

Uniform Power of Attorney Act
Testimony by Representative Doug Wozniak

Madam Chair and Members of the Committee, I appreciate the opportunity to speak to the importance of replacing Michigan's Durable Power of Attorney Act with the Uniform Power of Attorney Act.

Having sponsored this same package of bills in 2020, 2022 and, again, earlier this year, you can imagine how pleased I am to have this similar package taken-up in our committee, today.

As a practicing attorney, who has specialized in the area of elder law for decades, I was very pleased, several years ago, to learn of the work being done by the Michigan Bar Association's Probate Section workgroup to align the Uniform Power of Attorney Act with other Michigan acts.

The concept of a "power of attorney" was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making for those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship."

Fifty years after Michigan's adoption of the Durable Power of Attorney Act, the power-of-attorney is being used, by people of all economic means, for incapacity-planning, as well as convenience.

Adoption of the updated Uniform Power of Attorney Act is necessary because, over the years, Michigan, and other states, have adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The new act will provide uniformity on these issues and enhance the usefulness of the law.

The State Bar's Probate section workgroup spent countless hours working to ensure that the proposed legislation aligns with other state laws and is of significant benefit to the people of Michigan.

If it can not be my package of bills that is passed to implement the Uniform Power of Attorney Act in Michigan, then I encourage you to adopt the package before us, today.

ATTACHMENT 2

DRAFT 1
SUBSTITUTE FOR
HOUSE BILL NO. 4909

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 5104, 5106, 5310, 5313, and 5409 (MCL 700.5104, 700.5106, 700.5310, 700.5313, and 700.5409), section 5106 as amended by 2017 PA 136, section 5310 as amended by 2000 PA 54, section 5313 as amended by 2012 PA 545, and section 5409 as amended by 2000 PA 463, and by adding section 5106a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5104. (1) An interested person who desires to be notified
2 before an order is made in a guardianship proceeding, including a
3 proceeding subsequent to the appointment of a guardian under
4 section ~~5312~~, **5312a**, or in a protective proceeding under section
5 5401 must file a request for notice with the register of the court



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1 in which the proceeding is pending and with the attorney of record
 2 of the guardian or conservator or, if none, with the guardian or
 3 conservator, if any. A request is not effective unless it contains
 4 a statement showing the interest of the person making it and the
 5 address of that person or an attorney to whom notice is to be
 6 given. The request is effective only as to a proceeding that occurs
 7 after the filing. If a guardianship or protective proceeding is not
 8 pending at the time a person files a request for notice as
 9 authorized by this subsection, the person shall pay a fee for
 10 filing the request, which fee ~~shall~~**must** be in the same amount as,
 11 but is separate from, the fee required to commence such a
 12 proceeding.

13 (2) A governmental agency paying benefits to the individual to
 14 be protected or before whom an application for benefits is pending
 15 is an interested person in a protective proceeding.

16 Sec. 5106. (1) Subject to subsections (2) and (3) **and part 5A**
 17 **of this article**, the court may appoint or approve a professional
 18 guardian or professional conservator, as appropriate, as a guardian
 19 or conservator under this act, or as a plenary guardian or partial
 20 guardian as those terms are defined in section 600 of the mental
 21 health code, 1974 PA 258, MCL 330.1600.

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

25 (a) The appointment of the professional guardian or
 26 professional conservator is in the ward's, developmentally disabled
 27 individual's, incapacitated individual's, or protected individual's
 28 best interests.

29 (b) There is no other person that is competent, suitable, and



1 willing to serve in that fiduciary capacity in accordance with
2 section 5212, **5312a**, 5313, or 5409.

3 (3) The court shall not appoint a **person as a** professional
4 guardian or professional conservator as authorized under subsection
5 (1) unless the professional guardian or professional conservator
6 files a bond in an amount and with the conditions as determined by
7 the court. For a professional conservator, the sureties and
8 liabilities of the bond are subject to sections 5410 and 5411.

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



1 in this subsection to the ward, developmentally disabled
 2 individual, incapacitated individual, or protected individual and
 3 to interested persons.

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

10 (5) ~~(6)~~ A professional guardian appointed under this section
 11 shall ensure that there are a sufficient number of employees
 12 assigned to the care of wards for the purpose of performing the
 13 necessary duties associated with ensuring that proper and
 14 appropriate care is provided.

15 (6) A professional guardian or professional conservator may
 16 use support staff and other professionals, under the professional
 17 guardian's or professional conservator's active and direct
 18 supervision, to perform office functions and client services.
 19 Support staff and professionals may be used to gather and provide
 20 necessary information to the professional guardian or professional
 21 conservator regarding a ward or protected individual and to make
 22 recommendations to the professional guardian or professional
 23 conservator based on their knowledge and expertise. The
 24 professional guardian or professional conservator shall not
 25 delegate decision-making authority to support staff, a
 26 professional, or another person regarding financial decisions or
 27 decisions requiring informed consent, including, but not limited
 28 to, medical, mental health, placement, or care planning decisions
 29 unless the support staff, professional, or other person holds a



1 **license issued under part 5A of this article.**

2 (7) For the purposes of the statutory authorization required
 3 by section 1105(2)(e) of the banking code of 1999, 1999 PA 276, MCL
 4 487.11105, to act as a fiduciary in this state, if the court
 5 appoints a for-profit or nonprofit, nonbanking corporation
 6 organized under the laws of this state to serve in a fiduciary
 7 capacity that is listed in subsection (1), the nonbanking
 8 corporation is authorized to act in that fiduciary capacity. The
 9 authorization under this subsection confers the fiduciary capacity
 10 only to the extent necessary in the particular matter of each
 11 appointment and is not a general grant of fiduciary authority. A
 12 nonbanking corporation is not authorized to act in any other
 13 fiduciary capacity.

14 **Sec. 5106a. (1) The court shall not appoint a person as a**
 15 **professional guardian of a legally incapacitated individual or**
 16 **professional conservator of a protected individual who is not a**
 17 **minor, or both, under this article unless the person holds a**
 18 **license issued under part 5A of this article. This section does not**
 19 **apply until the governor appoints members and an executive director**
 20 **of the office of state guardian board under section 5532.**

21 **(2) This section does not apply to a financial institution**
 22 **appointed as a professional conservator.**

23 Sec. 5310. (1) On petition of the guardian and subject to the
 24 filing and approval of a report prepared as required by section
 25 5314, the court shall accept the guardian's resignation and make
 26 any other order that is appropriate.

27 (2) The ward or a person interested in the ward's welfare may
 28 petition for an order removing the guardian, appointing a successor
 29 guardian, modifying the guardianship's terms, or terminating the



1 guardianship. A request for this order may be made by informal
 2 letter to the court or judge. A person who knowingly interferes
 3 with the transmission of this kind of request to the court or judge
 4 is subject to a finding of contempt of court. **A petition for an**
 5 **order appointing a successor guardian under this subsection is**
 6 **subject to the priority of appointment under section 5313.**

7 (3) Except as otherwise provided in the order finding
 8 incapacity **or as provided by court rule, upon** receiving a
 9 petition or request under this section, the court shall set a date
 10 for a hearing to be held ~~within not later than~~ 28 days after the
 11 receipt of the petition or request. ~~An order finding incapacity may~~
 12 ~~specify a minimum period, not exceeding 182 days, during which a~~
 13 ~~petition or request for a finding that a ward is no longer an~~
 14 ~~incapacitated individual, or for an order removing the guardian,~~
 15 ~~modifying the guardianship's terms, or terminating the~~
 16 ~~guardianship, shall not be filed without special leave of the~~
 17 ~~court.~~

18 (4) Before removing a guardian, appointing a successor
 19 guardian, modifying the guardianship's terms, or terminating a
 20 guardianship, and following the same procedures to safeguard the
 21 ward's rights as apply to a petition for a guardian's appointment,
 22 the court may send a visitor to the present guardian's residence
 23 and to the place where the ward resides or is detained to observe
 24 conditions and report in writing to the court.

25 Sec. 5313. (1) ~~The~~ **Subject to sections 5106 and 5106a and part**
 26 **5A of this article, the** court may appoint a competent person as
 27 guardian of a legally incapacitated individual. The court shall not
 28 appoint as a guardian an agency, public or private, that
 29 financially benefits from ~~directly~~ providing housing, medical,



1 mental health, **caregiving**, or social services to the legally
 2 incapacitated individual. If the court determines that the ward's
 3 property needs protection, the court shall order the guardian to
 4 furnish a bond or shall include restrictions in the letters of
 5 guardianship as necessary to protect the property.

6 (2) In appointing a guardian under this section, the court
 7 shall appoint a person, if suitable **under subsection (5)** and
 8 willing to serve, in the following order of priority:

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

12 (b) A person the individual subject to the petition chooses to
 13 serve as guardian.

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

17 (d) A person named by the individual as a patient advocate or
 18 attorney in fact in a durable power of attorney.

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

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

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

29 (c) A parent of the legally incapacitated individual. This



1 subdivision ~~shall~~**must** be considered to include a person nominated
2 by will or other writing signed by a deceased parent.

