ELDRS Update

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Save the Date

- **Fall Conference**
  October 18-20, 2023

  Boyne Mountain Resort
  Hotel reservations are now available here.

Guardianship at the Appellate Level & Another Wave of Published Mental Health Cases

By Liisa Speaker, Speaker Law Firm, Lansing

Published Cases Surrounding Guardianship of Incapacitated Individuals

For many years, guardianship cases would not typically come before the Court of Appeals because they were appealable to the circuit court. This meant that the Court of Appeals was a second level of appeal by leave that was rarely granted. However, once the Supreme Court amended MCR 5.801 in 2015, guardianship cases were appealable by right to the Court of Appeals, resulting in more guardianship decisions and published opinions. Nonetheless, since 2015, there have only been four published guardianship decisions, and no Supreme Court decisions yet. Published guardianship cases typically have centered around specific legal issues about the application of the Michigan's Estates and Protected Individuals Code (EPIC) or specific ambiguities in EPIC. Probate attorneys should be familiar with these published cases to add to their arguments in the probate court.

Appointing a Guardian

MCL 700.5313 lays out two different rules for how the Court is to appoint a guardian to a legally incapacitated individual. MCL 700.5313(2) describes an order of priority for the Court to follow if there is a person who is suitable and willing to be a guardian. If no person is able to be selected under subsection (2), the Court will move on to subsection (3), which provides a secondary order of priority for a guardian who is related to the legally incapacitated individual. MCL 700.5106 states that a professional guardian can be elected in lieu of a relative, but only if:

a) The appointment of the professional guardian or professional conservator is in the ward's, developmentally disabled individual's, incapacitated individual's, or protected individual's best interests; AND

b) There is no other person that is competent, suitable, and willing to serve in that fiduciary capacity in accordance with MCL 700.5313.

In re Gerstler, 324 Mich App 494; 922 NW2d 168 (2018), demonstrates the process of appointing a legal guardian. In this case, the incapacitated individual, Harold, had a professional guardian. *Id*. at 171. Upon the guardian's resignation, Harold's daughter, Angelee, asked to be appointed as Harold's guardian. *Id.* at 171-172. Rather than appoint the daughter following the provisions of MCL 500.5313(3), the Probate Court bypassed her request and instead appointed another professional guardian for Harold. *Id.* at 172. Angelee appealed the Probate Court's decision. *Id*. at 174. *The Court of Appeals agreed with the daughter and stated that "in order to appoint a professional fiduciary [], the Trial Court was required to find that the appointment of such a professional served the individual's best interests and that no other person was competent, suitable, and willing to serve in that fiduciary capacity in accordance with the governing statutory provisions." Id.* At 176 (citing MCL 700.5106(2)) (emphasis in original). The Trial Court made considerable findings that it would be in Harold's best interest to have a professional serve as guardian but failed to account for Angelee petitioning to be one. *Id*. at 177. The Trial Court erred in failing to make any findings regarding Angelee's competence and suitability to serve before bypassing her request and issuing a professional guardian. *Id*. at 176-177.

Terminating a Guardian

An incapacitated individual can also terminate the appointment of a guardianship as illustrated in *In re Guardianship of Gordon*, 337 Mich App 316; 975 NW2d 114 (2021). Gordon is deaf and blind but lived independently for over 20 years after training for his disabilities. *Id.* at 317. In 2018, he was mugged near his apartment, which resulted in him being hospitalized. *Id*. A petition to establish a guardianship was filed with the probate court and was granted. *Id*. One year later, Gordon filed a petition to terminate the guardianship, arguing that he was lucid and could not progress in a group home. *Id*. The probate court stated the question to be answered was, *"Is it in the best interest of [Gordon] for [the guardianship] to be terminated?" Id*. at 319 (emphasis in original). The probate court found that there was no evidence indicating that terminating the guardianship was in Gordon's best interests, but in doing so, it applied the wrong legal standard. *Id*. MCL 700.5310(2) provides that a ward may petition the probate court for an order to terminate the guardianship. *Id*. The probate court must follow the same procedures that apply to a petition for the appointment of a guardian on a petition to terminate a guardianship. *Id*. at 320.

