ATTACHMENT

ONE

Approved, SCAO | JIS CODE: CSR

STATE OF MICHIGAN PROBATE COURT Oakland COUNTY CIRCUIT COURT - FAMILY DIVISION	PETITION FOR ☐ APPOINTMENT OF CONSERVATOR ☑ PROTECTIVE ORDER	FILE NO.

(A) Estate of [redacted] XXX-XX- 3739
Individual alleged to need protection — Last four digits of SSN

(B) 1. I, [redacted], am interested in this matter
Name
and make this petition as spouse.
State interest/relationship

(C) 2. The individual was born 10/20/1961, resides in Oakland County
Date
at [redacted]
Address
Novi, MI 48175 and has property in Oakland County.
City, state, zip

(D) ☐ 3. An action within the jurisdiction of the family division of circuit court involving the family or family members of the above individual has been previously filed in _____ Court, Case Number _____, was assigned to Judge _____, and ☐ remains ☐ is no longer pending.

(E) 4. The individual has ☐ a power of attorney (specify name and address below):
☐ a guardian (specify name and address below):
☐ a representative payee for social security (specify name and address below):

Name and address

(F) 5. ☐ a. The individual is an adult unable to manage his/her property and business affairs effectively due to:
☐ mental illness ☐ chronic use of drugs ☐ detention by a foreign power
☐ mental deficiency ☐ chronic intoxication ☐ disappearance
☑ physical illness or disability ☐ confinement ☐ _____
and either:
☐ the adult has property that will be wasted or dissipated unless proper management is provided.
☑ the adult or his/her dependents are in need of money for support, care, and welfare and protection is necessary to obtain or provide money.

☐ b. The adult petitioner is mentally competent but due to age or physical infirmity is unable to manage his/her property and affairs effectively, and recognizing the disability, requests the appointment of a conservator.

☐ c. The individual is a minor who:
☐ owns money or property that requires management or protection that cannot otherwise be provided.
☐ has or may have business affairs that may be jeopardized or prevented by minority.
☐ needs money for support and education and that protection is necessary or desirable to obtain or provide money.

☐ d. I am the guardian of the ward and it is in the ward's best interests to sell or otherwise dispose of the ward's real property or interest in real property.

(G) 6. The statements in item 5. are supported by the following facts: see exhibit A.
(Attach a separate sheet if more space is needed.)

SEE SECOND PAGE

Do not write below this line - For court use only

(H) 7. The individual to be protected has an estate of the approximate value as follows:

$ 320,800.00 Real property $ 37,531.62 Personal property $ _____ Insurance $ 4,346.42 Monthly income

(I) 8. The individual to be protected is receiving benefits from governmental agencies as follows:
☑ Social Security $ 2,186.00 . ☐ SSI $ _____ . ☐ Veterans Administration $ _____ , claimant number _____ . ☐ MFIA $ _____ . ☐ Other: _____ $ _____ .

(J) 9. The individual to be protected has:
☑ a spouse whose name and address are listed below.
☑ child(ren) whose name(s) and address(es) are listed below.
☐ no living child, but has living parent(s) whose name(s) and address(es) are listed below.
☐ no spouse, child(ren), or parent(s). The names and addresses of presumptive heirs are listed below.
☐ none of the above (must notify Attorney General - see instructions for the address of the Attorney General).

NAME	RELATIONSHIP	ADULT/ MINOR	ADDRESS AND TELEPHONE NO.
[redacted]	Spouse	☑ adult ☐ minor	[redacted] Novi, MI 48175
[redacted]	Child	☐ adult ☑ minor	[redacted], Novi, MI 48175
		☐ adult ☐ minor	

(K) 10. None of the above named persons is under any legal incapacity except:

Give name, incapacity, and representative of the person, if any

(L) 11. The individual is currently found at [redacted] Novi, MI 48175
Address or location

(M) 12. ☐ It is necessary that a preliminary protective order be entered pending the regular hearing because:

I REQUEST:

(N) 13. ☐ the court appoint _____
Name, address, and telephone no.

who has priority as _____ , as conservator of the estate to be protected.
Priority relationship

(O) 14. ☐ the court preserve and apply the individual's property pending the appointment of a conservator as follows:

(P) 15. ☑ the court enter a protective order that provides the relief as stated in the proposed order attached as Exhibit .

(Q) 16. ☐ the court appoint the guardian as special conservator with authority to sell or otherwise dispose of the ward's real property or interest in real property.

I declare under the penalties of perjury that this petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

(R) Date _____ Petitioner address _____

Petitioner signature _____ City, state, zip _____ Telephone no. _____

Attorney signature _____ Attorney address _____

Attorney name (type or print) _____ Bar no. _____ City, state, zip _____ Telephone no. _____

(S) 17. ☐ NOMINATION BY PERSON TO BE PROTECTED: **I am 14 years of age or older. I nominate as my conservator:**

Name, address, and telephone no.

Date _____ Signature of person to be protected _____

Exhibit A

1. [redacted] is a 47 year-old-man with multiple sclerosis (MS). He currently resides at his home.

2. [redacted] has been married to Petitioner [redacted] for 18 years.

3. During their life together, [redacted] was employed as an engineer with Ford Motor Company. However, he was forced to retire because of his MS. [redacted] was employed as a ____.

4. [redacted] currently resides with [redacted] at their home and is [redacted]'s full-time caretaker.

5. Michigan's Medicaid policy allows for the Home and Community-Based Services Waiver Program (waiver), which provides home and community-based services for aged or disabled persons who, if they did not receive such services, would require care in a nursing home. Department of Human Services Program Eligibility Manual (PEM) Item 106, page 1 (Exhibit B).

6. Michigan's Medicaid policy provides that the gross income limit for a potential waiver recipient is $1911 per month. PEM 164, page 2 (Exhibit C).

7. Michigan's Medicaid policy also provides that the income deductions available under the traditional Medicaid service are not applicable to the waiver program. *Id.*

8. However, Michigan's Medicaid policy allows for a court to issue a protective order to increase the community spouse income allowance (CSIA). PEM 546, page 4 (Exhibit D).

9. The CSIA helps to ensure that the community spouse is not impoverished by diverting too much of a family's income to pay for nursing home care.

10. In 2008, a maximum of $2,610 may be diverted to the community spouse. *Id.*

11. Using the formula set forth in PEM 546 pages 2-4, [redacted] would be entitled to $2,610 as a community spouse if [redacted] were to enter a nursing home. [redacted]'s resulting gross income would be $1,736.42 per month and consequently would meet the waiver income limit (Exhibit E).

12. However, because [redacted] is applying for the waiver and not Medicaid coverage for nursing home care, Michigan's Medicaid policy does not allow income to be diverted from [redacted] to [redacted] to help him qualify for the waiver. Instead, the waiver's "drop dead" income limit forces those Michigan residents that have too much income to qualify for the waiver yet not enough to provide for private medical assistance in their home to enter into nursing homes and leave their family behind.

13. Because [redacted] is only 47 years old, it would be inequitable to force him to enter a nursing home for the remainder of his life to receive the care that he needs.

14. Because [redacted] is [redacted]'s full-time caregiver, the only income she earns is $546 per month from [redacted]'s Social Security benefits (Exhibit F).

15. Due to this lack of income, the [redacted] family's monthly expenses exceed their monthly income.

16. However, if [redacted] were to be qualified for the waiver, [redacted] would be paid as [redacted]'s caregiver through Michigan's Adult Home Help Services.

17. Because [redacted] is not qualified for the waiver, [redacted] cannot be a paid for her full-time care of [redacted]. Because [redacted]'s needs preclude [redacted] from working outside the home, the Michigan waiver system effectively guarantees that the [redacted] family will lose their home due to the rapidly-increasing debt load.

18. Pursuant to MCL 700.5407(2), after notice and hearing, this court may authorize assets belonging to a legally incapacitated individual to be transferred, with or without consideration.

19. The authority granted to this court by MCL 700.5407(2)(c) may be exercised for the benefit of the immediate family of the protected individual as well as for the protected individual himself.

Petitioner requests this court to:

A. order [redacted] to pay $2,610 per month in support to [redacted]

B

DEPARTMENT POLICY

MA Only

This waiver is called the MI Choice Waiver Program. This waiver program provides home and community-based services for aged and disabled persons who, if they did not receive such services, would require care in a nursing home.

Services provided under this waiver program must be less costly for MA than the cost of nursing home services for the total number of waiver clients, not per person.

The MI Choice waiver is **not an MA category**, but there are special eligibility rules for people approved for the waiver. See "DHS Local Office Responsibilities" below.

TARGETED GROUP

Waiver services are covered for MA recipients who:

- Medically qualify, **or**
- Seek or have an expanded Home Help Program exception grant of $1000 or more per month, **and**
- Are age 65 or over, **or**
- At least age 18 and disabled.

WAIVER ADMINISTRATION

The Department of Community Health (DCH) administers the waiver through contracts with organized health care delivery systems. See "EXHIBIT I" in this item for a list of these waiver service agents. The agent's functions are described below.

Assisting Patients

The agent will assist prospective waiver participants in applying for MA and for initial asset assessments. The agent will also help the person obtain requested information and verification.

WAIVER PROCESS

The waiver process includes:

Assessment

The agent completes an assessment to verify medical eligibility for the waiver.

Care Plan

A written care plan is developed by the agent and the waiver participant if the assessment confirms medical eligibility for the waiver. The participant may choose to receive home and community-based services from the waiver service provider.

At a minimum, the plan includes:

- Types of services to be furnished; and
- The amount, frequency and duration of each service; and

- The type of provider to furnish each service.

Care Management

The agent is responsible for arranging for plan services to be provided.

APPROVED FOR THE WAIVER

Approved for the waiver means:

- The agent conducted the assessment, **and**
- The participant received, or expects to receive, supports coordination services from the agent with appropriate waiver services for at least 30 consecutive days.

Approval and Termination Dates

The agent determines the waiver approval date and termination date. The agent is responsible for advising the appropriate local DHS office of these dates.

The waiver automatically terminates when the patient enters an LTC facility. See PEM 547 for instructions.

DHS LOCAL OFFICE RESPONSIBILITIES

Local offices' primary responsibilities are doing initial asset assessments and determining MA eligibility for waiver patients.

Waiver Patient Defined

A waiver participant is a person whose month being tested is a waiver month.

Waiver Month Defined

A waiver month is a calendar month containing at least one day that the participant is (was) approved for the waiver. The agent determines the waiver approval date.

Note: For purposes of MA eligibility, a month remains a waiver month even if the waiver participant enters a LTC facility and/or hospital in the same calendar month. A waiver month does not become a L/H month (See PRG).

Eligibility

Special MA policies to use in the eligibility determination are:

- A waiver participant is a group of one even when he lives with his spouse (PEM 211).
- The Special MA Asset Rules in PEM 402 apply.
- MA divestment policy in PEM 405 applies to waiver participants.
- The extended-care category is available to waiver participants (PEM 164).

