

ELDRS Update

Summer Edition, Volume 2, 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.

Registration Deadline Nearing

Fall Conference Registration Deadline September 3

The deadline for registering for the ELDRS Fall Conference is now less than a month away. The deadline for both conference registration and for reserving rooms at the special conference rate is September 3, 2012. For more information on registration for both the conference and hotel rooms, go <http://www.michbar.org/elderlaw/>. For any ombudsmen wishing to attend, the contact person is Alison Hirschel at hirschel@lsscm.org.

This year's Fall Conference will be held October 3-5, 2012 at the Crystal Mountain Resort in Thompsonville, Michigan with the following program:

- The keynote speaker will be Kevin Urbatsch of Myers Urbatsch, P.C., San Francisco, CA, holding sessions on how agents under Power of Attorney, Health Care Directives, Guardians, and Conservators interact and who has the power; the California Model for setting legal guidelines for professional fiduciaries to increase capacity for the agent and protection for the principal; and the 20 (or more) ways a Trustee can get into trouble and how to help avoid those issues.
- Speakers on Medicaid and Medicare topics include David A. Lipschutz, Center for Medicare Advocacy, Inc. in Washington, D.C.; Douglas Chalgian, Amy Tripp, and David L. Shaltz of Chalgian & Tripp Law Offices PLLC; and Thomas Trainer of the Kemp Klein Law Firm.
- Speakers on Health Care speakers include Gabrielle Warner, Michigan Benefits Navigator, LLC; Jane Dinnen, RN, Munson Health Center; Caroline M. Dellenbusch, Caroline Dellenbusch, PLC; and Robert Anderson, Elder Law Firm of Anderson Associates, P.C.
- Other sessions will cover—but are not limited to—legal competency, constitutional issues, litigation, Native American tribal elder law issues, Veterans' benefits and consumer law.

Once again, to register or to reserve accommodations at the Crystal Mountain Resort, go to <http://www.michbar.org/elderlaw/>. Accommodations at the resort are on a first-come, first-served basis.

New Power of Attorney Statute – PA 141 of 2012 (MCL 700.5501)

By James B. Steward, Steward & Sheridan, PLC

Member: Power of Attorney Committee of the Probate & Estate Planning Council

A significant amendment to EPIC section 5501 was signed into law as of May 22, 2012 but does not apply to powers of attorney signed before October 1, 2012. All attorneys need to review this statute and become acquainted with its provisions. A copy of the MCL version is available at <http://legislature.mi.gov/doc.aspx?mcl-700-5501> and a highlighted version of the Public Act is available [here](#). A summary of some of the provisions follows:

(1) The requirements for “durability” are essentially unchanged.

(2) New signing requirements added:

- (a) Signed in the presence of 2 witnesses, neither of whom is the attorney-in-fact, and both of whom also sign the durable power of attorney. **and/or**
- (b) Acknowledged by the principal before a notary public, who endorses on the durable power of attorney a certificate of that acknowledgment and the true date of taking the acknowledgment.

Note: *I opposed (a) because I felt that requiring two witnesses did nothing to protect the principal; that should be pretty easy to get. Just as now, all the principal has to do is print something off the internet, put it in front of the person for signing, and have two of friends or other relatives sign as witnesses. The notary requirement (alone) would provide much better protections. The Committee and Probate & Estate Planning Council agreed, but what you see is the final compromise.*

(3) Certain responsibilities and limitations are now statutory (some provisions paraphrased):

An attorney-in-fact designated and acting under a durable power of attorney has the authority, rights, responsibilities, and **limitations as provided by law** with respect to a durable power of attorney, **including, but not limited to, all of the following:** [emphasis added]

- (a) Except as provided in the durable power of attorney, agent required to act according to fiduciary standards of care applicable when exercising powers under a durable power of attorney.
- (b) The attorney-in-fact shall take reasonable steps to follow the instructions of the principal.

(c) Agent to keep the principal informed of the agent's actions, and upon request provide an accounting to the principal, and a conservator or guardian appointed on behalf of the principal, or pursuant to judicial order.

(d) Cannot make gifts, unless provided for in the durable power of attorney or by judicial order. **Note:** *This restriction is not limited to gifts to the agent.*

(e) Cannot place assets into joint tenancy with the principal, unless provided in the durable power of attorney or by judicial order. **Note:** *This would apply, on its face, even to assets that were owned by the agent individually; this could create significant issues for spouses and some children, unless when the spouse (child, etc.) acts to create the joint tenancy account with the agent's own assets, the spouse is deemed to be acting on his or her own and not as agent for the other spouse. However, the wording of the statute does not seem to recognize that nuance.*

(f) Agent must maintain records of the attorney-in-fact's actions on behalf of the principal, including transactions, receipts, disbursements, and investments.

(g) The attorney-in-fact may be liable for any damage or loss to the principal, and may be subject to any other available remedy, for breach of fiduciary duty owed to the principal.

Note: *This is merely a restatement of prior law. In the durable power of attorney, the principal may exonerate the attorney-in-fact of any liability to the principal for breach of fiduciary duty except for actions committed by the attorney-in-fact in bad faith or with reckless indifference. An exoneration clause is not enforceable if inserted as the result of an abuse by the attorney-in-fact of a fiduciary or confidential relationship to the principal.*

(h) The attorney-in-fact may receive reasonable compensation for the attorney-in-fact's services if provided for in the durable power of attorney. **Question:** *May the agent receive any compensation if the POA is silent on this? Under prior law, it is my opinion that the agent would be entitled to reasonable compensation, even if not stated in the document; the new provision seems to say no compensation unless stated.*

Additional Note: *An agent's responsibilities primarily remain as currently embedded in our common law and some statutes. This was intentional on the part of the Probate & Estate Planning Council committee. The subject statute is a limited-purpose statute. It was not intended to be, nor could it be, within this context, a complete power-of-attorney code or restatement. This was attempted a few years ago, and after a very significant effort by that prior committee, no consensus could be reached.*

