

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, Editor, at christine@caswellpllc.com.

ELDRS Legislative Day 2023

By Angela M. Hentkowski, ELDRS Chair, Steward & Sheridan, PLC, Ishpeming

The Elder Law and Disability Rights Section will be holding our Legislative Day on Wednesday, May 24, 2023 in Lansing. We will start at 9:00 am and end around 1:30 pm. We will train and feed you!! This is the single most important thing you can do to help the Section as we attempt to build bridges with the new legislature and administration. All we are asking for is a little bit of your time. We'll do the rest.

If can attend, please complete the following very short, jot registration form: <https://form.jotform.com/231095192797062>.

Please register as soon as possible so Capitol Services can start planning our Legislative Day. We hope to see you there.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

The Michigan Legislature has returned from spring recess and, as of this writing, is focused almost exclusively on the completion of the Fiscal Year 2023-2024 budget. The House and Senate are expected to complete work on their own versions of appropriations bills in early May. The final decisions will likely be worked out in late May after the Consensus Revenue Estimating Conference (CREC) meets on May 19. Legislators will have a more accurate estimate of next year's expected state revenues after the CREC meeting.

In the meantime, the legislature has been working on policy bills ranging from penalties for distracted driving to additional gun safety laws. In addition, bills were introduced in April regarding guardianships that will likely spark conversations among ELDRS members. They have

Save the Dates

- **ELDRS Legislative Day, Meet Your Legislators**

May 24, 2023

Members will meet at 9 am at the new Heritage Hall, 323 W. Ottawa St., Lansing, MI 48933.

Register [here](#).

- **Fall Conference**

October 18-20, 2023

Boyne Mountain Resort Hotel reservations are now available [here](#).

yet to move, but a similar house package is expected soon, and hearings on the bills could begin in May.

Guardianship Reform on Deck

A key part of the recommendations stemming from the Attorney General's Elder Abuse Task Force are proposed changes to state laws overseeing guardianships and conservatorships. Last session, a package of bills moved through the House Judiciary Committee but failed to go any further. In April, a package of bills was introduced in the senate that takes aim at creating additional requirements for guardians. The package was referred to the Senate Committee on Civil Rights, Judiciary and Public Safety. We also expect a house package to be introduced sometime in May.

The stated goal of the legislation is to improve the process for appointing guardians, with an emphasis on professional guardians. Senate Bills 253-256 and Senate Bill 258 would create limits on the number of wards a professional guardian may have; set requirements for minimum visitation; and most controversially, create a certification process for professional guardians. The bills were introduced by a bi-partisan group of state senators, namely Sen. Jeff Irwin (D-Ann Arbor), Sen. Ruth Johnson (R-Groveland Twp.), Sen. Jim Runestad (R-White Lake), and Sen. Paul Wojno (D-Warren).

Key elements of the bills include:

- Limit professional guardians to no more than 200 wards;
- Require professional guardians to visit each ward in person at least once every three months;
- Additional requirements for guardians to provide notice to heirs or relatives of the death or hospitalization of a ward;
- Require guardians who have more than two wards (or three wards if they are a licensed attorney in good standing with the State Bar of Michigan) to obtain certification as set forth by administrative order of the Michigan Supreme Court.

Although, as of this writing they have not yet been introduced, we have been told that the house package of bills might contain differences from the senate version, although we do not yet know details on those differences. We do expect the house versions to also have bi-partisan sponsors, and they will likely be referred to the House Judiciary Committee.

ELDRS to Propose Legislation to Address Care Contracts for Medicaid Applications

Years ago, representatives from the ELDRS Council began meeting with the Michigan Medicaid Office with the hope of convincing MDHHS to alter some of its Medicaid eligibility requirements. One of the issues we discussed was an arbitrary restriction on Medicaid eligibility that considers any payments made for personal care services within the previous five years a

divestment. The only way to avoid a divestment penalty is for the applicant to have a signed and notarized care contract with the provider AND a document from a physician stating that the services are medically necessary. ELDRS argued that the requirements were needlessly draconian, conflicted with federal Medicaid rules, caused harm to Medicaid applicants, and provided no benefit to the state. Those arguments fell (and continue to fall) upon deaf ears.

ELDRS member David Schaltz responded to the lack of a resolution on this issue by saying, “It seems that it is more than appropriate for the Michigan legislature to fill this hole with common sense statutory standards governing care contracts that serve the public interest in making sure that people who are making good faith efforts to spend their financial resources on their needs, while living in the community and avoiding the need for a nursing home admission, are not penalized by arbitrary and capricious standards created by MDHHS bureaucrats whose main interest is finding ways to prevent people from qualifying for Medicaid.”

Last year, with the help of Mr. Schaltz, ELDRS began working on a legislative proposal to amend the Social Welfare Act to correct what we feel is an injustice. Thanks to the work of several members and allied attorneys, we have a draft piece of legislation that we plan to provide to lawmakers with the hope of having a bill introduced and moved in the current legislative session.

