ELDRS Update

Winter Edition 2018, Volume VII, Issue 4

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.

ELDRS Spring Conference – Registration is Open

The ELDRS Spring Conference will be held March 16, 2018 at the Inn of St. John's in Plymouth, starting at 9 a.m. Sessions include the following:

- **How to Enforce Orders Against DHHS and Other Administrative Law Matters** - David Shaltz and Sanford J. Mall
- **Health Insurance** - Norman Harrison and Jae Oh
- **Maximize Opportunities When Filing Social Security & Avoid Mistakes** - Daniel McHugh
- **New Tax Law and Opportunities for Your Clients** - Leon LaBrecque
- **What to Do if You or Your Files Have Been Subpoenaed and Other Issues** - Colleen Burke
- **Government Benefits Update** - Robert Mannor, Christopher Smith, Arthur Malisow, and Jackie Rygiel-Sprague

There is a reception following the conference. To register for the conference, click here.

Legislative Update

By Todd Tennis, Capitol Services, Inc.

The Legislature has returned from after the holiday recess and will soon turn much of its attention to the budget process. Governor Snyder gave his last State of the State address on January 23, and his final budget presentation took place on February 7.

Last year, much of the focus of the House and Senate was taken up by efforts to reform Michigan's No-Fault Auto Insurance system, making changes to public pension rules, and various discussions regarding possible tax cuts. Going into an election year, it is less likely that hugely controversial issues will come to the forefront, although that conventional wisdom may go out the window in these unconventional times.

Work Group Scheduled for End-of-Life Bills

While we were working on getting last year's POST legislation to the Governor's desk, another package of legislation was introduced that addresses similar issues. Two sets of identical bills were introduced in the House and Senate (HB 5075 and HB 5076; and SB 597 and SB 598) that create new parameters on the use of life-sustaining treatment. Right to Life – Michigan, a strong supporter of the POST legislation, is the main proponent of the new bills.

The House bills, sponsored by Rep. Tristan Cole (R-Mancelona) and Rep. Jeff Noble (R-Plymouth), will be the subject or a work group meeting scheduled for February 28 in Lansing at which ELDRS will be a participant. HB 5076 would prohibit physicians form ordering the withholding or withdrawal of life-sustaining treatment unless they had first obtained the consent of either the patient, a patient advocate, or a guardian. The concern with HB 5076 is that it might conflict with the recently-enacted POST legislation. However, it if it amended to clarify that POST forms constitute "consent," that would make it more palatable.

HB 5075 seeks to make significant changes to how patient advocates and guardians make medical decisions for a patient. From the House Fiscal Agency analysis:

- Currently, the court may modify the terms of a guardianship to include the powers of a patient advocate if a petition alleges, and the court finds, that a patient advocate designation was not properly executed or that a patient advocate is not acting consistently with either his or her designated authority or the patient's or ward's best interests.

- House Bill 5075 would add a "by clear and convincing evidence" standard to the court's determination on the petition and would also allow the appointment of a guardian in these cases, in addition to the modification of a guardianship's terms.

- The bill would also prohibit a patient advocate from making a decision to withhold or withdraw life-sustaining medical treatment from the patient or ward while a petition described above is pending. The bill would establish, as a rebuttable presumption for these proceedings, that a patient's or ward's best interests include his or her continuing to live.

The ELDRS Legislative committee expressed great concerns over several aspects of this bill, particularly the level of "clear and convincing" evidence and the inclusion of a rebuttable presumption that a patient's best interest is to continue to live. Both of those changes could lead to cases where a patient's wishes could be overturned or delayed. There was also concern expressed that this language could amplify fractures among the family and friends of a terminally ill patient regarding medical decisions.

Caroline Dellenbusch will represent ELDRS at the work group where we will attempt to address the concerns with these bills.

