Eldercare for the Baby-Boom Generation: Are Caregiver Agreements Valid?

“We’ve all got the sense that this shouldn’t be reduced to a monetary equation—you should do it because you love your parents . . . .” But caregiving can be grueling, and reducing or forgoing employment can undermine an adult child’s ability to save for her own retirement. ‘So I don’t see anything wrong with money going to the one who’s actually doing the work . . . .’

I. INTRODUCTION

Behind the current cacophony of concerns about the unemployment rate, slow economic recovery, and U.S. budget deficit, is the ever-present murmur of the impending economic impact baby boomers will have as they retire and rely on government benefits. In 2010 Social Security went “cash negative,” states threatened to drop out of the Medicaid program, and more individuals dipped into their 401k plans for current needs. The “silver tsunami” looms closer as the first members of the baby-boom generation turned sixty-five in 2011, and concerns over how to manage long-term care for elders increase at an individual, state, and federal level. State and federal governments’ concerns


come from the heavy burden long-term care for boomers will put on
government-funded health services at a time when governments face pressure
to cut these services to decrease deficits. Individuals’ worries stem from the
need to provide long-term care for themselves or for aging family members.

Individuals who care, or will care, for an aging relative must consider how
long-term care duties can decrease both their earning potential in the workplace
and their savings as they pay for an elderly relative’s necessities. Caregivers
often cannot afford to cut down their time or quit their job outside the home.
In order to continue caring for an elderly relative, an increasing number of
caregivers are asking elder-law attorneys to draw up agreements in which the
caregiver helps the elder for a certain number of hours each week in exchange
for an hourly wage. These caregiving agreements benefit both parties by
relieving financial strain on caregivers and by keeping elderly relatives out of
nursing homes.

While caregiver agreements may reassure individual caregivers, these same
agreements are a concern for states. State Medicaid agencies claim these
agreements are often a front for elders to gift assets to their children,
impoverish themselves, and qualify for the state to pay for long-term care in a
nursing home. The high price of nursing home care would quickly deplete

5. See Philip Moeller, Senior Safety Nets at Risk in 2011, US NEWS, Dec. 22, 2010,
restraints to Social Security, Medicare, and Medicaid necessary to cut deficit); Ramshaw, supra note 3
(displaying Texas’s proposal to drop Medicaid in order to address state’s budget shortfall); Stephanie Reitz,
ns/health-health_care/e/seniors-pinches-rising-costs-home-care/ (discussing states’ struggle in funding
programs for elderly while baby boomers soon joining elderly population).

http://www.nytimes.com/2006/12/30/us/30support.html (citing high financial costs to adult children who act as
caregivers for aging parents).

7. See Peggie R. Smith, Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century, 25
responsibilities).

8. See Span, supra note 1 (giving example of daughter unable to afford fewer hours at her hospital job).

9. See id. (summarizing agreement made by elder law attorney). In this particular instance, the aging
mother paid her adult daughter the same hourly wage the daughter would have earned at her job as a nurse in a
hospital. Id. All of the other family members agreed this was fair. Id. These types of caregiving agreements
are increasingly used by elder-law attorneys. See Victoria E. Knight, Relatives Can Be Paid to Look After
caregiver contracts and predicting increased use as economy declines); Rachel Emma Silverman, Who Will
719862-51.stm (discussing elder-law attorneys noticing increased use in caregiver agreements).

10. See Reitz, supra note 5 (observing in-home care services help elderly avoid costly nursing homes). If
faced with the need to live in a nursing home one elder stated, “I would ask the dear Lord to go ahead and take
me.” Id. In-home care programs benefit elders who want to avoid nursing homes and states that want to avoid
spending Medicaid dollars on nursing home care. Id.

11. See infra Part II.C (discussing cases in which state agency questioned caregiver agreements).

12. See DEP’T OF HEALTH & HUM. SERVS., CTR. FOR MEDICARE & MEDICAID SERVS., THE DEFICIT
most seniors’ accumulated wealth; however, if elders can transfer their assets to their children via a “caregiver contract,” elders may qualify to have Medicaid pay for nursing home care, while ensuring that their posterity will receive an inheritance. States want to preserve scarce resources for those who truly cannot afford care.

This Note will explore the benefits and burdens of courts acknowledging and upholding caregiver agreements, ultimately arguing for more recognition of caregiving agreements to encourage greater numbers of caregivers for the burgeoning elder population. First, this Note will examine the parties to caregiver agreements and what influence their identities may have on a court’s evaluation of the agreement. Parties to a caregiver agreement are typically family members, so the initial discussion of the parties’ identities will lead to a discussion of the cultural and legal presumptions against family-member contracts. Then, turning more specifically to caregiver agreements, this Note will outline the considerations a Medicaid agency uses when deciding if an elder qualifies for benefits. State Medicaid agencies decide long-term care benefits; therefore, this Note will use Massachusetts as a case study to review caregiver agreements evaluated by the Office of Medicaid Board of Hearings and state courts. In light of the decisions in Massachusetts, this Note will propose clarifications to the Massachusetts Medicaid regulations to give Massachusetts and other states direction about how to allow caregivers who truly are rendering services to contract for their services, while avoiding giving elders Medicaid services if their “contract” was merely a gift. In addition, this Note will analyze current presumptions about family members and contracts. Finally, this Note will argue that acknowledging caregiver agreements will benefit caregivers, the elderly, and the state.

_deficit_reduction_act_downloads_checklist1.pdf (last visited June 30, 2012) [hereinafter IMPORTANT FACTS] (criticizing individuals using financial planners and attorneys to arrange assets to qualify for Medicaid). The Deficit Reduction Act includes “provisions designed to discourage the use of such ‘Medicaid planning’ techniques and to impose penalties on transactions which are intended to protect wealth while enabling access to public benefits.” _Id._


15. _See infra_ Parts II-IV (developing background information about and arguments in favor of restructuring regulations and upholding caregiver agreements).

16. _See infra_ Part II.A (investigating identities of parties to caregiver agreements).

17. _See infra_ Part II.B (discussing cultural and legal presumptions against familial contracts).

18. _See infra_ Part II.C (explaining agencies’ procedure for examining care agreements prior to elder applying for Medicaid).

19. _See infra_ Part III.C (outlining hearing decisions and cases in Massachusetts).

20. _See infra_ Part III.A (recommending particular changes to MassHealth regulations).

21. _See infra_ Part III.B (suggesting cultural and legal norms regarding “family” have changed substantially).

22. _See infra_ Part IV (expounding benefits of regulations and decisions supporting caregiver agreements).
II. BACKGROUND

A. The Parties to the Agreement

Identifying the parties to a caregiver agreement illustrates what a caregiver agreement is and expands analysis beyond the four corners of a page.23 Despite being ignored in some courts’ written analyses, identity can influence courts’ assessment of contracts.24 One obvious facet of the parties’ identities in a caregiver agreement is their relationship as family members, which is the focus of section B of this Note.25 Another salient aspect of the parties’ identities is gender because both the elderly and their caregivers are predominantly women.26 An additional pertinent factor of identity is class because of the assumption that caregiver agreements are tools of the wealthy.27

1. Gender

Women are principally the caregivers of the elderly.28 Regardless of employment status, women bear more responsibility for eldercare.29 Additionally, despite eldercare not being “inextricably linked with the biological event of pregnancy,” as is childcare, women still take on the majority of eldercare.30 These care responsibilities undoubtedly impact women’s earning potential.31

23. See infra Parts II.A.1-2 (describing identity of parties to caregiver agreement).
24. See, e.g., Snyder v. Nixon, 176 N.W. 808, 810 (Iowa 1920) (considering woman’s “indigent circumstances” and her husband’s “laboring man” status when evaluating woman’s contract claim); Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (describing history of protections used by courts in contracts cases involving women); Majorie Florestal, Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts, 14 MICH. J. RACE & L. 1, 30 (2008) (highlighting influence of race in famous contract case Williams v. Walker Thomas Furniture Company, 198 A.2d 914 (D.C. 1964)). While the descriptor of “Black” is omitted from the Williams opinion, race is “the two thousand pound elephant in the room, trumpeting stridently.” Id.
25. See infra Part II.B (examining courts’ use of presumption against contracts between family members).
26. See infra Part II.A.1 (highlighting unequal numbers of women to men as caregivers and elderly).
27. See infra Part II.A.2 (suggesting caregiver agreements executed by wealthy).
29. Smith, supra note 7, at 364 (stating nearly two-thirds of women caregivers maintain full-time jobs outside home).
30. Id. at 360-61 (noting unequal labor division among men and women for elder caregiving).
31. See infra notes 32-39 and accompanying text (explaining care responsibilities’ impact on women’s wealth).
The effect of care responsibilities can be seen from mere figures. Adults who care for aging parents typically either reduce the number of hours they work or quit their other employment outside the home, thereby decreasing or negating their salary. A less transparent influence on the earning power of caregivers for the elderly is family responsibilities discrimination (FRD). FRD is discrimination against employees with family caregiving responsibilities. While it affects both men and women, the majority of claimants are women.