Notices

Waiver activities are performed by agents who meet the federal definition of administering the MA program. Therefore, you can share the fol-

lowing information with the agents without a signed release from the client:

- A copy of the DHS-3503, Verification Checklist.
- A copy of the DHS-4598, Medical Program Eligibility Notice, or the LOA equivalent.
- A copy of the DHS-1175, MA Determination Notice.
- A copy of the DHS-4588, Initial Asset Assessment Notice.

The original DHS-3503, DHS-4598, DHS-1175 and DHS-4588 must be sent to the client or the guardian, court or agency who is legally responsible for the client.

Do not enter waiver service agents on ASSIST as a third party type (AUTREP). Only the person's legal guardian, court or agency legally responsible for the participant can be entered as a third party type.

HOSPICE SERVICES

Waiver participants may receive hospice services and waiver services simultaneously.

The waiver services provider and the hospice coordinate their plans of care to avoid overlapping services. DCH is responsible for assuring correct payments are made.

MANAGED CARE PLANS

MA recipients must choose either waiver services or enrollment in an health maintenance organization (HMO). They cannot receive both waiver services and be enrolled in an HMO.

CIMS INPUT

Use the following data elements in the medical services authorization (FPAC transaction):

- Level of Care (LC) code - 22.
- Medical Provider Identification Number (Provider ID) -9999980.

EXHIBIT I - DCH WAIVER SERVICE AGENTS

WAIVER SERVICE AGENTS	COUNTIES SERVED
Detroit Area Agency on Aging 1333 Brewery Park Blvd, Suite 200 Detroit, MI 48207 Phone: 313-446-4444 Fax: 313-446-4446	Cities of: Detroit, Hamtramck, Highland Park, Grosse Pointe, Grosse Pointe Park, Grosse Pointe Shores, Grosse Pointe Woods, Grosse Pointe Farms, Harper Woods
The Senior Alliance 3850 Second Street, Suite 201 Wayne, MI 48184-1755 Phone: 734-722-2830 1-800-815-1112 Fax: 734-722-2836	All of Wayne County excluding those areas served by the Detroit Area Agency on Aging
The Information Center, Inc. 20500 Eureka Road, Suite 110 Taylor, MI 48180 Phone: 734-282-7171 Fax: 734-282-7105	All of Wayne County excluding those areas served by the Detroit Area Agency on Aging
Area Agency on Aging 1B 29100 Northwestern Hwy, Suite 400 Southfield, MI 48034 Phone: 248-357-2255 1-800-852-7795 Fax: 248-948-9691	Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw
Macomb-Oakland Regional Center, Inc. 16200 Nineteen Mile Road PO Box 380710 Clinton Township, MI 48038-0070 Phone:586-263-8953 Fax: 586-228-7029	Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw
Region 2 Area Agency on Aging 8363 US 12 P.O. Box 303 Onsted, MI 49265-0303 Phone: 517-467-2204 1-800-335-7881 Fax: 517-467-8214	Jackson Hillsdale Lenawee
Senior Services, Inc. 918 Jasper Street Kalamazoo, MI 49001 Phone: 269-382-0515 Fax: 269-382-3189	Barry, Branch, Calhoun,Kalamazoo, St. Joseph
Burnham Brook Center 200 West Michigan Avenue Suite 100 Battle Creek, MI 49017 Phone: 269-966-2475 1-800-626-6719 Fax: 269-966-2493	Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, St. Joseph, Van Buren

WAIVER SERVICE AGENTS	COUNTIES SERVED
Region IV Area Agency on Aging 2900 Lakeview Avenue St. Joseph, MI 49085 Phone: 269-983-0177 1-800-442-2803 Fax: 269-983-5218	Berrien Cass Van Buren
Valley Area Agency on Aging 711 North Saginaw Street, Suite 207 Flint, MI 48503 Phone: 810-239-7671 1-800-978-6275 Fax: 810-239-8869	Genesee Lapeer Shiawassee
Tri-County Office on Aging 5303 South Cedar Street Lansing, MI 48911-3800 Phone: 517-887-1440 1-800-405-9141 Fax: 517-887-8071	Clinton Eaton Ingham
Area Agency on Aging of Western Michigan, Inc. 1279 Cedar Street NE Grand Rapids, MI 49503-1378 Phone: 616-456-5664 1-888-456-5664 Fax: 616-456-5692	Allegan, Ionia, Kent, Lake, Mason, Mecosta, Montcalm, Newaygo, Osceola
HHS, Health Options 5363 44th Street SE Grand Rapids, MI 49512 Phone: 616-954-1547 1-800-634-2712 Fax: 616-285-2588	Allegan, Ionia, Kent, Lake, Mason, Mecosta, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa
Region VII Area Agency on Aging 126 Washington Avenue Bay City, MI 48708 Phone: 989-893-4506 1-800-858-1637 Fax: 989-893-3770	Bay, Clare, Gladwin, Gratiot, Huron, Isabella, Midland, Saginaw, Sanilac, Tuscola
A&D Home Health Care, Inc. 3150 Enterprise, Suite 200 Saginaw, MI 48603 Phone: 989-249-0929 1-800-884-3335 Fax: 989-249-1147	Bay, Clare, Gladwin, Gratiot, Huron, Isabella, Midland, Saginaw, Sanilac, Tuscola
Northeast Mich Comm. Service Agency, Inc. Region IX Area Agency on Aging 2375 Gordon Road Alpena, MI 49707 Phone: 989-356-3474 1-800-219-2273 Fax: 517-354-5909	Alcona, Alpena, Arenac, Cheboygan, Crawford, Iosco,Montmorency, Ogemaw, Otsego, Presque Isle, Roscommon

WAIVER SERVICE AGENTS	COUNTIES SERVED
Northern Michigan Regional Health System 416 Connable Avenue Petoskey, MI 49770-2297 Phone: 231-487-7194 or 231-487-5308 Fax: 231-448-4480	Alcona, Alpena, Arenac, Cheboygan, Crawford, Iosco,Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon
Area Agency on Aging of Northwest Michigan 1609 Park Drive PO Box 5946 Traverse City, MI 49696-5946 Phone: 231-947-8920 1-800-442-1713 Fax: 231-947-6401	Antrim, Benzie, Charlevoix, Emmet, Grand Traverse, Kalkaska, Leelanau, Manistee, Missaukee, Wexford
Northern Lakes Community Mental Health 105 Hall Street, Suite D Traverse City, MI 49684 Phone: 231-933-4917 or 231-933-4913 Fax: 231-995-7900	Antrim, Benzie, Charlevoix, Emmet, Grand Traverse, Kalkaska, Leelanau, Manistee, Missaukee, Wexford
Senior Resources 255 West Sherman Boulevard Muskegon Heights, MI 49444 Phone: 231-739-5858 1-800-442-0054 Fax: 231-739-4452	Muskegon Oceana Ottawa
U.P. Area Agency on Aging (UPCAP) 2501 14th Avenue South PO Box 606 Escanaba, MI 49829 Phone: 906-786-4701 1-800-338-7227 Fax: 906-786-5853	Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, Schoolcraft

LEGAL BASE **MA**

Social Security Act, Section 1915
42 CFR Part 435.217, 441.350,.400

JOINT POLICY DEVELOPMENT

Medicaid, Adult Medical Program (AMP) also known as Adult Benefit Waiver (ABW), Transitional Medical Assistance (TMA/TMA-Plus), and Maternity Outpatient Medical Services (MOMS) policy has been developed jointly by the Department of Community Health (DCH) and the Department of Human Services (DHS).

C

DEPARTMENT POLICY

MA Only

This is an SSI-related Group 1 MA category.

Consider eligibility under this category only if eligibility does **not** exist under PEM 154 through 163. Use this category before using a Group 2 category.

Consider Medicare Savings Program eligibility in addition to this category. See PEM 165.

This category is available only to L/H and waiver clients who are aged (65 or older), blind or disabled. See PRG for the definition of L/H patients. See PEM 106 for the definition of waiver clients. Gross income **cannot** exceed $1869.

All eligibility factors in this item must be met in the calendar month being tested. If the month being tested is an L/H month and eligibility exists, go to PEM 546 to determine the post-eligibility patient-pay amount.

NONFINANCIAL ELIGIBILITY FACTORS

- The person must **not** be eligible for MA under PEM 154 through 163 but may be eligible for a Medicare Savings Program under PEM 165.
- The person must be an L/H or waiver client.
- The person must be aged, blind or disabled (see PEM 240, Age, or PEM 260, MA Disability/Blindness). The MA eligibility factors in the following items must be met:
  - PEM 220, Residence.
  - PEM 221, Identity.
  - PEM 223, Social Security Numbers.
  - PEM 225, Citizenship/Alien Status.
  - PEM 255, Child Support.
  - PEM 256, Spousal/Parental Support.
  - PEM 257, Third Party Resource Liability.
  - PEM 265, Institutional Status.
  - PEM 270, Pursuit of Benefits.

FINANCIAL ELIGIBILITY FACTORS

Groups

Use fiscal and asset group policies for SSI-related MA groups in PEM 211.

Assets

Countable assets **cannot** exceed the asset limit in PEM 400. Countable assets are determined based on MA policies in PEM 400, 401 and 402.

Divestment

Policy in PEM 405 applies.

Income Eligibility

Income eligibility exists when **gross** income does **not** exceed:

- $1911 for months in calendar year 2008.
- $1869 for months in calendar year 2007.

Apply the MA policies in PEM 500 and 530 to determine gross income. Do **not** apply the deductions in PEM 540 and 541.

Income eligibility **cannot** be established with a patient-pay amount or by meeting a deductible.

VERIFICATION REQUIREMENTS

Verification requirements for all eligibility factors are in the appropriate manual items.

INSTRUCTIONS

Refer to 'How Do I' for CIMS coding instructions.

LEGAL BASE

MA

42 CFR 435.217 and .236
Deficit Reduction Act 2005, Social Security Act 1903(x), PL 109-171

JOINT POLICY DEVELOPMENT

Medicaid, Adult Medical Program (AMP) also known as Adult Benefit Waiver (ABW), Transitional Medical Assistance (TMA/TMA-Plus), and Maternity Outpatient Medical Services (MOMS) policy has been developed jointly by the Department of Community Health (DCH) and the Department of Human Services (DHS).

D

DEPARTMENT POLICY

MA Only

Use this item to determine post-eligibility patient-pay amounts (PPAs). A post-eligibility PPA is the L/H patient's share of their cost of LTC or hospital services. First determine MA eligibility. Then determine the post-eligibility PPA when MA eligibility exists for **L/H patients** eligible under:

- A Healthy Kids category, or
- A FIP-related Group 2 category, or
- An SSI-related Group 1 or 2 category ***except:***
  - QDWI, or
  - SSI recipients, or
  - Only Medicare Savings Program (with **no** other MA coverage).

MA income eligibility and post-eligibility PPA determinations are **not** the same. Countable income and deductions from income often differ. Medical expenses, such as the cost of LTC, are never used to determine a post-eligibility PPA.

PATIENT-PAY AMOUNT

The post-eligibility PPA is total income minus total need.