3 (d) A relative of the legally incapacitated individual with
4 whom the individual has resided for more than 6 months before the
5 filing of the petition.

6 (e) A person nominated by a person who is caring for the
7 legally incapacitated individual or paying benefits to the legally
8 incapacitated individual.

9 (4) If none of the persons as designated or listed in
10 subsection (2) or (3) are suitable **under subsection (5)** or willing
11 to serve, the court may appoint any competent person who is
12 suitable **under subsection (5)** and willing to serve, including a
13 professional guardian as provided in section 5106. **If the court**
14 **appoints a professional guardian that employs 2 or more employees**
15 **who hold a license issued under part 5A of this article, the**
16 **professional guardian shall designate a licensed employee who must**
17 **be the decision maker for the ward. The professional guardian shall**
18 **notify the ward and interested persons in writing of the name and**
19 **contact information of the designated decision maker not later than**
20 **7 days after the court appoints the professional guardian and, if**
21 **there is a permanent change in the designated decision maker, not**
22 **later than 7 days after the permanent change. The professional**
23 **guardian shall make the name and contact information of the**
24 **designated decision maker available on request to the court, the**
25 **ward's caregivers, medical and service providers, advocates, law**
26 **enforcement, and any other person who requests the name and contact**
27 **information to address a concern regarding the ward's health,**
28 **safety, or welfare.**

29 (5) The court shall appoint a person with priority guardian of



1 a legally incapacitated individual unless specific findings on the
2 record indicate that the person is not suitable as set forth in
3 this subsection or is not willing to serve. A person is suitable to
4 serve on a determination of specific findings of the court,
5 including, but not limited to, all of the following factors:

6 (a) The preference of the individual subject to the
7 guardianship, including who should serve and not serve as guardian.

8 (b) The person's availability to the individual subject to the
9 guardianship.

10 (c) The person's history and relationship with the individual
11 subject to the guardianship.

12 (d) The person's criminal history that is relevant to the
13 care, custody, and control of the individual subject to the
14 guardianship.

15 (e) The person's personal history, including, but not limited
16 to, employment, training, skills, and stability, that will
17 facilitate fulfillment of duties.

18 (f) The person's ability to fulfill duties regardless of
19 interpersonal disputes between interested persons or others with an
20 interest in the welfare of the individual subject to guardianship.
21 Interpersonal disputes alone must not be the basis for finding a
22 person with priority, under subsection (2) or (3), is unsuitable
23 unless the court finds by clear and convincing evidence that no
24 other person is able to fulfill the duties.

25 (g) The person's ability to meet the requirements of section
26 5410, if applicable.

27 (h) The person's ability to advocate appropriately for the
28 best interests of the individual subject to the guardianship with
29 health care and service providers.



1 (6) In deciding between 2 persons with equal priority under
 2 subsection (2), the court shall weigh the factors in subsection (5)
 3 with specific findings on the record. The court may appoint 2
 4 persons to serve as coguardians. Unless the order of appointment
 5 and letters of guardianship otherwise state, coguardians must act
 6 jointly. However, a coguardian may delegate the coguardian's
 7 authority to the other coguardian under section 5103.

8 (7) Letters of guardianship must expire not later than 15
 9 months after the date of appointment. The expiration date must be
 10 printed on the letters of guardianship. Letters of guardianship
 11 must not be reissued to a guardian that fails to report the
 12 condition of the ward and the ward's estate that is subject to the
 13 guardian's possession or control, as required by the court, under
 14 section 5314. The probate register may reissue letters of
 15 guardianship under this subsection without a hearing.

16 Sec. 5409. (1) The court may appoint an individual, a
 17 corporation authorized to exercise fiduciary powers, or a
 18 professional conservator described in section 5106 to serve as
 19 conservator of a protected individual's estate. The following are
 20 entitled to consideration for appointment in the following order of
 21 priority:

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

25 (b) ~~An individual or corporation~~ **A person** nominated by the
 26 protected individual if he or she is 14 years of age or older and
 27 of sufficient mental capacity to make an intelligent choice,
 28 including a nomination made in a durable power of attorney.

29 (c) The protected individual's spouse.



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

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

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

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

8 (h) If none of the persons listed in subdivisions (a) to (g)
9 are suitable **under subsection (3)** and willing to serve, any person
10 that the court determines is suitable **under subsection (3)** and
11 willing to serve.

12 (2) A person named in subsection (1)(a), (c), (d), (e), or (f)
13 may designate in writing a substitute to serve instead, and that
14 designation transfers the priority to the substitute. ~~If persons~~
15 ~~have equal priority, the court shall select the person the court~~
16 ~~considers best qualified to serve. Acting in the protected~~
17 ~~individual's best interest, the court may pass over a person having~~
18 ~~priority and appoint a person having a lower priority or no~~
19 ~~priority.~~

20 (3) The court shall appoint a person with priority to serve as
21 conservator of a protected individual's estate unless specific
22 findings on the record indicate the person is not suitable as set
23 forth in this subsection or is not willing to serve. A person is
24 suitable to serve on a determination of specific findings by the
25 court, including, but not limited to, all of the following factors:

26 (a) Preference of the individual subject to the
27 conservatorship, including who should serve and not serve as
28 conservator.

29 (b) Availability to the individual subject to the



1 conservatorship.

2 (c) History and relationship with the individual subject to
3 the conservatorship.

4 (d) Criminal history that is relevant to the role of a
5 conservator.

6 (e) Personal history, including, but not limited to,
7 employment, training, skills, and stability that will facilitate
8 fulfillment of duties.

9 (f) Ability to fulfill duties regardless of interpersonal
10 disputes between interested persons or others with an interest in
11 the welfare of the individual subject to conservatorship.
12 Interpersonal disputes alone must not be the basis for finding a
13 person with priority is unsuitable unless the court finds by clear
14 and convincing evidence that no person with priority can fulfill
15 the duties.

16 (g) Ability to meet the requirements of section 5410.

17 (4) In deciding between 2 persons with equal priority, the
18 court shall weigh the factors in subsection (3) with specific
19 findings on the record. The court may appoint not more than 2
20 persons to serve as coconservators. Unless the order of appointment
21 and letters of conservatorship otherwise state, coconservators must
22 act jointly.

23 (5) Letters of conservatorship must expire not later than 15
24 months after the date of appointment. The expiration date must be
25 printed on the letters of conservatorship. Letters of
26 conservatorship must not be reissued to a conservator that fails to
27 account to the court as required under section 5418. The probate
28 register may reissue letters of conservatorship under this
29 subsection without a hearing.



1 Enacting section 1. This amendatory act takes effect 180 days
2 after the date it is enacted into law.

3 Enacting section 2. This amendatory act does not take effect
4 unless all of the following bills of the 102nd Legislature are
5 enacted into law:

6 (a) House Bill No. 4910.

7 (b) House Bill No. 4911.

8 (c) House Bill No. 4912.

9 (d) House Bill No. 5047.



DRAFT 1
SUBSTITUTE FOR
HOUSE BILL NO. 4910

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 5305, 5314, 5406, 5417, and 5418 (MCL 700.5305, 700.5314, 700.5406, 700.5417, and 700.5418), section 5305 as amended by 2017 PA 155, section 5314 as amended by 2018 PA 594, section 5406 as amended by 2000 PA 464, and sections 5417 and 5418 as amended by 2000 PA 312, and by adding section 5314a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5305. (1) ~~The Subject to subsection (2), the~~ duties of a
2 guardian ad litem appointed ~~for when~~ an individual **is** alleged to be
3 incapacitated include all of the following:

4 ~~(a) Personally visiting the individual.~~

5 ~~(b) Explaining to the individual the nature, purpose, and~~



1 ~~legal effects of a guardian's appointment.~~

2 ~~(c) Explaining to the individual the hearing procedure and the~~
 3 ~~individual's rights in the hearing procedure, including, but not~~
 4 ~~limited to, all of the following:~~

5 ~~(i) The right to contest the petition.~~

6 ~~(ii) The right to request limits on the guardian's powers,~~
 7 ~~including a limitation on the guardian's power to execute on behalf~~
 8 ~~of the ward either of the following:~~

9 ~~(A) A do not resuscitate order.~~

10 ~~(B) A physician orders for scope of treatment form.~~

11 ~~(iii) The right to object to a particular person being appointed~~
 12 ~~guardian.~~

13 ~~(iv) The right to be present at the hearing.~~

14 ~~(v) The right to be represented by legal counsel.~~

15 ~~(vi) The right to have legal counsel appointed for the~~
 16 ~~individual if he or she is unable to afford legal counsel.~~

17 ~~(d) Informing the individual that if a guardian is appointed,~~
 18 ~~the guardian may have the power to execute a do not resuscitate~~
 19 ~~order on behalf of the individual and, if meaningful communication~~
 20 ~~is possible, discern if the individual objects to having a do not~~
 21 ~~resuscitate order executed on his or her behalf.~~