(4) The agent must now sign a specified acknowledgment before exercising authority as agent under the power of attorney, so start putting this into all of your power of attorney documents. **There are no special signing requirements for the acceptance, but it probably should be notarized and otherwise in recordable form.** **Note:** *The failure to sign does not affect the agent's authority to act, nor does it affect the agent's responsibilities or potential liability (see paragraph 6). This was intentional. The committee was concerned that: (1) that the agent could*

argue that he/she did not sign and therefore shouldn't be liable for his/her actions because he/she hadn't accepted such liability, (2) if the agent did not have authority as attorney in fact until something like this was signed, then any actions taken before the document was signed would likely be considered void; this could present some big problems even when there was no actual controversy, such as real estate transactions (as well as other transactions), for which the magic document was not recorded and later could not be found, and (3) a special document that had to be signed before the POA springs to life could make it even more difficult to get powers of attorney accepted by banks, etc. *Thus, this led to the use of the term "acknowledgment" rather than "acceptance." Under prior and current law, the fact that an agent has acted under the power of attorney constitutes acceptance.*

(5) Third parties who act in good faith are exonerated from liability. Note: *I was opposed to this provision, unless we had a corresponding provision requiring third parties to accept the power of attorney document which complied with the statutory requirements. However, the bankers opposed that (of course), so that was omitted. A third party can require the agent to sign the statutory acknowledgment, without liability, before recognizing the power of attorney.*

Question: *Can the third party require anything else? The statute sort of implies that it cannot, or at least that it could be liable for requiring more.*

(6) As noted above: An attorney-in-fact's failure to comply with subsection (4) does not affect the attorney-in-fact's authority to act for the principal as provided for in the durable power of attorney and does not affect the attorney-in-fact's responsibilities or potential liability to the principal.

(7) Applicability. The new act does not apply to documents executed before October 1, 2012. It also does not apply to several types of documents that can be characterized as powers of attorney. Everyone should review the list carefully. However, if there is any doubt as to whether an exception applies, it would likely be best to comply with the requirements of the new act to the extent that it could conceivably be applicable.

Legislative Update

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

The legislature recessed in mid-June and returned to session July 18. Both chambers now will return on August 15, following the August 7 Primary Election, and then return after Labor Day. Prior to their July session, the Governor had signed most of the legislation that had been sent to him—including the state budget—with very few vetoes. What he did veto was a bill to broaden Michigan's photo identification law for voting, making him the first Republican governor nationwide to veto such legislation during a tidal wave of such legislation enacted in the last

two years. However, the Governor's office and the legislature are working to reach consensus on legislation regarding this issue.

House Likely to Take Up Health Care Exchange...Timing Uncertain

After the June 28 Supreme Court decision to uphold the Affordable Care Act (ACA), the Michigan House is fairly likely to act on a bill to create a state health care exchange. In November, the Senate had passed Senate Bill 693 (Senator Jim Marleau-R, Lake Orion), legislation to create Michigan's web-based health care exchange. MIHealth Marketplace would provide an online platform through which Michigan residents could shop for private health insurance, and then purchase on that site or over the phone.

Governor Snyder has favored creating the exchange prior to and regardless of the Supreme Court decision because he believes it will provide citizens with an efficient way to shop for individual health care plans. However, in part, as a result of anti-ACA political opposition, the House had put off voting on the bill until the Supreme Court made its decision. Now some ACA opponents are urging the House to wait until January when they believe Mitt Romney, as President, will repeal the law.

In his latest statements, House Speaker Jase Bolger (R-Marshall) has indicated that the House Health Policy Committee, chaired by Rep. Gail Haines (R-Waterford) along with the House Appropriations Subcommittee on Licensing and Regulatory Affairs will hold hearings in August to get answers to questions to questions such as:

- Will Michiganders face an individual mandate and will citizens and businesses face the tax penalty if the state does not set up an exchange?
- What flexibility does the state have regarding the details of the exchange, and what parameters must be met?
- What are the advantages and disadvantages to the state setting up an exchange versus one being established by the federal government?
- Could private companies set up a marketplace/exchange that would meet federal mandates?

The federal government has established a January 2013 deadline for states to demonstrate that they have a plan ready to be implemented by the following year. If states do not meet this deadline, the federal government will implement its own version of an exchange. Governor Snyder believes, however, that regardless of the deadline, planning for the creation of an exchange should begin as soon as possible simply because of the magnitude of the project. According to the state, this would be the biggest project the Department of Licensing and

Regulatory Affairs (LARA) has ever had to take on. One potential option for Governor Snyder is creating an exchange by executive order, but he has indicated he would prefer to do so through legislation.

Medicaid Expansion Also Under Review

The Department of Community Health (DCH) has indicated it is not planning to tighten eligibility for Medicaid to reduce the number of people on the state's rolls. However, the Administration has not yet decided whether it would expand eligibility for Medicaid to persons with incomes of 133 percent of the poverty level, an option for states under the Affordable Care Act—given that the Supreme Court's recent decision gives states the choice to opt out of that section of the Act. Essentially, the Court said that offering an incentive for states to behave in a certain way is permissible, but—as the Senate Fiscal Agency reiterated in a June 28 memo—“...something that effectively gives a state a choice between compliance and fiscal chaos is not.” The state of Texas has announced it will utilize the “opt out option.”

If Michigan does expand Medicaid, the Senate Fiscal Agency estimates that about 400,000 people would be newly covered at a cost of roughly \$2 billion gross. Initially, the expansion would be 100% federally funded. By the year 2020 and beyond, the match rate would drop to 90%.

The Senate Fiscal Agency (SFA) has also indicated that expanding Medicaid to everyone under 133% of the federal poverty level would actually save the state at least \$200 million per year until the match requirement begins in 2017. SFA's rationale is that most of the more than \$270 million spent on Community Mental Health non-Medicaid is used for services to people who would be eligible for Medicaid under this expansion. The Michigan Association of Community Mental Health Boards has announced its strong support for the expansion.

Elder Abuse Legislation Signed by Governor

Many of the bills in the Senate-passed package of bills dealing with elder abuse and the protection of vulnerable adults have worked their way through the House and have been signed into law.

The bills that have been signed by the Governor, who has strongly supported this package, are:

- SB 454, now PA 170, Sen. Nofs (R- Battle Creek), which deals with the requirements for witness testimony.
- SB 455, 459, and 465, now PAs 169, 172, and 168, Sen. Rocca (R-Sterling Heights), increases penalties for elder financial abuse and fraud.

