

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’”¹

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.² 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.³ 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.⁴ State and federal governments’ concerns

1. Paula Span, *Family Caregiving on Contract*, N.Y. TIMES NEW OLD AGE BLOG (June 25, 2009, 1:03 PM), <http://newoldage.blogs.nytimes.com/2009/06/25/caregiving-on-contract/> (quoting elder law attorney Craig Reaves).

2. See Shelly Gigante, *How Boomers Will Impact the Health Care Industry*, CNBC NEWS (Feb. 22, 2010), http://www.cnbc.com/id/35524106/How_Boomers_Will_Impact_the_Health_Care_Industry (debating impact of boomers on health care system and describing some predictions as apocalyptic); *Baby Boomers to Blame for U.S. Job Market Weakness: Study*, HUFFINGTON POST (Feb. 7, 2012), http://www.huffingtonpost.com/2012/02/07/baby-boomers-to-blame-for-job-market-weakness_n_1260265.html (noting one study looked to boomers as source of job market weakness).

3. See Lori Montgomery, *Social Security’s Billion Dollar Contribution*, FISCAL TIMES (Oct. 30, 2011), <http://www.thefiscaltimes.com/Articles/2011/10/30/WP-Social-Securitys-Billion-Dollar-Contribution.aspx#page1> (explaining cost of government benefits surpassing tax collections); see also Bianna Golodryga & Jessica Hopper, *Shrinking Savings: Record Number of Americans Dip into Retirement Nest Egg*, ABC NEWS (August 20, 2010), <http://abcnews.go.com/WN/record-number-americans-dip-401k-retirement-accounts-loans/story?id=11448653> (noting spike in number of Americans borrowing from retirement accounts); Emily Ramshaw, *Texas Considers Medicaid Withdrawal*, N.Y. TIMES, Nov. 6, 2010, <http://www.nytimes.com/2010/11/07/us/politics/07tmedicaid.html> (announcing possibility of Texas dropping out of Medicaid program).

4. See COMM. ON THE FUTURE HEALTH CARE WORKFORCE FOR OLDER AMES., INST. OF MED. OF THE NAT’L ACADS., *RETOOLING FOR AN AGING AMERICA: BUILDING THE HEALTH CARE WORKFORCE*, at xi (2008) [hereinafter *RETOOLING*] (detailing dramatic increase in elderly population as seventy-eight million member baby-boom generation ages); Christopher C. Jennings & Christopher J. Dawe, *Long-Term Care: The Forgotten Health Care Challenge*, 17 STAN. L. & POL’Y REV. 57, 58 (2006) (explaining anxiety of families and governments over providing long-term care for retirees).

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.⁵ Individuals' worries stem from the need to provide long-term care for themselves or for aging family members.⁶

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.⁷ Caregivers often cannot afford to cut down their time or quit their job outside the home.⁸ 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.⁹ These caregiving agreements benefit both parties by relieving financial strain on caregivers and by keeping elderly relatives out of nursing homes.¹⁰

While caregiver agreements may reassure individual caregivers, these same agreements are a concern for states.¹¹ 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.¹² 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, <http://money.usnews.com/money/blogs/the-best-life/2010/12/22/senior-safety-nets-at-risk-in-2011> (asserting 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, *Seniors Pinched by Rising Costs for Home Care*, MSNBC, Mar. 8, 2010, http://msnbc.msn.com/id/35767362/ns/health-health_care/t/seniors-pinches-rising-costs-home-care/ (discussing states' struggle in funding programs for elderly while baby boomers soon joining elderly population).

6. See Jane Gross, *Elder-Care Costs Deplete Savings of a Generation*, N.Y. TIMES, Dec. 30, 2006, <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 BERKELEY J. EMP. & LAB. L. 351, 370-72 (2004) (describing lost wages and lost funds resulting from eldercare 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 Elderly*, WALL ST. J., Jan. 14, 2009, <http://online.wsj.com/article/SB123197145248583055.html> (describing caregiver contracts and predicting increased use as economy declines); Rachel Emma Silverman, *Who Will Mind Mom? Check Her Contract*, POST-GAZETTE, Sept. 7, 2006, <http://www.post-gazette.com/pg/06250/719862-51.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 REDUCTION ACT: IMPORTANT FACTS FOR STATE GOVERNMENT OFFICIALS 3, <https://www.cms.gov/>

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.¹³ States want to preserve scarce resources for those who truly cannot afford care.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ In addition, this Note will analyze current presumptions about family members and contracts.²¹ Finally, this Note will argue that acknowledging caregiver agreements will benefit caregivers, the elderly, and the state.²²

DeficitReductionAct/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.*

13. See *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483, 484 (Mass. App. Ct. 2007) (explaining elders' desire to have state program pay for nursing home expenses).

