



PROBATE & ESTATE PLANNING SECTION

Agenda and Attachments for

Friday, March 10, 2023

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

Or *via* Zoom

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

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

Friday, March 10, 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: Mar 10, 2023, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZEsd-irqDkvHtDpGOn_fRyKbkPzLx0lv7pY

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

If you are calling in by phone, 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 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>.

Nathan Piwowarski
Section Secretary

Nathan Piwowarski
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**Officers of the Council
for 2022-2023 Term**

Office	Officer
Chairperson	Mark E. Kellogg
Chairperson Elect	James P. Spica
Vice Chairperson	Katie Lynwood
Secretary	Nathan R. Piwowarski
Treasurer	Richard C. Mills

**Council Members
for 2022-2023 Term**

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Olson, Kurt A.	2020 (2 nd term)	2023	No
Savage, Christine M.	2020 (2 nd term)	2023	No
Anderton V, James F.	2020 (1 st term)	2023	Yes
David, Georgette E.	2020 (1 st term)	2023	Yes
Hilker, Daniel	2020 (1 st term)	2023	Yes
Krueger III, Warren H.	2020 (1 st term)	2023	Yes
Wrock, Rebecca K.	2021 (1 st term)	2024	Yes
Glazier, Sandra D.	2021 (1 st term)	2024	Yes
Hentkowski, Angela M.	2021 (2 nd term)	2024	No
Mysliwiec, Melisa M. W.	2021 (2 nd term)	2024	No
Nusholtz, Neal	2021 (2 nd term)	2024	No
Sprague, David	2021 (1 st term)	2024	Yes
Mayoras, Andrew W.	2022 (2 nd term)	2025	No
Silver, Kenneth	2022 (2 nd term)	2025	No
Dunnings, Hon. Shauna L.	2022 (1 st term)	2025	Yes
Chalgian, Susan L.	2022 (1 st term)	2025	Yes
Shelton, Michael D.	2022 (1 st term)	2025	Yes
Borst, Daniel W.	2022 (1 st term)	2025	Yes

Ex Officio Members of the Council

Christopher Ballard; John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Shaheen I. Imami; Robert B. Joslyn; Kenneth E. Konop; Marguerite Munson Lentz; Nancy L. Little; James H. LoPrete; Richard C. Lowe; David P. Lucas; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; David L.J.M. Skidmore; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Marlaine C. Teahan; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack

State Bar of Michigan
 Probate and Estate Planning Section
 2022 - 2023 Standing Committees

Standing Committee	Mission	Chairperson	Members
Amicus Curiae	Review litigants' applications and Courts' requests for the Section to sponsor amicus curiae briefs in pending appeals cases relating to probate, and estate and trust planning, and oversee the work of legal counsel retained to prepare and file amicus briefs	Andrew W. Mayoras	Ryan P. Bourjaily Angela Hentkowski Neil J. Marchand Kurt A. Olson David L.J.M. Skidmore Trevor J. Weston Timothy White Scott Kraemer
Annual meeting	Plan the Section's Annual Meeting	Mark E. Kellogg [as Section Chairperson]	[Chairperson only]
Awards	Periodically make recommendations regarding recipients of the Michael Irish Award, and consult with ICLE regarding periodic induction of members in the George A. Cooney Society	David L.J.M. Skidmore [as immediately previous Section Chairperson]	David Lucas Christopher A. Ballard [as previous Section Chairpersons]
Budget	Develop the Section's annual budget	Nathan R. Piwowarski [as immediately previous Section Treasurer]	Richard C. Mills Katie Lynwood [as incoming Treasurer and immediately previous Section Secretary]
Bylaws	Review the Section's Bylaws, to ensure compliance with State Bar requirements, to include best practices for State Bar Sections, and to assure conformity to current practices and procedures of the Section and the Council, and make recommendations to the Council regarding such matters	Daniel W. Borst	Christopher A. Ballard John Roy Castillo David P. Lucas Nancy H. Welber
Charitable and Exempt Organizations	Consider federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations, and make recommendations to the Council regarding such matters	Rebecca K. Wrock	Celeste E. Arduino Michael Bartish Julia Dale Brian Heckman Richard C. Mills Kate L. Ringler
Citizens Outreach	Provide opportunities for education of the public on matters relating to probate, and estate and trust planning	Kathleen M. Goetsch	Kathleen Cieslik Michael J. McClory Neal Nusholtz Jessica M. Schilling Nicholas J. Vontroba

State Bar of Michigan
 Probate and Estate Planning Section
 2022 - 2023 Standing Committees

Committee on Special Projects	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Melisa M.W. Mysliwicz	meeting attendees
Court Rules, Forms, & Proceedings	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	JV Anderton Susan L. Chalgian Morgan E. Cole Hon. Michael L. Jaconette Andrew W. Mayoras Michael J. McClory Dawn Santamarina Marlaine C. Teahan
Electronic Communications	Oversee all matters relating to electronic and virtual communication matters, and make recommendations to the Council regarding such matters	Angela Hentkowski	Michael G. Lichterman Amy N. Morrissey Nathan R. Piwowarski [Section Secretary] Marlaine C. Teahan
Ethics & Unauthorized Practice of Law	Consider matters relating to ethics and the unauthorized practice of law with respect to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Kurt A. Olson	William J. Ard Raymond A. Harris J. David Kerr Neil J. Marchand Robert M. Taylor Amy Rombyer Tripp
Guardianship, Conservatorship, & End of Life Committee	Consider matters relating to Guardianships and Conservatorships, and make recommendations to the Council regarding such matters	Sandra Glazier	William J. Ard Michael W. Bartnik Kimberly Browning Kathleen A. Cieslik Raymond A. Harris Phillip E. Harter Hon. Michael L. Jaconette Michael J. McClory Kurt A. Olson James B. Steward Paul S. Vaidya

State Bar of Michigan
 Probate and Estate Planning Section
 2022 - 2023 Standing Committees

Legislation Development and Drafting	Consider matters with respect to statutes relating to probate, and estate and trust legislation, consider the provisions of introduced legislation and legislation anticipated to be introduced with respect to probate, and estate and trust planning, draft proposals for legislation relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Robert P. Tiplady	Aaron A. Bartell Howard H. Collens Georgette David Kathleen M. Goetsch Daniel S. Hilker Henry Lee Michael G. Lichterman David P. Lucas Katie Lynwood Alex Mallory Richard C. Mills Nathan Piwowarski Christine M. Savage James P. Spica David Sprague Stephen Dunn
Legislation Monitoring & Analysis	Monitor the status of introduced legislation, and legislation anticipated to be introduced, regarding probate, and estate and trust planning, and communicate with the Council and the Legislation Development and Drafting Committee regarding such matters	Michael D. Shelton	Stephen Dunn Brian K. Elder Elizabeth Graziano David Sprague
Legislative Testimony	As requested and as available, the Members of this Committee will give testimony to the Legislature regarding legislation relating to probate, and estate and trust planning	Melisa M.W. Mysliwicz [as CSP Chair]	[Chairperson only]
Membership	Strengthen relations with Section members, encourage new membership, and promote awareness of, and participation in, Section activities	Angela Hentkowski	Kate L. Ringler Susan L. Chalgian
Nominating	Nominate candidates to stand for election as the officers of the Section and the members of the Council	David L.J.M Skidmore [as previous Section Chairperson]	David P. Lucas Christopher A. Ballard [as previous Section Chairpersons]
Planning	Periodically review and update the Section's Plan of Work	Mark E. Kellogg [as Section Chairperson]	James P. Spica Katie Lynwood Nathan Piwowarski Richard C. Mills [as Section Officers]

State Bar of Michigan
 Probate and Estate Planning Section
 2022 - 2023 Standing Committees