Removing a Guardian

PIC also includes provisions on how to remove a guardian. Under MCL 700.5310(2), "the ward or a person interested in the ward's welfare may petition for an order removing the guardian,

appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship." However, EPIC does not provide for a specific standard that a probate court is meant to follow to determine whether the guardian should be removed.

The Court of Appeals took up that question in *In re Guardianship of Dorothy Redd*, 321 Mich App 398; 909 NW2d 289 (2017). In this case, Redd was the ward and her son, Gary, was appointed as guardian. *Id*. at 400. Two years after the appointment, Gary's daughter sought to remove Gary as guardian, alleging that he was no longer suitable to serve in that role. *Id*. The probate court agreed, but Gary appealed stating that the wrong standard of removal was applied. *Id.* at 411. The Court of Appeals looked at MCL 700.5313(3) and (4), which provide that an individual identified for appointment could be disqualified if the individual was either unsuitable or unwilling to serve. *Id*. at 406. After considering EPIC, the Court of Appeals extended the standard to removal and held that "to remove a guardian under MCL 710.5310, the probate court must find that the guardian is no longer suitable or willing to serve." *Id*. at 407. Sadly, the ward died while the case was pending in the Michigan Supreme Court, so the appeal was moot. 503 Mich 878 (2018).

<u>Attorneys Receiving Payment for Guardianship Services</u>

In re Guardianship of Malloy and In re Jenkins are two consolidated cases currently pending in the Michigan Supreme Court, awaiting oral argument. Mich (4/27/2023). These cases are of interest to probate attorneys because they pertain to how attorneys and law firms as guardians can provide guardianship services and receive payment for it.

In *Malloy*, the legally incapacitated individual suffered a traumatic brain injury from a motor vehicle accident in 1979. Mich App issued Oct. 13, 2022 (Docket No. 358006). Malloy's mother was her co-guardian and caregiver for approximately 40 years following the incident. *Id*. The court appointed an attorney and professional fiduciary as Malloy's legal guardian, who provided Malloy legal and guardianship services through his firm. *Id*. Malloy's no-fault insurer refused to pay for the legal and guardianship services provided to Malloy because it did "not appear Ms. Malloy's guardian performed the guardianship services being claimed." *Id*.

In *Jenkins*, an attorney and professional fiduciary was appointed as Jenkins' legal guardian because he suffered a traumatic brain injury that rendered him as legally incapacitated. *Id.* slip op at *2 (Docket No. 358021). Like Malloy, the court-appointed guardian and his firm provided legal and guardianship services to Jenkins. *Id*. The no-fault insurer refused to pay for the services because the guardianship services were "completed by someone other than" the attorney. *Id*. In both cases, the incapacitated individuals argued that the fees and costs were allowable under the no-fault act and necessary to provide care, recovery, or rehabilitation for the individual. *Id*. The no-fault insurer argued that it had no liability to pay no-fault benefits,

and it could refuse to pay because guardianship services were provided by individuals other than the court-appointed guardian. *Id*. slip op at *3.

The court stated that a guardian's duties include "being responsible for the ward's care, custody, and control and communicating and consulting with the ward if possible before making decisions." *Id*. slip op at *4 (citing MCL 700.5314). In both cases, the court appointed guardian delegated the performance of duties to other individuals to assist in caring for his wards; he did not delegate powers, so he did not violate MCL 700.5103. *Id*. slip op at *6-7. MCL 700.5106 demonstrates that it was anticipated that a guardian would delegate tasks to other individuals when caring for a ward. *Id*. slip op at *8. The statute also allows "an individual associated with the professional guardian" to be "responsible for the ward's care" and that a professional guardian "shall ensure that there are a sufficient number of employees assigned to the care of wards" to carry out the necessary duties. *Id*. The court held that the trial court correctly determined that the duties performed on behalf of the wards could be delegated by a court-appointed guardian. *Id*. slip op at *1. The court remanded the consolidated cases because of a factual question of whether the court-appointed guardian delegated tasks that altered the "rights, duties, liabilities, or other legal relations" of Malloy and Jenkins when he allowed other individuals to prepare for and attend hearings regarding the modification of the guardianships. *Id*. slip op at *1, 8.

