ELDRS Update

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Spring Elder Law Conference on March 4

The 14th Annual ELDRS' Spring Conference is Friday, March 4, from 9 a.m. - 4:30 p.m. at the Inn at St. John's in Plymouth. The agenda includes providing for digital assets, Medicare advocacy, Medicaid, uncapping issues, and Social Security and self-settled trusts. There will be a reception following the conference. The cost for section members is $135 and $170 for non-section members. The optional lunch is $25. For more information, and to register, click here.

Also, please note that ELDRS' Fall Conference is scheduled for October 5-7 at the Crystal Mountain Resort in Thompsonville. More details will be in upcoming issues.

A Word from the Chair

By John B. Payne, ELDRS Council Chair, Garrison Lawhouse PC, Dearborn

It is often said that bad things come in threes. That is not superstition or idle speculation. Bad things, in fact, really come in threes. It is a scientific fact.

Bad things are composed of a type of dark matter called maleffluvium, which is trivalent. Because maleffluvium is attracted to other maleffluvium, a single bad thing tends to attract a second bad thing and two bad things attract a third. However, because maleffluvium is trivalent, a fourth bad thing can only form a very weak bond with a three-bad-thing group and is easily pulled away by another group of two bad things. Thus, the most common sequence is three bad things occurring together.

It is not the Section Council's fault that we are considering three bad things at the same time. We, like most other worldly entities, are subject to the dictates of science. Do not blame us.

The Three Bad Things the Council is forced to entertain are an increase in the registration fee for the Spring Conference, an increase in the registration fee for the Fall Conference, and an increase in the Section dues. Many members of the Section and participants in the Section conferences would agree with the epitaph seen in a hypothetical cemetery: "At Last, No More Taxes." If we could, the Council would maintain the current pricing structure forever. The problem is that we cannot reduce the volume or weight of our product to raise the price by subterfuge, like Proctor & Gamble or General Foods. We could reduce the size of the meeting rooms at the conferences or cut the size of the articles in this newsletter, but that would not trim our costs sufficiently. Furthermore, one of our major expenses has been litigation.

We have filed several amicus curiae briefs and were invited by the Michigan Supreme Court to file a brief in *Estate of Roush v. Laurels of Carson City, LLC*, Docket150882. The heft of the hammer we can swing when we litigate on behalf of the Section's constituents is directly related to our bank balance.

In summary, it is the Council's hope that you all, gentle readers, will see that we are raising the cost of Section membership and activities with reluctance. We also hope that you will perceive the great value of membership and attendance at the conferences.

Our Section dues will continue to compare favorably with other sections and the conference registration fees will still be far lower than registration fees for other CLE events of comparable length and quality. Besides, if you have attended any of the Section's events, you must agree that the collegiality, networking–and fun–are incomparable.

The Section listserv, elderlaw@groups.michbar.org, is hugely informative and sometimes entertaining. By itself, the listserv is worth the cost of Section membership. If you are a Section member and have not experienced the listserv, it is an outstanding source of information on current events in the Elder Law and Disability Rights community and an expansive sounding board for discussing the problems that crop up in the practice.

If you are unsure about the value of Section membership, attend a monthly Council meeting. The meetings are from 10 a.m. to noon on the first Saturday of most months. You are welcome to call or log in and join the discussion. The call-in information and the agenda are posted to the Section listserv, or contact any Council member for web or phone registration information.

Please bear with use through this adjustment in our fee structure. The Elder Law and Disability Rights Section is a crucial agent for change and improvement for our areas of practice. To

continue to serve our members and other stakeholders, we must ask for a higher level of financial commitment.

Thank you for your consideration. The Council and I sincerely hope you will maintain your membership in the Section and that you will join us at the 2016 Spring Conference on March 4 (see details above) and 2016 Fall Conference on October 5-7.