22 ~~(e) Informing the individual that if a guardian is appointed,~~
 23 ~~the guardian may have the power to execute a physician orders for~~
 24 ~~scope of treatment form on behalf of the individual and, if~~
 25 ~~meaningful communication is possible, discern if the individual~~
 26 ~~objects to having a physician orders for scope of treatment form~~
 27 ~~executed on his or her behalf.~~

28 ~~(f) Informing the individual of the name of each person known~~
 29 ~~to be seeking appointment as guardian.~~



1 ~~(g) Asking the individual and the petitioner about the amount~~
 2 ~~of cash and property readily convertible into cash that is in the~~
 3 ~~individual's estate.~~

4 ~~(h) Making determinations, and informing the court of those~~
 5 ~~determinations, on all of the following:~~

6 ~~(i) Whether there are 1 or more appropriate alternatives to the~~
 7 ~~appointment of a full guardian or whether 1 or more actions should~~
 8 ~~be taken in addition to the appointment of a guardian. Before~~
 9 ~~informing the court of his or her determination under this~~
 10 ~~subparagraph, the guardian ad litem shall consider the~~
 11 ~~appropriateness of at least each of the following as alternatives~~
 12 ~~or additional actions:~~

13 ~~(A) Appointment of a limited guardian, including the specific~~
 14 ~~powers and limitation on those powers the guardian ad litem~~
 15 ~~believes appropriate.~~

16 ~~(B) Appointment of a conservator or another protective order~~
 17 ~~under part 4 of this article. In the report informing the court of~~
 18 ~~the determinations under this subdivision, the guardian ad litem~~
 19 ~~shall include an estimate of the amount of cash and property~~
 20 ~~readily convertible into cash that is in the individual's estate.~~

21 ~~(C) Execution of a patient advocate designation, do not~~
 22 ~~resuscitate order, physician orders for scope of treatment form, or~~
 23 ~~durable power of attorney with or without limitations on purpose,~~
 24 ~~authority, or duration.~~

25 ~~(ii) Whether a disagreement or dispute related to the~~
 26 ~~guardianship petition might be resolved through court ordered~~
 27 ~~mediation.~~

28 ~~(iii) Whether the individual wishes to be present at the~~
 29 ~~hearing.~~



1 ~~(iv) Whether the individual wishes to contest the petition.~~

2 ~~(v) Whether the individual wishes limits placed on the~~
3 ~~guardian's powers.~~

4 ~~(vi) Whether the individual objects to having a do not~~
5 ~~resuscitate order executed on his or her behalf.~~

6 ~~(vii) Whether the individual objects to having a physician~~
7 ~~orders for scope of treatment form executed on his or her behalf.~~

8 ~~(viii) Whether the individual objects to a particular person~~
9 ~~being appointed guardian.~~

10 ~~(2) The court shall not order compensation of the guardian ad~~
11 ~~litem unless the guardian ad litem states on the record or in the~~
12 ~~guardian ad litem's written report that he or she has complied with~~
13 ~~subsection (1).~~

14 ~~(3) If the individual alleged to be incapacitated wishes to~~
15 ~~contest the petition, to have limits placed on the guardian's~~
16 ~~powers, or to object to a particular person being appointed~~
17 ~~guardian and if legal counsel has not been secured, the court shall~~
18 ~~appoint legal counsel to represent the individual alleged to be~~
19 ~~incapacitated. If the individual alleged to be incapacitated is~~
20 ~~indigent, this state shall bear the expense of legal counsel.~~

21 ~~(4) If the individual alleged to be incapacitated requests~~
22 ~~legal counsel or the guardian ad litem determines it is in the~~
23 ~~individual's best interest to have legal counsel, and if legal~~
24 ~~counsel has not been secured, the court shall appoint legal~~
25 ~~counsel. If the individual alleged to be incapacitated is indigent,~~
26 ~~this state shall bear the expense of legal counsel.~~

27 ~~(5) If the individual alleged to be incapacitated has legal~~
28 ~~counsel appointed under subsection (3) or (4), the appointment of a~~
29 ~~guardian ad litem terminates.~~



1 (a) Impartially gather information as provided by law.

2 (b) Seek information from the individual and, if communication
3 is possible, communicate in a manner the individual is best able to
4 understand. If communication is not possible or there is a barrier
5 to communication, the guardian ad litem must note that in the
6 report under subsection (3).

7 (c) Interview the individual in person at the individual's
8 location and out of the presence of any interested person.

9 (d) Advise the individual that the guardian ad litem does not
10 represent the individual as an attorney and that no attorney-client
11 relationship has been created.

12 (e) Identify whether the individual wishes to be present at
13 the hearing. If the allegedly incapacitated individual does not
14 wish to be present at the hearing, the guardian ad litem shall
15 identify the reasons why the individual does not wish to be
16 present.

17 (f) Identify any barrier to attending hearings at the place
18 where court is held or otherwise fully participating in the
19 hearing, including the need for assistive technology,
20 transportation, or other support. If the allegedly incapacitated
21 individual wishes to attend, the guardian ad litem must identify
22 whether the individual has identified a plan for how the individual
23 will attend.

24 (g) Identify whether the individual plans to retain legal
25 counsel or wants appointed legal counsel. If the allegedly
26 incapacitated individual does not plan to retain legal counsel or
27 request appointed legal counsel, the guardian ad litem must make a
28 recommendation as to whether legal counsel should be appointed.

29 (h) Identify whether a disagreement or dispute related to the



1 petition might be resolved through court-ordered mediation.

2 (2) The duties of a guardian ad litem appointed when an
3 individual is alleged to be incapacitated or a legally
4 incapacitated individual include all of the following, as
5 applicable:

6 (a) Explain to the individual the nature, purpose, and legal
7 effects of a guardian's appointment.

8 (b) Explain who has filed the petition and who, if anyone, has
9 been nominated as guardian.

10 (c) Explain to the individual the hearing procedure and the
11 individual's rights in the hearing procedure, as identified in
12 section 5306a, including, but not limited to, the following:

13 (i) The right to contest the petition, in whole or in part.

14 (ii) The right to request limits on the guardian's powers.

15 (iii) The right to be present at the hearing. If the individual
16 is unable to attend the hearing at the location court proceedings
17 typically are held, the guardian ad litem shall inform the
18 individual of his or her right for the hearing at another location.

19 (iv) The right to request a reasonable accommodation to allow
20 the individual to participate as fully as possible at the hearing,
21 including with assistive technology or other support.

22 (v) The right to be represented by legal counsel of the
23 individual's choice. If the individual is unable to secure legal
24 counsel of his or her choice, the right to have legal counsel
25 appointed by the court.

26 (vi) The right to request an independent medical evaluation.

27 (d) Explain to the individual that if a guardian is appointed,
28 the guardian may have the power to take certain actions on behalf
29 of the individual. A guardian ad litem must inform the individual



1 that a guardian may have any of the following powers and, if
2 meaningful communication is possible, discern if the individual
3 objects to a guardian having any of the following powers:

4 (i) Executing a do-not-resuscitate order.

5 (ii) Executing a physician orders for scope of treatment form.

6 (iii) Consenting to any medical treatment.

7 (iv) Consenting to placement decisions, including moving the
8 individual to a nursing facility or adult foster care home.

9 (v) Choosing whether the individual can marry or divorce.

10 (vi) Handling any financial and property matters, including the
11 sale or disposal of personal property and the maintenance of real
12 property.

13 (e) Identify whether the individual objects to the particular
14 person proposed as guardian, if any.

15 (f) If a guardian were to be appointed, identify a list of
16 whom the individual would want to serve, in order of preference.

17 (g) If a guardian were to be appointed, identify whom the
18 individual would not want to serve.

19 (3) Subject to subsections (4) and (5), a guardian ad litem
20 appointed for an individual alleged to be incapacitated or a
21 legally incapacitated individual shall file a written report with
22 the court and in the form required by the state court
23 administrative office.

24 (4) If an individual who is subject to an initial petition
25 under this part, petition to terminate under this part, or petition
26 to modify under this part contests the petition, the guardian ad
27 litem's written report required under subsection (3) must include
28 only the following:

29 (a) That the individual contests the petition.



1 (b) Whether the individual has retained legal counsel or
2 wishes for legal counsel to be appointed.

3 (c) Whether the individual has any barriers to attending court
4 at the place where it is usually held.

5 (d) If a guardian were appointed, who the individual would
6 want to serve in order of preference.

7 (e) If a guardian were appointed, who the individual would not
8 want to serve.

9 (f) Any other information the guardian ad litem determines
10 would be helpful to the court in ruling on the petition.

11 (5) If an individual who is subject to an initial petition
12 under this part, petition to terminate under this part, or petition
13 to modify under this part does not contest the petition, the
14 guardian ad litem's report required under subsection (3) must
15 include only the following:

16 (a) The date and time the guardian ad litem met with the
17 individual.

18 (b) The length of time the guardian ad litem met with the
19 individual.

20 (c) The location where the guardian ad litem met with the
21 individual.

22 (d) Whether the guardian ad litem was able to meaningfully
23 communicate with the individual and any barriers to communication.

