

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.

Save the Date: ELDRS' Fall Conference

By Angela Hentkowski, Steward & Sheridan, P.L.C., Ishpeming

The 2016 ELDRS' Fall Conference will be held October 5-7 at Crystal Mountain in Thompsonville.

This year's keynote speakers are Bradley J. Frigon and Steve Riley. Mr. Frigon is the Past-President of the National Academy of Elder Law Attorneys, appointed member of the Special Needs Alliance, a Certified Elder Law Attorney (CELA), a member of the Council of Advanced Practitioners (CAP), a member of the Colorado Bar Association, a Fellow in the Kansas Bar Association, a board member of the Colorado Fund for People with Disabilities and a Fellow of the American College of Trust and Estate Counsel (ACTEC). He has been practicing for over 30 years and has extensive experience in estate planning, elder law, special needs planning, probate and tax matters. In addition, Mr. Frigon is an adjunct professor at Stetson University College of Law, the co-editor of content for the Special Needs Module for ElderCounsel, a nationally recognized speaker, author of numerous publications including co-author of "Fundamentals of Special Needs Trusts," and has been quoted in the *Wall Street Journal*, MSN Money, Kiplinger Retirement Report, and Bloomberg.

Mr. Riley has coached attorneys for more than 15 years. His one-on-one coaching focuses on top-producing attorneys committed to taking their practices to new levels of excellence, profit, and personal success. He also presents at group coaching workshops around the country for individual law firms, state bar associations, and other legal organizations. In addition, Mr. Riley is an award-winning attorney. He built his estate planning practice into a million-dollar business using innovative management and marketing skills. The bulk of his client base was developed through word-of-mouth referrals from highly satisfied clients and a network of legal and financial professionals who trust Mr. Riley's legal expertise and integrity.

There will also be intermediate sessions and advanced sessions, a discussion on ADA issues, as well as ELDRS' own experts.

Fiduciary Access to Digital Assets Becomes Law in Michigan

By Howard H. Collens, Galloway and Collens, PLLC, Huntington Woods

The use of the internet in all segments of daily life is a reality of the 21st Century. From all varieties of commerce to social networking, storage of photos and data in the cloud, to sending emails, texts and photos, there is not a time when someone is not engaging in the use of the internet. It is also true that every day, people are becoming incapacitated or dying. Michigan law had not directly addressed the intersection of these two realities.

After a couple of years of legislative starts and stops, the Michigan Legislature passed, and the Governor signed into law, the Fiduciary Access to Digital Assets Act (Michigan FADAA). Public Act 59 of 2016, which was based on the Revised Uniform Fiduciary Access to Digital Assets Act promulgated by the Uniform Law Commission, affords users of a broad variety of digital assets to name a fiduciary to manage those assets upon incapacity or after death. The Michigan FADAA authorizes a fiduciary, including agents under powers of attorney, guardians and conservators, personal representatives in decedent's estates, and trustees of trusts, to access and utilize the incapacitated or deceased individual's online assets to the extent permitted. Michigan FADAA recognizes the unique nature of Michigan probate practice and extends the possibility of fiduciary access to cover special fiduciaries, plenary guardians, partial guardians, as well as special conservators.

A user of digital assets now has the ability to identify who should serve as the fiduciary and the scope of access to the digital assets that the fiduciary should enjoy. A broad range of possibilities exist as the user may grant full access or may require the digital assets to be deleted and accounts terminated.

Using a newly created device, known as an "online tool," users may identify their preferred fiduciaries directly with the digital custodian. Digital custodians are typically the service providers such as Google, Yahoo, AOL, a bank that allows online access, or cloud storage. The user can establish, through the online tool, whether the digital assets should or should not be disclosed to a third person. An example of an online tool that is already up and running is Google's Inactive Account Manager.

If a user has utilized an online tool that meets the statutory requirements, it will supersede the user's selection of fiduciary and level of disclosure articulated in other documents like powers of attorney, wills, and/or trusts. This priority afforded to online tools is a potential trap that attorneys must be keen to. It is important to ask if a client has filled out an online tool and to determine if it matches the intent placed in the client's estate planning documents. If not, the elections made in the online tool may need to be canceled.

