

ELDRS Update

Fall 2023, Volume XIII, Issue 3

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, Editor, at christine@caswellpllc.com.

From the Chair

By Maria Messina Wiersma, Chalgian and Tripp Law Offices, PLLC, Southfield



Welcome to the 2023-2024 term of the Elder Law and Disability Rights Section. I have the honor of serving the Section as Chair for the next year. As anyone who has been involved in ELDRS knows, we have such a special group of attorneys

who are enormously generous with their time, knowledge, passion, and commitment. Nowhere is this more evident than at our annual Fall Conference. Congratulations to Susie Chalgian and the Fall Conference committee for hosting another successful event. Boyne Mountain was the perfect backdrop for an intimate conference filled with the latest updates, new insights, and the gathering of established colleagues and new friends. The camaraderie you will find in ELDRS makes it a truly unique and welcoming group. I am so proud to be a part of this Section and to follow in the footsteps of the exceptional leaders who have come before me. I hope to live up to their legacies.

My goal for the ELDRS Section this year is **balance**.

At our Fall Conference, I borrowed a term from the Big 10 Conference and spoke of *Legends and Leaders*. The continued strength of the Section depends on maintaining a balance of our seasoned members who bring with them experience and institutional knowledge and our emerging new leaders who bring innovative ideas and insight. This year our nominating committee brought back two former council members who have made meaningful contributions to the Section over the years. Our new treasurer is a past chair. Also joining Council is a vibrant young attorney who is already proving herself a leader in the elder law field. I look forward to seeing what we can accomplish together.

Save the Dates

- **Spring(ish) Conference**
February 23, 2024
Kellogg Center, East Lansing

Note: 2024 Council Meetings will change to Fridays at noon

The need for balance applies to the Section's focus, as well. Historically, ELDRS has been a collaboration of private and non-profit attorneys advocating for issues affecting all older adults and persons with disabilities. Due to changes in regulations, erroneous application of policies, and increased opposition by DHHS, the attention of the Section has shifted toward Medicaid planning advocacy. There is no question that this will continue to be a large part of the work done by this Section. However, some of the initial objectives have been overshadowed by the time and effort dedicated to these issues. In recent years, the creation of the Disability Rights Committee has helped to bring focus back on the disability part of Elder Law and Disability Rights. Inspired by the success of that committee, I have established a new non-profit/public interest committee to invite our non-profit partners back to the table. The opportunity for private and non-profit elder law attorneys to share ideas and resources promises to further strengthen the Section and benefit our clients.

Furthering my attempts to strive for balance, this is the year members can reclaim their Saturday mornings. A poll at Fall Conference demonstrated a desire to move Council meetings to the workday, so we will be scheduling most of the monthly Council meetings for the second Friday of the month at noon. We are bringing back some in-person meetings as well, with three meetings scheduled in Lansing, Grand Rapids, and the Metro Detroit area this year. It is my hope that this change helps members improve their own work-life balance and allows more members to attend meetings and participate in the Section.

The greatest resource of the Elder Law and Disability Rights Section is its members. I encourage all of you to participate in ways that are meaningful to you and that fit into your schedule. Join us at our monthly meetings to stay up to date on relevant legislation and Section events. Consider sharing your voice with an article for our newsletter. Contribute your time and talent to one of our webinars. Present at our Fall or Spring conferences. Participate on one of our many committees to effect real change in the policies and advocacy of ELDRS. Not only will you be giving back to the Section and the legal profession, but becoming involved in ELDRS reaps the benefits of mentorship, camaraderie, and networking. If you are interested in joining any of the following committees, reach out to me for information.

- Conference Committee
- Disability Rights Committee
- Legislative Committee
- Litigation Committee
- Membership and Education Committee
- Administrative Committee
- Wayne County Probate Court Committee
- Eldercares Coordination Committee
- Non-profit and Public Interest Committee

I look forward to working with you all in the year ahead.

2023-24 Council

Executive Committee

- Chair: **Maria R. Messina Wiersma**
- Chair-Elect: **Raymond A. Harris**
- Secretary: **Susan Lucile Chalgian**
- Treasurer: **Sanford J. Mall**

New Council Members with terms ending in 2026

- **Howard H. Collens**
- **Kelli Michelle King-Penner**
- **Beth A. Swagman**

Current Council Members

Antonia B. Harbin, Nadia Dionne Vann, Nicholas James Ryan, Terri Lynn Winegarden, Karen Willis, Jill J. Babcock, Kimberly Parks, Shannon Kathleen DeWall, Catherine Hodge Jacobs, Erin Elizabeth Mortenson, Amanda Necole Murray, and Charles S. Ofstein

Thanks to outgoing members **Theresa Orlaske-Rich** and **Tracey Ann Rowens** for each serving six years on Council. Congratulations to Theresa as the new mayor of Farmington Hills.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Editor's Note: At the time of publication, the legislature has already adjourned for 2023.