24 (e) Who, if anyone, was present for the interview besides the
25 individual.

26 (f) Whether the individual wishes to be present at the
27 hearing. If the individual wishes to be present at the hearing but
28 has a barrier to fully participating, the guardian ad litem must
29 include in the written report whether the barrier can be resolved



1 by moving the location of the hearing or using assistive
2 technology, or both, or other support.

3 (g) Whether the individual has identified a plan for how the
4 individual will attend.

5 (h) Whether the individual plans to retain legal counsel or
6 has requested appointed legal counsel. If the individual has not
7 indicated he or she wishes to be represented by legal counsel, the
8 guardian ad litem shall include in the written report a
9 recommendation as to whether legal counsel should be appointed to
10 represent the individual.

11 (i) Whether the individual has any of the following:

12 (i) A power of attorney with or without limitations on purpose,
13 authority, or time period.

14 (ii) A patient advocate designation.

15 (iii) A physician orders for scope of treatment form.

16 (iv) A benefits payee, trustee, or other fiduciary.

17 (j) Whether a disagreement or dispute related to the petition
18 might be resolved through court-ordered mediation.

19 (k) Whether the appointment of a visitor with appropriate
20 knowledge, training, and education such as a social worker, mental
21 health professional, or medical professional could provide the
22 court with the information on whether alternatives to guardianship
23 or a limited guardianship is appropriate.

24 (l) If a guardian were appointed, who the individual would want
25 to serve in order of preference.

26 (m) If a guardian were appointed, who the individual would not
27 want to serve.

28 (n) An estimate of the liquid assets as that term is defined
29 in section 5314, income, real property, and a description of



1 personal property to the extent known after reasonable inquiry.

2 (o) Any other information the guardian ad litem determines
3 would be helpful to the court in ruling on the petition.

4 (6) If a guardian ad litem is appointed for any purpose other
5 than an initial petition under this part, petition to terminate
6 under this part, or petition to modify under this part, the
7 guardian ad litem must provide a written report to the court that
8 includes, at a minimum, the information described in subsection (4)
9 or (5), as applicable, and any other information required by law. A
10 special limited guardian ad litem appointed under subsection (13)
11 is not required to provide a written report unless ordered to do so
12 by the court under subsection (13).

13 (7) A guardian ad litem shall file the report required under
14 subsection (3) with the court and serve it on all interested
15 persons at least 5 days before the date of the hearing. The court
16 may order the report to be filed and served less than 5 days before
17 the hearing only if the petition is made on an emergency basis
18 under section 5312.

19 (8) The court may receive into evidence without testimony the
20 written report of the guardian ad litem required under subsection
21 (3) if the report is filed with the court and served on all
22 interested persons not less than 5 days before the hearing. The
23 guardian ad litem is required to report findings until the date of
24 the termination of the guardian ad litem. The court may issue on
25 its own initiative, or any interested person may secure, a subpoena
26 to compel the preparer of the report to testify. On request of any
27 interested person, the court shall issue a subpoena to compel the
28 preparer of the report to testify.

29 (9) The court shall not order compensation of the guardian ad



1 litem unless the guardian ad litem states in the guardian ad
2 litem's written report that the guardian ad litem complied with
3 subsections (2) to (7), as applicable.

4 (10) The court shall not appoint a person that was previously
5 appointed as guardian ad litem as legal counsel for the individual
6 if the guardian ad litem's report under subsection (3) or
7 recommendation to the court conflicts with the wishes of the
8 individual.

9 (11) If an individual who is subject to a petition under this
10 part has not already secured legal counsel, the court shall appoint
11 legal counsel if any of the following apply:

12 (a) The individual requests legal counsel.

13 (b) The individual objects to any part of the petition for
14 guardianship or potential authority of a guardian.

15 (c) The guardian ad litem determines it is in the individual's
16 best interest to have legal counsel if legal counsel has not been
17 secured. If the individual who is subject to the petition is
18 indigent, this state shall bear the expense of appointed legal
19 counsel under this subsection.

20 (12) If an individual who is subject to a petition under this
21 part has legal counsel appointed or retained, the appointment of a
22 guardian ad litem terminates. The report of the guardian ad litem
23 must not be admitted into evidence after the appearance or
24 appointment of legal counsel for the individual who is subject to
25 the petition.

26 (13) After appointment or retention of legal counsel for the
27 individual who is subject to the petition under this part, the
28 court may, for good cause shown, appoint a special limited guardian
29 ad litem to provide information on a narrowly defined issue that



1 will likely otherwise be inadequately addressed. A special guardian
 2 ad litem is exempt from subsections (2) to (6). The court may order
 3 that a special limited guardian ad litem appointed under this
 4 subsection provide a written report. The report under this
 5 subsection must contain the information the court considers
 6 necessary to adequately address the issue leading to the
 7 appointment of the special limited guardian ad litem. A special
 8 limited guardian ad litem shall not communicate directly with the
 9 individual who is subject to the petition and must instead
 10 communicate through legal counsel to the individual who is subject
 11 to the petition, unless legal counsel otherwise gives consent.

12 (14) An individual alleged to be incapacitated has the right
 13 to retain legal counsel of his or her choice at any stage,
 14 regardless of findings regarding his or her capacity. Retained
 15 legal counsel shall file a substitution of legal counsel or a
 16 motion to substitute if legal counsel has already been appointed.
 17 Retained legal counsel is entitled to reasonable attorney fees.

18 Sec. 5314. (1) If meaningful communication is possible, a
 19 legally incapacitated individual's guardian shall consult with the
 20 legally incapacitated individual before making a major decision
 21 affecting the legally incapacitated individual. To the extent a
 22 guardian of a legally incapacitated individual is granted powers by
 23 the court under section 5306, the guardian is responsible for the
 24 ward's care, custody, and control, but is not liable to third
 25 persons because of that responsibility for the ward's acts. In
 26 particular and without qualifying the previous sentences, a
 27 guardian has all of the following powers and duties, to the extent
 28 granted by court order:

29 (a) ~~The~~ Subject to section 5314a, the custody of the person of



1 the ward and the power to establish the ward's place of residence
 2 in or outside this state. ~~The guardian shall visit the ward within~~
 3 ~~3 months after the guardian's appointment and not less than once~~
 4 ~~within 3 months after each previous visit. The~~ **Subject to section**
 5 **5314a, the** guardian shall notify the court ~~within not later than 14~~
 6 ~~days of after a change in the ward's place of residence or a change~~
 7 in the guardian's place of residence. **All of the following apply to**
 8 **the duty of the guardian to visit the ward:**

9 **(i) The guardian shall visit the ward in person not later than**
 10 **1 month after the guardian's appointment and not less than once**
 11 **within 3 months after each in-person visit. The guardian shall also**
 12 **visit the ward using both audio and video technology, or if that**
 13 **technology is not available, only audio means, each month in which**
 14 **an in-person visit does not occur. If the ward is unable to**
 15 **communicate using audio and visual or audio-only means, the**
 16 **guardian shall communicate with the ward's caregivers or any other**
 17 **party who is familiar with the ward's circumstances and can apprise**
 18 **the guardian of the ward's needs and progress. If the guardian**
 19 **determines that audio and visual visits or audio-only visits are**
 20 **not possible or that the ward is unable to communicate through**
 21 **audiovisual means, the records the guardian must maintain must also**
 22 **identify the circumstances that required the guardian to rely on an**
 23 **audio-only visit or that required the guardian to consult with**
 24 **caregivers or others instead of communicating directly with the**
 25 **ward. The guardian shall maintain records relating to the date,**
 26 **time, duration, and significant information for each required**
 27 **visit. The guardian shall make the records available for the**
 28 **court's review and for review of interested persons.**

29 **(ii) If the guardian is a limited guardian, the visitation**



1 duties described in subparagraph (i) apply. However, the limited
2 guardian may seek approval from the court to conduct audiovisual or
3 audio-only visits less often than monthly in the months in which
4 the limited guardian is not visiting in person. The court may grant
5 the request if the court finds on the record that monthly
6 audiovisual or audio-only visits in the months in which an in-
7 person visit is not occurring are not necessary for the
8 individual's well-being and best interests and identifies on the
9 record the individual's circumstances that led to that finding.

10 (iii) If the guardian is not a professional guardian, the
11 guardian may delegate the required in-person visits under
12 subparagraph (i) to another person. The guardian shall communicate
13 with the person who conducted the in-person visit and maintain
14 records regarding the information shared by the person who
15 conducted the visit.

16 (iv) If the guardian is a professional guardian and the
17 professional guardian employs 2 or more employees who hold a
18 license issued under part 5A of this article, the designated
19 decision maker under section 5313(4) shall not delegate the
20 required in-person visits under subparagraph (i) to another person.
21 The designated decision maker may delegate the required audio-
22 visual or audio-only visits under subparagraph (i) to another
23 licensed employee only if the designated decision maker is
24 unavailable to conduct the audio-visual or audio-only visits. If
25 the designated decision maker delegates a visit requirement to
26 another licensed employee as allowed under this subparagraph, the
27 licensed employee who conducts the visit must prepare and submit a
28 written report consistent with the requirements under subparagraph
29 (i) to the designated decision maker.



