

AG's A2J COVID -19 TASK FORCE RECOMMENDATION SUBMISSION FORM

*Please submit separate forms for each recommendation

1. Committee submitting the recommendation:

Life & Health Planning Committee

2. L&HP Recommendation No. 4:

Amend the existing Maryland Statutory Form Limited Power of Attorney to permit agents to apply for Medicaid and other public benefits on behalf of a principal.

The Maryland Statutory Form Limited Power of Attorney allows a person (“a principal”) to name another trusted person or persons (“agent/s”) to act on their behalf in various financial and legal matters. The principal may pick and choose which of the specified powers on the form that they wish to grant to the agent/s. Examples of such powers are to make deposits and pay bills, buy and sell property, file tax returns, and handle insurance claims. For individuals who suffer from physical or mental limitations, the power of attorney allows their agent to provide them with much needed support. However, currently there are limitations within the Maryland Statutory Form Limited Power of Attorney that do not clearly allow the agent/s to engage in Medicaid planning on behalf of the principal. Individuals with physical and mental limitations, especially those who are hospitalized or living in assisted living or nursing home facilities need to be able to authorize an agent to help them apply for and receive the public benefits to which they are entitled. Adding an additional option on the Maryland Statutory Form Limited Power of Attorney that grants the agent the power to assist the individual with necessary steps to qualify and apply for public benefits on behalf of the individual would be a solution to this problem. The Committee recommends that this legislation be drafted and submitted for enactment by the 2021 Maryland General Assembly.

3. Describe the civil justice problem related to COVID-19 the proposal is solving.

The Maryland Statutory Form Limited Power of Attorney is designed to allow individuals to engage in management of their property and finances without having to go to court. While the existing provisions of the statutory form allow the agent to apply for benefits, and authorizes other powers that may be helpful in applying for those benefits, the agent may still be limited in their ability to obtain benefits without additional language that expressly grants the agent with certain powers that are necessary to secure those benefits. The proposed change in the form would expand the list of powers that a principal may grant to their agent in the context of benefits planning, thus easing access to Medicaid benefits for qualifying individuals who are sick with COVID-19 and unable to engage in applying for and obtaining the benefits while hospitalized or incapacitated.

3a. Add context and detail about how this issue directly affects Marylanders; what are the implications of not acting. (This will be helpful in explaining the real-world impact of these issues in the task force's report.)

Failure to act would mean that agents appointed by people to handle their affairs in the event they are sick or incapacitated still may not be able to secure all of the public benefits, such as Medicaid, for which the sick or incapacitated individuals may qualify. This inability likely limits access to an extremely important source of income for individuals incapacitated by COVID-19 or another medical issue.

3b. Please identify, if possible, contacts at organizations (mix of 3 - grassroots, social services and legal services) working on these issues who could provide more detailed information about the impacts on average Marylanders to our report writer.

- Anne W. Coventry, Chair, Maryland State Bar Association (MSBA) Estates and Trusts Law Section; Partner, Pasternak & Fidis, acoventry@pasternakfidis.com.
- Morris Klein, Immediate Past Chair, MSBA Elder Law & Disability Rights Section; morrisklein@morrisklein.com.
- Viola A. Woolums, Director, Senior Legal Services, vwoolums@baltimorebar.org.

4. Detail how race/ethnicity/national origin disparities are addressed in the proposal and include any context (i.e., identify existing disparities before COVID-19 and exacerbated post COVID-19; refer to racial equity assessment questions).

