



ELDER LAW

The newsletter of the Illinois State Bar Association's Section on Elder Law

Watch your mailbox, your health insurance may be terminated: A guide to the new managed care program for Illinois healthcare program participants

By Gina Salamone, Esq., Zach Hesselbaum Esq., and Bonnie Schradel

Surprise! Imagine yourself walking to your mailbox and amongst your daily pile of mostly junk mail and grocery ads you find a notice that the health insurance coverage you have had for 20-plus years has been terminated. Recently we have all been inundated with front page national news related to changes in health insurance exchanges as a result of the implementation of the Affordable Care Act. Unfortunately, a major change for Illinois citizens, a large sector of who are seniors, has flown mostly under the radar of news outlets. This change terminates Medicare coverage and Medicare supplemental coverage in favor of a managed care coverage

chosen by the State of Illinois with little notice. As this program continues to develop it is imperative for the affected community to be able to access information to make informed decisions as the window provided by the State to "opt in" or "opt out" is limited.

In the first half of 2014, the State began rolling out the Medicare Medicaid Financial Alignment Initiative (MMAI) in select counties. This is a managed care program for all people who are considered "dual eligible." Dual eligible refers to people who are both on full Medicare, receiving Medic-

Continued on page 2

More legally disabled are now able to toll statute of limitations

By Stephen Sotelo; The Law Firm of Thomas J. Homer, P.C.; Naperville

On August 26, 2014, after passing both houses of the General Assembly unanimously, the Governor signed HB5512 into law, allowing more persons to toll the statute of limitations on account of legal disability.¹ Prior to the amendment, tolling only occurred for those under legal disability "at the time the cause of action accrued."² After the amendment, similar protections will be afforded to a person "not under a legal disability at the time the cause of action accrues, but [who] becomes under a legal

disability before the period of limitations otherwise runs."³

For purposes of the statute, a person suffers from a "legal disability" where he or she is "entirely without understanding or capacity to make or communicate decisions regarding his [or her] person and totally unable to manage his [or her] estate or financial affairs."⁴

A plaintiff with autism, for example, does not

Continued on page 5

INSIDE

Watch your mailbox, your health insurance may be terminated: A guide to the new managed care program for Illinois healthcare program participants 1

More legally disabled are now able to toll statute of limitations 1

Grandparent visitation case heard by the First District Appellate Court ... 5

Upcoming CLE programs 7

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Watch your mailbox, your health insurance may be terminated: A guide to the new managed care program for Illinois healthcare program participants

Continued from page 1

aid benefits without spend down and over 21 years of age.¹ This program will drastically change how healthcare for dual eligible individuals is accessed and funded.

If you are serving clients who are dual eligible, aiding them in becoming dual eligible, or you represent a health care provider, a confused and distraught phone call is likely on its way. There are 659,800 dual eligible individuals in Illinois and 135,825 being initially targeted by this pilot program.^{2,3} Dual eligible individuals in 21 counties should receive a letter from the Illinois Department of Healthcare and Family Services asking them to choose a new health plan by a certain date or the State will be canceling their existing health insurance and choosing a new plan for them. The letter can be frightening and certainly confusing to clients and, unfortunately, a call to their Medicaid caseworker provides little to no assistance. Further, in some instances immediate pressure from certain health care providers to “opt in” or “opt out” could be staring the participant in the face which could affect the eligibility of the participant for future services or coverage. As with so many things, their next call may be to their trusted attorney.

Why are Things Changing?

The impetus for this program was the Affordable Healthcare Act which called for the establishment of the Federal Coordinated Health Care Office.⁴ The goal of the Office was to improve the healthcare of dual eligible individuals, streamline the processes of Medicare and Medicaid and reduce the “regulatory conflicts and cost-shifting that occurs between the Medicare and Medicaid programs, States, and the Federal government.”⁵ Without a doubt, this is a noble pursuit but the community and providers have been blindsided by this pilot program. Further authority for the program was granted to Medicaid in 42 C.F.R. 438 et. Seq. and Medicare in Part C and Part D of Title XVIII, and 42 C.F.R. Part 422 and 423.

Two experimental healthcare models were created and are being tested in 26 states. Illinois is one of 11 states (plus Washington D.C.) implementing a “capitated mod-

el.”⁶ Other states are implementing a “fee for service model.”⁷ Although at this time the pool of dual eligible individuals is limited to the test areas, over 9 million people in the United States are considered dual eligible.⁸

Illinois is implementing its MMAI in 21 counties, focusing on the Chicagoland area and some central Illinois counties.⁹ It is considered a pilot program that runs from October 1, 2013 to December 31, 2016 and, if it is not affective, the program could expire.¹⁰

How does it Work?