Probate Institute	Work with ICLE to plan the ICLE Probate and Estate Planning Institute	Katie Lynwood [as Section Vice Chairperson]	[Chairperson only]
Real Estate	Consider real estate matters relating to probate, and estates and trusts, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Carlos Alvarado-Jorquera Jeffrey S. Ammon William J. Ard Leslie A. Butler J. David Kerr Michael G. Lichterman Richard C. Mills James B. Steward
State Bar & Section Journals	Oversee the publication of the Section's Journal, and assist in the preparation of periodic theme issues of the State Bar Journal that are dedicated to probate, and estates and trusts	Melisa M.W. Mysliwicz, Managing Editor	Nancy W. Little Neil J. Marchand Richard C. Mills Diane Kuhn Huff Molly P. Petijean Rebecca K. Wrock Kurt A. Olson
Tax	Consider matters relating to taxation as taxation relates to probate, and estates and trusts, and make recommendations to the Council regarding such matters	JV Anderton	Daniel Borst Jonathan Beer Mark DeLuca Stephen Dunn John McFarland Richard C. Mills Neal Nusholtz Robert Labe Christine M. Savage

The Probate and Estate Planning Section Chairperson is an ex-officio Member of each Standing Committee

State Bar of Michigan
Probate and Estate Planning Section

2022 - 2023 Ad Hoc Committees

Ad Hoc Committee	Mission	Chairperson	Members
Assisted Reproductive Technology	Review the 2008 Uniform Probate Code Amendment for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction, and make recommendations to the Council regarding such matters	Nancy H. Welber	Christopher A. Ballard Edward Goldman James P. Spica Lawrence W. Waggoner Nazneen Hasan Christina Lejowski
Electronic Wills	Review proposals for electronic wills, including the Uniform Law Commission's draft of a Uniform Law, and make recommendations to the Council regarding such matters	Kurt A. Olson	Kimberly Browning Georgette David Sandra Glazier Douglas A. Mielock Neal Nusholtz Christine M. Savage James P. Spica
Fiduciary Exception to the Attorney-Client Privilege	Consider whether there should be some exception to the rule that beneficiaries of an estate or trust are entitled to production of documents regarding the advice given by an attorney to the fiduciary, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	Aaron A. Bartell Ryan P. Bourjaily
Nonbanking Entity Trust Powers	Consider whether there should be legislation granting trust powers to nonbanking entities, and make recommendations to the Council regarding such matters	James P. Spica and Robert P. Tiplady (co-Chairpersons)	JV Anderton Laura L. Brownfield Warren H. Krueger, III Richard C. Mills Mark K. Harder Kathleen Cieslik Joe Viviano
Premarital Agreements	Consider whether there should be legislation regarding marital property agreements, and	Christine M. Savage	Daniel W. Borst Sandra Glazier Kathleen M. Goetsch Patricia M. Ouellette
Uniform Community Property Disposition at Death Act	Consider the Uniform Community Property Disposition at Death Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Kathleen Cieslik Richard C. Mills Christine M. Savage David Sprague

Undue Influence	Consider the definition of undue influence and attendant evidentiary presumptions, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Sandra Glazier Hon. Michael L. Jaconette Warren H. Krueger, III John Mabley Andrew W. Mayoras Hon. David Murkowski Kurt A. Olson David L.J.M. Skidmore
Uniform Fiduciary Income & Principal Act	Consider the Uniform Fiduciary Income and Principal Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	James P. Spica	Anthony Belloli Kathleen Cieslik Marguerite Munson Lentz Richard C. Mills Robert P. Tiplady Joe Viviano
Uniform Partition of Heirs Property Act	Consider the Uniform Partition of Heirs Property Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Marguerite Munson Lentz Alex Mallory Elizabeth McLachlan Christine Savage David Sprague
Uniform Power of Attorney Act	Consider the Uniform Power of Attorney Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	Christine M. Savage	Kathleen A. Cieslik David P. Lucas Alex Mallory Michael D. Shelton James P. Spica David Sprague
Various Issues Involving Death and Divorce	Should EPIC be changed so that a pending divorce affects priority to serve in a fiduciary position; Should Council explore whether EPIC should be changed so that a pending divorce affects intestacy, elective share, exemptions and allowances, etc. Should "affinity" be defined to prevent elimination of stepchildren's gifts by operation of law after divorce or, instead, should there be an exception allowing gifts to stepchildren on a showing of, Perhaps, clear and convincing evidence demonstrating that the Settlor would not have intended the omission of the stepchild?	Daniel Borst Sean Blume	Andy Mayoras Hon. Shauna Dunning Georgette David Katie Lynwood Elizabeth Siefker

The Probate and Estate Planning Section Chairperson is an ex-officio Member of each Ad Hoc Committee

State Bar of Michigan
 Probate and Estate Planning Section

2022 - 2023 Liaisons

liaison to:	Liaison
Alternative Dispute Resolution Section	John Hohman
Business Law Section	Mark E. Kellogg
Elder Law and Disability Right Section	Angela Hentkowski
Family Law Section	Anthea E. Papista
Institute of Continuing Legal Education	Lindsey DiCesare
Law Schools	Savina Mucci
Michigan Bankers Association	David Sprague
Michigan Legal Help/Michigan Bar Foundation	Kathleen Goetsch
Michigan Probate Judges Association	Hon. Michael L. Jaconette
Probate Registers	Morgan Cole, Ingham County Probate Register
Real Property Law Section	Kenneth Silver
Supreme Court Administrative Office	Melisa M.W. Mysliwicz
State Bar	Jennifer Hatter
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

The mission of each respective Liaison is to develop and maintain bilateral communication between such Liaison's respective association and the Probate and Estate Planning Section of the State Bar of Michigan, in matters of mutual interest and concern.

Council Materials

**MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN**

Friday, March 10, 2023

Agenda

- I. Call to Order and Welcome (Mark Kellogg)
- II. Zoom Roll Call Confirmation of Attendees (Mark Kellogg)
- III. Excused Absences (Mark Kellogg)
- IV. Lobbyist's Report (Public Affairs Associates)
- V. Monthly Reports:
 - A. Minutes of Prior Council Meeting – March (Nathan Piwowarski) –
Attachment 1
 - B. Chair's Report (Mark Kellogg)
 - C. Treasurer's Report (Rick Mills)
 - D. Committee on Special Projects (Melisa Mysliwec)
 - E. Tax Committee Tax Nugget (JV Anderton) – **Attachment 2**
 - F. Membership Committee (Angela Hentkowski)
- VI. Oral Reports
 - a. Guardianship, Conservatorship, and End of Life Committee (Sandy Glazier) –
Attachment 3
- VII. Written Reports
- VIII. Other Business
- IX. Adjournment

The next Probate & Estate Planning Council meeting will be **Friday, April 14, 2023**. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM. To register for participation via Zoom, visit

<https://us02web.zoom.us/meeting/register/tZlOcO6qrT4jHdBhcaVfGsMrOBkevKGRlwf>.

ATTACHMENT 1

**MEETING OF THE COUNCIL OF THE
OF THE PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN**

Friday, February 10, 2023 @ 10:00 AM

University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910
and
Remote

Minutes

- I. **Call to Order and Welcome** (Mark Kellogg)
 - a. Chairperson Mark E. Kellogg called the meeting to order at 10:00 AM noting that the meeting was being recorded and that the resulting recording is to be deleted once the minutes of the meeting have been submitted by the Secretary and accepted by the Council.
- II. **Zoom Roll Call Confirmation of Attendees** (Mark Kellogg)
 - a. In Person: Mark E. Kellogg, Richard Mills, Ryan Phillips, David Sprague, Angela Hentkowski, Susan Chalgian, Daniel Hilker, Elizabeth Siefker, Michael Lichterman, and Michael D. Shelton.
 - b. Remote: James Steward, James P. Spica, Daniel Borst, Melisa Mysliwiec, David Lucas, Kenneth Silver, Christine Savage, Neal Nusholtz, Robert Tiplady, Sandra Glazier, Nathan Piwowski, James F. Anderton, Katie Lynwood, Marguerite Lentz, David Lentz, Kurt Olson, Jonathan Beer, Stephen J. Dunn, Kathleen A. Cieslik, Georgette David, Rebecca Wrock, Warren Krueger, Katie Szymanski, Sean Blume, Kenneth Tacoma, Lindsey DiCesare (ICLE), Alaina Nelson, Rebecca Bechler (Public Affairs Associates), and Andrea Neighbors (Administrative Assistant)
- III. **Excused Absences** (Mark Kellogg)
 - a. Andrew Mayoras
- IV. **Lobbyist's Report** (Public Affairs Associates)
 - a. According to Rep. Graham Filler, we are waiting for LSB to release the second half of the reintroduced EPIC Omnibus bills. Becky is hopeful that the package will be introduced within the next week or two. Rep. Graham Filler and Rep. Kelly Breen will be sponsoring this package. Both are ready to go, the committee chair, Rep. Kelly Breen and Rep. Kara Hope who chairs the judiciary committee are ready to move this as soon as we can get it introduced.
 - b. A meeting has been requested with Sen. Stephanie Chang, who chairs the Senate judiciary committee, regarding powers of appointment and rules against perpetuity to see if she could put those bills in on the Senate side. Both the house and senate are actively engaged in the councils' issues.
- V. **Monthly Reports**
 - a. **Minutes of Prior Council Meeting** – January (Nathan Piwowski) –Attachment 1
 - i. Motion by Nathan Piwowski, second by Melisa Mysliwiec to accept minutes with the spelling corrections of Susan Chalgian and Elizabeth Siefkers' names. Approved.

