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.

ELDRS Fall Conference

Save the Date

The 18th Annual ELDRS Fall Conference will be held October 2-4, 2013 at the Crystal Mountain Resort in Thompsonville, Michigan. Topics will include Medicare and Medicaid updates, tax issues, VA certification and recertification (qualified applicants only), gerontology issues, and keynote speaker Robert E. King of Legally Nanny, Irvine, California, discussing caregiver contracts. We will be sending e-mail notices to section members when the registration form is available on-line. Please save the dates, and watch the ELDRS Web page at http://www.michbar.org/elderlaw/ for more information.

Changes in Veterans Benefits

By Michael Viterna, Law Office of Michael R. Viterna PLLC

Today there are over 665,000 military veterans in Michigan eligible for federal benefits administered by the Department of Veterans Affairs (VA). It is likely that you will encounter a veteran or his/her family as you provide legal assistance to the elderly and disabled. Receipt of VA health, pension and/or compensation benefits can positively impact the quality of the veteran's life. Unfortunately, even today, many veterans are not fully aware of the benefits to which they may be entitled. This article will discuss benefits available to certain classes of veterans that either have changed or are expected to be modified. Veterans who may be eligible for benefits can be referred to www.va.gov, to a county veteran service office, or to a veteran service organization for additional information or assistance in filing a claim.

1. Vietnam Related Benefits

Vietnam veterans are known to suffer from a number of conditions that have been linked to Agent Orange exposure and too often are not aware that they can receive compensation and no-cost health care for those conditions. Those individuals who spent time on the mainland of Vietnam, as opposed to the waters offshore, are able to receive compensation from VA for

a number of conditions, including: AL amyloidosis; chronic B-cell (hairy) leukemia; diabetes mellitus, type 2; Hodgkin's Disease; ischemic heart disease; multiple myeloma; non-Hodgkin's Lymphoma; Parkinson's Disease; peripheral neuropathy; porphyria cutanea tarda; prostate cancer; respiratory cancers; and soft tissue sarcoma.

The list of disabilities includes two conditions added within the past two years of importance to the elderly but are commonly unknown to the veteran: ischemic heart disease and Parkinson's Disease.

For more information on these conditions and the benefits available, visit the VA's website at http://www.publichealth.va.gov/exposures/agentorange/diseases.asp.

2. Pension Requirements to Change

Veterans of wartime are eligible for a VA pension, including additional monies for housebound status or for aid and attendance. To be eligible, a veteran must meet certain income and asset limitations. While there have been no restrictions against divestment of assets to meet eligibility, change is expected. In response to complaints related to the VA pension program, the Government Accountability Office (GAO) conducted an investigation into possible abuses and released its report on June 6, 2012.[1] The report recommended that Congress should consider establishing a look-back and penalty period for pension claimants who transfer assets for less than fair market value prior to applying, similar to other federally supported means-tested programs. This investigation comes at a time when the VA pension annual expense has grown to $4.3 billion in 2012 from $3.7 billion in 2007.

On the date the GAO report was released, a hearing was held before the Senate Special Committee on Aging. The GAO report, in conjunction with a number of witnesses, combined to outline problems experienced with the pension program as the result of a "growing industry of predatory financial planners and attorneys who are using the Aid and Attendance program to target vulnerable seniors and sell them inappropriate financial instruments." The so-called "pension poachers," as they were dubbed, soon became the recipients of the wrath of the Committee, and promises for change were quickly made.

As a consequence of the June 6, 2012 hearing, and in consideration of the special oversight historically afforded veterans, Senate Bill S.3270 was introduced that would amend Title 38, United States Code, to require the VA to "consider the resources of individuals applying for pension that were recently disposed of by the individuals for less than fair market value when determining the eligibility of such individuals for such pension, and for other purposes." This Bill would also impose a look-back review as is in place for other means-tested programs,

[1] GAO-12-540, Report to Congressional Requesters, Veterans' Pension Benefits. Improvements Needed to Ensure Only Qualified Veterans and Survivors Receive Benefits, May 2012.

such a Medicaid. While this Bill died in the prior Congress, VA can be expected to implement changes in line with GAO's recommendations and take additional steps as it deems necessary to improve oversight over the pension program.

