

**SEPTEMBER 2017 MINUTES OF THE
ELDER LAW & DISABILITY RIGHTS SECTION
STATE BAR OF MICHIGAN**

September 16, 2017

Location: State Bar of Michigan, 306 Townsend, Lansing, Michigan. Participants had the option to appear by telephone.

Attendance:

- **In Person:** Michele Fuller-Urbatsch*, Sara Schimke*, Christopher Smith*, Beth Swagman*, Caroline Dellenbusch*, Michael Mestelle*, Kelly Quardokus*, Christine Caswell*, Raymond Harris*, Maria Messina Wiersma*, Patricia Kefalas Dudek, Megan Edmonds, Tracey Rowens, Hansen Clarke, Todd Tennis.
- **On Phone:** James Steward*, Angela Hentkowski*, David Sprague*, Robert Mannor*, Jacquelyn Rygiel-Sprague*, John Payne*, Howard Collens*, Erma Yarbrough-Thomas*, David Kerr, Elizabeth Vincent, Ellen Burns, Paul Sturjel.

18 out of 20 members of Council were present.

* Indicates Council member.

I. Executive Reports.

1. **Minutes.** The minutes from the August meeting were submitted for Council's approval. **Christine Caswell** moved to approve the minutes. **Caroline Dellenbusch** seconded the motion. The August minutes were approved unanimously.
2. **Treasurer's Report.** **Beth Swagman** provided the Treasurer's report. She reminded people that the end of the fiscal year for the State Bar is coming up, so anyone needing to get paid should get their requests in.

II. Committee Reports.

1. **Fall Conference.** **Angela Hentkowski** indicated that everything is ready to go for the conference. There are still some rooms available if people need.

2. **Litigation Committee**

- a) **Raymond Harris** gave the Litigation Committee's report. Ray notified the Council that **David Shaltz** will be joining the Committee.
- b) On August 9th, NAELA of Michigan approved the ELDRS Section's request for \$3,500 from the NAELA Litigation Fund to be used to support Jim Schuster's amicus efforts in the *In re Hegadorn* et al. matter (SBO Trust litigation) matter in front of the Michigan Supreme Court.
- c) Council then had extensive discussion regarding the *Mardigian* case. In the *Mardigian* case an attorney that drafted a Will where he and his children received \$16 million. The Michigan Supreme Court invited the ELDRS Section to submit an amicus brief. Howard Collens mentioned that the probate section is taking an amicus position. Jim Steward indicated that he is more supportive of our position (as proposed in the motion below) and indicated that this position is also more consistent with the professional responsibility section. David Kerr noted that this is a case where bad facts could make bad law.

Motion (Kelly Quardokus moved; Michael Mestelle seconded):

The ELDRS Section of the State Bar of Michigan will file an amicus brief in the *Mardigian* case (*In re Mardigian*). The brief will be prepared by David Kerr for \$2,500 from NAELA Michigan. The brief will answer as follows to the questions posed by the Michigan Supreme Court: Question 1: The rebuttable presumption of undue influence set forth in the *Powers* case (*In re Powers Estate*, 375 Mich 150 (1965)) sufficiently protects the testator; Question 2: *Powers* should not be overruled based on the adoption of MRPC 1.8(c), the MRPC should not effect a forfeiture, and MRPC 1.8(c) should be clarified; and Question 3: *Powers* should stand.

Yeas: Michele Fuller-Urbatsch, Sara Schimke, Christopher Smith, Beth Swagman, Caroline Dellenbusch, Michael Mestelle, Kelly Quardokus, Christine Caswell, Erma Yarbrough-Thomas, Raymond Harris, Maria Messina Wiersma, James Steward, Angela

Hentkowski, David Sprague, Robert Mannor, Jacquelyn Rygiel-Sprague, Howard Collens.

Nays: None.

Abstain: John Payne.

17 yeas, 0 nays, 1 abstentions. Motion passes.

- d) Ray also emphasized the committee will be making another request for donations at the Fall Conference.

3. **Legislation Committee.**

- a) *POST*. *POST* continues to be moving along in the legislature. Our concerns were addressed to a certain degree to ensure that the *POST* is not automatically nullified among certain changes in circumstances such as a year passing, significant change in health status, or change in setting. However, a mandatory review is required. While this does not exactly reflect the changes that Council requested, the Committee determined it is good enough. Thus, while Council will keep its existing public policy statement, we are satisfied with the latest draft of the bill.
- b) *Jajuga* case. House Bill 4410 involves legislation to correct the decision in the *Jajuga* case that essentially prohibited an individual from writing a child's allowance out of a Will. Regarding the current draft of the legislation, Council is concerned that it might detrimentally impact individuals with disabilities.