- SB 457, now PA 171, Sen. Colbeck (R- Canton Twp.), allows for an elderly and vulnerable adult death review team to be established.
- SB 461, now PA 173, Sen. Schuitmaker (R-Lawton), lists rights of persons for whom a guardian is appointed.
- SB 462, now PA 174, Sen. Bieda (D-Warren), requires nursing home employees to report abuse to Department of Licensing and Regulatory Affairs (LARA).
- SB 464, now PA 175, Sen. Schuitmaker (R-Lawton), requires an "in-person" interview during an investigation with the abused adult in the adult's home or at the county DHS office.
- SB 466, now PA 176, Sen. Schuitmaker (R-Lawton), creates Senior Alert program.
- SB 468, now PA 177, Sen. Hansen (R-Hart), amends criminal procedural code for reports of vulnerable and elderly abuse.

New Appointments to the Autism Council

Governor Snyder made the following appointments to the Autism Council, which will operate within the Department of Community Health (DCH), to oversee Michigan's Autism Spectrum Disorders (ASD) State Plan:

- **Colleen Allen**, of Detroit, was appointed chair of the council. She will represent non-profit organizations serving those with ASD for a four-year term which ends September 30, 2016. Ms. Allen is president and CEO of Autism Alliance of Michigan, a senior staff speech language pathologist in Henry Ford Health System's neurology department, and is an adjunct professor at Wayne State and Oakland universities.
- **Michael Caine**, of Lansing, will represent local and intermediate school districts for a three-year term ending September 30, 2015. He is currently the special education administrator for Haslett Public Schools.
- **Mary Chaliman**, of Holt, will represent the Department of Human Services (DHS) for a two-year term which ends September, 30, 2014. She is the director of DHS's Permanency Division.
- **R. Wayne Fuqua**, of Kalamazoo, will represent state universities for a four-year term ending September 30, 2016. Professor Fuqua is chair of Western Michigan University's Department of Psychology.
- **Kimberly Gaedeke**, of Plymouth, will represent the Department of Licensing and Regulatory Affairs (LARA) for a two-year term, ending on September 30, 2014. Ms. Gaedeke is currently LARA's assistant deputy director.
- **Anthony Ianni**, of East Lansing, will represent the ASD community for a three-year term ending on September 30, 2015.

- **Elizabeth Knisely**, of Plymouth, will represent DCH for a two-year term, which ends on September 30, 2014. She is currently the director of the Bureau of Community Mental Health Services within DCH's Behavioral Health and Developmental Disabilities Administration.
- **Amy Matthews**, of Grand Haven, will represent state-funded initiatives for a three-year term ending September 30, 2015. She is an associate professor of psychology at Grand Valley State University, focusing on autism and intellectual and development disabilities, and is also currently the director of the Statewide Autism Resources and Training Project.
- **Stacie Rulison**, of St. Johns, will represent the ASD community for a four-year term, which ends on September 30, 2016. Ms. Rulison is currently the operations director for the Autism Alliance of Michigan, is a behavioral therapist at Henry Ford Health System, and is an independent autism/behavioral specialist for Residential Options Inc., Autism Alliance, Wayne State University, and Grand Valley State University.
- **Robert Sheehan**, of Lansing, will represent adult service agencies, Prepaid in Patient Health Plans and Community Mental Health Services Programs, for a three-year term ending September 30, 2015. He is currently CEO of the Community Mental Health Authority of Clinton, Eaton and Ingham counties.
- **Dr. Jane Turner**, of East Lansing, will represent medical service centers and health care providers for a four-year term ending September 30, 2016. She is the assistant medical director for DCH's Office of Medical Affairs, serving as chief medical consultant for children's special health care services.
- **Joanne Winkelman**, of Bloomfield, will represent the Department of Education (MDE) for a two-year term, ending September 30, 2014. Ms. Winkelman is a policy coordinator for the Policy and Compliance program within MDE's Office of Special Education.

Other Bills of Interest

- HB 4518, Rep. Lori (R-Constantine) - Provides for an income tax check-off option for the Michigan Alzheimer's Association. Bill passed in the House, sent to the floor of the Senate, May 29.
- HB 4519, Rep. Lori (R-Constantine) - Establishes the Michigan Alzheimer's Association fund in the Department of Treasury. Bill passed in the House, sent to the floor of the Senate May 29.
- HB 5089, Rep. Johnson (R-Clare) - Creates and establishes duties relating to the unused prescription drug repository and distribution program. Bill passed in the House, referred to the Senate Health Policy Committee, June 6.

- HB 5090, Rep. Ananich (D-Flint) - Requires acceptance and destruction or disposal of drugs or medications not eligible for distribution. Bill passed in the House, referred to the Senate Health Policy Committee, June 6.
- HB 5650, Rep. Lane (D-Fraser) - Amends the Social Welfare Act to require that a patient of a nursing home be automatically approved for medical assistance if the department has not mailed the applicant a notice of approval or denial within 45 days from the date the local office received the application. If the applicant is subsequently declared ineligible, he or she shall then no longer receive medical assistance. Referred to the Committee on Families, Children and Seniors, May 22.
- HB 5702, Rep. Lund (R-Shelby Twp.) - Limits attorney fees on contingency cases. Bill referred to House Government Operations Committee, May 30.
- HB 5747, Rep. Olumba (D-Detroit) - Enhances penalties for Medicaid fraud. Bill referred to House Families, Children and Seniors Committee, June 14.
- SB 324, Sen. Pappageorge (R-Troy) - Provides for income tax check-off option for contribution to Michigan Alzheimer's Association Fund. Bill passed in the Senate, reported out of House Tax Policy Committee, May 16.
- SB 325, Sen. Warren (D-Ann Arbor) - Creates Michigan Alzheimer's Association Fund and earmarks revenue. Bill passed the Senate, reported out of House Tax Policy Committee, May 16.
- SB 884, Sen. Hansen (R-Hart) - Modifies the nursing home survey process. Bill passed the Senate, reported out of House Families, Children, and Seniors Committee with substitute (H-3) adopted, June 12.
- SB 902, Sen. Schuitmaker (R-Lawton) - Makes arbitration provisions of the revised judicature act subject to the uniform arbitration act. Bill passed in the Senate, referred to House Judiciary Committee, May 17.
- SB 903, Sen. Schuitmaker (R-Lawton) - Enacts alternate dispute resolution to uniform arbitration act. Creates new act. Bill passed the Senate, referred to House Judiciary Committee, May 17.
- SB 980, Sen. Jones (R-Grand Ledge) - Revises powers of appointment of trusts. Bill passed the Senate, referred to House Judiciary Committee, May 23.
- SB 1050, Sen. Gleason (D-Flushing) - Prohibits the commissioner of the Office of Financial and Insurance Services from working for entities regulated by the office for two years after leaving office. Bill referred to Senate Government Operations Committee, March 28.
- SB 1054, Sen. Gleason (D-Flushing) - Provides for income tax credit for certain renovations made to the home of a person with a disability. Bill referred to Senate Finance Committee, March 29.

