

VALUING CARE

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Much has been written in the family law literature about how the law supports, undermines, and values the care that family members provide to children and young adults. Consistent with the field's historical tendency to focus on the concerns of younger persons, the family law literature is examining how the law treats care provided to older adults is much less developed.

This study therefore seeks to understand how elder care is valued in the modern era. It does so by examining a concrete situation in which the state is called upon to declare if care provided to older adults has monetary value and, if so, what value. Specifically, it examines how state regulations, administrative law judges, and the courts assess the value of personal care contracts entered into by older adults who subsequently apply for Medicaid coverage of long-term care services. The number such contracts is skyrocketing because, in the wake of the Deficit Reduction Act of 2005, personal services contracts have become a popular Medicaid planning techniques. Using this technique, an older adult enters into a personal service contract with an adult child (or other person whom he or she wishes to benefit) to provide certain caregiving services. If the older adult pays fair market value for the services, then he or she is effectively able to give money to the care provider without incurring a Medicaid eligibility penalty that would result from an outright transfer. In many cases, state departments of social services nevertheless impose a penalty on older adults who have entered into such contracts, claiming that the payment was a "gift" or that the services rendered had no monetary value.

By determining the conditions under such state regulations require payments for elder care to be deemed gifts, and when administrative judges and the courts affirm denials of Medicaid coverage on the grounds that alleged care payments were impermissible gifts, this study helps paint a picture of how elder care is valued—or is not valued—in modern America.

The study is guided by, and builds upon, a study that Hendrik Hartog published in his book *Someday All This Will Be Yours* which analyzed court decisions determining whether to enforce a promise by an older adult to give land to a caregiver in return for care and/or company. Hartog used these cases to show how people in the 19th and early 20th century perceived their moral and legal responsibilities to family and the aged. Notably, he found that courts' willingness to enforce such promises varied significantly based on the gender of the care provider. Because such cases were rarely brought after the early 20th century, however, the study was unable to assess how such caregiving might be valued today and whether such

gender discrepancies persist. This project therefore uses a very different set of cases to try to explore these questions in a modern context.

The study's early findings suggest that all three categories of legal actors examined (state regulators, administrative law judges, and state courts) attach little or no monetary value to elder care in most cases. Many states are adopting regulations that presume that that elder care delivered by family members lacks monetary value. When confronted with cases in which such presumptions might be rebutted by the facts, administrative law judges routinely hold that personal care services provided by family members—even when significant and necessary to keep an older adult out of a nursing home—were either gratuitous or simply lacked monetary value. The result is that, in the name of combatting Medicaid fraud, states are preventing older adults from entering into binding contracts to pay for their own care. They are also penalizing older adults who attempt to do so by rendering them ineligible for critically needed services.

While public distaste for Medicaid planning may partially explain these patterns, it cannot fully explain the state's willingness so profoundly devalue personal services provided to older adults. Rather, the language used both in state regulations and in case decisions suggests that these patterns reflect entrenched, gendered stereotypes about personal care work.