14. See generally *Piers v. Bigney*, No. CV07-00443, 2009 WL 6574639 (Mass. Super. Ct. Mar. 31, 2009) (describing need to reserve public funds for those who "genuinely" cannot afford care).

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 II.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).

28. See RETOOLING, *supra* note 4, at 248 (noting daughters predominately provide care to aging parents); Brenda C. Spillman & Kirsten J. Black, *Staying the Course: Trends in Family Caregiving*, AARP PUB. POL'Y INST. 20 (2005), http://assets.aarp.org/rgcenter/il/2005_17_caregiving.pdf (estimating wives and daughters outnumber sons and husbands three to two as caregivers); Smith, *supra* note 7, at 360-61 (approximating seventy percent of elder care provided by women). "The elderly most commonly turn to a female for help." LAWRENCE A. FROLIK & ALISON McCHRISTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 20 (4th ed. 2007); cf. KERSTIN AUMANN ET AL., *FAMILIES & WORK INST., THE ELDER CARE STUDY: EVERYDAY REALITIES AND WISHES FOR CHANGE* 8 (2010) (reporting women and men equally act as caregivers, but women provide more hours of care).

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.³² 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.³³ A less transparent influence on the earning power of caregivers for the elderly is family responsibilities discrimination (FRD).³⁴ FRD is discrimination against employees with family caregiving responsibilities.³⁵ While it affects both men and women, the majority of claimants are women.³⁶

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."³⁷ 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.³⁸ 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).

34. See generally Joan C. Williams, *Family Responsibilities Discrimination: The Next Generation of Employment Discrimination Cases*, 763 PLI/LIT 333 (2007) (describing FRD and its effects on caregiver employees).

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.*

38. See Laura Fitzpatrick, *Why Do Women Still Earn Less Than Men?*, TIME, Apr. 20, 2010, <http://www.time.com/time/nation/article/0,8599,1983185,00.html> (stating women earned seventy-seven percent of what men earned in U.S. in 2008). Even after accounting for women's caregiving roles, there is a persistent gap between male and female wages. See *id.*; Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1043-44 (2011) ("Even [female attorneys] who never take time out of the labor force and who work long hours have a lower chance of partnership than similarly situated men.").

additionally shouldering caregiving work are “underpaid for one job and unpaid for their second.”³⁹

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.⁴⁰ Given women’s longer life expectancy, their lack of pension funds is problematic.⁴¹ 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.”⁴²

The ratio of males to females drops steadily as age increases, creating an “overwhelming preponderance” of elderly women to elderly men.⁴³ Thus, in addition to caregivers for the elderly typically being women, the elderly themselves are also generally women.⁴⁴ 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.⁴⁵

In addition to the financial strain on women as caregivers, caregiving can cause psychological and physical stress to caregivers.⁴⁶ Family caregivers lack

39. Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT’L L. & POL’Y 861, 867 (1995).

40. See RICHARD W. JOHNSON, URBAN INST., THE GENDER GAP IN PENSION WEALTH: IS WOMEN’S PROGRESS IN THE LABOR MARKET EQUALIZING RETIREMENT BENEFITS? 1 (1999), http://www.urban.org/uploadedPDF/BRIEF1_L.pdf (noting increased gender gap in pension income from 1976-1996); KEVIN KINSELLA & YVONNE J. GIST, U.S. DEP’T OF COM., OLDER WORKERS, RETIREMENT, AND PENSIONS 21 (1995), http://www.census.gov/population/international/files/ipc95_2.pdf (explaining lower wages and fewer years in work force cause lower pensions for women); Callie Shanafelt, *Over 75 Percent of Seniors Living in Poverty Are Women*, BAY CITIZEN, Feb. 9, 2012, <http://www.baycitizen.org/health/story/women-poverty-seniors-california-study> (highlighting gendered nature of retirement security).

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).

