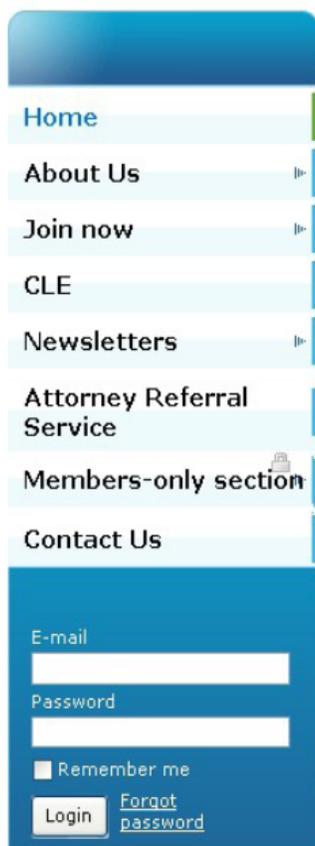


SUMMER 2009 NEWSLETTER

Bar Association launches new member-focused website



Welcome to the new GTLA Bar Association website!

The GTLA Bar Association has revamped its website in order to make it more useful to bar association members and the public.

For our members and potential members, we have added easy-to-use online membership applications and online renewal and event registration processes. Information about the different types of bar association memberships and the benefits of being a GTLA Bar Association member are outlined in the "Join Now" section. Current members can update profile and contact information as needed, and per request, we have added directory fields to include areas of practice and licensing information. Members control what profile information appears in the publicly-accessible directory and/or the members-only directory with a click of the mouse.

Another new feature is the ability to accept online credit card payments for memberships and events. These payments are made via PayPal, and members who select the credit card option are automatically linked to that site. Members who prefer to pay by check can continue to do. An invoice is emailed directly to the member if that option is selected.

The "Members Only" section of the website includes board minutes and financials, recent GTLA Bar Association survey results, and a "members only" directory. Access to this area is only available after log in.

As with any new site, we will be making adjustments and additions. If you have any feature you would like to see or have any questions on how the site works, don't hesitate to contact Jill Porter at the bar association (231-922-4715) or via email at gtlab@grandtraverse.org.

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Annual Dinner and Law Day Wrap-Up



Kyle Trevas, Bethany Warner and Brooke Bearup at May 7th's bar association annual dinner



Law Day Committee Chair, Michael Richey, and the Honorable Michael J. Kelly of the Michigan Court of Appeals

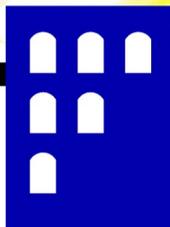
The GTLA Bar Association elected its 2009-2010 officers and board members at its May 7th Annual Dinner held at the Waterfront Conference Center in Traverse City. Jo Bullis will serve as president, with Shelley Kester serving as president-elect, and Deborah Rysso as secretary. Mardi Black will continue on as treasurer. Mattis Nordfjord is our newest board member.

Traverse City Mayor Michael Estes proclaimed May 1st "Law Day" to kick off the GTLA Bar Association's annual day of outreach to the public. Judge Michael J. Kelly of the Michigan Court of Appeals spoke at the bar luncheon during which Meghan Brown, an eighth-grade student at TC East Middle School was awarded the Law Day Essay Contest prize for her essay on the rights of newspapers to run stories containing classified information. Runners-up to the prize were her classmates, Lucas Nielsen and Abbey Kaufman. William Catinella, 13th Circuit Court Supervisor of Probation, was presented with the Liberty Bell Award, honoring a non-attorney committed to community service.



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Repeal of the Rule Against Perpetuities

John F. Welch and Christopher T. Haenicke

Since May 28, 2008, Michigan attorneys and their clients have enjoyed an estate planning option previously unavailable to them under Michigan law, the perpetual or dynasty trust for personal property. On that day, Governor Jennifer Granholm signed into law the Personal Property Trust Perpetuities Act (the Act), legislation that was initially proposed by Greenleaf Trust in 2005 and subsequently endorsed by the Michigan Bankers Association and the Council of the Probate and Estate Planning Section of the State Bar of Michigan. In a nutshell, the Act modified Michigan's rule against perpetuities so as to exclude the rule's application to personal property held in a trust that is either revocable on May 28, 2008, or created after that date.

Once thought of only as a vehicle used by the likes of John D. Rockefeller to keep wealth within a family, dynasty trusts are increasingly being utilized by those of more modest wealth. Individuals and couples with the means to do so are forming such trusts to pay for their descendants' education, healthcare, and living expenses. Moreover, there can be estate tax savings and asset protection benefits to such trusts. Properly drafted, such trusts are protected from creditors of the trust beneficiaries in the event of bankruptcies, lawsuits and divorce.