1 (v) If the guardian is an individual professional guardian,
2 the professional guardian shall not delegate the required in-person
3 visits under subparagraph (i) to another person.

4 (b) If entitled to custody of the ward, the duty to make
5 provision for the ward's care, comfort, and maintenance and, when
6 appropriate, arrange for the ward's training and education. The
7 guardian shall secure services to restore the ward to the best
8 possible state of mental and physical well-being so that the ward
9 can return to self-management at the earliest possible time. **The**
10 **guardian shall make a reasonable effort to identify a reasonable**
11 **number of items of personal or sentimental value, including, but**
12 **not limited to, family heirlooms, photo albums, and collections.**
13 **Not later than 56 days after appointment, the guardian shall serve**
14 **on all interested persons a list of the identified items. The list**
15 **must be signed by the guardian and include an attestation that**
16 **states, "I represent this list is true and correct to the best of**
17 **my knowledge, information, and belief at the time of signing. I**
18 **understand that I must handle this property, like all of the ward's**
19 **property for which I am responsible, consistent with my fiduciary**
20 **duties. This may include sale, disposal, or other actions to meet**
21 **my fiduciary duties. I am not responsible for storing any items at**
22 **my own expense."** Without regard to custodial rights of the ward's
23 person, the guardian shall take reasonable care of the ward's
24 clothing, furniture, vehicles, and other personal effects and
25 commence a protective proceeding if the ward's other property needs
26 protection. If a guardian commences a protective proceeding because
27 the guardian believes that it is in the ward's best interest to
28 sell or otherwise dispose of the ward's real property or interest
29 in real property, the court may appoint the guardian as special



1 conservator and authorize the special conservator to proceed under
2 section 5423(3). A guardian shall not otherwise sell the ward's
3 real property or interest in real property.

4 (c) The power to give the consent or approval that is
5 necessary to enable the ward to receive medical, mental health, or
6 other professional care, counsel, treatment, or service. However, a
7 guardian does not have and shall not exercise the power to give the
8 consent to or approval for inpatient hospitalization unless the
9 court expressly grants the power in its order. If the ward objects
10 or actively refuses mental health treatment, the guardian or any
11 other interested person must follow the procedures provided in
12 chapter 4 of the mental health code, 1974 PA 258, MCL 330.1400 to
13 330.1490, to petition the court for an order to provide involuntary
14 mental health treatment. The power of a guardian to execute a do-
15 not-resuscitate order under subdivision (d), execute a nonopioid
16 directive form under subdivision (f), or execute a physician orders
17 for scope of treatment form under subdivision (g) does not affect
18 or limit the power of a guardian to consent to a physician's order
19 to withhold resuscitative measures in a hospital. As used in this
20 subdivision, "involuntary mental health treatment" means that term
21 as defined in section 400 of the mental health code, 1974 PA 258,
22 MCL 330.1400.

23 (d) The power to execute, reaffirm, and revoke a do-not-
24 resuscitate order on behalf of a ward. However, a guardian shall
25 not execute a do-not-resuscitate order unless the guardian does all
26 of the following:

27 (i) Not more than 14 days before executing the do-not-
28 resuscitate order, visits the ward and, if meaningful communication
29 is possible, consults with the ward about executing the do-not-



1 resuscitate order.

2 (ii) Consults directly with the ward's attending physician as
3 to the specific medical indications that warrant the do-not-
4 resuscitate order.

5 (e) If a guardian executes a do-not-resuscitate order under
6 subdivision (d), not less than annually after the do-not-
7 resuscitate order is first executed, the duty to do all of the
8 following:

9 (i) Visit the ward and, if meaningful communication is
10 possible, consult with the ward about reaffirming the do-not-
11 resuscitate order.

12 (ii) Consult directly with the ward's attending physician as to
13 specific medical indications that may warrant reaffirming the do-
14 not-resuscitate order.

15 (f) The power to execute, reaffirm, and revoke a nonopioid
16 directive form on behalf of a ward.

17 (g) The power to execute, reaffirm, and revoke a physician
18 orders for scope of treatment form on behalf of a ward. However, a
19 guardian shall not execute a physician orders for scope of
20 treatment form unless the guardian does all of the following:

21 (i) Not more than 14 days before executing the physician orders
22 for scope of treatment form, visits the ward and, if meaningful
23 communication is possible, consults with the ward about executing
24 the physician orders for scope of treatment form.

25 (ii) Consults directly with the ward's attending physician as
26 to the specific medical indications that warrant the physician
27 orders for scope of treatment form.

28 (h) If a guardian executes a physician orders for scope of
29 treatment form under subdivision ~~(f)~~, **(g)**, not less than annually



1 after the physician orders for scope of treatment is first
2 executed, the duty to do all of the following:

3 (i) Visit the ward and, if meaningful communication is
4 possible, consult with the ward about reaffirming the physician
5 orders for scope of treatment form.

6 (ii) Consult directly with the ward's attending physician as to
7 specific medical indications that may warrant reaffirming the
8 physician orders for scope of treatment form.

9 (i) If a conservator for the ward's estate is not appointed,
10 ~~the power to do any~~ **all** of the following:

11 (i) ~~Institute~~ **The power to institute** a proceeding to compel a
12 person under a duty to support the ward or to pay money for the
13 ward's welfare to perform that duty.

14 (ii) ~~Receive~~ **The power to receive** money and tangible property
15 deliverable to the ward and apply the money and property for the
16 ward's support, care, and education. The guardian shall not use
17 money from the ward's estate for room and board that the guardian
18 or the guardian's spouse, parent, or child have furnished the ward
19 unless a charge for the service is approved by court order made on
20 notice to at least 1 of the ward's next of kin, if notice is
21 possible. The guardian shall exercise care to conserve any excess
22 for the ward's needs.

23 **(iii) The duty to allow interested persons to review proofs of**
24 **income and disbursements at a time reasonably convenient to the**
25 **guardian and interested persons.**

26 (j) The duty to report the condition of the ward and the
27 ward's estate that is subject to the guardian's possession or
28 control, as required by the court, but not less often than
29 annually. The guardian shall also serve the report required under



1 this subdivision on the ward and interested persons as specified in
2 the Michigan court rules. A report under this subdivision must
3 contain all of the following:

4 (i) The ward's current mental, physical, and social condition.

5 (ii) Improvement or deterioration in the ward's mental,
6 physical, and social condition that occurred during the past year.

7 (iii) The ward's present living arrangement and changes in his
8 or her living arrangement that occurred during the past year.

9 (iv) Whether the guardian recommends a more suitable living
10 arrangement for the ward.

11 (v) Medical treatment, including mental health treatment,
12 received by the ward.

13 (vi) Whether the guardian has executed, reaffirmed, or revoked
14 a do-not-resuscitate order on behalf of the ward during the past
15 year.

16 (vii) Whether the guardian has executed, reaffirmed, or revoked
17 a nonopioid directive form on behalf of the ward during the past
18 year.

19 (viii) Whether the guardian has executed, reaffirmed, or revoked
20 a physician orders for scope of treatment form on behalf of the
21 ward during the past year.

22 (ix) Services received by the ward.

23 (x) A list of the guardian's visits with, and activities on
24 behalf of, the ward.

25 (xi) A recommendation as to the need for continued
26 guardianship.

27 (k) If a conservator is appointed, the duty to pay to the
28 conservator, for management as provided in this act, the amount of
29 the ward's estate received by the guardian in excess of the amount



1 the guardian expends for the ward's current support, care, and
2 education. The guardian shall account to the conservator for the
3 amount expended.

4 (2) If a conservator has not been appointed for the ward, and
5 if the ward's qualified estate is greater than 400% of the federal
6 poverty level, the guardian must file a petition for
7 conservatorship under part 4. This subsection does not prevent the
8 appointment of a conservator for the ward if the ward's qualified
9 estate is less than 400% of the federal poverty level. As used in
10 this subsection:

11 (a) "Federal poverty level" means the poverty guidelines
12 published annually in the federal register by the United States
13 Department of Health and Human Services under its authority to
14 revise the poverty line under 42 USC 9902.

15 (b) "Liquid assets" means assets that can easily be converted
16 into cash in a short amount of time. Liquid assets includes, but is
17 not limited to, cash, checking and savings accounts, money market
18 instruments, certificates of deposit, mutual funds held in a
19 taxable account, marketable securities, bonds, and the monetary
20 value of life or other insurance. A retirement account is
21 considered a liquid asset once the individual's circumstances allow
22 him or her to withdraw cash without facing any Internal Revenue
23 Service early withdrawal penalties.

24 (c) "Ward's qualified estate" means, except as otherwise
25 provided in subdivision (d), the ward's liquid assets or income, or
26 both, reported by the guardian ad litem under section 5305 or later
27 discovered by the guardian.