Changes to Medicaid Policy

By David Shaltz, Chalgian & Tripp Law Offices, PLLC, East Lansing

Editor's Note: The following was an internal memo for the Chalgian and Tripp Law Offices but was kindly shared with ELDRS by Mr. Shaltz.

On December 1, 2015, the Department of Health and Human Services released new BEM and BAM policies that went into effect on January 1, 2016.

Promissory Notes

BEM 400, page 40, describes the treatment of promissory notes, land contracts, and mortgages. DHHS has clarified its policy to require that payments under these arrangements must now be made in "equal monthly amounts." Otherwise, the amount loaned under the note will be subject to a divestment penalty.

Long-Term Care Insurance Partnership Policies

BEM 400, pages 44-45, contain a description of long-term care partnership policies. The update to the policy is language that confirms the amount paid to a beneficiary under one of these policies is (1) disregarded as an asset for Medicaid eligibility purposes and (2) protected from estate recovery.

Personal Care and Home Care Contracts

BEM 405, page 8, shows DHHS has reinstated its prior policy for personal care and home care contracts/agreements, that the client's physician must certify in writing at the time the services are received that they are necessary to prevent the transfer of a client to a residential care or nursing facility. If there is no such certification, the money spent to purchase those services will be treated as divestment.

2016 Divestment Divisor

BEM 405, page 13 shows the divestment divisor for a person with a baseline date1 in 2016 is $8,282.

PPA and VA Aid and Attendance Payments
BEM 546, page 2, says that VA Aid and Attendance payments are excluded for purposes of determining a person's eligibility for Medicaid; however, those payments are counted in calculating the post-eligibility Patient Pay Amount for a nursing home resident.

Health Insurance Premiums and the PPA
BEM 546, page 8, states, "Include as a need item the cost of any health insurance premiums (including vision and dental insurance) the L/H patient pays for another member of their fiscal group, regardless of who the coverage is for." BEM 211, page 5, says that for a nursing home patient, the fiscal group is that person alone and does not include a spouse. This means that the health insurance premium a nursing home patient pays for her or his spouse is not deducted in calculating the Patient Pay Amount. What has me scratching my head is that DHHS then retains the following sentence that appears in current policy: "Example: L/H patient pays health insurance premiums for two (self and spouse). Allow health insurance premiums for two."

My guess is that DHHS's failure to delete this language was an oversight that will be corrected in future policy revisions. The baseline date is the first date the client was eligible for Medicaid and in a nursing home or approved for the MI Choice waiver program.

Other Changes
The other changes announced in this release address eligibility policy for the Modified Adjusted Gross Income (MAGI) related Medicaid groups, e.g., the Healthy Michigan Plan, the disability determination requirements for Medicaid in BAM 815, and other parts of Medicaid that affect persons who are not older or disabled.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

New Year, Old Issues
We are now halfway through the 2015-2016 Legislative Session in Michigan, and a good number of issues pertinent to elder law and disability rights have carried over from last year. Some of them are expected to be completed relatively soon, while others may wind up on the legislative scrap heap at the end of 2016.

The issue most likely to get to the Governor's desk quickly is legislation creating a system for the disposition of digital assets. House bill 5034, sponsored by Rep. Anthony Forlini, would address the increasingly complicated issue regarding transfer of digital property, be it email, online accounts, or websites, from a decedent to an heir. The bill also would lay the groundwork for access to the digital assets of an incapacitated individual by a guardian or

conservator. The issue was initially contentious as elder law and probate attorneys differed with online corporations (such as Google and AT&T) on how to follow the wishes of an individual while protecting their privacy rights. HB 5034 is modeled on compromise legislation crafted by the Uniform Law Commission, and it passed the Michigan House unanimously. It is expected to be taken up in the Senate Judiciary Committee in February.