Prior to the passage of this legislation, Michiganders had to take their business outside of Michigan if they desired to establish a dynasty trust. More often than not, this required the use of an out-of-state attorney and a trustee in a foreign jurisdiction. With the passage of the Act, such grantors can work with the Michigan attorney and bank with whom they have an existing relationship. Michigan joins nearly half of the states in permitting such perpetual (or nearly perpetual) trusts, and continues the nationwide trend of liberalizing restrictions on the duration of personal trusts.

While the number of grantors that will want to establish a dynasty trust will be relatively small, all Michigan estate planning attorneys will want to familiarize themselves with the Act and review their trust forms in light of the Act's provisions. Those with access to ICLE's online materials will want to check out Douglas Mielock's *Drafting with the New Michigan Rule Against Perpetuities*, 18th Annual Drafting Estate Planning Documents, January 29, 2009, and James P. Spica's *Rule Against Perpetuities Repeal in Michigan*, available at ICLE's New Law Centers at www.icle.org/modules/lawnews. The Act was also the subject of a few sessions at the 49th Annual Probate & Estate Planning Institute that was recently held in Acme (the materials for which should be available on ICLE's website in June 2009).

As noted above, the Act exempts the application of the rule against perpetuity to personal property held in a trust. Real property held in trust or otherwise remains subject to rule against perpetuities in Michigan. Real property was not included within the scope of the Act because of opposition that surfaced during the legislative process. While bills seeking to expand the scope of the Act's coverage to include real property

were introduced last fall, the initiative died when the bills failed to make it to the floor during the last legislative session.

Greenleaf Trust is proud to have led the charge to bring dynasty trusts to Michigan. The impact of such trusts on the lives of Michiganders will grow over time as individuals opt to include dynasty trusts in their estate plans. Greenleaf Trust is a privately-held Michigan-chartered bank designed to maintain its existence and independence in perpetuity. Those who establish dynasty trusts administered by Greenleaf Trust can rest assured that Greenleaf will be here, carrying out their plans for generations to come.



John Welch is the Market Leader for Greenleaf Trust in Northern Michigan market. He is a graduate of the ABA National Trust School and earned an M.B.A. from Western Michigan University. John is a Certified Trust and Financial Advisor (CTFA) with more than 20 years of leadership experience in the trust and financial services industry.



As an attorney, Chris specialized in estate planning and business law, with additional expertise in estate settlement. He is a graduate of The Ohio State University, the University of Cincinnati College of Law, and the American Bankers Association National Graduate Trust School. Chris is a Certified Trust and Financial Advisor.



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In terrorem clauses and the Michigan Trust Code

Brooke Bearup



Prior to December of 2008, the established rule in Michigan was that in terrorem or 'no-contest' clauses in Wills were not enforceable if the challenger had probable cause to make the challenge, though this rule was limited to Wills and not to Trusts. For individuals that desired to thwart any potential challenge by their beneficiaries, drafting a Trust was a superior estate planning technique because these individuals could include whatever penalty provisions they wanted in the Trusts and such provisions would be enforced by the Courts.

On December 2, 2008 the Michigan Court of Appeals decided *Nacovsky v Hall (In re Griffin Trust)*, 281 Mich App 532; 760 NW2d 318 (2008). The Court of Appeals concluded that a no-contest clause in a Trust Agreement is unenforceable if probable cause exists to challenge the Trust, noting that the Estates and Protected Individuals Code, MCL Section 700.2518 relating to in terrorem clauses in Wills reflects the state's public policy that 'no-contest' clauses in Trust Agreements should be unenforceable when there is probable cause for challenging the Trust. The Court rationalized that if there is no probable cause to challenge the Trust, it is then not contrary to public policy to enforce the 'no-contest' clause. The Court of Appeals came to this conclusion despite the fact that the Michigan legislature did not extend the probable cause exception from EPIC to Trusts.

On June 3, 2009, the Michigan Supreme Court reversed the judgment of the Court of Appeals in *In re Griffin Trust*, stating simply that it is not the province of the courts to decide the public policy of the state; state policy should be decided by the legislature. According to the Supreme Court, the Court of Appeals overstepped its bounds by implying that the public policy intended by the legislature for Wills should also be extended to Trusts. Further, the legislature had the opportunity to extend the probable cause limitation to Trusts when EPIC was passed, but it intentionally neglected to do so.

