ELDRS Update

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Save the Date for ELDRS' Fall Conference

September 30-October 2, 2015

By Angela Hentkowski, Steward & Sheridan PLC. Ishpeming

The 2015 ELDRS' Fall Conference will be held September 30-October 2 at Boyne Mountain Resort in Boyne Falls. This year's keynote speakers will be Kevin Urbatsch and Tim Takacs.

Urbatsch serves as National Director of the Academy of Special Needs Planners (ASNP) and is a member of the American College of Trust and Estate Counsel. In 2013, *Parenting* magazine named him as one of the nation's Top Child Advocates for fighting for the rights of children with special needs. In May 2011, he was presented with NAELA's Presidential Recognition Award for his work in special needs planning.

Takacs was one of the first elder law attorneys in the nation to assemble an interdisciplinary team of experts to provide integrated client care. His innovations have transformed the practice of elder law in the U.S. and set a new standard of excellence. Takacs is a founding member of the Life Care Planning Law Firms Association and was the association's first president. He is also a founding member of the Special Needs Alliance and was a member of NAELA's Board of Directors from 2004-08.

There will also be a judge's panel, a discussion on the new MI Health Link, as well as ELDRS' own experts, including Patti Dudek, Alison Hirschel, Amanda Goerge, and Jules Olsman.

Registration will be open in late May.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

No-Fault Auto Insurance Legislation Suddenly on Fast Track

On March 26, just before the Legislature left for a two-week spring recess, Sen. Joe Hune (R-Whitmore Lake), introduced legislation that would make sweeping changes to Michigan's No-Fault Auto Insurance laws. Senate Bill 248 was referred to the Senate Insurance Committee,

chaired by Sen. Hune. The Michigan Legislature returned to session on April 14, and late that afternoon, the Senate Insurance Committee gave notice that it would hold a hearing on SB 248 the following day. Although the notice was technically within the legal requirements, it was still surprising that such a controversial issue would be taken up with such little time for interested parties to prepare.

On April 15, the Senate Insurance Committee met to consider SB 248. Just minutes before the committee convened, a substitute bill was circulated that the committee adopted. Even those few individuals and organizations who had been able to respond to the short committee notice were not privy to the substitute bill, and there were allegations that even the committee members themselves had only received it shortly before the meeting began. Nonetheless, after two hours of testimony from proponents and opponents of the bill, the committee reported it out on a 5-3 vote with one member not voting.

The very next day, April 16, the bill was brought up on the Senate floor. Yet another substitute bill was adopted and then amended. The Senate then passed the bill by a 21-17 vote. Despite cries of foul play by the bill's opponents, all applicable laws regarding open meetings and all rules of procedure were followed. This is an example of hardball politics, and despite the outcry, there was nothing illegal about the manner in which the legislation was rushed through the process.

The following week, the House Insurance Committee held a series of three hearings before it, too, voted the bill from committee on April 23. The only difference between the House and Senate action is that, despite their best efforts, backers of the bill were not able to obtain enough votes to pass the bill through the House that same day. As of this writing, the bill remains on the House floor awaiting action as arms get twisted and deals are made in an effort to get the necessary 56 votes for House passage.

Even in its short life, Senate Bill 248 has already seen several changes. It was reported from the Senate Committee with provisions that would cap payments for family attendant care at $15 per hour, and utilize Workers' Compensation fee schedules for medical services for no-fault insured accident victims. However, by the time the bill got to the House floor, those provisions had been modified. Language was inserted in the bill that allowed for a victim to request a medical review that could allow for family attendant care payments of higher than $15 per hour, and family members who are licensed medical providers themselves are exempt from the $15/hour cap. In addition, the Workers' Compensation fee schedule provision was replaced with language that limits medical payments for auto no-fault insurers to 150% of Medicare

rates. Even with these changes, the Michigan Health and Hospital Association estimates that the bill would cut hospital funding in Michigan by over $1.2 billion per year.

Proponents of the bill have claimed from the beginning that the changes would reduce auto insurance rates. However, they resisted efforts to place mandatory rate reductions in the bill. When it came to the House committee, though, they agreed to language that will require a $100 annual rate reduction per vehicle that would last for two years.