Visitation Rights Bill Reported out of Senate Hearing (See editorials below)
Senate Bill 713, sponsored by Senator Jim Marleau (R-Lake Orion), was the subject of a hearing in the Senate Judiciary Committee on February 13. The legislation stems from incidents in which a patient's guardian or agent under a power of attorney prohibits loved ones and family members from having access to or visiting with the patient. One such case that received national attention was that of radio celebrity Casey Kasem. Mr. Kasem's children were barred from visiting him near the end of his life by Jean Kasem, his wife and guardian. Since his death, one of Mr. Kasem's children, Kerri Kasem, has created a national effort to change state guardian laws so as to prevent other families from experiencing what she and her siblings went through. Kerri Kasem, along with Glen Campbell's oldest son and Mickey Rooney's daughter, testified to the Senate Committee on the 13th.

Since SB 713 was introduced, some ELDRS members have expressed concerns about how the bill is written. It amends the Estates and Protected Individuals Act (EPIC) and creates a new section that deals with "Isolated Adults." The ELDRS Legislative Committee discussed the bill at length, and there was general agreement that some of the language needs to be changed to ensure that it does not conflict with other sections of EPIC. It was also agreed that the Probate Section and the Probate Judges Association should be consulted.

Do-Not-Resuscitate Bills Introduced
A three-bill package that would give parents and guardians of minor children the ability to sign a Do-Not-Resuscitate form on the child's behalf was introduced in the Senate. Senate Bills 784, 785, and 786 were sponsored by Sen. Rebekah Warren (D-Ann Arbor) and Sen. Rick Jones (R-Grand Ledge). In addition, SB 785 creates a provision in the Revised School Code that establishes how public schools will file and maintain DNR orders for their students.

The bills are up for a hearing in the Senate Judiciary Committee on February 6

ELDRS Editorials: SB 713 Family Visitation Rights

The ELDRS Council voted to take the following official stance on SB 713 at its February 2, 2018 meeting. While ELDRS will continue to work with the senate and other interested organizations on this bill, below are two opinions from individual section members on the current version.

Official Position taken by the Elder Law & Disability Rights Section Council on SB 713 as of 2/2/18
ELDRS supports SB 713 in its overall concept that isolation of vulnerable adults is a serious issue that requires legislative attention. However, ELDRS opposes the current written form of SB 713 because more revisions are necessary to ensure that citizens will not be harmed by it, that provisions and procedures do not adversely compromise existing law (EPIC), and that more input from various stakeholders (courts, probate practitioners, adult protective services, etc.) is needed.

Why We Need SB 713, Family Visitation Rights, to Pass

By Robert C. Anderson, of Brogan & Yonkers, P.C., Marquette

The high-profile cases of Casey Kasem and Mickey Rooney started a nationwide movement to enact family visitation laws for isolated, vulnerable adults often suffering from dementia. So far, the ABA reports 12 states have enacted such laws in 2015 and 2016. The most comprehensive visitation law passed in Arkansas in 2017 which provides for family members and other close friends to petition the court for visitation in non-guardianship situations as well as guardianship situations. Wisconsin's version of family visitation also provides for dual coverage. It is Michigan's turn to step forward and enact comprehensive family visitation for isolated, vulnerable adults. Michigan Sen. James Marleau has introduced Senate Bill 713 (2017) to provide such comprehensive family visitation.

Common isolation situations include a second spouse who excludes his or her stepchildren from visiting their mother or father, a sibling in control of a parent who excludes other siblings, or a family member who excludes the person's close friends or life partner. Michigan's current Estates and Protected Individuals Code (EPIC) contains no protection for an adult under guardianship to exercise his or her fundamental constitutional right of association—that is to visit and communicate with family members or others of his or her choice.

Michigan's EPIC is behind the times. In its 2016 report, the ABA Commission on Aging supports family visitation. The National Guardianship Association's (NGA) 2017 practice standards support the right of visitation and communication. The 2017 proposal on guardianship protective orders of the National Conference of Commissioners on Uniform State Laws (ULC) favors enactment of family visitation rights. This proposal states, "A guardian may not restrict the ability of the adult subject to guardianship to communicate, visit, or interact with other persons unless specifically authorized by the court..."