Michigan FADAA rewards those who plan and may punish those who don't. The statute identifies two significant categories of digital assets: Catalogue of electronic communications and Content of electronic communications. Consider a user's email to help understand the difference. The catalogue of the email is the sender, the recipient, the date, and time of the email. The content is the subject line and the body of the email.

Depending on whether the user has used an online tool and/or prepared a written estate plan directing who will serve as fiduciary and what level of access that fiduciary should have, access to the entirety of the digital assets may be limited. If a user has no written plan—such as when a guardian or conservator is appointed—the fiduciary will be limited to access to the catalogue of the digital assets. If the user has a written plan, but it does not specify the breadth of access to the digital assets, the fiduciary may also be limited to access to the catalogue.

A user who hopes to grant broad access to his or her digital assets immediately, upon incapacity and after death would be wise to put it in writing in a durable power of attorney, will, and/or trust. It will also be important to identify if accounts are to be terminated and/or deleted.

The new law describes what types of information that a digital custodian can require before granting access to a fiduciary. The Michigan FADAA gives broad discretion to the digital custodian as to what type of access it will grant. The digital custodian may assess a reasonable administrative charge for the cost of disclosing the digital assets.

The terms of service agreements entered into between the digital custodian and the user still apply even with the enactment of the Michigan FADAA. This statute gives fiduciaries no greater rights than a user would possess. Fiduciaries also don't obtain title to the underlying assets. Consider online access to a bank account. A fiduciary with proper authorization will be able to learn about what is in the bank account, but the fiduciary will still need to engage in probate or trust administration to transfer title to the assets in the account itself.

Probate court involvement may still be necessary under Michigan FADAA in a variety of circumstances. The digital custodian can require the fiduciary to obtain a court order if it believes that the request to disclose places an undue burden upon the digital custodian. If a digital custodian fails to disclose the digital assets within 56 days of a properly submitted request, the fiduciary may petition the probate court for relief. Additionally, an interested person may file a petition in the probate court for an order to limit, eliminate, or modify the personal representative's powers with respect to the decedent's digital assets.

As users and their fiduciaries begin to seek and gain access to digital assets under the Michigan FADAA, experience will tell us if the hurdles remain too high for effective, useful access.

Special thanks should be given to Rep. Anthony Forlini for his leadership in helping the digital custodians and users work through often contentious issues to develop a workable

compromise. Support for creating FADAA in Michigan was developed through the collaboration of the Elder Law and Disability Section with the Probate and Estate Planning Section of the State Bar of Michigan. We also had a strong partnership with the Michigan Probate Judges Association and significant input from Probate Registers across the state.

An Early Look: Medigap Subsidies & the Michigan Health Endowment Fund

By Christopher Smith, Chalgian & Tripp Law Offices, PLLC, Southfield

Beginning August 1, 2016, Blue Cross Blue Shield of Michigan (BCBSM) will no longer have a statutory or contractual obligation to subsidize (or even offer) the popular Legacy Medigap plans. As a quick reminder, BCBSM currently offers two different Legacy plans: a basic Plan A (\$40.42) or a very comprehensive Plan C (\$122.86). These plans are substantially subsidized, “community rated” (meaning they are the same price regardless of an individual’s age), not subject to medical underwriting, and are also available to individuals with disabilities under the age of 65.

More than 205,000 Michiganders are estimated to have Legacy Medigap plans. As a result of BCBSM’s conversion to a nonprofit mutual insurance company in 2013, these Michiganders face an uncertain future regarding the future cost of, or even the existence of, these beloved Medigap plans. Frustratingly, in a recent inquiry, BCBSM has indicated that it is still “too early” to release any information regarding the future of the Legacy plans.

