



Theme Introduction

The Evolution of Elder Law and Disability Rights

By Christine Caswell

While elder law is one of the fastest growing fields, it is also one of the most complex with ever-changing laws, rules, and regulations. Practitioners not only need to keep up with these changes but also to understand the interplay between federal and state levels and, often, the lack of agreement between the two. Additionally, the Elder Law and Disability Rights Section of the State Bar of Michigan deals with all age groups in its disability advocacy, ensuring that this population not only receives protection of its rights but also financial planning to protect its long-term well-being.

This article traces the beginning and evolution of elder law and disability rights in Michigan through interviews with some of its earliest practitioners. The following four articles in this

theme issue address important subjects within the field, including competency issues, holistic planning, Medicare advocacy, and special-needs planning.

The early years

John Bos, one of the first Michigan attorneys to practice in the field of elder law in the late 1970s, said the field grew out of President Lyndon Johnson's "Great Society."

"Johnson was the speaker at my law school graduation back in 1964," Bos explained. "And much of his commencement speech dealt with the 'Great Society' which created Medicare and Medicaid. All of it came out of that time period."¹

“When I first started representing clients who had Medicaid issues with sheltering assets and preparing trusts, the look-back period [for divestment and penalties] was 12 months, so we would do irrevocable, discretionary trusts, and . . . those assets didn’t count. If there were joint accounts with another family member, they were excluded.”²

The look-back period is now five years,³ joint accounts do count,⁴ and state agencies are not always in agreement with practitioners as to the type of trusts that meet Medicaid requirements.

“There were a lot of different choices then, but that all started changing when Congress started making major changes in the Medicaid laws,” Bos continued. “The field has broadened in scope from when I started. Now elder law not only includes Medicaid but also other benefit programs such as Social Security, Social Security disability, Medicare, and dealing with nursing homes and their rental agreements and practices, as well as elder abuse. It also deals with drafting estate documents that plan specifically for problems elders might face. Elder law is now a very broad area.”

“Elder law is the integration between traditional probate and estate planning and all other issues that an older and disabled person faces, such as substitute decision-making, conservatorships, guardianships, government benefits, and housing, leading to meeting as many of those needs as you can using your legal skills,” added David Shultz, another longtime Michigan practitioner. “The biggest difference 20 years ago was if you were working in a small estate planning and probate firm, you did wills and trusts, management of assets during your lifetime, and the disposition of assets after you were gone. Today you have clients fill out questionnaires about every aspect of their lives. Do you have powers of attorney, is there a possibility you might qualify for government benefits, are there any private benefits you qualify for, any insurance? There are a whole range of issues you might run into.”⁵

Shultz said the SBM Elder Law and Disability Rights Section started out as the Senior Justice Committee around 1980⁶ and got its current name in 1983.⁷

“I remember there was a limited group, but then at one point, the meeting had so many people that it turned into a section,” noted Caroline Dellenbusch, who also remembers attending Bos’s first ICLE sessions on elder law. “It became something that attorneys could base their whole practice on. It has grown because of the aging population, and it grew because the substantive part of it was something you had to keep up with. You can’t dabble in it.”⁸

As to how disability rights joined with elder law, Shultz explained, “Government benefit programs for elders and disabled people were the same, and elders are more likely to become disabled and have the same kind of issues as younger people with disabilities. There was a lot of overlap.”⁹

“We determined that many of the legal issues for folks with disabilities and elders were similar,” added Patricia E. Kefalas Dudek, whose practice represents children and young people

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with disabilities such as autism spectrum disorder and mental illness. “For example, Olmstead implementation,¹⁰ access to quality long-term supports, Medicaid/Medicare, and other benefit issues. So we determined that we should adjust the name to reflect that we represent and advocate for folks with challenges of all ages, not just seniors. We now partner with the disability community much more than in the past.”¹¹

The elder law and disability rights practitioner

When asked what skills are necessary to be an elder law and disability rights attorney, Bos replied, “I think they need to have a strong foundation in estate planning and document drafting and understanding the Medicaid rules and regulations. The whole Medicaid area is very complex from the federal statutes on down. Some of the things we do have tax implications, so you have to know the tax consequences of certain trusts and gifts. You need to understand people. They need to have their hand held, and you, as the practitioner, need to be a great judge of character to determine what they need—and not just the legal part. They have stress because they’re wandering into uncharted territory. They think they’re going to lose their home. When you explain to a spouse or another family member what you can do in the Medicaid area and how you may shelter some assets . . . you can see the stress drain out of their bodies.”¹²