There are other important reasons why family visitation legislation to protect vulnerable adults in Michigan makes sense:

1. *Family visitation petitions in probate courts can reduce the number of full guardianships by providing a simpler remedy to resolve family disputes. There are far too many unnecessary petitions for full guardianship where the sole purpose is to exercise control over a spouse or parent and to exclude other family members.*
2. *By reducing full guardianships, the autonomy and independence of persons with dementia can be maximized in many cases. Independence and autonomy are stated goals in EPIC for persons subject to guardianship.*
3. *As reported by the ULC, the use of family visitation can give the courts and APS another source to learn of and stop financial and isolation abuse when the abuse is practiced by the guardians themselves.*

4. *The authority of Adult Protective Services and county prosecutors tends to be limited to criminal and physical abuse matters. They have little authority to resolve family disputes involving abusive isolation. Therefore, isolation abuse in Michigan is largely being unaddressed.*
5. *Michigan and federal laws and regulations currently offer some protection for the visitation and communication rights of persons in skilled nursing homes, adult foster care, homes for the aged, and in hospitals. However, these laws and regulations have weak or no enforcement measures. Therefore, those who exercise control over pliable, defenseless long-term care residents through powers of attorney or guardianships can often easily exclude family and friends from visiting the residents. These violations of residents' rights can be prevented by providing concerned family and friends with a probate court visitation remedy. Of course, the remedy would also be available for isolation situations in residential settings.*

Family visitation legislation in Michigan can become an important stake in the heart of elder abuse. However, we need to balance this proposal with reasonable restrictions to stop those who seek to obtain visitation rights to exploit vulnerable adults. Senate Bill 713 amends EPIC to achieve a balanced approach to enforce family visitation.

Summary of SB 713

This legislation amends EPIC to allow certain family members and friends of an adult who is being isolated to file a petition in the probate court to request visitation rights. Such a petition can be done whether or not a guardianship is in place.

The right to petition is available when someone is considered an "isolated adult" who is defined as an adult, including a ward "who has been denied visitation with a qualified person." MCL 700.5101(d). A "qualified person" is given the right to file a petition for visitation. MCL 700.5603(1).

A "qualified person" includes the following three categories of persons:

(1) certain family members of an allegedly isolated adult, including a child, grandchild, parent or sibling,
(2) an individual who has a significant and ongoing relationship with the adult, and
(3) an individual whom the adult named in a patient advocate designation with whom the adult would like to visit. MCL 700.5101(e).

The details of the new petition process in a probate court are discussed in the new Part 6 of EPIC, being MCL 700.5601 and 5603. Section 5603(2) discusses the requirements for what a petition for visitation must contain. A petition may also include a request for notification in the event the allegedly isolated adult's residence is changed or he or she is admitted to a hospital or nursing home.

Section 5603 employs certain presumptions and burdens of proof that aid the parties in presenting proofs and the court in making decisions. First, under 5603(7), it is "presumed that it is in the best interests of the allegedly isolated adult to visit with a qualified person." This presumption can be rebutted by the respondent with clear and convincing evidence to the contrary. Second, the allegedly isolated adult is given the right to object to the petition, and if he or she does, the burden of proof then shifts to the petitioner to demonstrate by clear and convincing evidence that the objection resulted from undue influence by the person accused of isolation.

The court that finds in favor of visitation is given discretion in fashioning reasonable visitation and may require the person in control of the adult to provide the petitioner with a 14-day notice if the adult's residence is changed or he or she is admitted to a hospital or nursing home. The court is also given specific direction in assessing attorney fees and costs.

With specific regard to guardianships, MCL 700.5310(5) now makes it clear that the visitation remedy in Section 5603 applies in guardianship situations. Also, MCL 700.5306a(1)(gg) adds to the specific rights of a ward subject to guardianship the right "to visit and communicate with individuals of his or her choice." Finally, guardians ad litem in proposed guardianships will be required to ask the proposed ward whom he or she wishes to visit and report the same to the court. MCL 700.5305(1)(g)(viii).