Another issue that made it through only one chamber in 2015 is a bill known as the Designated Caregiver Act, sponsored by Senator Margaret O'Brien (R-Portage). Modeled after a national effort known as the Caregiver Advise, Record, Enable (CARE) Act, Senate Bill 352 would require hospitals to allow patients to designate a specific individual as their caregiver. The hospital would then need to provide consultation with designated caregivers to prepare them for the patient's assistance needs after release from the hospital. The bill is part of a national effort led by AARP to increase the quality of home-based care provided by non-professional family members or friends, and to give those caregivers education and support. The bill passed the Senate unanimously and is awaiting a hearing in the House Health Policy Committee.

State of the State Address Focuses on Flint

Gov. Snyder will unveil his budget proposal in early February, but based on the content of his State of the State Address, it will likely focus on helping residents of Flint regain access to safe drinking water. The governor called for an immediate appropriation of $28 million in aid to Flint, which the House quickly passed last week. Most observers expect that these funds are the vanguard of what will be a much larger request coming for the 2016-2017 budget. Because the state is looking to find more money to address the situation in Flint, that could have a negative effect on spending needs elsewhere. Funding increases for services to the aging that were included in the current year budget will hopefully not be in jeopardy, but additional funds for items like the Home and Community Based Waiver, in-home care services and senior food assistance programs may be hard to come by—despite the ever-growing demands for those services.

Michigan Aging and Adult Services Agency Reviewing Dementia Plan

The State Dementia Plan for Michigan was last updated in 2009, and the Aging and Adult Services Agency (AASA) housed within the Department of Health and Human Services is considering ways to update it. The current plan was originally developed by a coalition of organizations with expertise in dementia issues, such as the Geriatric Education Center at Michigan State University, the Institute of Gerontology at Wayne State University, the Alzheimer's Association, and the Michigan Public Health Institute. The first step in reviewing and updating Michigan's Dementia Plan will be to reconvene key stakeholders in the process. AASA is developing a list of those stakeholders and determining best practices for an effective

and inclusive process. ELDRS will have an opportunity to participate and provide crucial expertise on legal issues surrounding a dementia diagnosis. The department hopes to begin the plan update process sometime in 2016.

Why Unrecorded Deeds Are Not Worth the Risk

By Robert C. Anderson, Elder Law Firm of Anderson Assoc, Marquette

The idea of recording deeds to loved ones after an owner's death as a simple way for the owner to maintain control during life and avoid probate after death has been around for many years. The practice is controversial and has been the subject of many reported Michigan Court decisions as early as 1877 in *Thatcher v. Wardens & Vestryment of St. Andrew's Church,* 37 Mich 264 (1877).

In the early days of my firm's 31 years of estate planning practice, we did prepare unrecorded deeds for clients. As our practice matured, we stopped using unrecorded deeds as a parade of unfortunate consequences befell clients and the loved ones they named in them.

The Delivery Requirement is Critical

For a deed to be valid in Michigan, it must be notarized and delivered with intent to create a present interest. *Resh v Fox*, 365 Mich 288 (1961). Recording a deed is the best evidence of delivery. MCL § 600.2110. "The controlling factor in determining the question of delivery in all cases is the intent of the grantor." *McMahon v Dorsey*, 353 Mich 623, 626 (1958). The Supreme Court further held that such intent to deliver is "manifested and evidenced by the words, acts and circumstances of the conveyance," *id*. "The issue of delivery often turns on the peculiar facts in each case," John G. Cameron, Jr., *Michigan Real Property Law* §10.13, 3rd ed. (2005).

When the grantor gives the unrecorded deed to a third party for delivery after the grantor's death, reported decisions hold that to constitute an effective delivery, the grantor must have given expressed or implied instructions authorizing the third party holding the deed to deliver it after the grantor's death. *Hooker v Tucker*, 335 Mich 429 (1953). If the instructions are vague or nonexistent, present delivery will fail. *Gilmer v. Anderson*, 34 Mich App 6 (1971). Other courts, on the other hand, have held that if the grantor relinquishes control of the unrecorded deed to a third party or the grantee fails to express his or her right to recall the deed, that failure is enough to validate effective deed delivery. *Hynes v. Halsted*, 282 Mich 627 (1937); *Takacs v Takacs*, 317 Mich 72 (1947).