As a consequence of the foregoing, practitioners who assist clients obtain VA pension benefits should be aware that divestment may not be without penalty. It is also worthwhile to note the legal limitations on charging veterans and their dependents for benefit counseling and for applying for those benefits. Fees are permitted, however, in the event an adverse decision results and is appealed, but are subject to the additional limitations of reasonableness and VA accreditation requirements, as outlined in 38 U.S.C. § 5907.

3. Camp Lejeune Disabilities

Military members and dependents that were stationed at Camp Lejeune during the period from June 1957 until March 1987 were exposed to a number of toxins in the base drinking water. Public Law 112-154 was passed August 20, 2012 and provides that those individuals, numbering approximately 500,000, are eligible for no-cost medical care from VA if they were stationed at this Marine Corps base for 30 days or more and suffer from certain conditions, including: cancer of the esophagus, breast, lung, kidney, or bladder; leukemia, multiple myeloma, myelodysplastic syndromes; hepatic steatosis; renal toxicity; scleroderma; neurobehavioral effects, female fertility, and non-Hodgkin's lymphoma.

Individuals who suffer from the identified or similar disabilities should also consider filing a compensation claim with VA. As occurred with the Agent Orange exposure claims from Vietnam veterans, it is likely that the list of disabilities related to the toxic exposure will increase as additional information is developed.

Many valuable benefits are available to our military veterans who served, yet many are either not fully aware of these benefits or elect not to pursue them. This is truly unfortunate. You can render an invaluable service by asking your clients if they are veterans and then advising them to inquire as to their eligibility for VA benefits.

Michael R. Viterna practices in Belleville, Michigan. He retired from the USAF after nearly 33 years and practices nearly exclusively in VA benefits appeals. He is member of the Board of Directors for the National Organization of Veterans Advocates, Inc. and serves as its president and is co-chair of the ABA's Veterans Affairs Committee.

The Need for Mental Health Parity

By Judith Kovach, Ph.D., Licensed Psychologist

The United States has a long history of separating the treatment of mental and physical illnesses, dating back to the days when the severely mentally ill were put in poorhouses, jails and, later, public asylums.

That ended after the deinstitutionalization movement of the 1960s, but the access to services is still far from equal because treatment of mental and emotional disorders is still not on par with medical illness for many people.

Countries like Canada and the United Kingdom, with national health care systems that don't limit access to any services, long ago moved toward merging these two branches of health care, and the Scandinavian countries are known for treating mental illnesses as medical diseases, according to researchers who have studied the various systems.

Over the last ten years, in the United States, research studies examining the link between physical brain abnormalities and disorders like severe depression and schizophrenia have begun to make a strong case that the disorders are manifestations of actual problems in brain circuitry and neurochemistry. These disorders affect behavior and mood, and they look different from neurological disorders like Parkinson's disease or multiple sclerosis in brain imaging. A growing number of studies — and many more are under way — are making the biological connection, redefining the concept of mental illness as brain illness.

The fight for mental health parity legislation in Michigan has gone on for nearly 20 years. The first parity bill was introduced by Rep. Lynn Rivers. Michigan Partners for Parity, a coalition of over 80 organizations was formed about 15 years ago to promote and support mental health parity legislation in Michigan. For many years, even under a Democratic majority, we were unable to even get a bill out of committee because of a powerful organization, the Economic Alliance (EA), which was a partnership among big business, big insurance and big labor united to keep health care costs down. The EA and the UAW opposed parity on the premise that it was too costly and would either bankrupt small businesses or cause employers to stop providing health insurance. This was a problem unique to Michigan. No other state faced union opposition. Partners for Parity commissioned several actuarial studies of projected costs in Michigan. Even when the cost data, consistent with that for the federal plan, indicated a projected maximum cost of less than one-half of 1% without even considering the huge medical cost offsets, the coalition was unable to compete with the power of the Chamber of Commerce on the one hand, and the UAW on the other.

