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.

Elder Law and Disability Rights Section

11th Annual Spring Conference 2013 – Speakers and Registration Fees

The Inn at St. Johns – Plymouth, Michigan

Friday, March 15, 2012

- 8:30 a.m. – 9:00 a.m. Registration
- 9:00 a.m. – 9:45 a.m. Sex and Aging
  Rosemary Buhl and Chris Wistrom
- 9:45 a.m. – 10:30 a.m. What is Important to Our Elder Clients
  Thomas Jankowski, Ph.D.
- 10:30 a.m. – 10:45a.m. Break
- 10:45 a.m. – 12:00 p.m. The View from Lansing
  Rep. Kurt Heise (R-Plymouth Twp.)
  Ellen Hoekstra, Senior Partner, Capitol Services, Inc.
- 12:00 p.m. – 1:30 p.m. Lunch
  Speaker – Justice Bridgett McCormack
- 1:30 p.m. – 2:45 p.m. Practice Tips for Medicare Issues
  Christopher Smith, Sandy Mall and Norm Harrison
- 2:45 p.m. – 3:00 p.m. Break
- 3:00 p.m. – 4:30 p.m. What is New in Medicaid
  John Payne, Tom Trainer, Ken Puzycki, and Angela Swanberg

REGISTRATION FEES

Section Member:	$100.00
Non-Member:	$135.00

LUNCH FEES

Classic Cobb Salad:	$20.00
Neo Classic Chicken Caesar Salad:	$20.00

For registration, go to http://www.michbar.org/elderlaw. Join the Elder Law & Disability Rights Section and save $35 on the registration fee.

New Year, New Legislature

By Todd Tennis and Ellen Hoekstra, Capitol Services, Inc.

The 2011-2012 Michigan Legislative Session ended with a bang as Governor Snyder shepherded through a wide variety of legislation including cuts to the Personal Property Tax, reenactment of the Emergency Financial Manager Law, a controversial bill regulating abortion clinics, and an even more controversial package of legislation making Michigan a "Right to Work" state.

Among the Governor's signature packages of bills were Senate Bills 1293 and 1294 which make structural changes to the laws governing Blue Cross/Blue Shield of Michigan (BCBSM). In a surprising turn of events, the Governor ended up vetoing legislation he had worked hard to pass. That issue is at the forefront of items we expect to see taken up in the newly opened 2013-2014 session.

The 28 new members of the Michigan House have been sworn in, but, as of this writing, we are still awaiting the announcement of House Committee appointments. The new partisan makeup is 59 Republicans and 51 Democrats. Although the margins are slightly tighter than the 64-46 advantage Republicans had at the end of last session, they still enjoy a comfortable majority. Speaker of the House Jase Bolger (R-Marshall) was reelected to that position, while Representative Tim Greimel (D-Auburn Hills) was elected as the House Minority Leader.

The only change in the Senate is the vacancy of the seat formerly held by Senator John Gleason (D-Flushing) who left the Senate to become the new Genesee County Clerk. The Governor has called a special election to fill that vacancy, and several candidates have thrown their hats in the ring (most notably Representative Jim Ananich (D-Flint) and Representative Woodrow Stanley (D-Flint)).

Blue Cross Legislation – Take Two

EDITOR'S NOTE: As of the date of publication, the Senate had already passed this legislation.

Legislation to convert BCBSM into a non-profit mutual insurance company was the subject of great debate right up to the last two weeks of the 2011-2012 Legislative session. Seeing that they were only

introduced last September, many interested observers felt that these bills received short shrift in the Legislature. The bills were highly promoted by Governor Snyder who argued that the changes were necessary with pending full implementation of the Patient Protection and Affordable Care Act.

While the debate over the bills covered a great deal of ground, ELDRS focused on how the legislation would impact the ability to get Medigap insurance coverage in the future. BCBSM has an agreement with the Attorney General's office that will maintain the current Medigap program at the current rates through 2016. However, once that agreement expires, there was fear that the legislation would allow BCBSM to end the subsidy or stop issuing Medigap policies altogether.

The current estimate is that BCBSM subsidizes its Medigap policy by approximately $200 million per year. The Senate-passed version of the bills would have ended this subsidy and replaced it with a percentage of the $1.5 billion fund that the legislation created. The AARP estimated that such a change would increase Medigap costs for the average customer by nearly $1,000 per year.

The Medigap issue became a sticking point in the House Insurance Committee, and fuel was added to the fire as Attorney General Bill Schuette made the protection of Medigap his priority in the legislation. An amendment was drafted that would require BCBSM to continue providing Medigap coverage much as it does today, even if it were to become a non-profit mutual company.