On June 18, 2009 Governor Jennifer Granholm approved the Michigan Trust Code, with an anticipated effective date of April 1, 2010. One of the features of the Trust Code is that the probable cause exception will now extend to Trusts. MCL Section 700.7113 will state that, "A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust." Additionally, the Trust Code will have a retroactive effect on all prior Trusts. Thus, the emerging question becomes, what constitutes a challenge to a Trust that subjects itself to a probable cause analysis? Clearly direct challenges to the validity of the Trust may include mental incapacity, duress, and undue influence, but what conditions trigger an in terrorem clause? Furthermore, how will these conditions be evaluated in a 'probable cause environment' under the Michigan Trust Code?

For example, if a surviving spouse petitions for a spousal allowance under the probate code, can the petition trigger a forfeiture of all beneficial provisions for the survivor under the Trust? Surviving spousal allowances are provided as a matter of right, but those rights can and often are waived in pre and post nuptial agreements. But a husband must consider, if it is his intention that what he provides for his second spouse should be limited and he does not believe her income should be supplemented by what EPIC might give her as a surviving spouse, and further, that he intentionally limited what she was to receive from his estate so that his children from his prior marriage might also receive a substantial part of his estate, his wife could potentially receive nothing if she attempts to get more than what he provided to her under his Trust. The petition for a survivor's allowance is not a direct challenge to the Trust, but it might trigger a forfeiture. How will a court interpret the Trust if the surviving wife petitions for an allowance in probate court?

Another consideration is whether the settlor can make a beneficial provision contingent upon living with his or her choice of trustee; is the identify of the trustee a 'material purpose' of the Trust? If removal of a named Trustee does indeed constitute an effort to change a material purpose of the Trust, does this warrant a forfeiture of a beneficial interest? If there is a good cause to petition to remove the trustee, due perhaps to their bad investment choices or violations of fiduciary duties, should that be subject to the probable cause analysis?

In terrorem clauses can be used to prevent challenges to the validity of Trusts and further, they can be drafted in such a manner to prevent disruptions to the administration of Trusts. Will the Michigan Trust Code and its probable cause exception to in terrorem clauses be limited to challenges to the validity of the Trust, or will it be extended to the interpretation, construction, and administration of Trusts? How long and how tight will the settlor's 'dead hand' be tied by the probable cause exception? In terrorem clauses can be written in a way that deals more than with just direct challenges to the validity of the Trust, thus, significant thought should go into drafting them.

Brooke Bearup is an attorney with Bethany C. Warner & Associates in Traverse City. She can be contacted at bbearup@warner-law.com.



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Medicaid Issues for Homeowners – It Seems So Simple on the Surface

Greg Kish



Attorneys who have practiced in the areas of estate planning and probate have undoubtedly encountered issues surrounding the eligibility of senior citizens for long-term care Medicaid benefits. Those who do not frequently practice in this area can usually recall one or two basic rules regarding Medicaid eligibility. The most pervasive is “the home is exempt.”

What may once have been a simple, straightforward rule regarding Medicaid eligibility has, over time, been twisted time and again with restrictions and exceptions that can serve as land mines for the unwary. This article presents only some of the issues that arise with homestead property and should not be considered a comprehensive resource on the subject.

What is a homestead?

A person’s homestead is where the person lives. It may be a mobile home or real property, which includes adjoining land.

Is the home considered a “countable asset” for Medicaid purposes?

Generally, no. However, if a single person owns a home with an equity value greater than \$500,000, Medicaid benefits for long-term care, home help, and in-home services through the MI-Choice waiver program are unavailable.

A person’s home is not countable for Medicaid purposes if the person lived in the home at one time **and** (1) the person intends to return to the home, (2) the person is in a long-term care facility, adult foster care home, or home for the aged, **or** (3) or if a co-owner lives in the home.

If the owner never lived in the home, the home will not be countable if the owner is a nursing home resident and the owner’s spouse or other dependent relative lives in the home.

One Potential Problem

Consider a single senior who suffers a fall and enters a skilled nursing facility for rehabilitation services. Her rehabilitation takes several months, and she applies for and obtains Medicaid benefits to help cover the cost. As she nears the end of her rehab, realizes that she can no longer manage her two-story home. So, she sells the home and purchases a one-floor condominium which will be more manageable and have fewer maintenance concerns.

Sounds reasonable, right? Her new condominium is now a countable asset, and she is disqualified from receiving Medicaid benefits for long-term care. Since she never lived in the condominium and has no spouse, the property will most likely disqualify her from Medicaid.