Women’s domestic responsibilities continue to impact hiring, promotion, and other employment decisions because “the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest.” Decreased hours and discriminatory practices resulting from caregiving responsibilities further exacerbate the already stubborn trend of women continuing to earn less than their male counterparts across the entire spectrum of careers. As a result, women who work outside the home while

32. See Jennifer L. Morris, Note, Explaining the Elderly Feminization of Poverty: An Analysis of Retirement Benefits, Health Care Benefits, and Elder Care-Giving, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 571, 592 (2007) (noting workers providing eldercare forced to change work patterns, substantially affecting wealth). In one survey, changes like leaving work early, switching to part time, taking time off, or leaving jobs entirely led to an average total wealth loss of $659,139 over the caregiver’s lifetime. Id.; cf. Michelle J. Budig & Paula England, The Wage Penalty for Motherhood, 66 AM. SOC. REV. 204, 205 (2001) (explaining women lose employment time or have period of no earnings due to childcare); Morris, supra, at 592 (discussing caregiving roles other than eldercare affecting women’s work patterns outside home).

33. See EVERCARE, NAT’L ALLIANCE FOR CAREGIVING, FAMILY CAREGIVERS—WHAT THEY SPEND, WHAT THEY SACRIFICE: THE PERSONAL FINANCIAL TOLL OF CARING FOR A LOVED ONE 7 (2007), http://www.caregiving.org/data/Evercare_NAC_CaregiverCostStudyFINAL20111907.pdf (finding thirty-seven percent of caregivers in study quit jobs or reduced work hours to give care); Span, supra note 1 (describing daughter decreasing outside employment to care for mother).


35. See id. at 335.

36. See id. at 335-36 (providing statistics suggesting men subjected to FRD less). Significantly, only eight percent of FRD claimants are men. Id. at 336. While FRD typically is thought of in reference to mothers, the term also encompasses cases involving discrimination towards an individual who cares for an elderly family member. Id.

37. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003) (explaining how generalizations about gender influence employment); see also Williams, supra note 34, at 338-51 (documenting court cases in which female caregivers experience employment discrimination). Stereotypes of women’s domestic roles correspond to stereotypes of a lack of men’s domestic roles. Nev. Dep’t of Human Res., 538 U.S. at 736. Both women and men who have family care responsibilities are harmed when employers hold these “mutually reinforcing stereotypes.” Id.

additionally shouldering caregiving work are “underpaid for one job and unpaid for their second.”

Women are caregivers, women earn less, and consequently, fewer women have pensions—public or private—and those women who do, have significantly smaller pensions than men. Given women’s longer life expectancy, their lack of pension funds is problematic. By providing care to the elderly, women sacrifice opportunities to save and prepare for their own retirement, contributing to “the feminization of poverty among the elderly.”

The ratio of males to females drops steadily as age increases, creating an “overwhelming preponderance” of elderly women to elderly men. Thus, in addition to caregivers for the elderly typically being women, the elderly themselves are also generally women. The recipient of eldercare is most often the caregiver’s mother or mother-in-law, with caregiving services provided to fathers or fathers-in-law much less frequently.

In addition to the financial strain on women as caregivers, caregiving can cause psychological and physical stress to caregivers. Family caregivers lack

41. See Johnson, supra note 40, at 5 (noting retiring women lack economic resources of men).
42. See Morris, supra note 32, at 592-93 (reiterating how women caretakers’ sacrifices increase their risk of poverty).
44. See supra notes 28-30, 43 and accompanying text (noting women comprise majority of both caregivers for elderly and elderly themselves).
45. See Aumann et al., supra note 28, at 12 (citing results of study where mothers frequently received caregiving).
education and training for the demanding and technically complex tasks they are required to perform for the elderly.\textsuperscript{47} If, however, caregivers receive training and information, the strain placed on them can be reduced.\textsuperscript{48} Furthermore, governments potentially could decrease their health care costs if family caregivers are trained and capable of keeping elders out of hospitals and nursing homes for longer periods of time.\textsuperscript{49}

2. Class

In addition to gender, the identity characteristic of class is particularly relevant information when debating the validity of caregiver agreements.\textsuperscript{50} Rather than being used as a tool to help caregivers in financial need, Medicaid agencies and courts often view caregiver agreements as a way to help wealthy elders preserve their assets for their children as opposed to spending assets on the high cost of nursing home care.\textsuperscript{51} The idea that some wealthy elders are using caregiver agreements as an estate-planning device warrants grave concern because of the uncontrollable growth of Medicaid and corresponding unbearable costs to the states.\textsuperscript{52} Medicaid is a joint federal and state program that provides medical services, including nursing home care, to eligible individuals and families.\textsuperscript{53} Medicaid costs states more money than any other program besides education.\textsuperscript{54} And at the federal level, Medicaid has been

\textsuperscript{47} See \textit{RETOOLING}, supra note 4, at 254-55 (stressing lack of training and education for caregivers incongruous with complex responsibilities).

\textsuperscript{48} See \textit{AUANN ET AL.}, supra note 28, at 38 (documenting caregivers desire to obtain better information); \textit{RETOOLING}, supra note 4, at 256 (citing studies showing education and training decreasing caregivers’ stress); \textit{SENIOR CONNECTION}, supra note 46 (explaining government program’s goal of providing services, resources, and support to help caregivers with challenges).

\textsuperscript{49} See \textit{RETOOLING}, supra note 4, at 256 (citing study in which caregivers with training reduced health care cost to government).

\textsuperscript{50} See \textit{E.S. v. Div. of Med. Assistance & Health Servs.}, 990 A.2d 701, 706 (N.J. Super. Ct. App. Div. 2010) (describing Medicaid funds as for those “truly in need”). Courts often discuss the elder’s assets in cases involving a state Medicaid agency questioning the validity of a caregiver agreement. See \textit{id.} (detailing how assets must remain below threshold limit for Medicaid eligibility).

\textsuperscript{51} See \textit{Andrews v. Div. of Med. Assistance}, 861 N.E.2d 483, 484 (Mass. App. Ct. 2007) (describing preference to pass wealth to children and have state pay nursing home expenses). In addition to Medicaid-specific concerns, from a broader perspective, if caregiver agreements are not contracts with consideration but merely inheritances, they may be considered as yet another way to “exacerbate[] the gap between rich and poor.” \textit{Joshua C. Tate, Caregiving and the Case for Testamentary Freedom}, 42 U.C. DAVIS L. REV. 129, 165 (2008) (describing any inheritances as increasing concentration of wealth in hands of few).

\textsuperscript{52} See \textit{Jennings & Davwe, supra note 4, at 61 (showing percentage of Medicaid funds spent on long-term care steadily increasing); Tami Luhby, Medicaid Funding Bouts State Budgets, CNN MONEY (Feb. 28, 2011, 7:03 PM), http://money.cnn.com/2011/02/28/news/economy/medicaid_funding_states/index.htm (examining burden on states due to Medicaid funding demands).