43. See FROLIK & BARNES, *supra* note 28, at 8 (describing disproportionate numbers of elderly women to men); LISA HETZEL & ANNETTA SMITH, U.S. CENSUS BUREAU, THE 65 YEARS AND OVER POPULATION: 2000, at 3 tbl.2 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf> (counting seventy men for every one hundred women aged sixty-five and older); David Brown, *Life Expectancy Hits Record High in United States*, WASH. POST, June 12, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/11/AR2008061101570.html> (noting, although disparity declining, women outlived men by 5.3 years). *But see* GRAYSON K. VINCENT & VICTORIA A. VELKOFF, U.S. CENSUS BUREAU, THE NEXT FOUR DECADES: THE OLDER POPULATION IN THE UNITED STATES: 2010 TO 2050, at 8 (2010) (asserting age disparity between men and women will narrow by 2050).

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).

46. See RETOOLING, *supra* note 4, at 258 (noting caregivers more susceptible to “physical illness and psychological distress”); Emanuella Grinberg, *As Baby Boomers Retire, a Focus on Caregivers*, CNN.COM, Jan. 16, 2012, <http://www.cnn.com/2012/01/16/living/caregiver-stress-report/index.html> (narrating caregiver’s story caring for father and associated stress); *Central Massachusetts Family Caregiver Support Program*, SENIOR CONNECTION, <http://www.seniorconnection.org/caregiversupport.htm#goals> (last visited Aug. 28, 2012) [hereinafter SENIOR CONNECTION] (recognizing “enormous personal, social, and economic challenges of caring for an elderly parent”); Exec. Office of Elder Aff., *Caregiver Support*, MASS.GOV.,

education and training for the demanding and technically complex tasks they are required to perform for the elderly.⁴⁷ If, however, caregivers receive training and information, the strain placed on them can be reduced.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.⁴⁹

2. Class

In addition to gender, the identity characteristic of class is particularly relevant information when debating the validity of caregiver agreements.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.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.⁵² Medicaid is a joint federal and state program that provides medical services, including nursing home care, to eligible individuals and families.⁵³ Medicaid costs states more money than any other program besides education.⁵⁴ And at the federal level, Medicaid has been

<http://www.mass.gov/elders/caregiver-support/> (last visited Aug. 28, 2012) [hereinafter *Caregiver Support*] (acknowledging challenges and frustrations of caregiving).

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

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

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

50. See *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 *id.* (detailing how assets must remain below threshold limit for Medicaid eligibility).

51. See *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." 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).

52. See Jennings & Dawe, *supra* note 4, at 61 (showing percentage of Medicaid funds spent on long-term care steadily increasing); Tami Luhby, *Medicaid Funding Busts 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).

53. See *Haley v. Comm'r of Pub. Welfare*, 476 N.E.2d 572, 574 (Mass. 1985) (providing basic overview of Medicaid).

54. See 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

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.*

57. See Jan Dennis, *Contracts Adding Legal Twist to Family Health Care*, NEWS BUREAU, UNIV. OF ILL. (May 27, 2009), available at <http://news.illinois.edu/news/09/0527caregiver.html> (noting increased interest in caregiver agreements in light of time and money required for care); Anne Tergesen, *Compensating a Family Caregiver*, WALL ST. J., Aug. 29, 2010, <http://online.wsj.com/article/SB10001424052748703669004575458151412654506.html> (correlating increased use of caregiver agreements with difficult economic times); cf. ARLENE G. DUBIN, *PRENUPS FOR LOVERS* 26, 43 (2001) (describing increased use of another familial contract—prenuptial agreements—by more than just wealthy Americans).

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

59. See Carol Levine et al., *Bridging Troubled Waters: Family Caregivers, Transitions, and Long-Term Care*, 29 HEALTH AFF. 116, 116, 122 (2010) (emphasizing family caregivers as “essential” and “bedrock” of long-term care in U.S.).

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.*

68. See Elizabeth Warren, *Families Alone: The Changing Economics of Rearing Children*, 58 OKLA. L. REV. 551, 565 (2005) (detailing shift in women’s participation in work force and increased family reliance on their income).

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

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 a promise 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)(f) (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).

73. See, e.g., *Eule v. Eule*, 320 N.E.2d 506, 510 (Ill. App. Ct. 1974) (holding void contractual clause waiving husband’s duty to support wife); *In re Marriage of Gudenkauf*, 204 N.W.2d 586, 587 (Iowa 1973) (declaring antenuptial agreements prohibiting alimony void and contrary to public policy); *Duncan v. Duncan*, 652 S.W.2d 913, 915 (Tenn. Ct. App. 1983) (opining allowing couples to contract to limit alimony void).