There is a small consolation prize for low-income seniors and individuals with disabilities. To become a nonprofit mutual insurance company, BCBSM was required to fund the Michigan Health Endowment Fund. The Fund is required to spend \$120 million over five years to assist individuals who are unable to afford Medigap policies on their own. MCL 550.1653(6). By law, a means test must be applied to these subsidies.

What will these subsidies look like? While the details are still being finalized, Terry Gardner of the Michigan Health Endowment Fund generously provided some early details:

- Although the income levels to receive the subsidies have not yet been set (and must be approved by the Attorney General), the means test will almost certainly be an income-only test. These income level limits will be some percentage above the federal poverty rate.
- The subsidies will be greater in the early years and will decrease over the 4- to 5-year period to help ease the transition to when the subsidies will no longer be available.

- The Michigan Health Endowment Fund is working to pay the rebate directly to insurers (as opposed to reimbursing the low-income beneficiaries).
- The applications will be managed by a vendor contracted by the Michigan Health Endowment Fund.
- An informational website will be available midsummer. Applications for the subsidy will likely take place in early October through early December (roughly the time frame of the annual enrollment period).

Ultimately, we expect most changes to be timed with this year's Medicare's annual enrollment, so keep an eye out for more information in late summer and early fall. If you want to get a head start on how you might advise your clients, please see the Medicare Update on-demand seminar that Norman Harrison, Sanford Mall, and I recently did for ICLE.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Legislature Prepares for a Busy Spring

As the weather finally begins to warm up in Michigan, the State Legislature is focused on its annual ritual of formulating the state budget for next year. The process was over halfway completed by the beginning of May, and most observers expect the final document to be completed by early June. Aside from some critical needs regarding the City of Flint and the Detroit Public Schools (which are primarily being addressed in separate legislation), this year's budget process has been relatively quiet. However, two appropriations issues of interest to ELDRS' members arose in the Governor's Budget Recommendation.

House and Senate Pass Initial Budget Plans

As of May 4, both the Michigan House and Michigan Senate passed their own versions of the 2016-2017 budget. They each made various changes to Gov. Snyder's initial recommendation, but fortunately both chambers have adhered to the Governor's recommendations for funding in areas supported by ELDRS.

First was a proposed increase to senior programs, including the Program of All-Inclusive Care for the Elderly (PACE). The Governor proposed an increase of \$26.5 million to support expansion of the program in Jackson County and Traverse City, and to fund additional slots at current PACE sites. The Governor also recommended an additional \$12 million for the Home and Community Based Waiver program to support inflationary cost increases and a small expansion of available slots. The House and Senate have so far agreed to these increases. The Governor also recommended the continuation of the Alzheimer's Association Pilot Project that provides \$150,000 for enhanced home support services for afflicted individuals and their

families in Monroe, Macomb, and St. Joseph counties. The Senate adopted the Governor's recommendation, but the House temporarily removed the funding. However, it was discovered that was based on inaccurate information, and once that discrepancy was cleared up, the funding was quickly restored.

The most controversial portion of the Governor's budget proposal centered on boilerplate language in the DHHS budget that would have required mental health services to be coordinated by private health plans beginning in 2017. This sparked a firestorm of opposition and concern, and the House and Senate Appropriations Committees have since deleted that section of the boilerplate.

FADAA and CARE Acts Signed into Law

In addition to work on the budget, the Legislature has completed work on two issues that ELDRS was closely following. On March 29, Gov. Snyder signed House Bill 5034 into law, which establishes Michigan's version of the Fiduciary Access to Digital Assets Act (FADAA). According to the enacting section of the bill, it will take effect on June 27. The bill allows for the disposition of digital assets, such as email, web content, and online accounts for persons who are deceased, or access for guardians or conservators to the same types of assets on behalf of persons who have become incapacitated. The bill, sponsored by Rep. Anthony Forlini (R-Harrison Twp.), represents a compromise between online companies and elder law and probate advocates, and reflects an agreement arranged by the Uniform Law Commission. The bill is now Public Act 59 of 2016. (For more information, see Howard Collens' article above.)