\textsuperscript{54} See \textit{Luhby, supra note 52 (describing states’ spending on Medicaid).
targeted as one program necessitating cuts if a federal deficit reduction is ever to occur.55

Yet not all users of caregiver agreements are wealthy citizens attempting to take advantage of Medicaid benefits.56 “[E]veryday Americans” are using caregiver agreements at an increasing rate.57 Families that need to find ways to care for aging parents other than by expensive, privatized care can utilize caregiver agreements to pay one family member to act as caregiver.58

Families of all socioeconomic statuses need family caregivers.59 If adult children cannot afford to give up full-time work to become caregivers, elders may be forced to turn to private-care options.60 Elders who are forced to use more expensive care alternatives may exhaust their assets and qualify for Medicaid sooner than if they had been able to utilize home-based services such as family caregiving.61 This general need to draw on family caregivers will become even more acute as the population of aging baby boomers begins to outpace the number of formal or informal caregivers.62 The direct-care workforce is already small and possibly in decline, and caregiver agreements may help support and maintain the availability of caregivers for all classes of the elderly.63

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55. See Moeller, supra note 5 (listing Medicaid, Medicare, and Social Security as programs requiring reform for deficit reduction to occur).

56. See Weitzel v. Dehner, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (describing case in which elderly woman only had $12,000 in assets). In Weitzel, the elderly woman had paid her daughter $10,000 for caregiving services, funds that were only available after the elderly woman sold her home. Id. The Medicaid agency disputed the transfer, claiming it was $10,000 over the $2000 limit of assets an elder may hold and qualify for Medicaid benefits. Id.


58. See Span, supra note 1 (describing agreement to pay daughter who could not afford to lose income from outside employment).


60. See Jennings & Dawe, supra note 4, at 60 (stating higher costs for institutional care versus home care).

61. See id. at 62 (connecting lower-middle class spending on long-term care to qualification for Medicaid).

62. See Tate, supra note 51, at 173 (describing estimates of elders needing long-term care growing substantially faster than number of caregivers); see also RETOOLING, supra note 4, at ix (warning about substantial number of older Americans overwhelming number of geriatricians).

63. See RETOOLING, supra note 4, at 242 (citing concern over declining number of caregivers in United States).
B. Familial Contracts

1. Legal Presumption Against Familial Contracts

In addition to discussing the gender and class of caregivers and the elderly, considering the familial relationship between caregivers and the elderly is vital given the family member rule in contracts.\(^{64}\) When valuable services are rendered there is an expectation of compensation, yet, when valuable services are performed for a family member, there is a presumption that the services were performed gratuitously.\(^{65}\) Courts assume family members perform services for one another either based on love or mutual convenience.\(^{66}\) The presumption against contracts involving family members dates back to the mid-nineteenth century, when family members performed services for the mutual convenience of everyone in their household.\(^{67}\) Additionally, this presumption reflects a time when a greater percentage of women stayed home to perform household services without remuneration—before spouses and children relied on women’s income from jobs outside the home.\(^{68}\) While skeptical of family

\(^{64}\) See Sabin v. Graves, 621 N.E.2d 748, 752 (Ohio Ct. App. 1993) (noting clear shift in presumption against contracts when services rendered to another family member); In re McTamany’s Estate, 44 Pa. Super. 484, 486 (1910) (distinguishing family members performing services from implied contracts based on performance and receipt of services).

\(^{65}\) See Plowman v. King (In re Pauly’s Estate), 156 N.W. 355, 356 (Iowa 1916) (explaining general presumption of services performed for member of same household not creating payment obligation); Andrews v. Div. of Med. Assistance, 861 N.E.2d 483, 486 (Mass. App. Ct. 2007) (indicating services given to family member presumed gratuitous); Ann Laquer Estin, Love and Obligation: Family Law and the Romance of Economics, 36 Wm. & MARY L. REV. 989, 994-95 (discussing limitations to permitting compensation for interactions between family members); Jonathan S. Henes, Note, Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts, 17 CARDOZO L. REV. 705, 705 (1996) (stating general rule of expected compensation for services and exception when services performed by family). When services are performed for a family member, “naturally a question arises whether such services would have been rendered gratuitously . . . or whether a genuine transaction occurred with expectation of payment for value given and received.” Andrews, 861 N.E.2d at 484. But cf. Northrup v. Brigham, 826 N.E.2d. 239, 243 (Mass. App. Ct. 2005) (refusing to apply gratuitous presumption despite romantic relationship between parties). Unlike other courts, no Massachusetts court has ever applied the presumption that unmarried cohabitants in a close relationship perform services for each other without expectation of remuneration. Id.

\(^{66}\) See Harold C. Havighurst, Services in the Home—A Study of Contract Concepts in Domestic Relations, 41 YALE L.J. 386, 390 (1932) (describing courts’ expectations of reciprocal services among family members)

\(^{67}\) See Henes, supra note 65, at 706-09 (questioning utility of family-member rule in contemporary society); see also Snyder v. Nixon, 176 N.W. 808, 809 (Iowa 1920) (describing reciprocity among family members for services, thus precluding recovery). When families lived in the same household they could perform reciprocal services; however, due to increases in geographic mobility, family responsibility for eldercare has shifted, typically to the child who lives closest to an elderly parent. Tate, supra note 51, at 175-76. But see Havighurst, supra note 66, at 390 (describing pre-1932 cases in which only one of many children cared for aging parent). Additionally, increases in the age at which women bear children may also affect distribution of eldercare, thus imposing greater responsibility on family members with no dependent children. See id.

members contracting for services, courts have nonetheless upheld these familial contracts.69

In addition to contracts, other areas of the law are affected by the presumption of free household services and the conflicting need to give value to such services.70 For example, testators may reward children who are more attentive to them in their old age through their wills.71 In another context, when dividing property in divorce some courts consider the “contribution of each of the parties as a homemaker to the family unit” when dividing property.72

Both the presumption that a woman performed gratuitous services in the home and the presumption that a man, as a husband, carried the duty to support his wife financially, made it difficult for courts to uphold familial contracts.73 Historically, courts refused to acknowledge prenuptial agreements because the husband had a legal duty to provide for the wife, and the spouses could not

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69. See Snyder, 176 N.W. at 810 (upholding implied-in-fact contract despite presumption of gratuitous services between family members); In re Burton’s Estate, 257 N.Y.S. 634, 635 (1932) (determining presumption of gratuity inapplicable to services provided by sister); cf. 755 ILL. COMP. STAT. 5/18-1.1 (2012) (allowing relatives to make claims on estate if caregiver provided three years of service to disabled relative). The Illinois statute looks similar to the implied contract and reliance claims that are often disregarded by the family member rule: “The claim shall take into consideration the claimant’s lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person.” 755 ILL. COMP. STAT. 5/18-1.1. Reliance claims seem logical for family caregivers who disrupt their personal and business lives on the reliance of some type of payment or inheritance. See Jay M. Feinman, Critical Approaches to Contract Law, 30 UCLA L. REV. 829, 854-55 (1983) (summarizing one court’s reliance rationale).

70. See infra notes 71-72 (giving examples of courts granting value for providing care and household services).

71. See Tate, supra note 51, at 134 (suggesting freedom to disinherit descendants corresponds with ability to reward adult children acting as caregivers). Some scholars suggest that as the need for eldercare increases, greater testamentary freedom is necessary to encourage children to become caregivers for their parents. Id. at 135 (arguing need for eldercare justifies testamentary freedom).