If the grantee of an unrecorded deed makes improvements to the subject land, that gives an inference that grantor intended a present delivery. *Cook v Sadler*, 214 Mich 582 (1921). If the grantor retains the deed, despite his or her expressions of intent in favor of the grantee,

delivery will generally fail. *Wandel v Wandel*, 336 Mich 126 (1953); *Dillon v Meister*, 319 Mich 428 (1947).

The bottom line is that unrecorded deeds swim in murky water of discerning the intent of a deceased person by introducing hearsay and inferential facts and testimony. Michigan courts offer no clear bright line rule for validating unrecorded deeds.

The Risks Abound

1. **Lost Deeds.** The first risk is that an unrecorded deed may be lost or intentionally destroyed by a competitor to the named grantees. As a result, the property could pass through probate to persons the owner did not intend, which happened in *Peterson v Bisbee*, 191 Mich 439 (1916).

2. **Inadvertent Recording.** Assume a parent initially names one of four children on a deed but keeps it in a desk to be able to change her mind. Assume the named child finds the deed and records before the parent dies, thereby cutting off the parent's right to change her mind.

3. **Intervening Third Parties' Rights**. Standard 3.15 of the Michigan Land Title Standard's recognition of recording delays after signing is subject to the exception of the rights of intervening third parties. These situations arise if an owner forgets about the unrecorded deed and wants to sell the property or give the property to someone else. What if the owner is unduly influenced into the changing directions, or what if a rogue agent under a durable power of attorney acts to change the deed? What happens when an owner of land subject to an unrecorded deed becomes the subject of a conservatorship? The deed will then be subject to a probate court hearing and court determination of the deed's validity.

4. **Unrecorded Deeds May Later Become Unrecordable**. Due to unexpected future changes in the formality requirements of deeds, unrecorded deeds may later become unrecordable.

5. **Medicaid Consequences.** Unrecorded deeds can create issues when Medicaid may be needed to cover nursing home costs. In one case, a Medicaid agency made a fraud claim against a son who did not disclose an unrecorded deed when his mother applied for Medicaid but then recorded it after she died. In another Medicaid case, an administrative judge denied Medicaid because it held that the father's camp was still a 100 percent countable asset even though there was an unrecorded camp deed to a son 10 years earlier. Under Medicaid, transfers must be made five years before applying for Medicaid. The judge said that since the father held the deed in his safe, it wasn't a valid transfer because of lack of delivery. As a result, the camp's value exceeded the Medicaid asset limit, requiring the family to sell the camp and use its proceeds for cost of care.

6. **Property Tax Consequences.** Because there is no bright line rule for when an unrecorded deed satisfies the delivery requirement, a city or township assessor is free to take the position that a "transfer of ownership" to someone else took place on the date the deed was signed rather than the later date of recording. For a homestead property, the assessor could retroactively deny the principal residency exemption (PRE). A retroactive property tax increase could also result under the uncapping rules of the Proposal A Statute, MCL§211.27a, back to the date that an unrecorded deed was signed. This happened in the Tax Tribunal case of *Nelson v Village of Leroy*, MTT Docket No. 311866 (2-28-06).

7. **Capital Gains Tax Consequences.** We have seen unrecorded deeds cause loss of the all-important stepped-up tax basis under IRC §1014. The ambiguity caused by an unrecorded deed invites the IRS to contend that a completed gift occurred when the deed was signed prior to death, which results in a carry-over tax basis. When the property is sold after death, the applicable carry-over tax basis will result in an unnecessary capital gains tax.

