sheridan PLC, 205 South Main Street, Ishpeming, MI, 10 a.m.
- September 15 - ELDRS Council Meeting, State Bar of Michigan Office, 306 Townsend Street, Lansing, MI, 10 a.m.
- October 17-19 - Annual Fall Conference and Annual Meeting, Mission Point Resort, Mackinac Island, MI

NAELA – www.naela.org

- May 16-19 - NAELA 2018 Annual Conference and Pre-Workshop, Hilton Riverside Hotel, New Orleans, Louisiana

ICLE/SBM – www.icle.org

- May 17-19 - Probate & Estate Planning Institute, 58th Annual, Acme (Live)
- June 14-15 - Probate & Estate Planning Institute, 58th Annual, Plymouth (Live)
- Sept. 13-14 - Elder Law Institute, 4th Annual, Serve the Expanding Needs of Your Client Confidently, Plymouth (Live)
- Sept 14 - Hands-On Medicaid Part II: Planning Strategies and Divestment, Plymouth (Live)
- Sept 18 - Drafting an Estate Plan for an Estate Under $5 Million, Plymouth (Live)