As the last days of session ticked down, Rep. Lund, the chair of the House Insurance Committee, announced a compromise to the legislation which ended up passing the House and Senate. The legislation sent to the Governor's desk would have required Blue Cross to create a special fund of up to $1.5 billion to cover various health-related services over the next 18 years. It also required that at least $120 million of that fund be used annually to subsidize the cost of individual Medigap coverage. This subsidy would have lasted until December 31, 2021. Further, potential Medigap recipients would have been subject to a means test that would have been developed by the Insurance Commissioner and approved by the Attorney General. While an improvement over the original bills, this compromise left much to be desired by senior advocates. Then, much to everyone's surprise, the Governor vetoed the bills.

In order to garner enough votes in the House to move the legislation forward, an amendment had been added restricting abortion coverage to entice some of the more conservative members of the House Republican caucus to support the bills. This, apparently, was more than the Governor was willing to accept. He stated that such an amendment constituted state interference in the insurance market. The end result was two dead bills.

However, the issue itself is far from dead. The Governor once again called for changes to BCBSM in his State of the State Address, and Senate Insurance Committee Chair Joe Hune (R-Hamburg), along with Senator Virgil Smith, (D-Detroit) have already re-introduced the package in the form of Senate Bill 61 and Senate Bill 62. The bills are identical to those vetoed except the abortion amendment was removed. Therefore, in terms of Medigap coverage, these bills have the same provisions as the bills that passed the House and were vetoed by the Governor.

Senior advocates expect these bills to be taken up in the Senate very soon. A coalition consisting of ELDRS, the AARP, the Area Agencies on Aging, and representatives from the Attorney General's office are working to make further changes to the bills that better protect the Medigap program. It will be very important over the next several weeks for individuals who would be impacted by a reduction in the Medigap subsidy to contact their state legislators and ask them to protect the program as these bills again move through the process.

Other Legislative Issues

While we expect most of our legislative efforts to focus on the Blue Cross issue early in 2013, here are some other items we will be keeping our eyes on:

- Pooled Trusts – Rep. Kurt Heise (R-Plymouth) has promised to reintroduce legislation that failed to move before the end of the 2012 session. We hope to see the new bill by the end of January. (See Michele Fuller's article below.)
- Estate Recovery – It just wouldn't feel the same if the Estate Recovery issue didn't pop up again. Last year, the bill was proposed by the Snyder Administration, but the bill sponsor, Senator Roger Kahn (R-Saginaw Twp.), chose to focus on other issues and, therefore, let the legislation linger and die. It is not clear if this is a high priority for the administration in the upcoming session.
- Medicaid Expansion – To expand or not to expand…that will be the question in 2013 as Michigan decides whether to increase the eligibility limit for Medicaid to 133% of the federal poverty level. Doing so would provide health care to thousands of uninsured Michigan citizens and bring in hundreds of millions of dollars in federal funds. However, it would also lock Michigan into eventually putting up a share of those dollars. Tea Party activists are already hoping to kill expansion the same way they killed a state-run health insurance exchange.
- Budget Items – The Governor's budget presentation is expected in early February, and we will be watching to see where he proposes adding or subtracting dollars from programs that aid seniors and persons with disabilities. We will keep a keen eye out for changes to the MI Home and Community Based Waiver (MIChoice) program, and the Program for All-Inclusive Care for the Elderly (PACE).

Blue Cross Legislation - Why Should We Be Concerned?

(Blue Cross Medigap 101)

By Jill Goodell, Goodell Legal Services PLLC

The two Blue Cross bills that were vetoed by Governor Snyder at the end of the last legislative session are back. Senate Bills 1293 and 1294 have been reincarnated as Senate Bills 61 and 62. Thanks to the above article from Capitol Services, we already have a good summary of the events leading to this situation.

I have heard from several members of our section who are having trouble understanding the significance of these bills and therefore don't know how to advocate for our clients when contacting their legislators. You can look at the Fall *ELDRS Update* to see a wonderful summary by Christopher Smith of the issues involved. Essentially, “back in the day,” Blue Cross/Blue Shield of Michigan (BCBSM), as part of the granting of their nonprofit corporation status in Michigan, agreed to provide insurance coverage for people having difficulty getting coverage. BCBSM became the “insurer of last resort” for those who were denied coverage for various reasons, primarily health history. Now BCBSM wants to change its non-profit status, and with the changes coming from the Affordable Care Act, this can make sense.