28 (d) Ward's qualified estate does not include liquid assets or
29 income that is subject to some oversight such as a representative



1 payee, durable power of attorney, joint ownership, trust, or other
2 protection.

3 Sec. 5314a. (1) The guardian shall maintain a legally
4 incapacitated individual in the legally incapacitated individual's
5 permanent residence if possible and consistent with the well-being
6 and preferences of the legally incapacitated individual. If a
7 legally incapacitated individual is removed from his or her
8 permanent residence temporarily for any reason, the guardian must
9 make all reasonable efforts to return the legally incapacitated
10 individual to his or her permanent residence at the earliest
11 opportunity consistent with the legally incapacitated individual's
12 wishes. Temporary removal of the legally incapacitated individual
13 from his or her permanent residence for the purpose of receiving
14 health care or supervision, for engaging in family or social
15 activities, or for other reasons including the well-being or
16 convenience of the legally incapacitated individual does not
17 relieve the guardian of the obligations set forth in this section
18 regarding permanent removal from the permanent residence. A
19 guardian shall not primarily consider the guardian's own
20 convenience or benefit when making a decision to remove the legally
21 incapacitated individual from the legally incapacitated
22 individual's permanent residence or selecting a new residence for
23 the legally incapacitated individual.

24 (2) A guardian shall explore reasonably available and
25 affordable supports and services that could enable the legally
26 incapacitated individual to remain in his or her permanent
27 residence.

28 (3) If a guardian proposes to move the legally incapacitated
29 individual from his or her permanent residence, the guardian must



1 attempt to consult with the legally incapacitated individual and
2 honor the legally incapacitated individual's preference to the
3 greatest extent possible.

4 (4) In exercising the guardian's power to establish the
5 legally incapacitated individual's place of residence, the guardian
6 shall do both of the following:

7 (a) Select a residential setting the guardian believes the
8 legally incapacitated individual would select if the legally
9 incapacitated individual were able. If the guardian does not know
10 and cannot reasonably determine what setting the legally
11 incapacitated individual would likely select, or the guardian
12 reasonably believes the decision the legally incapacitated
13 individual would make would unreasonably harm or endanger the
14 welfare or personal or financial interests of the legally
15 incapacitated individual, the guardian must choose a residential
16 setting that is consistent with the legally incapacitated
17 individual's best interest.

18 (b) Give priority to a residential setting in a location that
19 will allow the legally incapacitated individual to interact with
20 persons and participate in activities important to the legally
21 incapacitated individual and meet the legally incapacitated
22 individual's needs in the least restrictive manner reasonably
23 feasible.

24 (5) If a guardian that is not a professional guardian removes
25 a legally incapacitated individual from the legally incapacitated
26 individual's permanent residence to another location in this state,
27 the guardian must notify the court in writing not later than 14
28 days after the removal. The notification required under this
29 subsection must include the address of the new permanent residence.



1 (6) A guardian shall not move the legally incapacitated
 2 individual out of state without order of the court. If the guardian
 3 petitions to move the legally incapacitated individual out of
 4 state, a guardian ad litem must be appointed and the court shall
 5 schedule a hearing regardless of whether the individual files
 6 objections or expresses dissatisfaction with the proposed move. If
 7 the legally incapacitated individual files objections or expresses
 8 dissatisfaction with the proposed move, the court must appoint
 9 legal counsel if the legally incapacitated individual is not
 10 already represented by legal counsel.

11 (7) Subject to subsections (9) and (10), and except as
 12 otherwise provided in subsection (14), a professional guardian
 13 shall not permanently remove a legally incapacitated individual
 14 from the legally incapacitated individual's permanent residence
 15 unless, subject to subsection (8), the professional guardian files
 16 a petition under this subsection and the court grants the petition
 17 under subsection (13). A petition under this subsection must be
 18 separate from the petition for a finding of incapacity and
 19 appointment of guardian under section 5303. A petition under this
 20 subsection must include all of the following information:

- 21 (a) The individual's current permanent residence.
 22 (b) The proposed new residence.
 23 (c) The reason for the proposed move.
 24 (d) Whether the move is to a more or less restrictive setting.
 25 (e) The efforts made or resources explored to enable the
 26 individual to remain in his or her current permanent residence.
 27 (f) Whether the guardian has engaged in meaningful
 28 communication with the individual about the proposed move.
 29 (g) Whether the individual objects to or supports the proposed



1 move.

2 (8) If the person petitioning for guardianship under section
3 5303 proposes or anticipates that a professional guardian will be
4 appointed under section 5306, the petitioner or any interested
5 person that believes that it is necessary for the well-being of the
6 alleged incapacitated individual to move the individual permanently
7 from his or her permanent residence may file a petition under
8 subsection (7) seeking authority for a professional guardian, if
9 appointed under section 5306, to permanently remove the alleged
10 incapacitated individual from his or her permanent residence.

11 (9) If a professional guardian determines that to protect the
12 health, safety, or welfare of the legally incapacitated individual,
13 it is necessary to move the legally incapacitated individual from
14 his or her permanent residence to a another residence the
15 professional guardian intends to be permanent before obtaining
16 court approval under subsection (13), the professional guardian may
17 move the legally incapacitated individual. Not later than 14 days
18 after moving the legally incapacitated individual as allowed under
19 this subsection, the professional guardian must file a petition
20 under subsection (7). The petition must include the circumstances
21 that the professional guardian determined were necessary to move
22 the legally incapacitated individual before filing a petition under
23 subsection (7).

24 (10) If, after a temporary stay in a health care facility or
25 at a residence the professional guardian initially intended to be
26 temporary, the professional guardian determines that it is
27 necessary to change to the permanent residence of the legally
28 incapacitated individual, the professional guardian must, not later
29 than 14 days after making the determination, file a petition under



1 subsection (7). The petition must include the circumstances
2 underlying the professional guardian's determination.

3 (11) If a petition for removal from the permanent residence
4 has been filed under subsection (7), the court shall promptly
5 appoint a guardian ad litem and hold the hearing not later than 28
6 days after the petition is filed. The guardian ad litem must, in
7 addition to the other duties set forth in section 5305, do all of
8 the following:

9 (a) Advise the individual that a petition has been filed to
10 move the individual from his or her permanent residence to the new
11 residence identified in the petition or another location the court
12 determines is appropriate.

13 (b) Explain that if the court grants the petition to move the
14 individual, the guardian will have the authority to change the
15 individual's permanent residence to the location specified in the
16 petition or to another location the court determines is
17 appropriate.

18 (c) Ascertain, if possible, the wishes of the individual to
19 remain in his or her permanent residence.

20 (d) Include a summary of the discussion in the guardian ad
21 litem's written report.

22 (12) If the alleged incapacitated individual or legally
23 incapacitated individual does not already have legal counsel, the
24 court must appoint legal counsel if the individual files an
25 objection to the petition for authority to move the individual from
26 his or her permanent residence under subsection (7) or if the
27 guardian ad litem's report under subsection (11) states that the
28 individual objects to being removed from his or her permanent
29 residence.



1 (13) The court shall not grant a petition for removal from the
2 permanent residence under subsection (7) unless the court, after
3 due consideration and opportunity for testimony on the matter,
4 determines by clear and convincing evidence that moving the legally
5 incapacitated individual from the permanent residence to the
6 residence identified in the petition is 1 or more of the following:

7 (a) Necessary to protect the individual's physical health,
8 safety, or welfare.

9 (b) Consistent with the individual's wishes.

10 (14) If the legally incapacitated individual must leave the
11 permanent residence because the residence becomes permanently
12 unavailable, the professional guardian must provide at least 14
13 days' prior written notice to the legally incapacitated individual
14 if possible under the circumstances or, if less time is available
15 before the legally incapacitated individual must move, notice at
16 the earliest opportunity. The professional guardian shall provide
17 written notice to the court and all interested persons not later
18 than 14 days after the move under this subsection explaining why
19 the permanent residence is no longer available, whether the
20 professional guardian attempted to consult with the legally
21 incapacitated individual about where the legally incapacitated
22 individual wanted to move, whether the professional guardian
23 honored the legally incapacitated individual's preferences
24 regarding where he or she wanted to move, the address of the new
25 residence, the type of residence, and how the new residence will
26 meet the legally incapacitated individual's needs. If the legally
27 incapacitated individual's residence becomes permanently
28 unavailable, the professional guardian is not required to file a
29 petition under subsection (7) and the court is not required to



1 appoint a guardian ad litem or legal counsel or hold a hearing. For
2 purposes of this subsection, a residence becomes permanently
3 unavailable as a result of a facility closure, removal of the
4 property from the rental market, involuntary discharge, notice to
5 quit, or eviction that cannot be appropriately resolved by the
6 professional guardian, irreparable damage to the permanent
7 residence, or other circumstances that are not initiated by the
8 professional guardian but necessitate the permanent removal of the
9 legally incapacitated individual from his or her permanent
10 residence.