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

74. See Stephanie A. Bruno, Note, *Insuring the Knot: The Massachusetts Approach to Postnuptial Agreements*, 45 SUFFOLK U. L. REV. 397, 404 nn.32-33 (2012) (explaining husband's alimony duty and refusal by courts to accept spouses contracting around duty).

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).

76. See, e.g., *In re Estate of Harber*, 449 P.2d 7, 16 (Ariz. 1969) (enforcing postnuptial agreement assuming decision voluntary and free from fraud); *Ansin v. Ansin*, 929 N.E.2d 955, 961 (Mass. 2010) (agreeing with other states in enforcing marital agreements); *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004) (allowing marital partners to validly contract without contemplation of divorce).

77. See Estin, *supra* note 65, at 1082 (noting risks of simplifying family relationships to merely economic functions); Katie Wise, Note, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 563, 571 (2002) (describing filial responsibilities corresponding to positive family relationships).

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.").

80. See *Weitzel v. Dehner*, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (contradicting hearing officer's imposition of moral duty on daughter to care for mother).

81. See *supra* Part II.B (describing legal and cultural presumptions against caregiver contracts between family members).

Medicaid benefits.⁸² In order to qualify for state-paid nursing home care, elders must have no more than \$2000 in countable assets.⁸³ 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.⁸⁴ 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.⁸⁵

States administer Medicaid, although it is a federal program.⁸⁶ The federal government sends states interpretive guidance about the Medicaid program and the states' regulations must comply with the federal guidelines.⁸⁷ 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.⁸⁸

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.⁸⁹ MassHealth will primarily examine three factors

82. See CTRS. FOR MEDICARE AND MEDICAID SERVS., U.S. DEP'T OF HEALTH AND HUM. SERVS., STATE MEDICAID MANUAL § 3258.1(A) (2001), available at <http://wayback.archive-it.org/2744/20111202045358/http://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=1&sortOrder=ascending&itemID=CMS021927&intNumPerPage=10> [hereinafter STATE MEDICAID MANUAL] (outlining considerations used by Medicaid agencies when family member pays family caregiver).

83. See 130 MASS. 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.*

84. See 130 MASS. CODE REGS. 520.019(B) (2012) (explaining Medicaid agency looks at elder's transactions for full sixty months prior to application). The Deficit Reduction Act, adopted in 2006, extended the look-back period from thirty-six to sixty months prior to when an elder applies for Medicaid long-term care benefits. See Pub. L. No. 109-171, §6011 (2006) (codified as amended at 42 U.S.C. § 1396p(c)(1)(B)(i) (2006)). Money that leaves an elder's estate in payment for goods or services will be regarded as "legitimately" reducing the elder's estate. *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483, 484 (Mass. App. Ct. 2007) (explaining why money may leave elder's estate legitimately).

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).

89. See *Piers v. Bigney*, No. CV07-00443, 2009 WL 6574639 (Mass. Super. Ct. Mar. 31, 2009)

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.⁹⁰ 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.⁹¹

1. Fair Market Value

In evaluating caregiving agreements, the hearing officer or judge first considers whether the transaction was made for fair market value.⁹² 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.”⁹³ 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.⁹⁴ 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.”⁹⁵ Determining the prevailing price of elder care services, however, is not a straightforward process.⁹⁶

Hearing officers and judges disagree about how the prevailing price for caregivers should be determined.⁹⁷ 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).

91. See *Forman v. Dehner*, No. BRCV2009-01045, 2010 WL 2344934 (Mass. Super. Ct. Apr. 7, 2010) (explaining court’s conclusion based on review of contract and record evidence).

92. See *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483, 486 (Mass. App. Ct. 2007) (presuming transfers between relatives for care gratuitous, and thus less than fair market value); see also, e.g., *Piers v. Bigney*, No. CV07-0043, 2009 WL 6574639 (Mass. Super. Ct. Mar. 31, 2009) (questioning fair market value of agreement); 130 MASS. CODE REGS. 520.019(F)(2) (2012) (determining eligibility for MassHealth benefits includes uncovering whether resources transferred for fair market value); Massachusetts Office of Medicaid Board of Hearings, Appeal 1001965, at 11 (Oct. 29, 2010) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board Hearings) [hereinafter Massachusetts Medicaid Appeal 1001965] (“[This] case is essentially about whether Appellant received or intended to receive fair market value.”).

