

# ELDRS Update

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*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](mailto:christine@caswellpllc.com).*

## ***Upcoming ELDRS' Events***

Please mark your calendars for ELDRS' semi-annual conferences in 2016:

- March 4 - Spring Conference, Inn of St. John, Plymouth
- October 5-7 - Fall Conference, Crystal Mountain Resort, Thompsonville

Look for more information on the Spring Conference, including the agenda and registration information, in the next newsletter.

## ***Michigan Community Mental Health System in Crisis***

*By Patricia E. Kefalas Dudek, Patricia E. Kefalas Dudek & Associates, Farmington Hills*

In response to Medicaid waiver services being cut by Community Mental Health (CMH), elder law and disability advocates have experienced an increase in heartbreaking calls from people with disabilities and their families, often when the person's needs are increasing or have not changed. There has not been a major change in Medicaid statutes or BEM policy, so what exactly is happening?

First, the state has implemented a new regional administrative process, whereby new funding policies are imposed on formerly independent Pre-Paid Inpatient Health Plan (PIHP)'s. Also, according to a source, the Department of Health & Human Services (DHHS) "Medicaid rebasing" is now in place which "moved away from historically-based payments to weigh other factors such as morbidity." According to the source, "This has resulted in cuts in some areas that tend to have more intensive programming or more difficult/complex client treatments. It has also resulted in increases in other places that can't be spent, so it lapses back to DHHS as savings."

Additionally, the state now funds the new Healthy Michigan program. For many CMH's this has effectively cut the dollars the agency receives from the state in half (or more) for fiscal year 2014-2015. Reportedly, the Legislature set monthly payments to the state's 46 community

mental health agencies at \$23.5 million. But the post-April 1 allocation was chopped to \$13.9 million, and the expenditure eventually fell to \$4.3 million monthly by the end of the fiscal year on Sept. 30, 2015. According to the source, “The problem is that the Healthy Michigan program moves people from [general funds] to Medicaid as planned, so the state cut [general fund] dollars to CMH’s in favor of an influx of Healthy Michigan program dollars (Medicaid). The problem is... that the replacement didn’t turn out to be one to one. First, Healthy Michigan runs through the PIHP’s and then to the CMH’s, while [general fund dollars] went straight to the CMH’s. Second, many [general fund] programs (like housing supports, jail services, etc.) don’t qualify for Healthy Michigan’s (Medicaid’s) strict rules, so the funding is just gone.”

These state funding changes have forced the end of services to a group of people with disabilities who don’t qualify for Medicaid, including folks who may be on an income spend-down for Medicaid services. Most of them are served by Medicare, but Medicare doesn't cover the range of supportive services people with mental illness or developmental disabilities often require to live successfully in the community.

Sadly, advocates are also witnessing people with disabilities being moved into more restrictive and, often, less quality residential settings. Many folks have filed for a Medicaid Fair Hearing and have argued that if the services were approved as “medically necessary” in past years, and the person’s need for support has not changed, then that person’s support should still be medically necessary. However, this argument has failed to be successful. Administrative law judges are upholding cuts, supposedly relying on the Medicaid waiver provision that requires services to be funded in the most cost-effective manner. ELDRS and its members are researching other legal options for the folks being drastically harmed by these changes, so stay tuned.

If you have been contacted by potential clients with similar issues, feel free to email the author at [pdudek@pekdadvocacy.com](mailto:pdudek@pekdadvocacy.com) to brainstorm.

## ***Kevin’s Law and Its Proposed Changes***

*By Julie McCowan, Royal Oak*

***Editor’s Note: Contrary to what was posted on the State Bar web site, ELDRS voted to support the proposed legislative changes to Kevin’s Law and took a second vote at its November 7, 2015 meeting to ensure that the correct information will be posted in the future. We apologize for any confusion this has caused.***

Kevin’s Law was named for a graduate student, Kevin Heisinger, who was traveling to orientation at the University of Michigan in 2000 when the bus he was riding made a stop in

Kalamazoo. Kevin got off the bus and went to the bathroom where he was attacked and killed by a man with a long history of untreated paranoid schizophrenia.