Two other major pieces of the legislation remained essentially unchanged from the bill's introduction: the creation of a new catastrophic claims entity, and the development of an insurance fraud authority. The fraud authority language was fairly non-controversial, though opponents of the bill pointed out that the authority would only seek out consumer fraud and not insurance fraud (amendments offered to make the authority root out all fraud—even fraud committed by an insurer, were defeated).

The creation of a new catastrophic fund, however, is what many observers felt was the real impetus for the fast action on the bill. SB 248 would close the existing Michigan Catastrophic Claims Association (MCCA) and replace it with a new catastrophic fund that would act as a public body. However, the legislation would ensure that all actions taken by the existing catastrophic fund over the past would remain hidden from public scrutiny.

The existing MCCA was created in 1978 to be a re-insurer for auto no-fault claims that exceeded $500,000. Although it was created by the Legislature, it has been run exclusively by the auto insurance industry, and the industry has insisted that it, therefore, is not required to comply with laws pertaining to public bodies (such as the Open Meetings Act or Freedom of Information Act). There has been a great deal of controversy over the past decade as to whether the MCCA should open its books for public scrutiny, and that has culminated in a lawsuit that has gone all the way to the Michigan Supreme Court. The court could decide to rule that the MCCA is subject to the Freedom of Information Act and, therefore, it would be required to make its records public.

There are some cynical souls in Lansing who have opined that fear of the Supreme Court is what is truly driving this legislation. Another provision that has been the centerpiece of No-Fault Reform legislation for the past decade—a lifetime limit on medical benefits—was left out of SB 248. While there is no doubt the insurance industry would certainly prefer capping lifetime medical benefits, it has been unable to achieve passage of legislation containing such language. Therefore, the hope is that by leaving it out of SB 248, the bill will have a better chance to get through the House.

Current estimates are that backers of the bill are anywhere from 4-8 votes short of the 56 needed for House passage. Even so, this is as close as the insurance industry has come to winning a major no-fault auto reform in 20 years. How it will end is anyone's guess.

Guardian and Conservatorship Bill Moving Quickly

The No-fault reform bill is not the only one moving quickly in Lansing. On April 15, Sen. Rick Jones (R-Grand Ledge) sponsored Senate Bill 270; a bill that seeks to make changes to the ability of probate judges to appoint guardians and conservators. Specifically the bill amends sections of EPIC to itemize criteria for whom a judge may appoint a guardian or conservator in Michigan. In order to have a guardian or conservator appointed, the individual must either reside in Michigan or be present in Michigan and have a "significant connection" to Michigan. In determining the extent of a "significant connection," the court would have to consider the following factors:

- The wishes of the individual;
- The location of the individual's family and other interested persons;
- The length of time the individual was present in the state and the length of any absence;
- The location of the individual's property;
- The extent to which the individual has ties to this state such as voting registration, state tax return filing, vehicle registration, driver license, social relationship and receipt of services;
- Any other factor the court considers relevant.

The bill was reported from the Senate Judiciary Committee on April 29. It now awaits action on the Senate floor.

*MI Health Link—What You Need to Know**

By Erin L. Majka, Chalgian & Tripp Law Offices PLLC, Jackson

MI Health Link is a pilot program in certain Michigan regions, providing health care coverage for people currently eligible for both Medicare and Medicaid (dual eligibles).

How It Works

In 2011, the Medicare-Medicaid Coordination Office within the Centers for Medicare and Medicaid Services (CMS) offered federal funds for pilot programs combining Medicare and Medicaid benefits and funding for dual eligibles from both programs. Michigan was selected to run MI Health Link.

MI Health Link covers acute, primary, and behavioral health care; long-term supports and services; prescriptions, dental care, vision care, and durable medical equipment for dual eligibles. Under the program, Michigan and CMS enter into contracts with private health insurers, called Integrated Care Organizations (ICO), that receive a prospective blended payment to provide enrolled dual eligibles with coordinated care. The ICO provides acute and primary care, long-term supports and services, and is responsible for coordinating the delivery of services. The ICO is responsible for contracting with Pre-Paid In-Patient Health Plans (PIPH) to provide mental health, substance abuse, and developmental disability services. If an individual is already receiving these services through Community Mental Health (CMH), then CMH will serve as the PIPH and the dual eligible's services will not be interrupted.