Elder Abuse Task Force Recommendations Moving in Legislature

Attorney General Dana Nessel created the Elder Abuse Task Force during her first term in office. The Task Force, made up of lawmakers, attorneys, advocates, and experts from around Michigan, has presented several proposals to the Michigan Legislature with the goal of protecting vulnerable adults. This fall, two of those proposals are receiving significant attention: adoption of a Uniform Power of Attorney Act and passage of a package of guardianship reform legislation.

House bills 4644-4646, a package of legislation that creates a new Uniform Power of Attorney Act, passed the House earlier this year. The bills were reported out of the Senate Civil Rights, Judiciary and Public Safety Committee in mid-October, and passed the Michigan Senate on October 24. ELDRS submitted testimony expressing two major concerns with the package. First, we suggested that instead of creating a freestanding act, the changes be incorporated into the Estates and Protected Individuals Code (EPIC). The ELDRS Council agreed that such a change would reduce potential confusion with elements concerning powers of attorney spread between two separate public acts.

Second, we took issue with the creation of a statutory form for the creation of a power of attorney. Proponents of the change argue that a statutory form will reduce delays in processing requests from financial institutions, health care providers, and other vendors. The ELDRS Council, however, expressed concern that a statutory form might actually make it easier to commit fraud and abuse by making it less likely that a court or other third party would be able to examine the POA before it was used to implement changes that could harm the principal.

Unfortunately, the bills were not amended to reflect these suggestions. The recommendations of the Elder Abuse Task Force did not support the recommended changes by the ELDRS Council, and the legislature sided with the Attorney General on those points. The bills were enrolled by the House and are awaiting the Governor's signature to become law. Governor Whitmer is expected to sign the bills into law sometime in the next few weeks.

Guardianship Reform Package Passes House

Another part of the Attorney General's Elder Abuse Task Force legislative recommendations is a package of bills seeking to make several changes to the regulation of guardians and conservators in Michigan. House Bills 4909-4912 would reform guardianship regulation in several ways, including:

- Certification for prospective guardians and conservators;
- The creation of a Guardian and Conservator Certification Advisory Council;
- More specific guidelines on suitability of potential guardians and conservators;
- Increased requirements for guardians regarding visitations and reporting;
- Modification to procedures for the appointment of emergency guardians, temporary guardians, and guardians ad litem.

Since the initial bills were introduced, a fifth bill, House Bill 5047, was introduced by Rep. Betsy Coffia (D-Traverse City). HB 5047 would create the Office of State Guardian as an independent agency within the Department of Health and Human Services. Initially, the office was intended to be housed in the Supreme Court Administrative Office, but the Supreme Court deemed that it would be inappropriate for the Judicial branch to perform a regulatory function that would normally be the purview of the Executive branch. For now, the legislation would house the Office in MDHHS, although there has been talk that it might be a better fit in other parts of state government, or even as a free-standing contract with a third party.

In any event, the Office would be responsible for the certification of professional guardians and conservators. An Office of State Guardian Board would also be created to oversee the office's functions. The Board would determine minimum standards for licensure of professional

guardians and conservators; establish processes for regulating licensees and managing complaints; and promulgate rules concerning discipline of professional guardians and conservators who fail to comply with minimum standards.

The bills passed the House on October 24 and, as of this writing, are awaiting a hearing in the Senate Civil Rights, Judiciary and Public Safety Committee. It is unclear if they will be taken up before the end of the year since they are currently being reviewed by the executive office to determine necessary funding and staffing for the proposed Office of State Guardian. It is still possible the bills might move before the legislature adjourns, but they could be held over until early next year.