Total income is the client's countable unearned income plus his remaining earned income. See "COUNTABLE INCOME" below.

Total need is the sum of the following when allowed by later sections of this item:

- Patient Allowance.
- Community Spouse Income Allowance.
- Family Allowance.
- Children's Allowance.
- Health Insurance Premiums.
- Guardianship/Conservator Expenses.

COUNTABLE INCOME

For all persons in this item, determine countable income as follows:

- RSDI, Railroad Retirement and U.S. Civil Service and Federal Employee Retirement System.

Use countable income per PEM 500 and 530. Deduct Medicare premiums actually withheld by:

- Including the L/H patient's premium along with other health insurance premiums, and

- Subtracting the premium for others (example, the community spouse) from their unearned income.

Exception: Do **not** use the following special exclusion policies regarding RSDI. These policies only apply to eligibility, **not** post-eligibility patient-pay amounts.

- PEM 155, **"503 COUNTABLE RSDI".**
- PEM 156, **"COUNTABLE RSDI".**
- PEM 157, **"COUNTABLE RSDI".**
- PEM 158, **"COUNTABLE RSDI".**

Note: The checks of clients on Buy-In increase about 3 months after Buy-In is initiated. Recompute the PPA when the client's check actually changes. PAM 810 has information about Buy-In.

- **Earned and Other Unearned Income**

  Use PEM 500 and 530. For clients, use FIP- or SSI-related policy as appropriate. Use SSI-related policies for all other persons.

  For the **client only**, disregard $65 + 1/2 of his countable earned income. Use RFT 295 to determine the disregard. Earned income minus the disregard is **remaining earned income**.

PATIENT ALLOWANCE

The patient allowance for clients who are in, or are expected to be in, LTC and/or a hospital the entire L/H month is:

- $60 if the month being tested is November 1999 or later, and
- $30 if the month being tested is before November 1999.

Exception: Use $90 for any month a patient's VA pension is reduced to $90 per month. See "EXHIBIT."

Use the appropriate protected income level for one from RFT 240 for clients who were **not** in, or are **not** expected to be in, LTC and/or a hospital the entire L/H month.

COMMUNITY SPOUSE INCOME ALLOWANCE

L/H patients can divert income to meet the needs of their community spouse. The **community spouse income allowance** is the maximum amount they can divert. However, L/H patients can choose to contribute less. Divert the **lower** of:

- The community spouse income allowance, or
- The L/H patient's intended contribution (see "Intent to Contribute" below).

Compute the community spouse income allowance using steps one (1) through five (5) below.

1. Shelter Expenses

Allow shelter expenses for the couple's principal residence as long as the obligation to pay them exists in either the L/H patient's or community spouse's name.

Include expenses for that residence even when the community spouse is away (e.g., in an AFC home). An AFC home or home for the aged is **not** considered a principal residence.

Shelter expenses are the total of the following monthly costs:

- Land contract or mortgage payment, including principal and interest.
- Home equity line of credit (HELOC) or second mortgage.
- Rent.
- Property taxes.
- Assessments.
- Homeowner's insurance.
- Renter's insurance.
- Maintenance charge for condominium or cooperative.

Also add the appropriate heat and utility allowance if there is an obligation to pay for heat and/or utilities. The heat and utility allowance for a month is:

- $587, starting April, 2007.
- $529 starting January, 2008.

Convert all expenses to a monthly amount for budgeting purposes.

2. Excess shelter allowance

Subtract the appropriate shelter standard from the shelter expenses determined in step one. The shelter standard for a month is:

- $516, starting January, 2007.
- $525, starting January, 2008.

The result is the **excess shelter allowance**.

3. Total allowance

Add the excess shelter allowance to the appropriate basic allowance. The basic allowance for a month is:

- $1750, starting April 2008.
- $1712, starting April, 2007.
- $1719, starting January 2007.

The result, up to the appropriate maximum, is the **total allowance**. The maximum allowance for a month is:

- $2610, starting January 2008.
- $2547, starting April 2007.
- $2541, starting January 2007.

Exception: In hearings, Administrative Law Judges can **increase** the total allowance to divert more income to an L/H patient's community spouse. See PAM 600.

4. Countable income

Determine the community spouse's countable income. See "COUNTABLE INCOME" in this item.

5. Community spouse income allowance

Subtract the community spouse's countable income from the total allowance. The result is the **community spouse income allowance**.

Exception: Use court-ordered support as the community spouse income allowance if:

- The L/H patient was ordered by the court to pay support to the community spouse, **and**
- The court-ordered amount is **greater** than the result of step five (5).

Intent to Contribute

DHS-4592, Intent to Contribute Income:

- Determines the amount of income an L/H patient intends to contribute to his community spouse
- Instructs the L/H patient to report how much income he intends to make available
- Should be returned within 10 days

If the DHS-4592 is **not** returned within 10 days:

- Do **not** delay case actions, and
- Budget the entire community spouse income allowance.

Budget the entire allowance **until** the DHS-4592 is returned indicating the L/H patient intends to contribute **less**.

When the DHS-4592 indicating an intent to contribute **less** income is received:

- **Decrease** the income diverted to the community spouse to the indicated amount.
- Do **not increase** the income diverted to the community spouse without a new DHS-4592.
- **Decrease** the income diverted if:
  - The community spouse's circumstances change, **and**
  - The change reduces the community spouse income allowance **below** the amount indicated on the DHS-4592.
- Use timely negative action procedures to increase the patient-pay amount.

Do **not** use amounts from previous DHS-4592s when diverting income again after stopping a diversion for one of these reasons:

- An L/H patient is discharged to a non-L/H setting for 30 or more days.
- An L/H patient's ongoing MA case (including active deductible) terminates.
- An L/H patient's spouse is hospitalized or in LTC for 30 or more consecutive days.

Start the diversion process from the beginning.

FAMILY ALLOWANCE

An L/H patient's income is diverted to meet the needs of certain family members. The amount diverted is called the **family allowance**.

Family members must:

- Live with the community spouse, **and**
- Be **either** spouse's:
  - Married and unmarried children under age 21.
  - Married and unmarried children age 21 and over if they are claimed as dependents on either spouse's federal tax return.

- Siblings and parents if they are claimed as dependents on either spouse's federal tax return.

The **basic allowance** for each dependent is the monthly amount **minus** the dependent's countable income, divided by 3. The monthly amount is:

- $1712, starting January, 2007.
- $1750, starting April, 2008.

The **family allowance** is the sum of the dependents' basic allowances.

CHILDREN'S ALLOWANCE

L/H patients without a community spouse can divert income to their unmarried children at home who:

- Are under age 18, **and**
- Do **not** receive FIP or SSI.

The amount diverted is called the **children's allowance**. It is the children's protected income level from RFT 240 **minus** their net income. **Net income** is:

- 80% of countable earned income per RFT 295, **plus**
- Countable unearned income.

Do **not** divert income if information concerning the children's income is **not** provided.

HEALTH INSURANCE PREMIUMS

Include as a need item the cost of any health insurance (see PRG) premiums (including vision and dental insurance) the L/H patient pays, regardless of who the coverage is for. This includes Medicare premiums that a client pays.

Example: L/H patient pays health insurance premiums for two (self and spouse). Allow health insurance premiums for two.

Do **not** include premiums paid by someone other than the L/H patient as a need item.

Convert the cost of all premiums to a monthly amount for budgeting purposes.

Note: Allow the $5 deduction paid by GM retirees which includes LTC insurance coverage as an insurance expense deduction.

- The cost of certain medically necessary services **not** covered by MA such as chiropractic, podiatry, dental (other than emergency dental and oral surgery) and hearing aid dealers, and
- The MA co-payments for covered services.

The remainder of the PPA is then applied to the cost of care provided by the LTC facility. Department of Community Health, determines whether an offset is allowable.

PPAs are **not** offset by local office staff.

VERIFICATION REQUIREMENTS

Verify income per PEM 500.

Clients must verify the following before the cost can be used to determine excess shelter:

- Shelter obligation and amount.
- Heat and utility obligation but **not** amount.

These must be verified at application, redetermination or change.

Verify the cost of health insurance premiums before allowing the expense at application, redetermination or change.

Verification Sources

Shelter Obligation and Amount:

- Mortgage or rental contracts.
- Statement from mortgage company, bank or landlord.
- Tax or assessment bill or a collateral contact with the appropriate government department.
- Insurance policy, receipt or bill for premium or collateral contact with the insurance company.

Heat and Utility Obligation:

- Current bill or receipt or a written statement from the heat/utility provider.
- Collateral contact with the heat/utility provider.

Health Insurance Premiums:

- Insurance policy.
- Receipt or bill for premium.
- Contact with insurer.

Guardian/Conservator Expenses:

- Court Documents.

EXHIBIT - VA NOTICE

This is a portion of an April 1991 letter announcing reduced VA benefits. Key wording is highlighted.

You have been **a patient in a Medicaid-approved nursing home and covered by a Medicaid** plan for services since (Date). **Because you have no dependents and are receiving Improved Pension, the law requires that we limit your pension to $90.00 monthly** while you are receiving this type of care.

For that reason, we propose to reduce your benefits from (Date). No overpayment will be created.

This $90.00 monthly payment is for your incidental needs, such as toilet articles, snacks, etc. and **no part of this payment should be used by Medicaid to cover your medical expenses.** You should notify your state Medicaid office that your Improved Pension is being reduced.

LEGAL BASE **MA**

Social Security Act, Section 1924
42 CFR 435.725, .726 and .832

JOINT POLICY DEVELOPMENT

Medicaid, Adult Medical Program (AMP) also known as Adult Benefit Waiver (ABW), Transitional Medical Assistance (TMA/TMA-Plus), and Maternity Outpatient Medical Services (MOMS) policy has been developed jointly by the Department of Community Health (DCH) and the Department of Human Services (DHS).

E

F

Approved, SCAO

OSM CODE: ORD

STATE OF MICHIGAN PROBATE COURT Oakland COUNTY CIRCUIT COURT - FAMILY DIVISION	ORDER	FILE NO.

In the matter of [redacted]

1. Date of hearing: _____ Judge: _____ Bar no.

On petition filed, **THE COURT FINDS** that:

2. Notice of hearing was given to or waived by all interested persons.

IT IS ORDERED that:

A. [redacted] shall pay support to [redacted] an amount of $ per month.

Date

Judge

Attorney name Bar no.

Address

City, state, zip Telephone no.

Do not write below this line - For court use only

ATTACHMENT

TWO

Medicaid Outside the Context of Long Term Care, Including Special Needs Trusts
Patricia E. Kefalas Dudek, Patricia E. Kefalas Dudek & Associates
Lauretta K. Murphy, Miller Johnson Snell & Cumminsky

Michigan's Medicaid Waivers: Empowering or Imprisoning?

Katherine E. Lionas
Patricia E. Kefalas Dudek
Patricia E. Kefalas Dudek & Associates

I. Introduction

This article details the struggles of Harry[1], a man with developmental disabilities whose dream to move near his brother is being crushed by the bureaucratic red tape of Michigan's Medicaid Program, and its local contract agency.