- b. **Chair's Report** (Mark Kellogg)
 - i. Mr. Kellogg received a communication regarding the Corporate Transparency Act from Sharon Lavine regarding a webinar with the participants Mark High of Dickinson's Wright and Alexis Lupo of Michigan Corporations Division of LARA. Ms. Lavine requested permission to use the sections' email list to send out a blast regarding the webinar. There was a discussion with the end result of the Chair will make the decision and communicate that decision to Sharon Lavine.
- c. **Treasurer's Report** (Rick Mills)
 - i. Mr. Mills suggested that the council member donation to Hearts & Flowers is \$35.
- d. **Committee on Special Projects** (Melisa Mysliwec)
 - i. General thresholds in the EPIC Omnibus

Ms. Mysliwec related that CSP had considered whether the threshold amounts identified in Exhibit 1A related to the EPIC Omnibus Legislation should be increased as reflected in the exhibit as well as whether the limits in MCL 700.3918 and 700.5102 should be increased to \$50,000.

- A significant majority of the CSP believed that Council should adopt a public policy position in favor of increasing the threshold amounts in the EPIC Omnibus Legislation that are identified on page 2 of Exhibit 1A of the CSP Agenda.
- A majority of the CSP believed that Council should leave the threshold amounts in MCL 700.3918 and 700.5102 at \$25,000, as listed, rather than increase those limits.

Based on that, Ms. Mysliwec moved the the Council adopt a public policy position in favor of increasing the threshold amounts in the EPIC Omnibus Legislation identified on page 2 of Exhibit 1A of the CSP Agenda, specifically,

MCL 700.3605: increase threshold to \$30,000
MCL 700.3981: increase threshold to \$1,500
MCL 700.3982: increase threshold to \$50,000
MCL 700.3983: increase threshold to \$50,000
MCL 257.236: increase threshold to \$120,000
MCL 324.80312: increase threshold to \$230,000

The Secretary recorded a vote of 20 in favor, 0 opposed, 3 not voting, and 0 abstaining, and the Chair declared the motion carried.

- ii. Threshold for the small estate proceeding (MCL 700.3982) in the EPIC Omnibus

Ms. Mysliwec shared that CSP also considered a proposal to amend MCL 700.3982 to allow for netting of certain liens in determining eligibility for administration of small estates using a Petition and Order for Assignment.

Ms. Mysliwicz moved, based on that recommendation, that the Council adopt a public policy position in favor of amending MCL 700.3982 as reflected in Exhibit 1B of the CSP materials, except that the amount of indebtedness "not to exceed amount" is increased to \$250,000 rather than \$50,000, so that it reads:

(5) Beginning _____, in calculating the balance of a decedent's gross estate under subsection (1), if real property that is included in the estate is encumbered by or used as security for an indebtedness, the amount of the indebtedness (not to exceed \$250,000) must be deducted from the value of the real property.

and further, that Council grant the Chair of the Legislative Drafting and Development Committee the authority to make non-substantive changes in the legislative process leading to enactment of this amendment.

The Secretary recorded a vote of 20 in favor, 0 opposed, 3 not voting, and 0 abstaining, and the Chair declared the motion carried.

- e. **Tax Committee Tax Nugget** (Christine Savage) – Attachment 2. Christine Savage reviewed the information included in Attachment 2.

VI. **Written Report Only**

VII. **Other Business.**

VIII. **Adjournment**

- a. There being no other business before the Council, the Chairperson declared the meeting adjourned at 10:38 AM.

Respectfully Submitted,

Nathan Piwowarski, Secretary

ATTACHMENT 2

TAX NUGGET

Mis-Administration of GRATs CCA 202152018

By: Robert B. Labe

Grantor retained annuity trusts (GRAT) are an estate planning technique used by ultra high net worth individuals to shift wealth to their descendants. A GRAT is an irrevocable trust whereby the ultra high net worth individual transfers assets to the irrevocable trust and retains an annuity interest for a fixed term of years. The annuity amount must be payable at least annually. The annuity amount is typically a payment of a stated percentage of the fair market value of the trust, but it can be a fixed dollar amount. Typically GRATs are either short term GRATs (usually a 2 year term) or 5-10 year GRATs. Longer term GRATs are used in very low inflationary environments. A short term GRAT is usually a rolling GRAT.

GRATs can be structured so there is almost no gift tax consequences to the Grantor (i.e. a zeroed out GRAT). In a zeroed out GRAT the GRAT is structured so that the retained annuity's actuarial value is almost equal to the value of the property transferred to the trust, resulting in a remainder (and a gift tax value) of approximately zero. The gift to the remainder beneficiary of the GRAT, is equal to the fair market value of the assets contributed to the GRAT on its creation date reduced by the present value of the annuity payments retained by the grantor.

The annuity payment is typically paid annually on the anniversary GRAT creation date (the date of funding). An annuity amount payable on the anniversary date of the creation of the trust must be paid no later than 105 days after the anniversary date. See Treas. Reg. §25.2702-3(b)(4) "If the annuity is stated in terms of a fraction or percentage of the initial fair market value of the trust property, the governing instrument must contain provisions meeting the requirements of Treas. Reg. §1.664-2(a)(i)(iii) . . . (relating to adjustments of any incorrect determination of the fair market value of the property in the trust)" Treas. Reg. §25.2702-3(b)(2).

If the GRAT outperforms the IRC Section 7520 rate the appreciation will be transferred to the remainder beneficiaries of the GRAT at the end of the term. Thus, the GRAT is funded with assets that are expected to appreciate significantly during the term. GRATs are structured as grantor trusts so neither the contribution to the trust nor the in kind annuity payments to the Grantor will trigger an income tax.

Recently significant concerns have been raised by legal commentators and the estate planning community about the Internal Revenue Service's aggressive posture regarding the administration of GRATs. This heightened concern was triggered by Chief Counsel Advice ("CCA") 20215208.

The CCA involves a two year GRAT that resulted in a draconian determination by the Internal Revenue Service based on the government's view of the bad facts in the case

that it believed were abusive. The government concluded that the retained interest was not a qualified interest under Section 2702 of the Internal Revenue Code because the Grantor used an outdated appraisal that did not take into account all the facts and circumstances of a pending merger. The Internal Revenue Service asserted in the CCA that as of the date of the contribution to the GRAT of the stock “the hypothetical willing buyer of the company stock could have reasonably foreseen the merger and anticipated the price of the company stock” would trade at a substantial premium over the value determined by the outdated appraisal. If the retained interest is not a qualified interest under Section 2702 of the Code, the contribution to the GRAT is a taxable gift equal to the fair market value of the assets as of the date of contribution since the value of any retained interest which is not a qualified interest is zero. Thus, the result is significantly worse than an outright gift since there is no offset for the value of the annuity payments to the Grantor.