- SB 1134, Sen. Nofs (R-Battle Creek) - Provides for the creation and funding of the low-income energy assistance fund. Bill passed the Senate, referred to House Energy and Technology Committee, May 31.
- SB 1135, Sen. Caswell (R-Hillsdale) - Creates a financial assistance program for energy assistance to low-income households. Bill passed the Senate, referred to House Energy and Technology Committee, May 31.
- SB 1184, Sen. Hune (R-Hamburg) - Allows health insurers, health plans and health maintenance organizations direct access to information regarding its members or its insured. Bill referred to Senate Health Policy Committee, June 14.
- SB 1185, Sen. Hune (R-Hamburg) - Allows employees the right to object to immunizations. Bill referred to Senate Health Policy Committee, June 14.
- SB 1193, Sen. Gleason (D-Flushing) - Allows operation of a motor vehicle by an individual with a ventricle-assist device under certain circumstances. Bill referred to Senate Transportation Committee, June 14.

If you would like to read more about any of the bills listed, please go to www.legislature.mi.gov.

Thanks to Rep. Marilyn Lane, et al.

By Patricia E. Kefalas Dudek, Patricia E. Kefalas Dudek & Associates

As an elder law and disability rights practitioner, I wanted to personally thank Rep. Lane and her co-sponsors for introducing HB 5650, which proposes to amend the Social Welfare Act to require that a patient of a nursing home be automatically approved for medical assistance if DHS has not mailed the applicant a notice of Medicaid approval or denial within 45 days from the date the local office received the application. It is a hardship for people in need of long-term care services, their families, and the providers of care when applications sit as long as they do, and it violates the standard of promptness required *by federal law* when they go beyond the 45 days. Therefore, although it appears this bill is not likely to pass anytime soon, I suggest that the council, the section, and its individual members support this bill, or, at the very least consider writing a letter of thank you to the folks that introduced it, including Reps. Marilyn Lane, Harold L. Haugh, Anthony Forlini, and Lesia Liss!

Michigan House Approves Eliminating “Pop-Up” Tax Family-to-Family Property Transfers

By Robert C. Anderson, Anderson Associates, P.C.

In June, the Michigan House approved House Bill 4753 which would allow immediate family member transfer of real property to each other without incurring an uncapping of taxable assessment to the state equalized value, sometimes known as the “Pop-Up Tax.” This was sponsored by Rep. Peter Pettalia. This proposed legislation still needs to pass the Senate and be signed by the Governor. The interest in this topic must have emanated from the Klooster case which was decided in March 2011. The fiscal impact of this will negatively impact property tax revenues, and the reductions will force an increase in state aid to schools.

Recent News for the Elder Practitioner

Summer 2012

By Christopher W. Smith, Michigan Law Center, PLLC

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By The Numbers

- It is estimated that as many as one in five adults (between 5.6 and 8 million) over the age of 65 “has a mental health or substance abuse problem.” [Report: Too Little Mental Health Care for Boomers, AP, July 10, 2012.](#)
- According to the Centers for Medicare & Medicaid Services, health spending will account for 19.6% of gross domestic product in 2021, up from 17.9% in 2010. This is an average of 5.7% increase in the next ten years. Government spending currently represents 46% of health care spending. [Christian Torres, Report: Health Spending Will Climb to Nearly One-Fifth Of GDP, Kaiser Health News: Capsules Blog, June 12, 2012.](#)

- “The median family’s net worth dropped 38.8%” between 2007 and 2010 – from \$126,400 in 2007 to \$77,300 in 2010 according to the Federal Reserve. [Americans Suffered Record Decline in Wealth During Recession: Report, Reuters, June 11, 2012.](#)
- “53% of American adults ages 65 and older use the internet or email” versus 82% of the total population, according to the Pew Internet Project. 34% of those 76 or older use the internet. 33% of individuals 65 and over use social networking websites such as Facebook, a significant rise from 13% in 2009. 69% of adults ages 65 and older have a mobile phone, up from 57% in 2010. [Kathryn Zickuhr and Mary Madden, Older Adults and Internet Use, Pew Internet Research, June 6, 2012.](#)
- “For the first time, racial and ethnic minorities make up more than half [50.4%] the children born in the U.S.” [Hope Yen, Minority Birth Rate: Racial and Ethnic Minorities Surpass Whites In U.S. Births for First Time, Census Reports, The Huffington Post, May 17, 2012.](#) On the elder side, the gap between white and black life expectancies has narrowed with the life expectancy of black men from birth being 70.8 years and black women being 77.5 years. White men have a life expectancy of 76.2 years and white women 81.2 years. [Rosie Mestel, Life Expectancy Gap Narrows Between Blacks, Whites, L.A. Times, June 5, 2012.](#)
- “The average cost of healthcare for a family of four this year has increased nearly 7% [6.9%] to \$20,728 annually” according to benefits consultant Milliman. On average, employees pay \$8,584 or 41% of these health costs. [Chad Terhune, Average Annual Healthcare Cost for a Family Tops \\$20,000, L.A. Times, May 15, 2012.](#)
- Heart disease and cancer were by far the largest causes of death in the United States in 2010, neither of which were in the top three in 1900. In 1900, the leading causes of death were (1) pneumonia/influenza, (2) tuberculosis, and (3) gastrointestinal infections. *The New England Journal of Medicine* has an interesting look at the changes in causes of death over the last 110 years (as well as a great [interactive graph](#)) in its latest issue. [David S. Jones et al., The Burden of Disease and the Changing Task of Medicine, The New England Journal of Medicine, June 21, 2012.](#)