In August of 2008, Harry's attorney and legal guardian petitioned the Oakland County Probate Court for permission to move Harry from Michigan to Illinois, without loss of his Medicaid Waiver services.[2] Harry is a 37 year-old Medicaid beneficiary with significant developmental disabilities and mental illness.[3] Harry was born with Cerebral Palsy[4] and cognitive impairments; he currently receives mental health services through

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[1] Harry's story is based on an actual case. Names of individuals involved have been changed or omitted for confidentiality.

[2] See § II B for the definition and full discussion of Medicaid Waivers.

[3] The Michigan Mental Health Code defines "developmental disability as a severe, chronic condition that: Is attributable to a mental or physical impairment or a combination of mental and physical impairments; Is manifested before the individual is 22 years old; Is likely to continue indefinitely; Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; Reflects the individual's need for a combination and sequence of special interdisciplinary or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated." *See* MORC, Inc. eligibility information at: http://www.morcinc.org/eligibility.htm. See also Michigan Mental Health Code § 330.1100a(20).

[4] "The term cerebral palsy refers to any one of a number of neurological disorders that appear in infancy or early childhood and permanently affect body movement and muscle coordination but don't worsen over time. Even though cerebral palsy affects muscle movement, it isn't caused by problems in the muscles or nerves. It is caused by abnormalities in parts of the brain that control muscle movements." *See* National Institute of Neurological Disorders and Stroke at: http://www.ninds.nih.gov/disorders/cerebral_palsy/cerebral_palsy.htm.

Michigan's Medicaid program through a contract with Oakland County Community Mental Health Authority (OCCMHA) and OCCMHA's contract agency, Macomb Oakland Guardianship (MORC, Inc.).[5] During his most recent psychiatric evaluation Harry was also diagnosed with Bipolar Disorder and Mild Mental Retardation.[6] Harry no longer has living relatives in the State of Michigan and but for his guardian and the providers employed by service organizations serving persons with disabilities,[7] he has no one to provide companionship to and advocacy for him.[8]

For the past year Harry, his advocate, and his attorney have been actively pursuing his dream to move to Chicago and live near family. Harry has articulated his goal to move to Chicago a number of times during his Person Centered Planning (PCP) meetings.[9] Specifically, Harry is asking to move to a place in Chicago, Illinois called "Little City Foundation." Little City Foundation is an organization that provides services

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[5] OCCMHA is a public agency that provides Oakland County children, adults, and families with mental health services by linking them with service providers, such as MORC, Inc. OCCMHA contracts with MORC, Inc. to provide services to individuals with disabilities. Services range from group therapy, to case management services, to substance abuse counseling. Available at http://www.occmha.org/ir/faq/dd.htm.

[6] "Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function. Different from the normal ups and downs that everyone goes through, the symptoms of bipolar disorder are severe. They can result in damaged relationships, poor job or school performance, and even suicide." National Institute of Mental Health available at: http://www.nimh.nih.gov/health/publications/bipolar-disorder/complete-publication.shtml. Mental Retardation is defined as "Below-average intellectual ability resulting from a genetic defect, brain injury, or disease, and usually present from birth or early infancy. *See* Dictionary.com. *The American Heritage® Science Dictionary*. Houghton Mifflin Company, available at: http://dictionary.reference.com/browse/mental retardation (accessed: July 10, 2008).

[7] Providers employed by service organizations are also called "paid support staff."

[8] Harry has some money in a trust for his benefit, which pays for an independent advocate for him.

[9] Person Centered Planning means that a developmentally disabled individual is given the opportunity to direct his or her own treatment and coordinate his or her own services with assistance from medical and mental health professionals, family, and friends. See § II D for full discussion.

to adults and children with developmental disabilities.[10] Harry's older brother John has lived in Little City for over thirty years. John has a severe developmental disability, and Harry's parents moved John to Little City when he was around 5 years old. Throughout Harry's childhood, he would visit John at Little City, and he consequently formed a close relationship with his brother. After Harry lost his mother in a tragic car accident, he was left alone with no relatives in Michigan. Moving near his brother became Harry's one dream and his main goal. Unfortunately, John cannot move to Michigan to live near Harry; his disability is too intense. John receives 24-hour support at his home at Little City; Harry's only option to reuniting with his brother is to move near John.

It is important to note that Harry is not asking to move to an institution.[11] Harry wants to live on Little City's campus, in an apartment. Harry may be able to live in an independent setting at Little City, and still have the convenience of visiting his brother every day, living within a safe walking distance of his brother's home. At Little City,

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[10] Little City Foundation began serving adults and children with developmental disabilities as an alternative to institutional living in 1959. Little City's Adult Services offer four different living arrangements, some on-campus and others off-campus in the greater Chicago area, for participants, including: Community Integrated Living Arrangements (CILA); Community Living Facility (CLF); Supportive Living Arrangements (SLA); and Community Integrated Living Arrangement 1 (CILA 1). Each setting is designed to encourage individuals to learn the skills that will enable them to be more independent, get involved in the community, and be good neighbors to those around them. Little City encourages individuals to enjoy the benefits of meaningful employment around the local community, as well as on-campus. There are six different Employment and Business Development programs at Little City, each geared toward different individual's needs, and varying abilities. Little City's vocational program is unique because it does not just give an individual a job, the program takes the process further by developing the individual's skills and helping the individual to grow as a person, and work toward their personal best. See http://www.littlecity.org/ , follow "Building a Better Tomorrow" hyperlink.

[11] In 1999, the Supreme Court decided a landmark Americans with Disabilities Act (ADA) case, *Olmstead v. L.C.* In *Olmstead*, the Court found that the "unjustified institutional isolation" of individuals with disabilities violates the ADA. "This decision marked the first time that the Court has interpreted the ADA, the landmark civil rights law for people with disabilities, in a way that directly impacts Medicaid, the national program providing health and long-term care services to people with disabilities." The *Olmstead* decision represents a trend of moving away from institutionalization toward community inclusion for the developmentally disabled. "Olmstead v. L.C.: The Interaction of the Americans with Disabilities Act and Medicaid," Kaiser Family Foundation (2004), available at: http://www.kff.org/medicaid/7096a.cfm. See § III A for a full discussion of the *Olmstead* decision.

Harry could receive the supports he needs, but would also have his brother nearby, and finally have the opportunity to socialize and make friends in a safe, supportive, and nurturing environment. It is Harry's dream to live near or at Little City, and to be able to see his brother every day. The natural support of family is of paramount importance in Harry's life.

This case summary focuses on the legal tribulations of Harry's attempt to gain control of his future and move to Chicago; specifically in the context of the Medicaid system, Medicaid Waivers, and the constitutional implications of a Medicaid recipient crossing state lines.

II. Background

A. Medicaid - Generally

Medicaid is a program jointly funded by federal and state funds, but administered by the individual states.[12] Generally, the federal funds are given to the states to establish medical assistance programs for low income and disabled individuals who reside in that state, subject to federal statute's approval of state programs.[13] The way the programs are developed and carried out varies from state to state.[14] In Michigan, Medicaid eligibility is determined by the same eligibility factors as federal Supplemental Security Income (SSI) requirements, and by law the requirements may not be any

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[12] William E. Dussalt, Planning for a Disability 12 (American Law Institute – American Bar Association of Continuing Legal Education) (2007).

[13] *Social Security and Medicare*, American Jurisprudence, 2nd Edition. Individual states are required to provide Medicaid benefits to all eligible residents of the state. See 42 C.F.R. §435.403 for residency requirements. A state may NOT deny Medicaid to individuals because they have not resided in the state for a certain amount of time. 42 C.F.R. §435.403(j)(1).

[14] Dussalt, *supra* note 12 at 12.

stricter.[15] There are both financial and medical criteria that an individual must meet in order to be eligible.[16] Although individual states are able to determine many details of the program, there are certain medical services that Medicaid must cover.[17] The mandatory services include: inpatient and outpatient hospital care, physician services, laboratory and X-ray services, family planning services, health clinic services, nurse midwife and nurse practitioner services, early and periodic screening, diagnostic and treatment services and immunizations for children under 21 years old, nursing home care, and transportation services to and from doctor, hospital, and health care visits.[18]

The Medicaid program is the United States' major public health program – it covers over fifty-eight million Americans, including eight million Americans with disabilities.[19] Since a disability must be permanent to qualify for Medicaid coverage, the needs of the disabled in the Medicaid program are often extensive, and require many different services from various facets of the medical community.[20] The types of supports that Medicaid's disabled population requires often goes above and beyond what a traditional insurance program would cover, for instance, community-based services to help the individual to work and live in the community, as opposed to living in

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[15] Centers for Medicare and Medicaid Services, available at: http://www.cms.hhs.gov/medicaideligibility/.

[16] *Id.*

[17] The Henry J. Kaiser Family Foundation, Navigating Medicare and Medicaid, 2005: A Resource Guide for People with Disabilities, Their Families and Their Advocates 39 (2005) [hereinafter *Navigating]*, http://www.kff.org/medicare/med020705pkg.cfm.

[18] *Id.*

[19] Diane Rowland, Sc.D., The Henry J. Kaiser Family Foundation, Helping Families with Needed Care: Medicaid's Role for People with Disabilities 1 (2008), http://www.kff.org/medicaid/7732a.cfm.

[20] *Id.*

an institution.[21] In addition to the mandatory Medicaid services discussed above, states may also cover other optional services such as prescription drug coverage, personal care assistants, and rehabilitation and physical therapy.[22] These optional services are often available to disabled Medicaid beneficiaries, to ensure that they are an active part of their community and to discourage institutionalization.

Medicaid services for the developmentally disabled and individuals with mental illness in Michigan are provided to individuals at a local level through a community mental health services program (CMHSP).[23] CMHSP's assist individuals in determining eligibility for services, and are ultimately responsible for developing the individual's plan of services.[24] "The CMHSP is responsible for developing a plan of service tailored to the individual's needs and desires, detailing the amount, duration, and scope of the services to be provided to the individual."[25] The plan of service is created by using the person centered planning process, discussed in detail below.

B. Medicaid Waivers

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[21] Community based services are any services that enable a disabled individual to live in a home setting and participate in their community, as opposed to living in an institution. Such services may include: personal assistants, assistive technology, day programs, adult skills programs, vocational services, assistance to participate in recreational and leisure activities, and transportation services. *See,* Disability Network Michigan, http://www.dnmichigan.org/comm-based-living.aspx.

[22] *Navigating, supra* note 17, at 39.

[23] Patricia E. Kefalas Dudek & Elizabeth Luckenbach Brown, Services and Eligibility for Persons with Disabilities, *in* Advising the Older or Disabled Client 9-1, 9-2 (George Cooney et. al. ed., 2007). In Michigan, the purpose of a CMHSP is to provide a "comprehensive array of mental health services appropriate to conditions of individuals who are located within its geographic service area, regardless of an individual's ability to pay." MCL § 330.1206(1).

[24] Dudek & Brown, supra note 23, at 9-2.

[25] *Id.* at 9-2.