As there are so few published cases interpreting EPIC's guardianship provisions, we expect that more published cases will be issued. By having the background knowledge of published Court of Appeals cases, an attorney will be able to provide a stronger, more persuasive argument to show why the Court should rule in their client's favor.

More Mental Health Decisions

Since the 2015 legislative and court rules amendments, which allowed a party to appeal a probate court decision in a Mental Health Code case directly to the Court of Appeals, we have seen a slew of published Mental Health Code opinions. In the Summer 2022 issue of the *ELDRS Update*, we covered six such published cases. Since July 2022, we have had four more published cases to share with you.

These cases address subject matter jurisdiction of the probate court in Mental Health Code cases, due process rights of respondents, and probate court violations of Mental Health Code cases.

In re Bazakis, ___ Mich App ___ (2022)
Docket No. 358276 (Mich App, June 23, 2022).

In a judgment of divorce, the parties were granted joint legal and physical custody of their developmentally disabled adult daughter. They are also co-guardians. The court ordered that

both parents alternate parenting time on a two-week basis with a split schedule for only Christmas, Thanksgiving, and Easter – no other holidays.

Her mother, appellant, argued to the Court of Appeals that the lower court erred by failing to consider her daughter's preferences when deciding with whom she would spend her birthday and Easter. The Court of Appeals held that no provision of the Mental Health Code called for a court's consideration of the developmentally disabled person's preference except in the appointment of a guardian. MCL 330.1628(2). As such, appellant failed to provide a legal basis to extend the Mental Health Code to circumstances under which the Court of Appeals could resolve the dispute between co-guardians. The court reversed the probate court's order that directed the mother on how to allocate the daughter's benefits but affirmed the probate court in not taking the daughter's preference into account as to which parents she spent her birthday with. This case is currently pending oral argument in the Supreme Court of Michigan.

In re Eddins, ___ Mich App ___ (2022)
Docket No. 360060 (Mich App, Aug 11, 2022).
Respondent appealed the probate court's order finding that she required continued treatment on the basis of mental illness. Respondent had a long history of receiving involuntary mental health treatment, with petitions alleging significant paranoid symptoms (visual hallucinations, accusing others of using witchcraft on her, demonic possession) and homicidal ideations after going months without taking her medications. Seven court orders requiring her to be hospitalized for mental health treatment had previously been entered against her. She appealed the most recent order after her motion for summary disposition was denied; she alleged that the order did not exactly comply with the requirements stated in the Mental Health Code, and that the trial court lacked jurisdiction pursuant to MCL 330.1403 (stating "[i]ndividuals shall receive involuntary mental health treatment only pursuant to the provisions of" the Mental Health Code).

Under MCL 330.1473, a petition for continuing involuntary mental-health treatment must "contain a statement setting forth the reasons for the hospital director's or supervisor's or their joint determination that the individual continues to be a person requiring treatment, a statement describing the treatment program provided to the individual, the results of that course of treatment, and a clinical estimate as to the time further treatment will be required. The petition shall be accompanied by a clinical certificate executed by a psychiatrist." The Court of Appeals found that the petition was deficient because it contained no statement setting forth the reasons that respondent continued to require treatment. The petition was also deficient because, though it did provide details on the treatment she had been provided, it did not include the results of that course of treatment.

The Court of Appeals also concluded that the probate court had subject matter jurisdiction over this claim because it has exclusive legal and equitable jurisdiction over protective proceedings, including those brought under the Mental Health Code. Its jurisdiction is not dependent upon whether the petition for continuing mental-health treatment filed in this case strictly complied with the requirements of the Mental Health Code. Although the petition did not comply with the requirements of MCL 330.1473, that failure did not deprive the court of its jurisdiction. Nor did the probate court err in denying respondent's motion for summary disposition and granting petitioner's motion to amend the petition. The Court of Appeals, thus, affirmed the probate court's decision.

In re Jestila, ___ Mich App ___ (2023).
Docket No 362500 (Mich App, Jan 23, 2023).