The CCA made the negative determination although the two year GRAT seemed to satisfy the qualified interest requirements under Section 2702 of the Internal Revenue Code and the corresponding regulations. The most disconcerting part of the CCA’s analysis to many practitioners is its reference to *Atkinson v Commissioner* 115TC 26 2000, *aff’d* 309f 3d 1290 11th Cir(2002) and its adoption of the legal rationale set forth therein which disqualified a charitable remainder annuity trust. In *Atkinson* no annual payments were ever made from the charitable remainder annuity trust to Mrs. Atkinson during the time of the creation of the charitable remainder trust until Mrs. Atkinson’s death. The Tax Court and Eleventh Circuit both disallowed the charitable deduction based on the failure of the Trustee’s failure to comply with rules governing charitable remainder annuity trusts.

CCA 20215208 concluded with the following paragraph that can be viewed as a warning to the practitioner and possibly provide some comfort for inadvertent mistakes that may sometimes happen with the administration of GRATS:

“The operational effect of deliberately using an undervalued appraisal is to artificially depress the required annual annuity. Thus, in the present case, the artificial annuity to be paid was less than 34 cents on the dollar instead of the required amount, allowing the trustee to hold back tens of millions of dollars. The cascading effect produced a windfall to the remaindermen. Accordingly, because of this operational failure, Donor did not retain a qualified annuity interest under §2702. See Atkinson.”

The Internal Revenue Service concluded the donor did not retain a qualified annuity interest even though the GRAT included a formula authorized by the Treasury Regulations to adjust the annuity payments to pay the required percentage of the initial fair market value of the property transferred to the trust, as finally determined for federal tax purposes.

The silver lining of the CCA like *Atkinson* if there is one is it appeared the Internal Revenue Service’s overly aggressive posture was based on the apparent lack of good faith effort by the donor to make a proper determination of the fair market value of the contribution to the GRAT. It may be tempting to dismiss the CCA as a bad facts case and outlier. However, with its reliance on the rationale set forth in the *Atkinson* decision

it may lead the Internal Revenue Service to accelerate its more aggressive posture regarding the misadministration of GRATS.

ATTACHMENT 3

To: Probate Council

From: Sandra Glazier, Chair – Guardianship, Conservatorship and End of Life Committee

Date: March 3, 2023

Re: Written Report of the Guardianship, Conservatorship and End of Life Committee for Probate Council Meeting of March 10, 2023

Two guardianship-related bills from last session have been reintroduced (attached). Last session, Council adopted a public policy position opposing them. The Committee will request that Council again do so.

What follows is the Committee's observations regarding the bills from last session:

1. Generally, it was felt that some level of training, made readily available for online access and viewing is appropriate. At least some level of basic training should be available to family members appointed to act as guardians and/or conservators. Training need not be completed before appointment, but should be completed within a reasonable time following appointment.
2. Many complained of actions or omissions of guardians or conservators were felt to be unintentional (out of ignorance of the law or requirements) as opposed to intentionally wrongful conduct. Some counties (such as Genesee) provide training that all individual fiduciaries must undertake either before or within a reasonable period after appointment, so that those appointed have a fuller understanding of their fiduciary duties and responsibilities.
3. Some counties (such as Wayne) have a process in place that is more centralized to address complaints against guardians and conservators appointed in that court, but other counties don't have such resources.
4. While there isn't strong opposition to the idea of "certifying" professional guardians and conservators (who aren't attorneys or financial institutions), some expressed the belief that "certification" as opposed to "training" should be limited to professional guardians and should exclude attorneys (who already have training on fiduciary duties and the law, and face loss of licensure for violation of such duties), family members and financial institutions.
5. Others felt that "certification" as envisioned by the Senate Bills contemplates use of national as opposed to state specific standards and won't address the core issue of abuse of the vulnerable or compliance with Michigan laws.
6. Relying upon LARA or another certifying body to take action to remove certification or licensure is too slow a process. Local courts need to have the ability to select fiduciaries who they believe will best serve a vulnerable person's needs, especially if there aren't interested and appropriate relatives to fill those roles. One committee member commented that local authority to act must remain. She likened it to the medical profession. While a doctor might be licensed by LARA, it is a long process to remove licensure. However, to perform services, they must have privileges in the hospital they which to practice at, and the hospital has internal disciplinary authority that permits suspension of privileges long before the medical board and LARA would remove licensure.
7. Smaller counties/communities are having difficulty finding persons/entities/organization willing to serve in fiduciary capacities, particularly for those who lack financial resources and/or family

willing and able to fill those roles. We shouldn't make the process and requirements so onerous that this problem is exacerbated.

8. Cheboygan County recently advertised for persons willing to act in such capacities, because the need exceeds the pool of persons available to fill the role.
<https://www.cheboygannews.com/story/news/local/2022/06/17/cheboygan-county-need-public-guardians-help-residents/7645067001/>
9. A centralized repository for complaints is needed and it needs to be accessible to the local courts on a timely basis, so that a court can consider whether or not to appoint someone. A court should be permitted to have access to information that indicates that a professional fiduciary, entity, attorney, person has a complaint pending or adjudicated against them.. If complaints are pending, but haven't been adjudicated, it might be helpful if a court considering an appointment knew that 5 complaints are currently pending in x and y county about the proposed fiduciary, so that the court might reach out to the particular county to see what the allegations are and any findings to date as part of the court's deliberative process in deciding to or not to appoint a proposed fiduciary.
10. Often reiterated was the concern that the training not be so onerous that it discourages persons from becoming fiduciaries and that the costs and requirements needs to be addressed in advance of passage of bills so we know what we considering.
11. Certification should not be used as a means to bolster membership in national organizations or which results in training that is not based upon Michigan standards.
12. Concerns were raised regarding obtuse wording in the proposed statutes regarding certification, that might be interpreted to require that a caregiver engaged by a professional fiduciary (e.g. in home services or even a facility) will be required to have certifications, pass criminal checks and have been a resident of the state for at least a year before their services can be engaged by the fiduciary.
13. While a court may consider certification, perhaps certification should not be mandated.
14. Any certification and/or training requirements have to be tie barred with appropriate funding and resources. Policy without appropriations to implement the proposed changes benefit no one, especially those who may be servicing persons who are indigent (and those who need representation and services) and not participating in Medicaid covered nursing home care.
15. It was generally felt that this was an area better governed through the courts, with any training created with SCAO and local court input, as opposed to through LARA (or some national organization). If a different agency is to be utilized, perhaps DHS (which already provides screening and contracting for guardians in some situations might be an option) might be utilized as the central reporting agency, since they do have the ability to perform some adjudicative functions, but it's also important that the probate courts have ready and timely access to information regarding complaints filed and disciplinary actions taken as well as the ongoing ability to remove fiduciaries and authorize as well as restrict conduct when deemed appropriate. Another member suggested that perhaps APS was better suited to be the central reporting agency for complaints and investigations of the same.
16. Another member commented that while LARA and/or DHHS could provide a service related to certification (under the parameters identified above) and, if necessary, the slow process of revocation of a certificate when necessary, a statewide reporting system could operate independently but timely local county court access would be required. It would be helpful to

have a statewide court reporting system that was controlled by the courts, in which each guardianship would be entered accompanied by the name of each guardian. If the court receives a complaint about the guardian, that would also be entered in the system and if the complaint was found to have merit, that would be entered as well. The data on the guardians could hopefully be sorted so that the court could see the number of cases and number of complaints against a guardian. There will always be clients who complain so the finding of a complaint would not necessarily be significant. But it could rouse the suspicions of the probate judge if there were significant complaints relative to the number of guardianships. This would give the opportunity for a Judge to make a brief assessment of “suitability” before appointment of a guardian in each case. Without such a system to identify and cue the judges as to bad actors, it was queried whether any of the proposed changes were really making the system better rather than must more complex. Running an iChat alone is not enough for a judge to measure suitability at appointment of a guardian. It could take a year or more under the current systems to pull a certificate from a professional guardian and, obviously, a great deal of harm could have already happened to our vulnerable clients in the meantime.

Respectfully submitted,

Sandra D. Glazier
Chair of the Probate Section’s
Guardianship, Conservatorship and End of Life Committee

HOUSE BILL NO. 4171

March 02, 2023, Introduced by Reps. VanderWall, Zorn, Green, Wozniak, Paiz, Prestin, Kunse, Rheingans, Thompson and Bezotte and referred to the Committee on Judiciary.