Alzheimer’s / Dementia / Cognitive Impairment

- Changes in walking patterns (such as speed, length of stride, or more variable patterns) without a physical explanation may be an early sign of dementia according to several recent studies. [Pam Belluck, Footprint to Cognitive Decline and Alzheimer’s are Seen in Gait, N.Y. Times, July 16, 2012.](#)
- Individuals with a rare gene mutation that slows the production of beta amyloid (a brain substance believed to be a factor in Alzheimer’s when present in excess) were significantly less likely to develop Alzheimer’s. The finding suggests that drug makers focused on reducing the presence of beta amyloid are on the right track, even though prominent studies of drugs developed by Eli Lilly and Pfizer focused on reducing beta amyloid have recently failed. However, treatments related to beta amyloid may need to occur before significant symptoms occur. [Gina Kolata, In Preventing Alzheimer’s, Mutation May Aid Drug Quest, N.Y. Times, July 11, 2012.](#)

- Feeding tubes increase the likelihood of bedsores in dementia patients, according to a Brown University study. A patient with a feeding tube was 2.27 times more likely to develop a bed sore and 3.21 times more likely to develop a “stage 4” severe bed sore. [For Dementia Patients, Feeding Tubes May Increase Bed Sores, U.S. News, May 14, 2012.](#)
- “Adults ages 65 and older who reported binge drinking at least twice a month were 2½ times more likely to suffer cognitive and memory declines than similar-aged adults who don't binge-drink” according to a British study at the University of Exeter. “In this study, binge drinking is defined as four or more drinks on one occasion.” [Janice Lloyd, Binge Drinking Increases Risk of Cognitive Decline, USA Today, July 18, 2012.](#)

End of Life and Advance Directives

- Dying at home, a “therapeutic alliance” with a person’s physician and pastoral support, improves the quality of life of terminal cancer patients and their caregivers at the end of life, according to a study published in the Archives of Internal Medicine. ICU, hospital stays, chemotherapy, and feeding tubes in the last week were all shown to negatively impact quality of life. The report suggests that a person’s continued relationship with his or her physicians can improve a person’s quality of life even when the physician can no longer cure a patient. [Baohui Zhang et al., Factors Important to Patients’ Quality of Life at the End of Life, Archives of Internal Medicine, July 2012.](#)
- Trips to an emergency room can dramatically impact how a person spends his or her last days. Of those over 65, 51% visited an emergency room in the last month of his or her life, according to a study published in Health Affairs. Because emergency rooms are designed to treat and not to provide palliative care, approximately 77% of those admitted to the emergency room are admitted to the hospital (with 39% spending time in an intensive care unit). Of those admitted, 68% die in the hospital. [Paula Span, At the End, a Rush to the E.R., N.Y. Times: The New Old Age Blog, June 5, 2012.](#)

Healthcare and Medicine

- Walgreens and pharmacy benefit manager Express Scripts reached an agreement that will allow Express Scripts customers to return to Walgreens for prescriptions. Analysts estimate that Walgreens lost more than \$4 billion in annual revenue because of the dispute. [Bruce Japsen, Walgreen and Express Scripts Reach Deal, N.Y. Times, July 19, 2012.](#)
- GlaxoSmithKline agreed to pay a record breaking \$3 billion fraud settlement with the U.S. Department of Human Services for fraudulently marketing several of its prescriptions drugs, including Paxil, Wellbutrin, and Avandia. [Katie Thomas, Glaxo Agrees to Pay \\$3 Billion in Fraud Settlement, N.Y. Times, July 2, 2012.](#)
- The United States Preventative Services Task Force finalized its recommendation that regular annual prostate screening (P.S.A. tests) cause far more harm than good. Medicare has not stopped covering the tests. [Tara Parker-Pope, New Data on Harms of Prostate Cancer Screening, N.Y. Times: Well Blog, May 21, 2012.](#)
- “Cut the growth in rates of obesity by just 1% a year over the next two decades, and you’ll slice health care costs by \$85 billion. Keep obesity rates at their current levels – which is well below a

33% increase being projected — and you'll save nearly \$550 billion during the same time frame," according to a study presented at a conference sponsored by the U.S. Centers for Disease Control and Prevention. [Judith Graham, Even Small Reductions in Obesity Would Generate Major Savings, Kaiser Health News: Capsules Blog, May 7, 2012.](#)

Insurance

- 59% of employers now offer high-deductible health insurance plans and 17% of families were enrolled in these plans in 2011 according to a report by the RAND Corporation. "Families that switched from a traditional health plan spent an average of 21% less on health care in the first year after switching than similar families remaining in traditional plans." "2/3rds of the savings came from initiating fewer episodes of care; 1/3rd came from spending less per episode." [Skin in the Game: How Consumer-Directed Plans Affect the Cost and Use of Health Care, RAND Corporation, 2012.](#)
- Genworth is significantly reducing its long-term care insurance offerings. And with the few policies that will remain, Genworth will require stricter underwriting and is reducing commissions to agents. With the recent exits of MetLife and Prudential from the long-term care insurance markets, consumers continue to have fewer options for long-term care insurance. [Terry Savage, Long-Term Care Insurance Takes A Hit, Chicago Sun-Times, July 8, 2012.](#)
- The difference in benefits between public and private-sector workers is quite striking:
 - 51% in private sector vs. 73% in public sector employees receive health benefits from their employers;
 - 65% in private sector vs. 89% in public sector get offered some type of retirement benefit;
 - 57% in private sector vs. 79% in public sector get life insurance through work; and
 - 61% in private sector vs. 89% in public sector get paid sick leave.[Ben Casselman, Number of the Week: Public Workers More Likely to Have Health Benefits, Wall Street Journal: Real Time Economics Blog, July 14, 2012.](#)
- In all, "[o]nly 55.9% percent of adults aged 26 to 64 received employer-provided health insurance in 2012, down from 61.6% in 2008." [Tim Mak, Poll: Fewer Insured through Work, Politico, July 5, 2012.](#)
- Under the Affordable Care Act, 12.8 million people will benefit from health insurance rebates averaging \$151/household due to the requirement that insurers spend 80% of premiums on healthcare. However, only a proportion of those households will actually receive checks because an employer paid most of the premium and can place the rebate back into the company's health plan. [Checks Not Guaranteed for All Insurance Rebates, AP, June 21, 2012.](#)
- Large health insurers paid the wrong amount owed on medical bills 9.5% of the time. While a strikingly large percentage, the percentage is significantly down from 19.3% last year. The number of insurance denials went up from 2.10% in 2010 to 3.48% in 2011. [Peter Frost, 1 In 10 Health Insurance Claims Processed Improperly, Chicago Tribune, June 18, 2012;](#) [Monifa Thomas, Incorrectly Paid Medical Claims Decline, AMA Study Finds, Chicago Sun-Times, June 18, 2012.](#)

