

# 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, Managing Editor, at [christine@caswellpllc.com](mailto:christine@caswellpllc.com).*

## ***Lt. Gov. to Speak at ELDRS' Spring Conference on March 10***

Lt. Gov. Brian Calley will be just one of the speakers at ELDRS' 2017 Spring Conference at the Inn at St. John's in Plymouth on March 10. During his tenure, Lt. Gov. Calley has been active in disability rights, so we look forward to his presentation.

We also will have our own esteemed Section members discussing the appellate process, mediation, creditor issues, and future health care issues as they all relate to elder law and disability rights. Additionally, there are still sponsorship opportunities for the conference.

For more information, to sign up for a sponsorship, and to register, please click [here](#).

## ***Passage of the Special Needs Trust Fairness Act***

### **A Boon to Persons with Capacity**

*By Michele P. Fuller and Kevin Urbatsch, Michigan Law Center PLLC, Sterling Heights*

The Special Needs Trust Fairness Act (a part of the 21st Century Cures Act) passed into law on December 13, 2016 and became immediately effective. This law allows people with disabilities to create their own self-settled first-party special needs trusts without having to rely on others. It corrects a decades-old problem in federal law that presumes that all persons with disabilities lack the mental capacity to handle their own affairs.

Under prior law, as set forth in 42 USC §1396p(d)(4)(A), if a person with special needs wanted to fund his or her own assets into an individual first-party special needs trust to preserve both the assets and maintain access to government benefits, that person had to have a parent, grandparent, legal guardian, or a court establish the trust. The underlying bias in that law was that persons with a disability were incapable of establishing their own trust. Many people considered the failure to include the "individual" as one of the persons allowed to establish a trust as an oversight or a mistake, but it was the law.

For adults with capacity, it was demeaning to be told they had to ask someone else to help them establish a trust. For those without a parent or grandparent, attorneys had to find creative ways to obtain court jurisdiction to establish a qualifying trust. Once an attorney was in court, sometimes the court used the opportunity to place the trust under ongoing court supervision. Instead of using the person with a disability's funds to pay for his or her own special needs, it was used to pay for attorney's fees, bond, filing fees, and expensive court accountings, even though the beneficiary had total capacity to manage his or her own affairs. People with disabilities who had capacity (but no parent or grandparent) were subjected to these unnecessary costs and fees while people with a parent and grandparent did not. It was fundamentally unfair and difficult to explain. This change in the law does not affect people with disabilities who do not have capacity to set up a trust. For those people, it is still required that their special needs trust be established through a probate court of appropriate jurisdiction.

Adults who have capacity can now establish their own (d)(4)(A) special needs trust. This will avoid going to court. It will be less expensive and easier to establish. If a person is receiving Supplemental Security Income (SSI), then the person can establish his or her own trust right away. If the person is on Medicaid, it may require some explanation to DHHS as its policy manuals still do not list individuals. It is expected that both the SSA and DHHS will issue directives explaining the new law to personnel, but if relying on this law, it is recommended that you provide an explanation as to why a person can now establish his or her own (d)(4)(A) SNT.

## ***Legislative Update***

*By Todd Tennis, Capitol Services, Inc.*

### **Looking Ahead to the Next Legislative Session**

While the government in Washington, DC is being completely reshaped with the inauguration of President Trump, the 2016 elections left Michigan's legislative landscape relatively untouched. Although 2017 will bring over 40 new faces to the Michigan House, the overall partisan makeup (63-47 Republican majority) is the same as last year. Gov. Snyder and members of the Michigan Senate were not on the ballot, and aside from the addition of Sen. Ian Conyers (D-Detroit) who ran to fill a vacancy last year, the Senate is unchanged.

Senate Majority Leader Arlen Meekhof (R-West Olive) and Speaker of the House Tom Leonard (R-DeWitt) both laid out their major legislative agenda items for 2017, and they are quite similar. Both hope to pass major reforms to Michigan's No-Fault Auto Law, make reductions in the Michigan Income Tax, and enact major changes to public pension laws. In his State of the State Address, Gov. Snyder also called for a task force to address problems with municipal pension systems. The governor also spoke about the need to make infrastructure investments

and praised the Healthy Michigan Plan, Michigan's version of expanded Medicaid benefits under the Affordable Care Act.