Counterpoint on SB 713

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

It is generally accepted among elder law attorneys that the issue of isolation of vulnerable adults is becoming more prevalent. Unfortunately, SB 713 is not the answer; instead it is a generic resolution that does not consider the impact on Michigan laws and court procedures, nor of the dignity and rights of all Michigan citizens.

There are really two parts to this bill: 1) creation of a new cause of action that allows a "qualified person" to file a visitation proceeding in probate court to seek an order requiring visitation with a capacitated, but "allegedly isolated adult," and 2) changing the guardianship procedures, requiring the probate court to "design the guardianship to ... continue the existing relationships with qualified persons." As always, the devil is in the details.

Petition for visitation

SB 713 (at page 17) creates this new cause of action for a "qualified person," separate from any other proceeding, "for a finding that an individual who is at least 18 years of age is being isolated from a qualified person by another individual" (under new EPIC Section 5603). This does not need to be part of a guardianship proceeding, and no finding of incapacity is required. There is no clear jurisdictional basis for the probate court to hear such a petition and order a person

with capacity to be visited by someone. The term "isolated" is not defined, but the term "isolated adult" is defined at page 3 of the bill (which adds a definition of "isolated adult" to Section 5101 of EPIC) as follows:

> *(D) "ISOLATED ADULT" MEANS AN INDIVIDUAL WHO IS 18 YEARS OF AGE OR OLDER, INCLUDING A WARD, AND WHO HAS BEEN DENIED VISITATION WITH **A QUALIFIED PERSON BY ANOTHER PERSON**. [Emphasis added].*

Note that it does not matter that the person who is denying the visitation could be the alleged isolated adult. The definition also does not require that all visitation be denied. All that is needed is for the "qualified person" to have been denied visitation once (by someone; SB 713 does not specify that the "respondent" must be the person who is denying visitation). The reason for such denial has nothing to do with the definition.

The term "qualified person" is defined at page 3 of the bill, which adds the definition to Section 5101 of EPIC, as follows:

> *(i) THE SPOUSE, CHILD, GRANDCHILD, PARENT, OR SIBLING OF AN ALLEGEDLY ISOLATED ADULT.*
>
> *(ii) AN INDIVIDUAL WHO HAS A SIGNIFICANT AND ONGOING RELATIONSHIP WITH AN ALLEGEDLY ISOLATED ADULT.*
>
> *(iii) AN INDIVIDUAL WHOM THE ALLEGEDLY ISOLATED ADULT NAMED IN HIS OR HER PATIENT ADVOCATE DESIGNATION WITH WHOM THE ALLEGEDLY ISOLATED ADULT WOULD LIKE TO VISIT.*

Anyone who falls under this definition of "qualified person" may bring a petition for the probate court to determine if the individual over age 18 "is being isolated from a qualified person." Whether the "individual who is at least 18 years of age" is being "isolated" from someone other than a "qualified person" is not addressed. Moreover, this language expands the legal effect of patient advocate designations to include those with whom you would wish to visit. But, how can we create such a list that may not be needed until many years into the future? As attorneys, we know wishes change and documents are rarely updated. To rely on a patient advocate designation to create an enforceable visitation list would be wrong based on our collective experience and on the statutory purpose for patient advocate designations.

*Persons who are not among the listed "relatives" category, or listed on a patient advocate designation, are not part of the definition of "qualified person," unless that person has a "significant and ongoing relationship" with the allegedly isolated person. Anyone who can show a "significant and ongoing relationship" is included. The term is not defined, and there is no requirement that it be a **good** relationship. There is also no recognition of the right to associate*

generally with others, but, rather, only those who fall under the statutory definition of "qualified person."