Of significant concern to elder and disability rights advocates and our clients is the Medigap policy that BCBSM currently offers and which would be eliminated with the change in BCBSM status. This policy is currently available to anyone who is eligible for Medicare. This includes individuals with disabilities under the age of 65 who have been receiving federal disability benefits for 24 months. The current favored Medigap policy has a monthly premium of $122.86 which pays to cover the “gaps” in Original Medicare Parts A and B.

These gaps include a hospital (Part A) deductible of $1,184 for an inpatient admission, and $147 deductible for outpatient services, i.e., doctor visits, lab tests, X-rays, etc. (Part B). *Either or both of these deductibles can be incurred multiple times each year for people with recurring or chronic illnesses.* For the disabled and elders on limited incomes, these Medicare gaps can result in financial ruin and cause other problems, including reliance on Medicaid for medical coverage. (This is a very simplified summary. Do not rely on this information to assist a client in regard to his or her specific situation. Remember this is Medigap101.)

I can already hear someone asking, "Why don't they just get a Medicare Advantage plan?" Advantage plans are not available to everyone. In addition, they have co-payments and deductibles that work well for people who do not use many health services but are not financially viable for those with recurring or chronic illnesses or those who need regular care or complex treatments.

In Capitol Services’ article, there are provisions in SB 61 and 62 intended to set aside funds from BCBSM assets to continue to provide the BCBSM-type of Medigap protections for our clients, but the proposed funding is not adequate to provide the protection (subsidy) that is needed for this population. Please contact your state legislators to encourage a requirement to increase BCBSM funds available to provide more protection in the future for our clients and to minimize the number of disabled and elder Michiganders who become impoverished and need to rely on Medicaid for their health care.

You can stay up to date on this topic by accessing Christopher Smith's website. (Mr. Smith’s website does not necessarily represent the views of the Council of the Elder Law and Disability Rights Section of the State Bar of Michigan.)

NOTE: For a copy of January 29, 2013 testimony from the Area Agencies Association of Michigan, click here.

Elder and Disability Advocacy in Today's Legislative World

What we can learn from Blue Cross Blue Shield of Michigan

By Christopher W. Smith, Michigan Law Center, PLLC[1]

On September 11, 2012, Governor Snyder surprised Michigan's elder and disability advocates by announcing a plan that would convert Blue Cross/Blue Shield of Michigan (BCBSM) from a nonprofit corporation into a nonprofit mutual insurance company. What was not initially emphasized, but what became immediately apparent, was that the proposed legislation cuts more than $200 million per year in BCBSM funded (i.e., non-taxpayer) Medicare assistance in Michigan and would eliminate many other Medicare protections that Michiganders currently enjoy.

In short, what the Governor presented as a benign modernization of Michigan's insurance system will actually add billions of dollars to BCBSM's revenues on the backs of Michigan's seniors, the disabled, and taxpayers.

From the beginning, BCBSM's advocacy efforts gave it the upper hand, and the legislation sailed through the Michigan legislature. Then, much to everyone's surprise, Governor Snyder vetoed the bill because of an abortion provision that was inserted at the last minute on the Michigan House floor. But the legislation has already been reintroduced (without the abortion provision) and Governor Snyder reiterated his support of it in his State of the State address on January 16, 2013.

The nature of politics—both nationally and in Michigan—is always evolving. In turn, elder and disability advocates must also evolve or risk becoming increasingly irrelevant in the political conversation. Being relatively new to political advocacy, but having been intensely involved with the recent debates over the BCBSM legislation, I offer the following observations about how we can be more effective legislative advocates.

- **There is no off-season.** Our potential adversaries work year-round for their causes. They also never give up. As we saw from BCBSM and the no-fault insurance debates, many of our adversaries have full-time (and well-paid) staff continually pushing their agendas. Also, setbacks in one legislative session do not deter them, and they will return in full force the following session.

  Advocates must be clear about short- and long-term priorities and continuously advocate for those priorities. There are no days off. To that end, we must build the organizational structure and manpower that such year-round efforts require. Temporary ad-hoc volunteers (particularly those with day jobs) are not sufficient.

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[1] I did not learn the lessons below alone. I have to thank the Elder and Disability Rights Section of the State Bar, AARP of Michigan, Mary Ablan of the Area Agency on Aging Association, Robert Fox of the Michigan Senior Advisory Council, and Capitol Services, Inc. for much of what I have learned. We all owe each of them a debt of gratitude for their efforts in the latest BCBSM debate. Further, I would be remiss not to thank Blue Cross Blue Shield of Michigan for many of these advocacy lessons, even if I learned from them while disagreeing with their positions.