Motion (Kelly Quardokus moved; Michael Mestelle seconded): The Elder and Disability Rights Section of the State Bar of Michigan support HB 4410 with the amendment language as outlined by the State Bar of Michigan Probate Section position (and attached to these Minutes by reference).

Yeas: Michele Fuller-Urbatsch, Sara Schimke, Christopher Smith, Beth Swagman, Caroline Dellenbusch, Michael Mestelle, Kelly Quardokus, Christine Caswell, Erma Yarbrough-Thomas, Raymond Harris, Maria Messina Wiersma, James Steward, Angela Hentkowski, David Sprague, Robert Mannor, Jacquelyn Rygiel-Sprague, Howard Collens, John Payne

Nays: None.

Abstain: None.

18 yeas, 0 nays, 0 abstentions. Motion passes.

- c) *House Bill 4684.* This bill appears to offer some of the benefits regarding guardianships and visitations that the Section has been considering. The Legislative Committee will look into the legislation and report back to Council.
 - d) *Legislative Report.* The Legislative Report is incorporated by reference into the Minutes.
- 4. **Community Outreach. Erma Yarbrough-Thomas** reported for the committee. The Elder Section will be participating in the State Bar of Michigan's "Who Should You Trust" Committee on October 11, 2017. We need more attorneys to volunteer and speak.
 - 5. **New Administrative Issues Committee.** A new Committee to concentrate on administrative issues and policy is being formed. The Committee will likely start with caregiver contract and promissory note matters. Robert Anderson, Sara Schimke, Michele Fuller-Urbatsch, and Patti Keflas Dudek are possible initial members.

The meeting adjourned at 11:29 a.m.

Next Meeting: October 5, 2017, Bay City, Michigan (Double Tree) at the lunch for the Fall Conference.

HOUSE BILL No. 4410

March 23, 2017, Introduced by Rep. Lucido and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled
 "Estates and protected individuals code,"
 by amending section 2404 (MCL 700.2404), as amended by 2000 PA 177.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 2404. (1) The decedent's surviving spouse is also
 2 entitled to household furniture, automobiles, furnishings,
 3 appliances, and personal effects from the estate up to a value not
 4 to exceed \$10,000.00 more than the amount of any security interests
 5 to which the property is subject. IF there is no surviving
spouse, IF EXCEPT AS OTHERWISE PROVIDED

6 ~~IN SUBSECTION (4), IF there is no surviving spouse,~~ the decedent's
 7 ~~children~~ WHO ARE NOT EXCLUDED UNDER SUBSECTION 4 are
 7 entitled jointly to the same value.

8 (2) ~~IF EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (4), IF~~
 9 ~~IF~~ encumbered assets are selected and the value in excess
 9 of security

1 interests, plus that of other exempt property, is less than
 2 \$10,000.00, or if there is not \$10,000.00 worth of exempt property
 3 in the estate, the spouse or children WHO ARE NOT EXCLUDED UNDER
SUBSECTION 4 are entitled to other assets

4 of the estate, if any, to the extent necessary to make up the
 5 \$10,000.00 value. Rights to exempt property and assets needed to
 6 make up a deficiency of exempt property have priority over all
 7 claims against the estate, except that the right to assets to make
 8 up a deficiency of exempt property abates as necessary to permit
 9 payment of all of the following in the following order:

10 (a) Administration costs and expenses.

11 (b) Reasonable funeral and burial expenses.

12 (c) Homestead allowance.

13 (d) Family allowance.

14 (3) The rights under this section are in addition to a benefit
 15 or share passing to the surviving spouse or children by the
 16 decedent's will, unless otherwise provided, by intestate
 17 succession, or by elective share. The \$10,000.00 amount ~~expressed~~
 18 **DESCRIBED** in this section shall ~~shall~~ **MUST** be adjusted as provided in
 19 section 1210.

20 (4) ATHE DECEDENT MAY EXCLUDE 1 OR MORE CHILDREN FROM
RECEIVING

21 THIS ALLOWANCE BY EITHER OF THE FOLLOWING MEANS:

22 (a) DECEDENT BY WILL OR OTHER SIGNED WRITING MAY EXPRESSLY

21 ~~EXCLUDE OR LIMIT THE RIGHT OF A CHILD WHO IS NOT A MINOR OR~~

22 ~~DEPENDENT CHILD TO MAKE A CLAIM STATES THAT THE CHILD IS~~
~~OTHERWISE TAKES NOTHING OR~~

23 ~~ENTITLED TO~~ 23 AN AMOUNT OF \$10.00 OR LESS FROM THE ESTATE.