The ICO and PIPH coordinate their efforts and services through Care Bridge, a platform that allows each member of the dual eligible's care and support team to track care plans. In addition, each individual has a care coordinator assigned to manage his or her case. The care coordinator is an ICO employee and must be (1) a licensed registered nurse, nurse practitioner, or physician's assistant, or (2) have a Bachelor's or Master's Degree in Social Work.

Pilot Program Regions and Enrollment

The MI Health Link pilot program will run through December 2018 and is being implemented in four regions:

- All Upper Peninsula counties;
- Eight Southwest Michigan counties (Berrien, Cass, Van Buren, St. Joseph, Kalamazoo, Branch, Calhoun, and Barry);
- Macomb County; and
- Wayne County.

There are an estimated 100,000 dual eligibles in the four regions. Individuals may voluntarily enroll in MI Health Link, or they may affirmatively opt out. However, if an individual does not voluntarily enroll or affirmatively opt out, that person will be automatically enrolled in the program. Individuals can opt out after enrolling, with changes occurring at the beginning of a month. Nursing home patients can enroll in the program, but they must continue to pay their patient pay amount. Dual eligibles with spend-downs or those enrolled in hospice are ineligible.

In the Upper Peninsula and Southwest Michigan regions, coverage started for voluntary enrollees on March 1, 2015, and for automatic enrollees on May 1, 2015. In Macomb and Wayne counties, coverage started for voluntary enrollees on May 1, 2015 and will begin for

automatic enrollees on July 1, 2015. But there are exceptions to automatic enrollment. MI Choice Waiver or PACE participants can voluntarily enroll but will not be automatically enrolled. However, if they do enroll, they are effectively leaving waiver and PACE. Similarly, dual eligibles receiving Medicare through an employer- or union-provided Medicare Advantage Plan can voluntarily enroll, but they are also voluntarily giving up their Advantage plan and will not regain that coverage if they opt out later.

Within 45 days of an individual's enrollment start date, the care coordinator must complete a Level I assessment to identify and evaluate the enrollee's current health and functional needs. If the assessment finds mental health or substance abuse disorders, intellectual or developmental disabilities, or needs for long-term supports and services, a Level II assessment must be completed within 15 days. The ICO will coordinate with its selected PIHP or a regional Long Term Supports and Services provider to conduct the Level II assessment. For people in nursing homes or receiving waiver services, the Level II Assessment will use the Michigan Nursing Facility Level of Care Determination to establish if the enrollees still meet the requirements of these services. Within 90 days of enrollment, the Individual Integrated Care and Supports Plan must be completed. This is the single plan that coordinates care for all of the enrollee's services and providers, including any PIHP and LTSS services.

Potential Challenges

The focus of MI Health Link is person-centered care. When staying in the network, there are no co-pays or deductibles, and continuous care may be smoother. However, these long-term benefits cannot yet be measured.

In the short term, there are many concerns. The sufficiency of staffing for smooth implementation is unknown. The ICOs generally do not have experience handling managed long-term care. Enrollees may suffer disruption of doctors, medications, and services that are not covered under the selected ICO.

The biggest concern is the enrollment process. If a dual eligible did not voluntarily enroll or affirmatively opt out before the effective coverage date for voluntary enrollment, the individual will receive a letter from Michigan ENROLLS (ENROLLS), alerting that person that he or she is being automatically enrolled. Almost simultaneously, these individuals receive a letter from Medicare indicating that Medicare Part D coverage is being canceled due to enrollment in MI Health Link. However, all of this is occurring while an individual still has time to opt out. In fact, if the individual opts out before the automatic enrollment effective date of coverage, his or her Medicare Part D will be automatically restored.

Without an advocate, this process can be confusing and daunting. However, having an advocate work with ENROLLS presents more challenges. The dual eligible must be present when ENROLLS is contacted. After verifying identity, ENROLLS allows the individual to appoint someone to handle enrollment or opting out on that person's behalf, but the appointment is valid for that day only. If the individual needs help again, the whole process must be completed again. If the individual has a guardian or agent under a health care power of attorney, Michigan ENROLLS will not work with that person until the Michigan Department of Health and Human Services (DHHS) verifies incapacity.

Finally, impacted individuals have recently been receiving blank releases from DHHS that must be signed and returned. However, the individuals are not given any information about the purpose of the release or how it will be used.

It is too early to know whether MI Health Link will actually prove to be a benefit. For now, we must look at helping clients in the MI Health Link regions manage the process and determine whether to enroll or opt out.

