

# ELDRS Update

## Winter 2023, Volume X, 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, Editor, at [christine@caswellpllc.com](mailto:christine@caswellpllc.com).*

### *Save the Date*

- **Spring Conference**, Kellogg Center, East Lansing, March 31, 2023  
Watch for the registration eblast coming soon.
- **Fall Conference**, Boyne Mountain Resort, October 18-20, 2023

### ***SECURE 2.0: Michigan Advocacy Helps Pass the Special Needs Trust Improvement Act***

*By Christopher W. Smith, Chalgian & Tripp Law Offices, PLLC, Southfield*

Special needs planners regularly encounter families who have accumulated large retirement accounts. While the initial SECURE Act forced most beneficiaries of an inherited retirement account to take distributions out in 10 years (or fewer), beneficiaries with disabilities (referred to as “eligible designated beneficiaries” in SECURE) remain eligible to take minimum distributions over their entire life expectancies.

While planners used to try to keep retirement assets from hitting special needs trusts, many are starting to flip their thinking and leave more retirement assets to special needs trusts to take advantage of this life expectancy payout.

Additionally, a special needs trust is, by definition, an “accumulation trust” for IRA purposes. Thus, *before* the SECURE Act, if a family member wanted to leave a retirement asset to a special needs trust, we were concerned about the ages of any residuary beneficiaries (i.e., the age of any beneficiaries who would inherit after the beneficiary with disabilities dies). If a residuary beneficiary was older than the beneficiary with disabilities, we had to use the older beneficiary’s age as the life expectancy when calculating minimum distributions. This often led to families naming random nieces and nephews to keep the life expectancy below the primary special needs trust beneficiary.

Under the proposed SECURE regulations, the ages of residuary beneficiaries no longer matter! Suddenly leaving retirement assets to special needs trusts looks even more attractive.

But there was still a problem if the family was charitably inclined. Like the rules before the SECURE Act, a charitable remainder beneficiary of a special needs trust would ruin this life

expectancy payout because a charity is not a person. For example, if a family left an asset to a child with a disability and then the Arc of Michigan after that child dies, the child would have lost the ability to stretch minimum distributions over the child's lifetime. So again, it was typically the best legal advice to have the family name some far-off relative as a remainder beneficiary instead of benefitting a charity that made a real difference in the family's life.

Thankfully, the Special Needs Trust Improvement Act within SECURE 2.0 changed this. It's one small paragraph on page 915 of the recently passed 1,653-page Consolidated Appropriations Act, 2023 (a.k.a. Section 337 of SECURE 2.0). Certain charities can now be the remainder beneficiary of a special needs trust without impacting the life expectancy payout for the beneficiary with a disability.

A small clarification. Under the Special Needs Trust Improvement Act, the residuary beneficiary has to be what would be commonly known as a 501(c)(3) charity. You *cannot* name a donor-advised fund or a private foundation.

Given the possibility of using the beneficiary's life expectancy to stretch out minimum distributions, and with only minimal concern over whom you name as the residuary beneficiary, have special needs trusts suddenly become the preferred beneficiary of retirement plans? Probably so, even if it will take planners a while to let this massive change sink in.

We are proud that The Special Needs Alliance, where Roxanne Chang and I are the co-chairs of the Public Policy Committee, led the efforts to pass the Special Needs Trust Improvement Act. In addition to our committee members, we're very grateful to the bipartisan efforts of Sen. Young (R-Indiana) and Sen. Hassan (D-NH) for first introducing the Special Needs Trust Improvement Act in the Senate and then Rep. Schneider (D-IL) and the late Rep. Walorski (R-IN) for introducing it in the House of Representatives. We're also indebted to The Arc and The Arc of Indiana for joining us in our efforts.