A bill to amend 1974 PA 258, entitled
"Mental health code,"
by amending section 628 (MCL 330.1628), as amended by 1995 PA 290.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 628. (1) ~~The~~ **Subject to subsection (2), the** court may
2 appoint as guardian of an individual with a developmental
3 disability ~~any~~ **a** suitable individual or agency, public or private,
4 including a private association capable of conducting an active
5 guardianship program for an individual with a developmental
6 disability. The court shall not appoint the department of ~~mental~~

HOUSE BILL NO. 4172

March 02, 2023, Introduced by Reps. Wozniak, VanderWall, Prestin, Rheingans, Thompson, Green and Bezotte and referred to the Committee on Judiciary.

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending the title and sections 5106, 5108a, 5313, and 5409 (MCL 700.5106, 700.5108a, 700.5313, and 700.5409), section 5106 as amended by 2017 PA 136, section 5108a as amended by 2020 PA 338, section 5313 as amended by 2012 PA 545, and section 5409 as amended by 2000 PA 463, and by adding sections 5106a and 5106b.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 TITLE
2 An act to codify, revise, consolidate, and classify aspects of

1 the law relating to wills and intestacy, relating to the
 2 administration and distribution of estates of certain individuals,
 3 relating to trusts, and relating to the affairs of certain
 4 individuals under legal incapacity; to provide for the powers and
 5 procedures of the court that has jurisdiction over these matters;
 6 to provide for the validity and effect of certain transfers,
 7 contracts, and deposits that relate to death; to provide procedures
 8 to facilitate enforcement of certain trusts; **to provide for the**
 9 **certification of certain individuals; to provide for the powers and**
 10 **duties of certain state governmental officers and entities; to**
 11 **prescribe penalties;** and to repeal acts and parts of acts.

12 Sec. 5106. (1) Subject to subsections (2), ~~and (3)~~, **and (4)**,
 13 the court may appoint or approve a professional guardian or
 14 professional conservator, as appropriate, as a guardian or
 15 conservator under this act, or as a plenary guardian or partial
 16 guardian as those terms are defined in section 600 of the mental
 17 health code, 1974 PA 258, MCL 330.1600.

18 (2) The court shall only appoint a professional guardian or
 19 professional conservator as authorized under subsection (1) if the
 20 court finds on the record all of the following:

21 (a) The appointment of the professional guardian or
 22 professional conservator is in the ward's, developmentally disabled
 23 individual's, incapacitated individual's, or protected individual's
 24 best interests.

25 (b) There is no other person that is competent, suitable, and
 26 willing to serve in that fiduciary capacity in accordance with
 27 section 5212, 5313, or 5409.

28 (3) The court shall not appoint a professional guardian or
 29 professional conservator as authorized under subsection (1) unless

1 the professional guardian or professional conservator files a bond
 2 in an amount and with the conditions as determined by the court.
 3 For a professional conservator, the sureties and liabilities of the
 4 bond are subject to sections 5410 and 5411.

5 **(4) Beginning 2 years after the effective date of the**
 6 **amendatory act that added section 5106a, except as otherwise**
 7 **provided in section 5313 or 5409, as applicable, the court shall**
 8 **not appoint an individual as a professional guardian or**
 9 **professional conservator unless the individual is certified under**
 10 **section 5106a.**

11 **(5) ~~(4)~~**—A professional guardian or professional conservator
 12 appointed under this section shall not receive as a result of that
 13 appointment a benefit beyond compensation specifically authorized
 14 for that type of fiduciary by this act or the mental health code,
 15 1974 PA 258, MCL 330.1001 to 330.2106. This subsection does not
 16 prevent a person from providing compensation or other benefits,
 17 from a source other than the estate of the ward, developmentally
 18 disabled individual, incapacitated individual, or protected
 19 individual, to a professional guardian or professional conservator
 20 appointed or approved under this section. If a professional
 21 guardian or professional conservator appointed or approved under
 22 this section receives or is to receive compensation or other
 23 benefits as a result of that appointment from a person other than
 24 this state, a political subdivision of this state, or a trust
 25 created under section 5407(2), the professional guardian or
 26 professional conservator shall file with the appointing or
 27 approving court a written statement of the compensation or other
 28 benefit received or to be received, including the source of the
 29 compensation or other benefit, in a form and in a manner prescribed

1 by the Michigan court rules. The professional guardian or
 2 professional conservator shall serve a copy of the form described
 3 in this subsection to the ward, developmentally disabled
 4 individual, incapacitated individual, or protected individual and
 5 to interested persons.

6 **(6)** ~~(5)~~—A professional guardian appointed under this section
 7 shall establish and maintain a schedule of visitation so that an
 8 individual associated with the professional guardian who is
 9 responsible for the ward's care visits the ward within 3 months
 10 after the professional guardian's appointment and not less than
 11 once within 3 months after each previous visit.

12 **(7)** ~~(6)~~—**Subject to subsection (8),** a professional guardian
 13 appointed under this section shall ensure that there are a
 14 sufficient number of employees assigned to the care of wards for
 15 the purpose of performing the necessary duties associated with
 16 ensuring that proper and appropriate care is provided.

17 **(8) Beginning 2 years after the effective date of the**
 18 **amendatory act that added section 5106a, an employee of a**
 19 **professional guardian described in section 5313(3)(f) or of a**
 20 **professional conservator described in section 5409(1)(h) shall not**
 21 **make medical, psychological, financial, legal, or housing decisions**
 22 **on behalf of a ward or protected individual, as applicable, unless**
 23 **the employee is certified under section 5106a.**

24 **(9)** ~~(7)~~—For the purposes of the statutory authorization
 25 required by section 1105(2)(e) of the banking code of 1999, 1999 PA
 26 276, MCL 487.11105, to act as a fiduciary in this state, if the
 27 court appoints a for-profit or nonprofit, nonbanking corporation
 28 organized under the laws of this state to serve in a fiduciary
 29 capacity that is listed in subsection (1), the nonbanking

1 corporation is authorized to act in that fiduciary capacity. The
2 authorization under this subsection confers the fiduciary capacity
3 only to the extent necessary in the particular matter of each
4 appointment and is not a general grant of fiduciary authority. A
5 nonbanking corporation is not authorized to act in any other
6 fiduciary capacity.

7 **Sec. 5106a. (1) Beginning 2 years after the effective date of**
8 **the amendatory act that added this section, the department shall**
9 **certify an individual as a professional guardian or professional**
10 **conservator who meets all of the following requirements:**

11 (a) Submits a completed application to the department on a
12 form prescribed by the department.

13 (b) Pays an initial application fee of \$250.00 or renewal
14 application fee of \$100.00, as applicable.

15 (c) Is 21 years of age or older.

16 (d) Submits a criminal background check under section 5106b.

17 (e) Has not been convicted of a crime listed in section
18 5106b(1).

19 (f) Has not been found liable in a civil action that involved
20 fraud, misrepresentation, material omission, misappropriation,
21 theft, exploitation, abuse, or conversion.

22 (g) Has not been removed as a guardian or conservator by the
23 court for an action involving fraud, misrepresentation, material
24 omission, misappropriation, theft, exploitation, abuse, or
25 conversion.

26 (h) Has not been relieved of the responsibilities of a
27 guardian or conservator by an employer or client for an action
28 involving fraud, misrepresentation, material omission,
29 misappropriation, theft, exploitation, abuse, or conversion.

1 (i) Has not been found liable in a subrogation action by an
2 insurance or bonding agent.

3 (j) Has graduated from an accredited high school or comparable
4 school or educational institution or passed the general educational
5 development test or other graduate equivalency examination.

6 (k) Passes and submits proof to the department of passage of
7 the Center for Guardianship Certification National Certified
8 Guardian Examination.

9 (l) Submits proof to the department of completion of other
10 educational requirements required by the Center for Guardianship
11 Certification, including a minimum of 12 hours of continuing
12 education units in the 24 months preceding the submission of the
13 application, as offered by a state or national trade association
14 dedicated to the advancement of the guardianship profession.

