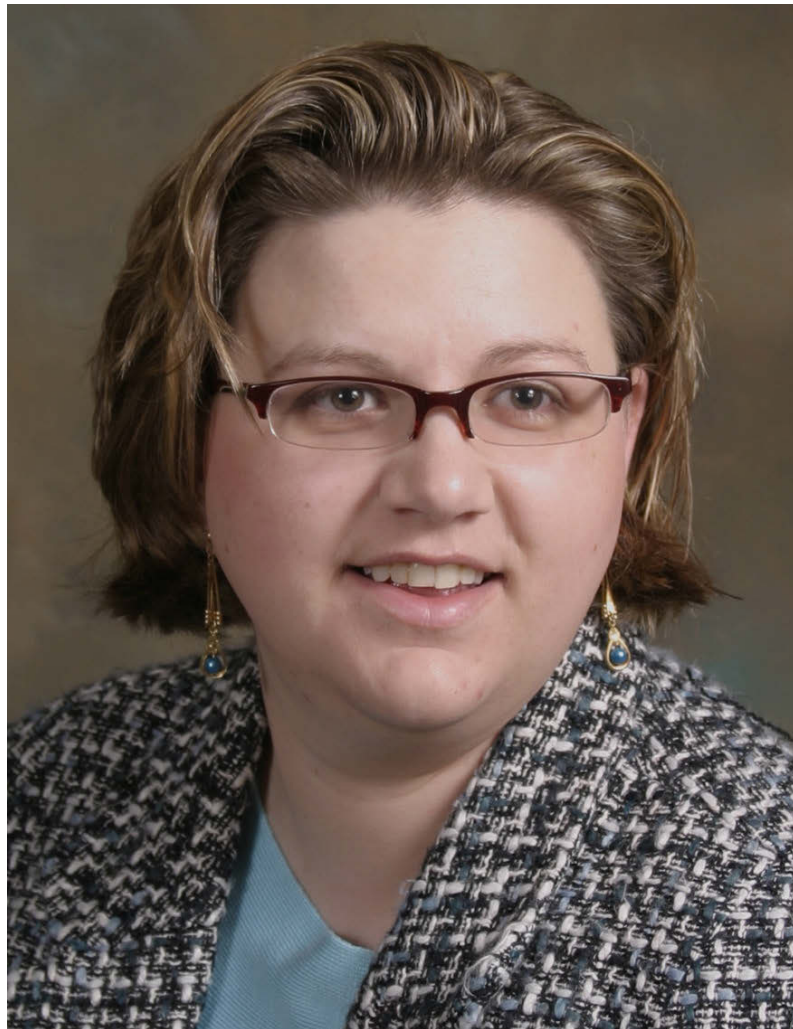


July/August 2015

BARBEAT

Genesee County Bar Association



Shayla D. Blankenship, 2015-2016 GCBA President

Good Works

Brian M. Barkey Community Service Award

Obergefell, et al. v Hodges: "Equal Dignity In The Eyes Of The Law"

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Published bimonthly by the State Bar of Michigan,
 306 Townsend St., Lansing, MI 48933, for the
 Genesee County Bar Association. For advertising,
 call (517) 346-6315.

No material in *Bar Beat* reflects the opinion or endorsement of the
 Genesee County Bar Association, unless otherwise stated.

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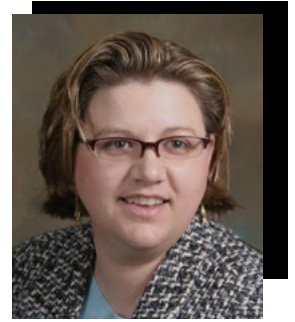
Good Works

By Shayla D. Blankenship, President

It is my pleasure to serve as your Genesee County Bar Association President for 2015-2016. We have an exciting year ahead of us.

Our Vice President, Michael Kowalko, is working diligently on scheduling exciting monthly luncheon speakers for the upcoming year. Jessica Hammon is working on a Barrister's Ball event that promises to be fun. We have seminars, learning lunch hours, and opportunities to volunteer for various events.