Tragedy Leads to AFC Reform Proposal

A family whose mother died in an Adult Foster Care facility is promoting legislation that would create education and oversight requirements for AFC staff. Representative Stephanie Young (D-Detroit), chair of the House Children, Families and Seniors Committee, is preparing to introduce the bill which is colloquially known as “Theresa’s Law.”

Theresa’s Law would amend Public Act 218 of 1979 (Michigan’s Adult Foster Care Licensing Act).

The bill would attempt to improve the quality of care and life for seniors living in Adult Foster Care facilities and provide Direct Care Workers (DCW) with the education and skills to properly serve this population.

The key elements of Theresa's Law:

- The educational requirements of direct care workers:
- Licensee must keep a written training plan for all workers and keep a record of all training and education requirements, including details of courses completed and documentation of passed written and performance-based competency tests. This information must be provided at the next license renewal period.

- Unsupervised resident contact is prohibited prior to completion of all required continuing education (CE) classes.
- In addition to on-the-job training, all DCWs must complete certain CE courses within 60 days of hire and staff must demonstrate understanding by passing both a written and competency-based performance test on certain subject areas.

Appropriate staffing levels and experience:

- At a minimum, a Licensed Practical Nurse (LPN) must be on duty 24/7. At least 1 staff member certified in CPR must be on duty 24/7.
- Must have a social worker on staff with a minimum availability for 1 hour per week with each resident.
- Financial penalties for cited violations.
- Stronger oversight and enforcement of regulations.
- Transparency of residents' rights.

We expect the bill to be introduced soon, and it will likely be referred to the House Children, Families and Seniors Committee.

Functionality vs. Legal Requirements: When Accommodations Are Misused

When your firm or your clients' businesses could be sued

By Jill Babcock, Detroit

Although our section often focuses its practice on Medicaid, special needs, and elder law planning, many clients also need advice for their small businesses or their residential or commercial rental properties. One of the less obvious legal traps in business and real estate law is the certificate of occupancy or business license.

Even though a local municipality may have approved your client's compliance with the numerous building codes, usually the accessibility requirements are overlooked, misunderstood, or even ignored by the officials who issue permits and licenses. This could lead to costly litigation against your client in defending a civil rights case.

The State of Michigan and the municipalities in the state follow a modified version of the International Building Code (IBC) of 2015. Chapter 11 of the IBC 2015 covers accessibility requirements. IBC is considered a safe harbor under the Fair Housing Act, meaning that if construction adheres to the IBC 2015 and meets the rationale of the Fair Housing Act, the property is deemed compliant. The Americans with Disabilities Act also recognizes the IBC building code: the construction requirements, or architectural guidelines, created by the US Access Board offer a comparison booklet (<https://www.access-board.gov/ada/ada-ibc-comparison/>) for synchronizing the two.

However, the trap for your clients is set by local inspectors who fail to require compliance with these and other barrier-free laws.

Recently, I went to a new restaurant in downstate Michigan. It had a beautiful ramp but no designated disability parking spaces in its parking lot. I asked the owner why not, and he assured me, sitting in my wheelchair, it was okay because the local Planning Commission had granted a “temporary variance.” His misguided reliance on the assumed authority of the local commission left him a sitting duck, waiting for a lawsuit against his new business.

This situation happens often. People with disabilities routinely must call venues ahead of set rendezvous’ to ascertain if the venue is accessible, or whether an accessible bathroom is available. I’ve had similar issues with hotels: when asking for an accessible room once in Northern Michigan, I was told that the local inspector had told the developers that accessibility was not required because the property was “grand fathered.” We all know by now this illustrious “grandfather” is a myth, and it is unfortunate for the business owner that the person in the position to make change is delusional about the laws.

Don’t jump to the conclusion that this ill advice is completely the inspector’s fault, or the volunteer Planning Commission’s fault. The lack of emphasis and recognition of disability rights leads to a lack of training. In fact, I’ve been told that on most inspector checklists, accessibility requirements fall under one all-encompassing check-the-box, while much more energy is used to verify all specific electrical and plumbing matters.

So why do people with disabilities complain so much? I think the answer is obvious. Accessibility laws are on the books ensuring an equal playing field in the built environment, but whatever the reason, they are routinely disregarded. Unfortunately, society seems okay with ignoring these complaints, leaving no other alternative than filing a lawsuit. That brings us back to your client and their naïve reliance on the municipal inspections: don’t refuse the case! Just proceed with open eyes. Your due diligence could make all the difference.

CCRC Hosts “Elder Abuse Has No Borders Conference”

First Time in Four Years

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

The Coordinated Community Response Coalition (CCRC) of Oakland, Macomb, and Wayne Counties is an elder abuse task force that falls within one of the many initiatives of the State of Michigan Elder Abuse Taskforce created by Attorney General Dana Nessel and is currently chaired by The Hon. Carl Marlinga (Ret. Macomb County Probate Court). This organization represents a multidisciplinary team that spans across three counties. However, there are often participants from outside of those areas. The mission of the taskforce is to promote

coordinated strategic responses to victims of elder abuse, neglect and exploitation, while ensuring victim safety and confidentiality. The CCRC, in conjunction with Neighborhood Legal Services Michigan (NLSM)-Elder Law and Advocacy Center (ELAC), is known for its “No Excuse for Elder Abuse” campaign, which has brought awareness about elder abuse to millions in the Metro Detroit area. Participating members include attorneys, social workers, credit union manager(s), the AAA(s), ombudsmen, forensic nursing students, senior service directors, and other older adult/caregiver agency workers. The CCRC holds regular collaborative meetings every first Monday of the month at 1 pm via zoom.

