



PROBATE & ESTATE PLANNING SECTION

Supplemental Materials for

Saturday, December 11, 2021

Meeting of Committee on Special Projects (CSP)

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

**Probate & Estate Planning Section of the
State Bar of Michigan**

You are invited to the December meetings of the Committee on Special Projects (CSP) and
the Council of the Probate & Estate Planning Section:

Saturday, December 11, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.

When: Dec 11, 2021, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

<https://us02web.zoom.us/meeting/register/tZMsd-yprDsQGtY4tqJ5FJlt5aFIZIejBSoY>

After registering, you will receive a confirmation email containing information about joining the meeting.

*If you are calling in by phone and will email your name and phone number to Angela Hentkowski
ahentkowski@stewardsheridan.com, we will put your name in a zoom user list that will identify you by
name when you call in.*

Please note that the Zoom feature of these meetings entails that that they will be recorded.

This will be a regular in person and remote meetings of the Council of the Probate & Estate Planning
Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects
(CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting
will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate
Planning Section page of the SBM website. Once those things are posted, you should be able to download
them from: <http://connect.michbar.org/probate/events/schedule>.

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Council Materials

The following Supplemental Attachment is submitted on behalf of the Guardianship, Conservatorship and End of Life Committee.

SUPPLEMENTAL COUNCIL ATTACHMENT

To: Probate Council & David Skidmore

Cc: Nathan Piwowarski, Josh Ard, Elizabeth Graziano and Kathleen Goetsch

From: Sandra Glazier

Re: Supplement to Guardianship, Conservatorship & End of Life Committee Report dated 12-1-21

Date: December 9, 2021 (dictated but not read)

A virtual meeting of the Guardianship, Conservatorship & End of Life Committee was held on 12-8-21, in an attempt to address the December 1 2021 report and in an attempt to address the issues that remain to be discussed with Katharyn Barron relative to the policy position taken by Council at its November, 2021 meeting.

Present were Sandy Glazier, Josh Ard, Elizabeth Graziano, Nathan Piwowarski, and Kathleen Goetsch.

In response to a query by Josh Ard, Sandy and Nathan reaffirmed their respective perspectives that the discussions held on November 30, 2021 appeared productive in relaying the concerns expressed by Counsel and the practical experiences and rationale behind the concerns expressed, such that it is anticipated that the Task Force will be considering the comments and discussion had at an upcoming meeting to see how they might be further addressed. It remains important to keep the discussion productive and open in an attempt to reach consensus on how to improve the proposed legislation to the greatest extent possible.

Generally, the positions espoused in the December 1, 2021 report continued to be supported by members of the committee. However, two significant areas that were not discussed during the November 30, 2021 meeting still needed to be addressed. These related to:

- (1) Removal of an individual from their habitual residence; and,
- (2) Tangible personal property of sentimental value (hereinafter referred to as "STPP").

Two of the members of the committee have separately shared some of their comments and perspectives with counsel via emails generated on 12/8/21 and 12/9/21. Therefore, those comments are not reiterated here in detail. In more general terms, it was generally agreed that while the revised proposed language with regard to STPP was better than what was contained in the originally proposed legislation, it did not address the practical problems that fiduciary's face in dealing with STPP in two particular regards. The first being the time consuming effort of itemizing each item of sentimental value in an inventory. When an individual needs to be moved from their home of decades, they likely have accumulated many items which have sentimental (but perhaps little monetary) value. Having to specifically list each item, picture, photo album, and item collected by that individual over their lifetime can be a time consuming task. In situations where a form 706 is filed, items valued over a certain amount must be specifically identified and appraised. When a form 706 is required, often the task of inventorying items is delegated to a professional and the cost of doing so (in a home of average size) often runs around \$5,000. It may be important to note that while most guardianships are established for persons with mental illness or developmental disabilities, for those over the age of 65, they may

