

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.

Hope to see you there—in person or virtually

ELDRS Fall Conference

*By Susan Chalgian, Chalgian & Tripp Law Offices PLLC,
East Lansing*

We are excited to invite you to the 2021 Elder Law and Disability Rights Section Fall Conference which will be hosted on Zoom as well as in person at the DoubleTree of Bay City on Monday, October 4 through Wednesday, October 6. We will have the same daily format but earlier in the week due to the pandemic push back of our reservation in 2020. And do not worry, we will return to a Wednesday-Friday conference in 2022.

Please book your rooms with DoubleTree of Bay City, located at One Wenonah Park Place in Bay City, Michigan 48708, at (989) 891-6000 or online. Make sure to mention you are attending the ELDRS Fall Conference and book before September 12, 2021 to receive our special rate. Look for an e-blast from the Bar for conference registration in the next couple of weeks.

While the actual conference will run from noon on Monday until noon on Wednesday, we are offering an add-on seminar for Monday morning: a VA benefits course taught by VISPRO owner and operator, Karen McIntyre. This 3-hour course counts as a CLE for accredited VA attorneys or for those who are applying for accreditation. If you are interested in joining this seminar, consider booking a hotel room for Sunday, October 3 as we will start promptly at 8 am on Monday morning. There will be an additional charge for this session.

We look forward to seeing you virtually or in-person for this special event. Any questions or concerns can be shared with the EDLRS Fall Conference Committee Chair, Susie Chalgian, at

Save the Dates

- **Fall Conference**, October 4-6, 2021 at the DoubleTree by Hilton Hotel in Bay City (note, this is Monday-Wednesday)
- **Annual Meeting**, October 5, 12 pm, at the DoubleTree by Hilton Hotel in Bay City

schalgian@mielderlaw.com or (517) 332-3800. If you need additional accommodations for the hotel or conference, please let me know as soon as possible.

Legislative Update

Snag with Nursing Home Cameras

By Todd Tennis, Capitol Services, Inc.

The recent US District Court ruling in *AFT Michigan v Project Veritas* has created more confusion around an already confusingly law dealing with eavesdropping and the concept of single-party consent to record conversations. The Michigan Supreme Court declined to opine on the case in response to a request by the federal court. By declining, they created even more confusion over Michigan's current wiretapping law.

According to a 1982 Michigan Court of Appeals ruling (*Sullivan v Gray*), Michigan is a single-party consent state for recording conversations. But the interested party must be a part of the conversation, i.e., you can record any conversation you are a party to without telling the other parties that you are recording it. However, the US District Court ruled last year in *AFT v Project Veritas* that the ruling in *Sullivan* "contravenes the legislature's intent made clear by the plain, unambiguous language of the statute."

The Michigan Supreme Court's decision not to weigh-in creates confusion because Michigan now has two conflicting rulings regarding eavesdropping. When added to the rapidly increasing prevalence of security and recording devices in everyday life, uncertainty about whether Michigan is a single-party or two-party consent state sets the stage for a mountain of litigation. It also hamstring efforts to set statutory parameters on issues ranging from cameras in nursing homes to landlord/tenant contracts.

To resolve conflicting interpretations, a coalition is working on possible solutions. Our firm, Capitol Services, represents several interested groups. These include the Negligence Law and Elder Law and Disability Rights Sections of the State Bar, the Michigan Association for Justice, and the Michigan Coalition to End Domestic and Sexual Violence. We hosted a meeting on this

ELDRS Meets with House Families, Children, Seniors Committee



Rep. Doug Wozniak (and ELDRS member), second from right, invited ELDRS to speak to the House Families Children and Seniors Committee regarding elder law issues on May 18. Council Members who spoke (from l to r) were Kelly Quardokos, Immediate Past Chair; Christine Caswell, Chair; and Catherine Jacobs, Legislative Committee Co-Chair.

issue that also included representatives from the Office of the Attorney General and the Prosecuting Attorneys Association of on July 21.

The consensus was that Michigan has been a single-party consent state for eavesdropping purposes since 1982, and that despite the recent US District Court ruling, it should continue to be one. However, just as the courts found, this issue can rapidly become exceedingly complicated. The increasing use of video and audio surveillance technology for security purposes can quickly cross the line between safety and protection to invasion of privacy. Threading the needle between protecting individual privacy rights while also protecting individual rights to record conversations or monitor their own spaces is no simple task.

Work will continue on this issue over the summer with the goal of developing consensus language that will return Michigan to being a single-party state for purposes of audio and video recording. The trick will be balancing that goal so that it is narrowly applied and protects against bad actors who would use such recordings for nefarious purposes.