The ADA and the DOJ

By Jill Babcock, Detroit

Editor' Note: ICLE held an ADA Accommodation Workshop in Plymouth which will be available for streaming on November 23

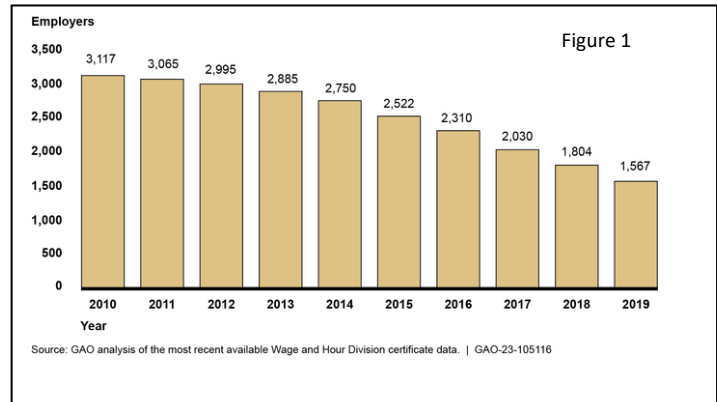
https://www.icle.org/modules/store/seminars/schedule.aspx?product_code=2023CK5347

The Sub-minimum Wage Debacle

- As mentioned in the 2022 Fall edition of the *ELDRS Update*, October is National Disabled Employee Awareness Month. Though the month brings recognition to the workplace contribution of people with disabilities (PwD), one topic not usually discussed is the subminimum wage variance.
- The federal government classifies disability as a protected class. This means that federal programs and services are barred from discriminating against a person because of disability for housing, employment, healthcare,¹ and transportation, to name a few. This prohibition on discrimination extends to state/local governments and private entities through civil rights acts such as the ADA, the Rehabilitation Act of 1973, and various other laws and regulations.
- So how can §14(c) of the Fair Labor Standards Act exist? §14(c) is the provision that allows employers to pay PwD a lower-than minimum wage for the same work as an able-bodied employee, basing work on productivity instead of time. Disability is the ONLY group not subject to the minimum wage requirement. §14(c) allows a business to apply for a certificate to disregard the minimum wage in certain situations.

¹ Such discrimination is still widespread; even with provisions in §504 of the Rehabilitations Act (see *Cummings v Premier Rehab Keller, PLLC* No.20-219), enactment of the ADA, and §1557 of the ACA access to healthcare for people with disabilities can be difficult.

- Holders of §14(c) certificates, issued by the Wages & Hours Division of the US Department of Labor, are allowed to pay sub-minimum wages for PwD.² The application is complex and purportedly attempts to ensure that employees with disabilities are paid commensurately as able-bodied co-workers. However, the Government Accounting Office (GAO) faulted the US Department of Labor for its lack of oversight of the program³ leading to abuses. The Biden administration issued an executive order in April 2021



raising the minimum wage for federal contractors to \$15/hr, regardless of a §14(c) certificate, and more than 14 states have disallowed resident businesses to use the §14(c) variance. As part of its report, the GAO analyzed the trend of §14(c) certifications (Figure 1) and a found a decrease primarily because of such actions.⁴

- The GAO report also showed that nearly 1,000 employers throughout the country still hold §14(c) certificates, employing nearly 50,000 employees with disabilities of which 51% make less than \$3.50/hr.⁵ Most work in “sheltered workshops” segregated from their able-bodied co-workers.⁶ Worse, 66% of employers who hold §14(c) certificates fail to comply with the Fair Labor Standards Act requirements resulting in \$15 million not paid to PwD employees.⁷
- In Michigan, the Disability Rights Network (formerly MPAS) developed a report in 2014 analyzing §14(c). It found Community Mental Health Program Services reported 8,131 PwD with developmental disabilities or mental health issues were employed though 68% made less than minimum wage.⁸ At the time of the report, 47% of §14(c) employees in Michigan were making less than \$2/hr.⁹ As of October 1, 2023, there were still Michigan businesses employing 806 PwD with §14(c) certificates.¹⁰ (This is down from 1,704 businesses in 2014).¹¹
- A major reason Congress adopted the ADA was to prohibit discrimination “from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and

² Form WH-226, <https://www.dol.gov/agencies/whd/forms/wh226>

³ <https://www.gao.gov/products/gao-23-105116>

⁴ *Id.*

⁵ *Id.*

⁶ https://www.ndrn.org/wp-content/uploads/2019/03/Beyond_Segregated_and_Exploited.pdf

⁷ <https://browngold.com/blog/unfair-labor-standards-act-disabilities/>

⁸ <https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/Keeping-Michigan-Healthy/Mental-Health/Development-Disability/Council-Resources/EmploymentFirstinMichigan.pdf?rev=5cacdab7feb147c381e3521ab168c71d>

⁹ *Id.*

¹⁰ <https://www.dol.gov/agencies/whd/workers-with-disabilities/section-14c/certificate-holders>

¹¹ *Id.* at 8.

contribute to society.’ [Yet] the statute books still contain a law that itself discriminates against people with disabilities, reflects an overprotective policy towards them, and encourages segregation and relegation to lesser jobs.”¹²

So, happy National Disabled Employee Awareness Month.