This example presents the simplest of situations. Seemingly simple scenarios can quickly become more difficult. A few points to remember:

- A home is not automatically excluded; consider the facts and circumstances in light of the specific homestead exclu-

sions to determine whether your client’s home will be countable.

- Even if a home is not a countable asset, giving an interest in the home away to a family member will still trigger a divestment penalty, during which the person will not be eligible for benefits.
- A home owned by a revocable trust is a countable asset, which can sometimes be a good thing for some married couples because it can increase the amount of assets the non-nursing home spouse can keep.
- Proceeds from the sale of a home are countable assets unless a written agreement to purchase another homestead is in place, and even then the exclusion lasts only one year.

Attorneys advising clients regarding the purchase, sale, or ownership of the client’s home must stop and consider the Medicaid consequences. Unlike some other areas of the law, common sense does not govern Medicaid eligibility determinations, and a well-intentioned advisor can inadvertently steer a client the wrong way. With Medicaid rules constantly changing, even attorneys familiar with Medicaid rules are well served by reviewing the specific homestead rules and exclusions for every situation.

Greg Kish is a member of Smith Haughey Rice & Roegge’s Elder Law and Probate Litigation Group, within the Business and Individual Planning Department. He works frequently with seniors and their families and consults with other attorneys on Elder Law issues. He also practices in the areas of Real Estate, Probate, Employment, and Business law.

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- A home is not automatically excluded; consider the facts and circumstances in light of the specific homestead exclu-

26th Annual Golf Outing Scheduled



The Grand Traverse-Leelanau-Antrim Bar Association's 26th Annual Golf Outing is scheduled for Thursday, September 17 at Elmbrook. The popular four-person "scramble" format will continue, with members encouraged to form their own "teams" and begin pre-outing boasting and challenges at any time. Law firm teams are encouraged and firm teammates may include non-lawyer employees, spouses and significant others. Judges are "wild cards" and may be utilized to complete a firm foursome. Attorneys may also form their own non-firm foursomes, though any group which appears to be too strong will be harassed during their backswings and may be assessed stroke penalties ex post facto in an amount determined by popular vote of the rest of the golfers. Attorneys may also register individually and will be placed in a foursome by the committee.

Tee time for our shotgun start is 1:00 p.m. sharp. Don't be late or the others in your group will have to begin without you. A box lunch will be included for every golfer.

18 holes including cart, lunch, dinner, prizes and a good time, all for \$64.00. Golf, lunch, cart and prizes only: \$47.00; dinner only: \$17.

We must confirm the number of golfers and diners with the golf course one week in advance. Therefore all who plan to attend must register online on the Events Page at www.gtlaba.org or mail your registration and checks payable to the GTLA Bar Association by September 10. Only a limited number of tee times are available, so get your reservations in early.

There will be lots of door prizes that will take no skill to win -- just luck.

For further information, call Jill Porter (922-4715), Doug Bishop (946-4100) or John Racine (947-0400).



GOLF OUTING - RESERVATION

Name: _____

My foursome will include: _____

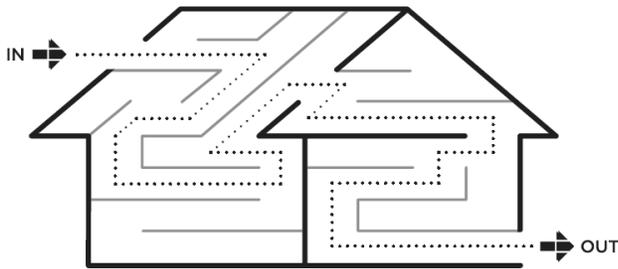
_____ Golf, lunch and dinner. Enclosed is my check for \$64.

_____ Golf and lunch only. Enclosed is my check for \$47.

_____ Dinner only. Enclosed is my check for \$17.

Dinner will be buffet style and will include steak, salads and dessert.

Make checks payable to "Grand Traverse-Leelanau-Antrim Bar Association" and return to Jill Porter, P.O. Box 1958, Traverse City, MI 49685-1958, by **September 10**. We cannot guarantee dinner for you unless Jill receives your check by that date. There will be no refunds for cancellation requests received after that date.



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Heard in the Halls

James C. Baker, Smith & Johnson, Attorneys, P.C., was recently invited to speak at the MCODSA - Michigan Court Officer, Deputy Sheriff, and Process Servers Association's Spring Seminar at Crystal Mountain Resort. Mr. Baker discussed the relationship between court officers and attorneys, from a practical standpoint; while also discussing the interpretation and application of court officer's fees, and the importance of a reasonable relationship between court officers and attorneys, all for the benefit of the client.