For ELDRS, a number of issues that were unable to get passed last year will carry over to the new session. These include legislation dealing with Physician Order for Suitable Treatment (POST) forms and possible changes to state mental health funding.

Rep. Jim Tedder (R-Waterford) was the key sponsor of a package of bills last year that aimed at creating a form that terminally ill patients may use for their wishes for medical treatment. Other states have passed such legislation, such as a Physician Order for Life Sustaining Treatment (POLST) or a Physician Order for Suitable Treatment (POST). Regardless of the acronym, the goal is the same: to provide individuals approaching the end of their life to state a clear direction as to their treatment decisions.

The Michigan Legislation uses the "POST" designation, and although it was originally introduced last year, there was not enough time in the 2015-16 session to get the bills through the House and Senate. Rep. Tedder plans to reintroduce the bills this session. Representatives from ELDRS have met with Rep. Tedder's staff to review the draft bills and make suggestions for changes. Most of the suggestions have been technical, such as ensuring that the language in the new POST legislation does not conflict with existing language regarding guardians or powers of attorney, and we expect those changes to be adopted.

One of the suggested changes, however, will be more political in nature. It is regarding the use or removal of feeding tubes in terminally ill patients. Most states that have passed similar legislation allow patients to specify that they do not wish to have their lives extended by the insertion of nutritional supports. However, Rep. Tedder's initial draft would not allow a POST form to authorize withholding of medically assisted nutrition unless the patient or patient representative consents to the withholding *at the time it is withheld or withdrawn*. ELDRS has taken a position that such a restriction would infringe upon the wishes of a patient, particularly one who may have become incapacitated since the POST form was completed. We hope the Legislature will decide to follow the lead of other states and allow medical personnel to follow the patient's wishes as specified on a POST form regarding medically assisted nutrition.

Another issue that carried over is funding options for mental health services in Michigan. Gov. Snyder created a firestorm of controversy when he recommended that funding for mental and physical health services be coordinated and administered through managed care organizations. The backlash from mental health providers and advocacy groups led the Legislature to reject this proposal. Lt. Governor Calley led a workgroup made up of stakeholders from across the mental health advocacy spectrum that had hoped to complete a report with recommendations by last fall. However, that process moved more slowly than expected, and the group issued an interim report in mid-January. The final report is expected by March.

The interim report contained numerous recommendations. However, the key proposal calls for maintaining separate funding streams for physical and mental health treatment, and rejects proposals that would combine and privatize payment administration. Other recommendations from the report include the state taking steps to improve pay for caregivers, eliminating gaps in coverage across geographic regions, and increasing screening for substance abuse.

Following the issuance of the interim report, some of the members who had participated in the work group issued a "Minority Report." The Michigan Association of Health Plans (MAHP), which represents HMO's, argued that the interim report did not go far enough. MAHP stated that "...the report offers few real solutions and has so far missed an important opportunity to encourage pilot programs that we believe will demonstrate that MAHP members can deliver improved services to one of the most vulnerable groups in our society."

This "Minority Report" was in turn blasted by other members of the workgroup, including Arc Michigan and the Mental Health Association in Michigan (MHAM). Mark Reinstein, CEO of MHAM, stated that the proposal to "move all community mental health Medicaid money and clients to the MHP's has been thoroughly discussed and assessed three times in the last year" and "that proposal has gone down every time."

Battle lines are clearly being drawn on this issue with HMOs pushing hard for coordination of payment systems and mental health providers and advocates seriously concerned about what such coordination could mean to the provision of behavioral health services. We expect this fight to continue through 2017 and possibly beyond.

### ***Mental Health Update: Is Managed Care Inevitable?***

*By Christine Caswell, Caswell Law PLLC, Lansing*

The Michigan Partners in Crisis (PIC), which is part of the Mental Health Association in Michigan (MHAM), held its Winter Conference on Dec. 5, 2016 in East Lansing, featuring federal speaker Rebecca Farley, the vice president of policy and advocacy for the National Council on Behavioral Health in Washington DC. The Council is the association representing managed care organizations (MCO) and has 2,900 members.

In her presentation, Farley said states are going for "efficiency." As always, cutting costs is key.

