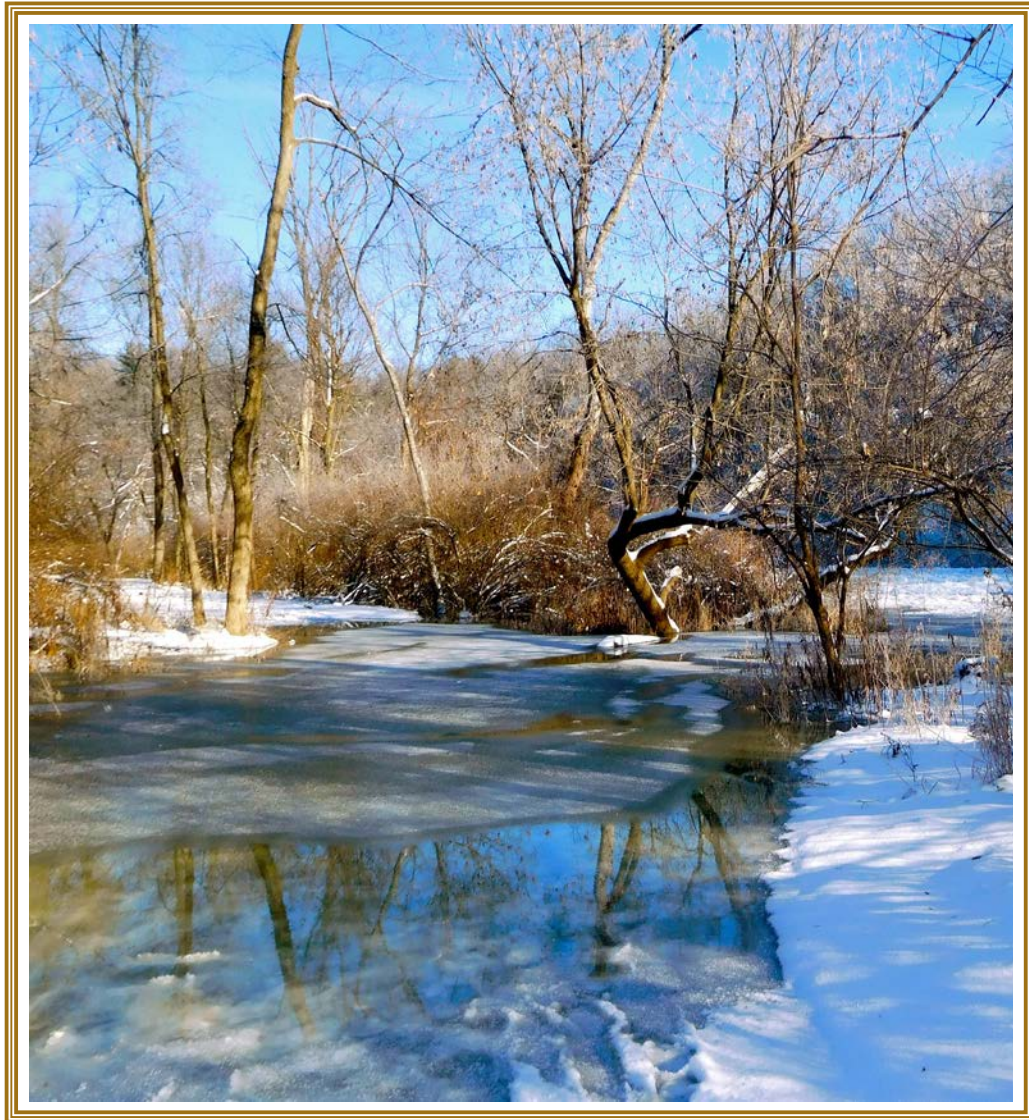


January/February 2019

BARBEAT

Genesee County Bar Association



Barristers' Ball 2019

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Michigan Unemployment Act: More Profitable
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Book Review: A Higher Loyalty

Who's on the Bench—Elizabeth Kelly and
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Barristers' Ball 2019

By Jessica J. Hammon, President

Most of you know by now that my pet project over the past few years has been the revival of the Genesee County Barristers' Ball. It is my understanding that Genesee, like many other counties, used to have a ball every year, but for unknown reasons it fell off in the seventies. During the 2015-2016 term, the GCBA leadership gave the go-ahead to establish a committee and see if we could bring back the ball.