I am pleased to announce the GCBA board voted to establish the Brian M. Barkey Community Service Award.



Shayla D. Blankenship

Brian has been a laudable example of commitment to community service. For this issue, I interviewed Brian and explored why he volunteers, how he believes it benefits the legal community, and what he receives out of his volunteer opportunities.

This year we will highlight the good works you perform each and every day. We have wonderful members who give so much to our community, and I am proud to be your President.

Brian M. Barkey Community Service Award

By Shayla D. Blankenship

The Brian M. Barkey Community Service Award recognizes a Genesee County Bar Association attorney or affiliate member who has demonstrated outstanding commitment to community service. We will focus this year on the good works our members and affiliates perform for our community. I thought it best to begin with Brian Barkey, for whom the award is named. I sat down with Brian to explore why he has such a commitment to volunteering in our community and here is what he said:

Shayla: Brian, why do you volunteer?

Brian: You know, I read a book about volunteering, *A Call to Service*, about why people volunteer and it taught me a lot. I used to think that people were called to volunteer for higher reasons – to make the world a better place, as a means of recognizing our own good fortune, etc. This book taught me that most people do this for a bit more selfish reason – it makes you feel good. I swear at the end of the Holiday Dinner, I don't want to go home, I feel so wonderful. Tired, but wonderful. And we were all attracted to this profession because we like to help people.

There is another reason that I did not stumble across until much later. It is good for business. Your service on volunteer boards or performing legal work in a volunteer position allows you to meet people who might need legal services or know people who could use a good lawyer. And watching you doing volunteer work teaches them that you are capable.

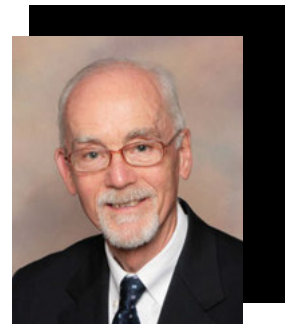
Shayla: Have you ever had a volunteer experience you didn't like?

Brian: Yes, but just like the law, if you don't like something you can change it. If you get tired of handling one kind of legal matter – criminal law or domestic cases, for example, you can stop doing them. The same is true with volunteer opportunities. Eventually, you are only doing matters you like and only having volunteer experiences you like. In my practice, I go through my files twice a year and will routinely decide to fire a client. Why? Because I can. Because the client insists on doing something I disagree with or do not like. The same is true with volunteer work.

Shayla: How has performing volunteer work helped you to become a better lawyer?

Brian: The more you serve in a volunteer capacity, the more opportunities you have to learn how to solve problems. There are two styles to the practice of law. The first is the defense style. We often find this in criminal matters. Your job is to find the reasonable doubt or expose a problem with the other side's case. You're not in charge of explaining the doubt or resolving the problem. This style is a legitimate practice, but I find another style more satisfying. The second method is solving problems. You have to figure out a method to resolve a problem. When you volunteer, you are putting into practice your problem solving skills, which teaches you how to be a better lawyer.

Shayla: If a younger attorney wanted to get started volunteering, where would you suggest they start?



Brian M. Barkey

Brian: Get involved with GCBA committees, activities, Centennial Inns of Court, and shadow attorneys at court. If you do this, it will expose you to people in a non-adversarial setting where you can break down barriers for mentoring opportunities. So get involved.

Shayla: Any final thoughts?

Brian: I wish I had learned this earlier in my practice. Find a volunteer opportunity and do what you like. At the end of a few years, you will only be practicing the type of law you want and will have an enriched life performing volunteer work you like.

Obergefell, et al. v Hodges: “Equal Dignity In The Eyes Of The Law”

By Shelley R. Spivack

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death...

They (the petitioners) ask for equal dignity in the eyes of the law. The Constitution grants them that right.