"[Managed care] streamlines administration and provides better integrated care," said Farley. "Managed care is here to stay."

Farley admitted there has been limited research on the states currently implementing managed care. "It is complicated in states like Michigan with expanded Medicaid," she stated. "Many MCO's lack understanding of mental health, which is why what is in the contract is king."

Right now, Kansas, Kentucky, Florida, and West Virginia are transitioning to managed care. Anecdotal problems being reported include patient access, worse outcomes, and a greater burden on the poor, Farley stated.

“MCO’s may not know what crisis stabilization is and how to handle it,” she said. “Advice from the other states is to try a network approach where the contract includes mental health organizations, so you are building a relationship.”

Another big issue, according to Farley, is provider credentialing. “The administrative burden is linked to the number of MCO’s in your region. There is a big problem in Florida with issues such as background checks. Is there care delivery by peers and paraprofessionals included in the contract? What area of services are you going to need? What area of services are you going to provide? Does the patient need to go to different sites for continuity of care? How are you deciding what services patients are entitled to?”

She noted that contracts need to include care transitions and coordinate care management programs, while also providing uniform definitions of services and qualified providers.

“Medication access is a huge issue for patients,” Farley said. “Each MCO may have its own requirements. Try and get use of standardized forms for prior authorization.”

She also mentioned that it is difficult to develop a review process for mental health similar to what is currently used for physical health outcomes. “Parity is huge,” she said. “How do you implement parity into managed care?”

Another issue is low payment rates and slow payment to MCO’s. “We recommend putting payment language in the contract,” said Farley.

While Michigan has so far resisted proposals for managed care for mental health, according to Farley, it will eventually be used in all states. PIC and MHAM will continue to oversee the issue in Michigan.

## ***Marketing Your Practice for Promoting Harmony and Independence***

*By Robert C. Anderson, Anderson Brogan & Yonkers, Marquette*

One of the best ways to market your practice is by offering elder law solutions in trust agreements and client offerings. This article will guide you in how to distinguish your practice, make a real difference for clients and their families, and increase appointments and commitment rates by incorporating harmony and independence, and providing exploitation solutions.

## Introducing Harmony into Estate Plans

It is estimated that 25% to 30% of estate plans go up in the smoke of disharmony and conflict; sometimes in court and sometimes breeding a lifetime of estrangement among family members. "Family Harmony: An All Too Frequent Casualty of the Estate Planning Process," is the groundbreaking law review article by NAELA Attorney Timothy O'Sullivan, *Marquette Elder's Advisor*: Vol. 8, Iss. 2/4. The article is a must-read for elder law attorneys.

The primary causes of estate disharmony are deep-seated, historic dysfunction within families and the sense of entitlement possessed by children and other heirs, which spin out of control when the parental glue is gone, whether by incapacity or death. While estate disharmony can never be eliminated, it can be reduced with proactive measures.

Since public awareness is high, prospective clients will flock to estate planning attorneys who offer creative and effective harmony solutions. Our firm offers seven time-tested harmony measures that have significantly reduced estate conflict when our clients have died or become incapacitated. These measures are marketed on our website, in our public presentations, in prospective client mailings, and during client meetings.

The seven measures we recommend are:

- **Family Harmony Agreements.** As part of a client's estate plan, children are asked to agree in writing that they will honor their parents' desire for harmony in the settlement. While such an agreement may not be enforceable, we have found it does help in setting a more congenial stage in the settlement process. The agreement should not be used in highly dysfunctional situations.
- **Mediation in Setting up the Estate Plan.** In setting up a client's estate plan, it may be helpful to have the attorney mediate parental decisions with the participation of all children. This is an optional service.
- **Stating Harmony as a Goal in Trust Agreement.** When trusts are contested, the guiding principle used by courts is to enforce the settlor's intent as stated in the trust agreement. Therefore, it is important to incorporate the goal of harmony within the trust. While such a provision is only precatory, it is helpful to set the stage for peaceful settlement.
- **Requiring a Clear-the-Air Settlement Conference in the Trust Agreement.** The trust agreements of our clients contain a clear-the-air settlement conference to be held within 21 days of a parent's death. We have found this provision to be effective in reducing fears and putting peaceful trust settlement on the right track after a client has died.
- **The No-Contest Trust Provision.** While this is a common trust provision, most state laws and courts will not enforce it. A more enforceable trust provision is to require mediation as a condition to receive trust benefits, as described next.