- **Do not wait until legislation is introduced.** BCBSM likely gained the upper hand in its latest legislative push back in September 2011—a full year before the legislation was formally introduced. That is when BCBSM began its latest campaign to lobby the Michigan legislature and, to its own financial detriment, extended its Medicare commitment to 2016. This gave political cover to those voting for the Medicare cuts because all of those elected officials will have reached their term limits by then.

  When the legislation was actually introduced, many (if not most) legislators had already bought into BCBSM's message. We were forced to respond to their messaging, instead of proactively championing our own message. Also, the worst time to try to correct a misconception or promote a message is in the middle of election season when legislators are busy trying to get elected and have a pile of other pressing bills to consider.

- **Keep it simple.** When passionate about a cause, it is easy to dive into the details, and our main message can get lost. We must generally resist the temptation to provide too much detail even if it seems like it would be really helpful in making the case. Instead, as when selling professional services, we need to step back and create a consistent elevator speech of no more than three simple, memorable, and extremely compelling points.

  There should still be a designated place where someone can get more detailed information (e.g., a website). But repetition of key points, not detail, is typically more persuasive.

- **Words have meaning.** In the middle of the legislative debate, BCBSM made a push to have everyone stop calling the legislation a "conversion" and instead call it a "transition." The implication was that the legislation would only be a minor change to the entity's operational structure and social mission. Further, BCBSM uses the word "subsidy" every chance it gets when describing the Medicare Legacy plans in an effort to make it sound like an undeserved handout.

  We must also choose words carefully and not automatically accept and parrot the (likely focus-grouped) words that our opposition strategically chooses to use.

- **Cultivate journalists.** Throughout the legislative debate, it was frustrating to see the cozy and dependent relationships many journalists seemed to have with BCBSM's spokesperson. But BCBSM has spent years cultivating relationships with journalists, both professionally and personally. And it was hard not to laugh when seeing a pro-BCBSM editorial next to a BCBSM advertisement on a newspaper website.

  Advocates cannot expect to get the attention of journalists only when we need them in a crisis. We must interact with them consistently and on multiple topics in ways that make their extremely stressful jobs easier and their reporting more successful. Advertising in their publications also cannot hurt.

- **Public relations – a different adversary.** Lawyers are trained to make sure every word they say is backed by evidence. Further, if we stretch a fact too far, we risk not only losing our case, but

breaking an ethics rule. Public relations professionals do not have to abide by these same strict rules and can be much freer in their interpretation and presentation of the facts.

Public relations professionals also seem to relish watching the opposition scramble to respond to a misleading statement. It can be frustrating to spend a lot of time and energy mounting a forceful response to a misleading statement because the public relations professional can simply move on to another misleading statement. While we must respond to these statements, we have to remain focused on our primary message regardless of what a public relations professional may throw at us.

- **Take a stand in social media.** Until recently, I did not really understand social media (particularly Twitter). Most elder and disability-related social media feeds are a real bore. But during the BCBSM legislative debate, I quickly realized that social media (particularly Twitter) is a great equalizer where anyone with an online presence can be heard just as loudly as those with much more money and influence. It is a surprisingly effective place to organize and identify supporters. It is also a virtual place where journalists hang out and look for leads and angles for their reporting. Public relations departments know the power of social media and have made major investments in social media staff.

  While offering details about using social media is outside this article's scope, here is one quick tip: if you are reluctant to use your main organization's social media accounts for advocacy purposes, then free up members of your organization to use their personal accounts for advocacy and enlist them to do so. BCBSM does this effectively.

- **Money, Money, Money.** According to FollowTheMoney.org, BCBSM gave $475,925 in political contributions in 2012 alone. BCBSM is one of the biggest political contributors to a great number of Michigan legislators, particularly those on important committees or in leadership positions.

  Here is the challenge and opportunity. If the BCBSM legislation passes, 210,000 Michiganders will endure average annual rate increases of at least $1,000 if they want to maintain their excellent health coverage in 2016 and beyond. If each of these 210,000 people donated an average of just $20, that would create a pot of $4.2 million to advocate for saving at least $210 million/year in premium increases. So while we cannot ignore money's influence, we should not just admit defeat in this area.

- **Don't be a cheap date.** Politicians love to say they are senior or disability friendly. They trumpet important, but politically easy, senior and disability legislation and highlight their senior and disability activities in promotional materials. Meanwhile, many of these same individuals are doing little with regard to substantive policy issues that affect these populations, such as the homestead credit, pension tax, mental health parity, and now Medicare.