Respondent suffers from schizoaffective disorder. A petition was filed seeking an order for continuing her mental health treatment, and respondent was personally served with the petition and notice of hearing. The hearing was scheduled at least four times, and no proof of service was filed indicating that respondent was provided notice of the rescheduled hearing. She was absent for the hearing, where a doctor testified that the order to continue treatment was necessary, and the trial court entered an order requiring another year of mental health treatment. Respondent alleged this was a violation of her due process rights, and the Court of Appeals agreed. Although the procedures embodied in the Mental Health Code satisfy due process guarantees, the probate court did not comply with the notice and service requirements delineated in the Mental Health Code. MCL 330.1453(1). The Court of Appeals vacated the probate court's order and remanded.

Muskegon County v Department of Health and Human Services, ___ Mich App ___ (2023).
Docket No 360007 (Mich App, March 9, 2023).

Muskegon County and its agency, HealthWest, sued the State of Michigan for reimbursement of funds spent on Medicaid-eligible mental health services. MCL 330.1308(1) requires that DHHS "pay 90% of the annual net cost of a community mental health services program that is established and administered in accordance with chapter 2," and respondents allege that "net cost" includes expenditures for services funded by Medicaid.

The Court of Appeals found that MCL 330.1308 and MCL 330.1310 did not support the county's contentions. Even if the expenditures were eligible for state financial support under MCL 330.1310, plaintiffs could not establish that the expenditures satisfied the requirements set forth by the same statute because the statute requires approval by the department, not by the prepaid inpatient health plan (PIHP). Additionally, DHHS is not solely responsible for distributing these funds; rather, there is risk shared between the PIHP and DHHS. Plaintiff does not dispute

that payment for shortfalls is sometimes made with money from the PIHP in accordance with the risk-sharing agreement between the PIHP and the DHHS. The county's argument for mandamus was rejected by the Court of Appeals, and thus, fatally flawed. The Court of Appeals affirmed.

Liisa Speaker is the owner of Speaker Law Firm, an appellate boutique firm in Lansing, MI. She is a family law appellate attorney, with a special emphasis on child-related cases, including adoption and Safe Delivery of Newborns Law appeals.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Legislation Pending to Address Personal Services Agreements

Michigan has some fairly unique rules when it comes to Medicaid eligibility. For the past several years, ELDRS leaders have had ongoing discussions with the Michigan Department of Health and Human Services, including one that deals with care contracts and personal services agreements. Unfortunately, these discussions, even when led by supportive lawmakers like Rep. Doug Wozniak (R-Shelby Twp.), have yet to bear fruit.

Older adults often need more assistance in maintaining their household than they did when they were younger. They may need help with lawn mowing and snow removal, household maintenance and cleaning, and even more substantive supports, such as meal preparation and personal assistance. It is not unusual for older adults to hire service providers or to pay family members, friends, or neighbors to help with these needs.

The Michigan Department of Health and Human Services has determined that any such personal service agreement runs afoul of Medicaid eligibility requirements. MDHHS has implemented rules that consider any payment for personal services a divestment unless all of the following apply:

- The service was recommended by a physician;
- The personal service agreement was spelled out in a written contract;
- The written contract was witnessed and notarized.

ELDRS believes that this determination by MDHHS is needlessly draconian and burdensome to Michigan families. It has led to countless Medicaid long-term care applications being denied because an applicant hired someone to mow their lawn or provide in-home services, and they did not know that they needed to obtain a written, notarized contract, or to consult with a physician first to avoid complications should they ever need long-term care services. ELDRS has asked MDHHS to revise this policy for several years, but they have consistently refused to do so.

This year, we took our plea directly to the Michigan Legislature. Sen. Kevin Hertel (D-Saint Clair Shores) has drafted legislation to be introduced in the Senate this fall that will amend the Social Welfare Act to specify that the department may not consider most types of personal service agreements as divestments for purposes of Medicaid eligibility. The legislation will state that, as long as a service was provided for fair market value, and it was not an expenditure made for the express purpose of qualifying for medical assistance, payment for a personal service – even to a family member – will not constitute a divestment that penalizes the Medicaid applicant. Rep. Stephanie Young (D-Detroit) is also exploring introducing the same legislation in the Michigan House.