**This information is current through the date of submission and is subject to change as the program is implemented.*

Diploma Dilemma

By Mary Kathryn McKinley, Bradley Vauter & Associates, P.C., Grand Ledge

The increasing wave of students with autism spectrum disorders (ASD) increases the challenge of preparing them for adult life as they navigate careers, further education, independence, and personal fulfillment. Their needs are many, and the options available, while increasing, remain limited.

Students with ASD are, in general, full of potential. According to the CDC, almost half (46%) of children identified with ASD had average or above average intellectual ability (IQ greater than 85).[1] But to be successful adults, most of these students need significant transition supports and services. Without them, they will likely never have the opportunity to realize their full potential and contribute to society.

[1] Centers for Disease Control and Prevention, Data as of Feb. 2015 (http://www.cdc.gov/ncbddd/autism/data.html)

The challenge of supporting this population as it transitions to adulthood is daunting. In Michigan, 831 students with ASDs exited high school at the end of the 2013-2014 school year.[2] Nationally, the numbers of students with ASDs are rising at an alarming rate. For students born in 1996, one in 125 has an ASD; for 1998, one in 110; and for 2002, one in 68.[3] This means that the number of students with ASDs exiting high school in 2020 will be double what it is now and is likely to continue increasing in the future.

What exactly is "Transition?"

"Transition" can mean many things in many contexts in special education. It can be the challenges of moving from one class to another, from one classroom to another, or from one building to another. But most frequently, the word refers to transition services, a crucial component of the Individualized Education Plan (IEP) for every student with disabilities. School districts are charged under the Individuals with Disabilities Education Act (IDEA) not only with providing a free, appropriate public high school education to students with defined special needs, but they are also responsible for preparing students with disabilities for life after high school.[4] Special education students are entitled under IDEA to a robust array of specific, relevant, and meaningful transition services as part of their IEPs. Transition is defined as a "coordinated set of activities for a child with a disability" that is "results oriented" and aimed at "facilitating the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation…based on the individual child's needs, taking into account the child's strengths, preferences, and interests…."[5]

By age 16, specific transition goals, individualized to the student's interests and strengths, are required to be included in every IEP.[6] By the time a student exits special education, the transition process should be largely completed because the options available through IDEA terminate once a student's eligibility for special-education services end. But when does that eligibility end? This decision is left to the states, which can provide more eligibility than that mandated by IDEA but not less. Michigan Administrative Rules for Special Education (MARSE) set forth Michigan's special education rules.

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[2] Michigan Department of Education data

[3] *Id*.

[4] 20 U.S.C § 1400 (d)(1)(a).

[5] 20 U.S.C. § 1401(34)); 34 CFR § 300.43.

[6] 34 CFR § 300.320(b), (c); 20 U.S.C. §1414 (d)(1)(A)(i)(VIII)].

Michigan provides special education services to qualified individuals up to age 26, unless the student has "graduated from high school."[7] New proposed rules would change the wording significantly, to cut off special-education services for students who have "completed the requirements for a regular high school diploma."[8] This means school districts will no longer be allowed to provide additional services, such as transition services, by putting the actual graduation formalities[9] on hold after sufficient credits towards a diploma have been earned, and that eligibility for special-education services will end.

Diploma vs. Certificate

The students with ASDs (as well as students with other disabilities) who leave high school in Michigan fall roughly (but not exclusively) into two groups: those who receive a regular diploma and those who receive a certificate of completion. Only those students who earn a regular diploma are cut off from additional services before age 26.

To earn a regular diploma, students in Michigan must complete all of the requirements of the Michigan Merit Curriculum (MMC) or complete a modified version of this (a "Personal Curriculum").[10] The MMC is a rigorous regimen of coursework that includes algebra II, chemistry or physics, English, social studies, civics, and other requirements.[11] Students who complete other, less structured, less rigorous coursework are generally awarded a Certificate of Completion and are exempt from the ambitious MMC curriculum. They can fashion a high school curriculum that meets their individual preferences.

But how and when do students make the election to aim for a diploma or a certificate? It varies. Essentially, all students are on the diploma track until they are taken off. And at some point, often as early as middle school, some students with ASDs are advised that the "diploma track" would be too stressful, and, thus, to lower their expectations. Part of this "stress" is caused by Michigan being a state that exclusively promotes "inclusion" as the gold standard in education. Inclusion is the practice of teaching all students together, regardless of their learning challenges. Thus a student who is not neuro-typical, who has focus and attention difficulties, processing delays, sensory challenges and the like is expected to learn at essentially the same rate and in essentially the same manner as his or her nondisabled peers. That is another important discussion, best left to another day.