8. **Risks of Litigation and Malpractice.** It is not surprising that the uncertainty and ambiguity resulting from unrecorded deeds increases the risk of litigation of competing interests in the subject property. Disappointment from unrecorded deeds breeds malpractice actions against the attorneys who help clients establish them. Attorneys need to fully explain the risks of unrecorded deeds to clients who request them, and they need to offer clients better alternatives.

Better Recorded Deed Options

Four well known recorded deed options—a revocable living trust, joint tenancy, life estate and lady bird deeds—can avoid the uncertainty and traps caused by unrecorded deeds and provide a good deal of lifetime control as well as probate avoidance.

A lady bird deed is a deed transferring a remainder interest to loved ones wherein the grantor retains a lifetime power of possession and the right to transfer the property without the consent of the loved ones. Such a deed is authorized as a retained power of appointment under the Power of Appointment Act, and is approved by Standard 9.3 of the Michigan Land Title Standards. The use of a living trust and a lady bird deed offer full lifetime control. In joint tenancy and life estate deeds, the grantee's interest is vested but increased control for the grantor can be achieved by having the grantee sign a power of attorney back to the grantor. More control for the grantor of a joint tenancy can also be increased by having the grantor's share stated as 99 percent or some other high percent. Unequal joint tenancies were recognized in *In re Estate of Ledwidge*, 136 Mich App 603 (1984). In conclusion, unrecorded deeds open the door to contests and invite government agencies to take positions in their favor. It is just not worth the risk.

Use of a Conservator to Protect Troubled Consumers

By Josh Ard, Law Office of Josh Ard PLLC, Williamston

Consumer debt often leads to judgments, which can lead to impoverishment or at least an inability to maintain one's standard of living or to support dependents. The most likely means of escaping this situation are not particularly attractive. An alternative that many lawyers are not even aware of is a conservatorship. This allows protection of at least three types:

- Prophylactic measures to stop hemorrhaging of debt
- A more effective means to challenge transactions that result in debt
- A system for managing the remaining resources of a person for herself and her dependents.

Michigan's exemptions to execution after judgment are anachronistic and laughable. Consider some of them:

> (b) All household goods, furniture, utensils, books, and appliances, not exceeding in value $1,000.00.
>
> (e) The tools, implements, materials, stock, apparatus, team, vehicle, motor vehicle, horses, harness, or other things to enable a person to carry on the profession, trade, occupation, or business in which the person is principally engaged, not exceeding in value $1,000.00.
>
> (g) A homestead of not more than 40 acres of land and the dwelling house and appurtenances on that homestead that is not included in a recorded plat, city, or village, or, at the option of the owner, a quantity of land that consists of not more than 1 lot that is within a recorded town plat, city, or village, and the dwelling house and appurtenances on that land, owned and occupied by any resident of this state, not exceeding in value $3,500.00. This exemption applies to any house that is owned, occupied, and claimed as a homestead by a person but that is on land not owned by the person. All in MCL 600.6023.

Nowadays, most appliances exceed $1000.00 and few motor vehicles come that cheaply. Unfortunately, some homes might be worth less than $3,500.00 in particularly blighted neighborhoods. It is indeed sad that these homes are worth less than some high-end Toto toilets. Perhaps the only way to get the legislature to come up to 20th century standards, much less 21st century standards, is for someone to use another exemption from this statute to buy prized breeding cattle at over $1 million each, since there is no maximum dollar value given:

(d) To each householder, 10 sheep, 2 cows, 5 swine, 100 hens, 5 roosters, and a sufficient quantity of hay and grain, growing or otherwise, for properly keeping the animals and poultry for 6 months.

According to the *New York Times*, a Vermont cow sold for $1.3 million in 1985. The price was more for her breeding success than for expected dairy or meat products.