Recently, the local news media called attention to Kevin's Law, reporting that the mental health law never delivered on its promise to help the mentally ill. The original hope of Kevin's Law was to provide an avenue for courts to intervene earlier by ordering assisted outpatient treatment, before danger was imminent. One of the goals of implementing assisted outpatient treatment was to decrease the physical, psychological, and financial cost of psychiatric hospitalization to the individual and the community. However, in March 2015, the Mental Health Association of Michigan, together with Mental Health & Justice Coalition, published "*A 2014 Survey of Michigan Probate Courts and Community Mental Health Services Programs Regarding Assisted Outpatient Treatment ("Kevin's Law")*". The survey concluded that "assisted outpatient treatment appeared to be little used outside of Oakland County...." The main reason given was that the existing version of Kevin's Law was too complex and confusing.

On June 2, 2015, House Bill 4674 was introduced by Representative Tom Leonard to clarify and encourage the use of Kevin's Law by attorneys. House Bill 4674 aims to modify more than 30 sections of Michigan's Mental Health Code's assisted outpatient treatment program (AOT), also known as "Kevin's Law." The bill will take effect 90 days after it is enacted or April 1, 2016, whichever is later. As of October 20, 2015, the bill was passed in the House of Representatives. A brief summary of the bill follows:

#### **SCAO Responsibility**

The State Court Administrative Office shall prescribe the forms used for court proceedings under this chapter. In addition, the application (hospital) form and petition form is consolidated to one petition.

#### **Community Mental Health Services Responsibility**

A Community Mental Health Services program shall determine an individual's eligibility for a private health insurer, Medicaid, Medicare, and shall bill the private health insurer, Medicaid, Medicare, first before expending money from the state general fund for providing treatment and services under this Act to the individual.

#### **Definition of Time Frame**

Any reference to a time frame of 12 hours to 168 hours, or equivalent amount of days, would exclude Sundays and legal holidays.

#### **AOT Petition and Hearing**

The petition shall contain the facts that are the basis for the assertion, the names and addresses, if known, of any witnesses to the facts, and, if known, the name and address of the nearest relative or guardian, or, if none, a friend, if known, of the individual. It must be proven by clear and convincing evidence the individual is a person requiring treatment in that [he or she has] a mental illness and the definition of a person requiring AOT.

An AOT petition hearing must be convened not more than 28 days after the filing of the petition. If at the time of filing AOT petition the individual was an inpatient at a psychiatric hospital the hearing must be convened within seven days of the filing.

### **Definition of Emergency Situation**

The definition of “emergency situation” is expanded to include “the individual has a mental illness that has impaired his or her judgment so that the individual is unable to understand his or her need for treatment, and that impaired judgment, on the basis of competent clinical opinion, presents a substantial risk of harm to the individual or others in the near future. The bill would eliminate the definition of “psychiatric partial hospitalization program.”

### **Definition of a Person Requiring AOT**

The definition of a person requiring assisted outpatient treatment (AOT) is expanded to include “an individual who has mental illness, whose understanding of the need for treatment is impaired to the point he or she is unlikely to *voluntarily participate in or adhere to treatment* that has been determined necessary to prevent a relapse or harmful deterioration of his or her condition, and whose noncompliance with treatment has been a factor in the individual’s placement in a psychiatric hospital, prison, or jail at least 2 times within the last 48 months or whose noncompliance with treatment has been a factor in the individual committing 1 or more acts, attempts, or threats of serious violent behavior within the last 48 months.” The bill has removed “currently noncompliant with treatment that has been recommended by a mental health professional” requirement for AOT petitions.

### **Assisted Outpatient Treatment**

Assisted outpatient treatment will enable the probate court to order an individual to receive outpatient treatment through community mental health or other service provider to assist the individual to live and function in the community. AOT may include case management service but is not required to provide care coordination. Assisted outpatient treatment may also include 1 or more of the following: medication, blood

test or urinalysis to determine compliance with prescribed medication, individual or group therapy, day or partial day programming, vocational, educational, or self-help training, assertive community treatment team services, alcohol or substance use disorder treatment, counseling, periodic substance testing, supervision of living arrangements, and any other services within a local or unified service mental health disorder treatment plan. The bill would allow assisted outpatient treatment to be combined with hospitalization.