On October 3, 2008, the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 was signed into law. This Federal law required group health insurance plans (those with more than 50 insured employees) that offer coverage for mental illness and substance use disorders to provide those benefits in no more restrictive ways than all other medical and surgical procedures covered by the plan. The Mental Health Parity and Addiction Equity Act does not require group health plans to cover mental health (MH) and substance use disorder (SUD) benefits, but, when plans do cover these benefits, MH and SUD benefits must be covered at levels that are no lower and with treatment limitations that are no more restrictive than would be the case for the other medical and surgical benefits offered by the plan.

After the passage of the federal parity bill, many people believed that a state bill was unnecessary. However, the law applies only to businesses with more than 50 employees, leaving a large number (perhaps as many as 2 million) of Michigan families without mental health coverage.

In the last legislative session, when enough actual real time data was available on both a state-by-state and federal level, it seemed an embarrassment to oppose parity on the basis of cost, and we thought we might finally prevail, but we lost the fight for mental health parity to the supporters of an “autism spectrum only” bill, under the hands-on management and leadership of the Lieutenant Governor.

Under the Affordable Care Act, all policies purchased through the health care exchange (to be established by the federal government in Michigan) will include mental health parity. Only those individuals who purchase policies outside the exchange will not include a parity requirement. No one is sure how many people would not have parity coverage but the number is relatively small and probably does not exceed 100,000. Sen. Shuitmaker (R-Kalamazoo) has re-introduced the parity bill she sponsored last year as SB204. Sen. Warren (D,-Ann Arbor) serves on the new Mental Health Commission and has also come out publicly in support of passing parity. It is the hope of the Parity Coalition that all Michigan citizens will soon have access to affordable mental health care, as well as physical health care.

ELDRS’ Council Seeks Comments on Olmstead Request

ELDRS’ Council Chair Brad Vauter received the following request from The Michigan Olmstead Coalition regarding House Bills 4382, 4383, and 4384. The Council has already voted to support these bills, in part to help close some of the "authority confusion gaps," when these laws intersect, said Vauter. “We have posted our support as required by the State Bar when public policy positions are adopted. Now the Council is being asked to reconsider our support or refine our support.”

Below the Olmstead letter is an opinion from Council Member Dolores Coulter regarding this request and the proposed legislation. The Council would like to hear from more section members about these bills before taking an official stance.

APR 11 2013

THE MICHIGAN *OLMSTEAD* COALITION

Working to Make Community-Based Long Term Care Available To All Who Need It

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April 10, 2013

Mr. Brad Vauter
Elder Law of Michigan
3815 W St. Joseph St.
Suite C-200
Lansing, MI 48917

Dear Brad:

We are writing on behalf of The Michigan Olmstead Coalition to bring your attention to proposed legislative changes for do not resuscitate orders. As chair of the Michigan Bar Association Elder Law and Disability Rights section we ask your committee to review the proposed bills and take appropriate action.

House Bills 4382, 4383 and 4384 seek to authorize guardians to execute do not resuscitate orders for their wards without any finding that the person is terminal or ill or without any court intervention. We are alarmed by this prospect. The Arc of Michigan in conjunction with other advocates for people with disabilities is working to eliminate these bills or have them amended.

We believe the bills could be significantly improved with the following amendment: guardians who wish to authorize do not resuscitate orders for their wards must obtain the signatures of two physicians to state that the ward is eligible for hospice care (not expected to live for six months).

This would protect wards who are young and healthy but for some reason experience a situation such as a serious choking incident that results in their breathing interrupted.

The Michigan *Olmstead* Coalition is a non-partisan, non-profit group that includes the Michigan Disability Rights Coalition; The Arc Michigan; UCP Michigan; Disability Network/Michigan; Area Agencies On Aging Association of Michigan; Michigan Campaign For Quality Care; Michigan Protection and Advocacy Service; Michigan Statewide Independent Living Council; Michigan Developmental Disabilities Council; Michigan Paralyzed Veterans of America; ADAPT of Michigan; Community Housing Network; National Multiple Sclerosis Society-Michigan Chapter; Developmental Disabilities Institute; PHI National; UCP of Metropolitan Detroit; Washtenaw Association for Community Advocacy; Disability Network/Lakeshore; Capital Area Center for Independent Living; Disability Advocates of Kent County; Ann Arbor Center for Independent Living; Disability Network/Mid Michigan; disability Connections; Disability Network/Southwest; Michigan Alliance of Direct Support Professionals, The Disability Network; and the State Long-Term Care Ombudsman.