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[7] MARSE, R 340.17

[8] https://www.michigan.gov/documents/mde/Proposed_Rule_Changes_2014_447265_7.pdf.

[9] MCL §380.1278b.

[10] MCL §380.1278a.

Students who choose a certificate path have time available in high school for transition services, such as vocational training, placements, and practical courses aimed at helping them live independently. After completing high school and receiving their certificates, these students are eligible to receive additional services, usually through their intermediate school district, until they are 26 years old.

The law is not so thoughtful towards those students who earn a diploma. These students generally have the same types of challenges and the same multifaceted transition needs. But the requirements of the MMC leave little time in high school for anything except academics, and when students do complete the MMC requirements, they lose eligibility for further, crucial transition services receive about eight fewer years of post high school transition services.

Is there any way around this?

There is, unfortunately, no perfect solution. But many students who work towards a diploma are choosing to prolong high school beyond the typical four years. They are holding back that last credit needed for graduation until a fifth and/or sixth year of services are completed. This can be the time for vocational training and placements, for courses teaching independent living skills, perhaps for postsecondary coursework with supports necessary for success, to prepare the student for further education. Many, if not all, of these services can be provided outside of the high school, depending on the school district. A very deliberate and comprehensive IEP, with the best possible transition goals, must be in place for this strategy to succeed. Planning begins, optimally, when the student enters high school or before. It begins with a clear focus on the desired outcomes: the student's vision for adulthood, and the options that must be available, all based on real interests and strengths. Once this picture is clear, the specific transition services and supports needed to achieve these goals will also become clear.

Robust transition goals that focus on independent living, the ability of the student to participate in rewarding employment, and perhaps continued education, are required under IDEA. But too frequently IEPs contain perfunctory, boilerplate transition goals masquerading as legitimate goals. Vigilance, vision, and a careful, well thought out plan which is revised as needed, will ensure strong goals. The resulting IEP will be a powerful argument for the school to agree that additional time is needed for those goals to be reached.

Individualized, meaningful, challenging, well-designed transition goals, necessarily and by definition, take time for the student to master. With careful planning and attention to detail, and perhaps a few extra years of high school, students with ASDs who elect to pursue a diploma won't find the door shut on their ambitions when they graduate.

Landmark Trust Case in Michigan Court of Appeals

By Andrew W. Mayoras, Barron Rosenberg Mayoras & Mayoras PC, Troy

On January 29, 2015, the Michigan Court of Appeals released a published opinion that clarified several different aspects of Michigan's comprehensive Trust Code, a relatively new law, passed in 2010. The opinion involved longstanding and very contentious probate court litigation in which Ron Barron served as a co-trustee of a substantial trust, and Andy Mayoras served as the litigation and appellate counsel.

The case, *In re Gerald L. Pollack Trust*, ___ Mich App ___, ___ NW2d ___ (2015), involved a heated dispute that started in Oakland County Probate Court. It was brought by two sons of the decedent, successful business owner Gerald Pollack, who died in 2009. The sons felt that their father's final estate plan did not leave enough to them, instead favoring the decedent's wife. The final trust protected the wife's interests throughout her life and passed on the business interests for the benefit of the sons after her life. The sons felt entitled to inherit control and ownership of the business immediately.

In bringing this heated probate court battle, numerous legal issues of first impression were raised which have now been answered (in many cases for the first time in Michigan) by this Court of Appeals opinion. These include:

1. When the trustee of a trust follows the proper procedure outlined in the Michigan Trust Code, beneficiaries wishing to challenge a trust document must do so within six months of receiving notice. This new law applies even where the decedent died before the new law was passed, as long as the notice was sent afterward and provided the full six-month time period set forth in the Trust Code.
2. Applying the new law in this fashion did not violate the sons' due process rights or any "accrued rights" that arose prior to the date the new law became effective. The right to bring a trust challenge is not accrued or "vested" until the claim is actually filed.
3. The new six-month period provided the sons with a reasonable time to bring their trust challenge, and they failed to do so. As such, any rights they had as trust beneficiaries prior to the new law being passed, were not impaired or extinguished by the new law.
4. That Barron served as a co-trustee of the Trust, along with a corporate trustee, did not give rise to a finding that he received a benefit from the Trust, which would potentially trigger a presumption of undue influence. If the presumption had applied, it would have permitted the sons to present their claims at trial. Instead, the Oakland County Probate judge dismissed the undue influence claims through summary disposition. The decision was upheld by the Court of Appeals.