With these words Justice Anthony Kennedy, writing for the Court in a much anticipated 5-4 ruling, held that the Fourteenth Amendment of the U.S. Constitution protects the legal right of same-sex couples to marry and that laws, such as Michigan’s constitutional amendment, banning such unions can no longer be enforced. *Obergefell, et al. v Hodges*, 576 U.S. ____ (2015) overruling *DeBoer v Snyder*, 772 F. 3d 388 (2014).

In reaching this conclusion, Justice Kennedy, mindful of the human lives affected by the decision, explored the evolving history and meaning of the term “marriage.” In contrast to each of the four dissenting opinions which defined marriage solely as a “gender-differentiated union of man and woman,” Justice Kennedy views “marriage” as an institution that “has evolved over time” (slip op at 6) and which, in today’s society, includes two persons of the same gender.

Finding the right of same-sex couples to marry to be a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment, Justice Kennedy cites four principles supporting this conclusion: (1) “the right to personal choice regarding marriage (which) is inherent in the concept of individual autonomy” (see *Loving v Virginia*, 388 U.S. 1 (1967) invalidating interracial marriage bans) (slip op at 12); (2) the right to marry which supports a unique two-person union (see *Griswold v Connecticut* 381 U.S. 479 (1965) protecting the right of married couples to use contraception)(slip op at 13); (3) the right to marry which

“safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education”(see *Pierce v Society of Sisters*, 268 U.S. 510 (1925) protecting a family’s right to educate their children)(slip op at 16); and (4) Supreme Court precedent and national traditions which “make clear that marriage is a keystone of our social order”(see *Maynard v Hill*, 125 U.S. 190,211 (1888) holding that “marriage is the foundation of the family and of society.” (slip op at 16).

Justice Kennedy also looks to the Equal Protection Clause to find support for constitutional protection of same-sex marriage. Laws such as those in Michigan not only “burden the liberty of same-sex couples,” but they also “abridge central precepts of equality.” (slip op at 22). “Same-sex couples are denied all the benefits (of marriage) afforded to opposite-sex couples and are barred from exercising a fundamental right.”(slip op at 22).

In the opinion, Justice Kennedy addresses the question raised by Sixth Circuit and in each of the dissents: whether it is the role of state legislatures or the courts to legalize same-sex marriage. While the Sixth Circuit and the dissenting opinions argue that it is not the business of “unelected” federal judges to define “marriage” under state law, Justice Kennedy takes a different view of the role of the federal judiciary: “Thus, when the rights of persons are violated, ‘the Constitution requires redress by the courts,’ notwithstanding the more general value of democratic decision making. . . . This is why “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”(slip op at 24).

While the Constitution “does not permit the State to bar same-sex couples from marriage” Justice Kennedy recognizes the role of the First Amendment in ensuring



Shelley R. Spivack

“that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” (slip op at 27). The precise meaning of this language will surely be the subject of future litigation as states enact legislation such as Michigan’s P.A. 53 which allows adoption agencies receiving state funding to refuse to provide services if those services conflict with the agency’s “sincerely held religious beliefs.”

In contrast to the single majority opinion, each of the dissenting Justices displayed his own view of the Constitution and role of the Supreme Court. Perhaps the most quoted is that of Justice Scalia who calls the majority opinion a “threat to American democracy,” “couched in a style that is as pretentious as its content is egotistic” and “lacking even a thin veneer of law.”

VA Pension Benefit: An often unknown pension that can make a world of difference

By Brett Howell

The VA pension benefit can make a significant difference in the life of a veteran or a veteran’s spouse. With the ever-increasing costs of long term care, a VA pension can mean the difference between being confined to a nursing home or affording in-home or assisted living care. Hopefully this article will provide you with that potentially life changing knowledge.

The Department of Veterans Affairs (VA) offers a non-service connected, monetary benefit to eligible veterans, their surviving spouses and their dependents known as the Improved Pension benefit.¹ It is a needs-based program with specific income and asset limitations.