15 (m) Submits proof to the department of coverage by
16 professional liability insurance, as the named insured or employee
17 of the named insured.

18 (2) The department shall issue a unique certification number
19 to an individual certified under this section.

20 (3) Only an individual certified under this section may
21 advertise that he or she is a certified professional guardian or
22 certified professional conservator.

23 (4) An individual certified under this section who has been
24 found civilly liable or criminally convicted in an action that
25 involves fraud, misrepresentation, material omission,
26 misappropriation, theft, exploitation, abuse, or conversion shall
27 report this finding or conviction to the department and each
28 probate court in which he or she is currently serving as a
29 professional guardian or professional conservator within 30 days

1 after conviction or finding of civil liability.

2 (5) The department shall revoke the certification of an
3 individual who does not meet the requirements under subsection (1).

4 (6) An individual denied certification or whose certification
5 has been revoked by the department based on a criminal history
6 check conducted under section 5106b may appeal to the department if
7 he or she believes that the criminal history report is inaccurate,
8 and the appeal must be conducted as a contested case under the
9 administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to
10 24.328.

11 (7) The department shall post on its website a list of
12 certified professional guardians and certified professional
13 conservators, and if applicable, their employer. The department
14 shall update the list each month.

15 (8) As used in this section, "department" means the department
16 of licensing and regulatory affairs.

17 Sec. 5106b. (1) Except as otherwise provided in subsection
18 (2), a professional guardian or professional conservator shall not
19 employ or independently contract with an individual who regularly
20 has direct access to or provides direct services to incapacitated
21 or protected individuals served by the professional guardian or
22 professional conservator, if the individual has been convicted of
23 any of the following:

24 (a) A relevant crime described under 42 USC 1320a-7(a).

25 (b) Any of the following felonies or misdemeanors, an attempt
26 or conspiracy to commit any of those felonies or misdemeanors, or
27 any other state or federal crime that is similar to the felonies or
28 misdemeanors described in this subdivision:

29 (i) A felony or misdemeanor that involves the intent to cause

1 death or serious impairment of a body function, that results in
2 death or serious impairment of a body function, that involves the
3 use of force or violence, or that involves the threat of the use of
4 force or violence.

5 (ii) A felony or misdemeanor involving cruelty or torture.

6 (iii) A felony or misdemeanor under chapter XXA of the Michigan
7 penal code, 1931 PA 328, MCL 750.145m to 750.145r.

8 (iv) A felony or misdemeanor involving criminal sexual conduct.

9 (v) A felony or misdemeanor involving abuse or neglect.

10 (vi) A felony or misdemeanor involving the use of a firearm or
11 dangerous weapon.

12 (vii) A felony or misdemeanor involving the diversion or
13 adulteration of a prescription drug or other medications.

14 (viii) A felony or misdemeanor involving fraud,
15 misrepresentation, material omission, misappropriation, theft,
16 exploitation, or conversion.

17 (ix) A felony or misdemeanor involving home invasion.

18 (x) A felony or misdemeanor involving embezzlement.

19 (xi) A felony or misdemeanor involving negligent homicide or a
20 violation of section 601d(1) of the Michigan vehicle code, 1949 PA
21 300, MCL 257.601d.

22 (xii) A felony or misdemeanor involving larceny.

23 (xiii) Any other misdemeanor involving assault, fraud, theft, or
24 the possession or delivery of a controlled substance.

25 (2) Except as otherwise provided in this subsection or
26 subsection (5), a professional guardian or professional conservator
27 shall not employ or independently contract with an individual who
28 regularly has direct access to or provides direct services to

1 incapacitated or protected individuals served by the professional
2 guardian or professional conservator and an individual applicant
3 must not be certified as a professional guardian or professional
4 conservator until the professional guardian, professional
5 conservator, or the individual applicant for certification has a
6 criminal history check conducted in compliance with this section or
7 has received criminal history record information in compliance with
8 subsections (3) and (10). This subsection and subsection (1) do not
9 apply to an individual who is under an independent contract with a
10 professional guardian or professional conservator if he or she is
11 not under the professional guardian's or professional conservator's
12 control and the services for which he or she is contracted are not
13 directly related to the provision of services to an incapacitated
14 or protected individual or if the services for which he or she is
15 contracted allow for direct access to the incapacitated or
16 protected individuals but are not performed on an ongoing basis.
17 This exception includes, but is not limited to, an individual who
18 is under an independent contract with the professional guardian or
19 professional conservator to provide utility, maintenance,
20 construction, or communications services.

21 (3) An individual who applies for certification as a
22 professional guardian or professional conservator or employment
23 either as an employee or as an independent contractor for a
24 professional guardian or professional conservator and who has not
25 been the subject of a criminal history check conducted in
26 compliance with this section shall give written consent at the time
27 of application for the department of state police to conduct a
28 criminal history check under this section, along with
29 identification acceptable to the department of state police. If the

1 applicant has been the subject of a criminal history check
2 conducted in compliance with this section, the applicant shall give
3 written consent at the time of application for the professional
4 guardian or professional conservator to obtain the criminal history
5 record information as prescribed in subsection (4) from the
6 department and for the department of state police to conduct a
7 criminal history check under this section if the requirements of
8 subsection (10) are not met and a request to the Federal Bureau of
9 Investigation to make a determination of the existence of any
10 national criminal history pertaining to the applicant is necessary,
11 along with identification acceptable to the department of state
12 police. On receipt of the written consent to obtain the criminal
13 history record information and identification required under this
14 subsection, the professional guardian or professional conservator
15 that has made a good-faith offer of employment or an independent
16 contract to the applicant shall request the criminal history record
17 information from the department and shall make a request regarding
18 the applicant to the department to conduct a check of all relevant
19 registries in the manner required in subsection (4). If the
20 requirements of subsection (10) are not met and a request to the
21 Federal Bureau of Investigation to make a subsequent determination
22 of the existence of any national criminal history pertaining to the
23 applicant is necessary, the professional guardian or professional
24 conservator shall proceed in the manner required in subsection (4).

25 (4) On receipt of the written consent to conduct a criminal
26 history check and identification required under subsection (3), the
27 professional guardian employer, professional conservator employer,
28 or the applicant for certification as a professional guardian or
29 professional conservator shall make a request to the department of

1 state police to conduct a criminal history check on the applicant,
2 to input the applicant's fingerprints into the automated
3 fingerprint identification system database, and to forward the
4 applicant's fingerprints to the Federal Bureau of Investigation.
5 The department of state police shall request the Federal Bureau of
6 Investigation to make a determination of the existence of any
7 national criminal history pertaining to the applicant. The
8 applicant shall provide the department of state police with a set
9 of fingerprints. The request must be made in a manner prescribed by
10 the department of state police. The professional guardian or
11 professional conservator shall make the written consent and
12 identification available to the department of state police. The
13 professional guardian or professional conservator shall make a
14 request regarding that applicant to the relevant licensing or
15 regulatory department to conduct a check of all relevant registries
16 established according to federal and state law and regulations for
17 any substantiated findings of abuse, neglect, or misappropriation
18 of property. If the department of state police or the Federal
19 Bureau of Investigation charges a fee for conducting the criminal
20 history check, the professional guardian employer, professional
21 conservator employer, or applicant for certification as a
22 professional guardian or professional conservator shall pay the
23 cost of the charge. The department of state police shall conduct a
24 criminal history check on the applicant named in the request. The
25 department of state police shall provide the department with a
26 written report of the criminal history check conducted under this
27 subsection. The report must contain any criminal history record
28 information on the applicant maintained by the department of state
29 police. The department of state police shall provide the results of

1 the Federal Bureau of Investigation determination to the department
2 within 30 days after the request is made. If criminal history
3 record information is disclosed on the written report of the
4 criminal history check or the Federal Bureau of Investigation
5 determination that resulted in a conviction, the department shall
6 notify the professional guardian employer, professional conservator
7 employer, or applicant for certification as a professional guardian
8 or professional conservator in writing of the type of crime
9 disclosed on the written report of the criminal history check or
10 the Federal Bureau of Investigation determination without
11 disclosing the details of the crime. Any charges imposed by the
12 department of state police or the Federal Bureau of Investigation
13 for conducting a criminal history check or making a determination
14 under this subsection must be paid in the manner required under
15 this subsection.