We do not believe that a guardian should have the authority to authorize a ward's death when that ward is healthy or perhaps has health issues but is not terminal or seriously ill. We believe that an individual's right to remain alive must outweigh the inconvenience of a guardian regarding this irreversible decision.

Could you and your committee assess the proposed bills and take appropriate action? The bills have been heard by the Judiciary committee and we believe they will go forward so action is needed.

Thank you for your attention to this important matter.

Sincerely,

Dohn Hoyle
Executive Director, ARC of MI

Kathleen Brockel
Executive Director, United Cerebral Palsy of MI

To see a better copy of the Olmstead letter, click here.

Opinion from Dolores Coulter, ELDRS Council Member, Grand Blanc

I have some concerns regarding HB 4384 which amends several provisions of EPIC regarding the duties of a GAL and the authority of a guardian to execute a DNR order.

HB 4384 would amend MCL 700.5305 to require the GAL to inform the individual that if a guardian is appointed, the guardian may have the power to execute a DNR order and that he/she has the right to

request a limitation on the guardian's power to execute a DNR order. If meaningful communication is possible, the GAL would also be required to discern if the individual objects to having a DNR order executed on his/her behalf. The problem that I have with this is that a question such as "if a guardian is appointed for you, do you want your guardian to have the authority to execute a DNR order" could not be meaningfully answered without a discussion of what a DNR order involves and under what circumstances the individual might want the guardian to execute such an order on his or her behalf. I question whether the GAL is in the best position to conduct this discussion and whether this is the appropriate context in which to have this discussion. I am also concerned that the proposed ward would misunderstand the inquiry and assume that the person seeking to be appointed as guardian is planning to immediately sign a DNR once appointed. If a guardian is appointed, he/she is required under MCL 700.5314 to consult with the ward, whenever meaningful communication is possible, before making a major decision affecting the ward. Decisions regarding end of life care, including whether a DNR order is appropriate, would certainly be considered a major decision affecting the ward. HB 4384 addresses this in the proposed amendment to 700.5314(d).

HB 4384 would amend MCL 700.5314(d) to require a guardian to follow certain procedures before executing a DNR order. The guardian would be required to visit the ward and, to the extent possible, consult with the ward about executing a DNR order; consult directly with the ward's attending physician as to the medical indications that warrant a DNR order; and review the DNR order with the ward and the attending physician on an annual basis. To further protect the ward's interests, I would suggest that the guardian also be required to inform the ward that the ward has the right to object and if the ward objects, the guardian may not execute a DNR order and that the guardian be required to advise the ward that if a DNR order is entered, he/she has the right to revoke the order at any time. I think these changes to MCL 700.5314 would adequately protect the ward's interests.

Legislative Update

By Todd Tennis and Ellen Hoekstra, Capitol Services, Inc.

It has been an eventful few months in Lansing, even though the 2013-2014 legislative session has only just begun. The first months of 2013 marked the passage of Blue Cross/Blue Shield legislation that reformed the company into a non-profit mutual insurer. The Legislature has also spent a great deal of time working on the budget for the next fiscal year (which begins on Oct. 1, 2013), and issues such as whether or not Michigan will adopt Medicaid Expansion per the Affordable Care Act will have huge implications on funding – especially for programs run by the Department of Community Health. Governor Snyder has also recently announced his intention to make major changes to Michigan's No-Fault Auto insurance law which will be highly controversial. All in all, it is shaping up to be another active year in Michigan government.