A. Basic Eligibility

1. Service Requirement.

- a. The veteran must have served at least 90 days of active military service with at least one day during war time and have been discharged for reasons other than dishonorable.

2. Age or Disability Requirement.

- a. Age 65 years or older or totally and permanently disabled.

3. Income Requirement.

- a. Income Limitation. A veteran may not have countable adjusted income above the maximum annual pension rate.
- b. Deductions from Income. Unreimbursed

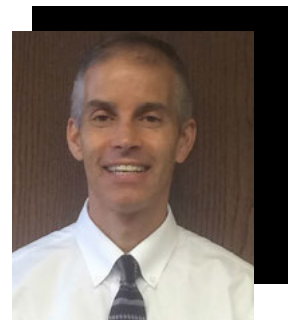
medical expenses may be deducted from countable income provided the expenses exceed 5 percent of the maximum annual pension rate.

4. Asset Requirement.

- a. Countable Assets: cash, qualified accounts, investments, annuities, real estate (other than principle residence), etc.
- b. Non-countable Assets: principle residence, vehicle, household furnishings, etc.
- c. Asset limitation. \$80,000 is often used as a guideline.

B. Improved Pension

- I. An additional pension benefit is available if the claimant is eligible for the basic monthly pension and is either substantially confined to his or her dwelling (housebound benefit) or requires the aid and attendance of another person.
 - a. Maximum pension amounts for 2015.
 - (i) Aid and Attendance - surviving spouse = \$1149.00/month.
 - (ii) Aid and Attendance – single veteran = 1788.00/month.



Brett Howell

- (iii) Aid and Attendance – married veteran = \$2120.00/month.

C. Current Planning Options

1. Joint Ownership. By adding a joint owner to an account, the VA will allocate 50% of the value to the joint owner provided the joint owner does not live in the same household.
2. Gifting. The VA does not penalize a veteran or claimant for divesting assets.
3. Annuities. A single premium annuity can be used to convert countable assets to an income stream.
4. Trusts. For a trust to be an effective planning technique, the veteran or claimant cannot have ownership, control or retain any beneficial interest in the trust assets.

D. Proposed Rule Changes (be aware - much of what you just read could be history).

1. On January 23, 2015, the VA released comprehensive rule changes that, if adopted, will significantly modify the VA eligibility rules and planning options.
2. Summary of Major Proposed Changes.
 - a. *New net worth limit.* Establish a clear net worth limit equal to the maximum community spousal resource allowance under the Medicaid rules (2015 = \$119,220).
 - (i) Annual income will be added to claimant's net worth.
 - (ii) A claimant's primary residence is excluded provided its "residential lot area" does not exceed two acres unless the additional acreage is not marketable.
 - (iii) The net worth limit will be increased by the same percentage as the cost of living increase for Social Security benefits.
 - (iv) No distinction between married or single claimants.
 - b. *Thirty-six (36) month look-back period.* Transfers for less than fair market value within 36 months prior to the date of application will result in a penalty period.
 - (i) A transfer for less than fair market value includes the purchase of an annuity or transfer to a trust.

- (ii) Maximum penalty period is 10 years.
- (iii) The penalty divisor is the maximum Aid and Attendance monthly benefit available at the time of the application.
- (iv) Recalculation of the penalty if the original calculation was in error or the transferred assets are returned before the date of the claim or within 30 days after the date of the claim. The evidence "however" must be received by the VA within 60 days after the date of the VA's notice to the claimant concerning the penalty period.

The VA pension benefit can make a significant difference in the long term care options available to veterans and their spouses. Unfortunately, the VA appears intent on restricting access to this benefit. Nonetheless, many of our clients can become eligible for this pension – with a little assistance from us.

Endnotes

- I The VA also offers a monthly compensation benefit for veterans with service connected disabilities. This article does not address this benefit.