11 (15) If removal from the permanent residence necessitates the
12 sale, transfer, or disposal of real property or sentimental
13 personal property and if meaningful communication is possible, the
14 guardian must consult with the legally incapacitated individual
15 before taking any action to dispose of the property. A guardian
16 shall make all reasonable efforts to identify and honor the legally
17 incapacitated individual's wishes to preserve sentimental personal
18 property in the overall context of the legally incapacitated
19 individual's estate, including items identified in the inventory
20 under section 5314, and shall take reasonable steps to safeguard
21 that personal property. The court may remove a guardian that fails
22 to comply with this subsection.

23 (16) As used in this section, "permanent residence" means any
24 of the following:

25 (a) The location the allegedly incapacitated individual or
26 legally incapacitated individual uses as a permanent address, in
27 which most of the individual's possessions are maintained.

28 (b) The location the allegedly incapacitated individual or
29 legally incapacitated individual considers to be his or her home.



1 Sec. 5406. (1) ~~Upon-On~~ receipt of a petition for a
 2 conservator's appointment or another protective order because of
 3 minority, the court shall set a date for hearing. If, at any time
 4 in the proceeding, the court determines that the minor's interests
 5 are or may be inadequately represented, the court may appoint an
 6 attorney to represent the minor, giving consideration to the
 7 minor's choice if 14 years of age or older. An attorney appointed
 8 by the court to represent a minor has the powers and duties of a
 9 guardian ad litem.

10 (2) ~~Upon-On~~ receipt of a petition for a conservator's
 11 appointment or another protective order for a reason other than
 12 minority, the court shall set a date for **initial** hearing. Unless
 13 the individual to be protected has chosen **legal** counsel, or is
 14 mentally competent but aged or physically infirm, the court shall
 15 appoint a guardian ad litem. ~~to represent the person in the~~
 16 ~~proceeding.~~ If the alleged disability is mental illness, mental
 17 deficiency, physical illness or disability, chronic use of drugs,
 18 or chronic intoxication, the court may direct that the individual
 19 alleged to need protection be examined by a physician or mental
 20 health professional appointed by the court, preferably a physician
 21 or mental health professional who is not connected with an
 22 institution in which the individual is a patient or is detained.
 23 The individual alleged to need protection has the right to secure
 24 an independent evaluation at his or her own expense. The court may
 25 send a visitor to interview the individual to be protected. The
 26 visitor may be a guardian ad litem or a court officer or employee.

27 (3) The court may utilize, as an additional visitor, the
 28 service of a public or charitable agency to evaluate the condition
 29 of the individual to be protected and make appropriate



1 recommendations to the court.

2 (4) A guardian ad litem, physician, mental health
3 professional, or visitor appointed under this section who meets
4 with, examines, or evaluates an individual who is the subject of a
5 petition in a protective proceeding shall do all of the following:

6 (a) Consider whether there is an appropriate alternative to a
7 conservatorship.

8 (b) If a conservatorship is appropriate, consider the
9 desirability of limiting the scope and duration of the
10 conservator's authority.

11 (c) Report to the court based on the considerations required
12 in subdivisions (a) and (b).

13 (5) **Subject to subsection (6), the duties of a guardian ad**
14 **litem appointed under subsection (2) for an individual alleged to**
15 **need protection include all of the following:**

16 (a) **Impartially gather information as provided by law.**

17 (b) **Seek information from the individual and, if communication**
18 **is possible, communicate in a manner the individual is best able to**
19 **understand. If communication is not possible or there is a barrier**
20 **to communication, the guardian ad litem must note that in the**
21 **report.**

22 (c) **Interview the individual in person at the individual's**
23 **location and out of the presence of any interested person.**

24 (d) **Advise the individual that the guardian ad litem does not**
25 **represent the individual as an attorney and that no attorney-client**
26 **relationship has been created.**

27 (e) **Identify whether the individual wishes to be present at**
28 **the hearing. If the individual alleged to need protection does not**
29 **wish to be present at the hearing, the guardian ad litem shall**



1 identify the reasons why the individual does not wish to be
2 present.

3 (f) Identify any barrier to attending hearings at the place
4 where court is held or otherwise fully participating in the
5 hearing, including the need for assistive technology,
6 transportation, or other support. If the individual alleged to need
7 protection wishes to attend, the guardian ad litem must identify
8 whether the individual has identified a plan for how the individual
9 will attend.

10 (g) Identify whether the individual plans to retain legal
11 counsel or wants appointed legal counsel. If the individual alleged
12 to need protection does not plan to retain legal counsel or request
13 appointed legal counsel, the guardian ad litem must make a
14 recommendation as to whether legal counsel should be appointed.

15 (h) Identify whether a disagreement or dispute related to the
16 petition might be resolved through court-ordered mediation.

17 (6) The duties of a guardian ad litem appointed for an
18 individual alleged to need protection or a protected individual
19 include all of the following, as applicable:

20 (a) Explain to the individual the nature, purpose, and legal
21 effects of a conservator's appointment or issuance of a protective
22 order.

23 (b) Explain who has filed the petition and who, if anyone, has
24 been nominated as conservator, if applicable.

25 (c) Explain to the individual the hearing procedure and the
26 individual's rights in the hearing procedure, including, but not
27 limited to, the following:

28 (i) The right to contest the petition, in whole or in part.

29 (ii) The right to request limits on the conservator's powers.



1 (iii) The right to be present at the hearing. If the individual
2 is unable to attend the hearing at the location court proceedings
3 typically are held, the guardian ad litem shall inform the
4 individual of his or her right to have the hearing at another
5 location.

6 (iv) The right to request a reasonable accommodation to allow
7 the individual to participate as fully as possible at the hearing,
8 including with assistive technology or other support.

9 (v) The right to be represented by legal counsel of the
10 individual's choice. If the individual is unable to secure legal
11 counsel of his or her choice, the guardian ad litem shall explain
12 to the individual that he or she has the right to have legal
13 counsel appointed by the court.

14 (vi) The right to request an independent medical evaluation.

15 (d) Explain to the individual that if a conservator is
16 appointed, the conservator may have the power to take certain
17 actions on behalf of the individual. A guardian ad litem must
18 inform the individual that a conservator may have any of the powers
19 described in section 5407 and, if meaningful communication is
20 possible, discern if the individual objects to a conservator having
21 any of those powers.

22 (e) Identify whether the individual objects to the particular
23 person proposed as conservator, if any.

24 (f) If a conservator were to be appointed, identify a list of
25 who the individual would want to serve, in order of preference.

26 (g) If a conservator were to be appointed, identify who the
27 individual would not want to serve.

28 (7) A guardian ad litem appointed for an individual alleged to
29 need protection or a protected individual shall file a written



1 report with the court in the form required by the state court
2 administrative office.

3 (8) If an individual who is subject to an initial petition
4 under this part, petition to terminate under this part, or petition
5 to modify under this part contests the petition, the guardian ad
6 litem's written report required under subsection (7) must include
7 only the following:

8 (a) That the individual contests the petition.

9 (b) Whether the individual has retained legal counsel or
10 wishes for legal counsel to be appointed.

11 (c) Whether the individual has any barriers to attending court
12 at the place where it is usually held.

13 (9) If an individual who is subject to an initial petition
14 under this part, petition to terminate under this part, or petition
15 to modify under this part does not contest the petition, the
16 guardian ad litem's written report required under subsection (7)
17 must include only the following:

18 (a) The date and time the guardian ad litem met with the
19 individual.

20 (b) The length of time the guardian ad litem met with the
21 individual.

22 (c) The location where the guardian ad litem met with the
23 individual.

24 (d) Whether the guardian ad litem was able to meaningfully
25 communicate with the individual and any barriers to communication.

26 (e) Who, if anyone, was present for the interview besides the
27 individual.

28 (f) Whether the individual wishes to be present at the
29 hearing. If the individual wishes to be present at the hearing but



1 has a barrier to fully participating, the guardian ad litem must
 2 include in the written report whether the barrier can be resolved
 3 by moving the location of the hearing or using assistive
 4 technology, or both, or other support.

5 (g) Whether the individual has identified a plan for how the
 6 individual will attend.

7 (h) Whether the individual plans to retain legal counsel or
 8 has requested appointed legal counsel. If the individual has not
 9 indicated he or she wishes to be represented by legal counsel, the
 10 guardian ad litem shall include in the written report a
 11 recommendation as to whether legal counsel should be appointed to
 12 represent the individual.

13 (i) Whether the individual has any of the following:

14 (i) A power of attorney with or without limitations on purpose,
 15 authority, or time period.

16 (ii) A patient advocate designation.

17 (iii) A physician orders for scope of treatment form.

18 (iv) A benefits payee, trustee, or other fiduciary.

19 (j) Whether a disagreement or dispute related to the
 20 conservatorship petition might be resolved through court-ordered
 21 mediation.

22 (k) Whether the appointment of a visitor with appropriate
 23 knowledge, training, and education such as a social worker, mental
 24 health professional, or medical professional could provide the
 25 court with the information on whether alternatives to
 26 conservatorship or a limited conservatorship under section 5419(1)
 27 is appropriate.

28 (l) For an initial petition under this part, if a conservator
 29 were appointed, who the individual would want to serve in order of



1 preference.