Once the legislation is introduced, we will ask for committee hearings to begin quickly, with the hope of moving the bills before the end of the year. We will look for examples of how the current practice has harmed Michigan residents who, because they were unaware of MDHHS's extraordinary requirements for personal service contracts, were penalized by having their eligibility for Medicaid long-term care supports delayed or denied. ELDRS members who have had clients who experienced problems due to this policy are encouraged to share them with the ELDRS Council. There will also be opportunities to provide oral or written testimony to House and Senate committees once the bills are introduced and scheduled for hearings.

The ADA and the DOJ

By Jill Babcock, Detroit

- *Editor' Note: On Nov. 2, ICLE is holding an ADA Accommodation Workshop in Plymouth, available for streaming on November 23 https://www.icle.org/modules/store/seminars/schedule.aspx?product_code=2023CK5347*

Imagine you are sitting at your desk when a call from your client gets patched through. They are frantic; they just received notification from the U.S. Department of Justice (DOJ) that someone has filed a complaint that they have violated the Americans with Disabilities Act (ADA). What do you do?

A colleague received that call the other week. His client, a medical office, claimed not to realize that under law they are required to supply an ASL interpreter to patients requesting accommodation to offset auditory impairments. Although advance communication might have rectified this situation, the DOJ fined the client.

There is a myth that a rash of lawsuits and complaints have been made under the ADA. There are some limited examples of apparent abuse, for instance, a serial ADA litigant who failed to report his settlement income to the IRS supposedly filed 1,000 suits over alleged ADA violations in northern California in 2021 alone.

Numerous jurisdictions have attempted to curtail these suits through the court system or by enacting legislation. Judicially, current case law suggests a suit cannot be dismissed solely because the complainant may frequently file ADA lawsuits; according to the Ninth Circuit decision in *Langer v Kiser* (No. 21-55183, 1/23/2023), the lower court erroneously dismissed the complaint after deciding that the complainant lacked credibility for standing because of his history of filing ADA lawsuits (over 2,000 in 32 years). However, a case pending before the US Supreme Court, *Acheson Hotels LLC v Laufer*, specifically questions whether a complainant can file a suit under the ADA regardless of any evidence to make plans to visit the location. Other jurisdictions are attempting legal "reform." In 2017, Congress introduced HR 620 requiring complainants to notify businesses of alleged violations prior to filing suits so the business has the chance to remediate the issue.

The ADA is tantamount to civil rights law, though it succeeded the civil rights movement by decades. It legally requires covered entities to remove barriers so people with disabilities can operate equally as people without disabilities. It emphasizes that built obstacles excluding people with disabilities cause the same discrimination as behavioral actions. Unfortunately, most businesses, governments, and people do not follow requirements nor even acknowledge rights granted by the ADA. Simply put, they do not voluntarily follow the laws. This means that enforcement is mostly left to the people with disabilities filing complaints and lawsuits. In his brief in opposition to Acheson Hotel's Writ for Certiorari, Thomas B. Bacon eloquently argues:

> *Petitioner and the Amici would have this Court ignore the reasoning of* Hensley *so that they can immunize themselves from suits by civil rights advocates seeking to enforce the law. Without civil rights advocates such as this plaintiff, there would be no enforcement of the ADA, and the Amici would be free to continue with their discriminatory practices without consequence. Indeed, the Amici have the power to put an end to ADA enforcement suits by simply complying with the law.*

There is a simple solution to this issue, which could save businesses, governments, and people thousands of dollars in litigation: follow the law. We all understand "you only know what you know." Governmental entities need to redirect the funds currently used to investigate and adjudicate these complaints; stop trying to limit people's rights through legislation and instead direct the money toward education and enforcement. Then people with disabilities will no longer have to file complaints and lawsuits.

ADA violations are not frivolous. I'm tired of being left out because I use a wheelchair and having to explain why places should be accessible. Lawyers have always sued to achieve change. I am pro-enforcement, like every person with a disability and their loved ones that I know. I am constantly appalled by others' obliviousness to other people's needs and feelings.