Medicaid waiver programs were first enacted by Congress in 1981.[26] The Social Security Act §1115, allows the Secretary of the Department of Health and Human Services (HHS) to waive certain requirements of the traditional Medicaid program.[27] The Secretary of HHS provides federal Medicaid funds to a state, and under the waiver, that state may provide coverage that does not necessarily meet federal standards.[28] In essence, it waives some of the federal requirements. For the developmentally disabled, the waivers represent a progression away from unnecessary institutionalization, toward integration in the community. Medicaid Waiver programs require "budget neutrality," meaning that a particular state's federal funding for a waiver program cannot exceed what the cost of traditional Medicaid would be in that state without such a program.[29] The states that use waivers take the federal funds, create a number of available slots for eligible Medicaid beneficiaries, then fill the slots accordingly with the eligible individuals.[30] If there are more individuals than slots, waiting lists are employed until a slot becomes available.[31] While on a waiting list the individual will remain on traditional Medicaid.

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[26] Julia Gilmore Gaughan, Comment, *Institutionalization as Discrimination: How Medicaid Waivers, the ADA, and §1983 Fail*, 56 U. Kan. L. Rev. 405, 408 (2007).

[27] The Henry J. Kaiser Family Foundation, The New Medicaid and CHIP Waiver Initiatives 11 (2002) [hereinafter *The New Medicaid*], http://www.kff.org/medicaid/4028-index.cfm.

[28] *The New Medicaid* at 11. "Waivers have allowed states to experiment with provisions of new benefits, like hospice care or community-based care as an alternative to nursing home care, to extend family planning services to women, and to provide coverage to uninsured or underinsured individuals with HIV." *Id.*

[29] *The New Medicaid* at 11.

[30] "States often have more individuals in need of waiver services than the number of available spaces, called 'slots,' on a program. Many states use waiting lists when their program slots are filled." The Henry J. Kaiser Family Foundation, Medicaid 1915(c) Home and Community-Based Service Programs: Data Update, 9, (2005), http://www.kff.org/medicaid/upload/7345.pdf.

[31] *Id.* at 9.

1915(b) waivers[32] are available for individuals with developmental disabilities or severe mental illness.[33] Besides the basic Medicaid covered services for medically necessary health care, this waiver expands coverage to psychological testing, psychiatric evaluations, behavioral analysis, and other services related to mental health.[34]

Home and community-based services waivers (HCBS), codified in § 1396n(c), are used in many states to keep people with different types of disabilities integrated in the community, and out of institutions.[35] The waivers differ from traditional Medicaid in that the waivers do not adhere as strictly to income and resource requirements, and allow the states to experiment with different types of alternative care.[36] These Medicaid waivers are especially helpful for individuals living with mental illness, as the waivers give these individuals more choice and flexibility in their treatment. From 1992 to 2002, Medicaid spending on HCBS waivers has more than doubled, jumping from 15% to 31% of the long term care budget in those 10 years.[37] In 2002, more than 2 billion individuals received services through the HCBS waivers.[38]

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[32] 1915(b) waivers are also known as "Managed Care or Freedom of Choice" waivers. Like other waivers, the 1915 (b) waiver allows a state to waive certain traditional Medicaid requirements. See www.cms.hhs.gov follow the "Medicaid" hyperlink.

[33] Dudek & Brown, *supra* note 23, at 9-7.

[34] Dudek & Brown, *supra* note 23, at 9-7.

[35] 42 U.S.C. §1396n(c)(1).

[36] Gaughan, *supra* note 26, at 411.

[37] The Henry J. Kaiser Family Foundation, Medicaid 1915(c) Home and Community-Based Service Programs: Data Update, 1, (2005), http://www.kff.org/medicaid/upload/7345.pdf.

[38] *Id.* at 1.

MI Choice is the Medicaid HCBS waiver program in Michigan, and is administered by the State's contract agencies. The program is designed for individuals who are elderly and disabled, but wish to remain in their home and receive services.[39] MI Choice offers a broad range of services for the client to receive in the comfort of their own home.[40] Some of services offered include: homemaker services, transportation, personal care, adult day care, counseling, environmental modifications, chore services, private duty nursing, and medical supplies and equipment that may not be covered by Medicaid.[41] MI Choice also offers classes to help train individuals to learn independent living skills.[42] Individuals who receive services under the MI Choice waiver are often eligible to participate in Self Determination[43], which allows them to manage their own budget for services and even hire caregivers of their choosing.[44]

Again, because Medicaid is run through individual state Medicaid plans and many different waivers in each state, the rights protected by this joint federal and state program can be disjointed through the states and local communities. In this ever increasingly mobile society, one has to wonder if we have a duty to advocate for a more coordinated approach of services for people with disabilities. At what point does the Trustee's duty of loyalty to pursue all sources of public support end?

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[39] Alison E. Hirshel, Long-Term-Care Options and Quality Issues, *in* Advising the Older or Disabled Client 8-1, 8-15 (George Cooney et. al. ed., 2007).

[40] *Id.* at 8-16.

[41] *Id.* at 8-16.

[42] *Id.* at 8-16.

[43] Self-Determination is discussed in detail below in § D.

[44] Hirshel, *supra* note 39, at 8-18.

C. Section 504 of the Rehabilitation Act and the ADA

Section 504 of the Rehabilitation Act ("§ 504") was enacted by Congress in 1973 to include, integrate, and encourage full participation of disabled Americans in the country's public organizations and programs.[45] Section 504 applies to all organizations, businesses, and programs that receive funding from any federal agency, including the U.S. Department of Health and Human Services.[46] It is important to note that many state and local programs do not receive federal funding, thus, § 504 is not complete protection for those with disabilities.

The Americans with Disabilities Act (ADA) was enacted by Congress in 1990 to address the isolation and discrimination that has plagued individuals with disabilities throughout U.S. history and to fill in some of the gaps of § 504.[47] The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[48] The ADA was enacted in response to congressional findings that "individuals with disabilities are a discrete and insular

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[45] An individual must meet the statutory definition of disabled to qualify for § 504 protection. 29 U.S.C. § 794. An individual with a qualified disability under § 504 is an individual who "has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter." 29 U.S.C § 705(20).

[46] Your Rights Under Section 504 of the Rehabilitation Act, United States Department of Health and Human Services, www.hhs.gove/ocr. Follow hyperlink "Civil Rights on the Basis of Disability" and "Your Rights Under Section 504 of the Rehabilitation Act."

[47] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12189 (1990). Congressional findings of fact stated that in 1990, 43 million Americans had one or more disability. § 12101(a)(1). The ADA was enacted in response to society's tendency to "isolate and segregate individuals with disabilities" and because before the ADA, disabled individuals had no legal recourse against such discrimination. (§12101(a)). Individuals with disabilities encounter various forms of discrimination throughout their lives, such as "outright intentional exclusion, the discriminatory effects of architectural, transportation and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." § 12101(a)(5).

[48] 42 U.S.C. § 12101(b)(1)(2000).

minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society."[49] The ADA prohibits discrimination against disabled individuals in four main areas: employment[50], public services provided by the government,[51] public accommodations provided by private entities,[52] and telecommunications.[53] Title III of the ADA states that a public accommodation may not deny goods or services to a disabled individual, may not offer unequal benefits to disabled individuals, and must offer services in the most integrated setting possible.[54]

D. Person Centered Planning and Self Determination

Person Centered Planning is not just a mental health concept in Michigan, it is the law.[55] The Michigan Mental Health Code (the Code) defines "person centered planning" as "a process for planning and supporting the individual receiving services that builds upon the individual's capacity to engage in activities that promote community

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[49] § 12101 (a)(7).

[50] §§ 12111-12117.

[51] §§ 12131-12165.

[52] §§ 12181-12189.

[53] §§ 12201-12213.

[54] § 12182.

[55] *See* What is Person Centered Planning? http://www.michigan.gov/documents/pcp_156070_7.pdf.

life and that honors the individual's preferences, choices, and abilities. The person centered planning process involves families, friends, and professionals as the individual desires or requires."[56] The Code also states that the individual's responsible mental health agency must ensure that the person centered planning process is implemented, and that the individual receiving services participates in developing an individual plan of services that he or she is satisfied with.[57] Specifically, the Code provides that, "The responsible mental health agency for each recipient shall ensure that a person centered planning process is used to develop a written individual plan of services in partnership with the recipient."[58]

Person centered planning was created to respond to the needs, dreams, and aspirations of an individual receiving public services.[59] The process of person centered planning is meant to focus on the individual's strengths, preferences, and choices, all while keeping in mind the individual's cultural background and personal history.[60] Although person centered planning focuses on an individual, an integral part of the process is making sure that the individual's family, friends, and other advocates are involved in the process as well.[61] This family approach to person centered planning is significant; it recognizes that the supports and services provided to the individual will

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[56] MICH. COMP. LAWS ANN. § 330.1700(g) (1999).

[57] MICH. COMP. LAWS ANN. § 330.1712(1) & (2) (1999).

[58] MICH. COMP. LAWS ANN. § 330.1712(1) (1999).

[59] *See* Person Centered Planning Revised Practice Guideline, October 2002, at: http://www.michigan.gov/documents/PCPgud02_83966_7.pdf.

[60] *Id.*

[61] *Id.*

impact the family as a whole, and not just the individual receiving the services.[62] "The meeting should focus on the individual - what does he or she like and dislike; what are his or her dreams and goals; what are his or her health and safety concerns; and what mechanisms does he or she want in place in the event of crisis."[63] After it is created, the person centered plan is used as a roadmap to create the individual's plan of service.[64]

Correspondingly, self determination in Michigan is a concept that applies to individuals who receive services under the MI Choice Waivers.[65] Self determination is a set of four principles used by the Michigan Department of Community Health (MDCH) to empower individuals with developmental disabilities who receive certain Medicaid waiver services.[66] The principles include: Freedom, meaning the individual is free to make decisions about their life; Authority, meaning the individual has the authority to control their finances, and spend their own money; Support, meaning access to the help the individual may need; and Responsibility, meaning the responsibility to use their public supports wisely, and to contribute back to the community as best they can.[67] These four principles are the cornerstones to the self determination concept, and they assist as an outline that dictates what the individual can expect from their services, and what the service providers can expect from the individual. Self determination gives an

[62] *Id.*

[63] Dudek & Brown, *supra* note 23, at 9-12.

[64] Dudek & Brown, *supra* note 23, at 9-12.

[65] *See* Frequently Asked Questions About Self-Determination in Long-Term Care, http://www.michigan.gov/documents/ltc/FAQs_050608_239126_7.pdf.

[66] *See* What is Self Determination?, http://www.michigan.gov/documents/whatSD_156041_7.pdf.

[67] *Id.*

individual more choice and control because it establishes a specific self determination budget that the individual uses to choose and hire their own workers for different at-home supports.[68] Both self determination and person centered planning are concepts that go along with coordinating services and supports for individuals who receive services under Medicaid and Medicaid Waivers.