As with most notices, individuals enrolled in to the MMAI want to cut to the chase and know how to use their new coverage whether they can keep their current providers. Dual eligible individuals are enrolled with a Managed Care Organization (MCO). Currently, there are a number of providers in our area, including Aetna Better Health, IlliniCare, Meridian Health Plan of Illinois, HealthSpring, Humana, and Blue Cross/Blue Shield of Illinois. The MCO’s are given a “capitated payment” by CMS for Medicare Services and the State for Medicaid services.¹¹ A capitated payment is an up-front flat fee per member, regardless of how many or how few services the member actually uses.¹² The individual member does not pay a premium to the MCO. The member may or may not continue to pay a Medicare premium. For example, if an unmarried individual’s gross monthly income is less than \$1,187, their Medicare premium will be waived under the Medicare Savings Program.¹³ The individual’s existing supplemental insurance and Medicare D plan will be canceled.

Once on the plan, the MCO will pay the member’s health care providers directly, including, but not limited to, medical and hospital care, prescription drugs, mental health and behavioral health services, transportation to medical appointments and Long Term Care Services and Supports (LTCSS).¹⁴ MCOs will cover no less than what would have been covered by Medicare and Medicaid, but can cover even more.¹⁵ In an effort to entice members, each MCO seems to provide its own special incentives and perks.¹⁶ For instance, Aetna, Blue Cross and HealthSpring

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offer preventative dental care which was not previously offered by Medicare or Medicaid. Blue Cross also offers a free cell phone that can be used to call your doctor, care coordinator, or 911 as well as providing transportation to the pharmacy. These additions are certainly intriguing to those enrolled in the program and provide some added features that the previous coverage would not provide.

Illinois' program is considered "Person-centered planning [which] focuses on the strengths, needs, and preferences of the individual beneficiary instead of being driven by the care delivery system."¹⁷ Each member will be assigned a "Care Manager" or "Care Coordinator" to oversee their care and communicate with care providers. Depending on how high risk the member is, the Care Coordinator will also be tasked with contacting the member as frequently as every 90 days.¹⁸ In theory, care coordinators can be a tremendous resource. Therefore, finding a manner in which the enrollee can pursue the relationship with the care coordinator should be encouraged.

What Advice to Give Clients?

In lieu of becoming an expert on the subject, there are several simple ways to comfort and advise you client. First, you can explain the basic concept of the program to them and assure them that their healthcare needs will still be met.

If the client is in a nursing home or assisted living facility, it is recommended that they take the information they receive from the Department of Healthcare and Family Services to the person on staff in the facility who coordinates benefits. That person will best be able to assist in determining which plan is appropriate in light of providers available to that facility.

If your client is in the community, Senior Health Insurance Program (SHIP) provides a good resource regarding health coverage for Medicare beneficiaries and their caregivers. SHIP is free, statewide program providing health insurance counseling services. This organization can be contacted at (800) 548-9034 or email AGING.SHIP@illinois.gov.¹⁹ If it is important to remain with the same doctor, your client should also contact their doctor to determine what, if any, plan he or she accepts. To date, the list offered by the Department of Healthcare and Family Services online and through the mail does not seem to be up-to-date or very reliable.

For the time being, your client also has some opt out rights that can be exercised, depending on whether they are receiving long term care services. However, it is likely that everyone in the 21 participating counties will eventually be enrolled.

When the phone calls come to your office regarding this little known program keep calm and know there are good and easily accessible resources for you and your clients to navigate the maze of the new MMAI program. What will happen to those people if the program is discontinued December 31, 2016 remains to be seen. ■

This article was originally published in *Bar Briefs*, the monthly publication of the Kane County Bar Association.

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5. Letter from Cindy Mann, Director, Center for Medicaid, CHIP and Survey & Certification, and Melanie Bella, Director, Medicare-Medicaid Coordination Office, to State Medicaid Directors, re: Financial Models to Support State Efforts to Integrate Care for Medicare-Medicaid Enrollees, SMDL #11-008, ACA #18 (July 8, 2011), <https://www.cms.gov/smdl/downloads/Financial_Models_Supporting_Integrated_Care_SMD.pdf>.

