

ELDRS Update

Summer Edition 2015, Volume V, Issue 2

This is a publication of the Elder Law & Disability Rights Section of the State Bar of Michigan. All opinions are those of the respective authors and do not represent official positions of the Elder Law & Disability Rights Section or the State Bar of Michigan. Comments or submissions should be directed to Christine Caswell, Managing Editor, at christine@caswellpllc.com.

Early Registration Ends Soon for ELDRS' Fall Conference Special Hotel Rates End August 24

By Angela Hentkowski, Steward & Sheridan PLC. Ishpeming

Reduced early registration rates end September 1, and special room rates end on August 24 for the 2015 ELDRS' Fall Conference, Sept. 30-Oct. 2, at Boyne Mountain Resort in Boyne Falls. On-line/fax registration ends September 21, although walk-ins will be welcome at the conference site. This year's keynote speakers are 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 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. For registration information, click [here](#).

The ABLE Act in Michigan

By Christopher W. Smith, Chalgian & Tripp Law Offices, Jackson

President Obama signed the Achieving a Better Life Experience Act (ABLE Act) on December 19, 2014, giving special needs planners an additional tool. The ABLE Act builds from IRC 529, the same section providing for 529 College Savings Plans. The Act's intent is to allow individuals with disabilities to save using an option that resembles a 529 College Savings Plan.

A full discussion of the federal ABLE Act is beyond the scope of this article. While ABLE accounts are an additional tool, it is important to reiterate some of their most significant limitations under the federal legislation:

- ABLE accounts are limited to individuals who become disabled before age 26. Annual contributions are limited to the annual gift tax exclusion (currently \$14,000).
- Any funds left in an account after a beneficiary dies will almost certainly be subject to a state payback for state-funded medical assistance, even if the contributions were made by someone other than the individual (e.g., a parent). There is a small exception where the funds can be transferred to another individual with disabilities.

ABLE accounts will be great in certain situations, such as with individuals who have smaller amounts of money or who want to have more control than what a trust allows. But because of these (and other) limitations, this point cannot be overemphasized: *ABLE accounts will not replace traditional special needs planning and will only be appropriate for a limited subset of special needs clients and their families.*

Each state must enact legislation before ABLE accounts can become available. Rep. Anthony Forlini (R-Harrison Township) introduced Michigan's ABLE legislation on May 5, 2015. Since its introduction, the legislation has had strong bipartisan support with virtually no opposition. It was unanimously voted out of committee, voted out of the House by a 108-1 vote, and then unanimously voted out of the Senate Finance Committee on June 30. Everyone expects the legislation to become law soon, which means that Michigan ABLE accounts should be available sometime in 2016.

Michigan's ABLE legislation is composed of four bills:

- **House Bill 4541.** Raises the maximum that can be held in a 529 College Savings Plan or an ABLE account from \$235,000 to \$500,000.
- **House Bill 4542.** The main bill regarding ABLE accounts.
- **House Bill 4543.** Gives a Michigan income tax deduction for ABLE account contributions up to \$5,000 (individual return) or \$10,000 (joint return) a year.

- **House Bill 4544.** Ensures that ABLE accounts are not counted when applying for benefits for any assistance program governed by Michigan's Social Welfare Act (e.g., Medicaid).

Unfortunately, Michigan cannot undo the limitations contained in the federal legislation. But, Michigan's legislation does its best to make the most of the ABLE Act.

First, Michigan's enabling legislation raises the maximum amount that can be held in 529 College Savings Plans and ABLE accounts to \$500,000, which would be the highest in the nation. But with an annual contribution limit of \$14,000, it is difficult to see how an ABLE account can actually reach this level. However, theoretically, an individual could have an ABLE account that grows to \$500,000 and remain eligible for Medicaid in Michigan (but not Supplemental Security Income from Social Security, which limits accounts to \$100,000).

Second, Michigan provides for a state income tax deduction up to \$5,000 (single) and \$10,000 (married) in annual contributions. There is no equivalent federal income tax deduction. To date, few states are offering this tax benefit.