Through the person centered planning process, Harry has repeatedly requested to be allowed to use his self-determination budget, in the same amount, scope, and duration, to move to Chicago, Illinois. Specifically, Harry has asked that he receive assistance in moving his belongings and physically traveling to Illinois. Harry realizes that he is unable to move to Illinois without the assistance of the waiver services and supports that he currently receives.

E. Harry's Request

The past several years of Harry's life can be described as tumultuous at best. In 1998, Harry and his mother were involved in a motor vehicle accident that killed her and left Harry alone and severely injured. Over the last two years alone, Harry has moved more than six times, and has had no real stability in his living situations.

Although Harry is receiving services through the MI Choice waiver, his life still lacks one important aspect, something that his Medicaid services cannot provide: a family. Unfortunately, Harry's dream to live with his family has put his health, safety, and welfare in danger in the past. In 2007, Harry moved in with a family that he believed he could trust; Harry's service providers never did a background check on this family, and it

[68] *Id.*

was later discovered that a member of the family was a felon, and kept firearms in the home. Because Harry moved from his county of residence to live with the family, he lost his Medicaid Waiver services.

Throughout this chaotic time period, Harry lost his vocational services twice, lost his Community Living Supports (CLS) Service, and had no formal plan of service for approximately four months. [69] During the time he needed help the most, Harry was abandoned by the State of Michigan, and its contract agencies. Harry was provided no formal notice from MORC, Inc.[70] when he lost his services, and was not given the opportunity to appeal the loss of these essential services. The Manager of Customer Services for OCCMHA testified at Harry's Administrative Hearing in February 2008, stating that Harry had made a decision to move from Oakland to Macomb County, thus, his services were "suspended." The OCCMHA also stated that a suspension of services requires Due Process. Unfortunately Harry never received any notice that his services were being suspended; the services simply stopped, and Harry was not given the necessary due process for temporarily losing his services.

Harry's preference to live in a family-like setting is the common thread connecting all of his recent housing problems. One of Harry's advocates described his latest housing experiences by saying that Harry has been treated with less care than a typical person would treat their own furniture. Harry's intense longing for family after his

[69] Vocational services are supports that assist an individual with working in the community. Vocational services allow disabled individuals to participate as part of the community. Vocational services can range anywhere from periodic phone calls from a job coach, to having a full-time job coach with the individual during all working hours. See www.morcinc.org and follow the "Services" hyperlink, then follow the "vocational services" hyperlink. A plan of service is put together by the disabled individual and their Support Coordinator. The plan of service includes input from the individual on what type of assistance they need and would like, as well as input from other important people in the individual's life. See www.morcinc.org and follow the "Services" hyperlink, then follow the "Support Coordinator" hyperlink.

[70] Harry's service provider at the time.

mother died was one of the main reasons he decided to leave his Oakland County Supported Independence Program (SIP) home and move in with a family in a neighboring county.[71] Harry's reasons for moving were simple; all that Harry wanted was to have his own room, and to live in a family environment.

Unfortunately, Harry's decision to move in with the family in Macomb County proved to be a horrible one. It was a decision that could have been prevented had MORC, Inc., worked with Harry's advocates and MORC, Inc.'s own supports coordinator to keep Harry from moving into an unsafe home, and to facilitate a better and more supportive housing option for Harry. During Harry's Administrative Hearing his advocate explained that, "[The family] wasn't treating him well. They were opening his mail. They were withholding mail. They were refusing to drive him where he needed to go." MORC, Inc. did nothing to stop Harry from moving in with a convicted felon who kept firearms in the home. This was a dangerous placement for Harry, and MORC, Inc. should have been cognizant of this fact, especially since his supports coordinator, a MORC, Inc. employee, was working tirelessly to prevent this move. Harry's supports coordinator even went as far as to file a petition with the probate court for a guardian to be appointed to prevent the move.[72]

In addition, before Harry moved in with the family, MORC, Inc. was aware of a psychological report, prepared by a psychologist retained by MORC, Inc., who interviewed Harry in March of 2007. The psychologist's report stated that Harry can be

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[71] A SIP is a supported independence program, http://www.morcinc.org/about/abbreviations.htm.

[72] A "supports coordinator" works with the developmentally disabled individual to coordinate treatment plans, authorize needed services, provides advocacy, links the individual to other agencies, provides guidance on accessing other community resources, and assists the individual on safety and financial matters. *See* http://www.morcinc.org follow "Services" hyperlink, and then "Supports Coordinator" hyperlink.

very immature and impulsive. The report also said that Harry can make good decisions if he has trustworthy people around him, and in contrast, his ability to make decisions may be questioned when he is acting regarding decisions that he has an emotional connection to. Certainly Harry's decision to move to Macomb County was emotionally charged; Harry did not think twice, all he wanted was a family environment. Harry moved in with the family against the advice of his supports coordinator, a probate judge, his advocate, and his Co-Trustees at the time, who filed a Petition in Support of Guardianship.

Unfortunately, Harry's "service provider" MORC, Inc. felt that when Harry moved to Macomb County he was "walking away from his services." However, Harry had no idea that by moving to a neighboring city he would essentially lose his services. Harry had no effective plan of service while living in the neighboring county, and MORC, Inc. felt that was proper because Harry moved across county lines of his own accord, thus alleviating MORC, Inc. of any duty to Harry. These statements are in direct contradiction with MORC Inc.'s role as Harry's service provider and supports coordinator. This contradiction is illustrated by OCCMHA keeping Harry's case open because they were concerned about him living with the family in the neighboring county.

At Harry's Administrative Hearing, MORC, Inc. was unable to indicate any specific policy or provision of the Medicaid Provider Manual or CMH's contract that gives OCCMHA the ability to discontinue services when a consumer crosses county lines. Harry's time living with the family in Macomb County was his most difficult in recent years, and both MORC, Inc. and OCCMHA abandoned him during this time, contrary to the repeated pleas of his family and advocates. It is shameful that this

"system" would allow Harry to move between counties into a situation that put his very health and safety at risk. It is even more shameful that the same actors are now denying Harry the ability to move to a safe setting, which will facilitate more independence for him, and is the only setting which will allow him to have loving contact with his brother.

III. Analysis

Although there are no cases exactly on-point, Harry's predicament ties together many different issues that deal not only with Medicaid law, but also implicate the ADA and constitutional law as well. The case law below illustrates that it is against the ADA to keep an individual in a facility for longer than necessary for their medical or mental health condition, thus the law encourages choice and community-based settings. The cases also discuss the constitutional implications of individuals who receive Medicaid services and want to move to another state. Harry's situation is admittedly a little different than the cases below. Instead of moving to a new state and then demanding services when he gets there, Harry is attempting to request that his services from Michigan stay in place to help him move to Illinois. Without assistance from Michigan, Harry is unable to move to Illinois to live near his brother. While there is no case directly on-point, the cases do offer insight into Harry's request, and why the request should be granted.

A. The Olmstead Decision

A 1999 Supreme Court decision, *Olmstead v. L.C.*, changed the future of many disabled Americans who rely on public benefits such as Medicaid. In *Olmstead*, the

Supreme Court examined whether, under the anti-discrimination principles, the ADA may require placement of persons with mental disabilities in community based settings instead of institutions.[73] L.C. brought suit against the Commissioner of the Georgia Department of Human Resources, the Superintendent of Georgia Regional Hospital (GRH), and the Executive Director of the Fulton County Regional Board (collectively, the State) to challenge her confinement in the GRH psychiatric ward.[74] L.C. is a mentally retarded woman who is also diagnosed with schizophrenia, and was voluntarily admitted into the psychiatric ward of GRH in May 1992.[75] A year later, L.C.'s condition was stable, and her doctors were all in agreement that her needs would be best met in a state supported community based program.[76] Unfortunately, L.C. was institutionalized for almost three more years, and was not placed in a community-based program until February of 1996.[77]

L.C. brought suit against the State in May 1995, invoking 42 USC §1983 and the ADA.[78] L.C.'s claim stated that Georgia violated Title II of the ADA by "failing to place her in a community-based program once her treating professionals determined that such placement was appropriate."[79] E.W., a woman with similar circumstances as L.C.,

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[73] Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 593 (1999).

[74] *Id.* at 581.

[75] *Id.* at 581.

[76] *Id.* at 581.

[77] *Id.* at 582.

[78] *Olmstead* at 582.

[79] *Id.* at 581.

intervened in the action with an identical claim.[80] The District Court granted partial summary judgment for L.C. and E.W., and the Court of Appeals affirmed the judgment of the lower court, but remanded to the District Court to consider whether the additional expenditures of treating L.C. and E.W. in community-based care would be unreasonable among the other demands of the State's mental health budget.[81]

The Supreme Court granted certiorari and concluded that when a State's mental health professionals determine that an individual should be in community-based care instead of an institution, the individual does not oppose, and the placement can be reasonably accommodated, then the individual should be in the less restrictive environment.[82] The Supreme Court stated that the unjustified institutionalization of individuals with disabilities is discrimination for two reasons, first, it is perpetuating the mindset that these individuals are incapable or unworthy of involvement in the community, and second, that detention in an institution creates a barrier between the individual and their family, friends, employment opportunities, social events, various forms of independence, along with social and cultural enrichment.[83] It is important to note that an absolute right to community care is not created by the *Olmstead* decision. The case does determine however, that if a disabled individual who should be in a community setting is kept in an institution against the advice of their physician and their own will, it could be considered a form of discrimination under Title II of the ADA.

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[80] *Id.* at 582.
[81] *Id.* at 594.

[82] *Id.* at 595.

[83] *Id.* at 600.

B. Medicaid and the Right to Interstate Travel

1. Duffy v. Meconi

In 2007, the Federal District Court of Delaware held that the State of Delaware's residency requirements to qualify for Medicaid violate an individual's fundamental right to interstate travel.[84] Ms. Duffy is a 33 year old Medicaid beneficiary who resides in an intermediate care facility for mental retardation in North Carolina.[85] Ms. Duffy is diagnosed with mental retardation, autism and blindness; she is also non-verbal, and suffers from seizures.[86] Due to the severity of her condition, she requires 24-hour supervision.[87]

In 2001, Ms. Duffy's parents moved from North Carolina to Delaware.[88] Because her condition is so serious, Ms. Duffy's parents are unable to take care of her for any long period of time.[89] Upon moving, Ms. Duffy's parents immediately applied to obtain a similar placement for her in Delaware through Medicaid.[90] The State of Delaware determined that because she was not yet a resident, and she did not have "urgent

[84] Duffy v. Meconi, 508 F. Supp. 2d 399, 407 (2007).

[85] *Id.* at 401.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

needs," she would not receive community placement in Delaware.[91] The Duffys brought suit on behalf of their daughter alleging that the State's refusal to provide her with services violates the Privileges and Immunities Clause of Article IV of the Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment by restricting her right to interstate travel.[92]

The court examined whether, "by requiring Ms. Duffy, who cannot afford private care, to first physically move to Delaware at her own expense, before the State determines her Medicaid eligibility, the State is violating her Constitutional right to travel."[93] The court held that Delaware did violate Ms. Duffy's right to travel under the Equal Protection Clause of the Fourteenth Amendment, and granted summary judgment for Ms. Duffy.[94] The court stated that the residency requirement treats individuals who do not have sufficient funds to move from one state to another on their own, differently that it does those with the means to establish residency with their own finances, and the distinction is neither warranted nor justifiable.[95] The court stated that Delaware was deterring Ms. Duffy, and those similarly situated to her, from crossing state lines.[96]

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[91] *Id.* at 402.