Long-Term Care and Caregiving

Genworth Financial released its 2012 annual cost of care survey:

- Homemaker Services:
 - National: \$18/hr., 0% increase over 2011 (1.15% 5-year annual growth rate)
 - Michigan: apx. \$18.62/hr. (1% 5-year annual growth rate)
- Home Health Aide
 - National: \$19/hr., 0% increase over 2011 (1.09% 5-year annual growth rate)
 - Michigan: apx. \$19.98/hr. (2% 5-year annual growth rate)
- Adult Day Health Care
 - National: \$61/day, 1.67% increase over 2011
 - Michigan: \$71/day
- Assisted Living
 - National: \$3,300/month, 1.19% increase over 2011 (5.71% 5-year annual growth rate)
 - Michigan: \$2,713/month (6% 5-year annual growth rate)
- Nursing Home (Semi-Private Room)
 - National: \$200/day, 3.63% increase over 2011 (4.5% 5-year annual growth rate)
 - Michigan: \$220/day (4% 5-year annual growth rate)
- Nursing Home (Private Room)
 - National: \$222/day, 4.23% increase over 2011 (4.28% 5-year annual growth rate)
 - Michigan: \$240/day (5% 5-year annual growth rate)

This year, Genworth goes further and breaks the average cost of care down by Michigan cities/regions and is [available here](#). [Genworth 2012 Cost of Care Survey](#).

- A recent Northwestern University study showed just how little caregiver agencies are doing when hiring caregivers. “Only 16.5% of agencies tested potential caregivers’ basic knowledge about the job and its requirements” and “[o]nly 15% of agencies provided some type of training before sending a caregiver into someone’s home.” Furthermore, 56% conducted criminal background checks (none checked beyond the state the agency was operating in) and 32% conducted drug tests. [Judith Graham, Who’s Watching Mom?, N.Y. Times: The New Old Age Blog, July 19, 2012](#).
- 16% of the U.S. population (non-institutionalized and over age 15) provided “eldercare” in 2011, according to the American Time Use Survey taken by the U.S. Bureau of Labor Statistics. 56% of these caregivers were women and “individuals ages 45 to 54 and 55 to 64 were the most likely to provide eldercare (23 and 22 percent, respectively).” 69% cared for only one person and 42% cared for a parent. 23% of caregivers were also a parent of at least one child under age 18. [Bureau of Labor Statistics, American Time Use Survey – 2011, June 22, 2012](#); see also [Paula Span, New Numbers on Elder Care, N.Y. Times: The New Old Age Blog, July 5, 2012](#).
- Older women (mean age of 83) with disturbed sleep (e.g., frequently wake up after falling asleep) were much more likely to be placed into a long-term care facility according to a study published in the *Journal of the American Geriatrics Society*. Interestingly, the study did not find any causation between sleep duration and long-term care placement. [Adam P. Spira, Objective](#)

[Measured Sleep Quality and Nursing Home Placement in Older Women, *Journal of the American Geriatrics Society*, July 2012.](#)

- Over a six-year period, individuals over 65 who felt lonely saw a 24.8% decline in their ability to perform activities of daily living versus 12.5% of those who were not lonely according to a study reported in the Archives of Internal Medicine. Lonely individuals were also 45% more likely to die than those “who felt meaningfully connected to others.” [Judith Graham, *The High Price of Loneliness*, *N.Y. Times: The New Old Age Blog*, June 18, 2012.](#)

Medicaid

- According to the Center for Studying Health System Change, 78% of emergency room visits by Medicaid enrollees were classified as “very urgent, urgent, or semi-urgent,” potentially countering the perception that Medicaid beneficiaries significantly overuse emergency rooms for routine care. However, Medicaid enrollees still “had 45.8 emergency room visits per 100 enrollees, compared with 24 visits for the same number of privately insured individuals.” [Sarah Kliff, *Study: Most Medicaid Patients Visit the ER for Urgent, Not Routine, Care*, *Washington Post*, July 11, 2012.](#)
- Dual eligibles (i.e., those enrolled in both Medicare and Medicaid) accounted for 20% (16% in Michigan) of the Medicare population, but 32% (25% in Michigan) of Medicare expenditures in 2007. In Michigan, 23% of dual eligibles have 5 or more chronic conditions and the average spending for Michigan dual eligibles was \$2,259/year in 2007 with Medicare paying for 66% of these costs. [Medicare-Medicaid Enrollee State Profiles, Centers for Medicare & Medicaid Services, June 13, 2012.](#)

Medicare

- Medicare beneficiaries are much happier with their coverage than those with employer-based insurance. “Only 8% of Medicare beneficiaries age 65 or older rated their insurance as fair or poor, compared with 20% of adults with employer-sponsored insurance and 33% of adults purchasing coverage in the individual market.” Further, “[i]n 2010, about one-fourth (23%) of Medicare beneficiaries went without needed care because of the cost, compared with 37% of people with employer-based coverage.” [Karen Davis, *Medicare Beneficiaries Less Likely to Experience Cost- and Access-Related Problems Than Adults with Private Coverage*, *The Commonwealth Fund*, July 18, 2012.](#)
- Medicare beneficiaries in the prescription drug coverage gap (a.k.a. “the doughnut hole”) “reduced their monthly antidepressant prescriptions by 12.1%,” heart failure drugs by 12.9%, and antidiabetics by 13.4% compared to those with full coverage in the “gap.” [Yuting Zhang et al., *Effects of Medicare Part D Coverage Gap on Medication and Medical Treatment Among Elderly Beneficiaries with Depression*, *Archives of General Psychiatry*, July 2012.](#)
- With the U.S. Supreme Court largely upholding the Affordable Care Act, its changes to Medicare are likely to stand. These changes include the annual free wellness exam, increased number of free preventative tests, a gradual reduction of the “doughnut hole” until co-pays reach 25% in 2020, and reduced payments to Medicare Advantage plans to be more on par with Original