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More legally disabled are now able to toll statute of limitations

Continued from page 1

have a legal disability *per se*, as he or she may (or may not) still be able to make or communicate decisions regarding his personal or financial affairs.⁵

In one case, a person with autism was held to have no legal disability, because while under the alleged disability, “[he] applied to and graduated from college; consulted a physician regarding the possibility of contracting AIDS due to his physical relationship with a man; and enrolled in a master’s degree program,” all evidence of his capacity to make or communicate decisions regarding his person or financial affairs.⁶

Similarly, hospitalization, by itself, does not constitute legal disability.⁷ Thus, “[i]n a personal injury case, a person is not legally disabled if he or she can comprehend the nature of the injury and its implications.”⁸

As a matter of public policy, a prior adjudication of legal disability is not necessary to invoke the tolling provisions of the statute.⁹ Rather, the complaint need only allege sufficient facts that plaintiff was “under a legal disability” at the time the cause of action accrued;¹⁰ or, with the enactment of P.A. 098-

1077, if not at the time the cause of action accrued, before the limitations period otherwise ran.

The tolling provisions for legal disability were originally enacted “to protect the rights of those who were not ‘legally competent to bring actions directly’ since the courts recognized that the enforcement of their rights should not be ‘left to the whim or mercy of some self-constituted next friend.’”¹¹ But, by distinguishing between those who were legally disabled at the time a claim arose and those who only later become legally disabled, many continued to rely on the whims or mercy of others to protect their legal rights. P.A. 098-1077 aims to remedy that problem, by opening the courthouse doors to more people who have let the statute of limitations run through no fault of their own.

Public Act 098-1077 goes into effect on January 1, 2015, and it will apply to actions commenced or pending after that date. However, it will not invalidate any statute of repose, nor will it stay any limitations period more than 10 years from the date of any adjudication of legal disability.¹² ■

This article was originally published in the September 2014 issue of the ISBA’s *Trial Briefs* newsletter.

1. P.A. 098-1077, creating subsections 735 ILCS 5/13-211(b), 13-212(d), and 13-214.3(f).

2. 735 ILCS 5/13-211(a).

3. P.A. 098-1077.

4. *Estate of Riha v. Christ Hospital*, 187 Ill.App.3d 752, 756, 135 Ill.Dec. 907, 544 N.E.2d 403 (1st Dist. 1989).

5. *In re Doe*, 301 Ill.App.3d 123, 127, 703 N.E.2d 413 (1st Dist. 1998) (“Simply because autism is considered a developmental disability does not grant it automatic status as a legal disability”); *Sille v. McCann Construction Specialties Co.*, 265 Ill.App.3d 1051, 1055, 202 Ill.Dec. 808, 638 N.E.2d 676, 679 (1st Dist. 1994) (“Many impairments, both physical and mental, may be termed disabilities. All disabilities, however, are not legal disabilities, as that term is used within the statute cited above.”).

6. *In re Doe*, 301 Ill.App.3d 125, 703 N.E.2d 413.

7. *Hochbaum v. Casiano*, 292 Ill.App.3d 589, 596, 686 N.E.2d 626 (1st Dist. 1997).

8. *In re Doe*, 301 Ill.App.3d 127, 703 N.E.2d 413, citing *Sille*, 265 Ill.App.3d 1054.

9. *Estate of Riha*, 187 Ill.App.3d 755 - 56.

10. *Id.*

11. *Id.*

12. P.A. 098-1077.

Grandparent visitation case heard by the First District Appellate Court

By Michael K. Goldberg and Becky Rose Bloom

***In re Anaya R., a Minor*, ___ N.E.2d ___, 2012 IL App (1st), 121101**

On August 31, 2012, the Illinois Appellate court, while affirming the trial court’s denial of grandparent visitation, emphasized the importance of a healthy parent-grandparent relationship when evaluating whether to grant grandparent visitation.

On July 12, 2011, the paternal grandmother (“Mildred”) filed a petition for grandparent visitation and amended petition for guardianship of her granddaughter (“Anaya”). Mildred stated that because the child’s father was out of the country, and the mother (“Vanessa”) was unwilling to care for Anaya, that it would be in Anaya’s best inter-

est for the court to appoint Mildred as her guardian.