  Many corporations do the same thing. BCBSM touts its senior advisory council to demonstrate its commitment to seniors. Meanwhile, BCBSM belittles dedicated volunteer Medicare advisors who give out objective information about Medicare because such information is not in BCBSM's financial

interest. We cannot let politicians and companies use us when it benefits them, but dump us on the big issues. If they want to be recognized as senior and disability friendly, they need to earn it.

- **Let's stick together.** Elder and disability organizations live in a world of limited resources. We include numerous organizations with diverse boards and executives who have many agendas. But this also hurts our advocacy efforts. Organizational politics and the constant need for funding make many organizations leery of taking important advocacy positions. We even allow individuals who might have a conflict of interest with our causes to join our boards (and we sometimes even join their boards), which complicates our advocacy efforts. All of this makes it more difficult for us to work towards a common cause.

  As a famous African proverb states, "If you want to go quickly, go alone. If you want to go far, go together."

- **The importance of the Governor.** BCBSM made a brilliant move by having the Governor be the one to introduce its legislation. The Governor's office controls the grants to (and employs) many elder and disability advocates. Thus, his support for the legislation obviously has a chilling effect on many of our key advocates.

  For this reason, it is extremely important for state elder and disability advocates to win the support of the Governor on many of our causes or, at a minimum, get him or her to remain neutral.

- **Lobbyists are essential.** The Elder and Disability Rights Section of the Michigan State Bar spent a lot of time in heated debate when it decided to hire lobbyists. Now, hardly anyone questions their value. Advocates must have ears on the ground at all times watching what those who oppose our positions are doing. Then, when we need to quickly respond, lobbyists can gain access to key individuals more quickly than anyone else. Further, lobbyists are essential to prioritizing our agenda and crafting the strategy to achieve it.

- **Old-fashioned campaigning.** Even with money's outsized influence, politicians still must campaign to win votes. While large corporations may do a lot of wining and dining, it is a relatively small group of volunteers who largely run the on-the-ground campaign operations. Advocates, Republican or Democrat, need to make sure we are actively volunteering for campaigns and being clear within the bounds of the law that our volunteering comes with certain expectations.

- **Litigation – Utilizing that other branch of government.** Advocates cannot be afraid to utilize the court system when necessary. Companies (and, yes, even the government) do not hesitate to occasionally take a stance completely contrary to law and then dare us to challenge it, knowing that litigation is costly and time-consuming. Advocates must be prepared to take up the challenge and include litigation as part of any advocacy strategy.

- **Humanize the message.** Almost all of our causes have compelling human stories behind them. Advocates need to find these stories and use real faces to illustrate the message. Facts and numbers

rarely have the same impact as telling the story of a real individual who will be detrimentally impacted by the legislation or could benefit from it.

- **Show our numbers.** With the increased influence of money and modern advertising, simply threatening to encourage our allies to vote in a particular way is not enough. Advocates now need to be prepared to show our numbers at legislative offices, committee hearings, legislative sessions, and ultimately at the polls. Otherwise our threats will not be taken seriously.

The last Michigan legislative session was generally a tough one for the elder and disability community. The pension tax, elimination of the homestead credit, the failure of mental health parity, and now the possibility of BCBSM eliminating its Legacy Medicare program are all actions of great concern that have diminished the quality of life for our constituents.

Now at the beginning of a new legislative session—one that will end with Governor, Senate, and House races—it is important to reflect on what has and has not worked in our legislative advocacy efforts and chart a strong and dynamic course for the coming two years.

Landmark Development for Pooled Trusts?

It's open for debate

By Michele P. Fuller, Michigan Law Center, PLLC

The recent denial of certiorari by the U.S. Supreme Court to hear the Third Circuit case of *Lewis v Alexander*[2] sent waves of hope throughout the special needs community, generating e-blasts from multiple national organizations touting the ability to fund pooled trusts without penalty. However, much discussion is taking place in the special needs and elder law legal communities regarding the implications of the *Lewis* case.

In *Lewis,* the court reached several important conclusions. First, the court took great pains to systematically explain its analysis in support of its determination that Plaintiffs had a viable cause of action. The *Lewis* case was a class action brought by several pooled trust beneficiaries in Pennsylvania which challenged a state statute seeking to regulate pooled trusts. The court addressed the decisions reached by the Second and Tenth Circuits indicating that states are not mandated to follow 1396p(d)(4) and that states could opt not to recognize special needs trusts as non-countable assets. Instead, the court agreed with the Eighth Circuit's conclusion that Section "1396p(d)(4) imposes mandatory obligations upon the States," (page 31) relying on a plain reading of the statute in reaching its conclusion. Further, the court held that, "in determining Medicaid eligibility, States are required to exempt any trust meeting the provisions of 42 USC Sec. 1396p(d)(4)" (page 35).