The law office of **Bethany C. Warner & Associates** in downtown Traverse City would like to announce that **Brooke Bearup** has recently joined the firm. Ms. Bearup received her undergraduate degree from the University of Michigan, Ann Arbor, and her Juris Doctorate from Michigan State University College of Law in East Lansing.

Ms. Bearup will be focusing her practice on estate planning, while also practicing in the areas of business representation and real estate. She will receive her Certificate of Completion in the areas of Probate and Estate Planning issued by the Michigan Institute of Continuing Legal Education later this year. Ms. Bearup is accepting new clients and can be contacted at (231) 922-8028 or bbearup@warner-law.com.

James W. Boyd of Zimmerman Kuhn Darling Boyd Quandt & Phelps PLC co-authored the chapter, "Representing Chapter 7 Trustees" in ICLE's recent title, *Handling Consumer and Small Business Bankruptcies in Michigan*.

Smith Haughey Rice & Roegge's **Peter J. Boyles** is playing Free Safety/Cornerback with the Traverse City Wolves, a minor league football team in the NFL.



Thomas S. Gilbert, JD, MA, CAAC, of Traverse City, MI has been named Chief Executive Officer (CEO) of Twelve-step Living Corporation (TLC) of Sioux Falls, South Dakota. Since its opening in 2004, the TLC organization has benefited more than 500 people and their families.

Attorney/Mediator **Robert B. Guyot, III** moved to Running, Wise & Ford on June 1st.



Lee Hornberger, Arbitration and Mediation Office of Lee Hornberger, has been appointed to the Traverse City Human Rights Commission. He can be contacted at the Arbitration and Mediation Office of Lee Hornberger at 941-0746 and or via email at leehornberger@leehornberger.com.

Attorneys **Michael Kronk** and **Melanie Stanton** have formed the law office of "Kronk & Stanton PLLC". Their new telephone number is 922-8590. The office remains in the same location at 223 Lake Ave., Suite B, Traverse City, MI 49684.



Paul Jarboe has moved to a new location while continuing his firm's general law practice with an emphasis on domestic relations, family law, criminal defense and representation of small businesses. His new address is: Law Offices of Paul T. Jarboe, 160 E. State St., Suite 202, Traverse City 49684. Phone: 922-3451 Email: pjarboe@charter.net.



Hagerty Insurance, the nation's leading provider of collector car and classic wooden boat insurance, has announced that **Barbara LaSusa** has been promoted to the role of General Counsel. LaSusa brings over 15 years of legal experience in international and corporate business law. Most recently, LaSusa held the position of Compliance and Ethics Counsel for the company.

Prior to Hagerty, LaSusa served as General Counsel for Priority Solutions International, a logistics company with offices in Traverse City. LaSusa previously served Chicago-based commercial lending company, Heller Financial, Inc., as its Chief Regulatory and International Counsel and Chief Counsel for its Global Vendor Finance Group. She was Vice President, General Counsel and Secretary for Sears Savings Bank, a subsidiary of Sears Roebuck and Co. Prior to joining Sears, LaSusa was an attorney with Hopkins & Sutter, where she primarily represented federal bank savings and loan regulatory agencies.



An article by Smith Haughey attorneys **Craig Neckers** and **Todd Millar** titled, "The Opponent's Expert: Preparing for the Most Important Deposition in the Case," has been published in *FDCC Quarterly*, the national publication of the Federation of Defense and Corporate Counsel (FDCC). In this article, Craig and Todd describe how to prepare to depose the opponent's experts. They cover such topics as how to prepare using written discovery, how to prepare deposition checklists and outlines, and how to set goals for the deposition.

The Pro Bono Initiative of the State Bar of Michigan recently recognized **Parsons Ringsmuth Zelenock PLC** in the 2009 Pro Bono Circle of Excellence for its demonstrated full compliance with the Voluntary Pro Bono Standard adopted by the Representative Assembly in 1990.

(HitH cont'd)

Effective July 1, 2009, **Kent Rozycki**, CPA, JD will be practicing as "Kent A. Rozycki, PLLC." Kent will be handling IRS and state tax issues for individuals and businesses. He can still be reached at 223 Lake Avenue, Suite B, Traverse City 49684. Phone: 932-2400.

Attorneys **Deborah Rysso**, **Mary Kavanaugh-Gahn**, and **Mike Swogger** spoke at the Traverse City Senior Expo on May 20th. Ms. Rysso spoke on the topic of Financial and Medicaid planning; Ms. Kavanaugh-Gahn spoke about powers of attorney and guardianships and conservatorships, and Mr. Swogger spoke about wills and trusts.