The House and Senate also agreed in March on final language for Senate Bill 352 known as the CARE Act. The bill, sponsored by Sen. Margaret O'Brien (R-Portage) and supported by AARP Michigan, aims to give caregivers better information before a friend or loved one leaves the hospital. It requires hospitals to provide training on in-home care procedures for anyone the patient names as a "designated caregiver." While the bill initially passed the Senate last year without much controversy, an amendment was added just before Senate passage that caused a great deal of tumult for the bill in the House.

Hospitals asked for language to be placed into the bill that would immunize them from any liability for actions taken by a designated caregiver. However, the language was written in a way that many plaintiff attorneys feared it might prevent litigation even in cases where the hospital gave improper instructions to the caregiver, leading to injury or death. AARP argued that the language did not provide blanket immunity.

The Legislature sided with AARP's interpretation and moved the bill with the immunity language intact. The House did add an amendment, however, on behalf of the Coalition to

Protect Auto No-Fault (CPAN) aimed at ensuring that a no-fault carrier would not be able to use the CARE Act to deny claims of family caregivers. The bill, as originally written, stated that a “designated caregiver” must volunteer without compensation. There was fear that this could cause problems if a designated caregiver attempted to recover patient attendant fees from a no-fault carrier in the future. The House removed the phrase “without compensation” which will hopefully avoid conflicts with no-fault law. The bill signed into law by Gov. Snyder on April 13 and is now Public Act 85 of 2016.

Bill Introduced to Add Do-Not-Resuscitate to State Issued IDs

On April 12, Rep. Hank Vaupel (R-Howell) introduced HB 5537 that would add to state issued IDs (including driver licenses) a decal if the individual had opted for a “Do Not Resuscitate” or “No Heroic Measures” designation. The bill amends the portion of the act that currently allows decals that indicate if the carrier has a patient advocate.

The ELDRS’ Legislative Committee pointed out that there is no legal definition of “no heroic measures” in state law and directed Capitol Services to inquire where that phrase originated. Rep. Vaupel indicated it was common in the emergency medical field. However, after the Legislative Service Bureau confirmed that the phrase was undefined in state law, Rep. Vaupel told us that he plans to delete it from the bill. The bill was referred to the House Health Policy committee.

House Committee Hears Testimony on Education Seclusion and Restraint Legislation

A package of legislation aiming to prohibit seclusion or restraint of K-12 students in all but emergency situations was given a hearing in the House Education Committee on April 21. Lt. Gov. Calley spoke in favor of the bills (HB 5409-5418) saying they were necessary because too many schools do not closely adhere to current guidelines regarding seclusion and restraint of students. However, some representatives of school administrators expressed concern that the bills could restrict the ability of school personnel to protect students from children who are acting in a manner that could injure themselves or others. The hearing demonstrated the extreme complexity of attempting to provide a state policy that would be appropriate for every situation. A card was submitted on behalf of ELDRS that indicated support for the bills. The committee did not vote on any of the bills in the package.

SSA Raises the Bar on Internet Disability Appeal Applications

By Nancy Berryhill, Deputy Commissioner for Operations, Social Security Administration

The Social Security Administration (SSA) strives to provide world-class, convenient customer service to individuals who come to us for help, including representatives who provide assistance in the process. Since the agency first established an Internet presence in 1993, we have increased and enhanced the services we provide online, including for those appealing a

disability decision. In February 2004, SSA made online filing for disability appeals available with the introduction of the Disability Report (SSA-3441) portion of the internet Disability Appeals Application. In that first year, about 15,000 internet disability reports were filed. In FY 2007, the forms for requesting hearings (HA-501) and reconsiderations (SSA-561) were made available online, and more than 200,000 internet appeals were submitted. The online volumes have increased every year, with over one-million filings in FY 2015, representing 45 percent of all 501/561s and 33 percent of all 3441s.

Earlier this year, SSA released a new and improved version of the Internet Disability Appeals Application. More than 90,000 applicants and representatives conveniently use our online appeals application each month. After listening to customer feedback, the new online process is easier to use and improves the speed and quality of our disability and non-disability decisions. The application allows customers to simultaneously submit either the Request for Reconsideration (i-561) or Request for Hearing by Administrative Law Judge (i-501), along with the Disability Report for Appeals (i-3441), to the Social Security Administration via the Internet.