The most common means to escape these ridiculous burdens is to file bankruptcy, but that is not always possible. Some debts, such as most student loans, are not dischargeable. But there is another possibility that is not so well known—the protections offered in a conservator estate. Probate courts under the authority of Article V of the Estates and Protected Individuals Code may appoint a conservator or make another protective order for the property of an individual. MCL 700.5401 et seq. The possibility is not open to everyone. The basic criteria are set out in the statute:

(1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section. . . .[(2) this deals with minors]

(3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

(4) The court may appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment.

Many of the rationales in this statute reflect reasons why persons can acquire significant debt problems. As the Reporter's Comment to EPIC states, the term mental deficiency may be a slightly lesser standard than the term mental incompetency. This is critical because most courts agree with the Restatement of Contracts that a finding of mental incompetency automatically results in lack of capacity to engage in future contracts.

The Michigan statute, at least in my opinion, differs significantly from the Uniform Probate Code analogue adopted in most states because the uniform version of part (a) requires a finding that the individual has an impairment in the ability to receive and evaluate information or make decisions, unless the individual is missing, detained, or unable to return to the United States. I am not aware of how broadly Michigan courts have interpreted the conditions above. Research indicates that medical problems are a significant causal factor in consumer bankruptcies. Could a person successfully argue that physical or mental illness led to their inability to manage their property effectively even if they could make decisions? One could argue that because the Michigan legislature deliberately eschewed the decision-related criteria makes this more viable. It is also important to realize that creditors, including those who have obtained a judgment, are not interested persons entitled to notice of a petition to appoint a conservator, so their views will generally not be presented to the court. MCR 5.125(24). They are only interested persons for receiving a copy of the inventory or account or for challenging the way their claim was resolved. MCR 5.125(27). Moreover, the plain language of 5401(4) above allows a competent person who is aged or frail to ask for a conservator and gain protections. There is no guidance in the statute as to what age or degree of frailty suffices.

This only matters if a conservatorship offers some significant benefit. It certainly can. There are specific rules about payments of claims against the protected individual. The term claim is defined as follows:

> (g) "Claim" includes, but is not limited to, in respect to a decedent's or protected individual's estate, a liability of the decedent or protected individual, whether arising in contract, tort, or otherwise, and a liability of the estate that arises at or after the decedent's death or after a conservator's appointment, including funeral and burial expenses and costs and expenses of administration. Claim does not include an estate or inheritance tax, or a demand or dispute regarding a decedent's or protected individual's title to specific property alleged to be included in the estate. MCL 700.1103.

The term does not distinguish between judgments and bills and other requests for payments that have not been adjudicated. If a claimant has already perfected a lien, that lien remains until removed by a court or otherwise. MCL 700.5429(4) sets out the priority for payments for claims.

If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

> (a) Costs and expenses of administration
> (b) Claims of the federal or state government having priority under law

(c) Claims incurred by the conservator for care, maintenance, and education that were previously provided to the protected individual or the protected individual's dependents

(d) Claims arising before the conservatorship

(e) All other claims

The costs and expenses of administration include whatever is needed prospectively for the individual's support, care, and welfare or for those entitled to the individual's support. See 700.5401 above. Note that ordinary claims by creditors, unless for care, maintenance, and education, would rank no higher than (d) in this hierarchy. Depending on the family, (a) through (c) could eat up quite a lot of money, leaving little for claimants. Compare this to the ordinary exemptions from execution noted above. There is absolutely nothing in the Revised Judicature Act that requires preservation of enough assets to provide for the support, care, and welfare of the protected individual and her dependents. This can make an enormous difference when care is particularly expensive. Michigan is more protective than many other states. For example, California says that previous creditors must be paid first even if this negatively affects the welfare of the protective person.

There are other benefits as well. All claims against the protected individual, which, as I indicated, includes judgments, must be presented to the conservator:

(1) A conservator may pay or secure from the estate a claim against the estate or against the protected individual arising before or during the conservatorship upon the presentation of the claim and allowance in accordance with the priorities in subsection (4). A claim may be presented by either of the following methods:

(a) The claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and mailing address of the claimant, and the amount claimed.