- **Requiring Mediation in Trust Agreement as Condition to Receiving Benefits.** Another harmony-enhancing trust provision that works is to require all beneficiaries, as a condition to receiving any trust benefits, to sign an agreement to mediate any concerns and disputes without hiring a lawyer or going to court. We believe that this agreement has legal teeth since the trustee has the authority to withhold benefits if a beneficiary failed to cooperate in the mediation.
- **Personal Effects Disposition Forms.** The distribution of personal effects is a common source of conflict. The best publication on resolving this problem is *Who Gets Grandma's Yellow Pie Plate?: Workbook*, University of Minnesota Extension Service.

### **Introducing Independence Provisions into Trust Plans**

Most trust and estates attorneys seldom address a client's future need for long-term care, preference for independence and desire to be protected from exploitation in a trust agreement. In the elder law practice, however, planning for loss of memory and mobility and the need for long-term care are of primary importance. Clients prefer to stay in the least restrictive environment, usually at home, and maintain independence as long as possible when long-term care knocks.

These preferences should be stated not only in POA's but in trust and disclosure agreements as well.

### **Introducing Exploitation Solutions into Estate Plans**

Another way to distinguish your practice is to introduce financial exploitation and neglect prevention measures into your client's estate plans. These could include training DVD's and meetings with your clients' successors on what it means to be a fiduciary, how to detect dementia, and spot financial exploitation. The appointed agents under POA's are asked to sign an agreement to honor the client's desire for independence, and use his or her assets for the client's benefit, not their own.

Another strategy is to provide your clients with a consent form that authorizes your firm to take protective action, such as reporting to the next-in-charge or APS, when there is suspected exploitation or neglect.

Clients appreciate it when they know you've got them covered in the event of a decline in memory or mobility and that their goal of harmony will be honored when they are gone. A satisfied client will be a beacon for future referrals.

## ***Calendar of Events***

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

### **ELDRS – [www.michbar.org/elderlaw](http://www.michbar.org/elderlaw)**

- March 4 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend, Lansing, 10 a.m.
- March 10 - ELDRS' Spring Conference, Inn at St. John's, Plymouth, 9 a.m.
- April 1 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend, Lansing, 10 a.m.
- May 6 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend, Lansing, 10 a.m.

### **NAELA – [www.naela.org](http://www.naela.org)**

- Feb. 22 - Update: Video Conference Technology for Elder Law Attorneys, Webinar, 12-1 p.m., EST
- March 17 - Stetson Series - Anatomy of a Small Successful Practice, Webinar, 12-1 p.m., EDT
- March 23 - Serving the Needs of LGBTQ Clients, Webinar, 1-2 p.m. EDT
- April 25-29 - 2017 Annual Conference, Boston Marriott Copley Place, 110 Huntington Avenue, Boston, MA 02116
- May 18 - Asset Protection Planning for Blended Families, Webinar, 1-2 p.m. EDT

### **ICLE/SBM – [www.icle.org](http://www.icle.org)**

- Feb. 16 - 40-Hour General Civil Mediation Training, Plymouth Live
- Feb. 16 - Drafting Estate Planning Documents, 26<sup>th</sup> Annual, Plymouth Live
- Feb. 16-18 - 40-Hour General Civil Mediation Training, Plymouth Live
- Feb. 28 - Tax Law Series: Estate Planning Tax Considerations for 2017 - On Demand Webcast
- March 3-4 - 40-Hour General Civil Mediation Training, Plymouth Live
- March 28 - Microsoft Word Academy for Lawyers and Legal Staff, Plymouth Live
- March 30 - Masters in Litigation: Trials Tips, Tactics, and Practical Tales, Plymouth Live
- April 13 - Medicaid and Health Care Planning Update 2017, Plymouth Live
- May 17 - Experts in Estate Planning: Drafting Trusts to Optimize Income Tax Results, Acme (Live)
- May 18-20 - Probate & Estate Planning Institute, 57<sup>th</sup> Annual, Acme (Live)