[92] *Id.* at 402. "A state law implicates the constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." Id at 6, quoting *Attorney General of New York v. Soto-Lopez,* 476 U.S. 898, 903 (1986). *Id.* at 403.

[93] *Id.* at 404.

[94] *Id.* at 407.

[95] *Id.*

[96] *Id.* at 407. "While the State does not pronounce that an applicant has to be a resident for a set period of time in order to obtain benefits, the message that the State has clearly communicated to Ms. Duffy, and others similarly situated, is that she must first come to Delaware and, regardless of her ability to pay, wait

The court's decision in this case reunited a family that had been apart for six long years; hopefully it will help persuade a judge in Michigan, that Harry should be reunited with his brother in Chicago. Like the *Duffy* case, Harry's brother wants Harry to be near him, but he does not have the resources to get Harry to Chicago without the assistance of his Medicaid services. Accordingly, Harry is unable to simply pack his belongings and move to Chicago. In contrast to Ms. Duffy's situation, Harry does not have parents who can assist him in moving or even to fight for his constitutional right to move out-of-state. If Harry does not have services to assist him in moving, he will not have even the simple assurance that he will arrive in Chicago safely. Unfortunately, Harry received an unfavorable decision from the DCH Administrative Tribunal when he requested to be allowed to temporarily use his Medicaid services in the same amount, duration, and scope, to assist him to move to Chicago.

The DCH Administrative Tribunal reasoned that Harry needs to use his own money to get himself from Michigan to Illinois, and that moving out-of-state is not a Medicaid covered service. What DCH Administrative Tribunal failed to understand is that Harry does not have the capability to handle all of the planning and the details that go into moving from one state to another; this is not merely a financial issue. It will not cost the State of Michigan any more money to allow Harry to use his Medicaid services on a temporary basis to move, than it would for Harry to remain in Michigan with his services. At this point, all Harry is able to do on his own is to communicate his wishes, and use his voice during his Person Centered Planning meetings to articulate his dream

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somewhere between 48 hours and 90 days, before the State will approve her for benefits essential for her health, safety, and welfare." *Id.* at 405.

to someday be reunited with his brother. He continues to plead for access to services to facilitate the exercise of his Constitutional rights.

2. Bethesda Lutheran Homes and Services Inc. v. Leean et al.

Along the same lines as *Duffy*, the Seventh Circuit Court of Appeals in 1997 held that a private long term care facility in Wisconsin may not deny admission to individuals who are not already residents of Wisconsin.[97] In *Bethesda Lutheran*, three current residents of the facility and four out-of-state individuals who wanted to move to the facility, brought suit under 42 USC §1983 against Wisconsin officials.[98] The plaintiffs allege that the defendants are violating their constitutional right to travel, by imposing certain state and federal Medicaid regulations.[99]

Bethesda Lutheran is a long-term care facility that provides care for individuals with severe developmental disabilities.[100] Three plaintiffs who are current residents of Bethesda Lutheran are bringing suit based on the fact that they are currently ineligible for Medicaid because of their present living situation.[101] Since all three plaintiffs' parents were residents of Illinois when they were admitted into the Wisconsin facility, they are considered residents of Illinois in the eyes of the Wisconsin government, and therefore not eligible for Medicaid in Wisconsin.[102] Conversely, these three individuals

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[97] Bethesda Lutheran Homes and Services Inc., et al. v. Leean et al., 122 F.3d 443, 447 (7th Cir. 1997).

[98] *Id.* at 444.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 447.

[102] *Id.*

who are considered Illinois residents are not entitled to Medicaid benefits from Illinois either.[103] The other four plaintiffs are developmentally disabled individuals who currently live outside of Wisconsin, and are challenging the Wisconsin laws that prevent them from relocating to the Bethesda Lutheran facility.[104]

The Seventh Circuit concluded that the Wisconsin residency requirement in this case is a baseless interference with an individual's constitutional right to interstate mobility, and that the state was unable to communicate any plausible justification for such a requirement.[105] The court reasoned that it is virtually impossible for the four non-residents to establish residency under the current Wisconsin regulations.[106] "Since anyone who is approved for protective placement is by definition incapable of living outside the Watertown facility or its equivalent in restrictiveness, it is unclear where in Wisconsin the applicant for admission to the facility is supposed to live while being processed."[107]

As for the three individuals who already live in the facility and are in need of Medicaid benefits to remain there, the court determined that the Medicaid regulations prohibiting them from becoming residents of Wisconsin are also unconstitutional.[108] The Wisconsin government argued that if there is no residency rule, then disabled

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[103] *Id.* "We shall see that, as Illinois residents they are entitled to Medicaid benefits from neither Wisconsin nor Illinois, if the regulations are valid; and without those benefits they cannot afford to remain in the Watertown facility." *Id.* at 444.

[104] *Id.* at 444.

[105] *Id.* at 447.

[106] *Id.*

[107] *Id.* at 446.

[108] *Id.* at 449.

individuals will simply flock to the states with the best care, thus, there will be major economic ramifications in those states.[109] The court agreed that this is a substantial argument, but cited *Shapiro v. Thompson* where the Supreme Court held the exact argument in the context of residency requirements for welfare eligibility, inadmissible.[110] The court held that both the state and federal provisions that the plaintiffs challenged violate the constitutional right to travel.[111]

C. Harry's Constitutional Right to Move to Illinois

Harry must not be kept away from his family simply because he does not have the financial means to move to Illinois on his own without the support services identified in his person centered plan. Moving to a new state with no supports or services will jeopardize Harry's health, safety, and welfare. Like the plaintiffs in both *Duffy* and *Bethesda Lutheran*, Harry, longs to live near his brother, this is his dream. This dream should not be denied simply because Harry is developmentally disabled and relies on public services, and needs those services in order to move. Through person centered planning, Harry identified the desire to live in close proximity with family, most

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[109] *Id.*

[110] *Id.* at 449. "This strikes us as an excellent argument, but it is the exact argument- the need to prevent migration for better benefits- that the Supreme Court rejected in *Shapiro v. Thompson*, deeming the argument not merely outweighed by competing considerations, but inadmissible." *Id.* at 449. (citing Shapiro v. Thompson, 394 U.S. 618, 629-33 (1969)). In *Shapiro*, the Supreme Court struck down a state requirement that denied welfare assistance to individuals who had not lived in a state for a certain period of time preceding their application for assistance. The State argued that the waiting period requirement is utilized to preserve the fiscal integrity of the welfare program. The Court stated that the purpose of the time period regulation is to inhibit migration into the state, which is unconstitutional. "We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of citizens." *Shapiro*, 394 U.S. at 633.

[111] *Bethesda Lutheran*, 122 F.3d at 450.

importantly his brother John. To achieve this dream, Harry must move to Chicago, where his brother resides. Not allowing Harry to use his Self-Determination budget to move to Chicago, not only impedes his right to interstate travel, it holds him effectively hostage in Michigan, violating his right to travel across state lines and his civil rights under §504 of the Rehabilitation Act (§504) and the ADA.[112] It also denies him the covered services included in his waiver, specifically the use of a fiscal intermediary, vocational services, CLS, and housing assistance.[113]

The efforts to empower Americans with disabilities face major opposition to change, including but not limited to redundant, inefficient bureaucracies as Harry has experienced. As Carol Novak, a member of the National Council on Disability testified before the U.S. Senate Committee on Finance on, "Strategies to Improve Access to Medicaid Home and Community Based Services" on April 7, 2004:

> *The separate administrative structures for each of the States' Medicaid Home and Community Based waivers and for institutional Long-Term Services and Supports absorb an excessive amount of funding that would be better spent on direct services. The parallel bureaucracies also make it challenging and confusing for beneficiaries and their families to transition from one model of Medicaid long term service to another.... In our efforts to empower Americans with disabilities, we need to recognize and act on those opportunities for change that could enhance peoples' lives.*

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[112] A Self-Determination program allows an individual who receives services through a waiver to have control over their own budget. The budget is based on the individual's plan of service, and give the individual the option of how they would like to spend their money, and on what services. http://www.michigan.gov/mdch/0,1607,7-132-2941_4868_4897-14782--,00.html.

[113] A fiscal intermediary (FI) is an independent and neutral agency handles an individual's Self Determination budget under the MI Choice Waiver services. An FI assists the individual who has chosen to participate in the Self Determination program, assuring that Self Determination budget is properly handled. *See* Cash & Counseling, Michigan Self-Determination in Long Term Care at: http://www.cashandcounseling.org/resources/20070430-114144/Overview.doc.

Currently, people who rely on Medicaid Home and Community Based waiver services do not have the freedom to move from one state to another because there is no portability from one state's Medicaid program to another. If people do take the risk of moving to another state, they lose all Personal Assistance Services and have no idea how long they will have to wait for services in another state. They also have to contend with the disparity of Home and Community Based waiver services among states because each state designs its own waivers with different target populations and service menus. The notion of transforming Medicaid Long Term Care into a coordinated program administered by a single agency that is responsible for all models of long term services and supports, including Personal Assistance Services, could give people the freedom to move from one state to another, eliminate the disparity in services between states and the difficulty in transitioning from one model of Medicaid Long Term Care to another, reduce the number of bureaucracies, and make it easier to establish Personal Assistance Services as a viable career. It could also make coordination with housing and transportation entities easier to achieve. [114]

Until a nation-wide, uniform system is developed that is conducive to Medicaid recipients moving from state A to state B without loss of their services, it is up to the individual states to determine how they will respond to such requests.

The State of Michigan is attempting to address some of these challenges in the public mental health system via the Self-Determination Initiative which "is aiming for major system change which will assure that services and supports for people are not only person-centered, but person defined and person controlled. Self-determination is

[114] Carol Novak, Strategies to Improve Access to Medicaid Home and Community Based Services, National Council on Disability, available at: http://www.ncd.gov/newsroom/testimony/2004/novak_04-07-04.htm.

about choice and control. It is about giving over decision-making if authority to people with disabilities."[115] If self determination is truly about choice and control, then how is it possible that Harry has no choice regarding the most basic of human rights, where he wants to live, and the right to surround himself with people who love him.

Furthermore, Michigan has approved the Housing Best Practice Guidelines and incorporated consumer choice in housing into their contract with OCCMHA and OCCMHA's contract with MORC, Inc.[116] Both of these requirements related to housing have been continuously ignored for Harry. As previously discussed, Harry has been moved to unsafe housing without the most basic protection of even a lease. Even today, the refusal to allow him to potentially move to an apartment near his brother violates the terms of these policies which govern the use of Michigan Medicaid dollars, and support the approval of Harry's request for services.