In rendering its opinion, the Third Circuit considered Congressional intent behind OBRA 1993: "Congress' intent was not merely to shelter special needs trusts from the effect of 42 USC Sec. 1396p(d)(3). It was

[2] *Lewis v Alexander*, 685 F.3d 325 (2012). The link to the opinion is at http://www.ca3.uscourts.gov/opinarch/113439p.pdf.

to shelter special needs trusts from having any impact on Medicaid eligibility" (page 34). The court stated that the passage of specific provisions setting forth elements of a trust which would be a safe harbor for people with disabilities, who would otherwise qualify for Medicaid benefits but for excess assets, was deliberate, and "it seems clear that Congress intended to create a purely binary system of classification: either a trust affects Medicaid eligibility or it does not" (page 34). Further, Congress recognized that state benefits were insufficient to pay for necessities, such as clothing and phone service, as well as other goods and services that increase the quality of life and that a special needs trust was a statutory exception from the countability rules to allow for these expenses. The court struck down the State of Pennsylvania's attempt to regulate and restrict the distributions from the trust as well as the funds remaining in a beneficiary's account upon his or her death which were in conflict with or more restrictive than the federal statute, while recognizing state authority to regulate trusts (i.e. fiduciary duties, court supervision), estates, and property. The court chose not to examine a No More Restrictive (NMR) analysis relied upon by the lower court, and instead focused on Congressional intent and strict reading of 1396p(d)(4) and the doctrine of preemption.

With regard specifically to contributions to pooled trusts for those over age 65, the court stated, "The age provision of Section 1414(b)(1) [of the Pennsylvania statute] attempts to restrict pooled special needs trusts to beneficiaries 'under the age of sixty-five'…Congress did not include an age restriction for pooled special needs trusts. On that basis alone, the age restriction in Section 1414(b)(1) transgresses congressional intent" (page 52). While the court affirms that the trust is an exempt asset, many practitioners and leading organizations interpret the findings to mean that for individuals over age 65, contributions to a pooled trust are exempt and *without penalty*. However, after reading comments from my friend and colleague, David Lillesand, a closer reading is cause for concern. The troubling language is as follows (page 53 of the opnion):

> "We note here that Defendants were attempting [in their restriction of contributions to the pooled trust by those over age 65] to protect elderly beneficiaries of special needs trusts from potentially invalidating (at least temporarily) their Medicaid eligibility. Through a quirk of the Medicaid statute, elderly individuals (65 and over) transferring assets into a pooled trust are *made ineligible for Medicaid for a period of time* [emphasis added]…Congress could have rationally concluded that the benefits of making special needs trusts available to elderly individuals outweighed the burden of the penalty."

Therefore, while the trust assets are exempt, the funding of a pooled trust by individuals over age 65 triggers a penalty.

The council's initial reaction to the Supreme Court denial of certiorari was to question whether our continued efforts to legislate Michigan's use of pooled trusts were necessary. However, in light of a careful reading of the opinion, sustaining our efforts is more important than ever.

I would like to officially thank Representative Kurt Heise, who made our proposed Michigan Pooled Trust Act a priority and as a result, HR 4013 was introduced to the House on January 22, 2013, one of the first bills of this new session. This bill mirrors Section 1396p(d)(4)(C), and most importantly, like other states who have enacted similar legislation such as Wisconsin and Maryland, contributions will not trigger a penalty. The continued support of ELDRS and our clients, our contacts, and other organizations will be critical in ensuring the passage of this important legislation that will help our most vulnerable citizens sustain a quality life.

Powers of Attorney: Questions for Speculation and Research

By Josh Ard, Law Office of Josh Ard PLLC

Proper regulation of powers of attorney remains controversial. Many states have adopted the Uniform Power of Attorney Act, but many have not. Personally, I see more risk than reward in the current uniform law, so I am not unhappy that Michigan is among the states that have not adopted it. The legislature hasn't remained quiescent, however. PA 141 of 2012 added a requirement that most durable powers of attorney have to be acknowledged by the agent.

Another controversial matter is the widespread availability of do-it-yourself (or often do-it-for-your-intended victim) powers of attorney. There has been considerable controversy about whether the State Bar or its sections should provide on-line forms. Among the questions raised are the following:

- Is this improper interference with the business of private attorney who hopes to sell powers of attorney?
- Is this a valuable service to persons who cannot afford or will not pay for a lawyer's services?
- What effect, if any, would this have on currently available on-line versions? In particular, would it:
    - Drive out less suitable competition?
    - Provide further legitimacy to on-line forms?