The bill requires when creating and developing the AOT order that the court consider any preference or medication experience reported by the individual or designated representative, any direction included in an existing durable power of attorney or advanced directive. Before an AOT order expires, if the individual has not previously designated a patient advocate or executed a durable power of attorney or advanced directive, then the responsible community mental health services program will ascertain whether the individual desired to do so, and if so, direct the individual to appropriate community resources for assistance. If an existing durable power of attorney or advance directive is in conflict with an AOT order then the AOT order would have to be reviewed for possible adjustment by a psychiatrist not previously involved with developing the AOT order. If there is a conflict, the court is required to state the court findings on the record, or in writing if the court took the matter under advisement, including reasons for the conflict.

#### **AOT Clinical Certificate Exemption**

AOT petition may assert that the individual should receive assisted outpatient treatment and would not require a clinical certificate of a physician or licensed psychologist transmitted to the court. However, petitions requesting hospitalization continue to require clinical certificates.

#### **AOT Legal Representation**

The Mental Health Code specifies that every individual who is the subject of a petition is entitled to be represented by legal counsel. The individual named in an AOT petition has the right to be present at all hearings, a right that may be waived with a signed statement, and may stipulate to the entry of any AOT order for treatment.

#### **AOT Physical Examinations**

The individual named in an AOT petition who did not have a clinical certificate could not be found to require treatment unless at least one physician or licensed psychologist, and one psychiatrist who had personally examined the individual, testified, in person or by

written deposition at the hearing. Under the bill, these required examinations would be arranged by the court and the local community mental health services program, or other entity designated by Department of Health and Human Services.

### **AOT Non-compliance and Peace Officer Role**

During the period of an order for AOT or a combination of hospitalization, if the agency or mental health professional who is supervising an individual's assisted AOT determines that the individual is not complying with the court order, the supervising agency or mental health professional shall notify the court immediately.

The court may require 1 or more of the following, without a hearing:

- a) Individual be taken to the community mental health preadmission screening unit.
- b) Individual hospitalized for a period of not more than 10 days.
- c) Upon recommendation by community mental health services, the individual hospitalized for a period of more than 10 days, but not longer than the duration of the order for AOT or a combination of hospitalization and AOT, or not longer than 90 days, whichever is less.

The court may direct peace officers to transport the individual to a designated facility or a preadmission screening unit, as applicable, and the court may specify conditions under which the individual may return to AOT before the order expires.

For a complete analysis of HB4674, visit <http://legislature.mi.gov/doc.aspx?2015-HB-4674>.

## ***Legislative Update***

*By Todd Tennis, Capitol Services, Inc.*

After several years of debate and a highly unsuccessful ballot proposal, the Michigan Legislature has passed a plan to address transportation funding. The House and Senate have created a plan that Governor Snyder has agreed to sign that will phase in increases to transportation funding over the next several years. However, the plan also contains a policy that could spell long-term problems for the state's General Fund.

The Legislature is also working on a number of other issues that it hopes to address before the end of the year, including an update of Michigan's energy policy, reforms to the Detroit Public School System, and changes to the state's parole system. Pending issues of most interest to

ELDRS include legislation dealing with fiduciary access to digital assets and the granting of police powers to DHHS inspectors.

### **Digital Assets Bill Moves in House**

In October, after a great deal of discussion and modification, Rep. Anthony Forlini (R-Harrison Twp.) introduced a new version of the digital assets' legislation. House Bill 5034 incorporates changes made by the Uniform Law Commission and tailored to Michigan law by ELDRS and the Probate Section. It also represents an agreement that is supported by both the ULC and the technology industry.

On Nov. 3, the House Communication and Technology Committee held a hearing on the bill where ELDRS' Council Member Howard Collens explained the details to the committee. The committee is expected to take the bill up for a vote next week. Rep. Forlini is hopeful that the bill can be passed by the House and acted on by the Senate this year. If so, it would make Michigan the first state to have adopted digital assets legislation based on most recent ULC draft.