Our plan was and remains simple, to have a formal event where we as attorneys can socialize, have fun, and do a little good for the community. Each year we donate one-third of the proceeds from the event to a local charity while the remaining profits go to fund the many member activities of the GCBA.

In 2015-2016 we had our first ball - "A Great Gatsby Affair" - complete with champagne and the over-the-top decadence of the 1920's. We picked the YWCA Safehouse as our charity and were able to deliver to them a check for \$480.

In the 2016-2017 term we held "The Venetian Masquerade" where attendees arrived with beautiful gowns and masks and played casino games throughout the night. We were able to donate \$683.24 to the Crim Community Education Program that year.

Most recently, in the 2017-2018 term we presented the "Murder at the Capitol" ball. Guests were witness to a heinous murder at the Capitol Theater and subsequently had to put together the clues presented by our array of talented GCBA actors in order to find the murderer. It truly was a fantastic event. In addition, we were able to give our largest donation yet - \$1,420.37 to Ele's Place of Flint, an organization that helps children cope with the grief of losing a family member. With every one of these themed events the excitement grows, the money raised increases, and the fun had by the attendees spreads to new ears.

I am excited to announce that this year the 2018-2019 Barristers' Ball will be held on **March 16, 2019** at the historic **Durant Hotel** in downtown Flint. Our theme, "**Derby Nights**," will transport guests to a night of lively horse races, fancy hats, and mint juleps. Mark your calendars; this is not one to be missed. Sponsors can even have a horse named after them or their firm! More details and save-the-date reminders will be coming soon. Please join us for a spectacular evening!!



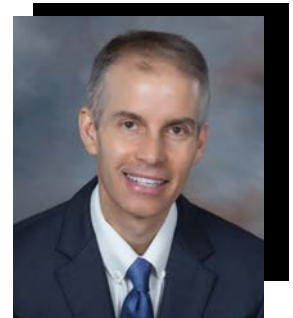
Jessica J. Hammon

VA Pension Rule Changes

By Brett Howell

The Department of Veterans Affairs (VA) pension program provides monthly benefit payments to veterans or their surviving spouses for non-service connected disabilities provided that certain eligibility requirements are met. The most common benefit is an enhanced pension benefit commonly referred to

as the Aid and Attendance (A&A) pension. For years, a common planning technique has involved gifting the veteran or spouse's assets to an irrevocable trust or to the applicant's



Brett Howell

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child. Over three and one half years ago on January 23, 2015, the VA proposed significant rule changes regarding eligibility requirements for the A&A pension which included adopting a three-year look back rule for gifts. Since that time, we have been waiting (and waiting) for the VA to release its final rules. Well, the wait is finally over. The new VA rules were released on September 18, 2018 with an effective date of *October 18, 2018*. Not surprisingly, the new rules will make it more difficult for many veterans and their spouses to qualify for the A&A pension. Here are the most notable changes:

1. New Bright Line Asset Limit. Previously, the VA used a net worth calculation that considered several factors in determining the maximum amount of assets an applicant was allowed. Beginning October 18, the net worth limit is \$123,600 – the same as the maximum community spousal resource allowance under the Medicaid rules. The applicant’s assets are calculated by adding together all of the applicant’s countable assets plus his or her annual income. Reasonably predictable unreimbursed medical expenses are, however, deductible from the applicant’s annual income.

2. Three-Year Look Back Period for Divestments. Previously, a veteran or veteran’s spouse could give away resources without penalty in order to qualify for the VA pension. Now there is a three-year look back period for any transfer for less than fair market value of a “covered asset” after October 18, 2018. A covered asset is defined as the amount by which a claimant’s net worth would have exceeded the asset limit if the gift had not been made. For example, an applicant’s assets total \$145,900 and after October 18, he or she gives away \$30,000 before applying for the VA pension. The applicant’s covered asset amount is \$22,300 (i.e. \$145,900 - \$123,600).