The issue is not going away. I know of nothing immediate on the horizon, so this may be a time to speculate on powers of attorney. Some of this speculation is political. What could we expect our courts and legislatures to accept? Some of the speculation is empirical. Too often people guess about effects without any research guidance. There are definite empirical questions that ought to be addressed.

In this brief article, I make some speculations but readily admit that these are no more than speculations. I wish we had better evidence to guide policymakers. I invite readers to join in on the speculation and especially to help find empirical answers.

1. Powers of attorney are dangerous and have been abused.

This presumably has been settled. Utility and danger go hand in hand. The most useful kitchen knives and power tools tend to be the ones that could potentially cause the greatest danger. Evidence indicates that billions of dollars are lost through the actions of agents of powers of attorney. Obviously, danger alone is no reason to ban a product. Let's not get into guns. Instead, consider cars. Cars are inherently dangerous, but no one thinks of banning them. Rather they are carefully regulated. To craft a policy to lessen danger, we need to understand better both how problems occur and what could be done to lessen them. I do not believe that many legislative actions are well informed on either of these questions.

2. Problems come from at least three sources: predators, opportunists, and Bad Samaritans.

This is an empirical question. Bennett Blum introduced me to the distinction between predators and opportunists. A predator is a person who intends harm from the outset. There is little doubt that some

people intentionally become an agent under a power of attorney intending exploitation. I assume that such incidents are rare, but there isn't much empirical data. An opportunist is different, i.e., a purse-snatcher is a predator; someone who notices that purse was left in an otherwise empty room and takes it is an opportunist. Presumably, much of the abuse of agent status is done by agents who hadn't intended any harm initially but fell victim to temptation when they needed money and noticed that no one was paying much attention.

The Good Samaritan was described in one of Jesus's parables. He was a bystander who provided assistance even though he had no duty to do so. Generally, agents under powers of attorneys have no duty to assist but agree to do so. Some do not intend to cause harm but end up doing so anyway, either through malfeasance or nonfeasance. The effect may be identical to the harm caused by predators or opportunists. If the principal needs money, it doesn't matter whether it was taken tortiously or lost through the ineptness. I cannot speculate about what percentages of loss are due to the three types of bad actors.

3. It is unlikely that a prophylactic plan will work across categories of bad actors.
This is an empirical question. I would speculate that the way to lessen the risk of loss through Bad Samaritans is a combination of:

- Informing them they do not have to take the job or they can resign
- Informing them of the burdens and risks to determine if they feel qualified
- Counseling principals about the qualities of good agents
- Providing better education and support for agents

Based on what we know about training in the workplace, I would further speculate that we need just-in-time training. It does little good to provide training now if the first time the agent will act is in two and a half years. How best to provide such just-in-time training is of course yet another empirical issue.

I would speculate that one way to discourage opportunists is to convince them that the opportunity isn't as easy as it may seem. Someone is checking, and they might get caught. When I draft powers of attorney, I recommend that the principal require the agent to report to others when the principal might not be able to oversee her own affairs. For example, if one child is agent, require that child to keep other children informed. It is less likely that someone will steal from Mom if siblings could easily see it. We even hear of opportunists who claim that they didn't realize they were doing anything wrong. Whether this is something they believe or just something they say to justify themselves isn't clear. Education could help here.

Such an approach will be useless for predators. They know full well what they are doing. All that might help here is normal criminal deterrence. Criminals are generally rational actors, even if their values are different from societal norms. If they believe that they are likely to get caught or to suffer serious consequences, they can direct their nefarious attention towards other schemes. Right now, elder exploitation is a very rational activity for criminals. The risks of being caught are low and the punishments are relatively light. One has to be dumb or desperate to attempt armed robbery at the police station, but it's relatively safe to take advantage of an older person.

4. I doubt that the required acceptance by the agent in PA 141 will discourage any of the three types of bad actors.
It would be nice to be wrong about this one. It doesn't seem to create much of a fear of being caught. It doesn't provide much instruction, especially at the right time. It doesn't increase oversight. About the only good I see now is that it would be harder for an agent to claim no knowledge that stealing money is a crime, something that was never very credible anyway.

5. Ideally there would be no general POAs available over the internet, but banning them isn't legislatively feasible.
Opposition would come from several areas. Free-market fundamentalists are opposed to regulation in general and are wary of any type of UPL laws. Advocates for the poor decry the costs of legal services. If there were only one authorized form, that would preclude all others, who would write it? If created by the legislature, would it forbid Medicaid planning? The current legislature might try to forbid its use for paying for an abortion. Would it prevent a lawyer from adding in more protection?