Collaborative Divorce Practice in Northern Michigan got a big boost with six additional attorneys and four area counselors completing the Collaborative Practice Institute of Michigan's 20 hour May training in Lansing. They are attorneys **Michael Lewis**, **Rob Tubbs**, **Kristyn Houle**, **Maura Brennan**, **Michael Richey** and **Marian Kromkowski**. The mental health professionals are Dr. Ann Marie Love, Dr. Lisa Franseen, Dr. Mary Dillon and social worker Michael Wright. They all join previously trained lawyers **Melanie Stanton**, **Shelley Kester**, **Billie Jo Clark**, **Jim Saffell** and **Stacey Pfarrer** in Up North Collaborative Divorce Professionals which has begun meeting the 2nd Monday of the month.

Third Level has scheduled its 7th Annual Golf Outing for Friday, September 11th. The event will be held at Elmbrook Golf Course and will have a shot gun start at noon. Interested players should contact Third Level at 922-4802.

ATTORNEY WANTED. Legal Services of Northern Michigan (LSNM) is seeking a full time staff attorney with a commitment to poverty law for its Gaylord office. LSNM attorneys handle a wide range of matters concentrating on housing, public benefits, disability, domestic violence and consumer issues.

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Attorney William J. Saffell receives LEAP's Fifth Annual Grand Traverse Area Pro-Bono Service Award



Jim Saffell receiving the LEAP Pro Bono Service Award from Fred Bimber

William J. (Jim) Saffell of Suttons Bay received the 5th Annual Grand Traverse Area Pro Bono Service Award on May 7, 2009, at the Grand Traverse-Leelanau-Antrim County Bar Association's Annual Spring Dinner. When Mr. Saffell relocated his practice from Denver to Michigan in 2002, he immediately sought out pro bono opportunities. He is one of the original founders of the Traverse Area Divorce Clinic and he regularly volunteers at the Third Level Crisis Intervention Free Legal Aid Clinic. Mr. Saffell is also a trained civil and domestic law mediator who provides pro bono assistance through Conflict Resolution Services. Mr. Saffell is an example of how one can incorporate pro bono service into a thriving law practice. More importantly, due to Mr. Saffell's pro bono service, many families in need received legal assistance that truly changed their lives.

L.E.A.P. (Law – Enhanced Access Partnership) is a unique blend of legal and human services providers, which organized to address the unmet legal needs of the Grand Traverse region's working poor. The primary partners in L.E.A.P. are Legal Services of Northern Michigan, Inc., Third Level Crisis Intervention Center, Inc., the Women's Resource Center – Grand Traverse Area, the Grand Traverse-Leelanau-Antrim Bar Association and Women Lawyers Association of Traverse City. The Three Generations Circle of Women Givers provides financial support through its community grant program.

GTLA Calendar of Events	
July 14	WLA meeting, Law Library, noon
July 15	Board meeting, Law Library, 4:30 pm
July 17	ADR committee meeting, Law Library, noon
Aug 11	WLA meeting, Law Library, noon
Aug 19	Board meeting, Law Library, 4:30 pm
Sept 8	WLA meeting, Law Library, noon
Sept 16	Board meeting, Law Library, 4:30 pm
Sept 17	Golf Outing, Elmbrook Golf Course, 1:00 pm

Recent Developments in Michigan MCR 2.403 Case Evaluation Law

Lee Hornberger



I. Introduction

This article reviews recent Michigan Supreme Court and Court of Appeal cases concerning MCR 2.403 case evaluation law.

II. Case Evaluation

A. Supreme Court Decisions

1. Right to a Hearing for Attorney Fee Amount

Young v Nandi, 482 Mich 1007 (2008), reiterated that the losing party is entitled to a hearing concerning the amount of attorney fees and costs to be assessed because of case evaluation sanctions.

2. Determination of Reasonable Attorney Fee - Four to Three Decision

Smith v Khouri, 481 Mich 519 (2008), reviewed a Circuit Court's award of "reasonable" attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Court held that the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number would then be multiplied by the reasonable number of hours expended.

3. Discovery Sanction Dismissal Order Not A "Verdict"

Oram v Oram, 480 Mich 1163 (2008), held that case evaluation sanctions are not available when the dismissal order is the result of discovery sanctions rather than a "verdict."

4. Interest On Case Evaluation Sanctions

Ayar v Foodland Distribs, 472 Mich 713 (2005), held that interest begins to accrue on costs and attorneys fees assessed for case evaluation sanctions from the date of the filing of the complaint. MCL 600.6013(8).