Eldercaring Coordination

Alternative Dispute Resolution Process Helps High Conflict Families Resolve Issues

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

The Senior Regional Collaborative (SRC), along with partners Neighborhood Legal Services Michigan – Elder law and Advocacy Center (ELAC); Linda Fieldstosne and Sue Bronson, Co-Chairs of the Elder Justice Initiative on Eldercaring Coordination; and Zena Zumeta, JD, of the Mediation Training and Consultation Institute, began work on a new Eldercaring coordination pilot for the state of Michigan in January of 2021. The pilot will create an advisory committee; inform and educate the community on Eldercaring coordination; develop a pool of trained Michigan based mediators as Eldercaring coordinators; and finally implement an Eldercaring coordination program in Michigan. This program will assist families of older adults experiencing high conflict with resolving non-legal issues independent from the court.

What is Eldercaring Coordination?

Eldercaring coordination is a private forum that enables high conflict families to work together with dignity to ensure the safety and preserve the autonomy of their older loved one with the assistance of an Eldercaring coordinator.

What is the role of the Eldercaring Coordinator?

An Eldercaring coordinator (EC) is a skilled professional who has completed family mediation, elder mediation, and eldercaring coordination training. The EC plays a major role in the Eldercaring coordination process by dedicating up to two years to assist families with their

conflict resolution process. The facilitation encompasses several phases, including orientation, engagement, management, application, integration, and termination. During the process, through the creation and implementation of an eldercaring plan, the EC teaches the family about effective communication, negotiation, and problem-solving skills. Additionally, the EC will make recommendations for resolutions and provide education on elder care resources.

Eldercaring Coordination vs. Elder Mediation

Although Eldercaring coordination and elder mediation both exist to resolve family conflict and protect older adults, they are very different processes. Elder mediation can be a voluntary or court-ordered process, but Eldercaring coordination is strictly court-ordered. Elder mediation is issue-driven, and the people are focused on resolving issues centered around the older adult while Eldercaring coordination addresses the family's conflict-driven dynamics, focusing on reducing conflict centered around the older adult's care and safety.

Elder mediation meets for a finite timeframe and a written agreement is drafted at the end of the mediation process. With Eldercaring coordination, families meet periodically for up to two years as needed, and an ongoing plan to address immediate steps forward and accommodate changes with the older adult is developed each meeting.

Benefits of Eldercaring Coordination

The Eldercaring coordination process conserves court resources by creating shorter and more streamlined hearings and reduces the number of emergency hearings. The process is also a less restrictive alternative to guardianship and reduces family conflict in guardianship cases.

Ultimately, this process prioritizes the needs of the older adult and protects them from abuse.

Currently, The SRC is seeking additional participants for the Eldercaring Coordination Advisory Committee.

General responsibilities of the Advisory Committee include:

- To inform and advise the planning committee on the overall program rollout.
- Review processes, laws, policies, and procedures established for Michigan Eldercaring coordinators.
- Suggest resources to support and educate the community at large on Eldercaring coordination.
- Recommend and link critical partners/stakeholders to the overall project (community-based organizations, legal connections, aging services providers, etc.)
- Connect the project with potential jurists.

- Champion and assist with the overall communication and marketing.
- Support ongoing assessment of the Michigan Eldercaring coordination program.
- Promote education about Eldercaring coordination and ongoing education for Eldercaring coordinators.

Please contact Julie Lowenthal at lowenthal@miseniors.org if you are interested in participating in the committee.

There are also pilot projects going on in several other states, and the state of Florida recently passed an Eldercaring coordination statute. For more information on Eldercaring coordination see <https://eldercaringcoordination.com> and <https://www.semisrc.org/eldercaring-coordination.html>.

Navigating Medicaid and More

By Amanda Murray and Jane Bassett, Bassett Murray Law Group, Ann Arbor

No “one size fits all” Medicaid planning tool works for everyone. With Medicaid, the only thing that can be applied to every single case is that Medicaid and Medicaid planning is constantly changing. From new and proposed Bridges Eligibility Manual (BEM) changes being introduced to new “interpretations” of existing BEMs that the Department of Health and Human Services may impose without notice, a plan that works one time may not work the next. For plans that require Probate Court action, the practitioner never quite knows when the Attorney General’s (AG) office will file an objection or appear at a hearing. Those who practice in the Medicaid field—or should we say minefield—must ensure that they are constantly changing as well to meet these demands. In an ever-changing environment that can make it challenging to stay the course, below are just a few areas to explore in securing client assistance while trying to preserve that client’s estate plan.