6. Ideally, any fill-in-the-blank general durable powers of attorney would be maximally protective and cumbersome to use.
Durable powers of attorney are risky. Persons who execute one without competent legal advice will not know what those risks are or how to minimize them. The only way to lessen the risk is to build in protections, but these protections will definitely make them harder to use.

There should be no possibility of authorizing gifting or waiving liability of the agent. The agent should be required to report to persons of equal or higher familial relationships if the principal cannot oversee the agent's actions. The action should be required to provide 72-hour notice to the principal and persons of equal or higher familial status before acting for an allegedly incapacitated agent. The agent should have to follow all laws regulating conservators, including communication and restrictions on real estate transactions. There should be no check-the-box forms. There should be conspicuous notice that it is better to see a Michigan licensed attorney in general, and, if you want anything different, you'll have to get it drafted by one.

These are significant restrictions. Such a power of attorney would be insufficient for most estate planning and Medicaid planning purposes, but those shouldn't be done without lawyers anyway. They would be slower to use. So be it.

7. Some protections may be legislatively and judicially feasible.
Here are a few suggestions:

> **a. Drafters' names should be required as is the case for deeds.**
> Often the principal's name would be given, but this isn't particularly credible for some principals. Simply giving the information might give some insight about the process and might discourage certain types of undue influence.
> **b. Deviations from a minimalist power of attorney might meet the *Dressel* standard.**
> I'm referring to the infamous case where the Michigan Supreme Court set the parameters of the practice of law. I cannot believe that the court as it is constituted would consider drafting a

generic power of attorney to be the practice of law. Perhaps it could be convinced that anything that deviates from a standard and affects rights and remedies of principals does involve legal advice and profound legal discretion. Obviously, this presupposes some minimal standard. Perhaps the minimalist power of attorney discussed above would suffice.

c. No third party may require or even offer powers of attorney that are general and affect financial matters not involving them.

The Secretary of State offers a power of attorney on-line, but it cannot be used to sell a house. Likewise, no financial institution should be allowed to offer a power of attorney that revokes previous powers of attorney or affects property rights outside the financial institution.

8. Ideally there should be some safe harbors for acceptance of powers of attorneys by third parties and penalties for noncompliance.

Lawyers and clients can become frustrated when carefully drafted powers of attorney are rejected or remain in limbo. On the other hand, we do not want third parties to accept proffered powers of attorney they have legitimate reasons to suspect.

The Uniform Power of Attorney addresses this problem but rather poorly. That act provides one safe harbor—notarization. Third parties can readily reject powers of attorney unless they are notarized. Notarization is presumably a reasonable basis to assume that the signature of the principal isn't forged. On the other hand, notaries public have no training and no experience in determining capacity, duress, deception, confusion about rights, and undue influence.

The interplay between the need for speed and the need for protection is complex. In general, the best protection is the involvement of a competent, disinterested Michigan-licensed attorney who met privately with the principal and counseled her. Presumably, the legislature would require some other alternatives, as well.

The problem with an overemphasis on penalties for rejection is that this biases financial institutions to accept POAs when there are questions. If they can be sued for wrongful rejection but there are no sanctions for wrongful acceptance, it is easy to see what a risk-averse entity will do.

9. It is difficult to speculate about what the effects would be of yet another do-it-yourself form blessed by the State Bar.

I cannot imagine that the State Bar would support this given the clamor that arose from previous postings. If this did happen, many Bar members would be upset. Who would use the Bar form? Research could be done about who used the previously posted version.

Suppose the Bar posted a form along the lines discussed above with maximum protection for the principal and minimum flexibility. Would potential users recognize that? Doubtless, predators wouldn't use it if they understood it. Perhaps the situation would be similar to letting patients choose their own prescription medication. One has little reason to believe they would choose the appropriate medication. Making those decisions requires medical knowledge. Choosing the right form requires legal knowledge, which gets us back to square one about how these should be created. My fear would be that a State Bar

form would legitimize other forms. After all, these forms can't be that dangerous if the State Bar offers one.

10. Check the box forms are especially dangerous.

Perhaps some handwriting experts are really good at detecting forgeries. I seriously doubt that any of them could say who checked a box. It is absurd to have forms where simply checking a box or adding initials can expand an agent's powers. There is no way to tell whether the principal authorized that expansion.

Conclusion

There is much we do not know. We can continue to speculate, but we need good, solid research on many of these matters.