24 (b) DECEDENT BY WILL EXPRESSLY STATES THAT THE CHILD IS NOT TO

25 RECEIVE AN ALLOWANCE UNDER THIS SECTION. THE EXCLUSION OR LIMITATION

24 ~~DESCRIBED IN THIS SUBSECTION MUST BE EXPRESSLY STATED BY THE~~

~~25 DECEDENT, AND MUST SPECIFICALLY REFERENCE THE ALLOWANCE DESCRIBED~~
~~26 IN THIS SECTION IN A MANNER SUFFICIENT TO EXPRESS THE DECEDENT'S~~
~~27 INTENT. AN EXCLUSION OR LIMITATION STATED BY A DECEDENT BY WILL~~

~~1 UNDER SECTION 2101, WITHOUT ADDITIONAL LANGUAGE SPECIFICALLY
2 STATING AN INTENT TO EXCLUDE OR LIMIT A RIGHT PROVIDED UNDER THIS
3 SECTION, IS NOT CONSIDERED SUFFICIENT LANGUAGE TO EXCLUDE OR LIMIT
4 A RIGHT PROVIDED IN THIS SECTION.~~

526

1 Enacting section 1. This amendatory act takes effect 90 days

62 after the date it is enacted into law.

To: ELDRS Council
From: Todd Tennis and Jean Doss
Re: Legislative Report
Date: September 16, 2017

The Michigan Legislature has returned to session after the summer recess. After completing the budget process for 2018 in June, the House and Senate are setting their sights on issues such as No-Fault Auto Insurance reform, changes to laws governing municipal pension systems, and updates to Unemployment Insurance statutes. We are also hopeful that the Senate Health Policy Committee will take up the POST bills that the ELDRS council have been working on for several years sometime this fall.

More Changes Made to POST Legislation Prior to Senate Committee

After legislation aimed at creating a statewide Physician Order for Suitable Treatment form passed the House in June, members of the ELDRS legislative committee discussed additional recommended changes to the package. While there had been agreement to limit the criteria for when a POST form would have to be reviewed, the actual language included in the version of the legislation that passed the House was still vague on that point.

The ELDRS legislative committee submitted suggested language changes to Representative Tedder's office (the main bill sponsor) that would have removed the requirement that POST forms be reviewed in certain situations, replacing it with language that stated that they "should" be reviewed. Representative Tedder and other interest groups working on the issue were reluctant to agree to the change, and a meeting of interested parties took place by conference call.

While the bill sponsor remained convinced that there should be situations in which a POST form must be reviewed in order to remain valid, it was pointed out that the way the bill was currently worded would have instantly invalidated any such POST form the moment any of the criteria triggering a review was met. These criteria included a change in physician, a change in care setting, and even a major health event. If any of these situations instantly invalidated a POST form pending a required review, it would severely weaken the efficacy of the form.

A compromise was reached in which a review would still be mandatory if one of the triggering events occurred, the Department of Health and Human Services would establish a time frame for the review to occur in which the POST form would remain valid. Therefore while a review would still remain necessary, DHHS would determine an appropriate time period in which a patient and their physician and patient advocate could review the form and change or reaffirm it. Most importantly, it means that a POST form would remain valid when it was needed most – immediately following a major change in the patient's health.

The Senate Health Policy Committee is currently conducting a staff review of the bills. We are hopeful that the committee will add the legislation to their agenda in the next several weeks.

Bill Dealing with Estates and Wills May be Taken up in House Committee

The House Judiciary is planning on holding a hearing on House Bill 4410, sponsored by Representative Peter Lucido (R-Shelby Twp.) The bill seeks to amend the Estates and Protected Individuals Act to more clearly allow a decedent to bar a child from making a claim on the estate. The bill as introduced states:

(4) A DECEDENT BY WILL OR OTHER SIGNED WRITING MAY EXPRESSLY EXCLUDE OR LIMIT THE RIGHT OF A CHILD WHO IS NOT A MINOR OR DEPENDENT CHILD TO MAKE A CLAIM THAT THE CHILD IS OTHERWISE ENTITLED TO UNDER THIS SECTION. THE EXCLUSION OR LIMITATION DESCRIBED IN THIS SUBSECTION MUST BE EXPRESSLY STATED BY THE DECEDENT, AND MUST SPECIFICALLY REFERENCE THE ALLOWANCE DESCRIBED IN THIS SECTION IN A MANNER SUFFICIENT TO EXPRESS THE DECEDENT'S INTENT. AN EXCLUSION OR LIMITATION STATED BY A DECEDENT BY WILL UNDER SECTION 2101, WITHOUT ADDITIONAL LANGUAGE SPECIFICALLY STATING AN INTENT TO EXCLUDE OR LIMIT A RIGHT PROVIDED UNDER THIS SECTION, IS NOT CONSIDERED SUFFICIENT LANGUAGE TO EXCLUDE OR LIMIT A RIGHT PROVIDED IN THIS SECTION.

The Probate Section has indicated concern about language making exceptions for minor or dependent children, stating that this could make for very confusing law. They have recommended amendments to the bill striking out the exemption. The bill may come up in the House Judiciary Committee this month.

