

Summer '94

From the Chair

By George A. Cooney Jr.

Recently I met with representatives of the Michigan Office of Services to the Aging and Region I-B Area Agency on Aging to plan a new training program. The program will provide resources for lawyers and other advocates to help elders with their problems and questions concerning pensions. As part of the meeting, I learned how pervasive pension problems have become: elders complain of defaults, lack of information, and mismanagement in both public and private pension plans.

In future months we will be working with the agencies to implement the training program, but what struck me at the meeting is that this is only the latest in a series of challenges to the well being of our growing elder population. The long-term care financing crisis and health care reform are two other challenges that our clients continue to face. Now more than ever, elders need the advocacy we can provide.

The Section is currently involved in advocacy activities with the Office of Attorney General and with DSS, among others. Please become involved in the activities of your Section and help make sure that our voice is heard on behalf of our clients.

It has been a unique pleasure to be the first Chair of the Section, and I am grateful to all of you who have made this year successful. I look forward to seeing you all at the training seminars in Gaylord and Ann Arbor.

Elder Law and Advocacy Section

Q: A parent places her child's name on the deed to her home so that she and the child now own the home as joint tenants with rights of survivorship. Is the home an exempt asset if the parent applies for Medicaid?

A: If the parent continues to reside in her home or if she enters a nursing home, the answer is "yes." However, the outright transfer of partial ownership of the homestead to the child may be construed by the Department of Social Services (DSS) as divestment, i.e., the transfer of a resource for less than fair market value. If the parent applies for Medicaid to pay for nursing home costs or community based waiver services, a determination by DSS that divestment has occurred may result in a period of ineligibility depending on the value of the homestead and when the transfer is made in relation to the date that the parent enters the nursing home or @ receiving community based waiver services. (Divestment does not affect eligibility for Medicaid payment of other covered health care services.) Item 405 (A) of the DSS Program Eligibility Manual should be consulted to ascertain if, when and how a divestment penalty might affect fact situations similar to this one.

Answer provided by David L. Shaft

Medicaid Estate Recovery Update

By David L. Shaltz

The last edition of the Elder Law and Advocacy Section Newsletter reported on the Medicaid estate recovery provisions of the Omnibus Reconciliation Act of 1993 (OBRA '93) and the State of Michigan's plans to implement them. (Newsletter, Spring 1994, page 7). Recent developments on this issue are described below.

Estate recovery will apply to persons who were age 55 or older when they received certain Medicaid services including nursing facility services, home and community-based services, and related hospital and prescription drug services and at the option of the state, any other items and services paid for by Medicaid. At the time the first Newsletter went to print many observers opined that the reference to age 55 in OBRA '93 was a typographical error and that Congress intended it to be 65. It was not.

In a June 24, 1994 letter to U.S. Health and Human Services Secretary Donna Shalala, Governor John Engler said:

On June 1, 1994, Dr. Gerald Miller, Director of the Michigan Department of Social Services, advised the Regional Office of the U.S. Department of Health and Human Services that the State of Michigan could not implement an estate recovery program at this time. We are currently waiting for the federal government to promulgate rules. After rules are promulgated, the Michigan Legislature will hold hearings before enacting legislation to implement estate recovery.

This is a departure from the Department's earlier position that it did not need state legislation to implement the OBRA '93 estate recovery provisions. It is noteworthy that Governor Engler, in his letter to Secretary Shalala, acknowledges that the federal estate recovery provisions frighten Michigan's older citizens and he inquires as to whether "the Administration has any plans to revisit this issue".

The Michigan Department of Social Services (MDSS) has ceased all staff activity related to developing an estate recovery program.

In the 1994-1995 fiscal year budget bill for the MDSS, a provision has been added that: requires the MDSS to conduct public hearings on its proposed estate recovery plan prior to implementing a Medicaid estate recovery program; makes the plan subject to review and approval by the legislature's appropriations committees before it is implemented, limits recoveries from estates to those payments made by the MDSS for Medicaid services provided after January 1, 1995 "or such subsequent date as set by federal statute". And requires the MDSS to provide quarterly reports on the effectiveness of the estate recovery program "including the number and amount of recoveries made" to the legislature's appropriations subcommittees on social services.

On July 13, 1994, the Governor signed the MDSS budget into law as Public Act 291. Despite the current hold on estate recovery in Michigan, it is incumbent on lawyers who counsel clients about eligibility for Medicaid coverage of nursing home and community care services to become familiar with the relevant provisions of OBRA'93. That law may ultimately have profound

consequences on the choices made by clients today.

Proposed Practice Standards

By Michael E. Daichp

The Practice Standards Committee submits the following Elder Law Practice Standards for adoption by the members of the Section. The proposed Standards were first published for comment in the Spring, 1994, Newsletter. It is intended that further development of the Standards will be an ongoing process. Amendments and commentary may be published with regard to each of the current Standards and additional Standards that may be adopted

Conflict of Interest

A. Identifying the Client

Whenever a family member, spouse, friend or other third party is interested in or purports to act for an elderly person who is a prospective client the Elder Law attorney shall, before accepting employment, identify who is "the" client in order to preserve confidences, avoid conflicts and maintain duties of loyalty and communication.

B. Acceptance of Fees

An Elder Law attorney shall not accept a fee paid by a family member, spouse, friend or other third party to represent an elderly client if the exercise of independent professional judgment by the attorney on behalf of the elderly client will be or is likely to be adversely affected by the acceptance of the fee, or if it will likely involve the attorney in representing differing interests, except as provided in #3 below.

During the course of representing an elderly client, an Elder Law attorney shall not continue to accept fees paid by a family member, spouse, friend or other third party if the exercise of the attorney's independent professional judgment on behalf of the elderly client becomes adversely affected by that arrangement, or it would be likely to involve the attorney in representing differing interests, except as provided in #3 below.