### **ABLE Act Signed into Law**

Legislation designed to enable persons with disabilities to open accounts to pay for qualified medical expenses was signed into law on Oct. 28 by Lt. Gov. Calley. Known as the ABLE Act, House Bills 4542-4544, sponsored by Rep. Anthony Forlini (R-Harrison Twp.) and Senate Bill 360, sponsored by Sen. Rebekah Warren (D-Ann Arbor) were officially enacted as Public Acts 160-163 of 2015. The Public Acts were enrolled on Nov. 3, and will take effect 90 days after that date.

### **Bills Allowing DHHS Inspectors to be Armed Scheduled for House Hearing**

Senate Bills 384 and 385 would allow the Director of the Department of Human Services to appoint agents to the department's office of Inspector General and grant them limited arrest powers and the ability to carry firearms. The bills had been scheduled for a hearing in the House Criminal Justice Committee but were pulled from the agenda. They have since been rescheduled for a hearing Nov. 10 at 9 a.m.

The bills' sponsors, Sen. Peter MacGregor (R-Rockford) and Sen. Rick Jones (R-Grand Ledge), argue that DHHS inspectors often deal with situations dangerous enough to warrant granting expanded powers and the ability to carry weapons. They cited examples of efforts to shut down Bridge Card trafficking schemes that sometimes have ties to organized crime.

However, the bills have been criticized for allowing DHHS inspectors to have these powers without ensuring proper training. Sen. Coleman Young, Jr. (D-Detroit) said the bills create a new police force without adequate training. Sen. Patrick Colbeck (R-Canton Twp.) argued that the bill follows the worst parts of the Affordable Care Act by being more about control than about providing care.

Senate Bill 384 passed the Senate by a vote of 27-11, and Senate Bill 385 passed 28-10. ELDRS has taken a position opposing the legislation.

### **Vulnerable Adult Abuse Bills Introduced**

A package of bills aimed at increasing penalties for those who commit abuse to a vulnerable adult were introduced recently in the Michigan House. House Bills 4056-4059 would increase the maximum incarceration for first-degree vulnerable adult abuse from 15 to 20 years and for second degree vulnerable adult abuse from four to 10 years. The bills were sponsored by Rep. Hughes (R-White River Twp.), Rep. Leonard (R-DeWitt Twp.), Rep. Bizon (R-Battle Creek) and Rep. Crawford (R-Novi). They were referred to the House Criminal Justice Committee.

### **Legislature Passes Road Fix Plan**

Gov. Snyder and leaders from the Michigan House and Senate have worked for the past several months to find a common-ground solution on transportation funding. As of early October, it seemed like the effort was failing. However, late in the month, the House suddenly put forth a proposal that became the foundation of a final agreement. The Senate adopted the plan with a few modifications, and the House concurred with the Senate changes on November 3. As of this writing, Gov. Snyder has indicated his intent to sign the bills into law.

The House plan will add an additional \$1.2 billion for road construction and maintenance (with about \$60 million being used for public transit). Half of the \$1.2 billion will come from new revenues from an increase in the Motor Fuel Tax of 7.6 cents per gallon and a hike in auto registration fees of approximately 20 percent. The remaining \$600 million will come by shifting that amount from other General Fund expenditures. In addition, the plan offsets the tax increase by increasing the Homestead Property Tax Exemption. With these pieces in place, the General Fund (the unrestricted money that is approximately \$10 billion annually) will have to be cut by \$800 million when this plan is fully phased in.

Added into the road funding plan was a bill that will restrict future Income Tax revenues. Senate Bill 414 creates a formula by which the Michigan Income Tax will be automatically rolled-back in any year in which increases to General Fund revenues outpace inflation by a certain amount set by a formula created in the bill. This would be a similar mechanism to the "Taxpayer Bill of

Rights” law passed in Colorado in 1992. After that state saw massive cuts to state support of higher education and (ironically) road maintenance, voters approved a ballot measure placing the law on hold in 2005.