The underlying premise is that it is in the "best interests" of the "allegedly isolated adult" to be visited by anyone who is a "qualified person" (but not others), and SB 713 creates a statutory presumption for that premise. However, the "significant and ongoing relationship" factor does not apply to the listed relatives or to a person named in the patient advocate designation as a person the "patient" would like to visit. That is, this presumption applies to all such people—even if the patient advocate designation was signed years or even decades and, also, to all listed relatives, even if the child or other listed relative had no recent contact with the "alleged isolated adult." As a result, the relatives and persons listed in the patient advocate designation can drag the alleged isolated adult into probate court and claim that the "respondent" has interfered with or denied them visitation regardless of any sort of current relationship with the person and regardless of the reason for such denial. Again, as attorneys, we know all too well what family dynamics could do with an opportunity like this, and it often would not be in the best interest of the "alleged isolated adult."

There also is no procedure for the appointment of a guardian ad litem or attorney for the "allegedly isolated adult" and no requirement that the "allegedly isolated adult" appear at the hearing. Apparently, the allegedly isolated adult is permitted to object to "visitation with the petitioner," although there is no procedure specifically allowing the person to do so or advising the person of his or her right to do so, but such an objection has no direct effect on the statutory presumption. SB 713 does provide that if the allegedly isolated adult objects to visitation with the petitioner (even though there is no actual procedure included allowing that person to do so and no requirement that the allegedly isolated adult be present at the hearing), then the petitioner must "demonstrate" by clear and convincing evidence "that the allegedly isolated adult's objection ***resulted from the respondent's undue influence****..." [Emphasis added.] SB 713 does not state what happens if the objections are not shown to have resulted from the respondent's undue influence, and the bill is silent on what effect such objections have, if any, on the "right" of the "qualified person" to obtain court ordered visitation (as noted above, such objections do not have any direct effect on the statutory presumption).*

Basically, there is no mechanism in SB 713 for even asking the allegedly isolated adult what he or she wants. Under the bill, the "battle" is between the petitioner and the respondent, and if the petitioner satisfies the statutory requirements, then visitation can be ordered. The question then becomes, how do you enforce a court order against an individual who has a constitutional right to choose his or her association?

SB 713 tries to define a person's right of association from the standpoint of someone else (a "qualified person"). This is inappropriate. How do you define who is important to any person? It also makes the assertion that someone has interfered with or denied visitation by one of the listed "qualified persons." That someone could be anyone; in fact, it could be you if you, for

example, ask your spouse to deny your sister's requests to come over for dinner because that sister sided with your brother in a disagreement. Under SB 713, the reason is irrelevant. You and your spouse could be in court explaining on the record (to you and your family's embarrassment, and at significant cost) your personal family issues. How is that not a violation of your right to associate and offensive to your dignity as a person who can make your own choices?

Guardianships

Under current Michigan law, if an incapacitated individual is managed inappropriately by another, a petition for guardianship (or perhaps a petition for protective order) allows the court to review the situation and grant authority to a suitable person to act on the incapacitated individual's behalf. Any such proceeding is subject to all the protections built into our current guardianship law, including appointment of a guardian ad litem, notice to alleged incapacitated person of his/her various rights, and appointment of an attorney for the alleged incapacitated person if requested. A guardianship remains under supervision of the court so interested parties can petition to modify the guardianship which may include clarification from the court on visitation rights, removal of the current guardian, and appointment of a replacement. While the "suitable" standard is not detailed in our Michigan statute for modification and termination of guardianships, case law such as the Court of Appeals case In re Guardianship of Dorothy Redd Mich App*,* [docket No. 335152, September 2017]*, supports removal of a guardian who is preventing the ward from visiting with the people he or she wants and/or exerting undue influence over the ward in that respect. As the issue continues to be presented, the supportive case law will grow. Because the issue is so fact specific, use of the court to determine "suitability" in the visitation context is more adaptable then any definition of "qualified person" and can adequately deal with the wide variety of family and other relationships that the statutory presumption as stated in SB 713 cannot.*

Under SB 713, the issue of visitation rights would be initiated immediately upon every petition for guardianship. While this issue exists in some cases, it is not involved in every guardianship and to require this complicated step would overburden our probate courts, increase the expenses incurred for every guardianship, create unnecessary drama between family and friends, and potentially put too much authority into the hands of the guardian when such basic rights should be reserved for the incapacitated individual whenever possible.