List of Monitored Legislation

[HB 4021](#) PROBATE ([Kosowski](#))

Allows probate judges to schedule certain hearings before minor turns 18 years of age.

[Text/Analysis](#)

Introduced (1/12/2017; To [Judiciary](#))

[HB 4043](#) VULNERABLE ADULTS ([Kosowski](#))

Establishes missing senior and vulnerable adult plan.

[Text/Analysis](#)

Introduced (1/18/2017; To [Law and Justice](#))

[HB 4104](#) PROPERTY TAX ([Wentworth](#))

Provides for requirement to issue a receipt to disabled veteran filling an affidavit for exemption of property taxes.

[Text/Analysis](#)

Introduced (1/26/2017; To [Tax Policy](#))

[HB 4111](#) VETERAN PROPERTY TAX ([Yanez](#))

Increases property tax credit for certain qualified veterans.

[Text/Analysis](#)

Introduced (1/26/2017; To [Tax Policy](#))

[HB 4170](#) HEALTH ([Tedder](#))

Allows physician orders for scope of treatment forms.

[Text/Analysis](#)

Passed in House (6/20/2017; 106-1, Immediate Effect; earlier Advanced to Third Reading with Substitute H-1 adopted)

HB 4171 PROBATE ([Cox](#))

Authorizes a guardian to sign physician orders for scope of treatment form.

[Text/Analysis](#)

Passed in House (6/20/2017; 105-2, Immediate Effect; earlier Advanced to Third Reading)

HB 4173 HUMAN SERVICES ([Vaupel](#))

Establishes procedure if adult foster care facility is unwilling to comply with physician orders for scope of treatment form.

[Text/Analysis](#)

Passed in House (6/20/2017; 105-2, Immediate Effect; earlier Advanced to Third Reading)

HB 4174 SCOPE OF TREATMENT ([Love](#))

Revises procedure for complying with a do-not-resuscitate order to reflect physician orders for scope of treatment forms.

[Text/Analysis](#)

Passed in House (6/20/2017; 105-2, Immediate Effect; earlier Advanced to Third Reading with Substitute H-1 adopted)

HB 4209 (PA 51) COURTS ([Lucido](#))

Increases juror compensation.

[Text/Analysis](#)

Signed by the Governor (6/22/2017; Signed: June 15, 2017; Effective: September 13, 2017)

HB 4210 (PA 52) JURIES ([Lucido](#))

Provides for increase in juror compensation.

[Text/Analysis](#)

Signed by the Governor (6/15/2017; Signed: June 15, 2017; Effective: September 13, 2017)

HB 4410 WILLS AND ESTATES ([Lucido](#))

Allows decedent to exclude adult child by written instrument.

[Text/Analysis](#)

Introduced (3/23/2017; To [Judiciary](#))

HB 4532 (PA 54) MARITAL STATUS ([Whiteford](#))

Modifies marital status in instruments conveying or mortgaging real estate.

[Text/Analysis](#)

Signed by the Governor (6/15/2017; Signed: June 15, 2017; Effective: June 15, 2017)

HB 4684 GUARDIANSHIP ([Lucido](#))

Allows limited guardianship to supervise access to incapacitated individual's relative.

[Text/Analysis](#)

Introduced (5/31/2017; To [Judiciary](#))

[SB 39](#) (PA 20) SURVIVING SPOUSE ([Jones](#))

Revises exceptions to definition of surviving spouse in relation to funeral representative.

[Text/Analysis](#)

Signed by the Governor (3/31/2017; Signed: March 30, 2017; Effective: March 31, 2017)

[SB 49](#) PROFESSIONAL GUARDIAN ([Booher](#))

Modifies provision related to compensation for professional guardian or professional conservator.

[Text/Analysis](#)

Reported in House (3/28/2017; Amendment adopted; By [Judiciary](#))

[SB 78](#) HOMESTEAD EXEMPTIONS ([Nofs](#))

Continues homestead exemption upon death of homeowner under certain conditions.

[Text/Analysis](#)

Received in House (4/20/2017; To [Tax Policy](#))

Passed in Senate (4/20/2017; 37-0)

[SB 378](#) HOMES FOR AGED ([Knollenberg](#))

Exempts homes for the aged from licensing.

[Text/Analysis](#)

Received in House (7/12/2017; To [Regulatory Reform](#))

[SB 525](#) NUMBER OF JUDGESHIPS ([Jones](#))

Reorganizes state judicial districts and the number of judgeships.

[Text/Analysis](#)

Introduced (9/6/2017; To [Judiciary](#))

[SB 540](#) TRANSFER OF OWNERSHIP ([Schuitmaker](#))

Makes changes to definitions as it relates to transfer of ownership of property and makes modifications to certain excluded transfers.

[Text/Analysis](#)

Introduced (9/7/2017; To [Local Government](#))