5. When examining the potential benefit received by a person under the presumption of undue influence test, the benefits received under the challenged document should be compared to the benefits received under the prior document, which was not contested in the probate court in this case (even though it was contested in the Court of Appeals).
6. A contestant of a will or trust who alleges mistake has the burden of establishing that a mistake occurred, and this includes the obligation to come forward with evidence of mistake at the summary disposition stage, even if the summary disposition motion does not specifically seek dismissal of the mistake claim (at least where the formal admission of the will was sought).
7. A trustee has standing to defend against not only a direct trust challenge but also a petition seeking to reform or modify the Trust, where the terms which the petitioners sought to reform or modify are tantamount to a challenge to the validity of the Trust, such as the terms of distribution and who served as trustee.
8. Further, a trustee has not only the right but the legal obligation to defend against a challenge to the validity of the Trust.
9. The grounds for seeking removal of a trustee are expressly set forth in the Michigan Trust Code, and prior common law grounds no longer apply. This is consistent with the Michigan Trust Code's purposes and policies of making more comprehensive laws governing trusts to foster certainty and to promote confidence in those who create a trust that their instructions will be followed.
10. Allegations of hostility or bias, as well as the existence of other litigation between the trustee and a beneficiary, are not enough to warrant removal of the trustee, where (as found here), there is no evidence that the Trust itself or its property was harmed, or that the parties seeking removal were affected as beneficiaries.

Because the Michigan Trust Code has only been in effect for five years, these new rulings will define and govern the applicability of these important provisions of the statutes for what is likely to be decades to come.

The Search for the Lady Bird Deed

By Kary C. Frank, Rockford

A number of years ago, a friend, who had moved to Florida, and I were discussing his estate plan, and he told me how his Florida attorney had used a lady bird deed. Being unfamiliar with the term, I did some research to determine what exactly a ladybird deed was. I found, as we know now, that the more formal term was an enhanced life estate deed. For purposes of the article an enhanced life estate deed or lady bird deed is loosely described as a conveyance of real property, reserving a life estate and the power to sell, mortgage, etc. In Michigan there is

Standard 9.3 of the Michigan Title Standards (6th ed.), which is on point and sanctions the lady bird transfer.

Because I saw the value of this type of deed, I created a few alternative models for my personal form bank. I also sent the one of the first enhanced life estate/lady bird deeds to the Michigan Institute of Continuing Legal Education (ICLE) for its form bank. It was not in general use at that time in Michigan.

It seems that, at least in everyday lawyer terminology, "lady bird deed" has been progressively replacing the nomenclature of enhanced life estate, or as Land Title Standard 9.3 title's it: *Life Estate with Power to Convey Fee*.[1] You only have to look at the title of past seminars on the subject.[2] Even a couple of Michigan Court cases reinforce this point.

See the 2013 Michigan Tax Tribunal decision, *Anderson v Township of Chocolay*, where the court discussing a pertinent 2009 conveyance stated, "The 2009 instrument is commonly referred to as a 'Lady Bird' deed."[3] The statement was noted with the following footnote: "The name comes from the mechanism that President Lyndon Johnson used to pass property to his wife, "Lady Bird" Johnson, on his death. Some lawyers call these 'enhanced life estate' deeds."[4]

Also see "*In re Tobias Estate,*" an unpublished Court of Appeals case decided May 10, 2012, which reviews the requirements of a Lady bird Deed. In that case the court states, "A 'Lady Bird Deed' is a nickname for an enhanced life estate deed. It is named after Lady Bird Johnson because allegedly President Johnson once used this type of deed to convey some land to Lady Bird. …"[5]

Even before reading the preceding cases, I thought it would be interesting to find the first lady bird deed and have it published as a historical document. After all, it was a somewhat clever real estate transaction document, created by a former president of the United States.