“Attorneys can call themselves elder law attorneys, but they have to be prepared to disclose the scope of their expertise,” added Shultz. “If someone comes to me with an age discrimination component to their issues, I have to refer that out. That’s an area of the law I don’t know. But as people come out of law school or jump into elder law, they should be co-counseling with an experienced attorney to ensure they are delivering quality services. A good part of my practice is fixing stuff that other people tried to pull off.”¹³

“Elder law is increasingly intertwined with other legal issues,” said J. David Kerr, another longtime practitioner. “It might be seen as a general practice on steroids . . . one which is dedicated to the unique and often complex planning concerns of disabled individuals, the senior population, and their adult children. It is



characterized less by what it is than by whom it serves.... There is great satisfaction, as well as challenge, in serving the needs of the elderly and the disabled. It is not for the faint of heart.”¹⁴

The future

After seeing so much change over the past few decades and as the oldest of the baby boomers enter their late sixties, the longtime practitioners can only speculate as to where the practice is headed.

“The influx of baby boomers needing elder law services is going to have a huge impact on our area of the law,” noted Shaltz. “My concern is whether current government benefits are going to be adequate to accommodate baby boomers going into their retirement years. Many of those people have not saved adequately or don’t have private pensions. How are they going to pay for long-term care services? Long-term care insurance is a small solution, but it’s not going to be adequate. The baby boomers are going to need both income and healthcare in their retirement years. I think that’s going to be the biggest challenge for elder law going forward.”¹⁵

“The costs are escalating so much that people who never thought they would need Medicaid need it,” added Dellenbusch. “You become impoverished very quickly if you have to pay for nursing home care. A couple will think they have saved sufficiently for their retirement, but it is used up in short order [in the nursing home]. People don’t have pensions anymore. They invest

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money and have IRAs, so it becomes a lot more complicated. People are living longer because of medical advances. The way we care for elders may change, so there is going to be a need for lawyers to advocate for seniors. I’m sure it’s going to be thriving, but I don’t know what it’s going to look like. It’s hard to predict.”¹⁶ ■



Christine Caswell is a sole practitioner in Lansing who focuses on elder law and disability rights, probate and estate planning, and administrative law. She is a member of the SBM Elder Law and Disability Rights Section Council and serves as chair of its Mental Health Committee and managing editor for the section’s newsletter.

ENDNOTES

1. Telephone interview with John E. Bos, of counsel, Chalgian & Tripp Law Offices PLLC (August 26, 2014).
2. *Id.*
3. Michigan Department of Human Services, Bridges Eligibility Manual 401, p 15, available at <<http://www.mfia.state.mi.us/OLMWeb/exf/BP/Public/BEM/401.pdf>> (accessed October 7, 2014).
4. *Id.*
5. Telephone interview with David Shaltz, of counsel, Chalgian & Tripp Law Offices PLLC (August 27, 2014).
6. *Id.*
7. E-mail from Heather Anderson and Candace Crowley, State Bar of Michigan, to author (August 28, 2014) [on file with author].
8. Telephone conversation with Caroline Dellenbusch (August 27, 2014).
9. Shaltz interview, n 5 *supra*.
10. See *Olmstead v LC*, 527 US 581; 119 S Ct 2176; 144 L Ed 2d 540 (1999) (holding that under the Americans with Disabilities Act, people with mental disabilities had the right to live in the community as opposed to institutional settings).
11. E-mail from Patricia E. Kefalas Dudek, attorney, Patricia E. Kefalas Dudek & Associates, to author (August 29, 2014) [on file with author].
12. Bos interview, n 1 *supra*.
13. Shaltz interview, n 5 *supra*.
14. Kerr, *Introduction to Elder Law and Disability Rights*, unpublished article (March 2014) [on file with author].
15. Shaltz interview, n 5 *supra*.
16. Dellenbusch conversation, n 8 *supra*.