72. MASS. GEN. LAWS ANN. ch. 208, § 34 (2012) (setting forth considerations for court when determining property division); see also MONT. CODE ANN. § 40-4-202 (2012) (noting homemaker contributions as factor in property division); OR. REV. STAT. ANN. § 107.105(1)(a) (2012) (considering spouse’s contribution as homemaker part of dividing property). Provisions like these effectively place “the homemaker-spouse’s noneconomic contributions on a par with the breadwinner-spouse’s direct economic contribution to the acquisition of property.” In re Marriage of Stice, 779 P.2d 1020, 1028 (Or. 1989) (describing Oregon’s “homemaker” provision as recognizing nonearning spouses’ economic contributions); see also In re Marriage of Brown, 587 P.2d 361, 365 (Mont. 1978) (approving wife receiving interest in marital assets due to contributions as housewife and mother). One court examined specific homemaking duties like preparing family meals, cleaning up after dinner, maintaining the yard, and helping children with homework in determining property division. Williams v. Massa, 728 N.E.2d 932, 937, 942 (Mass. 2000) (considering work performed as homemaker when determining property division in divorce); see also BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY, GENERAL CONTRIBUTIONS TO THE MARITAL PARTNERSHIP—HOMEMAKER CONTRIBUTIONS § 8:11 (3d ed. 2010) (explaining homemaker services frequently considered when determining division of assets).

waive this duty by contract. 74 Circumstances have changed, however, and courts have upheld some agreements between potential or former marital partners. 75 Some states even recognize marital agreements executed after marriage between spouses who plan to continue their marriage. 76

2. Cultural Presumptions Against Familial Contracts

While the legal presumptions against familial contracts will be considered by hearing officers and judges, deep-rooted cultural beliefs about caregiving also hold sway. 77 The very idea of charging a family member, particularly a parent, for care services runs counter to the Judeo-Christian ideal of honoring parents. 78 Strong cultural beliefs provide that parents should receive reciprocal care for the years they spend as uncompensated caregivers, and that contracts are abhorrent to relationships rooted in love with no expectation of remuneration. 79 These assumptions of a moral duty among family members still appear in hearing officers’ and judges’ opinions, while some hearing officers and judges seek to distinguish moral from legal duties. 80 The legal and cultural influences should both be taken into account as more specific cases are now reviewed. 81

C. Massachusetts Hearing Decisions and Case Law on Caregiver Agreements

Medicaid agencies scrutinize caregiver agreements when an elder applies for


75. See, e.g., Cook v. Cook, 691 P.2d 664, 669 (Ariz. 1984) (enforcing agreement combining funds despite possibility of cohabitation and pending marriage influencing making of agreement); Frey v. Frey, 471 A.2d 705, 710 (Md. 1984) (recalling when jurisdictions abandoned view antenuptial provisions void as against public policy); Karen Servidea, Reviewing Premarital Agreements to Protect the State’s Interest in Marriage, 91 VA. L. REV. 535, 536-40 (2005) (tracking history of premarital agreements); Bruno, supra note 74, at 397-98 & n.3 (describing validity of prenuptial and separation or settlement agreements).


78. See Exodus 20:12.

79. See Estin, supra note 65, at 1045-46 (explaining how acts of love do not require reciprocation); Wise, supra note 77, at 567-71 (reviewing various theories for requiring children to care for aging parents); Silverman, supra note 9 (“It’s hard to put a dollar figure when you are doing something for your mom.”).


81. See supra Part II.B (describing legal and cultural presumptions against caregiver contracts between family members).
Medicaid benefits. In order to qualify for state-paid nursing home care, elders must have no more than $2000 in countable assets. The Medicaid agency will not only look at an elder’s assets as of the application date, but will also examine all major financial transactions that occurred during the five years prior to the elder applying for Medicaid—commonly referred to as the look-back period. The state Medicaid agency wants to ensure caregiver agreements are not merely a way to allow elders to gift assets to children and rely on the state to pay for long-term care.

States administer Medicaid, although it is a federal program. The federal government sends states interpretive guidance about the Medicaid program and the states’ regulations must comply with the federal guidelines. Thus, while there are some state-to-state differences, many of the guidelines for Medicaid eligibility are common to all states, and this Note will focus on Massachusetts as an example of how state Medicaid agencies and state courts examine caregiver agreements when an elder applies for nursing home benefits.

Even if caregiver agreements were to pass the legal and cultural presumptions against familial contracts previously discussed, the agreements must also meet the requirements of the state Medicaid agency’s (MassHealth in Massachusetts) regulations. MassHealth will primarily examine three factors:


83. See 130 M.ASS. CODE REGS. 520.003 (2012) (listing $2000 as maximum value of assets owned by individuals to receive Medicaid). While there may be variations among states, assets counted towards the $2000 limit generally include checking and savings account funds, stocks, bonds, retirement funds from which withdrawals may be made, and real estate. See ELLEN O’BRIEN, LONG-TERM CARE FIN. PROJECT, GEORGETOWN UNIV., MEDICAID’S COVERAGE OF NURSING HOME COSTS: ASSET SHELTER FOR THE WEALTHY OR ESSENTIAL SAFETY NET? 12 n.2 (2005). Exempt assets include a home, car, and burial funds. Id.


85. See IMPORTANT FACTS, supra note 12, at 3 (noting elders artificially impoverish themselves by gifting assets to children).

86. See Andrews, 861 N.E.2d at 484 (describing Medicaid’s dual federal and state nature).

87. See id. at 486 (giving example of interpretive communication from federal Medicaid offices to states); see also Forman v. Dir. of Office of Medicaid, 944 N.E.2d 1081, 1085 (Mass. App. Ct. 2010) (explaining states required to comply with federal Medicaid law in order to receive federal funding); Mackey v. Dep’t of Human Servs., 808 N.W.2d 484, 486 (Mich. App. 2010) (noting states’ requirement to comply with federal statutes and regulations).

88. See infra Parts II.C.1-3 (discussing Massachusetts cases).

in making its determinations about whether a transfer of assets disqualifies the elder for MassHealth benefits: the fair market value of the transaction, the intent behind the transaction, and the reasonable enforceability of the agreement. While these same factors will be evaluated in every case, Medicaid benefits decisions are fact-specific, with hearing officers and judges examining both the written agreement (if one exists) and the entire record of evidence.

1. Fair Market Value

In evaluating caregiving agreements, the hearing officer or judge first considers whether the transaction was made for fair market value. As previously discussed, services performed for a family member are presumed to be gratuitous; however, the State Medicaid Manual states, “relatives and family members legitimately can be paid for care they provide.” In order for a family caregiver to be paid for services, the Medicaid applicant must show that he or she transferred funds to the caregiver and received services of comparable fair market value in exchange. Medicaid agencies define fair market value as “an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred.” Determining the prevailing price of elder care services, however, is not a straightforward process.

Hearing officers and judges disagree about how the prevailing price for caregivers should be determined. First, it is unclear how to or who should (requiring agreement to meet contract law and Medicaid regulation requirements).

90. See infra Parts II.C.1-3 (discussing fair market value, intent, and legally and reasonably enforceable as criteria).
93. See STATE MEDICAID MANUAL, supra note 82, § 3258.1(A)(1) (stating elder may pay relative, but transfers for love alone not considered legitimate).
94. See id. (deeming transactions less than fair market value if no fee assessed at time services provided). Medicaid agencies presume that “services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption . . . .” Id.
95. See id. (defining fair market value); see also 130 MASS. CODE REGS. 515.001 (2012) (giving MassHealth’s nearly identical definition of fair market value).
96. See infra notes 97-102, 104-108, and accompanying text (reviewing contradictory views of prevailing price for caregiving services).
determine a fair market hourly wage. For example, AARP estimates how much home-health aides are paid in each state, and this alone might be sufficient to support that an elder intended to make a transfer for fair market value. Yet, MassHealth pays its personal care attendants a much lower hourly wage, and given that Medicaid is state and federally funded, a fair market hourly wage could be based off of this information. Second, even if one wage was established as the fair market rate, there are still questions about what services would be included, and how wages would change if the elder had specific disabilities or infirmities that intensified care responsibilities.

Compare Massachusetts Medicaid Appeal 1001965, supra note 92, at 5-6, 14 (accepting AARP report to establish fair market value and rejecting MassHealth pay rate), with Piers v. Bigney, CV07-00443, 2009 WL 6574639 (Mass. Super. Ct. Mar. 31, 2009) (relying on MassHealth pay rate and private care provider’s rate to determine fair market value). Pointing out a technicality, one judge emphasized that the survey the applicant provided to establish fair market value was for 2009, while the services were performed between 2007 and 2008 and fair market value is based on the prevailing price at the time the transfer occurred. Forman, 2010 WL 2344934. In Piers, a pay rate of $25 per hour was found excessive; however, the reasoning behind finding the rate excessive was that the elder was already living in a nursing home and many of the services purportedly given to the elder in exchange for $25 per hour were duplicative of services provided by the nursing home. Piers, 2009 WL 6574639. Another hearing officer found that an hourly rate of $19 per hour in exchange for caring for the elder, providing meals, driving the elder to appointments, maintaining the house, paying bills, and cleaning not excessive, and that the caregiver agreement was for fair market value. Massachusetts Medicaid Appeal 1001965, supra note 92, at 12. This finding was made despite MassHealth’s contention that personal care attendances in MassHealth’s program earn between $10.84 and $12 per hour for performing similar services. Id. at 5. The hearing officer noted that the duties performed by the caregiver in that case did not “mimic” the Personal Care Attendant program provided by MassHealth. Id. at 6.