**ABLE Adjustment Act Also Passes.** Also, in part of the same bill, Congress finally passed the ABLE Adjustment Act, which will *eventually* change the eligibility age limit to qualify for an ABLE Account from age 26 to 46. I emphasize "eventually" because the age limit will not change to 46 until January 1, 2026. (Congress generally scores the costs of bills in 10-year timeframes and pushing the start date out nearly halves the age adjustment's estimated cost.) But while we wait, it is again important to remember that you just need to trace the start of the disability before age 26 for an individual to be eligible for an ABLE Account. A beneficiary does not have to be on Social Security Disability eligible before age 26.

**Concerns About Meeting the Definition of Eligible Designated Beneficiary.** All is still not perfect. The proposed SECURE regulations have at least two problems for special needs planners ensuring that beneficiaries meet the "eligible designated beneficiary" definition. First,

the proposed regulations seem to emphasize that an individual needs to be determined disabled by Social Security. But there are several reasons why an individual may be disabled but have no reason (or ability) to apply for Social Security. There needs to be a non-Social Security method to prove disability to meet the “eligible designated beneficiary” criteria. In the Special Needs Alliance’s comment on the proposed regulations, we suggested the alternative should mirror the disability certification requirements of ABLE Accounts.

Second, under the proposed rules, disability is determined on the IRA owner’s death date. This, however, can be entirely unfair, particularly to a minor child of a deceased parent. As we are all aware, we often do not know whether a child would meet Social Security’s definition of disability until at least adulthood. Thus, in the Special Needs Alliance’s comments, we suggest that at least for children, a disability certification be delayed until age 21 (the proposed age when a beneficiary is no longer a minor).

**Do you have a Michigan pensioner who wants to leave a pension to a special needs trust?** We have noted problems with State of Michigan employees who have taken a reduced pension to allow a dependent child to continue receiving the pension after the employee’s death. These retirees cannot assign the pension to a special needs trust *before* death. If you have a client in this situation, please get in touch with me at [smith@mielderlaw.com](mailto:smith@mielderlaw.com) so we can join them in our efforts to get this changed.

## ***Legislative Update***

*By Todd Tennis, Capitol Services, Inc.*

Gov. Whitmer delivered her fifth State of the State Address on January 25. For the first time in her administration, however, she was welcomed into the House Chamber by a Speaker of the House and a Senate Majority Leader from her own Democratic party. This change in partisan makeup in the Michigan Legislature is already making waves by moving to adopt longtime Democratic goals like the abolishment of Michigan’s so-called “Pension Tax” and the expansion of the Earned Income Tax Credit in the first month of the 2023-4 session.

In addition to those issues, Gov. Whitmer listed numerous policy goals she hopes to tackle in the upcoming year, including:

- Establishing Universal Pre-K education for Michigan 4-year-olds;
- The “Make it in Michigan” plan which calls for a regular funding source for economic development projects and a greater investment in worker training programs;
- Repealing Michigan’s 1931 law that bans abortion (a law made irrelevant first by *Roe v Wade*, and more recently by the passage of Proposal 3 in 2022);

- Adding LGBTQ+ protections to Michigan’s Elliott-Larsen Civil Rights Act;
- Increasing funding for the MI Kids Back on Track program that supports before- and after-school programming and tutoring;
- Passing gun safety laws that mandate universal background checks for potential gun owners and require that firearms be stored safely.

As mentioned above, the Michigan legislature has already begun moving to repeal the pension tax and expand the Earned Income Tax Credit. Gov. Whitmer might sign those issues into law by early February. The Michigan legislature is also moving on a bill that would move the presidential primary up to the 4th Tuesday in February in an attempt to make Michigan more of a factor in presidential races.

The State House and Senate have assigned their committees and named committee chairs, and ELDRS will be working with lawmakers whose assignments match our issue areas. Key committees will include the House Judiciary Committee and the Senate Civil Rights, Judiciary and Public Safety Committee, which will be chaired by Rep. Kelly Breen (D- Novi) and Sen. Stephanie Chang (D- Detroit), respectively. Other committees that could move pertinent legislation for ELDRS include the House Families, Seniors and Children committee chaired by Rep. Stephanie Young (D- Detroit), and the Senate Housing and Human Services committee chaired by Sen. Jeff Irwin (D- Ann Arbor).