An Elder Law attorney may accept a fee paid by a family member, spouse, friend or other third party to represent an elderly client if (1) it is obvious that the attorney can adequately represent the interests of the elderly client, and (2) if the elderly client and the payer each consent to the representation after full consultation and disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment on behalf of the elderly client, including the advantages and risks involved, and (3) if a writing evidencing the fee agreement has been signed by all parties to the agreement with capacity to do so including the elderly client, payer and attorney. Advantages and risks involved in such representation shall be set forth in the written agreement required by this Standard 1-B-3.

Elder Law Practice Standards No. 2

Decision Making

A. Client Availability

An Elder Law attorney has a duty to meet with his or her client. If it is impossible to meet with the client at the attorney's office, an Elder Law attorney shall not consider a client unavailable for that reason alone. An Elder Law attorney has a duty, in that event, to meet with the client at the client's home or any facility of care in which the client resides.

B. Paternalism

An Elder Law attorney has a duty to subordinate his or her view of the client's best interest to the judgment of the client and therefore shall use the substituted judgment standard in cases where the client cannot express himself or herself. Substituted judgment requires the attorney to pursue a course of action on behalf of the client, based on the client's previously expressed wishes. The best interest standard shall only be employed where, after diligent inquiry,

An Elder Law Attorney shall presume that a client is competent until incapacity is proven.

no evidence exists as to the client's preferred course of action. In making an independent determination the Elder Law attorney has a duty to utilize advice and information from all available sources, including medical and social services professionals and family.

C. Capacity

An Elder Law attorney has a personal duty to confirm that the client has the capacity to do what is sought to be done. The Elder Law attorney may seek guidance from an appropriate diagnostician. An Elder Law attorney shall presume that a client is competent until incapacity is proven. A diagnosis of dementia, Alzheimer's or other illness without other evidence of incapacity shall be insufficient to determine incapacity. If it is determined that a client is impaired, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship, including the duty to advance the desires of the client. To communicate with the client and to keep confidences. In dealing with clients of limited capacity an Elder Law attorney has a duty to investigate and understand the goal, basic life values and interest of the client and to apply the client's value system to a course of action.

D. Disclosure of Alternatives and Potential Risks to Client

An Elder Law attorney has a duty to disclose risks associated with the action the client seeks. An Elder Law attorney has a duty to inform his or her client of the potential problems with a strategy involving the sheltering or transferring of assets to plan for Medicaid eligibility. An Elder Law attorney must advise clients of constant changes in the law and the possibility that strategies that work today will not tomorrow. An Elder Law attorney has a duty to advise his or her client that any transfer of property to children or others, no matter how well meaning the transferee is at the date of transfer, has a great risk potential.

Illegal Practices by Nursing Homes

Nursing homes in Michigan are regulated by both state and federal law. They must be licensed by the Michigan Department of Public Health and certified by the federal government if they participate in Medicare and Medicaid programs. Despite extensive federal and state regulation, or perhaps because of it, many nursing homes either intentionally or inadvertently engage in illegal practices. Attorneys representing clients residing in or seeking admission to nursing homes must be aware of the rights of nursing home patients and the laws governing nursing homes.

Illegal practices fall into a number of broad categories:

Discrimination. Discrimination in the admission process is one of the most common types of illegal practices. Many nursing homes also engage in practices which discriminate against patients already admitted to the facility. Discrimination can take a number of forms.

Federal law prohibits charging a Medicaid recipient a deposit to hold a bed prior to admission. However, a nursing home may charge to hold a bed for a patient who is temporarily absent from the nursing home for hospital care or other reasons. Medicare and Medicaid do not cover this charge. Medicaid certified nursing homes are subject to federal regulation requiring that Medicaid recipients have the right to return to the first available bed after hospitalization.

Requiring a Guarantor. Many nursing homes seek a co-signor to execute the admission contract. Federal certification and Medicaid law both prohibit this practice. A Medicare or Medicaid certified facility may not require third party guarantee or other consideration as a condition of admission. Private pay patients may also challenge the requirement of a cosignor. Michigan law provides that only the resident, the resident's guardian and the facility are qualified to execute the admission contract. Many nursing homes seek a co-signor to execute the admissions contract. Federal law prohibits this practice.

Limitations of Liability. Nursing home contracts usually attempt to limit the home's liability for torts. Most try to waive responsibility for loss, theft or damage of personal items. However, both state and federal law require that the nursing home must protect the patient's personal items. The Michigan Court of Appeals has determined that contracts to limit liability for negligence can be held invalid

"The principle of freedom to contract does not carry a license to insert any provision in an agreement which a party deems advantageous. The public is concerned with the legality of contracts and limits the contractual freedom of private parties to legal undertakings. This public concern is manifest in the statutes and decisions of this state." *Allen v Michigan Bell Telephone Co.*, 18 Mich A pp 632 at 636, 171 NW 2d 689 at_ (1969).

A resident who has suffered theft, loss of or damage to a personal possession may have a cause of action against the nursing home under a theory of negligence. This claim may be asserted under the Michigan Consumer Protection Act. Under this act the provider of services may be subject to liability for actual damages or \$250, whichever is greater, plus reasonable attorney fees.

Nursing homes also have an obligation to manage the funds of its residents even though both state and federal law require that the home must agree to manage (although it may not insist on managing) a patient's funds deposited with the facility. If the nursing home retains patient's funds, they must be held in a trust account.

The attorney representing a nursing home patient or a person seeking admission to a nursing home must become familiar with both the state and federal laws governing the patient's rights and the nursing home's conduct. Only by doing so will the attorney be able to adequately represent her client.