On June 15, 2023 (World Elder Abuse Awareness Day), the CCRC will hold its first “Elder Abuse Has No Borders Conference” in four years. The Conference will be held at Madonna University and will be sponsored by the Detroit Area Agency on Aging, Oakland Community Health Network, The Senior Alliance, Area Agency on Aging 1B and Madonna University. This year’s theme is “How the Pandemic has changed the way we address Elder Abuse” and will include a variety of relevant topics for those involved in advocating for older adults. There will be speakers that address mental health and elder abuse, and the impact forensic nurses have on elder abuse. In addition, Adult Protective Services will discuss how they will operate post pandemic. There will be a panel discussion addressing financial exploitation and a presentation of the Kathleen M. Graham - Distinguished Service in Elder Advocacy & Abuse Prevention Award. Applications for nominations for this award are currently being accepted. For more information about the conference or the CCRC, please contact Antonia Harbin-Lamb, Staff Attorney at NLSM- ELAC/Chair of the CCRC at aharbin@wcnls.org.

Mary Theresa Schmitt Smith

Remembering the Creator of (d)(4)(a) Trusts

Edited from “Legacy,” as published by Lynch & Sons Funeral Directors - Clawson on Mar. 13, 2023.



Mary Theresa Schmitt Smith, 69, of Bloomfield Hills, passed away unexpectedly on March 9, 2023, after a short illness. Mary ... was born on December 9, 1953, in Detroit, Michigan After graduating (Sum Laude) from Eastern Michigan [,s]he went on to get her Doctor of Law (J.D.) degree at University of Detroit Mercy School of Law (1979) followed by a Master of Laws in Taxation (LLM) at Wayne State University in 1986, specializing in Estate Planning for People with Disabilities....

She began her career as a law clerk at the Oakland County Court and then went into private practice specializing in Estate Planning, Elder Law ... Disability Law and Special Needs Trusts.

She created a type of trust to protect assets of individuals with disabilities, a concept that was adopted into federal law as a "(d)(4)(A)" trust. She became Michigan's first certified Elder Law Attorney in 1999 and in 2005 formed her own firm, the Theresa Law Center, PC ("There's A Law!") to work on elder law. Eventually, she merged this center with the firm Lipson Neilson PC, where she had been a partner. In 2003, she became the 9th recipient of the national Theresa Foundation Award, in recognition of her community service for people with disabilities. The list of her accomplishments is long and impressive: She served on the National Academy of Elder Law Attorneys (NAELA) Board of Directors becoming a fellow of their academy in 2003; she was a founding member of the Special Needs Alliance (SNA), a past president of the ARC of Oakland County, Inc. (also serving on their Board of Directors and Advisory Board for many years), and one of the founding members of the National Moose Group, one of her favorites.

She was a member of the Elder Counsel Advisory Board and received the EP Maxwell J. Schleifer Distinguished Service Award in 2011. She was admitted to practice before the U.S. Tax Court and the U.S. Court of Appeals (6th Circuit), where she successfully appealed a federal district court decision interpreting Medicaid law in favor of a trustee of a special needs trust.

Mary had also presented on probate, tax, estate planning, and special needs trust topics for bar associations and law schools in Michigan, Florida, Wisconsin, Massachusetts, Texas, and New Jersey, as well as NAELA. She has published numerous articles in such publications as [the *Michigan Bar Journal*] and "Laches" [a publication of the Oakland County Bar.]
Memorials appreciated to ARC, 1641 W. Big Beaver, Troy, MI 48084.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

ELDRS Legislative Day (In-person)

- Heritage Hall, 323 W. Ottawa St., Lansing, 9 am (pre-registration required at <https://form.jotform.com/231095192797062>)

Council Meetings

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

- June 3 - 10 am
- No July Meeting
- August 5 - 10 am
- September 9 - 10 am

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

State Bar of Michigan Event

- June 9-10 - Great Lakes Legal Conference 2023, Keynote Speaker; Joan W. Howarth, Grand Hotel on Mackinac Island

MINAELA - www.naela.org/MINAELA/MINAELA/Home.aspx

- July 31 - Michigan NAELA Conference, Kellogg Center, East Lansing

ICLE/SBM – www.icle.org

- May 17 - In-Depth Retirement Asset Planning, Acme
- May 18-20 - Probate & Estate Planning Institute, 63rd Annual, Acme, or
- June 15-16 - Probate & Estate Planning Institute, 63rd Annual, Plymouth
- September 19 - Drafting an Estate Plan for an Estate Under \$5 Million
Plymouth

Coordinated Community Response Coalition (CCRC) of Oakland, Macomb, & Wayne Counties

- June 15, 2023 - Elder Abuse Has No Borders Conference, Madonna University