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).

97. See *Forman v. Dehner*, No. BRCV2009-01045, 2010 WL 2344934 (Mass. Super. Ct. Apr. 7, 2010) (refusing to rely on “State-Specific Data for Massachusetts from Genworth 2009 Cost of Care Survey”).

determine a fair market hourly wage.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

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 attendants 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.¹⁰²

Due to all of these considerations, there is substantial uncertainty surrounding the fair market value factor.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.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.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.¹⁰⁶

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.¹⁰⁷ The elder still has the opportunity to show either that

received \$1000 per month during the period the elder lived with the daughter and her family. *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. *Id.*

102. 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. *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. *Id.*

103. See *supra* note 97 (reviewing contrary cases regarding how much caregivers should receive for services).

104. 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. *Id.* at 3-4. The hearing officer found that the elder had paid fair market value for the services she received. *Id.* at 4.

105. See Massachusetts Medicaid Appeal 0818313, *supra* note 101, at 5-6 (concluding transfer made for fair market value).

106. See *id.* at 6 & n.5 (emphasizing caregiver's lack of ability to enforce terms of caregiving agreement).

107. See 130 MASS. CODE REGS. 520.019(F) (2012) (stating even if resources transferred for less than fair market value, still opportunity for eligibility).

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.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.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.¹¹⁰ Hearing officers and judges often look for reliable proof in the form of a written agreement.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.¹¹² In many cases, judges emphasize the issue of timing, wanting to ensure that an agreement was written prior to services being rendered.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

108. See *id.* (listing possibilities for proving intent of Medicaid applicant).

109. See STATE MEDICAID MANUAL, *supra* note 82, § 3258.10(C)(2) (requiring “convincing evidence” about “specific purpose for which the asset was transferred.”).

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.

111. See STATE MEDICAID MANUAL, *supra* note 82, § 3258.10(C)(1) (noting written arrangement may rebut 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).

112. Compare *Weitzel v. Dehner*, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (using Durable Power of Attorney as adequate demonstration of agreement to compensate daughter), with *Gauthier*, 956 N.E.2d at 1242 (listing multiple inadequacies with caregiver agreement).

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).

services to be provided.¹¹⁴ In some cases, judges compare the services discussed in the written caregiver agreement with the services that were actually performed.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ In addition to the presumption services performed for other family members are gratuitous, there are other problems with the enforceability of caregiver agreements.¹¹⁸ First, specific performance of a personal services contract is not an available remedy for breach of a caregiver agreement.¹¹⁹ This gives little incentive for caregivers to strictly fulfill all the terms of their agreement.¹²⁰ 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.¹²¹ 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).

117. See 130 MASS. CODE REGS. 520.007(J)(4) (2012) (requiring embodiment of transactions for future performance in enforceable contracts).

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

119. See *Forman v. Dehner*, No. BRCV2009-01045, 2010 WL 2344934 (Mass. Super. Ct. Apr. 7, 2010) (indicating specific performance not available remedy for breach); Massachusetts Office of Medicaid Board of Hearings, Appeal 0809900, at 11 (Dec. 11, 2008) (unpublished hearing decision) (on file with the Massachusetts Office of Medicaid Board of Hearings) [hereinafter Massachusetts Medicaid Appeal 0809900] (noting issue of specific performance on personal services contract).

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.¹²² And finally, sometimes the elder is already mentally incompetent at the time the contract is executed, making the contract voidable.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.¹²⁴ If a caregiver is performing ongoing services and receiving monthly payments for those services, there is not a need for an enforceable contract.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.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.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). *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).

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

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). *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).

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).

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

126. 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"). *But see* Weitzel, No. 08-0627-D (allowing agreement in which daughter provided care without compensation and only later began receiving payments).