(b) The claimant may file a written statement of the claim with the court in the form prescribed by court rule and may deliver or mail a copy of the statement to the conservator.

(2) The court shall consider a claim presented when the conservator receives the written statement of claim or when the claim is filed with the court, whichever happens first. A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 63 days after the presentation of the claim. The presentation of a claim tolls a statute of limitations relating to the claim until 28 days after the claim's disallowance.

(3) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by the applicable statute of limitations and, upon due proof, may procure an order for the claim's allowance, payment, or security from the estate. If a proceeding is pending against a protected individual at the time of

> the appointment of a conservator or is initiated against the protected individual after the appointment, the moving party shall give notice of the proceeding to the conservator if the proceeding could result in creating a claim against the estate. MCL 700.5429.

The mechanics are discussed by Patricia L. Patterson Courie in Chapter 10 of ICLE's Michigan Guardianship and Conservatorship Handbook. Consider her analysis in §10.34:

> Sometimes a creditor has already begun a proceeding against a protected individual for payment of a claim when the conservator is appointed. The proceeding may be pending in the circuit court or district court. Once a conservator is appointed, however, the claimant must give notice of the pending proceeding to the conservator if the proceeding may result in a claim against the estate. MCL 700.5429(3).

Any time a money judgment against the protected individual is possible, a claim against the estate of the protected individual is possible. This often occurs in the form of a personal injury cause of action, even when the protected individual has insurance coverage for such a claim. Although the insurance company may have appointed counsel to represent the individual, if there is any possibility of an over-limits verdict, the conservator has a right to receive notice. Many plaintiffs' attorneys are unaware that such notice must be provided to a later appointed conservator and fail to follow MCL 700.5429(3) in giving the appropriate notice. It may be possible to defend against an over-limits judgment against the estate of the protected individual and to protect his or her personal assets against attachment for payment of the claim if the plaintiff did not give appropriate notice.

If the protected person has been declared legally incapacitated, as probably the majority of protected persons are, then MCR 2.201(E)(1)(a) applies:

> If a minor or incompetent person has a conservator, actions may be brought and must be defended by the conservator on behalf of the minor or incompetent person.
> Any court battles over these issues must be brought in either probate court or the family division of circuit court. MCL 700.1302, MCL 600.1021.

These procedures generally are not in the comfort zone of most claimants. Creditors typically bring their battles in district court and many rely primarily on defaults. Here they could lose by default if they fail either to present their claims or respond within nine weeks of a denial of their claim.

Furthermore, conservators can do more to help the persons they are appointed to protect. A conservatorship is more effective as a preventive device. Essentially, the conservator acts as

trustee over all of the property assigned to the conservatorship estate. In most cases, it makes sense to give some sort of small "allowance" to the protected person to spend as she wishes. Such property is not included in the conservatorship estate. The goal is protection and few persons are at risk by having relatively small sums to spend on coffee, donuts, or whatever without asking the conservator first. The details are given in MCL 700.5419:

> (1) Appointment of a conservator vests in the conservator title as trustee to all of the protected individual's property, or to the part of that property specified in the order, held at the time of or acquired after the order, including title to property held for the protected individual by a custodian or attorney-in-fact. An order specifying that only a part of the protected individual's property vests in the conservator creates a limited conservatorship.
>
> (2) Except as otherwise provided in this act, the protected individual's interest in property vested in a conservator by this section is not transferable or assignable by the protected individual. Though ineffective to affect property rights, an attempted transfer or assignment by the protected individual may generate a claim for restitution or damages that, subject to presentation and allowance, may be satisfied as provided in section 5429.
>
> (3) Property vested in a conservator by this section and the protected individual's interest in that property is not subject to levy, garnishment, or similar process other than an order issued in the protective proceeding made as provided in section 5429.