16 (5) If a professional guardian or professional conservator
17 determines it necessary to employ an applicant before receiving the
18 results of the applicant's criminal history check or criminal
19 history record information under this section, the professional
20 guardian or professional conservator may conditionally employ the
21 individual if all of the following apply:

22 (a) The professional guardian or professional conservator
23 requests the criminal history check or criminal history record
24 information under this section on conditionally employing the
25 individual.

26 (b) The individual signs a statement in writing that indicates
27 all of the following:

28 (i) That he or she has not been convicted of 1 or more of the
29 crimes that are described in subsection (1) (a) and (b).

1 (ii) That he or she agrees that, if the information in the
2 criminal history check conducted under this section does not
3 confirm the individual's statement under subparagraph (i), his or
4 her employment will be terminated by the professional guardian or
5 professional conservator as required under subsection (1).

6 (iii) That he or she understands that the conditions described
7 in subparagraphs (i) and (ii) may result in the termination of his or
8 her employment and that those conditions are good cause for
9 termination.

10 (c) Except as otherwise provided in this subdivision, the
11 professional guardian or professional conservator does not permit
12 the individual to have regular direct access to or provide direct
13 services to incapacitated individuals or protected individuals
14 served by the professional guardian or professional conservator
15 without supervision until the criminal history check or criminal
16 history record information is obtained and the individual is
17 eligible for that employment. If required under this subdivision,
18 the professional guardian or professional conservator shall provide
19 on-site supervision of an individual served by the professional
20 guardian or professional conservator on a conditional basis under
21 this subsection by an individual who has undergone a criminal
22 history check conducted in compliance with this section. A
23 professional guardian or professional conservator may permit an
24 individual in the professional guardian's or professional
25 conservator's employment on a conditional basis under this
26 subsection to have regular direct access to or provide direct
27 services to incapacitated or protected individuals in the
28 professional guardian's or professional conservator's care without
29 supervision if all of the following conditions are met:

1 (i) The professional guardian or professional conservator, at
2 its own expense and before the individual has direct access to or
3 provides direct services to incapacitated individuals or protected
4 individuals of the professional guardian or professional
5 conservator, conducts a search of public records on that individual
6 through the internet criminal history access tool maintained by the
7 department of state police and the results of that search do not
8 uncover any information that would indicate that the individual is
9 not eligible to have regular direct access to or provide direct
10 services to incapacitated individuals or protected individuals
11 under this section.

12 (ii) Before the individual has direct access to or provides
13 direct services to incapacitated or protected individuals of the
14 professional guardian or professional conservator, the individual
15 signs a statement in writing that he or she has resided in this
16 state without interruption for at least the immediately preceding
17 12-month period.

18 (iii) If applicable, the individual provides to the department
19 of state police a set of fingerprints on or before the expiration
20 of 10 business days following the date the individual was
21 conditionally employed under this subsection.

22 (6) The department shall develop and distribute a model form
23 for the statements required under subsection (5) (b) and (c). The
24 department shall make the model form available to professional
25 guardians and professional conservators on request at no charge.

26 (7) If an individual is employed as a conditional employee
27 under subsection (5), and the information under subsection (3) or
28 report under subsection (4) does not confirm the individual's
29 statement under subsection (5) (b), the professional guardian or

1 professional conservator shall terminate the individual's
2 employment as required by subsection (1).

3 (8) An individual who knowingly provides false information
4 regarding his or her identity, criminal convictions, or
5 substantiated findings on a statement described in subsection
6 (5) (b) is guilty of a misdemeanor punishable by imprisonment for
7 not more than 93 days or a fine of not more than \$500.00, or both.

8 (9) A professional guardian or professional conservator shall
9 use criminal history record information obtained under subsection
10 (3) or (4) for only the purpose of evaluating an applicant's
11 qualifications for employment or an independent contract, in the
12 position for which he or she has applied and for the purposes of
13 subsections (5) and (7). A professional guardian employer or
14 professional conservator employer shall not disclose criminal
15 history record information obtained under subsection (3) or (4) to
16 a person who is not directly involved in evaluating the applicant's
17 qualifications for employment or an independent contract. An
18 individual who knowingly uses or disseminates the criminal history
19 record information obtained under subsection (3) or (4) in
20 violation of this subsection is guilty of a misdemeanor punishable
21 by imprisonment for not more than 93 days or a fine of not more
22 than \$1,000.00, or both. Except for a knowing or intentional
23 release of false information, a professional guardian employer or
24 professional conservator employer does not have liability in
25 connection with a criminal history check conducted in compliance
26 with this section or the release of criminal history record
27 information under this subsection.

28 (10) On consent of an applicant as required in subsection (3)
29 and on request from a professional guardian employer or

1 professional conservator employer that has made a good-faith offer
2 of employment or an independent contract to the applicant, the
3 department shall review the criminal history record information, if
4 any, and notify the requesting professional guardian employer or
5 professional conservator employer of the information in the manner
6 prescribed in subsection (4). Until the department of state police
7 can participate with the Federal Bureau of Investigation's
8 automatic notification system similar to the system required of the
9 state police under subsection (13) and federal regulations allow
10 the federal criminal record to be used for subsequent authorized
11 uses, as determined in an order issued by the department, a
12 professional guardian or professional conservator may rely on the
13 criminal history record information provided by the department
14 under this subsection and a request to the Federal Bureau of
15 Investigation to make a subsequent determination of the existence
16 of any national criminal history pertaining to the applicant is not
17 necessary if all of the following requirements are met:

18 (a) The criminal history check was conducted during the
19 immediately preceding 12-month period.

20 (b) The applicant has been continuously employed by the
21 professional guardian or professional conservator since the
22 criminal history check was conducted in compliance with this
23 section or meets the continuous employment requirement of this
24 subdivision other than being on layoff status for less than 1 year
25 from a professional guardian or professional conservator.

26 (c) The applicant can provide evidence acceptable to the
27 department that he or she has been a resident of this state for the
28 immediately preceding 12-month period.

29 (11) As a condition of continued employment, each employee,

1 independent contractor, or individual shall do each of the
2 following:

3 (a) Agree in writing to report to the professional guardian or
4 professional conservator immediately on being arraigned for 1 or
5 more of the criminal offenses listed in subsection (1)(a) and (b),
6 and on being convicted of 1 or more of the criminal offenses listed
7 in subsection (1)(a) and (b). Reporting of an arraignment under
8 this subdivision is not cause for termination or denial of
9 employment.

10 (b) If a set of fingerprints is not already on file with the
11 department of state police, provide the department of state police
12 with a set of fingerprints.

13 (12) The department of state police and the Federal Bureau of
14 Investigation shall store and retain all fingerprints submitted
15 under this section and provide for an automatic notification if
16 subsequent criminal information submitted into the system matches a
17 set of fingerprints previously submitted under this section. On
18 notification under this subsection, the department of state police
19 shall immediately notify the department and the department shall
20 immediately contact each respective professional guardian employer
21 or professional conservator with which that individual is
22 associated. Information in the database established under this
23 subsection is confidential, is not subject to disclosure under the
24 freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and
25 must not be disclosed to any person except for purposes of this act
26 or for law enforcement purposes.

27 (13) The department shall maintain an electronic web-based
28 system to assist professional guardian employers and professional
29 conservator employers and applicants for certification as a

1 professional guardian or professional conservator required to check
2 relevant registries and conduct criminal history checks of its
3 employees and independent contractors, and to provide for an
4 automated notice to those professional guardian employers or
5 professional conservator employers for those individuals inputted
6 in the system who, since the initial criminal history check, have
7 been convicted of a disqualifying offense or have been the subject
8 of a substantiated finding of abuse, neglect, or misappropriation
9 of property. The department may charge a professional guardian or
10 professional conservator a 1-time set-up fee of up to \$100.00 for
11 access to the electronic web-based system under this section.