I. IS THIS A MEDICAID PLANNING SITUATION?

All too often, practitioners hear a potential client walk in and tell them that Medicaid Planning is needed for his/her spouse or loved one; and it may very well be needed; however, it is necessary to explore other possibilities. The first consideration is what the care needs are for the individual in need of assistance and what setting is appropriate for that person. Most families do not know the difference between a memory care unit at a facility that does not accept Medicaid or the skilled nursing wing of that same facility that does. Having this discussion, along with exploring the alternative Medicaid programs (PACE and MiChoice Waiver) and whether the individual or individual’s spouse is a veteran is key. Perhaps there is a long-term-care insurance policy or the individual has enough income or assets to support

residing at an adult foster-care home. This is often a good time to evaluate the wants and needs of the individual. A review of the individual's assets and income is necessary to determine what assistance is available and what, if any, alternative programs can be explored. Providing the client with a basic understanding of Medicaid and any alternative options is a great foundation in assisting him or her in making an informed decision about which course should be taken.

II. VERIFICATION OF INCOME AND ASSETS

In reviewing the assets and income of the applicant, a policy that has served well over the past is "trust but verify." During asset and income disclosure, it is helpful to have the client sign an income and asset list at the beginning of representation. This way, everyone is aware of what has been disclosed. The specific assets disclosed dictate the Medicaid plan that is devised for the client. If the total assets or value of a specific asset change, which does happen, then the Medicaid plan may have to change. Should this occur, the signed income and asset list may become key in counseling the client, not to mention, in protecting the practitioner. Doing this thwarts any disagreement about what was or was not initially disclosed.

It's also necessary to require proof of the assets and income to be submitted from the client by a certain date. Of course, documentation verifies the actual current value of income and assets, but it ensures that the Medicaid plan devised is solid. Gathering the required documents also assists in determining if there are any assets that were not reported or contemplated when the initial plan was made. All too often clients find out that there is a life insurance policy with cash value, or a bank account or individual stock is discovered while looking for documentation. By creating a due date for the client, it also aids in reaching the target date of when the application will be submitted.

III. A BUMP IN THE ROAD

Everything is gathered, a phenomenal Medicaid plan is now in action, but sometimes things don't go as planned. While the BEMs are there to follow, caseworkers can apply the regulations from this manual very differently. It is helpful to be available for the caseworker and to reach out to him/her directly, especially if the Medicaid application is not clear-cut or the caseworker is newer. It can be challenging to reach a caseworker, but don't give up! Through tenacity and consistency, it is possible to form a relationship with the caseworker. Often they are willing to listen to explanations about which BEMs should be applied and why. It's frustrating when things are not processed correctly or interpreted/applied in a manner consistent with federal law. This is experienced by every single Medicaid planner at one time or another. Trying to make these instances a teaching opportunity can go a long way before it turns adversarial.

If the applicant has applied for or is receiving Medicaid and a Probate hearing is needed to accomplish some part of the plan, the AG's office must be served with notice of the hearing. If the AG's office appears for the hearing and raises objections, request to brief the issue for the court. Before submitting a brief, it is very helpful to reach out to colleagues to get input and guidance if needed. Any practitioner that has been a part of the ELDRS section and routinely practices Medicaid Planning will most likely have valuable insight to common Medicaid planning objections and challenges. Most importantly, we, a group of Medicaid Planning attorneys, want to make good case law for the clients we serve.

IV. MEDICAID IS APPROVED, BUT DON'T STOP THERE

Once an applicant is on Medicaid, a sudden inheritance can disrupt the entire plan. Make sure that the applicant is removed as a beneficiary or a devisee from the spouse's assets. Also, make sure that the applicant is removed as a joint owner from all the assets. This ensures that the applicant does not end up with the assets upon the death of the spouse. Further, the applicant is likely not in a position to serve as patient advocate, attorney in fact, personal representative, or trustee, and at least the spouse's documents will need to be reviewed and updated as needed. Any assets remaining in the applicant's name will need to be reviewed to make sure they are passing outside of probate to avoid estate recovery in the future.

Also, if there were any challenges along the way or unique opportunities that were done, it is great to report that on one of the ELDRS Listservs. Michigan has a close-knit group of Medicaid Planning attorneys who are very active on the ELDRS Listservs. Reporting nuances, challenges, and victories is a way to keep practitioners up to date on current issues and opportunities within the Medicaid planning arena.