98. See supra note 97 (reviewing different ways to determine fair market hourly wage).

99. See Massachusetts Medicaid Appeal 1001965, supra note 92, at 6, 10 (accepting as finding of fact $23 per hour as average rate as determined by AARP); Long-Term Care Cost Calculator, AARP.ORG (Oct. 2006), http://assets.aarp.org/external_sites/caregiving/options/your_options_calculator.html (providing calculator for care costs based on state and type of care).

100. See Piers, 2009 WL 6574639 (noting MassHealth pays $12 to $18 per hour for personal care services); Massachusetts Medicaid Appeal 1001965, supra note 92, at 5-6 (describing MassHealth pay rate as $10.84 to $12 per hour for its personal care attendants).

101. See, e.g., Weitzel v. Dehner, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (noting intensity of care that elder would require given she had Alzheimer’s disease); Massachusetts Medicaid Appeal 1001965, supra note 92, at 10 (discussing elder’s need for twenty-four-hour care in determining whether elder received fair market value); Massachusetts Office of Medicaid Board of Hearings, Appeal 0818313, at 6 (May 12, 2009) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) [hereinafter Massachusetts Medicaid Appeal 0818313] (taking into account elder’s medical conditions in determining fair market value). In Weitzel, a caregiver’s mother had Alzheimer’s, and the judge found that the condition would have necessitated a level of care commensurate with a nursing home. Weitzel, No. 08-0627-D. According to a clinical social worker, a nursing home in the elder’s area would have cost $4000 per month, yet the daughter only received $2500 per month. Id. at 2. Even with this evidence, a hearing officer initially found the agreement invalid, and only later, when reviewed by a judge, were the transfers held to be intended for fair market value. Id. at 4, 6. In another case, the hearing officer found that the elder, who was diagnosed with dementia, paid fair market value for services after taking into account the elder’s need for twenty-four-hour care. Massachusetts Medicaid Appeal 1001965, supra note 92, at 10, 12. Similarly, in a case where the exchange of money for services outlined in an agreement was found to be for fair market value, the elder, who had been diagnosed with advanced Alzheimer’s disease, moved into her daughter’s home, and was cared for by her daughter and her daughter’s family. Massachusetts Medicaid Appeal 0818313, supra, at 101. While the caregiver agreement stated that the daughter was to receive $5000 per month for the care and rent, she only
Additionally, having formal trainings or certifications might also affect the fair market rate that could be paid to caregivers.\textsuperscript{102} Due to all of these considerations, there is substantial uncertainty surrounding the fair market value factor.\textsuperscript{103} Hearing officers and judges have been certain, however, to deem caregiver agreements to represent fair market value when the caregiver provided frequent and labor-intensive services and received less than any conceivable fair market wage from the elder in return.\textsuperscript{104} In one case, for example, the elder had advanced Alzheimer’s disease necessitating intensive care, and the daughter provided housing and full-time care for the elder for only $25 per day.\textsuperscript{105} One hearing officer pointed out that it may be more appropriate to be concerned for the caregivers who do not receive pay commensurate with their services, than to be concerned for the elders receiving valuable services for their payments.\textsuperscript{106}

\section*{2. Intent}

If a hearing officer or judge decides that an elder transferred an asset and received less than fair market value in return, the transfer is not automatically deemed disqualifying.\textsuperscript{107} The elder still has the opportunity to show either that

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\item received $1000 per month during the period the elder lived with the daughter and her family. \textit{Id.} at 6. The hearing officer concluded that the daughter, as caregiver, had only received $17,000 (or approximately $25 per day) for room and care for a patient with advanced Alzheimer’s disease, and thus, the transfer was for fair market value. \textit{Id.}
\item See Forman v. Dehner, No. BRCV2009-01045, 2010 WL 2344934 (Mass. Super. Ct. Apr. 7, 2010) (pointing out daughter unlicensed as homemaker). To support the claim that the caregiver agreement terms represented fair market value, the elder’s daughter provided the court with a cost-of-care survey for homemaker services in Massachusetts. \textit{Id.} The judge highlighted that the survey was for average pay rates of licensed homemakers, and that there was no evidence the caregiver in the case was a licensed homemaker, thus making the cost-of-care survey inapplicable. \textit{Id.}
\item See supra note 97 (reviewing contrary cases regarding how much caregivers should receive for services).
\item See, e.g., Weitzel, No. 08-0627-D (noting elder required nursing home care, while caregiver received much lower pay rate); Massachusetts Medicaid Appeal 0818313, supra note 101, at 6 (allowing roughly $25 per day payment to house and care for elder with advanced Alzheimer’s); Massachusetts Office of Medicaid Board of Hearings, Appeal 0601673, at 3-4 (June 13, 2006) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) [hereinafter Massachusetts Medicaid Appeal 0601673] (recognizing caregiver expected $50,000 annually but received $20,000 for more than one year of services). A hearing officer held an agreement to represent fair market value when a daughter agreed to provide her elderly mother with housing, monitor her health status, secure her health care, assess her personal needs, and manage her finances in exchange for $16.11 per hour for sixty hours per week. Massachusetts Medicaid Appeal 0601673, supra at 104. The daughter performed the services outlined in the agreement, as well as additional services for more than one year, and only three years after the agreement’s execution did the daughter receive one payment of $20,000. \textit{Id.} at 3-4. The hearing officer found that the elder had paid fair market value for the services she received. \textit{Id.} at 4.
\item See Massachusetts Medicaid Appeal 0818313, supra note 101, at 5-6 (concluding transfer made for fair market value).
\item See \textit{id.} at 6 \& n.5 (emphasizing caregiver’s lack of ability to enforce terms of caregiving agreement).
\item See 130 Mass. Code Regs. 520.019(F) (2012) (stating even if resources transferred for less than fair market value, still opportunity for eligibility).
\end{itemize}
the transfer was made “exclusively for a purpose other than to qualify for MassHealth,” or that the elder intended to pay for the caregiving services.\textsuperscript{108} Mere “verbal assurances” that the elder was not considering applying for Medicaid when the elder transferred assets are insufficient to show that the resources were transferred for a purpose other than to qualify for MassHealth.\textsuperscript{109} Yet, even if the parties to the agreement were contemplating having the state pay for the elder’s nursing home care, there is still opportunity to provide “reliable proof” that the elder intended to receive valuable services in exchange for the transfer of his or her funds.\textsuperscript{110} Hearing officers and judges often look for reliable proof in the form of a written agreement.\textsuperscript{111}

While a written agreement may suffice for evidence of a caregiver agreement, hearing officers and judges disagree as to how specific the written agreement must be.\textsuperscript{112} In many cases, judges emphasize the issue of timing, wanting to ensure that an agreement was written prior to services being rendered.\textsuperscript{113} Some judges prefer the drafters to write specifics into caregiver agreements such as the specific duration services will be provided, the hours per week to be worked, the “explicit provision for a refund,” and standards of