12 (14) As used in this section:

13 (a) "Convicted" means either of the following:

14 (i) For a crime that is not a relevant crime, a final
15 conviction, the payment of a fine, a plea of guilty or nolo
16 contendere if accepted by the court, or a finding of guilt for a
17 criminal law violation or a juvenile adjudication or disposition by
18 the juvenile division of probate court or family division of
19 circuit court for a violation that if committed by an adult would
20 be a crime.

21 (ii) For a relevant crime described under 42 USC 1320a-7(a),
22 convicted means that term as defined in 42 USC 1320a-7.

23 (b) "Criminal history check conducted in compliance with this
24 section" means a criminal history check conducted under this
25 section.

26 (c) "Department" means the department of licensing and
27 regulatory affairs.

28 (d) "Direct access" means access to an incapacitated
29 individual's or protected individual's financial information,

1 medical records, treatment information, or any other identifying
2 information.

3 (e) "Independent contract" means a contract entered into by a
4 professional guardian or professional conservator with an
5 individual who provides the contracted services independently for
6 the professional guardian or professional conservator.

7 (f) "Under the professional guardian's or professional
8 conservator's control" means an individual employed by or under
9 independent contract with a professional guardian or professional
10 conservator for whom the professional guardian or professional
11 conservator does both of the following:

12 (i) Determines whether the individual who has access to
13 incapacitated individuals or protected individuals may provide
14 care, treatment, or other similar support service functions to
15 incapacitated individuals or protected individuals served by the
16 professional guardian or professional conservator.

17 (ii) Directs or oversees 1 or more of the following:

18 (A) The policy or procedures the individual must follow in
19 performing his or her duties.

20 (B) The tasks performed by the individual.

21 (C) The individual's work schedule.

22 (D) The supervision or evaluation of the individual's work or
23 job performance, including imposing discipline or granting
24 performance awards.

25 (E) The compensation the individual receives for performing
26 his or her duties.

27 (F) The conditions under which the individual performs his or
28 her duties.

29 Sec. 5108a. ~~(1)~~—Beginning April 30, 2020, a guardian, guardian

1 ad litem, or visitor may satisfy any requirement concerning a visit
 2 with an individual, including, but not limited to, a visit in the
 3 physical presence of a person under this act by instead conferring
 4 with the individual via 2-way real-time audiovisual technology that
 5 allows direct, contemporaneous interaction by sight and sound
 6 between the individual being visited and the guardian, guardian ad
 7 litem, or visitor.

8 ~~(2) This section does not apply after June 30, 2021.~~

9 Sec. 5313. (1) The court may appoint a competent person as
 10 guardian of a legally incapacitated individual. The court shall not
 11 appoint as a guardian an agency, public or private, that
 12 financially benefits from directly providing housing, medical,
 13 mental health, or social services to the legally incapacitated
 14 individual. If the court determines that the ward's property needs
 15 protection, the court shall order the guardian to furnish a bond or
 16 shall include restrictions in the letters of guardianship as
 17 necessary to protect the property.

18 (2) In appointing a guardian under this section, the court
 19 shall appoint a person, if suitable and willing to serve, in the
 20 following order of priority:

21 (a) A person previously appointed, qualified, and serving in
 22 good standing as guardian for the legally incapacitated individual
 23 in another state.

24 (b) A person the individual subject to the petition chooses to
 25 serve as guardian.

26 (c) A person nominated as guardian in a durable power of
 27 attorney or other writing by the individual subject to the
 28 petition.

29 (d) A person named by the individual as a patient advocate or

1 attorney in fact in a durable power of attorney.

2 (3) If there is no person chosen, nominated, or named under
3 subsection (2), or if none of the persons listed in subsection (2)
4 are suitable or willing to serve, the court may appoint as a
5 guardian an individual who is related to the individual who is the
6 subject of the petition in the following order of preference:

7 (a) The legally incapacitated individual's spouse. This
8 subdivision ~~shall~~**must** be considered to include a person nominated
9 by will or other writing signed by a deceased spouse.

10 (b) An adult child of the legally incapacitated individual.

11 (c) A parent of the legally incapacitated individual. This
12 subdivision ~~shall~~**must** be considered to include a person nominated
13 by will or other writing signed by a deceased parent.

14 (d) A relative of the legally incapacitated individual with
15 whom the individual has resided for more than 6 months before the
16 filing of the petition.

17 (e) A person nominated by a person who is caring for the
18 legally incapacitated individual or paying benefits to the legally
19 incapacitated individual.

20 **(f) A person, other than an individual, that is a professional**
21 **guardian or an individual professional guardian who is certified**
22 **under section 5106a.**

23 (4) If none of the persons as designated or listed in
24 subsection (2) or (3) are suitable or willing to serve, the court
25 may appoint any competent person who is suitable and willing to
26 serve, including a professional guardian **who is not certified under**
27 **section 5106a** as provided in section 5106.

28 Sec. 5409. (1) The court may appoint an individual, a
29 corporation authorized to exercise fiduciary powers, or a

1 professional conservator described in section 5106 to serve as
 2 conservator of a protected individual's estate. The following are
 3 entitled to consideration for appointment in the following order of
 4 priority:

5 (a) A conservator, guardian of property, or similar fiduciary
 6 appointed or recognized by the appropriate court of another
 7 jurisdiction in which the protected individual resides.

8 (b) An individual or corporation nominated by the protected
 9 individual if he or she is 14 years of age or older and of
 10 sufficient mental capacity to make an intelligent choice, including
 11 a nomination made in a durable power of attorney.

12 (c) The protected individual's spouse.

13 (d) An adult child of the protected individual.

14 (e) A parent of the protected individual or a person nominated
 15 by the will of a deceased parent.

16 (f) A relative of the protected individual with whom he or she
 17 has resided for more than 6 months before the petition is filed.

18 (g) A person nominated by the person who is caring for or
 19 paying benefits to the protected individual.

20 **(h) A person, other than an individual, that is a professional**
 21 **conservator or an individual professional conservator who is**
 22 **certified under section 5106a.**

23 **(i)** ~~(h)~~—If none of the persons listed in subdivisions (a) to
 24 ~~(g)~~ **(h)** are suitable and willing to serve, any person that the
 25 court determines is suitable and willing to serve.

26 (2) A person named in subsection (1)(a), (c), (d), (e), or (f)
 27 may designate in writing a substitute to serve instead, and that
 28 designation transfers the priority to the substitute. If persons
 29 have equal priority, the court shall select the person the court

1 considers best qualified to serve. Acting in the protected
2 individual's best interest, the court may pass over a person having
3 priority and appoint a person having a lower priority or no
4 priority.

5 Enacting section 1. This amendatory act does not take effect
6 unless Senate Bill No.____ or House Bill No. 4171 (request no.
7 01483'23) of the 102nd Legislature is enacted into law.

1 ~~health~~**health and human services** as guardian or any other agency,
 2 public or private, that is directly providing services to the
 3 individual, unless no other suitable individual or agency can be
 4 identified. In such instances, guardianship by the provider shall
 5 ~~only~~**must** continue **only** until ~~such time as~~ a more suitable
 6 individual or agency can be appointed.

7 **(2) In appointing a professional guardian under this section,**
 8 **the court shall appoint a professional guardian in the following**
 9 **order of priority:**

10 **(a) A person, other than an individual, that is a professional**
 11 **guardian or an individual guardian who is certified under section**
 12 **5106a of the estates and protected individuals code, 1998 PA 386,**
 13 **MCL 700.5106a.**

14 **(b) A professional guardian who is not certified under section**
 15 **5106a of the estates and protected individuals code, 1998 PA 386,**
 16 **MCL 700.5106a.**

17 **(3) ~~(2)~~Before the appointment, the court shall make a**
 18 **reasonable effort to question the individual concerning his or her**
 19 **preference regarding the person to be appointed guardian. ~~, and any~~**
 20 **~~preference indicated shall be given due consideration.~~The court**
 21 **shall consider the preference of the individual before appointing a**
 22 **guardian.**

23 Enacting section 1. This amendatory act does not take effect
 24 unless Senate Bill No.____ or House Bill No. 4172 (request no.
 25 01484'23) of the 102nd Legislature is enacted into law.