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First Indigent Defense Standards from MIDC Released for Comment

By Roberta J.F. Wray



Roberta J.F. Wray

It seems as if it has been a long time since Michigan and other states came under fire for failure to provide adequate defense for indigent criminally accused. Finally, though, the Michigan Indigent Defense Commission has come up with the first four proposed minimum standards for providing indigent criminal defense services. They cover “education and training, initial client interviews, experts and investigators, and counsel at first court appearance.” (<http://michiganidc.gov/standards>)

According to the MIDC website:

We selected these initial standards because they are either required by the statute or supported by United States Supreme Court precedent. MCL 780.989(1). We also wanted to start with a set of standards that would be amenable to the creation of lasting and measurable improvements in the criminal defense of poor people. Among other topics, future standards will tackle caseloads, qualifications, compensation, and independence of the

indigent defense function from the judiciary.

Approximately 35 members of the Genesee County Defender Program had advance exposure to the standards. Jonathan Sacks, Executive Director of the MDIC and Marla McCowan, Director of Training, Outreach, and Support, met with attorneys on June 15.

Defender Administrator Barbara Menear said, “Mr. Sacks provided an overview of the role of the Michigan Indigent Defense Commission. He responded to questions and was very informative.” She said, “I am personally supportive of the first set of proposed standards. I look forward to working with the Michigan Indigent Defense Commission, Genesee County and the local bar to arrive at a compliance plan.”

The complete standards can be found on the MIDC website at: <http://michiganidc.gov/standards>. A comment period ends August 7 at 5:00 pm, with a public hearing scheduled for 1:00 pm on August 18, at the Lansing Campus of WMU Cooley Law School.

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Achieving Success Under The New Expungement Laws - Part Two *(Continued from the May-June issue)*

By Amy K. Harris, (June 25, 1980 – May 11, 2015)



Amy K. Harris

Steps And Substance:

There is an SCAO check box form now available that complies with the new expungement rules. It is advisable for all counsel to use this form to begin the application process.

The steps that should be followed are:

1. Obtain a certified copy of conviction for the offense you are seeking to have set aside.
2. Have your client get fingerprinted and bring you the fingerprint card plus the \$50 Michigan State Police fee in the form of check or money order made out to the State of Michigan.
3. Fill out the SCAO form including a hearing date that is at least two months out, attach a copy of the certified copy of conviction, and mail it to:
 - a. Michigan State Police, with the fingerprint card and the \$50 fee,
 - b. Attorney General's Office,
 - c. Prosecutor on the case.
4. Certify that you have mailed it to those places, and file the application in the clerk's office. There is no filing fee as this is a criminal motion.
5. The State Police and the Attorney General's office will then send letters back to the court advising whether or not the client is eligible for expungement. MSP sends conviction history, and the AG's office notes problems such as if it is not an expungable offense. If these letters have not been received by the court date you chose, do not waste the court's time; adjourn the court date ahead of time as the court cannot proceed without these letters. Additionally, some courts require an updated presentence report from probation. Contact the court ahead of time to see if this is required before your petition may be heard.
6. While you are waiting for the letters to come back, you have the option to file a supplemental petition that includes information about what your client has done with his/her life in the years since their conviction. This should include information about employment, school, family life, community service, and any character letters your client would like included. While this supplemental petition is not required, it is highly advisable to notify the court of what your client has done to earn expungement since the offense happened. You may also want to file an affidavit from your client that the information contained in the supplemental petition is accurate.
7. Have the hearing: Present your client before the Court. Begin by stating that the statutory requirements for expungement have been met. If there is a victim on the case, they will be given an opportunity to address whether they agree with expungement or not. You should then address, in oral arguments, an overview of what your client has done to earn this expungement.
8. If for some reason the Court is not inclined to grant your request, you have the option to ask to withdraw the petition to improve upon it. If this request is granted, your client will not have to wait the three years to reapply.
9. Present an order to the Court granting your Petition. It is always advisable to mail a copy to the MSP records division. While the court clerk is supposed to do this, ensuring it was done will assist your client with having the correct records filed.