If the State of Michigan is serious about its Self-Determination Initiative and Housing Best Practice Guidelines, then the DCH, OCCMHA and MORC, Inc. should not fight so adamantly to keep Harry in Michigan, and deprive him of his constitutional rights, and his basic request to live near family. If Harry truly had "choice and control" in this situation he would be in the process of moving to be close to his brother, and temporarily using his Michigan services as a reasonable accommodation to do so.

D. Injunctive Relief for Harry

[115] Self-Determination Initiative, available at: www.mich.gov (hyperlink DHS, hyperlink Self Determination). Also discussed above in § D.

[116] Housing Best Practice Guidelines, available at: http://marthachurchill.com/ddBPGhouse.htm. From the contract between MDCH and CMH. "The Michigan Department of Community Health recognizes housing to be a basic need and affirms the right of all consumers of public mental health services to pursue housing options of their choice." *Id.*

Another way for Harry to move to Illinois while retaining his Medicaid benefits is through the petition that his attorney filed with the probate court to have him "placed" in Illinois.[117] After an individual exhausts all administrative avenues for their request to move out of their county of residence,[118] the guardian of, or attorney representing the individual may petition the Probate Court in the county where the individual resides, to place the person in the "out of network"[119] placement he or she desires.[120] In 2006, the Kent County Circuit Court affirmed the Probate Court's placement of a developmentally disabled individual in an out-of-network placement.[121] In *In the Matter of Joseph Lang*, Joseph is a developmentally disabled adult receiving Medicaid services in Kent County.[122] Joseph's parents were attempting to get him out-of-network services in a facility that would better meet his complex needs, and the local community mental health agency, network-180[123], would not approve the placement.[124]

Joseph is a 30-year-old Medicaid recipient with developmental disabilities, including "profound psychomotor retardation, a complex seizure disorder, reactive airway disease, and hypertension."[125] Joseph's parents took care of him for most of his

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[117]Petition for Placement Pursuant to MCL § 330.1521.

[118] Receiving an unfavorable decision after a Medicaid Fair Hearing is held.

[119] "Out-of-network" means outside of the county where the individual resides and is receiving services.

[120] Dudek & Brown, *supra* note 23, at 9-22.

[121] In the Matter of Joseph Lang, No. 06-0226-AV, *see* Dudek & Brown, *supra* note 23 at 9-64.

[122]Dudek & Brown, *supra* note 23, at 9-66.

[123] Network180, formerly Kent County Community Mental Health, is the contract agency for the county in which Joseph's parents (his legal guardians) are residents. *Id.* at 9-64. Please note that unless at the beginning of a sentence, network180 is spelled with a lowercase "n".

[124] *Id.* at 9-66.

[125] *Id.* at 9-66.

life[126] until their own health began to deteriorate, and finally in 2002, he was placed in a group home.[127] Unfortunately, a year later the group home that Joseph was residing in closed, and Joseph returned to his parent's home.[128] Joseph's parents were not in the condition to provide the 24-hour care that he required, but there were no other suitable adult foster care facilities for Joseph in Kent County.[129] A proper facility was located by Joseph's parents in a neighboring town, which happened to be located in a different county than their county of residence.[130] The out-of-network facility agreed to accept Joseph, but Ottawa County Community Mental Health rejected network180's request to take over responsibility for the cost of Joseph's care.[131] "Ottawa County Community Mental Health was willing to have Joseph placed in one of its facilities, but only so long as network180 paid for the placement."[132]

Despite the fact that the out-of-county placement would cost network180 the same amount as keeping Joseph in-county, network180 still refused the out-of-network placement, because his parent's are residents of Kent Count, not Ottawa County.[133] Network180 insisted that Joseph must stay in Kent County, in a facility that does not

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[126] "Until July, 2002, that care was provided by his parents with daytime assistance paid for by KCCMH. It is undisputed that Joseph is entitled to publicly-funded mental health services." *Id.* at 9-64.

[127] *Id.* at 9-64.

[128] *Id.* at 9-64.

[129] *Id.* at 9-65.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Dudek & Brown, *supra* note 23, at 9-65.

have the on-site nursing care that he requires.[134] "Network180 concedes that it may authorize an out-of-network placement, ie: a placement at a facility not normally utilized by it, including a facility in another county, but it refuses to do so for Joseph, fearing, it says, jeopardizing its government funds, and *not wanting to set the precedent of an out-of-network placement."* (emphasis added).[135]

Joseph's parents filed a petition with the Kent County Probate Court to have Joseph placed at the facility in Ottawa County, at network180's expense.[136] The Probate Court ordered network180 to pay for Joseph's placement at the out-of-network facility, pending final resolution of the Lang's petition.[137] Network180 filed an appeal, stating that the Probate Court does not have the authority to temporarily place Joseph, and even if the Probate Court did have authority, they did not properly utilize it.[138]

On appeal, the court held that the Probate Court did have the authority to place Joseph in the out-of-network facility.[139] The court stated that the Probate Court was within their jurisdiction to temporarily place Joseph while the petition to place him there

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[134] *Id.* at 165.

[135] *Id.* at 9-66. Network180 also stated that they have agreed to these types of placements in the past, but no longer want to. *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Dudek & Brown, *supra* note 23, at 9-69. "What MCL 600.847 means is that, so long as the Probate Court has jurisdiction to consider a matter or a request in the first instance, it can issue whatever orders are necessary to assert that jurisdiction in an effective way." *Id.* at 9-69. MCL 600.847 states: "In the exercise of jurisdiction vested in the probate court by law, the probate court shall have the same powers as the circuit court to hear and determine any matter and make any proper orders to fully effectuate the probate court's jurisdiction and decisions." MICH. COMP. LAWS ANN. § 600.847 (1999).

permanently was being resolved.[140] The court also felt that under MCL 330.1722,[141] network180 had neglected Joseph by refusing to give Joseph the care that is required, and vital to someone with such a condition.[142] The court pointed out that, "The Legislature has decided to entrust the Probate Courts, because of a longstanding expertise, responsibility for dealing with developmentally disabled individuals."[143]

The *Lang* decision stated that in order to safeguard the needs of a developmentally disabled individual, the Probate Court may place the individual in a facility pending a final resolution of the petition for permanent placement, or to avoid abuse or neglect, and may be made over the objection of the local community mental heath authority.[144] The court held that the placement of Joseph in the out-of-network facility by the Probate Court was proper.[145]

The *Lang* opinion is important to Harry for several reasons. First, the decision says that the Probate Court does have the authority to place Harry in Little City, if they so choose. Secondly, the decision states that a recipient of mental health services may pursue injunctive relief through the Probate Court if they have experienced abuse or

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[140] Dudek & Brown, *supra* note 23, at 9-69.

[141] MICH. COMP. LAWS ANN. § 330.1722 (1999). MCL 330.1722(3) protects mental health recipients from abuse or neglect. *Id.* at 9-66.

[142] *Id.* at 9-75. "In other words, not placing an individual in a facility "suited to his or her condition" is neglect which triggers MCL 330.1722(3)." The Circuit Court went on to say that "The Probate Court was not obligated to wait to act until something unfortunate happened to Joseph in a lesser placement. Network180's argument to that effect is based on a crabbed reading of the Mental Health Code's definition of "neglect." Nothing in that definition requires actual harm." *Id.*

[143] *Id.* at 9-72.

[144] *Id.* at 9-79.

[145] *Id.*

neglect within the mental health system.[146] This means that Harry may be able to show that he has experienced neglect during his years in the mental health system, especially during the times when he lost certain services without notice, which may help bolster his plea to get to Illinois. Next, the decision also made it clear that a developmentally disabled individual does not have to wait until actual harms occurs before the court orders injunctive relief.[147] Helpful to Harry, "the court states that failing to place an individual in a facility "suited to his or her condition" constitutes neglect, which triggers MCL 330.1722(3)."[148] The *Lang* decision opens up new avenues for the developmentally disabled in Michigan such as Harry, even after they have exhausted all administrative remedies through the community mental health authority.

IV. Conclusion

Although Harry has exhausted all of his administrative remedies and has started a judicial review of same, in his pursuit to move to Illinois, there are still other avenues that may assist him in moving without losing his services. As discussed above, Harry could still receive a favorable decision from the Probate Court, and the court could enter an order to place him in Little City, or Chicago in general. If Harry receives an unfavorable decision from the Probate Court he still has an appeal of the decision of the DCH Administrative Tribunal pending. Lastly, Harry could pursue arguments related to the Constitutional implications brought up in *Duffy* and *Bethesda Lutheran*, buttressed by the ADA and §504.

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[146] *See* MCL 330.1722(3).

[147] Dudek & Brown, *supra* note 23, at 9-23.

[148] Dudek & Brown, *supra* note 23, at 9-23.

Harry has been through countless negative experiences with his services since his mother's tragic death. Harry is an individual who is simply lost in the public benefits system, being denied the most basic right of accessibility to his family. The repeated failures of the Michigan system should lend support to Harry's request to move and receive the support services identified in his plan of service to assist him in moving to Chicago. There is no legal or logical reason why Harry must remain alone in Michigan when he could have accessibility to his brother if he lived in Chicago. Hopefully Harry's struggle will help to pave the way for future generations of individuals with disabilities, and help make it easier for these individuals to live lives full of meaning, purpose, and most importantly the opportunity to make their own choices and to be afforded their Constitutional rights.

ATTACHMENT

THREE

Subject: Out of state Medicaid medical and psychiatric coverage

By this e-mail, I am alerting you to the fact that Medicaid beneficiaries who choose to travel outside of Michigan do not enjoy the same medical and psychiatric benefit coverage as they would if they obtained those services from an in-state provider.

The applicable references can be found in Sections 6.1, 6.2 and 6.3 of the MDCH Medicaid Provider Manual.

Basically, a Medicaid beneficiary who crosses the state line, i.e., on vacation with a family member/residential provider or attending an out of state funeral, is only covered for emergency room services in a hospital to stabilize their medical or psychiatric condition. If they subsequently need to be admitted for inpatient care and treatment, need urgent care, routine medical care, or a prescription, Medicaid will deny the claims unless the service provider is enrolled as a provider in the Michigan system.

As you might expect, it would be the exception rather than the rule for an out-of-state medical hospital, psychiatric hospital, private physician or neighborhood pharmacy to invest the time and incur the expense of enrolling in Michigan's Medicaid system. The one exception appears to be national chain pharmacies. If an out of state pharmacy outlet of a national chain has a store in Michigan, and if that Michigan store is enrolled as a dispensing provider with Michigan's Medicaid system, any prescriptions on file in the Michigan can be filled nationally and will be covered by Medicaid.

I am bringing this to your attention so that when your staff receive requests for out-of-state travel assistance, they make an effort to inform the relatives or residential providers of these limitations. In practical terms, if something were to happen to a beneficiary out of state that requires medical attention, the relative or care giver will most probably have to sign a legally binding form agreeing to be personally responsible for all charges, before any non-emergency

services would be rendered. Hopefully, by sharing this information with them before they make their out-of-state travel plans, a lot of misunderstandings, hurt, and worry can be avoided.