A transfer for less than fair market value includes the purchase of an annuity or transferring assets into a trust unless the applicant can establish that he or she has the ability to liquidate

the entire balance for the applicant’s own benefit. An exception applies if the transfer for less than fair market value was made due to fraud, misrepresentation or unfair business practice, or that a trust was established for a child incapable of self-support.

3. Penalty for Divestments. Any transfer for less than fair market value within the three-year look back period is subject to a penalty period that can last up to five years. The penalty period begins on the first day of the month that follows the last transfer and is determined by dividing the total value of the covered asset that was divested by the maximum annual pension rate (currently \$2,169 for a married veteran with one dependent). Transfers can be cured in whole or in part provided that within 60 days after the date of the VA’s notice to the applicant of the penalty period, the assets are returned, and the VA is provided evidence of the returned assets within 90 days from the date of the notice.

4. Homestead Exemption. The VA continues to exclude the value of a primary residence in determining eligibility whether or not the applicant lives there. However, the “residential lot area” that the primary residence occupies cannot exceed two acres unless the additional acreage is not marketable.

5. Allowable Medical Expenses. The new rules clarify the medical expenses that veterans and their spouses are allowed to deduct from their countable income. This includes, for example, the cost of a care facility other than a nursing home, provided the applicant requires aid and attendance or needs to be in a protective environment due to cognitive impairment or mental or physical limitations.

These rule changes significantly impact common strategies that were used by attorneys as well as annuity agents to qualify applicants for the A&A pension. While planning opportunities still exist, anyone seeking the A&A pension must be aware of the new rules and how they may impact their eligibility.

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Michigan Unemployment Act: More Profitable than Remedial

By Cristine Wasserman



Cristine Wasserman

It seems that nearly everyone, at one point in time during their lifetime, has filed for unemployment benefits. What is unemployment, you ask? It's that money that the employer pays to the State of Michigan on the off chance someone is laid-off or terminated for something other than "misconduct." It is that \$365.00 per week (taxable) that former employees should be able to collect if they suddenly find themselves escorted from the premises of their \$45,000 a year job. For those who have not filed for unemployment benefits, it can be difficult to comprehend the complicated nature of the process. Whether it's the application, the calls to Marvin or the unavailability of any State of Michigan worker to explain what an applicant for unemployment benefits should do... unemployed workers need to beware and need to be exceptionally cautious about trying to receive these benefits.

From this author's standpoint, the possible benefits of collecting unemployment (\$365 x 20 weeks totaling \$7,300) are greatly exceeded by the historical harm caused by the State of Michigan in singlehandedly overseeing every aspect of the unemployment process. The most recent harms relate to the State of Michigan relying 100% on a computerized algorithm to determine whether an unemployed worker committed fraud. To make matters worse, this computer program was turned loose on past unemployment recipients for up to a 6-year period. Turns out, the computer program was wrong and the State of Michigan **admittedly** unfairly subjected 44,000 (this number is low) unemployed workers to enormous fines for committing fraud in the receipt of their unemployment benefits. The lawsuit, *Bauserman v UIA*, unpublished per curiam opinion of the Court of Appeals, 7/18/2017 docket No. 333181 seeking to redress these wrongs was recently dismissed by the Michigan Court of Appeals on the basis that the Plaintiffs failed to file suit within 6 months (or even a year) of receiving notice of their potential claims. The Plaintiffs sought leave to file an Appeal to the Supreme Court of Michigan. The Court ordered oral arguments on the issue of why they should grant leave.

An October 9, 2018, press release from former Attorney General Bill Schuette, in response to arguments before the Supreme Court of Michigan in the *Bauserman v UIA* case, indicates among other things:

...The MiDAS Computer system was flawed. The result of this flaw was 44,000 people being wrongly accused of fraud and 186 people wrongly charged by local prosecutor's offices, all of whom are ter-

rified of the long term consequences. The MiDAS system failed Michigan, and all of its Citizens.