Under the Illinois Marriage and Dissolution of Marriage Act, a grandparent may file for visitation with his or her grandchildren under certain circumstances:

Grandparents, great-grandparents, and siblings of a minor child, who is one year old or older, have standing to bring an action in circuit court by petition, requesting visitation in accordance with this Section ... Except as otherwise provided in this subsection (a-5), any grandparent, great-grandparent, or sibling may file a petition for visitation rights to a minor child if there is an unreasonable denial of visi-

tation by a parent and at least one of the following conditions exists:

(A-5) the child’s other parent is deceased or has been missing for at least 3 months. For the purposes of this Section a parent is considered to be missing if the parent’s location has not been determined and the parent has been reported as missing to a law enforcement agency;

(A-10) a parent of the child is incompetent as a matter of law;

(A-15) a parent has been incarcerated in jail or prison during the 3 month period preced-

ing the filing of the petition;

(B) the child's mother and father are divorced or have been legally separated from each other or there is pending a dissolution proceeding involving a parent of the child or another court proceeding involving custody or visitation of the child (other than any adoption proceeding of an unrelated child) and at least one parent does not object to the grandparent, great-grandparent, or sibling having visitation with the child. The visitation of the grandparent, great-grandparent, or sibling must not diminish the visitation of the parent who is not related to the grandparent, great-grandparent, or sibling seeking visitation;

(C) (Blank);

(D) the child is born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent, great-grandparent, or sibling of the child born out of wedlock; or

(E) the child is born out of wedlock, the parents are not living together, the petitioner is a paternal grandparent, great-grandparent, or sibling, and the paternity has been established by a court of competent jurisdiction.

750 ILCS 5/607 (a)(3) and (a-5)(1).

The grandparent has the burden of proving that the parent's denial of visitation is harmful to the child's mental, physical, or emotional health. 750 ILCS 5/607(3). This new Grandparent Visitation Act, which took effect in 2005, is more restrictive than the former version of the act, which the Illinois Supreme Court declared unconstitutional on its face in 2002. *Wickham v. Byrne*, 199 Ill. 2d 309, 263 Ill. Dec. 799, 769 N.E.2d 1 (2002).

The *Wickham* decision came shortly after the United States Supreme Court case of *Troxel v. Granville*, which ruled that Washington State's third-party visitation statute was unconstitutional as applied. 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The *Troxel* Court stopped short of declaring all state grandparent visitation statutes unconstitutional; but the decision (a plurality) set the foundation for the *Wickham* holding by

stating that the wishes of a fit parent must be given deference regarding third-party visitation requests.

After *Troxel*, in 2000, the Illinois Supreme Court held in *Lulay v. Lulay* that state-mandated grandparent visitation was unconstitutional as applied to the children of divorced parents, where both parents object to visitation, seeing it as an infringement on the parents' fundamental liberty interest in raising their children. 193 Ill.2d 455, 250 Ill. Dec. 758, 739 N.E.2d 521 (2000).

The *Troxel* and *Wickham* courts' deference to the wishes of a fit parent manifests itself in the *In Re Anaya R., a Minor* decision. During the hearing for Mildred's petition for grandparent visitation in January, 2012, 12 witnesses testified on Mildred's behalf, including Mildred. All the witnesses testified generally that Mildred cared for Anaya's mother ("Vanessa") during her pregnancy, cared for Vanessa like a daughter, and has always been involved in Anaya's life.

Vanessa called two witnesses, including herself. The witnesses testified generally that though Mildred helped with child care, that the relationship between Mildred and Vanessa was strained because Mildred was overbearing and tried to take Anaya away from Vanessa.

In spite of all the witnesses testifying as to Mildred and Anaya's lasting relationship, the GAL argued against granting Mildred visitation because of her overbearing attitude and combative relationship with Vanessa. The GAL also argued that Vanessa's denial of visitation was reasonable and understandable, in light of Mildred's overbearing attitude and Vanessa's fear that Mildred would take Anaya away.

The trial court denied Mildred's petition for visitation, adding that Mildred "was her own worst enemy," and that she was "domineering and overbearing." The Court recognized that Mildred had a strong relationship with the child, and also that Mildred was an active participant in caring for the child. But, in spite of Mildred's relationship with Anaya, and in light of Mildred's combative and overbearing relationship with Vanessa, the court found that Mildred and Anaya's relationship to be an insufficient basis for awarding visitation.

On appeal, Mildred claimed the trial court erred in denying her petition for visitation because she met her burden of proof that the denial of visitation would harm the child. The GAL restated his earlier argument: even though Mildred had a lasting relationship with Anaya, her combative and overbearing relationship with Vanessa weighed against her petition for visitation.