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\item[108.] See id. (listing possibilities for proving intent of Medicaid applicant).
\item[109.] See STATE MEDICAID MANUAL, supra note 82, § 3258.10(C)(2) (requiring “convincing evidence” about “specific purpose for which the asset was transferred.”).
\item[110.] See Gauthier v. Dir. of the Office of Medicaid, 956 N.E.2d 1236, 1244-45 (Mass. App. Ct. 2011) (contemplating how parties could have intended fair exchange even when also planning to use state funds); Andrews v. Div. of Med. Assistance, 861 N.E.2d 483, 485 (Mass. App. Ct. 2007) (describing need to show elder’s intent to pay for caregiving services). In Gauthier, the court separated the analysis of whether the elder’s purpose of transferring assets was to qualify for Medicaid from the analysis of whether the elder’s intent was to pay a caregiver for services. Gauthier, 956 N.E.2d at 1243-44. According to Gauthier, the elder could have intended to make an equal exchange of assets for caregiving services even if he or she failed the purpose analysis. Id. at 1244. In another case, however, the Massachusetts Appeals Court’s foremost analysis focused on the elder’s intent to pay her relatives for services. Andrews, 861 N.E.2d at 485-86. After finding that the elder lacked intent to pay her relatives for services, the court reasoned that the purpose of the transfer was to lower the elder’s assets in order to qualify for MassHealth. Id. at 487.
\item[111.] See STATE MEDICAID MANUAL, supra note 82, § 3258.10(C)(1) (noting written arrangement may rebuff presumption of less than fair market value for caregiving services). The presumption that services provided for free at the time of rendering were intended to be provided without compensation, can be challenged. Id. “[A]n individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.” Id. § 3258.1(A)(1).
\item[113.] See Treat v. Exec. Office of Health & Human Servs., 923 N.E.2d 1093, *1-2 (Mass. App. Ct. 2010) (highlighting written documentation created after services rendered); Andrews, 861 N.E.2d at 486 (describing invoice for labor and supplies dated after services provided). But see Weitzel, No. 08-0627-D (accepting agreement as valid when daughter provided caregiving for free prior to any formal agreement); 130 MASS. CODE REGS. 520.007(J)(4) (2012) (requiring enforceable contract only when transaction involves payment in exchange for services provided in future); Massachusetts Medicaid Appeal 0818313, supra note 101, at 6 (allowing daughter to perform services for mother gratuitously before payments for services began).
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services to be provided. In some cases, judges compare the services discussed in the written caregiver agreement with the services that were actually performed. Thus, the opportunity to construct a valid, written caregiver agreement has not been foreclosed, yet there is no clear standard for what the written requirements will be.

3. Legally and Reasonably Enforceable

In addition to considering fair market value and intent, when the caregiver agreement is for future performance by the caregiver, the court must find that the agreement is a valid contract that is legally and reasonably enforceable by the elder. In addition to the presumption services performed for other family members are gratuitous, there are other problems with the enforceability of caregiver agreements. First, specific performance of a personal services contract is not an available remedy for breach of a caregiver agreement. This gives little incentive for caregivers to strictly fulfill all the terms of their agreement. Second, if caregivers are also acting as the elder’s attorney, power of attorney, or health care proxy, they will be unlikely to sue themselves in their capacity as a caregiver. Third, even if the elder did not ask for

114. See Gauthier, 956 N.E.2d at 1242 (listing grievances with lack of specificity in caregiver contract); see also Forman v. Dir. of Office of Medicaid, 944 N.E.2d 1081, 1087 (Mass. App. Ct. 2011) (criticizing contract for not quantifying number of hours per week caregiver would provide services); E.S. v. Div. of Med. Assistance & Health Servs., 990 A.2d 701, 704, 710 (N.J. Super. Ct. App. Div. 2010) (finding contract inadequate despite enumeration of hours, weeks, and years for caregiver services). Specificity was insufficient for one caregiver contract because certain provisions stated that the caregiver agreement could not be transferred, assigned, or conveyed, and therefore it had no fair market value. See E.S., 990 A.2d at 710.

115. See Gauthier, 956 N.E.2d at 1242 (noting discrepancies between services provided to elder and services promised to elder in contract); Forman, 944 N.E.2d at 1086 (highlighting mismatch between services listed in contract and services provided).

116. See Massachusetts Medicaid Appeal 0601673, supra note 104, at 3 (finding acceptable agreement prepared by attorney with caregiver’s duties and hours per week of care). Compare Gauthier v. Dir. of the Office of Medicaid, 956 N.E.2d 1236, 1242 (Mass. App. Ct. 2011) (desiring specificity in contract regarding hours), and Forman, 944 N.E.2d at 1087 (requiring greater detail in contract regarding hours and duration), with Massachusetts Medicaid Appeal 0818313, supra note 101, at 6 (finding agreement providing basic monthly payments valid irrespective of lack of specificity about services).


118. See infra notes 120-123 (outlining potential arguments against enforceability of caregiver contracts).


120. See Forman, 2010 WL 2344934 (leaving open possibility of suing caregiver for damages while acknowledging specific performance unavailable as remedy).

121. See, e.g., id. (noting caregiver’s role of daughter and power-of-attorney makes it unlikely elder would sue); Massachusetts Office of Medicaid Board of Hearings, Appeal 1007746, at 10 (Oct. 20, 2010) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) [hereinafter Massachusetts Medicaid Appeal 1007746] (concluding arrangement unenforceable because power
specific performance, the elder would not want to sue for damages because a financial recovery on a contract would increase the elder’s assets, again making the elder ineligible for Medicaid benefits.\textsuperscript{122} And finally, sometimes the elder is already mentally incompetent at the time the contract is executed, making the contract voidable.\textsuperscript{123}

While there are multiple difficulties in ensuring that a written agreement is reasonably and legally enforceable, the regulation requiring an enforceable contract pertains only to contracts in which there is up-front payment in exchange for future services.\textsuperscript{124} If a caregiver is performing ongoing services and receiving monthly payments for those services, there is not a need for an enforceable contract.\textsuperscript{125} If, however, a caregiver performs services for free and later demands payment, then, similar to cases of future performance, hearing officers and judges may require a written agreement.\textsuperscript{126}

III. ANALYSIS

Federal Medicaid guidance states, “family members legitimately can be paid for care they provide,” yet ambiguity remains as to what hearing officers and judges will require before they will deem a family caregiver agreement valid.\textsuperscript{127} This section argues for changes to the MassHealth regulations in order to of attorney would not sue himself for specific performance); Massachusetts Office of Medicaid Board of Hearings, Appeal 0708089, at 7 (Sept. 27, 2007) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) [hereinafter Massachusetts Medicaid Appeal 0708089] (discussing improbability of caregiver enforcing agreement against himself). \textit{But see} Weitzel v. Dehner, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (finding durable power of attorney constitutes sufficient written evidence of agreement for caregiver payments).

\textsuperscript{122} See \textit{Forman}, 2010 WL 2344934 (reasoning suit against caregiver unlikely when recovered damages would render elder ineligible for MassHealth benefits).

\textsuperscript{123} See Massachusetts Medicaid Appeal 1001965, supra note 92, at 11 n.3 (questioning enforceability of agreement due to “questionable competency” of elder); Massachusetts Office of Medicaid Board of Hearings, Appeal 0807461 Remand, at 7 (July 21, 2009) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) (holding agreement unenforceable and invalid where elder had diminished mental capacity at time of agreement). \textit{But see} Massachusetts Medicaid Appeal 0818313, supra note 101, at 4, 6 (upholding agreement even though elder had advanced Alzheimer’s disease at time of agreement’s making).

\textsuperscript{124} See Massachusetts Medicaid Appeal 1001965, supra note 92, at 11 (noting when services provided and later payment given, no need for analysis of enforceable contract).

\textsuperscript{125} See id. (describing how regulations do not require contracts when compensation given at time caregiver provides services).

\textsuperscript{126} \textit{State Medicaid Manual}, supra note 82, § 3258.1(A)(1) (explaining care provided without contemporaneous payment presumed gratuitous, unless tangible evidence rebutting presumption exists); Gauthier v. Dir. of Office of Medicaid, 956 N.E.2d 1236, 1242-43 (Mass. App. Ct. 2011) (determining exchange not for fair market value because of “lump-sum up-front payment”). \textit{But see Weitzel}, No. 08-0627-D (allowing agreement in which daughter provided care without compensation and only later began receiving payments).

\textsuperscript{127} See \textit{State Medicaid Manual}, supra note 82, § 3258.1(A)(1); \textit{see also} supra Part II.C (discussing cases involving caregiver agreements).
clarify how families can contract for care. Additionally, this section will review other policy arguments in favor of greater acceptance of caregiver contracts.