Wayne County Probate Court

A Remotely Accessible Court

By Antonia Harbin-Lamb, Neighborhood Legal Services Michigan-Elder Law and Advocacy Center, Redford

The ELDRS Council - Wayne County Probate Court Subcommittee was created to address concerns and provide suggestions to the Wayne County Probate Court, which has become a completely remotely accessible court. Currently, most hearings are held on Zoom and filings are electronic. However, there are still opportunities to visit the court. These options exist for limited emergency in-person filings (emergency matters are specified on the website) or limited in-person court hearings.

The court’s working hours are Monday through Friday, during the hours listed to the right, and the court only accepts pleadings and documents for filing during those times. Detailed Information regarding filing at the probate court is available on the website with instructional videos showing how to complete the forms at <https://www.wcpc.us/>. The website also includes information on court closures and a chart on processing timelines/expectations and provides information on how you can contact the court if you have issues with filings.

Wayne Co. Probate Court Hours

Monday - Friday

Filing Hours

8:00am - 4:00pm

Customer Service Hours

8:00am - 12:30pm and

1:30pm - 4:00pm

Hours of Staff Operation

8:00am - 12:30pm and

1:30pm - 4:30pm

The subcommittee is considering additional training with Probate Registrar Jennifer Parmalee, which may be forthcoming. The next subcommittee meeting is to discuss Probate Court updates and solutions to any current issues is December 7, 2023.

¹² https://www.michigan.gov/-/media/Project/Websites/mdhhs/Folder2/Folder88/Folder1/Folder188/6-25-12_Bagenstos.pdf?rev=d9996895345043d2adb259f6572ed7dc

Eldercaring Update

By Kimberly A. Parks, Bassett Murray Law Group, PLLC, Ann Arbor

The Eldercaring Coordination Forms Committee was established at the request of the Southeast Michigan Senior Regional Collaborative (SRC). The SRC spearheaded the development of an Eldercaring Coordination program in Michigan.

Eldercaring Coordination is an alternative to mediation for high-conflict families, typically in the context of guardianship and conservatorship disputes. Since the introduction of Eldercaring Coordination, four cases have been referred to the program: Two in Washtenaw County and two in Oakland County.

The Forms Committee reviewed the draft court forms and provided feedback prior to the forms being submitted to the State Court Administrative Office (SCAO) for review. The current drafts have now been submitted to the SCAO forms review committee.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

Council Meetings

Note: Starting in 2024, Council meetings will be held on the second Friday of the month at noon. There will also be some in-person options which will be announced later.

- Saturday, December 2, 2023 – 10 am - 12 pm, Zoom
Register in advance for this meeting:
<https://us06web.zoom.us/meeting/register/tZ0sduurqzMoE9ODFkDLdmlIqQUF4aiPaIGI>
- No January Meeting
- Friday, February 9, 2024, 12 pm - 2pm, Zoom
Register in advance for this meeting:
<https://us06web.zoom.us/meeting/register/tZAodQgsrDguGtEsRK2m4npl8HdW3XTT0FN->
- Friday, March 8, 2024, 12 pm - 2pm, Zoom
Register in advance for this meeting:
<https://us06web.zoom.us/meeting/register/tZUufuuhqjwuG9xJKrQMc2bCEX6MYY1sHsfX>

Council Spring-ish Conference

Due to availability, the ELDRS 2024 Spring Conference will be held early next year:

- Friday, February 23, 2024, Kellogg Center, East Lansing

NAELA - www.naela.org

- Social Security in Your Practice – 3-Day Virtual Program
 - November 2, 2 - 5:30 pm ET
 - November 9, 2 - 5:15 pm ET
 - November 16, 2 - 5:30 pm ET
- November 14 - Revenue Ruling 2023-2: Setting the Record Straight, Webinar - 4-5 pm ET
- December 7 - Lunch & Learn Webinar: Continuing Care Retirement Communities, Presenter, Yvonne Troya, University of California Hasting College of Law. 1-2 pm, ET

ICLE/SBM – www.icle.org

- Dec. 5 - Handling Contested Probate Proceedings. Livestream
- Dec. 7 - Ethics Update 2023. Livestream
- March 5, 2024 - Negotiating and Drafting a Property Settlement Agreement. Livestream
- March 12, 2024 - Drafting an Estate Plan for an Estate Under \$5 Million. Livestream