As the Reporter's Commentary indicates:

> Section 5419 characterizes the conservatorship estate as a spendthrift trust. Subsections (2) and (3) are spendthrift restraints on the trust relationship described in subsection (1). Under subsection (2), the ward may not voluntarily alienate the assets. The provisions of subsection (3) prohibit creditors from reaching conservatorship assets directly. Assets may be reached only through the conservator under the claims procedure described in MCL 700.5429. Except for the limitations expressed in these spendthrift restraints and, as indicated in MCL 700.5407, the ward retains capacity to contract and to engage in other transactions.

In essence this is a back-handed way to create a self-settled creditor protection trust. Some states allow persons to voluntarily create those, but that is not generally possible under current Michigan laws.

To exemplify what that means, once a person has a conservator, the only property she can put at risk is property that is not assigned to the conservatorship estate. Normally all or almost all of the person's property is assigned to the conservator to manage. What is not assigned is usually nominal amounts for unmonitored spending, akin to a teenager's allowance. If someone is foolish enough to offer credit to a protected person, only non-conservatorship property is at

risk. For example, a protected person could agree to all sorts of things suggested by a telemarketer, but the telemarketer could not claim any property controlled by the conservator even if the contract were valid in the minority of situations where the protected person has not been declared legally incapacitated.

Usually credit bureaus do not report whether a person has a conservator. For many conservators, it makes sense to request a freeze on credit reporting to avoid the hassle of having to respond to various creditors who don't have a prayer of getting paid. Conservators can play an active role in challenging or voiding transactions the protected person was involved in before appointment.

I would like to thank Kathleen Goetsch and Joelle Gurnoe for examples they have given me. Conservators have been relatively successful in preventing imminent foreclosures and resolving transactions involving the protected person. Most of the time, the problems that motivated the appointment predated the appointment by some time. In many instances, the existence of those problems is sufficient to challenge or void the transaction. For example, persons with mental deficiencies often incur debts before protective proceedings are begun. Conservators generally have more cognitive and physical capabilities than protected persons and can be more active in pursuing remedies. All in all, there are many advantages to the establishment of a conservatorship for vulnerable adults. Attorneys who represent consumers should be much more aware of these advantages.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- February 6, ELDRS Council Meeting, Chalgian & Tripp, 1019 Trowbridge Rd., East Lansing, MI 48823, (517) 332-3800, at 10 a.m.
- March 4, Annual Spring Conference, Inn of St. John's, 8:30 a.m.
- March 5, ELDRS Council Meeting, Mannor Law Group PLLC, 8226 S. Saginaw St., Ste. A, Grand Blanc, MI 48439, (810) 694-9000, at 10 a.m.
- April 2, ELDRS Council Meeting, Jaffe Raitt Heuer & Weiss PC, 27777 Franklin Rd, Ste. 2500, Southfield, MI 48034, (248) 351-3000 at 10 a.m.
- May 7, ELDRS Council Meeting, Bassett & Associates PLLC, 2045 Hogback Rd, Ann Arbor, MI 48108, (734) 930-9200 @ 10:00 a.m.
- October 5-7, Annual Fall Conference, Crystal Mountain Resort, Thompsonville

NAELA – www.naela.org

- April 7-9, Annual Conference, Marriott City Center, 1701 California St., Denver, CO 80202

ICLE/SBM – www.icle.org

- February 18, Drafting Estate Planning Documents, 25th Annual, Plymouth (Live)
- April 27, Medicaid & Healthcare Planning Update 2016, Plymouth (Live) & Webcast
- May 11, Experts in Estate Planning: The Planner's Definitive Guide to Business Entities and Income Tax, Acme (Live)
- May 12-14, Probate & Estate Planning Institute, 56th Annual, Acme (Live)
- June 17, Probate & Estate Planning Institute, 56th Annual, Plymouth (Live)
- June 23, Drafting an Estate Plan for an Estate Under $5 Million (June 206), Plymouth (Live)