A. Changes to MassHealth Regulations

Given the increasing need for family caregivers, and the growing number of caregivers executing caregiver agreements, further regulatory guidance would allow attorneys to give competent counsel, and could also expedite or alleviate administrative and judicial evaluations of such agreements. The Massachusetts Appeals Court has noted a lack of specificity in the regulations regarding MassHealth eligibility and has stated that the court would benefit from the MassHealth agency’s interpretation and analysis of the regulations. In addition to benefitting the courts, refining regulations regarding caregiver agreements could allow Medicaid agencies to continue to guard against applicants who have transferred wealth exclusively for the purpose of qualifying for Medicaid, while allowing those who provide care services to elderly family members to receive remuneration for their services.

The Massachusetts regulations should assign a separate section of the regulations to family caregiver agreements. The federal Medicaid manual giving guidance to the states specifically mentions the possibility of family members being paid to provide care, but the MassHealth regulations do not mention family caregivers. A section within the MassHealth regulations could address some of the ambiguities frequently seen in hearing decisions and cases.

128. See infra Part III.A (outlining specific areas for change within regulations).
129. See infra Part III.B (setting forth arguments for encouraging caregiver contracts).
130. See supra notes 9, 57-58 and accompanying text (describing increasing need for family caregivers and increasing number of families using caregiver agreements).
131. See Gauthier, 956 N.E.2d at 1245-46 (discussing lack of guidance from MassHealth regulations). Once a court determines that a MassHealth applicant has made a disqualifying transfer—in other words, a caregiver contract is deemed invalid—the court will decide how long the applicant will be ineligible for MassHealth benefits. Id. at 1244. The ineligibility period is calculated based on how much of the amount the elder transferred to a caregiver went uncompensated. Id. at 1244-45. In Gauthier, the Massachusetts Appeals Court discussed the lack of guidance regarding how to calculate “uncompensated value.” Id. at 1245-46. Gauthier supports the proposition that clarification of the MassHealth regulations affecting caregiver agreements would lighten the burden on hearing officers and judges. Id.
133. See 130 MASS. CODE REGS. 520.007(J)(4) (2012) (listing “contracts” as one possible transaction involving future performance). While contracts are mentioned in the “future performance” section, contracts for past or current care are not mentioned. See 130 MASS CODE REGS. 520.019 (B)-(D), (F) (2012).
134. See STATE MEDICAID MANUAL, supra note 82 (recognizing possibility of paying relatives).
135. See supra Part II.C (discussing cases and hearing decisions involving caregiver agreements and noting differences in how agreements evaluated).
Within this section, the regulations should first address whether caregiver agreements need to be in writing, and if so, discuss the essential elements that must be written into the agreement in order for it to be found valid. Further guidance is needed given that some hearing officers and judges are already requiring certain information to be in a written agreement before they will deem an agreement valid. MassHealth and the federal Medicaid agency require “proof that the transfer genuinely was in payment for value received,” and the federal agency further suggests that family agreements for services provided for free in the past can be acceptable transfers by providing “tangible evidence that is acceptable to the State.” There are not specific guidelines, however, regarding what this “proof” or “tangible evidence” must be. Requiring documentation of every specific service the caregiver performs and the estimated value of each individual service need not be in the agreement; rather a statement of the services the caregiver will perform, the frequency with which those services will be performed, and a wage or salary amount would suffice.

Second, the way in which the market rate will be determined should be standardized. The State Medicaid Manual defines fair market value as the “value of an asset, if sold at the prevailing price at the time it was actually transferred”; however, there is discord as to what evidence is sufficient to show the “prevailing price.” The use of a “market rate” or “market price” occurs in many contractual contexts without specifically declaring how the term will be defined. It may be particularly critical, however, in the context of home caregiving—a work domain which historically has been outside the public

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137. See supra note 109 and accompanying text (giving examples of judges desiring details written into contracts).


139. See *State Medicaid Manual*, supra note 82, § 3258.1(A)(1) (lacking information concerning proof required). The State Medicaid Manual does state that a “payback arrangement” that was agreed to in writing at the time services were provided may suffice as evidence, but no further guidance about this arrangement or information about whether this should be a required piece of evidence is given. See id.


142. See *State Medicaid Manual*, supra note 82, § 3258.1(A)(1) (defining fair market value); supra Part II.C.1 (showing differences in opinion for determining prevailing price and fair market value).

sector—to set specific ways that the pay rate will be evaluated rather than allowing old stereotypes regarding the worth of homemaker services to prevail.\textsuperscript{144} Setting more specific ways to determine pay rate has occurred in other contexts; for example, in contracts for construction on public buildings or public works, wage rates are set by the Department of Labor, which determines the locally prevailing wage rates.\textsuperscript{145}

Third, the regulations should state whether any type of licensure or clinical oversight of the caregiver is required in order to show that a transfer to a caregiver was for fair market value.\textsuperscript{146} Licensure and oversight requirements would ensure transfers to an adult child are for purposes other than merely to qualify for MassHealth, while at the same time benefitting caregiver children by giving them the training and support needed to be an effective caregiver.\textsuperscript{147} Many of the state agencies that could potentially administer licensing and oversight of caregivers already exist; however, there would be added expense to the state if personnel were required to train and oversee family caregivers.\textsuperscript{148}

B. Family-Friendly Policy Agenda for Contracts

From a broad policy perspective, governments’ choice to support caregiver agreements has the potential to benefit elders, caregivers, and the state.\textsuperscript{149} A lack of long-term care workers—both formal health-care professionals and informal caregivers—already exists.\textsuperscript{150} As baby boomers age and require long-

\begin{itemize}
\item \textsuperscript{144} See Estin, supra note 65, at 1039 (criticizing experts’ conservative estimates of value of household services).
\item \textsuperscript{146} See Massachusetts Medicaid Appeal 0809900, supra note 119, at 12 (receiving pay for high level care without clinical oversight not equal to fair market value). A son was charging his mother for care at a rate comparable to an assisted-living-level facility, while not being subject to “any regulatory or clinical oversight that by statute and regulation defines an assisted living environment.” \textit{Id.} In \textit{Forman v. Dehner}, a daughter asserted the services she provided were those of a homemaker, using a survey that listed the hourly rate of homemaking services as proof that the transfer from her mother had been for fair market value. Forman v. Dehner, No. BRCV2009-01045, 2010 WL 234494 (Mass. Super. Ct. Apr. 7, 2010). The judge found the evidence insufficient to show that services were for fair market value because there was not any evidence that the daughter had been licensed as a homemaker. \textit{Id.}
\item \textsuperscript{147} See SENIOR CONNECTION, supra note 46 (outlining goals of Family Caregiver Support Program). The Family Caregiver Support Program currently does not provide licensure and clinical oversight; rather, it provides education and support services. \textit{Id.} The Family Caregiver Support Program is administered by the Massachusetts Executive Office of Elder Affairs. \textit{Id.}
\item \textsuperscript{148} See 45 C.F.R. § 1321.7 (2012) (instructing state agency on aging coordinate systems to allow elders to stay in their homes); Exec. Office of Health & Human Servs., Division of Health Professions Licensure, MASS.GOV http://www.mass.gov/dph/boards (last visited Aug. 28, 2012) (providing licensure services for health professions in Massachusetts); Caregiver Support, supra note 46 (stating goal of program to assist and support caregivers).
\item \textsuperscript{149} See Henes, supra note 65, at 716-17 (introducing some benefits of families contracting for services).
\item \textsuperscript{150} See RETOOLING, supra note 4, at 249 (indicating recent trend of decreased availability of informal caregivers); Levine et al., supra note 59, at 118 (noting shortage of paid caregivers).
\end{itemize}
term care, the disparity between supply and demand of caregivers for the elderly will only increase. The financial disincentive of low or no wages contributes to this shortage. Allowing informal caregivers to contract for their services would be one financial incentive that could increase the number of informal long-term care workers.

Increasing the number of informal caregivers could also benefit elders and the state. More informal caregivers permit more elders to stay in their homes, a living situation which most elders prefer. Growing numbers of informal caregivers also have the potential to benefit the state through decreasing state-paid hospital and nursing-home costs. The maximum benefits to states will occur when financial incentives like caregiver contracts combine with education and training for caregivers.