Following these steps and the information presented in this article should help ensure your client's petition is granted and will lead to our community having more contributing members. Good Luck!

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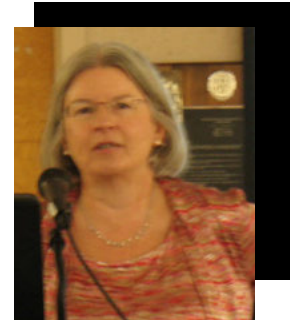
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Human Trafficking: It's Hiding Everywhere

By Roberta J.F.Wray



Suellyn Scarnecchia

Federal law defines “trafficking in persons” as:

Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

A website called American Thinker offers information about the problem of human trafficking and how it is reported:

Seventeen government departments and agencies collaborated to create the “Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States 2013-2017,” which states, “While it is difficult to measure the magnitude of human trafficking, the International Labour Organization estimates that **more than 20 million men, women, and children are victimized by forced labor and sex trafficking worldwide** (my emphasis), including in the United States.” Two pages later, it states, “Current statistics on human trafficking are limited.” Interestingly, the plan to help victims in the U.S. gives no estimate as to the scope of our nation’s problem. The plan, instead, states at the beginning of the section dedicated to improving the means for research, “Due to the hidden and complex nature of the crime, the full scope of human trafficking in the United States is unknown.”

(http://www.americanthinker.com/2014/07/human_trafficking_estimates_and_statistics.html#ixzz3ekQH4mc)

The Genesee County Human Trafficking Task Force has been formed to try to help the unknown number of victims in Genesee County. The problem is complex and requires a multi-disciplinary approach, according to Professor Suellyn Scarnecchia, of The University of Michigan Human Trafficking Clinic, who presented information at the June meeting of the GCHTTF.

She said, “No one knows for sure how many people are victims of human trafficking, nor how many are profiting from it.”

Some of the locations where victims of the human traffickers can be found include fake massage parlors, farms, and in the domestic services, and restaurant industries.

Many are sex workers, Ms. Scarnecchia said, requiring a “paradigm shift” in how the law enforcement and legal services communities deal with prostitution. The approach must be victim-centered. “Not all prostitutes are willing participants. They are victims, not criminals.” In addition, she said, “there are plenty of male victims, and plenty of U.S. citizens.”

New laws are helping to deal with many who are being victimized.

- Michigan neglect statutes have been amended so that Child Protective Services can assist exploited juveniles without a finding of parental fault.
- Immigration laws are being altered to provide a trafficking visa for undocumented victims, and some family members, who have been fraudulently or forcibly brought to this country by traffickers.

Much of the effort of the Genesee County Human Trafficking Task Force is aimed at learning to recognize signs of exploitation. They are working to raise the awareness of law enforcement and the general public about jobs where human exploitation may be happening, as well as how to identify its victims.

The task force is made up of representatives from health care, social work, law enforcement, courts, and mental health and education disciplines, and women’s and human rights activists. They meet monthly working closely with Genesee County’s Girls’ Court, with the mission of “establishing a unified community response to human trafficking” by the end of 2019.

The Child Welfare Services division of the State Court Administrator’s Office is sponsoring a free training session on Child Sexual Exploitation on August 11, 2015, in Grand Rapids. Information is available at: <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/ChildWelfare-ServicesTraining/CWS%20Training%20Materials/FY15%20SCAO-CWS%20Traomomg%20Calendar.pdf>.



Smile for the Camera



NEW LAWYERS: Three of Michigan's newest lawyers were sworn into the State Bar in May by The Honorable Judith A. Fullerton.

They are: Nikola Lucic, Brooke Tucker, and Kyle Lawrey

Also present were Prosecutor David Leyton, GCBA President Jeffrey Himelhoch, Robert Chimovitz, Chadd O'Brien and Michael Stanley.



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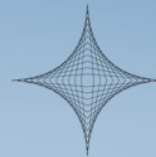
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