have an entire houseful of items collected over their lifetime all of which hold sentimental value. We believe the better course is to provide notice in advance of disposing STPP, when possible, to known heirs at law and any persons to whom items may have been designated in known estate planning documents, so that items might be distributed amongst such heirs and/or beneficiaries to the extent reasonable and practical. A hard and fast rule, in this regard, may not be advisable because a fiduciary may need to liquidate assets in order to provide for the individual's care and needs. Some items may continue to be held in the individual's possession, but when placement is to a nursing home or similar facility, often little of their personal property (other than clothing and some photos), and perhaps a blanket, will be available for retention. A practical approach that works in all situations needs to be considered and no consensus of what that approach would be could be reached by the committee. However, generally all agreed that for the most part, fiduciaries take their duties seriously and the issue is in addressing those who act for their own self-gratification or ease of their own interests without consideration of the individual entrusted to them. Therefore, the issue appears to require more of an emphasis of addressing the behavior of bad actors, when such behavior occurs, than mandating procedures that are too onerous to be practical and which may have the unintended effect of eliminating the pool of persons and/or entities willing to act when the need for appointment arises. In the end, there was no one-size-fits-all approach to addressing STPP that achieved approval of the committee members, almost all members in participation coming up with examples of where proposals discussed would not, in the real and practical world, work in all situations and not cause an undue burden of administration. All did, however, appear to concur that itemizing each item of STPP in an inventory was not the route to go, as it would be too onerous and dampen, if not discourage, persons from taking on the responsibility to act for individuals (particularly those without sufficient means to pay for a more extensive itemization of each and every item given the lack of clarity that "a reasonable" amount of STPP provides.

In addition, issues relating to the imposition of processes, outside of a Court's determination at an initial or subsequent hearing to restrict letters of authority with regard to the placement (in the situation of a guardianship) or sale of an individual's home (when dealing with letters issued in a conservatorship proceeding) were also felt to be problematic. In the case of an eviction, where a person is homeless and their habitual residence is a set location under a bridge, a facility is closing, or the person is being discharged, the need for placement in a new facility or location may require swift action. Often beds are hard to come by in good facilities for persons of limited means. Any delay may result in a bed in a good facility no longer being available. Therefore, it was felt that a better approach might be the following:

(a) Making sure each jurisdiction has their own viable process for checks and balances. Wayne County has an ombudsman who receives and investigates complaints regarding guardianship, conservatorship, and decedent's estates under the Court's jurisdiction. The Ombudsman reports his findings to the Chief Judge and makes recommendations regarding the complaints, which may include referral to the Attorney General, County Prosecutor, State Bar Grievance Commission, or any other appropriate governmental entity. Also, the Ombudsman identifies problems within the guardianship, conservatorship and decedent estates areas and makes recommendations concerning ways to improve the guardianship, conservatorship, and decedent estates system. If a jurisdiction doesn't have its own process, then a centralized ombudsman for those jurisdictions might be appropriate.

(b) As to judge's whose decisions are contested, there should be a "rocket docket" with no required fee charged for guardianships, so that decisions regarding appointment of a guardian or permanent (as opposed to emergency temporary) removal of an individual from their habitual residence can be reviewed on an expeditious basis.

(c) Procedurally, perhaps a Notice provided at the time of the appointment or any intended permanent move could remind individuals (and interested parties) of the individual's right to seek termination or modification of the guardianship at any time. All the ward needs to do is to send a written communication to the Court, and the Court will treat even such an informal communication as a petition to modify or terminate a guardianship.

(d) Some suggested that a medical certification of the need for different placement of a ward should, per se, be sufficient evidence of the need to move an individual. Unfortunately, it is impossible to come up with a list of factors that can be all inclusive as to those circumstances where a change of residence should be permitted without the need for additional steps or formal notice in those instances when a full unrestricted and unlimited guardianship (for ease of reference and without limiting to how that definition is used in DDP cases, a "plenary" guardianship) exists.

It was generally felt that the key was in the policing of actions, as opposed to the imposition of additional procedural requirements. While this might not be the approach proffered by the proposed legislation, it was felt this was the direction attention should be given, as opposed to the imposition of more procedural hoops that could have adverse consequences to persons in need of actual protection.

Generally, concerns that additional procedural steps might discourage or limit the pool of individuals willing to serve as guardians, and create obstacles to timely meeting the needs of individuals. Policing mechanisms with regard to bad actors who breach their fiduciary duties to the protected individual seems to a better and preferred approach. If a series of complaints are determined to be well founded in fact, those individuals could then be eliminated from the pool of potential appointees and/or removed from matters upon which they have already been appointed.