5. Appellate Attorney Fees Not Available For Sanctions

Haliw v City of Sterling Heights, 471 Mich 700 (2005), held that attorney fees for case evaluation sanctions do not include appellate attorney fees and costs.

B. Published Court of Appeals Decisions

1. Summary Disposition Order Is Verdict

In *Peterson v Fertel*, ___ Mich App ___ (2009), the ultimately prevailing defendants filed their motions for summary disposition before the case evaluation session and evaluation. The Court granted the motions before the evaluation. Plaintiff did not accept the evaluation, hence rejecting it. After the evaluation, the plaintiff filed a timely motion for reconsideration which was denied after the evaluation was not accepted. The Circuit Court granted defendants's motion for case evaluation sanctions because, in the Circuit Court's viewpoint, the entry of the order

after the evaluation rejection denying the reconsideration of the summary disposition order was a "verdict."

Plaintiffs appealed arguing that the denial of the reconsideration motion was not a "verdict" because the original order granting the summary disposition motions was entered before the evaluation. The Court of Appeals affirmed the Circuit Court's granting of attorney fee sanctions. According to the Court of Appeals, the ruling on plaintiff's reconsideration motion was a "verdict" within the meaning of the case evaluations rule.

2. Stipulated Damage Amount

In *Tevis v Amex Assurance Co*, 283 Mich App 76 (2009), the parties stipulated the amount of damages. Only the issue of liability was decided by the jury. The losing party argued that, since the parties stipulated the amount of damages, there was no "verdict" concerning monetary amount and hence case evaluation sanctions could not be granted. The Court of Appeals disagreed and reversed the trial court's denial of evaluation sanctions.

3. Statutory Attorney Fees As Affecting "Verdict" Amount

Ivezaj v Auto Club Ins Ass'n, 275 Mich App 349 (2007), held that the award of statutory attorney fees should not be included as part of the "verdict" when determining if a party is liable for case evaluation sanctions. The decision also indicated that, if the case evaluators incorporated statutory attorney fees when determining the valuation, the attorney fees should be considered part of the "verdict."

C. Unpublished Court of Appeals Decisions

1. Timeliness of Appeal From Case Evaluation Sanctions

King v American Axle & Manufacturing, Inc, unpublished opinion of the Court of Appeals, issued June 4, 2009 (Docket No 281928), involved a situation where the case evaluation sanction plaintiff timely appealed on November 9, 2007, the October 23, 2007, "final order" granting defendant summary disposition. Plaintiff did not file a new claim of appeal of the December 14, 2007, order granting case evaluation sanctions. The Court of Appeals held that it did not possess jurisdiction over the case evaluation issue because plaintiff did not file a timely notice of appeal covering such sanctions. A "final order" includes "a post-judgment order awarding ... attorney fees and costs under MCR 2.403." MCR 7.202(6)(a)(iv).

2. "Interest of Justice" Exception

Dormak v Zook, unpublished opinion of the Court of Appeals, issued May 21, 2009 (Docket No 284665), held that the Circuit Court erred when it denied the defendant's motion for actual costs by utilizing the MCR 2.403(O)(11) "interest of justice" exception. The Court of Appeals indicated that the Circuit Court's denial of sanctions pursuant to the interest of justice exception is reviewed for an abuse of discretion. For the interest of justice exception to be applicable, one of several "unusual circum-

stances” has to exist. Examples of these circumstances include legal issue of first impression or public interest, law is unsettled and substantial damages are at issue, a significant financial disparity between the parties, the effect on third persons may be significant, and where the prevailing party engages in misconduct.

3. Party Refuses To Settle As Affecting Sanctions

In *Moravcik v Trinity Health-Michigan*, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 281838), both parties rejected the evaluation. The defendant made no attempt to settle. At trial, the jury returned a no cause of action verdict in favor of defendant. The Circuit Court denied defendant’s motion for case evaluation sanctions because defendant had made no attempt to settle. The Court of Appeals reversed. According to the Court of Appeals, the Circuit Court had impermissibly added a restriction that depended on the rejecting party’s willingness to settle.

III. Conclusion

In conclusion, the Michigan Supreme Court and Courts of Appeal have generally continued to strengthen the principles of case evaluation. This includes: (1) *Ayar, id*, interest on case evaluation sanction; (2) *Peterson, id*, summary disposition is case evaluation verdict; (3) *Tevis, id*, stipulated damage amount can be verdict; *Dormak, id*, interest of justice exception; and (4) *Moravcik, id*, sanction rights unaffected by refusal to settle.