I started the search by contacting the Lyndon B. Johnson Library. I was transferred to Claudia Anderson, the supervisory archivist, who informed me that she had never heard of a lady bird deed. She said a Google search approached 100,000 hits. Our discussion and the search results advanced her interest, and she volunteered to see what she could find and get back with me.

After a few months, Anderson contacted me and said that she talked to members of the family and with the financial administrators of Mrs. Johnson's estate. No one was aware of the term lady bird deed. She was unable to find any information on land transfers that would have used such a deed, although she thought that there had been life estate transfers from Lady Bird Johnson to the United States Park Service involving a portion of the Johnson Ranch. These transfers would have been in Gillespie and Blanco counties.

I next contacted title companies in these counties. The first examiner I worked with was Sharon Jung, manager of Fredericksburg Titles, Fredericksburg, Texas. She seemed quite interested in finding the first lady bird deed. After some searching, she found a deed from Claudia (Lady Bird) Johnson and her daughters to the United States of America, reserving a life estate in the grantors. Jung emailed me a copy; but after review, I found that, although it was a life estate deed, it did not reserve the power to sell (which is a key component of the lady bird deed).

Then I contacted Linda McMain at Guardian Title with offices in Blanco and Johnson City asking for her assistance. She was familiar with the life estate deeds that the former first lady had signed. During the conversation, she related that she seemed to remember reading that the lady bird deed had nothing to do with Lady Bird Johnson. And, if McMain could remember the source, she would let me know.

Within a couple of weeks, she emailed me an article from the *Estate Planning Developments for Texas Professionals*. The January 2011 article written by Gerry W. Beyer, professor of law at Texas Tech University School of Law, and Kerri M. Griffin, Comment Editor for the *Estate Planning and Community Property Law Journal* Texas Tech University School of Law, was an introductory article about the usefulness of lady bird deeds. In the article, before addressing the reasons for using lady bird deeds, the authors gave the following background information:

> Many people think that the "Lady Bird" deed became known as such because President Johnson once used this type of deed to transfer property to his wife, "Lady Bird" Johnson. In reality, the first Lady Bird deed was drafted by Florida attorney Jerome Ira Solkoff around 1982, nearly ten years after the death of President Johnson. In his elder law book and lecture materials, Solkoff used a fictitious cast of characters with the names Linton, Lady Bird, Lucie, and Lynda in examples explaining the usefulness of this new type of deed, and the names became associated with the deed. Jerome's son, Scott Solkoff, jokes that the Lady Bird deed "could easily have become known as the 'Genghis Khan deed.'"[6]

I contacted Prof. Beyer, who confirmed the article. Using WestlawNext, he also emailed me the following section from the 2014-2015 edition of West's Florida Practice Series, Elder Law with Jerome Ira Solkoff, Esq. and Scott M. Solkoff, Esq. authoring Chapter 9: Titling Assets to Avoid Probate and Joint Ownership of Realty.

> **§ 9:53. "Lady Bird" life estate deeds—Life estate deed to convey future title to heirs**
>
> One could convey future title to the heirs by deed, keeping control of the property. The remaindermen obtain title immediately upon the death of the life estate owner without surrogate court proceedings. This form of deed has been popularly labeled the "Lady Bird" deed due to author Jerome Ira Solkoff's

> writings and lectures using a fictitious cast of characters to illustrate the facility of the deed form. Author Jerome Ira Solkoff created the “Lady Bird” deed form in 1982 and it is now in common use in Florida and throughout the United States.
>
> **Example:**
> Lyndon and Lady Bird, his wife, grantors, to Lyndon and Lady Bird, his wife, grantees, a life estate, without any liability for waste, with full power and authority in them to sell, convey, mortgage, lease and otherwise dispose of the property described below in fee simple, with or without consideration and without joinder by the remaindermen, and to keep absolutely any and all proceeds derived therefrom. Further, the grantors reserve the right to change remaindermen at any time without consent of remaindermen. Upon death of the life tenants, title shall be in Lucy and Lynda, joint tenants with rights of survivorship.[7]

Without his article, who knows if I would have come across Jerome Solkoff.