There are also a number of features of Michigan's ABLE legislation that were added, in part, because of the Elder and Disability Rights Section's efforts. These features include:

- Spendthrift protections that should make ABLE accounts unavailable to creditors.
- The ability for an individual's representative (e.g., a guardian or conservator) to open and fund an ABLE account without court approval (of course this will still likely need to be reported in annual accountings).
- Protections that should make it extremely difficult for a beneficiary to overfund an ABLE account causing an individual to lose his or her benefits.
- A requirement that the program manager consider the unique needs of the special needs population when providing customer service. While this may have limited practical benefit, it was important that the law recognize that this population has different needs than those funding traditional 529 College Savings Plans.

ELDERS is grateful to Rep. Forlini and his staff for being open to our suggestions.

ELDERS advocates had hoped the law would require marketing materials to contain reference to the state payback requirement. Families wanting to leave funds to an individual with disabilities should first consider a third-party trust and avoid this payback requirement. However, this did not make it into the current bill.

Also, the IRS issued proposed regulations relating to the ABLE Act on June 19, 2015. The regulations would put a significant burden on program managers that may severely limit the cost effectiveness of ABLE accounts. Additionally, the IRS regulations attempt to define who can

open an ABLE account on behalf of an individual and currently propose allowing a parent to open an account without any additional authority (i.e., without a power of attorney or conservatorship). Michigan's law would need to be amended to allow a parent to do this and to comply with any other final IRS regulations that are issued.

Rep. Forlini's office has indicated that it intends to pass Michigan's legislation as it is currently written but is willing to introduce future legislation that may be needed to comply with or complement the final IRS regulations. This is a logical approach as the IRS has told states they can pass enacting legislation now, and the IRS will work with states on compliance later.

Attorneys will be hearing a lot about ABLE accounts from disability organizations, financial planners, and accountants as it becomes law in Michigan. But the ABLE Act's passage has exposed—even among people who should be knowledgeable—how poorly informed many are about special needs planning.

ABLE is an additional tool for planners, and the Michigan legislature should be commended for passing legislation that is as strong as possible. But the ELDRS' community will now need a huge educational push regarding when ABLE accounts are appropriate and when other planning tools (e.g., special needs trusts) are better. As ABLE becomes law in Michigan, our responsibility to educate is just beginning.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Legislature Finishes Budgets, Still Working on Roads over Summer Recess

Traditionally, the Michigan Legislature goes into recess from July to September. In the few cases when it hasn't, the issues usually concerned the budget. This year, though, continuing talks concern funding for road and bridge repair. Despite the 2016 budget having been signed into law, the House and Senate continue to hold sessions hoping an agreement can be reached on transportation funding.

In the last month, both the House and Senate have passed their own versions of transportation funding packages. They differ in several key areas, most notably in how much new revenue they raise. The House version relies on the elimination of the Earned Income Tax Credit and an increase in diesel fuel taxes for the bulk of its new revenues. The Senate, conversely, adopted a plan that would keep the EITC in place but would increase the motor fuel tax by a large amount. One might ask why I am writing about transportation funding for a column intended for elder law and disability rights attorneys. The answer lies in area on road funding area on which the House and Senate seem to agree: shifting hundreds of millions of dollars from the state's general fund to pay for roads. That means that other areas of the budget, including programs

that provide vital services for elderly and disabled Michigan residents, could face major funding cuts, depending on what road funding plan the Legislature finally adopts.

In the budget signed by the governor, funding was maintained for a number of the programs ELDRS supports, including The Program of All-Inclusive Care for the Elderly (PACE), the Alzheimer's Association Pilot Project, and the Home and Community Based Waiver (Mi Choice). However, funding for the Alzheimer's project was nearly cut in this year's budget process. Current estimates of the House and Senate plans are that they could divert over \$700 million in general fund dollars when fully phased in.

Some lawmakers have interpreted the massive failure of Proposal 1 as an indication that Michigan voters oppose a tax increase to pay for roads, and others also believe that Michigan residents want to prioritize road funding. If the Legislature and Gov. Snyder act on those sentiments, next year's budget process will be much more difficult.