ELDRS is currently preparing its list of legislative goals for the upcoming session, but some of them will be issues that have carried over. For example, we are continuing work to make remote witnessing and remote notarization, that was created during the pandemic, permanent. That law expired in 2021. Also, we are continuing to ensure that Michigan’s Medicaid eligibility requirements match with federal guidelines and are not enforced in a more draconian manner than is necessary under federal law.

### ***Functionality vs. Legal Requirements: When Accommodations Are Misused***

*By Jill Babcock, Detroit*

A client comes to you and asks for advice to start a business or develop a property; you do your due diligence to advise your client of all pertinent laws, including those for disability rights, but your job is not done.

Legal accessibility and functional use by individuals with disabilities are not always synonymous. The Americans with Disabilities Act (ADA) outlines specific standards for accessible design in

facilities.<sup>1</sup> According to the ADA's guidance for small businesses, doorway clearance must be a minimum of 32 inches to accommodate wheelchair users, with a latch that can be operated with one hand that does not require firm grasping and must be placed no higher than 48 inches above the finished floor of the building.<sup>2</sup> Given that the average American's waist circumference in 2016 was 40 inches for men<sup>3</sup>, a minimum 32 inch door may be aesthetically pleasing, but it may not be functional for a wheelchair user.

The ADA covers many topics and sets forth a legal framework for providing accommodations to those who require these accommodations to access places and spaces. The design standards are provided to help cure difficulties individuals with disabilities face when physical elements in a location prevent movement or access to the building. For example, providing only one entrance to a building which has a lip, step-up, or stairs as the only way to access the space. The ADA's design standards do not address functionality; however, spaces without functional and readily available accommodations signal to individuals with disabilities that they are not welcome and should seek to conduct business elsewhere.

Many business establishments are receptive and adhere to notions of inclusivity through accommodations, but sadly, they make strict adherence to the law their focus without giving consideration to how a person with a disability will function in the space. While many businesses will strive to make their buildings accessible by adapting physical spaces with zero-threshold doors or wheelchair accessible counters, lots of businesses do not appropriately put these necessary features to work. Time and again, these features are used for other purposes.

As an example, I am a wheelchair user. During a post office visit to mail holiday parcels to my nieces, I was glad to see there was an ADA compliant counter for my use, but this joy soon turned to disappointment when I was unable to functionally use the counter to conduct business because a staff member had filled the counter with holiday decorations. This prevented me and other wheelchair users from using it. When at the airport, I once tried to eat at a restaurant before boarding and was seated at the wheelchair-accessible bar. Before I could be served, the hostess was forced to remove a stack of serving linens that was stored on the accessible bar. When she placed the linens on the bar so that I could be served, a bartender argued with her, upsetting both the hostess and me. More recently, I visited a nice restaurant near my office and found the zero-threshold entrance locked, redirecting all traffic around the corner to a door with two steps, no ramp, and no automatic door opener. Again, appearance and strict adherence to the ADA guidelines was all the owner thought about without giving

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<sup>1</sup> <https://www.ada.gov/law-and-regs/ada/>

<sup>2</sup> 2010 ADA Standards for Accessible Design accessed through <https://www.ada.gov/law-and-regs/ada/>

<sup>3</sup> <https://www.cdc.gov/nchs/data/nhsr/nhsr122-508.pdf>

consideration to the wheelchair, walker, and leader cane users ability to *use* the accessible entrance.

I applaud venues that make elevators available to customers as well as stairs. But a recurring reality is that the elevators need a key for operation and customers must climb stairs to find an employee *with* a key, *or* the elevator is located in an employee-only part of the establishment, such as through a busy kitchen. Needless to say, my wheelchair doesn't climb stairs very well. In either case, wheelchair users are prevented from using the businesses as independent customers. Because of the prevalence of these barriers, I, like many other wheelchair users, rarely venture out alone.