In the journal *Michigan Association for Justice*, Attorney Jennifer Lord states:

In 2013, the Michigan Unemployment Insurance Agency (UIA) laid off one-third of its employees. The agency replaced them with the Michigan Integrated Data Automated System (MiDAS), a \$46 million computer designed to automate all of the UIA's functions. One of the many functions automated when MiDAS came online in September 2013 was the agency's fraud detection and adjudication program. (Spring 2017; Vol. XLIX, No. 1, p. 13)

By the end of fiscal year 2016, Michigan had collected some \$60 million dollars in seized tax refunds and wage garnishments from tens of thousands of innocent workers. In addition, several hundred UIA recipients were criminally prosecuted, and in 2011, Gov. Rick Snyder lowered the **felony level for fraud from \$25,000 to \$3,500** to make it significantly more likely that individuals determined to have fraudulently collected unemployment benefits, also would criminally prosecuted.

Under the state's unemployment security law, fraud penalties and interest are deposited into a dedicated contingency fund, along with any solvency taxes or other damages. Due to the errors with MiDAS and other improper activities of the UIA, as of September, 2016, this "fraud" fund balance had ballooned to **\$154.7 million, up from \$3.1 million** at the end of 2011. In January of 2017, Gov. Snyder began taking the moneys from this dedicated UIA "fraud" fund and transferring it into the state's general fund 10-million dollars at a time. These transfers were made with the full knowledge and understanding that tens of thousands of people had been inaccurately determined to have engaged in "fraud" by this MiDAS system.

The State of Michigan has a long way to go to ensure that MiDAS accurately does what it is programmed to do for unemployed workers and employers. It is this writer's opinion that the changes should start first with permitting the *Bauserman v UIA* case to move forward in an effort to redress the admitted failures of the MiDAS system.

Book Review: A Higher Loyalty

By J. Dallas Winegarden Jr., Adjunct Professor
Michigan State University College of Law



J. Dallas Winegarden Jr.

The subtitle of this book tells the story: “Truth, Lies, and Leadership.” When Donald Trump fired the author of this book it set off a political firestorm.

This book breaks James Comey’s silence. The former Director of the Federal Bureau of Investigation writes an autobiography of his professional life, his role in the 2016 election, and its aftermath. He takes us through his life, both public and private, that shaped his views on justice, fairness and personal leadership. It is compelling reading.

Mr. Comey profiles his Mafia cases and compares President Trump to Sammy the Bull (A Mafia Enforcer) which would be hilarious if it weren’t so tragic for all of us who are officers of the court and work in the justice system as I have for almost 50 years. For lawyers and observers of decency, equal justice under law, due process of law, and the American political process, it is alarming to read.

In defending the Justice Department and the FBI, he states, “whatever your politics it is wrong to dismiss the damage to the norms and traditions that have guided the presidency and our public life for decades or in many cases since the republic was founded.”(p. 276) He goes on to state that “it is wrong also to stand idly by or worse just stay silent when you know better while a president brazenly tries to undermine public confidence in law-enforcement institutions that were established to keep our leadership in check.” (p. 276)

Comey remarks:

“politicians come and go, Supreme Court justices come and go, but the care of our nation is our commitment to a set of shared values that began with George Washington for integrity, transparency and truth. Further that if that slides away from us only a fool would be consoled by tax cuts or a different immigration policy.” (p. 276)

In the end of his book Comey chooses to be optimistic:




“that Trump will do significant damage to the name and traditions (of) our country which will be damaged in the flames but like forest fires as painful as they can be it spurs new growth. It spurs new life from young Americans, the courts, academics, nonprofits and other parts of our civil society.” (p. 277)

I would urge every lawyer and every American to carefully read this book, and I am sure that you will come to the same conclusion that I did: that to preserve the union and our democracy, silence is complicity!

But that’s an opinion you personally have to come to yourself.



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Who's on the Bench—Elizabeth Kelly and Brian S. Pickell



Hon. Elizabeth Kelly

Hon. Elizabeth Kelly

Undergraduate degree and school: Bachelors in Applied Science, University of Michigan Flint

Law school and year: Michigan State University College of Law – December 2007

Original reason you wanted to be a lawyer/judge: I have known

since I was four years old that I wanted to be a Judge, not sure how or why I decided at four, but it has been the focus of my education and career.