On the other hand, a few decisions have arguably espoused policy principles other than, or in addition to, the alternative

dispute resolution process in question. These decisions include: (1) *Haliw, id*, appellate attorney fees not available for case evaluation sanctions and (2) *King, id*, timeliness of appeal from case evaluation sanctions.

Lee Hornberger, Arbitration and Mediation Office of Lee Hornberger, www.leehornberger.com, is an arbitrator and/or mediator with the American Arbitration Association, Financial Industry Regulatory Authority, National Arbitration Forum, National Futures Association, and various courts, including the U.S. District Court for the Western District of Michigan. He is on the Hearing Officer lists of the Grand Traverse Band of Ottawa and Chippewa Indians, Little Traverse Bay Bands of Odawa Indians, and Michigan Civil Rights Commission. He is a Member of the Grand Traverse County Board of Canvassers and Traverse City Human Rights Commission.

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GTLA Bar Association

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GTLA Bar Association Mission Statement: *The Grand Traverse-Leelanau-Antrim Bar Association is a Michigan not-for-profit corporation whose members are attorneys principally practicing in Grand Traverse, Leelanau and Antrim counties. Its mission is to maintain the highest professional standards and competence among attorneys, to promote collegiality and camaraderie among attorneys, to improve the administration of justice, and to provide law-related service and education to its members and the public.*

2009-2010 - The GTLA Bar Association officers for 2009-2010 were elected at the May 7, 2009, annual meeting.

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Bar Association Newsletter

Editor & Committee Chair: Aaron Bowron; Assistant Editor: Deborah L. Rysso. Published Quarterly. Kindly mail articles and information to GTLABA by Sept. 21, 2009, for publication in the fall issue. Questions or comments should be directed to Aaron Bowron at legaloil@aol.com.

10 Things You Might Not Know About The WRC

Jo Bullis

Three members of the Women Lawyer's Association, Heather Blanton-Dykstra, Rachel Brochert Roe and Kathleen Shannon, hosted a benefit house party for the Women's Resource Center on June 5, 2009. They also serve on the WRC Board of Directors. WRC Executive Director Jo Bullis gave a short presentation entitled "10 Things You Might Not Know About The WRC."

1. The WRC began in 1975 as a volunteer organization focusing on women's economic issues and took on domestic and sexual violence issues when the need became apparent. That year it served 110 clients compared with over 1800 in 2008.
2. The WRC serves the five-county region – 1,700 square miles and a population of approximately 160,000.
3. In addition to its emergency shelter, Helen's House, the WRC operates three transition houses in Grand Traverse and Benzie counties. These homes provide 15 families with safe, affordable housing while they transition to independence and self sufficiency. One of the Traverse City homes, Madeleine's House, is named in honor of attorney Madeleine Thomas. Sara's House residents have addiction issues in addition to domestic violence and are actively involved in substance abuse treatment programs during their stay. In 2008 WRC housing programs provided 443 adults and children over 43,000 nights of housing, a 33% increase over 2007.
4. Besides Traverse City, the WRC has outreach offices in Benzonia, Kalkaska and Lake Leelanau.
5. The WRC offers a Doula Teen Parenting Program for young, first-time mothers and fathers. This program pairs parents with mentors and promotes healthy babies and relationships.
6. One of the fastest growing age groups receiving domestic violence assistance are senior citizens. Since 2000, this client population increased over 400% to nearly 300 a year.
7. In 1986, we were one of the first agency's in Michigan to work with domestic violence offenders. We've grown from one group for three men to ten groups for men and women. Most recently, we added a group at Pugsley Correctional Facility through the Michigan Prisoner Re-entry Initiative.
8. We have over 150 volunteers who give over 20,000 hours of service annually.
9. We partnered with Munson and local law enforcement agencies to start a Sexual Assault Nurse Examiner (S.A.N.E.) program in 1994. This program provides compassionate care and forensic exams for sexual assault victims.
10. While we depend on community support, including Thrift Shop revenue, for approximately 45% of our annual budget, we also give back to the community through our Three Gen-



Melissa Whitman holding Sophia (Ryssa) Vincent, Rachel Roe, and T.J. Andrews at the WRC benefit house party

erations Circle of Women Givers. Half the money raised through the Circle supports the WRC housing programs, the other half is granted to community partners to support the well-being of women and girls. Since its inception, the Circle has given nearly \$180,000 back to the community.

If you would like to learn more about these or other WRC programs, please contact Valerie Kirn-Duensing, 941-1210, jkirnduensing@wrcgt.com.

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