V. QUICK TIPS

There are many issues to consider when assisting an individual in this area of law. Below is a short list of techniques to consider for various situations that may come up.

If the applicant is married, a practitioner should explore, at least, the following techniques to see if there are circumstances that would support the specific planning:

- Houdini Trust
- Solely for the Benefit of Trust
- Increasing Community Spouse Resource Allowance via protective order
- Increasing Community Spouse Income Allowance via protective order
- Divorce

If the applicant has a dependent child or one with a disability, a practitioner should explore, at least, the following techniques:

- Protective order diverting assets or income for the benefit of the child
- Solely for the Benefit of Trust
- Gift to the child with a disability

If the applicant wants to give a gift to a person under 65 with a disability, the practitioner should explore a Solely for the Benefit of Trust.

If the applicant has an adult child who lived with him or her and has provided care, the practitioner should explore the possibility of transferring the property to the child.

For all situations, the following is a list to consider when assisting with a Medicaid applicant:

- Paying down debt, including mortgage
- Improvements to the residence to increase salability and value when sold
- Replace an old car or purchase a vehicle that is being leased
- Purchase of funeral contract for the client and spouse
- Purchase of burial goods for family members
- Reverse half-loaf divestment
- Care contracts (pre-need)
- Preexisting medical expense coverage
- Retroactive application
- Protective Order for purchase of life insurance with cash value to preserve death benefit

This is not an exhaustive list, and other techniques are being developed. The best place to stay informed is the ELDRS Listservs and National Academy of Elder Law Attorneys (National and Michigan Chapters).

CONCLUSION

In an area that is filled with as much change as it is constant, a practitioner cannot approach Medicaid planning with a canned list of questions and then rely on a longstanding BEM regulation to ensure Medicaid eligibility. Stay current, think outside the box, and take the circumstances that are presented by the client and find ways to use those to better a position. It is so important to reach out to colleagues to share challenges and victories. The ELDR Section wants to know about them, and the sharing of information and ideas help enhance the quality

of life for our clients and changes the lives of not only our clients but their families and for generations to come.

Back to Basics Webinar Series

By Amanda Murray, Bassett Murray Law Group, Ann Arbor

Our Back to Basics Webinar series continues as an exclusive benefit to ELDRS members. This benefit extends to your assistants and paralegals as well. For more information, contact Amanda Murray at amurray@bassettlaw.com. Stay tuned to SBM Connect on how to register.

The following webinars are:

- August 25 at 12 p.m. – “What No-Fault Changes Mean for your Clients” with Stephen Sinas, Sinas Dramis Law Firm
- September 21 at 12 p.m. - “Disability Rights” with Nadia Vann, State of Michigan; Jill Babcock; and Michael Bartnik, Law for Baby Boomers, PLLC
- November 10 at 12 p.m. – How to Run an Elder Law Practice with Amanda Murray, Bassett Murray Law Group, and Erin Mortensen, The Law Office of Erin E. Mortenson, PLLC

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- September 11, 10 a.m. ELDRS Council Meeting (virtual)
- October 4-6, ELDRS Fall Conference, DoubleTree Hotel, Bay City, (if we are safely able to host an in-person meeting); note this is Monday through Wednesday
- October 5, Annual Meeting - DoubleTree Hotel, Bay City, 12 pm (lunch)

NAELA – www.naela.org

- August 18 - Lunch & Learn: Pooled SNTs & The Disbursement Process, Webinar, Presenters, Joanne Marcus, President and CEO of Commonwealth Community Trust, and Cora A. Alsante, Esq., partner of Hancock Estabrook, 1-2 pm EDT
- September 9 - Lunch & Learn: Diversity & Inclusion in the Practice of Law, Webinar, Presenter, Tissa Hami, Founder and Principal of Korsi Consulting, 1-2 pm EDT
- September 28 - The Art of Retirement Planning for Legal Professionals, Webinar, Presenters, Maria Fisher, National Sales Director, ABA Retirement Funds Program, and Matthew Stagner, Sr., Special Needs Financial Consultant, Voya Cares, 1-2 pm, EDT

ICLE/SBM – www.icle.org

- August 18 - ICLE's Partnership Training: Guided Resource Tour, Livestream
- September 11 - 2021 Young Lawyer's Section Summit, 13th Annual, Livestream
- September 14 - Drafting an Estate Plan for an Estate Under \$5 Million, Livestream
- September 17 - Elder Law Institute, 6th Annual, Livestream
- October 21 - Administrative Hearing before the MDHHS: An Interactive Workshop, Livestream
- October 27-28 - Deposition Skills Workshop, Livestream