Here are some of the issues the Elder Law and Disability Rights Section will be working on in the coming months:

Pooled Trusts

ELDRS has been working with Rep. Kurt Heise (R-Plymouth) on legislation to clarify in-state law on the use of Pooled Trusts. Michele Fuller and Amy Tripp have come to Lansing a number of times to meet with legislators and staff to work on legislative language and to advocate for the legislation. House Bill 4013 was introduced by Representative Heise in January and was scheduled for a hearing in the House Financial Liability Reform Committee on April 25. We are hopeful that the committee will have a favorable vote on the bill within the next several weeks, so it is timely for members to contact their legislators.

HB 4013 will allow for greater quality of life and health care for people with disabilities. This legislation will help resolve a continuing problem for individuals, particularly those 65 and older, in creating and funding a pooled trust account.

New Council and Commission Created by Executive Orders

Governor Snyder has issued two Executive Orders that set up two new bodies to deal with mental health services, both headed by Lt. Governor Calley. The first, and the one likely to be of greatest interest to the Council, is EO 2013-6, which creates the Mental Health and Wellness Commission. While the charge to the Commission is complex, it is to issue a final report by December 20, 2013 and provide advice regarding any gaps in the delivery of mental health services. Areas of focus identified in the EO include long-term care, veterans, and mental and physical health integration.

The Mental Health and Wellness Commission will also coordinate with the second body, the Mental Health Diversion Council, created by EO 2013-7. In addition to the Lt. Governor, Department of Community Health Director Jim Haveman, and one legislator from each caucus were appointed to this second group. The Legislators appointed were Sen. Bruce Caswell (R-Hillsdale), Sen. Rebekah Warren (D-Ann Arbor), Rep. Matt Lori (R-Constantine), and Rep. Phil Cavanagh (D-Redford Twp.). Its goal, as stated in EO 2013-7, is to divert people with mental illness or substance abuse problems out of the criminal justice system and into treatment. The ELDRS Council has been preparing plans to interact with the Council as well as what it will want to say regarding the gaps in mental health services for seniors and individuals with disabilities.

Medicaid Expansion

In late March, the House Appropriations Subcommittee on the Department of Community Health reported out its initial version of the DCH budget bill (HB 4213, introduced by Rep. Lori, R-Constantine). The House subcommittee version of the DCH budget does not include the Governor's proposed Medicaid expansion, which is tied to $1.5 billion in federal funds. The expansion of the income criteria for Medicaid eligibility up to 133% of the federal poverty level would have qualified an additional 320,000 Michigan residents in FY 2013-14, with the anticipated expansion date being January 1, 2014. Under the ACA, the federal government would pay 100% of increased costs until 2017, with the federal matching rate gradually dropping to 90% by 2020.

The version of the DCH budget passed by the House matched the work of the subcommittee and assumed that Michigan will refuse to expand Medicaid. The Senate DCH Subcommittee likewise reported out a version of this budget bill that does not include Medicaid expansion. As of the date this report was written, the full Senate Appropriations Committee did not take up the DCH budget bill, mainly due to controversy over Medicaid expansion. Gov. Snyder continues to call for the Legislature to pass a budget and companion legislation to expand Medicaid, but the outlook for this remains uncertain.

Recently, the state also was forced to turn down $31 million in federal money to set up a joint state-federal health exchange, after previously having turning down a $9 million federal grant to set up an entirely state-run exchange. As a result, the state is now on the hook for $8.3 million to set up the IT infrastructure for a federally run exchange. This additional cost has not been budgeted for. The $9 million grant for a state run exchange died in the House last session after passing the Senate (SB 693 of 2011 – Marleau, R-Lake Orion); the $31 million provision for a joint exchange passed the House this session (HB 4111 – Haveman, R-Holland) but failed to make it through the Senate in time to meet federal guidelines. Whether the Legislature will reverse course and follow the Governor's lead in expanding Medicaid is a question that will likely be answered in May or June as the work on next year's budgets is completed.