While researching the disparities in access to estate planning, we discovered that race, education, gender, religion, personal values, income, and sexual orientation are among the factors that impact an individual's ability and willingness to engage in estate planning or end-of-life discussions. Unfortunately, many communities are being disproportionately affected by COVID-19, and are therefore experiencing a greater number of barriers to obtaining end-of-life resources and documents, likely exacerbating differences in access that already exist. For example, one study found that African Americans and Hispanic Americans are less likely than white Americans to engage in advance care planning such as creating a living will or durable power of attorney.¹

A 2020 survey conducted by Caring.com found that nearly 25% less people possessed a will or a similar estate planning document compared to the previous year. This decrease is said to be due to a lack of education surrounding estate planning documents, resources becoming less accessible for at-risk communities, and financial inequalities. For education

¹ See Martina Orlovic, Katharine Smith & Elias Mossialos, *Racial and ethnic differences in end-of-life care in the United States: Evidence from the Health and Retirement Study (HRS)*, SSM Popul Health (Nov. 30, 2018), *avail at*: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6305800/> (last accessed Sept. 30, 2020).

specifically, nearly 1 in 5 people surveyed indicated that they do not know what an Advance Directive is, and/or do not have access to the resources currently available. With regard to race, white Americans are more than twice and three times as likely than black and Hispanic Americans, respectively, to have access to and knowledge of estate planning materials. Several of the individuals who experience this education barrier are faced with additional barriers, including mistrust of healthcare providers and language barriers. This is due to a variety of factors, including race, religious affiliation, gender, age and access to education and documents for life planning. Several studies indicated that when individuals are provided with education and access to advance directives, they are more likely to obtain advance directives and similar estate documents.²

5. Detail disparities of other types and how the proposal aims to be inclusive and accessible to vulnerable persons, including those with disabilities, language differences and technology barriers.

Individuals with disabilities often are eligible for various Medicaid-funded programs, meaning the ability to have a trusted agent engage in Medicaid planning for them may be particularly useful. Individuals may select someone who speaks their language to be their agent, including for purposes of Medicaid planning.

6. Indicate what action is needed to implement the proposal (e.g., court rule change; legislative (local, state or federal) or regulatory change, MOU, MSBA or other agency or organization action).

State legislative action.

7. Provide any additional background that provides context and support for the Proposal.

The Maryland Statutory Form Limited Power of Attorney is codified in Section 17-203 of the Trusts and Estates Article, Maryland Code Annotated. The form took effect October 1, 2010 and has been amended from time to time since then, most recently in 2019.

8. Identify any known objections or obstacles to the proposal (e.g., opponents' arguments, cost, short time frame to act; previous attempts to accomplish failed).

Some taxpayers may view this proposal negatively, seeing it as a means of ensuring that people can transfer assets to their families in order to qualify for public assistance.

9. Share how the proposal compares to other states' laws, policies, or actions (e.g.,

² See Hart, J.L., Gabler, N.B., Cooney, E., *et al.* Are Demographic Characteristics Associated With Advance Directive Completion? A Secondary Analysis of Two Randomized Trials. *J. Gen. Int'l Med* 33, 145-47 (2018), *avail. at:* <https://doi.org/10.1007/s11606-017-4223-7> (last visited Sept. 30, 2020).

would the proposal make Maryland a leader in this area or bring Maryland in line with most other states).

In order to qualify for Medicaid, it is sometimes necessary to transfer the property of the disabled or incapacitated person to his or her spouse or other family member. This transfer of the property is a gift because it is made without consideration. This process is often described as Medicaid planning. The Committee is still researching whether other states have provisions specifically permitting an agent to engage in Medicaid planning on behalf of a principal under a statutory form limited power of attorney. However, the Committee notes that the Uniform Power of Attorney Act (the "Uniform Act") drafted in 2006 by the National Conference of Commissioners on Uniform State Laws and enacted by at least 31 states including Maryland, (Maryland adopted its own statute derived from the Uniform Law) includes a section that appears consistent with the policy of allowing an agent to engage in Medical planning. More specifically, Section 217(c) of the Uniform Act, a section that details the factors an agent should consider when making gifts on behalf of the principal, states:

An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

- (1) the value and nature of the principal's property;
- (2) the principal's foreseeable obligations and need for maintenance;
- (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes;
- (4) *eligibility for a benefit, a program, or assistance under a statute or regulation*; and
- (5) the principal's personal history of making or joining in making gifts.

Uniform Act § 217(c) (emphasis added).