I then attempted to contact Solkoff who is now retired. I did eventually talk with Scott Solkoff, who has a Florida estate planning and elder law practice and is now co-author of the current edition of the elder law portion of West's Florida Practice Series. Scott informed me that the term "lady bird deed" was essentially an unintended outgrowth of his father Jerome's educational endeavors. Around 1992, in an effort to keep the Florida practitioners somewhat entertained while presenting the concepts of the enhanced life estate deed, he used a cast of characters including Lyndon Johnson and Lady Bird Johnson as grantors, grantees, etc. A few days after I talked to Scott, Jerome Solkoff called me and reiterated the story. He also said that around 1982, he had contacted three Florida title companies and presented the enhanced life estate type of transfer for approval by the title companies. Later when asked by West Publishing to provide examples of such a transfer in the first edition of the elder law book, he came up with the characters as illustrations. As he remembers, the Medicaid example he first used was Ozzie and Harriet as grantors with David and Ricky as remaindermen.[8] So from that publication, the term "lady bird deed" began.

In the 1962 John Ford film, *The Man Who Shot Liberty Valance*, Ransom Stoddard (the man who everyone thought shot Liberty and who built a career on that reputation) tells a young reporter the true story of who shot Liberty Valance. At the end, the young reporter looked at the editor (who had also been listening to the story) in anticipation. The editor took the transcript and ripped it in pieces, saying, “When you have a choice of printing the truth or the legend, print the legend.” So, when a client is signing a “lady bird deed” and asks how the deed got the unusual name, you can say, "the *legend* is that President Johnson drafted the first lady bird deed."

[1] Standard 9.3 of the Michigan Title Standards (6th ed.).

[2] *Drafting Ladybird Deeds* (State Bar of Michigan, 9th Annual Solo & Small Firm Institute, September 20, 2012). Contributor: Douglas G. Chalgian, and *Drafting Ladybird Deeds* (ICLE, Drafting Estate Planning Documents, 17th Annual, 01/24/08) Contributor: Harley D. Manela.

[3] *Anderson v Township of Chocolay*, unpublished, MTT No. 433005 (Dec. 18, 2013) (Hon. Paul V. McCord), page

[4] *Anderson*, *supra*, page 6 n 3.

[5] *In re Tobias Estate*, unpublished, Court of Appeals No. 304852, May 10, 2012, page 5.

[6] Gerry W. Beyer & Kerri M. Griffin, *Lady Bird Deeds: A Primer for the Texas Practitioner*, Est. Plan. Devel. for Tex. Prof. , Jan. 2011, at 1 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736862.

[7] 14 Fla. Prac., Elder Law § 9:53 (2014-2015 ed.).

[8] Characters from *The Adventures of Ozzie and Harriet*, family sitcom, 1952-1966.

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Copy archived in the "Reference File" at the LBJ Presidential Library, Austin, Texas, by the supervisory archivist (2015).

Calendar of Events

By Erma S. Yarbrough-Thomas, Neighborhood Legal Services Michigan Elder Law & Advocacy Center, Redford

NAELA – www.naela.org

- May 14- May 16, 2015 - 2015 Annual Conference, JW Marriott Orlando Grande Lakes, Orlando, FL

ICLE/SBM – www.icle.org

- May 6 - Experts In Estate Planning: The Role of the Attorney throughout the Life Cycle of a Trust, ACME (Live)
- May 7-9 - Probate & Estate Planning Institute, 55th Annual, ACME (Live)
- June 19-20 Probate & Estate Planning Institute, 55th Annual, Plymouth (Live)
- June 24 - Drafting An Estate Plan for an Estate Under 5 Million, Plymouth (Live)
- September 10-11 - Elder Law Institute 1st Annual, Serving the Expanding Needs of Your Clients Confidently, Plymouth (Live)

Other Events

- June 6 - ELDRS Council Meeting, Bond Estate Planning & Elder Law PC, 400 Maple Park, Ste. 402, St. Clair Shores, MI 48081, 10 a.m.
- August 1 – ELDRS Council Meeting, Steward & Sheridan PLC, 205 S Main St., Ishpeming, MI 49849-2018, 10 a.m.
- September 12 - ELDRS Council Meeting, Caroline Dellenbusch PLC, 2944 Fuller Avenue, NE, Suite 100, Grand Rapids, MI 48505, 10 a.m.

- September 30 – Oct. 2 - ELDRS' 2015 Fall Conference, Boyne Mountain Resort, 1 Boyne Mountain Rd., Boyne Falls, MI 49713
- Oct. 2 – ELDRS' Annual Meeting, Boyne Mountain Resort