Medicare. See, e.g., [Paula Span, What the Health Care Ruling Means for Medicare, N.Y. Times: The New Old Age Blog, June 28, 2012.](#)

- What is the impact of Medicare's lack of comprehensive dental coverage? 26% of Medicare beneficiaries have no natural teeth and Medicare does not cover dentures. "On average, Medicare beneficiaries who used dental services spent \$672 out-of-pocket for dental care in 2008." "In 2010, one in five Medicare beneficiaries had not visited a dental provider in prior five years; among lower-income beneficiaries, one in three had not visited a dental provider in five years." [Oral Health and Medicare Beneficiaries: Coverage, Out-Of-Pocket Spending, and Unmet Need, Kaiser Family Foundation, June 19, 2012.](#)
- "Medicare Advantage enrollment grew by 10%" or "27% of the total Medicare population." "The average premium paid by Medicare Advantage enrollees was \$35 in 2012 or \$4 lower than in 2011." "65% enrolled in HMOs, 21% Local PPOs, 7% in Regional PPOs, and 4% in private fee-for-service plans." United Healthcare was the largest Medicare Advantage insurer at 19%, with Blue Cross Blue Shield and Humana both at 17%. In Michigan, Medicare Advantage enrollment accounted for 25% of the Medicare population (up 2% from 2011) with local PPOs nudging out HMOs as the largest type of plan. [Marsha Gold et al., Medicare Advantage 2012 Data Spotlight: Enrollment Market Update, Kaiser Family Foundation, June 11, 2012.](#)
- A Brown University study found that observation stays at hospitals increased by 25% between 2007 and 2009, and the number of people held on observation status for more than 72 hours increased by 88%. Michigan is about average in its number of observation stays (142 out of every 1,000 patients for an average of 26 hours). However, recent increases in Michigan have not been as significant as the national average, with observation stays increasing 15% between 2007 and 2009 and the average length of stay increasing 4% between 2007 and 2009. [Susan Jaffe, Study: Hospital Observation Stays Increase 25 Percent in 3 Years, Kaiser Health News: Capsules Blog, June 4, 2012.](#)
- 12% of Medicare beneficiaries wait over two years before making use of any benefits covered by Part B, even with a free "Welcome to Medicare" visit. [Frank A. Sloan, Despite "Welcome To Medicare" Benefit, One in Eight Enrollees Delay First Use of Part B Services for at Least Two Years, Health Affairs, June 2012.](#)
- Part D spending has been about 30% lower than the initial Congressional Budget Office projections made in 2003. Reasons? According to the Kaiser Foundation, enrollment has been less than expected (73% vs. a projected 87%), growth in prescription drug spending has been less, generic substitution has countered increased brand name drug prices (generics account for 75% of drugs prescribed), and fewer prescription drugs have been approved from the development pipeline than had been approved historically. The report downplayed the significance of plan competition. [Jack Hoadley, Medicare Part D Spending Trends: Understanding Key Drivers and the Role of Competition, Kaiser Family Foundation, May 2012.](#)

Michigan

- Responding to recent litigation against Blue Cross Blue Shield of Michigan, Michigan Insurance Commissioner Kevin Clinton said "the state will prohibit the use of preferential hospital pricing policies by insurers unless he approves them." Current federal litigation is going after "most

favorable nation clauses” that guarantee insurers the best pricing at certain hospital systems. [State to Block Preferential Hospital Pricing by Insurers, Detroit Free Press, July 19, 2012.](#)

- Medicare entered into contracts with three Michigan Accountable Care Organizations: Oakwood Healthcare system (1,500 doctors), the Southeast Michigan Accountable Care, Inc. (33 doctors in Dearborn), and the Accountable Healthcare Alliance (29 doctors in East Lansing). To date, there are 154 contracted ACOs nationwide. [Patricia Anstett, Medicare Teams with 3 Michigan Providers to Improve Seniors’ Health Care, Detroit Free Press, July 9, 2012.](#)

Retirement

- A recent study by the Employee Benefit Research Institute suggests that retirees spend less post-retirement than commonly thought. Individuals between the ages of 65 and 75 spend about 19% less than they did when they were 65. “But by age 85, median spending falls by 34%” and “by age 95, people spend only half as much as they did at age 65.” A caveat: 15.8% of those studied “saw their spending rise” and health care spending increased after age 65 even with Medicare. [Anne Tergesen, Spending Plummets with Age \(Except on Health Care\), Smart Money: Encore Blog, July 11, 2012.](#)
- Yes, working longer in life will be part of most retirement plans, but it may not be as long as people think. “Half of today’s households are ready to retire at age 65, but more than 85% would be prepared by age 70,” according to a survey by Boston College’s Center for Retirement Research. [Alicia H. Munnell et al., National Retirement Risk Index: How Much Longer Do We Need to Work?, Center for Retirement Research at Boston College, June 2012.](#)
- According to the Pew Center, states have a “\$757 billion hole in retirement funds covering millions of public employees.” Thirty-four states are failing to maintain 80% of long-term pension obligations, which is considered to be a safe level by experts. Healthcare is even worse as states have set aside 5 cents for every \$1 dollar obligation. [Christopher Wills, Study: State Pension Shortfall Ballooned in 2010, AP, June 19, 2012.](#)
- According to Fidelity Investments, a 65-year-old couple will spend at least \$240,000 on medical costs (even with Medicare) over their life expectancy. 32% will go to Medicare Parts B & D premiums, 23% will go to out-of-pocket prescription drug costs, and 45% will go to other out-of-pocket expenses such as co-insurance, co-pays, and deductibles. [Andrea Coombes, Your Retirement Health-Care Tab Will Run \\$240,000, The Wall Street Journal: MarketWatch, May 9, 2012.](#)

Social Security

- With today’s low interest rates, the vast majority of people (including those with mortality rates that are twice the average) will benefit from waiting to claim Social Security benefits according to a recent study published by the National Bureau of Economic Research. [Robert Powell, With Rates Low, It Pays to Delay Social Security, The Wall Street Journal: MarketWatch, July 12, 2012.](#)