Pennsylvania Supreme Court Elder Law Task Force

By John Payne, Garrison LawHouse PC

The Pennsylvania Supreme Court convened an Elder Law Task Force[2] on April 16, 2013. This is a blue-ribbon panel chaired by Justice Debra Todd, charged with reviewing and making recommendations on proposed revisions to the Probate, Estates and Fiduciaries Code and Orphan's Court Rules, monitoring court-appointed fiduciaries, and prevention of elder abuse. The 38-member task force[3] includes judges from all levels of the court system, prosecutors, elder law attorneys, court clerks and other court officials, leaders of organizations that provide services and protection to vulnerable adults such as the Area Agencies on Aging, and social work academics. I received the honor of being appointed to the Task Force and was assigned to the committee on monitoring guardians and their counsel.

Among other issues, the Task Force will address questions about whether power of attorney law should be amended to discourage agents from abusing their powers. Attempts to curb abuse may impair the flexibility of these useful estate-planning documents. The Task Force will also be looking at proposed changes in the statutes and court rules for the nomination, appointment, supervision, compensation, monitoring and removal of guardians by the Orphan's Courts in the various counties. The issues before the Task Force represent delicate balances between underprotecting vulnerable adults from malicious agents and guardians and creating protective mechanisms that hinder and discourage competent and

[2] http://www.pacourts.us/courts/supreme-court/committees/supreme-court-boards/elder-law-task-force
[3] http://www.pacourts.us/assets/files/setting-3093/file-2599.pdf?cb=be6758

well-meaning fiduciaries. The Task Force has an aggressive agenda that will challenge its members to develop new ways of addressing problems that have plagued probate courts since the Elizabethan Era.

Since major probate law and court rule revisions are now pending, the Task Force has an excellent opportunity to influence these changes positively. Participating in this Task Force has brought another task force to mind. Gov. Jennifer Granholm convened the Michigan Medicaid Long-Term Care Task Force (LTCTF) in 2004. It held meetings from June 2004 until May 2005 to examine the long-term care system and recommend changes to improve quality, expand home- and community-based services, and promote "an efficient and effective continuum of LTC services in Michigan."[4] The LTCTF worked hard and made extremely cost-effective and constructive recommendations. However, the concepts introduced, such as "single point of entry" and "money follows the person," have not generally been implemented except as pilot projects. Most incapacitated seniors are still being cared for by unpaid family members with nursing homes as the predominant alternative when care needs exceed the ability of family caregivers. The Michigan legislature has been unwilling to implement any new model for long-term care. It has continued to view family caregivers with suspicion. The major "reform" has been to institute Medicaid estate recovery so that when the family is forced to place the senior in a nursing home, the state can seize the home from the Medicaid recipient's probate estate when he or she passes away.

The Michigan Long Term Care Supports and Services Advisory Commission was established in the wake of the LTCTF by Gov. Granholm. The Commission was intended to be a forum for the discussion of issues relating to the provision of long-term care supports and services. However, the Commission is dominated by long-term care industry insiders. There are few advocates for LTC consumers and no elder law attorneys on the Commission. It is hard to see significant improvement in the long-term care services provided to incapacitated Michigan seniors and other vulnerable adults as a result of the LTCTF's efforts. Changes have been in extremely small increments and terribly slow in coming.
The ELDRS Fall Conference may give LTC consumer advocates and Section members a chance to launch a renewed effort to implement the LTCTF recommendations. It has been eight years since the LTCTF issued its ground-breaking report. Michigan's failure to make meaningful progress should be the subject of a renewed public-relations and lobbying campaign. If other Section members and advocates are interested, perhaps a time to get together could be arranged during the Fall Conference at Crystal Mountain.

[4] "Modernizing Michigan Medicaid Long-Term Care," report of the Michigan Medicaid Long-Term Care Task Force, May 2005, http://www.michigan.gov/documents/miseniors/Final_LTC_Task_Force_Report_344103_7.pdf.

Checking Accounts: The "Dos" and "Don'ts" of Titling© - One Attorney's Opinion

By the Elder Law Firm of Anderson Associates, P.C.

Opening checking accounts may seem like a simple matter. This is not true. There are unexpected death-time probate, guardianship, financial scam, and Medicaid consequences resulting from how you title your checking account. This article is based on our firm's 28 years of experience in assisting over 8,000 families to avoid probate, guardianship, financial scams, and Medicaid loss.