The new enhancements improve the application's functionality and efficiency to provide better online service to customers as follows:

- Allows customers to submit an appeal request and medical documentation simultaneously.
- Makes third-party information automatically available in all appeal applications within a single session.
- Simplifies the screen language and saves time by propagating information from the appeal request to the disability report.
- Improves navigation and on-screen help links.
- Expands the user base to include customers with a Foreign, Army, Fleet, or Diplomatic Post Office address.
- Allows the user to upload supporting documents to complete the application process, making the entire online process electronic.

In August 2015, SSA hosted a webinar entitled "Internet Disability Appeals Application Revitalizations and Attachment Utility Update." The webinar was designed to demonstrate to advocates, social service agencies, and representatives how to easily navigate the internet application and request their assistance in promoting this improved online service option. The webinar also included a live Q&A session.

The ability to file an appeal online is only one of a wide range of internet services our agency provides. Today people can file online for Title II Social Security retirement and disability benefits, as well as Medicare. In addition, SSA has plans to allow people to initiate Title XVI Supplemental Security Income (SSI) applications online in the future.

Individuals age 18 and over can now open a secure, online mySocialSecurity account to have 24/7 access to their Social Security records. If still working, individuals can check their earnings record for accuracy, obtain future benefit estimates, and access other tools to better plan for retirement. If already receiving monthly benefits, individuals can monitor their payments and make secure changes to their record such as a change of address or direct deposit information.

The agency's suite of online services allows people a choice in how they conduct business with us. For those who do not prefer online services or whose cases may be too complex for an online experience, the traditional office and telephone services remain fully available.

To view the webinar presentation, please visit www.ssa.gov/multimedia/webinars.

To file an appeal, visit <https://www.ssa.gov/disabilityssi/appeal.html>.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- June 4 - ELDRS Council Meeting, Caroline Dellenbusch PLC, 2944 Fuller Avenue, NE, Suite 100, Grand Rapids, MI 49505, (616) 451-4242, @ 10 a.m.
- August 6 - ELDRS Council Meeting, Steward & Sheridan P.L.C., 205 South Main Street, Ishpeming, MI, 49849 (906) 485-6311 @ 10 a.m.
- September 10 - ELDRS Council Meeting, Chalgian & Tripp, E. 1019 Trowbridge Rd., East Lansing, MI 48823, (517) 332-3800 @ 10 a.m.
- October 5-7, Annual Fall Conference, Crystal Mountain Resort, Thompsonville
- October 7, ELDRS Annual Meeting, Crystal Mountain Resort, Thompsonville, 8 a.m.

NAELA – www.naela.org

No Current Events

ICLE/SBM – www.icle.org

- May 11 - Experts in Estate Planning: The Planner's Definitive Guide to Business Entities and Income Tax, Acme (Live)
- May 12-14 - Probate & Estate Planning Institute, 56th Annual, Acme (Live)
- June 17 - Probate & Estate Planning Institute, 56th Annual, Plymouth (Live)
- June 23 - Drafting an Estate Plan for an Estate Under \$5 Million, Plymouth (Live)
- Sept. 8-10, & - 40-Hour General Civil Mediation, Plymouth (Live)
Sept. 30.-Oct. 1

- Sept. 15-16 - Elder Law Institute 2nd Annual, Plymouth (Live)
- Sept. 16 - Veterans' Benefits & Claims: A Practical Approach, Plymouth (Live)

Other Events

- June 8-9 - Neighborhood Legal Services Michigan, Great Lakes Legal Division, Elder Law Mediation Training with Zena Zumeta & Roxanne Chang, WCCC Western Campus, 9555 Haggerty Hwy, Belleville, Michigan 48111, Register: Eventbrite at <https://www.eventbrite.com/e/elder-mediation-training-tickets-20926879861>.