Special Needs

- According to the World Health Organization, “disabled children were 3.6 times more likely to be physically assaulted and 2.9 times more likely to be sexually assaulted.” [Donald G. McNeil, Jr.,](#)

[Assault: Children with Disabilities Are More Likely to Be Victims of Violence, Analysis Shows, N.Y. Times, July 16, 2012.](#)

- A questionnaire designed by researchers at the University of North Carolina may help to identify at 12 months those who are at a high risk for autism or other development disabilities. While there are typical tests at 18 and 24 months, researchers are hoping to find ways to identify autistic individuals earlier to begin intervention treatments even sooner. [Catherine Pearson, Diagnosing Autism in Babies: New Survey Could Identify Disorder in First Year of Life, The Huffington Post, July 16, 2012.](#)
- An unfortunate freezer failure at the Harvard brain bank ruined 150 brain specimens. While it was a setback for many researchers, it was seen as a particularly big setback to autism research, which lacks a sufficient number of autistic brains to study. The loss is driving a push for more brain donations. [Benedict Carey, Brain Banks for Autism Face Dearth, N.Y. Times, June 25, 2012.](#)
- Women who “reported having had a fever during pregnancy were more than twice as likely as those who did not to have a child with a developmental disorder,” according to a study in the *Journal of Autism and Developmental Disorders*. However, those who treated the fever with “drugs like Tylenol or Advil” had an indistinguishable risk from those who had no fever. [Nicholas Bakalar, Fever in Pregnancy Tied to Autism Risk, N.Y. Times: Well Blog, June 4, 2012.](#)
- Of youth diagnosed with an autism spectrum disorder, only 34.7% attended college, and 55.1% held employment in the six years after high school, according to a study published in the journal *Pediatrics*. [Paul T. Shattuck et al., Postsecondary Education and Employment Among Youth with Autism Spectrum Disorder, Pediatrics, May 14, 2012.](#)

Veterans

- Senators Ron Wyden (D-Oregon) and Richard M. Burr (R-North Carolina) introduced legislation in the U.S. Senate to add a three-year look back period for transfers for less than fair market value prior to applying for certain V.A. benefits. The legislation follows a Government Accountability Office report criticizing the practice of transferring assets to qualify for V.A. benefits. The report seemed to disapprove of lawyers, as well as financial planners, for the active recruitment of Veterans and noted that Aid and Attendance applications increased to 38,000 in 2011 versus 22,500 in 2006. The report also criticized the Veteran’s Administration for not actively supervising and for unclear qualification rules, while it also recommended a divestment penalty. [James Dao, Veterans Pension Program Is Abused, Report Says, N.Y. Times, June 5, 2012.](#)
- “45% of the 1.6 million veterans from the wars in Iraq and Afghanistan are now seeking compensation for injuries they say are service-related. That is more than double the estimate of 21% who filed such claims after the Gulf War in the early 1990s.” “[T]hese new veterans are claiming eight to nine ailments on average, and the most recent ones over the last year are claiming 11 to 14. By comparison, Vietnam veterans are currently receiving compensation for fewer than four, on average, and those from World War II and Korea, just two.” [IMPACT: Almost Half of New Vets Seek Disability, AP, May 27, 2012.](#)
- “About 10% of U.S. veterans under the age of 65 lack health insurance and are not being cared for by the Department of Veterans Affairs.” However, this is better than the overall under-65

population where just under 18% lack insurance. [Maggie Fox, Study: 10 Percent of Veterans Lack Health Insurance, *National Journal*, May 24, 2012.](#)

Upcoming Events

By K. Casey Danielak

DATE	ORGANIZATION	TITLE	LOCATION	WEBSITE
August 1, 2012	SBM	Unauthorized Practice of Law: Living Trust Education: Avoiding Estate Planning Mistakes	Webcast	www.michbar.org
August 28, 2012	SBM	Real Property Law Section, Land Contracts: Dealing with Common Issues/ Probate & Estate Planning Section Adding Medicare Advocacy to Your Practice	Webcast	www.michbar.org
August 28, 2012	ICLE	Adding Medicare Advocacy to Your Practice/Land Contracts	Webcast	www.icle.org
September 5, 2012	ICLE	Drafting an Estate Plan for an Estate Under \$5 Million	Plymouth, MI	www.icle.org
September 12, 2012	NAELA	Medicare Home Health Coverage for People With Long-Term and Chronic Conditions	Webinar	www.NAELA.org
September 25, 2012	ICLE	Estate Planning for Retirement Assets: A Case Study Approach	Webcast Only	www.icle.org

Upcoming Events

By K. Casey Danielak

October 3-5, 2012	SBM	Elder Law & Disability Rights Section Fall Conference	Thompsonville, MI	www.michbar.org
October 4, 2012	ICLE	After Hours Tax Law Series: MI Tax Law Update	Webcast Only	www.icle.org
October 10, 2012	NAELA	Protection for Nursing Home Residents	Webinar	www.NAELA.org
October 12, 2012	ICLE	iPad for Lawyers	Plymouth, MI	www.icle.org
October 23, 2012	ICLE	Negotiating and Drafting a Property Settlement Agreement	Plymouth, MI	www.icle.org
October 24, 2012	NAELA	Medicare Hospice Coverage Can Really Help at the End of Life	Webinar	www.NAELA.org
October 25, 2012	ICLE	HIPAA for Non-Health Care Lawyers	Webcast Only	www.icle.org
November 1, 2012	ICLE	Homeward Bound 2012-2013: Your Gov, Your Neighbor, and Your Water: The Ebb and Flow of Property Rights	Plymouth, MI	www.icle.org
November 6, 2012	NAELA	2012 NAELA Fall Institute and Advanced Elder Law Review	Washington, DC	www.NAELA.org

Upcoming Events

By K. Casey Danielak

November 8, 2012	ICLE	After Hours Tax Law Series: End of the Year Tax Planning Strategies	Webcast Only	www.icle.org
November 30, 2012	NAELA	2012 Florida UnProgram	Orlando, FL	www.NAELA.org
April 25-28, 2013	NAELA	2012 NAELA Elder & Special Needs Annual Conference	Seattle, WA	www.NAELA.org