The appellate court affirmed the trial court's finding, highlighting that the trial court placed the most weight on the relationship between Mildred and Vanessa, as opposed to the relationship between Mildred and Anaya. This case stands out among other grandparent visitation cases in that the Court strongly considered the parent-grandparent relationship when determining whether to award grandparent visitation. Even in the face of a strong grandparent-grandchild relationship, if a grandparent is uncooperative with and fights with a parent, the court will be less likely to award visitation. ■

This article was originally published in the October 2013 issue of the ISBA's General Practice, Solo & Small Firm newsletter.

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Thursday, 10/2/14- Teleseminar—Asset Protection for Real Estate. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 10/7/14- Teleseminar—Inter-species Conversions and Mergers-Part 1. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 10/7/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Wednesday, 10/8/14- Teleseminar—Inter-species Conversions and Mergers-Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/9/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Friday, 10/10/14- Palatine, Harper College: Wojcik Conference Center—Fall 2014 DUI & Traffic Law Conference. Presented by the ISBA Traffic Law Section. All Day.

Friday, 10/10/14- Chicago, Baker & McKenzie Law Office—Human Trafficking and the Commercial Sexual Exploitation of Children. Presented by the ISBA Administrative Law Section, the ISBA Standing Committee on Racial and Ethnic Minorities & the Law; the ISBA Standing Committee on Women and the Law and Baker & McKenzie Law Office.

Friday, 10/10/14- Chicago, ISBA Regional Office—The Unforeseen Challenges of Implementing the Affordable Care Act. Presented by the ISBA Health Care Section. 1-4:30.

Friday, 10/10/14- Live Webcast—The Unforeseen Challenges of Implementing the

Affordable Care Act. Presented by the ISBA Health Care Section. 1-4:30.

Monday, 10/13/14- Chicago, ISBA Regional Office—Advanced Workers’ Compensation- Fall 2014. Presented by the ISBA Workers’ Compensation Section. 9-4.

Monday, 10/13/14- Fairview Heights, Four Points Sheraton—Advanced Workers’ Compensation- Fall 2014. Presented by the ISBA Workers’ Compensation Section. 9-4.

Tuesday, 10/14/14- Teleseminar—2014 Americans with Disabilities Act Update. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/15/14- Teleseminar—Incentive Trusts in Estate Planning: Promise and Peril. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/16/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00.

Thursday, 10/16/14- Chicago, ISBA Regional Office—ISBA Solo & Small Firm Practice Institute. Presented by the Illinois State Bar Association. 8:30-5:30.

Thursday, 10/16/14- Live Webcast—ISBA Solo & Small Firm Practice Institute. Presented by the Illinois State Bar Association. 8:30-5:30.

Tuesday, 10/21/14- Teleseminar—Governance of Private and Family-Controlled Companies. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/23/14- Chicago, ISBA Regional Office—Family Law Nuts & Bolts. Presented by the ISBA Family Law Section. 8:30-5:00.

Friday, 10/24/14- Teleseminar—Attorney Ethics, Advertising and the Internet. Presented by the Illinois State Bar Association. 12-1.

Friday, 10/24/14- DeKalb, NIU School

of Law—Construction Contracts: The Boiler Plate That Gives You Fits. Presented by the ISBA Construction Law Section; co-sponsored by the ISBA Commercial Banking, Collections and Bankruptcy Section and the ISBA Real Estate Law Section. 8-4:30.

Friday, 10/24/14- Chicago, ISBA Regional Office—Hearing On Motion for Preliminary Injunction. Presented by the ISBA Labor & Employment Section; co-sponsored by the ISBA Civil Practice Section. 8:55-4.

Friday, 10/24/14- Live Webcast—Hearing On Motion for Preliminary Injunction. Presented by the ISBA Labor & Employment Section; co-sponsored by the ISBA Civil Practice Section. 8:55-4.

Tuesday, 10/28/14- Teleseminar—Fiduciary and Income Tax Issues in Estate Planning-Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 10/29/14- Teleseminar—Fiduciary and Income Tax Issues in Estate Planning-Part 2. Presented by the Illinois State Bar Association. 12-1.

November

Wednesday, 11/5/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11:00.

Thursday, 11/6/14- Springfield, President Abraham Lincoln Hotel—Family Law Nuts & Bolts. Presented by the ISBA Family Law Section. 8:30-5:00.

Friday, 11/7/14- Chicago, ISBA Regional Office—Hot Topics for Your Practice—Presented by the ISBA Civil Practice Section. 9-12:45.

Friday, 11/7/14- Live Studio Webcast—Juveniles, Psychotropics & The Law. Presented by the ISBA Child Law Section. 1:30-2:30.

Monday, 11/10/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11:00. ■

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