The House Fiscal Agency estimates that if such a formula had been in place over the past two budget years (years when the economy was pulling out of the Great Recession), it would have mandated a cut in the 2016 Michigan Income Tax from 4.25% to 3.92%. The effect of this would have been a General Fund revenue reduction of nearly \$680 million. Moreover, Senate Bill 414 has no mechanism to allow for the Michigan Income Tax to increase during a decline in the economy. This “ratchet-effect” would prevent the tax rate from increasing to offset economic downturns and has the potential to create perpetual budget difficulties in the future.

This plan to fix the roads—once it is fully phased in—should allow an additional \$1.2 billion annually to be dedicated to road construction and maintenance. But it also has the capability of requiring massive cuts in other areas. Once the initial shift to roads is absorbed, the regular growth in the economy would eventually make up for those cuts. However, as SB 414 becomes law along with the rest of the package, those cuts would never be restored, and there is a great likelihood that more cuts will be necessary in the future.

### *Accessible Home Incentives*

According to the National Muscular Sclerosis Society, SB 395 and HB 4719 would provide an income tax credit for Michigan residents “to make their homes more accessible. Such improvements would increase safety and independence, help prevent falls, increase a taxpayer’s connection to a job and the community, and make caregiving tasks more manageable.” The Society detailed the highlights of the bills as follows:

- The credit would be available to Michigan residents who retrofit an existing home to improve accessibility and provide universal visitability and to Michigan residents who purchase a new, never occupied home that has been designed to increase accessibility and universal visitability.
- Provide up to a \$5,000 non-refundable income tax credit for retrofitting expenses or for a qualifying new home purchase. The total credit issued in the state will be capped annually at \$1 million.
- A credit claimed in a taxable year, but not utilized, may carry forward for up to seven years. If the \$1 million is exhausted in one year, the credit must be reduced on a pro rata basis. An applicant could claim the balance in the following year.

## ***Calendar of Events***

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

### **ELDRS – [www.michbar.org/elderlaw](http://www.michbar.org/elderlaw)**

- December 5, ELDRS Council Meeting, Caroline Dellenbusch PLC, 2944 Fuller Avenue, NE, Suite 100, Grand Rapids, MI 49505, (616) 451-4242, at 10 a.m.
- January 9, ELDRS Council Meeting, Bond Estate Planning & Elder Law PC, 400 Maple Park Avenue, Suite 402, St. Clair Shores, MI 48081, (586) 447-3717, at 10 a.m.
- February 6, ELDRS Council Meeting, Chalgian & Tripp, 1019 Trowbridge Rd., East Lansing, MI 48823, (517) 332-3800, at 10 a.m.
- March 4, Annual Spring Conference, Inn of St. John, 8:30 a.m.
- October 5-7, Annual Fall Conference, Crystal Mountain Resort, Thompsonville

### **NAELA – [www.naela.org](http://www.naela.org)**

- November 11 - NAELA Lunch & Learn-Practical Ethics: Maintaining a Normal Relationship with Clients with Diminished Capacity, Webinar 1:00-2:00 p.m. EST
- December 2, NAELA Lunch & Learn - The Devil Is in the Details: Housing Issues in Special Needs, Webinar 1:00-2:00 p.m. EST
- January 28-30, 2016 - 2016 NAELA Summit, Island Hotel, 690 Newport Center Dr., Newport Beach, CA, 92660
- April 7-9, 2016 - 2016 Annual Conference, Denver, CO

### **ICLE/SBM – [www.icle.org](http://www.icle.org)**

- November 17 - Experts in Estate Planning Leaving an Education Legacy, Plymouth (Live)
- December 3 - Administration of Trusts Under the Michigan Trust Code, Plymouth (Live)
- January 14, 15, 16 - 40 Hour General Civil Mediation Training, Plymouth (Live)  
29, and 30, 2016
- January 21, 2016 - 25th Annual Drafting Estate Planning Documents, Grand Rapids (Live)
- February 3, 2016 - Drafting an Estate Plan for an Estate Under \$5 Million, Plymouth (Live)
- February 18, 2016 - 25th Annual Drafting Estate Planning Documents, Plymouth (Live)