Laws are very explicit about the requirement to be barrier-free or accessible for visual and auditory impairments, but they don't specifically state that these features be used for accessibility purposes. Successful businesses incorporate inclusivity<sup>4</sup> in their mission. The Northeast ADA Center sums up the problem by looking to the spirit of disability rights laws, which is ensuring that people with disabilities can adequately participate in society. Recognizing the "spirit" of disability rights laws not only increases the customer base but also sends a welcoming message.

As we look to understand and celebrate diversity and inclusion, advising your clients to adhere to disability rights, and other civil rights, law is crucial, but not enough. Being mindful of the "spirit" of these laws is paramount. It could be the difference between success and failure and should be included in any conversation about serving members of the public.

## ***Michigan's Eldercaring Coordination Program***

### **Moving into the Implementation Phase**

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

The Senior Regional Collaborative (SRC)—along with original partners Neighborhood Legal Services Michigan - Elder Law and Advocacy Center (ELAC); Linda Fieldstone 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. Currently, the implementation committee consists of the SRC; (ELAC); Linda Fieldstone and Sue Bronson; and Jennifer Sullivan. The pilot created an advisory committee; informed and educated the community on eldercaring coordination; and developed trained Michigan-based mediators as eldercaring coordinators.

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<sup>4</sup> <https://northeastada.org/resource/the-spirit-of-the-ada-and-your-business>, 01/15/2023

The Eldercaring Coordination program has now moved into the implementation phase. This program was designed to assist families of older adults, who are experiencing high conflict, to resolve 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 (EC).

### **What is the role of the Eldercaring Coordinator?**

An EC is a skilled professional that has completed family mediation, elder mediation, and eldercaring coordination training. The EC plays a major role in the process by dedicating up to two years to assist families with their conflict resolution process. The facilitation encompasses several phases that include 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.

### **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.

### Implementation Phase

Currently, the program is entering its third year. The SRC recently received an implementation grant for the next two years from the Michigan Health Endowment Fund. The program will also focus on the development and review of court forms for this process in hopes to have them approved by the State Court Administrative Office (SCAO).

The advisory committee will continue to have monthly meetings and the SRC continues to look for more members to sit on the committee. The focus for the next two years will consist of continued marketing to judges, probate registers, attorneys, guardians ad litem, dispute resolution centers, social workers, health care providers, community-based organizations, etc. We will also focus on communicating with guardians and conservators. The SRC is still 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 coordinators.

Please contact Darryl Jones at [djones@miseniors.org](mailto:djones@miseniors.org) if you are interested in participating in the committee.

There are also pilot projects going on in several other states, and 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>.

## *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) (Note all Council meetings will be by zoom only)

- March 4, 10 a.m. - ELDRS Council Meeting
- March 31, 8:30 am. - 4:30 p.m., ELDRS Spring Conference, Kellogg Center, East Lansing (Live)
- April 1, 10 a.m. - ELDRS Council Meeting
- May 6, 10 a.m. - ELDRS Council Meeting
- June 3, 10 a.m. - ELDRS Council Meeting

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

- May 3-5 - 2023 NAELA Annual Conference, Caribe Hilton in San Juan, Puerto Rico

**MINAELA** - [www.naela.org/MINAELA/MINAELA/Home.aspx](http://www.naela.org/MINAELA/MINAELA/Home.aspx)

- July 31 - Michigan NAELA Conference, Kellogg Center, East Lansing

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

- February 16 - Drafting Estate Planning Documents, 32nd Annual. Livestream
- March 14 - Microsoft Word Academy for Lawyers and Legal Staff. Livestream
- March 16 - Masters in Litigation: Persuading People on the Page & Screen. Livestream
- March 23 - Drafting an Estate Plan for an Estate Under \$5 Million. Livestream
- April 4 - Medicaid and Health Care Planning Update 2023. Livestream