Further, SB 713 requires the guardian ad litem to determine (and report that determination to the court for every guardianship petition), "whether it is appropriate for the [alleged IP] to visit or communicate with" people that the alleged IP "wishes to communicate and visit." The probate court is then required to "design the guardianship . . . to continue the existing relationships with ***qualified persons****" [emphasis added]. This requires the Court to determine all of those purported relationships, and it does not protect the IP's right to associate generally. This is a limitation on the incapacitated individual's right to associate, not an enforcement of that right. The incapacitated individual should be assumed able to visit with anyone he or she*

chooses, not limited to a list of presumed "qualified persons." As we all know, defined relationships often do not complete the story of personal dynamics. Legal incapacity should not automatically curtail the individual's basic right to choose with whom he or she wants to associate.

Conclusion

While I do not question the well-meaning intentions of the proponents, the statutory "fix" should be based first on the right of adults to visit or associate with persons of their own choosing rather than creating and enforcing a statutory "right of visitation." SB 713 could easily be used by those who want to victimize the "allegedly isolated adult" and/or other family members, by asserting their statutory "right" of visitation. Further, this proposal provides no real remedies for incapacitated persons, but, by creating artificial statutory presumptions, will add unreasonable burdens of cost and time on the ward and on the court in every guardianship. The ELDR Section should be among the most vocal opponents of a proposed law which does not recognize the rights of the people who are at the center of the dispute and which will interfere with an individual's free decision-making and exercise of right of association.

National Legislative Update: RAISE Signed into Law

Signed into law on January 22, 2018, the Recognize, Assist, Include, Support, and Engage (RAISE) Family Caregivers Act gives the Department of Health and Human Services (HHS) 18 months to create an advisory council charged with making recommendations to support family caregivers, addressing financial and workplace issues, respite care, and other ways to support caregivers. According to AARP, "family caregivers provide about 37 billion hours of unpaid help for their loved ones." According to the Alzheimer's Association, more than 15 million Americans provide unpaid care for people living with Alzheimer's and dementia while incurring $10.9 billion last year for the health costs associated with the stress of caregiving.

Calendar of Events

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

ELDRS – www.michbar.org/elderlaw

- March 3 – ELDRS Council Meeting, State Bar of Michigan, 306 Townsend St, Lansing, 10 a.m.
- March 16 – ELDRS Spring Conference, the Inn of St. John's, Plymouth, 8:30 a.m. - 4:30 p.m.
- April 7 – ELDRS Council Meeting, State Bar of Michigan, 306 Townsend St, Lansing, 10 a.m.

- May 5 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend St, Lansing, 10 a.m.
- June 2 - ELDRS Council Meeting, State Bar of Michigan, 306 Townsend St, Lansing, 10 a.m.

NAELA – www.naela.org

- Feb. 27 - Non-Borrowing Spouse Protections in HECM Transactions - Presenter, Stephen Pepe, JD, Webinar- 1-2 p.m. E/T
- March 15 - How the Elder Law Attorney Can Help Personal Injury Attorney - Presenters, Joanne Marcus, MSW, and Karen E. Dunivan, Esq., Webinar- 1-2 p.m. E/T
- May 16-19 - NAELA 2018 Annual Conference and Pre-Workshop, Hilton Riverside Hotel, New Orleans, Louisiana

ICLE/SBM – www.icle.org

- Feb. 15 - Drafting Estate Planning Documents, 27th Annual, Plymouth (Live)
- March 15 - Drafting an Estate Plan for an Estate Under $5 Million, Plymouth (Live)
- April 5 - Microsoft Excel for Lawyers, Plymouth (Live)
- April 5 - How to Incorporate HotDocs Document Assembly into Your Practice, Plymouth (Live)
- April 10 - Medicaid and Health Care Planning Update 2018, Plymouth (Live)
- May 17-19 - Probate & Estate Planning Institute, 58th Annual, Acme (Live)
- June 14-15 - Probate & Estate Planning Institute, 58th Annual, Plymouth (Live)