

ELDRS Update

Summer Edition 2016, Volume VI, Issue 2

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.

Register Now for 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, past-president of the National Academy of Elder Law Attorneys, and Steve Riley, who coaches attorneys in building their practices. There will also be intermediate and advanced sessions, a discussion on ADA issues, and presentations by ELDRS' own experts. Pre-registration ends September 26. After that, registration will only be taken on-site. Please note that lodging fills up quickly at the resort. For information about pricing and registration for the conference and the resort, click [here](#).

AARP: Implications of New CARE Act

By Christine Caswell, Caswell Law PLLC, Lansing (AARP Michigan Capitol Corps Member) and AARP Michigan

AARP Michigan took to the road to explain the impact of the CARE Act (Caregiver Advise, Record, Enable) which went into effect on July 12. At its July 20 presentation at MSU's College of Nursing, Lisa Dedden-Cooper, manager of advocacy for AARP Michigan; Barbara Given, PhD, RN, FAAN; and Erin Sarzynski, MD, MS were the three main presenters.

"When a person goes to the hospital, under the CARE Act, the hospital has to ask if they want to name a family caregiver and then record that," Dedden-Cooper explained. "Then the hospital has to notify that person, and the caregiver will have an opportunity to receive information and instructions for when the patient goes home. This includes managing medicines, wound care, and injections."

Dr. Given noted that before the Act, patients were often sent home still needing a great deal of care for which family members were ill-equipped. “For hip surgery, it can be a one-night stay at the hospital or a same-day discharge. For cancer, the patient might have 22 different medications. The Act is addressing someone who is chronically ill or who has chronic problems and is unable to take care of themselves. Do they need help with getting up, walking, and scheduling diagnostic tests and appointments? What are the symptoms of side effects?”

“Hospitals have been letting family members do what we wouldn’t let first-year nursing students do,” she stated.

Dr. Sarzynski explained that a caregiver is “someone who is living in the home with the person” who may not necessarily be the patient advocate. “This is the doctors and nurses working with the case manager for the best care for the patient,” she said. “Is it safe for that person to go home? If not, where can that patient go? Is the patient-advocate in Michigan or out-of-state?” All of this information needs to be considered before the patient can be discharged and must be conveyed to the caregiver, she stated.

The CARE Act makes the following mandatory for hospitals:

- Allow patients to designate a family caregiver;
- Notify the family caregiver when the patient is going to be discharged or transferred; and
- Give the family caregiver an opportunity for instruction and a demonstration of the medical tasks required when the loved one returns home.

If there are problems with a hospital not following these requirements, the presenters said to go to the hospital administration and to file a complaint with the Centers for Medicaid and Medicare Services if the patient is covered by either insurance.

According to AARP’s Public Policy Institute 2015 report, “there are 1.3 million family caregivers—2 million at any point in the calendar year—who devote 1.2 billion hours in unpaid care to loved ones at a total value of about \$15 billion.” Family caregivers are more likely to be women who also work full- or part-time, according to an AARP national study. The study found, “they provide an average of 21 hours of care per week for an average of four years. Nearly one in five family caregivers provide more than 40 hours of care to their loved one per week. Some are on call 24/7.”

AARP Michigan worked closely with Sen. Margaret O’Brien who sponsored the initial bill in May 2015 for passage of the CARE Act.

Most Caregivers Now Entitled to Minimum Wage and Overtime Pay

By Elder Law Answers

The federal government recently extended minimum wage and overtime protections to most home health care workers. When hiring a caregiver, clients need to be familiar with the rules, even if the paid caregiver is a family member.

Under the Fair Labor Standards Act (FLSA), employers who hire casual babysitters and domestic service workers to provide "companionship services" to elderly persons or persons with illnesses, injuries, or disabilities are not required to pay the minimum wage or provide overtime pay. Therefore, if clients directly hire a caregiver whose job it is to solely keep the elderly person company (for example, taking him or her for walks, playing games, reading, or accompanying the person on errands), then FLSA protections do not apply.

However, the companionship services exemption is not applicable when the caregiver spends more than 20 percent of his or her workweek performing "care services." Care services are defined as assisting the client with activities of daily living, including dressing, feeding, bathing, toileting, transportation, light housework, managing finances, taking medication, and arranging medical care. Caregivers who perform tasks for the entire household and caregivers who perform medical services are also not covered under the companionship exemption. In addition, if a home health care agency is the caregiver's employer, the home health care agency cannot ever claim the companionship exemption.

The rules for live-in caregivers are slightly different. If clients hire the live-in caregiver directly, they must pay the caregiver minimum wage but are not required to pay overtime. Third-party employers (such as health care agencies) that hire live-in workers are required to pay overtime. Under the FLSA, to be a "live-in" home care worker, the worker must either live at the person's home full-time or spend at least 120 hours or five consecutive days or nights in the person's home per week. Caregivers who live with the person are not necessarily working the entire time they are at the house, and employers do not need to pay for sleep time, mealtime, or other off-duty time.

Clients can hire family members as care workers and the same rules apply to them as to non-family care providers. If hiring family members, they must be paid overtime and minimum wage as long as family members are spending more than 20 percent of their time on care services. However, it is very important to have a written plan of care detailing the family member's working hours and obligations, so it is clear what is work time and what is family time.