My advice: when you get that phone call, represent your client, work with the DOJ, have the client make the necessary changes, and ensure they understand why they are making those changes (for example, because about one in four U.S. adults have a disability, it broadens their customer base to be accessible. Many accessibility features create a safe environment). Also, support ADA enforcement. Maybe we can create the type of place envisioned by Mr. Bacon in the *Laufer* case where people with disabilities no longer have to sue to enforce their rights.

Eldercaring Conflict Tool - Study in 3rd Pilot Stage

By Linda Fieldstone, M.Ed. and the Hon. Michelle Morley, Co-Chairs, Elder Justice Initiative on Eldercaring Coordination, in collaboration with Michael Saini, Ph.D.

To access the survey, please click here:

https://www.surveymonkey.com/r/ECCShort

After a year of study, we are excited to report an update on the Eldercaring Conflict Checklist and are hoping that other colleagues can participate in the next stage of our study.

We are creating the Eldercaring Conflict Checklist as a tool for assessing conflict in older families for use by professionals working with older adults and their families or younger families where older generations are involved. With the information gleaned from the tool, professionals will be better able to match interventions to characteristics and needs of each unique family. The first two studies of the Eldercaring Conflict Tool showed significant promise (thank you so much if you gave input). In response to feedback received, the tool was considerably reduced according to data provided. We are now in the 3rd phase of the study to determine if the modified Eldercaring Conflict Tool is as reliable with only half of the questions.

Please help us with this Pilot 3 by assessing the case study provided using the new abridged Eldercaring Conflict Tool on the above link and submitting your survey on or before **Monday, August 21, 2023**. The outcome of this study is dependent upon obtaining greater participation than the first two phases, so your help is crucial. Please send this to any other professionals who work with elders or families in conflict who might be interested in assisting us with this research to further develop the tool.

This shortened version of the Checklist will take approximately 15-20 minutes to read the scenario and complete the survey. Since your responses will be completely confidential, it is necessary to finish in one sitting. There are no right or wrong responses. Think of this as a case you might have where you have just completed your intake and are beginning work with the older adult and/or family; you may not know all of the answers. Along with completing the tool, as part of the survey, you will be asked to give us your feedback. We are so appreciative to hear about your experience and anything you think will be helpful.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

Council Meetings

Until further notice, all meetings will be virtual with registration links to be posted on the SBM Connect Listserv prior to the meeting:

- September 9 - 10 am
- October 18-20 - Fall Conference - Boyne Mountain Resort
- October 19, 2023 - Annual Meeting - Boyne Mountain Resort (Time to be announced)

State Bar of Michigan Event

- August 16 - The Rise of AI in the Legal Profession: Lawyers Brace for Impact. Virtual Seminar, featuring Speakers: Sharon D. Nelson, President Sensi Enterprise, Inc. & John W. Simek, Vice President Sensi Enterprises, Inc.

NAELA - www.naela.org

- August 8, 10, 15 - Online Annual Conference. Webinar - 2-5 pm, EDT
- September 12 - Lunch & Learn Webinar: The Medicare Hospice Benefits, Presenter, Mary T. Berthelot, University of Connecticut. 1-2 pm, EDT
- October 5 - Lunch & Learn Webinar: Secure Act 2.0 and Financial Tips, 1-2 pm, EDT
- December 7 - Lunch & Learn Webinar: Continuing Care Retirement Communities, Presenter, Yvonne Troya, University of California Hasting College of Law. 1-2 pm, EDT

ICLE/SBM – www.icle.org

- September 19 - Drafting an Estate Plan for an Estate Under $5 Million (September 2023), Plymouth
- October 25-26 - Deposition Skills Workshop, Plymouth
- November 2 - ADA Accommodation Workshop, Plymouth
- November 3 - Veterans Benefits & Claims: A Practical Approach, Plymouth

The Detroit Caregivers Support Collaborative

- August 10 - 8th Annual Aging Matters Education & Expo. Speakers, Edna Rose, RN, PhD, Michigan Alzheimer's Disease Research Center, and Paula Duren, PhD, Universal Dementia Caregivers, Wayne County Community College District-NW Campus, 8:30 am - 2:30 pm