127. *See* STATE MEDICAID MANUAL, *supra* note 82, § 3258.1(A)(1); *see also supra* Part II.C (discussing cases involving caregiver agreements).

clarify how families can contract for care.¹²⁸ Additionally, this section will review other policy arguments in favor of greater acceptance of caregiver contracts.¹²⁹

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.¹³⁰ 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.¹³¹ 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.¹³²

The Massachusetts regulations should assign a separate section of the regulations to family caregiver agreements.¹³³ 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.¹³⁴ A section within the MassHealth regulations could address some of the ambiguities frequently seen in hearing decisions and cases.¹³⁵

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.*

132. See *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483,484 (Mass. App. Ct. 2007) (noting “strict rules” promulgated to prevent elders from transferring assets to qualify for state assistance); *Weitzel v. Dehner*, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (explaining MassHealth regulations do not forbid parents from contracting with children for care services).

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.¹³⁶ 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.¹³⁷ 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.”¹³⁸ There are not specific guidelines, however, regarding what this “proof” or “tangible evidence” must be.¹³⁹ 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.¹⁴⁰

Second, the way in which the market rate will be determined should be standardized.¹⁴¹ 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.”¹⁴² The use of a “market rate” or “market price” occurs in many contractual contexts without specifically declaring how the term will be defined.¹⁴³ It may be particularly critical, however, in the context of home caregiving—a work domain which historically has been outside the public

136. Compare STATE MEDICAID MANUAL, *supra* note 82 (giving example of payback arrangement in writing at time services provided), with 130 MASS. CODE REGS. 520.019(B)-(D), (F) (2012), and 130 MASS. CODE REGS. 520.007(J)(4) (2012) (declining to note any specific written requirements for contracts).

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

138. See STATE MEDICAID MANUAL, *supra* note 82, § 3258.1(A)(1) (necessitating “tangible evidence”); see also *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483, 484 (Mass. App. Ct. 2007) (requiring “reliable proof”).

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.*

140. See *Piers v. Bigney*, No. CV07-00443, 2009 WL 6574639 (Mass. Super. Ct. Mar. 31, 2009) (deeming agreement disqualifying where “services [were] undetermined, discretionary, and freely modifiable by the parties”); *Weitzel v. Dehner*, No. 08-0627-D (Mass. Super. Ct. Dec. 30, 2008) (noting extreme nature of requiring caregivers to “meticulously” document all their services).

141. Compare Massachusetts Medicaid Appeal 1001965, *supra* note 92, at 6, 10 (incorporating appellant’s AARP report of \$23 per hour as average pay as finding of fact), with *Forman v. Dehner*, No. BRCV2009-01045, 2010 WL 2344934 (Mass. Super. Ct. Apr. 7, 2010) (refusing to rely on cost-of-care survey for 2009 when services performed previously).

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).

143. See U.C.C. § 2-713 (2012) (using “market price” to define contract damages).

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.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.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.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.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.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.¹⁴⁹ A lack of long-term care workers—both formal health-care professionals and informal caregivers—already exists.¹⁵⁰ As baby boomers age and require long-

144. See Estin, *supra* note 65, at 1039 (criticizing experts' conservative estimates of value of household services).

145. See U.S. Dep't of Labor, *Davis-Bacon and Related Acts*, <http://www.dol.gov/whd/govcontracts/dbra.htm> (last visited Aug. 28, 2012) (describing acts requiring contractors to pay laborers prevailing wage as determined by Department of Labor).

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." *Id.* In *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. *Id.*

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. *Id.* The Family Caregiver Support Program is administered by the Massachusetts Executive Office of Elder Affairs. *Id.*

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).

149. See Henes, *supra* note 65, at 716-17 (introducing some benefits of families contracting for services).

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).

term care, the disparity between supply and demand of caregivers for the elderly will only increase.¹⁵¹ The financial disincentive of low or no wages contributes to this shortage.¹⁵² Allowing informal caregivers to contract for their services would be one financial incentive that could increase the number of informal long-term care workers.¹⁵³

Increasing the number of informal caregivers could also benefit elders and the state.¹⁵⁴ More informal caregivers permit more elders to stay in their homes, a living situation which most elders prefer.¹⁵⁵ Growing numbers of informal caregivers also have the potential to benefit the state through decreasing state-paid hospital and nursing-home costs.¹⁵⁶ The maximum benefits to states will occur when financial incentives like caregiver contracts combine with education and training for caregivers.¹⁵⁷

Encouraging caregiver agreements may also benefit caregiving women.¹⁵⁸ While caregiving responsibilities for men appear to be increasing, and should be encouraged, women currently need support for their caregiving responsibilities.¹⁵⁹ 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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵ 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.¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰ 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 (“[T]oday'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).

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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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