Encouraging caregiver agreements may also benefit caregiving women. While caregiving responsibilities for men appear to be increasing, and should be encouraged, women currently need support for their caregiving responsibilities. Caregiver agreements acknowledge the work of caregiving and give women the opportunity to earn income for the strenuous caregiving role they are likely to fill for several of their wage-earning years. While women may want to care for an aging parent with no expectation of compensation, women’s spouses and children have expectations that women will bring cash flow into the family unit. In addition to these pressures, women have a greater need to earn income to save for retirement given their

151. See Retooling, supra note 4, at 1, 5 (warning of future shortages of long-term care workers unless action taken).
152. See id. at 10-11, 209-10 (emphasizing impact of low wages on numbers of direct-care workers and geriatric specialists).
153. See id. at 28 (correlating expectation of compensation with available supply of health care workers).
154. See supra note 10 (considering in-home care’s cost savings to state and benefits to seniors).
155. See supra note 10 (quoting senior citizen who wanted to avoid nursing home care); see also Retooling, supra note 4, at 254 (highlighting elders’ aversion to nursing-home care).
156. See Retooling, supra note 4, at 254 (linking availability of family members to shorter hospital stays for elders); Levine et al., supra note 59, at 118 (explaining how without family caregivers, seniors end up in nursing homes at public expense); Reitz, supra note 5 (noting benefits to state of elders staying in their own homes).
157. See Retooling, supra note 4, at 256 (correlating training caregivers with decreased health-care costs and shorter hospital stays); Levine et al., supra note 59, at 118 (“[F]ailure to fund effective caregiver interventions may be fiscally unsound.”).
158. See, e.g., Wright, supra note 39, at 867-69 (stressing lack of economic value given to tasks women typically perform, like caregiving); Morris, supra note 32, at 591-93 (discussing unremunerated costs to women of caregiving); Silverman, supra note 9 (summarizing woman’s ability to cover expenses of caregiving through caregiver contract).
159. See supra note 28 (recognizing unequal burden on women for elder care).
160. See supra Part II.A.1 (articulating women’s dominance of caregiving for elders and resulting lack of income for caregiving women).
161. See Warren, supra note 68, at 565 (introducing families’ reliance on women’s income when calculating monthly budget).
longer lifespan. Allowing women to contract for their caregiving services may, in the end, benefit the state by preventing a concentration of poor, elderly women dependent on state benefits.

Having discussed some of the benefits to family caregiver agreements, arguments against these agreements include the fear that these agreements are estate-planning devices for the wealthy and the family member rule in contracts. The regulatory changes previously suggested, like education and oversight of caregivers, could help eliminate those agreements that are merely an attempt to have the state pay for elders’ care. The argument of the family member rule is based, first, on a lack of expectation of compensation and, second, on the assumption of reciprocal services among family members.

As to the lack of an expectation of compensation, financial pressures necessitate two wage earners in a household, and families expect compensation for the work women perform. If a woman spends the hours she could be using to earn outside income inside the home caring for a family member, the financial expectations of the family remain. One could use the concept of reliance to argue in favor of caregiver agreements because an elder receiving the performance of a woman caregiver’s work should reasonably expect that the woman and her family are relying on receiving payment for her services.

And, as for the assumption of reciprocal services among family members, this assumption has changed as family members no longer rely on each other for services like childcare, education, and health care, but instead hire outside sources. Geographic mobility and the later age at which women are having

162. See supra notes 40-43 and accompanying text (describing women’s longer life spans and lack of savings).
163. See Retooling, supra note 4, at 50 (stating women more likely to use long-term care than men); Morris, supra note 32, at 571 (giving statistic of elderly women twice as likely as men to live below poverty line); Shanafelt, supra note 40 (exposing how women comprise seventy-five percent of low-income elders in California).
164. See supra Parts II.A.2, II.B.1 (discussing use of agreements by families of different socioeconomic statuses and family member rule).
165. See supra notes 146-148 and accompanying text (reviewing possible education and oversight of caregivers).
166. See Havighurst, supra note 65, at 389 (noting no expectation of compensation and assumption of reciprocal services); Henes, supra note 65, at 709 (describing services performed for mutual convenience of household).
167. See Warren, supra note 68, at 578 (“Today’s two-income family has less money than its one-income counterpart of a generation ago.”).
168. See id. (citing basic expenses that call for entire paycheck of working mother).
169. Feinman, supra note 69, at 855 (discussing rise in reliance concept). Particularly with caregiver agreements among family members, it is appropriate to view “society as composed of interdependent parties engaging in ongoing transactions giving rise to obligations even before the point of formal offer and acceptance (“cooperative contract”), rather than composed of isolated parties entering into discrete transactions after careful bargaining (“freedom of contract”).” Id.; see also Weitzel v. Dehner, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (criticizing hearing officer who required invoices and accountings of caregivers’ services).
170. See Warren, supra note 68, at 583 (describing how typical families rely on paid childcare); Henes, supra note 65, at 714 (discussing changing dynamic of families relying on outside sources for health care and
their first child have made shared care of an aging parent among siblings unattainable for many families. 171 If one son or daughter of an elder ends up caring for the aging parent while the other children are only concerned with their own incomes, the reasoning of reciprocity among family members folds. 172

Changes in domestic relations not only have altered the reasoning behind the family member rule in contracts, these changes have also affected the dynamics of marital contracts. 173 In the past, one rationale behind courts voiding premarital agreements was that the husband had a duty to provide for his wife and this duty should not be waived via a premarital agreement. 174 More recently, however, courts have recognized changes in women’s roles as wage earners for the family, and accordingly, have been more willing to uphold prenuptial agreements affecting alimony. 175 If men are able to shirk their alimony responsibilities under the theory that women now have equal opportunities for earning wages, women should be granted these alleged equivalent wage prospects by allowing women to contract for caregiving services. 176 Courts’ acknowledgment of caregiving contracts is one small step towards refashioning contract law for the needs of women. 177 Prenuptial agreements are no longer viewed by the public as a tool strictly for the aristocracy, but rather as a necessity for families. 178 Similarly, the popularity and widespread use of caregiving contracts could increase to assist families and the state with the long-term care of elders. 179

IV. CONCLUSION

An increasingly large elder population will outpace the number of geriatric education); see also Estin, supra note 65, at 1045-46 (offering explanation of love replacing any expectation of reciprocation within families).

171. See Tate, supra note 51, at 175-76 (describing changing demographics).
172. See Havighurst, supra note 66, at 390 (pointing to discrepancies among siblings when only one is charged with care of aging parent).
173. See Bruno, supra note 74, at 405 n.40 (acknowledging changes in domestic-relations policy had effect on courts’ evaluation of prenuptial agreements).
174. See id. at 401 n.21 (tracing courts’ historical refusal of prenuptial agreements and policy of not releasing alimony duties from husband).
175. See Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (declaring prior reasoning rejecting antenuptial agreements no longer valid). In Simeone, the court specifically mentioned the change from having men primarily as breadwinners to both spouses acting as income earners. Id. A concurring opinion in Simeone, however, acknowledged the continuing lack of equality for women especially in the work place. Id. at 405 (Papadakos, J., concurring).
176. See Wright, supra note 39, at 869 (articulating refusal of economies to recognize and give monetary value to women’s labor at home).
177. Contra Feinman, supra note 69, at 849 (viewing contracts as means for dominant class to continue hierarchy).
178. See Dubin, supra note 57, at 26, 43 (admonishing all potential marriage partners to use prenuptial agreements).
179. See supra note 9 (announcing increased use of caregiver agreements).
care workers. Caregiver agreements should be encouraged as a way of increasing the number of geriatric care workers, acknowledging the work caregivers provide, and encouraging families to care for the elderly. The majority of nursing-home residents have their care paid for by Medicaid. By delaying or preventing elders from using nursing-home care or hospital-inpatient care, family caregivers can help contain health care costs.

With uncertainty about how hearing officers and judges will interpret regulations, caregivers and elders do not know whether their caregiver agreements will be considered valid transfers of assets, or whether either party will be able to enforce the contract. By setting clear guidelines specifically related to caregiver agreements, MassHealth and other state Medicaid agencies could encourage family members to become caregivers, knowing they could be paid for the services they provide. Clear Medicaid regulations allow family members to legitimately be paid for their work, while preventing elders from transferring assets solely to qualify for Medicaid benefits.

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