The federal minimum wage in 2016 is \$7.25 per hour, but states may have higher rates. Beginning in January 2017, Michigan's minimum wage will be \$8.90. Employees who are

entitled to overtime pay can receive one and a half times their normal rate for every hour worked over 40 hours a week.

Regardless of who is the caregiver, there should be a written caregiver contract detailing the caregiver's rights and responsibilities. Attorneys can review these contracts to ensure families are following the law when it comes to hiring a caregiver.

The Department of Labor has produced a "[Paying Minimum Wage and Overtime to Home Care Workers](#)" guide for families on the FLSA requirements.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

Legislature Examines Ways to Ensure Patients' Wishes Are Honored

Continuous advances in medical treatment and technology have increased the likelihood that patients might be medically sustained even in cases where they themselves would have preferred that nature take its course. Even with powers of attorney for health care in place, the medical community is not always willing to abide by the directives of a patient advocate.

In an effort to provide further clarity to the medical community, Michigan attorneys have been working for years to improve the process of determining—and implementing—a patient's wishes. Two major contributors from ELDRS have been Robert Anderson of Marquette and Caroline Dellenbusch of Grand Rapids who worked on the ELDRS' MI-POST committee. MI-POST stands for Michigan's Physician Orders for Scope of Treatment and is a concept that has gained national momentum over the last decade.

According to the National POLST (Physician Order for Life-Sustaining Treatment) Paradigm Task Force, both POLST and POST are "approach[es] to end of life planning that emphasizes patients' wishes about the care they receive." It differs from advanced directives in that MI-POST focuses only on patients who have serious illness or frailty and for whom a physician would not be surprised if they were to die within a year. Most states have some sort of form available, though they often differ in certain details, and many states use a different name (e.g., POLST, Medical Orders for Scope of Treatment, Clinician Orders for Life Sustaining Treatment).

Michigan has not yet enacted legislation that would create a MI-POST-type paradigm. However, earlier this year, a package of legislation was introduced in the Michigan House that embraces many of the concepts of MI-POST, if not the entire concept. House Bill 5482, sponsored by Rep. Jim Tedder (R-Waterford), is the main bill of a multi-bill package that was referred to the House Judiciary Committee.

In June, representatives from ELDRS met with Rep. Tedder and his staff to discuss the legislation. The proposal that the ELDRS committee had been working on included certain areas that were not addressed in the Tedder bill. Most of omissions were technical, such as ensuring the activation of a patient advocate designation or including references to advanced directives or living wills. We hope that these items can be easily addressed.

Other differences, however, are more philosophical. For instance, unlike language developed by the ELDRS' committee, HB 5482 does not allow a Physician Order for Scope of Treatment to include provisions to withhold or withdraw feeding tubes and medically assisted nutrition even if that was the patient's wish. HB 5482 also allows the attending health professional who signed the POST form to unilaterally revoke it without consulting with the patient or a patient advocate. These issues are not off the table but will require further discussion with the bill sponsor and other key interest groups.

The future of HB 5482 is somewhat uncertain if only because of the calendar. The Michigan Legislature's 2015-16 session is coming to a close, and there are precious few session days left before the end of the year. Making things more difficult, the House Judiciary Committee is currently working on a number of other issues, and it may not have time to bring the MI-POST bills up for a hearing. It is possible that the bills might be re-referred to a different committee that has a more flexible calendar, but that is not a guarantee. Even so, the bills would then also have to move through the Senate process.

Even if this particular package of legislation fails to move this year, now that the Legislative Service Bureau has drafted it, it should not be too difficult to have it reintroduced for the 2017-18 session. There is hope that ELDRS' efforts to address end-of-life decision making will come to fruition soon.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- Sept. 10 - ELDRS Council Meeting, Chalgian & Tripp Law Offices PLLC. 1019 Trowbridge Rd., East Lansing, MI 48823, (517) 332-3800, 10 a.m.
- Sept. 22 - ELDRS: Legislative Changes & Digital Assets Act, State Bar of Michigan Annual Meeting, Speakers, Caroline Dellenbusch, Caroline Dellenbusch PLC, Grand Rapids; Howard Collens, Galloway & Collens PLLC, Huntington Woods; and Moderator, Beth A. Swagman, Beth A Swagman PLLC, Grand Rapids
- Oct. 5-7, Annual Fall Conference, Crystal Mountain Resort, Thompsonville

- Oct. 7, ELDRS Annual Meeting, Crystal Mountain Resort, Thompsonville, 8 a.m.

NAELA – www.naela.org

- Aug. 18-20, 11th Annual Council of Advanced Practitioners Conference, The Ritz Carlton, 160 East Pearson Street, Chicago, IL 60611
- Sept. 28, 2016 - Advising a Personal Representative or Trustee When an Estate or Trust Is the Beneficiary of Retirement Benefits. Webinar, 2-3 p.m. EDT

ICLE/SBM – www.icle.org

- 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, MI (Live)
- Sept. 27 - Drafting an Estate Plan for an Estate Under \$5 Million, Plymouth, MI (Live)
- Oct. 13 - Fundamentals of Estate Planning, Plymouth, MI (Live)
- Nov. 3 - Tech Competence, Confidentially, and Cyber Ethics for Lawyers and Law Firms, Plymouth, MI (Live)
- November 17 - Anatomy of a Workplace Investigation, Plymouth, MI (Live)