House Passes "ABLE" Act (See above story for more information on the ABLE Act)

Legislation designed to implement the federal ABLE Act (Achieving a Better Life Experience) in Michigan was introduced May 5 by Rep. Anthony Forlini. The four-bill package, House Bills 4541-4544, not only establishes the ability to create ABLE savings accounts for eligible persons with disabilities, but also increases the current cap on education savings accounts to \$500,000 and ties that cap to the ABLE accounts.

Representatives from ELDRS met several times with Rep. Forlini and his staff to make suggestions for improvements to the bills. For example, our suggestion for a clearer definition of "designated representative" was incorporated before the bill came out of committee. Likewise, creditor protections and a limitation of a beneficiary to no more than one account were also added per our request. The legislation passed the House on May 27 by a nearly unanimous vote. It has been referred to the Senate Finance Committee where it will likely be taken up this fall.

AARP Michigan's Proposes Care Act Legislation

Editor's Note: ELDRS' Council members are communicating with AARP at both the Michigan and national level to address specific issues with caregiver contracts and Medicaid after Jensen v Department of Human Services, Unpublished Opinion, CA No. 319098, February 19, 2015. Below is information from a press release from AARP Michigan on the current proposed legislation which does not address Jensen.

AARP Michigan and Sen. Margaret O'Brien (R-Portage) launched the CARE Act legislation at the State Capitol on May 20. Senate Bill 352 supports the state's family caregivers who make it

possible for older Michiganders to stay in their homes. Sen. O'Brien, the primary bill sponsor, introduced the Michigan Caregiver Advise, Record, Enable (CARE) Act which would support and equip family caregivers with the basic information and training they need when their loved ones go into the hospital and as they transition home. "It is important that we update health care policies that protect our most vulnerable. Ensuring caregivers have the proper knowledge to care for their loved ones is essential," Sen. O'Brien said. "A side benefit of the CARE Act is it saves money."

In Michigan, there are 2.1 million caregivers who devote nearly 1.4 billion hours to caregiving at a total value of \$15.5 billion, according to a 2011 report by AARP's Public Policy Institute. AARP has introduced the CARE Act in 30 states, legislation has been passed by 12, and it has been enacted into law in 10. The Michigan CARE Act features three provisions:

- The name of the family caregiver is recorded when a loved one is admitted into a hospital;
- The family caregiver is notified if the loved one is to be discharged to another facility or back home; and,
- The facility must provide an explanation and live instruction of the medical tasks required, such as medication management, injections, wound care, and transfers that the family caregiver will perform at home.

According to an AARP poll taken last summer, nearly eight in 10 adults age 50 and older are, have been, or expect to be caregivers. Family caregivers are more likely to be women who also work full or part-time. They provide an average of 21 hours of care per week for an average of four years. Nearly one in five family caregivers provide more than 40 hours of care per week. Also according AARP research, if caregivers are well prepared when patients are discharged from the hospital, the patient will be healthier and less likely to be readmitted. In Michigan, the ratio of caregivers to elderly persons is expected to drop from the current rate of 7:1 to 4.1:1 by 2030 and 3.3:1 by 2050, according to the AARP report.

Calendar of Events

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

ELDRS' Events

- Sept. 12 - 10 a.m. - ELDRS Council Meeting, Caroline Dellenbusch PLC, 2944 Fuller Avenue, NE, Suite 100, Grand Rapids, MI 49505
- Sept. 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, 7:30 a.m.

NAELA – www.naela.org

- Jan. 28-30, 2016 - 2016 NAELA Summit, Newport Beach, CA
- April 7-9, 2016 - 2016 Annual Conference, Denver, CO

ICLE/SBM – www.icle.org

- Sept. 10-11 - Elder Law Institute 1st Annual, Plymouth (Live) (*Editor's Note: This is a separate event from the Fall ELDRS' Conference listed above*)
- Sept. 29 - Drafting an Estate Plan for an Estate under \$5 Million, Plymouth (Live)
- Oct. 8-10, 23-24 - 40-Hour General Civil Mediation Training, Plymouth (Live)
- Nov. 17 - Experts in Estate Planning Leaving an Education Legacy, Plymouth (Live)
- Dec. 3 - Administration of Trusts under the Michigan Trust Code, Plymouth (Live)