We recommend the use of two checking account titling options to minimize unexpected consequences: (1) Joint Accounts with a trusted child or other loved one and (2) a Living Trust with the trusted child or other loved one as a co-trustee.

1. **Joint Account Strategy**

   By naming a trusted child as a joint owner, the child will be able to pay the parent's bills during a parent's incapacity and then after the parent's death without delay. This arrangement will also avoid the need of guardianship as to property (called a conservatorship). Since a joint account incorporates the feature of survivorship, death-time probate and Medicaid Estate Recovery in Michigan is avoided. Wisconsin, however, may impose Medicaid Estate Recovery against joint accounts (see the Trust Solution below). Also, a joint account with a trusted child will enable the trusted child to monitor the parent's account to detect and prevent financial scams.

   - **Use of a Family Sharing Agreement with a Joint Account.**
     Parents with more than one child can name their most trustworthy child as the joint owner rather than naming all their children. To protect the parent's wishes to treat all children equally upon the parent's death, the named child will sign a Family Sharing Agreement – requiring the child to share with her/his siblings. The Agreement will also require the named child to only handle the account in the parents' best interest, as a fiduciary.

   - **Disadvantages of a Joint Account**
     Accounts which add a child's name present three disadvantages which can be minimized and one disadvantage in Wisconsin which cannot. The three problems include exposing a parent's funds to the child's avarice, creditors, and divorce claims. These risks can be minimized by restricting the number of additional owners to only one, having the named child sign an agreement to only use funds for the benefit of the parent(s), and restricting the amount of funds in the affected checking account. In Wisconsin, its Medicaid Estate Recovery program ignores the survivorship feature of a joint account and seeks to capture the remaining funds in a Medicaid recipient's joint account after the recipient's death. Wis. Stat. Section 867.035.

- **Setting up Joint Accounts for Married Couples**
  Each spouse should have a separate checking account, each account with a separate social security number (SSN) for tax reporting and automatic deposits of each spouse's separate social security, pension, and annuity checks, if applicable. Of course, the other spouse, along with a trusted child, should be named as joint owners. For Medicaid reasons, do not commingle automatic deposits of social security, pension, and annuity checks of both spouses into one checking account. Also, for Medicaid reasons, automatic deposit of all monthly checks of one spouse should be set up in *one* account, not into two accounts.

  Do not, under any circumstances, receive monthly social security or pension checks by mail.

  Example: John and Mary are married. John receives social security and a pension. Mary receives social security and an annuity check from an annuitized annuity (not from a former employer). The correct way to arrange checking accounts and payments is as follows:

  Mary opens a separate checking account at Friendly Credit Union titled as: "Mary, John and Sally, joint tenants with survivorship." Mary's SSN is used for tax reporting. Her social security and annuity checks are auto deposited into this account. John and Mary also have three other children whom they want to inherit. Sally signs a Sharing Agreement to share with her three siblings upon John and Mary's passing. In the Sharing Agreement, Sally also agrees that she will only use the funds for her parents' benefit and at their direction. Sally is given on-line access to the account to monitor checks so that scams can be minimized.

  John opens a separate joint checking account at Happy Bank titled as "John, Mary and Sally, joint tenants with survivorship." John's SSN is used on this account for tax reporting. His social security and pension checks are automatically deposited into this account. Sally's Sharing Agreement also applies to this account to preserve her siblings' inheritance rights, and she is also given on-line access to check for financial fraud.

2. **Checking Account Living Trust™ Strategy**
   The second way to minimize these risks is the use of what our Firm calls a special Checking Account Living Trust™. This is a four-page living trust in which a trusted child or other loved one is named as a co-trustee with a parent. The parent is the primary trust beneficiary, which means that all funds must be used for the parent's benefit. Upon the parent's death, the child distributes the funds to the beneficiaries the parent designated in the trust. Probate is avoided.