Influential individuals in your life/career: My parents and my children have significantly influenced and shaped my life. My career in the Genesee County legal community began in the late 1980's when I was a paralegal student at Mott. I did an internship at the 68th District Court and worked for the Genesee County Bar Association. Every judge and attorney I have interacted with in the last 30+ years has influenced my career in one way or another.

Extra-judicial activities: I love my work and when I am not working, I like to be at home. I thoroughly enjoy reading, cooking, fishing, and spending time with my children when they are home. My husband and I have lived our entire lives in Genesee County and take part in many activities in our community.

Family: Husband Jeremy Hall; a grown son and daughter.



Hon. Brian Pickell

Hon. Brian S. Pickell

Undergraduate degree and school: Bachelor of Arts in Economics, University of Michigan,; satisfied Physics Department Criteria for Bachelor of Science in Physics, Wayne State University

Law school and year: Detroit College of Law, Michigan State University (1997)

Advanced degrees, studies: Admitted to U.S. Patent Bar (1999)

Original reason you wanted to be a lawyer/judge: I want to give back to this community by making reasoned, sound, timely decisions in a consistent manner from the bench often at a very difficult time in the lives of people who would come before the court.

Of course, we must punish severe criminal behavior and that against our most vulnerable (i.e., children, elderly, and mentally ill), but we should also be people of mercy. No matter how many regrets people carry, a judge is in a unique position to gently guide them and, in turn, their respective families out of their mess and toward hope and triumph.

Toward that end, I want to help to try to end the intergenerational cycle of alcohol, physical, and/or substance abuse found in many families of our county. I want to transform one life and, in turn, family at a time for the better.

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Influential individual in your life/career: My mother (Janet Pickell), as a devout woman of God, profoundly influenced both my life and career. She made it her life's work to try to lift up the City of Flint and all of Genesee County through prayer and service. It is my privilege and responsibility to do my small part to continue that to the best of my ability. It will be my humble honor to serve the people of Genesee County.

Extra-judicial activities: Mayfair Bible Church (ushering, drama teams, children's ministries), hockey

Family: Wife Malori, young son and daughter

2018 In Memoriam

Peter L. Diesel

Marvin L. Failer

J. David Karr



A Night of Honor

On Thursday, December 13, 2018, members of the Genesee County Bar Association honored and thanked the Honorable Judith A. Fullerton and the Honorable Geoffrey L. Neithercut for their contributions to the legal community.



Photo Credit: Shelley R. Spivack

28th Annual Community Holiday Dinner

Thank you! Thank you! Thank you!

Because of you our 28th Annual Community Holiday Dinner was a great success. We were able to meet and exceed our donation goal.

- 905 people served
- 317 kids received a gift and had their picture taken with Santa
- 351 books given away!

We wish you memories of these joys to start 2019!

Holiday Dinner Committee
Genesee County Bar Association
Genesee County Bar Foundation

Neithercut Legal Education Fund

An experiment of the Genesee County Bar Foundation is offering grants that reimburse GCBA members for half the cost of tuition, up to \$300 per attorney per year, to any Institute of Continuing Legal Education (ICLE) Seminar of the State Bar of Michigan (SBM). Details on the grant can be found in the November/December 2018 *Bar Beat*.

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Law School: Western Michigan University Thomas M.
Cooley School of Law

Attorney: Timothy A. Manley

Employer: Construction Development Professionals LLC

Undergrad School: University of Michigan – Flint
Law School: Western Michigan University Thomas M.
Cooley School of Law

Attorney: Kami Lynne Misch

Employer: Genesee County Prosecutors Office

Undergrad School: Ferris State University
Law School: Western Michigan University Thomas M.
Cooley School of Law

Attorney: Amy Nixon

Employer: Littler Mendelson

Undergrad School: University of Oklahoma
Law School: University of Oklahoma School of Law

Attorney: Erica A. Vicari

Employer: Self Employed

Undergrad School: University of Michigan - Flint
Law School: Western Michigan University Thomas M.
Cooley School of Law

Student: Jacquelyn Babinski

Undergrad School: Central Michigan University
Law School: Michigan State University College of Law

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