   Such a Living Trust will enable the co-trustee child to pay the parent's bills upon the parent's incapacity and after the parent's death. Such a Living Trust also avoids death-time probate and guardianship as to property and also avoids the problem that Wisconsin Medicaid Estate Recovery presents for joint accounts. Finally, the child co-trustee can monitor the account in order to prevent financial scams. The checking account is retitled or a new checking account is opened in the name of

the trust. Such an arrangement offers excellent protection against the creditor and divorce claims against the child who is named as co-trustee. See Section 700.750 of the Michigan Trust Code which prohibits the personal creditors of the trustee to make a claim against the trust.

3. **Avoid Payable Upon Death Designations**
   In a payable upon death (POD) designation, probate is avoided when the account owner(s) die, since the remaining funds are automatically payable to the named individuals or to the owner's living trust. However, there are four problems with this probate-avoidance strategy:

   - In Wisconsin, Medicaid Estate Recovery takes the funds in a POD account after death of the original owner. Wis. Stat. Section 867.035.

   - A guardianship/conservatorship in the probate will be needed upon the owner's incapacity if an *effective* Durable Power of Attorney (POA) is not in place.

   - Even if a durable POA is in place, most are ineffective because of drafting errors and staleness. Also, there are restrictions imposed by the 2012 power of attorney law in Michigan and POAs are often subject to lengthy compliance reviews by banks and credit unions. A recurring problem is that POAs drafted by inexperienced attorneys and those obtained over the internet often contain defective provisions.

   - The POD designation is often lost or forgotten about by the bank or credit union, especially when they are taken over by another institution. Unlike life insurance companies, banks and credit unions do not offer standard POD forms nor do they regularly present POD confirmations to customers.

4. **Avoid Accounts in Own Name Alone**
   Never ever leave a checking account in your own name alone. This will result in probate, guardianship, and Medicaid loss and may open the door to scams.

5. **Avoid Power of Attorney Accounts**
   Many children of our clients make the mistake of bringing a parent's durable power of attorney into a bank or credit union, which will designate the child as an agent under the POA on a parent's account. While this will allow the child to pay the parent's bills while the parent is alive, death-time probate will be triggered because a POA is revoked upon death.

   As a result of the need to probate the account, Medicaid Estate Recovery will claim the remaining funds in both Michigan and Wisconsin.

6. **Try to Avoid a Representative Payee Designation for Social Security Benefits**
   In a Representative Payee designation, a child is appointed by the Social Security Administration (SSA) to handle a parent's social security checks. Such a designation results in unnecessary annual reporting to the SSA. To avoid the annual reporting to SSA, a competent parent can set up an automatic deposit into a Joint Account or a Checking Account Living Trust.

Calendar of Events

NAELA – www.naela.org
Aug. 16 - 8th Annual Council of Advanced Practitioners Conference, Chicago IL
Nov. 5 - 2013 NAELA Fall Institute and Advanced Elder Law Review, Washington DC

ICLE/SBM – www.icle.org
May 16 - Handling Contested Estate Proceedings, Traverse City (Video)
Handling Contested Estate Proceedings, Marquette (Video)
Handling Contested Estate Proceedings, Lansing (Video)

2013 Medicaid & Health Care Planning Update, Traverse City (Video)
2013 Medicaid & Health Care Planning Update, Lansing (Video)
2013 Medicaid & Health Care Planning Update, Marquette (Video)

May 22 - Handling Contested Estate Proceedings, Grand Rapids (Video)

June 14-15 - 53rd Annual Probate & Estate Planning Institute, Plymouth (Live)

June 18 - Basics of Advising Elderly Clients & Those with Disabilities, Plymouth (Live)

June 26 - Drafting an Estate Plan for an Estate Under $5 Million, Plymouth (Live)

July 10 - Basics of Advising Elderly Clients & Those with Disabilities, Grand Rapids (Video)

July 11 - Basics of Advising Elderly Clients & Those with Disabilities, Traverse City (Video)
Basics of Advising Elderly Clients & Those with Disabilities, Marquette (Video)
Basics of Advising Elderly Clients & Those with Disabilities, Lansing (Video)

August 6 - Veterans Benefits and the Claims Administration Process, On-Demand Webcast