2 (m) For an initial petition under this part, if a conservator
3 were appointed, who the individual would not want to serve.

4 (n) An estimate of the liquid assets as that term is defined
5 in section 5314, income, real property, and a description of
6 personal property to the extent known after reasonable inquiry.

7 (10) If a guardian ad litem is appointed for any purpose other
8 than an initial petition under this part, petition to terminate
9 under this part, or petition to modify under this part, the
10 guardian ad litem must provide a written report to the court that
11 includes, at a minimum, the information described in subsection
12 (5), (6), (8), or (9), as applicable, and any other information
13 required by law. A special limited guardian ad litem appointed
14 under subsection (16) is not required to provide a written report
15 unless ordered to do so by the court.

16 (11) The court may receive into evidence without testimony the
17 written report of the guardian ad litem required under subsection
18 (7) if the report is filed with the court and served on all
19 interested persons not less than 5 days before the hearing. The
20 guardian ad litem is required to report findings until the date of
21 the termination of the guardian ad litem. The court may issue on
22 its own initiative, or any interested person may secure, a subpoena
23 to compel the preparer of the report to testify. On request of any
24 interested person, the court must issue a subpoena to compel the
25 preparer of the report to testify.

26 (12) A guardian ad litem shall file any report required under
27 this section with the court and serve the report on all interested
28 persons at least 5 days before the hearing. The court shall not
29 order compensation of the guardian ad litem unless the guardian ad



1 litem states in the guardian ad litem's written report that the
2 guardian ad litem complied with this subsection.

3 (13) The court shall not appoint a guardian ad litem as legal
4 counsel for the individual if the guardian ad litem's report under
5 subsection (7) or recommendation to the court conflicts with the
6 wishes of the individual.

7 (14) If an individual who is subject to a petition under this
8 part has not already secured legal counsel, the court shall appoint
9 legal counsel if any of the following apply:

10 (a) The individual who is subject to the petition requests
11 legal counsel.

12 (b) The individual who is subject to the petition objects to
13 any part of the petition for conservatorship or potential authority
14 of a conservator.

15 (c) The guardian ad litem determines it is in the best
16 interest of the individual subject to the petition to have legal
17 counsel and, if legal counsel has not been secured, the court shall
18 appoint legal counsel. If the individual who is subject to the
19 petition is indigent, this state shall bear the expense of
20 appointed legal counsel.

21 (15) If an individual who is subject to a petition under this
22 part has legal counsel appointed or retained, the appointment of a
23 guardian ad litem terminates. The report of the guardian ad litem
24 under subsection (7) must not be admitted into evidence after the
25 appearance or appointment of legal counsel for the individual who
26 is subject to the petition.

27 (16) After appointment or retention of legal counsel for the
28 individual who is subject to the petition under this part, the
29 court may, for good cause shown, appoint a special limited guardian



1 ad litem to provide information on a narrowly defined issue that
 2 will likely otherwise be inadequately addressed. A special guardian
 3 ad litem is exempt from subsections (5) to (10). The court may
 4 order that a special limited guardian ad litem provide a written
 5 report. The report under this subsection must contain the
 6 information the court considers necessary to adequately address the
 7 issue leading to the appointment of the special limited guardian ad
 8 litem. A special limited guardian ad litem shall not communicate
 9 directly with the individual who is subject to the petition and
 10 must instead communicate through legal counsel to the individual
 11 who is subject to the petition, unless legal counsel otherwise
 12 gives consent.

13 (17) ~~(5)~~—The individual to be protected is entitled to be
 14 present at the hearing in person. If the individual wishes to be
 15 present at the hearing, all practical steps must be taken to ensure
 16 the individual's presence including, if necessary, moving the site
 17 of the hearing. The individual is entitled to be represented by
 18 **legal** counsel, to present evidence, to cross-examine witnesses,
 19 including a court-appointed physician or other qualified person and
 20 a visitor, and to trial by jury. The issue may be determined at a
 21 closed hearing or without a jury if the individual to be protected
 22 or **legal** counsel for the individual so requests.

23 (18) ~~(6)~~—Any person may request ~~for~~ permission to participate
 24 in the proceeding, and the court may grant the request, with or
 25 without hearing, ~~upon~~**on** determining that the best interest of the
 26 individual to be protected will be served by granting the request.
 27 The court may attach appropriate conditions to the permission.

28 (19) ~~(7)~~—After hearing, ~~upon~~**on** finding that a basis for a
 29 conservator's appointment or another protective order is



1 established by clear and convincing evidence, the court shall make
2 the appointment or other appropriate protective order.

3 Sec. 5417. (1) ~~Within~~ **Not later than** 56 days after appointment
4 or within another time period specified by court rule, a
5 conservator shall prepare and file with the appointing court a
6 complete inventory of the estate subject to the conservatorship
7 together with an oath or affirmation that the inventory is believed
8 to be complete and accurate so far as information permits. **The**
9 **conservator shall serve on interested persons, along with the**
10 **inventory, account statements with account numbers redacted that**
11 **reflect the value of depository and investment accounts dated not**
12 **later than 30 days after the inventory's date.** The conservator
13 shall provide a copy of the inventory to the protected individual
14 if the individual can be located and is 14 years of age or older
15 and to interested persons as specified in the Michigan court rules.

16 (2) The conservator must keep suitable records of the
17 administration and exhibit those records on the request of an
18 interested person.

19 (3) **The conservator must make reasonable efforts to identify**
20 **on the inventory under subsection (1) a reasonable number of items**
21 **of special personal or sentimental value, including, but not**
22 **limited to, family heirlooms, photo albums, or collections. To the**
23 **extent meaningful conversation permits, the conservator must make**
24 **an inquiry with the protected individual as to what items the**
25 **protected individual identifies as having special personal or**
26 **sentimental value. If the conservator is unable to locate an item**
27 **identified as having special personal or sentimental value at the**
28 **time of filing the inventory under subsection (1), the conservator**
29 **must state that on the inventory. The inventory must be signed by**



1 the conservator and include an attestation that states, "I
 2 represent this list is true and correct to the best of my
 3 knowledge, information, and belief at the time of signing. I
 4 understand that I must handle this property, like all of the
 5 protected individual's property, consistent with my fiduciary
 6 duties. This may include sale, disposal, or other actions to meet
 7 my fiduciary duties. I am not responsible for storing any items at
 8 my expense.". A conservator shall make all reasonable efforts to
 9 identify and honor the protected individual's wishes to preserve
 10 items of special personal or sentimental value in the overall
 11 context of the protected individual's estate, including items
 12 identified in the inventory and annual accounts, and shall take
 13 reasonable steps to safeguard the property. The court may remove a
 14 conservator that fails to comply with this subsection.

15 (4) The inventory under subsection (1) must list any
 16 merchandise, funeral services, cemetery services, or prepaid
 17 contracts for which the protected individual or conservator is the
 18 contract buyer or contract beneficiary under the prepaid funeral
 19 and cemetery sales act, 1986 PA 255, MCL 328.211 to 328.235. If the
 20 conservatorship estate includes assets described in this
 21 subsection, the conservator must file all of the following with the
 22 inventory under subsection (1):

23 (a) A copy of any prepaid contract under the prepaid funeral
 24 and cemetery sales act, 1986 PA 255, MCL 328.211 to 328.235.

25 (b) Proof that payments made under a prepaid contract are held
 26 in escrow or under a trust agreement in compliance with the prepaid
 27 funeral and cemetery sales act, 1986 PA 255, MCL 328.211 to
 28 328.235.

29 (c) The most recent escrow statement issued concerning the



1 prepaid contract.

2 (d) Proof of any assignments of life policies or annuity
3 contracts made to purchase merchandise, funeral services, or
4 cemetery services under the prepaid funeral and cemetery sales act,
5 1986 PA 255, MCL 328.211 to 328.235, under subsection (1) must list
6 property with reasonable detail and the type and amount of any
7 encumbrance.

8 (5) The inventory under subsection (1) must be served on all
9 interested persons. Any interested person may file an objection to
10 the inventory with the court and serve the objection on all other
11 interested persons. The court shall set the matter for hearing.

12 Sec. 5418. (1) A conservator shall account to the court for
13 administration of the trust not less than annually unless the court
14 directs otherwise, upon resignation or removal, and at other times
15 as the court directs. ~~On~~The conservator shall serve on interested
16 persons, along with the account under this subsection, account
17 statements with account numbers redacted that reflect the value of
18 depository and investment accounts dated not later than 30 days
19 after the inventory's date and receipts, invoices, or other
20 documentation for expenses in excess of \$1,000.00. The account must
21 be in the form as provided by the state court administrative
22 office, or substantially similar. The account must detail assets
23 including those identified in the inventory under section 5417,
24 debts, gross income, and expenses.

25 (2) Not later than 56 days after the termination of the
26 protected individual's minority or disability, a conservator shall
27 account to the court or to the formerly protected individual or
28 that individual's successors. Subject to appeal or vacation within
29 the time permitted, an order, after notice and hearing, allowing an



1 intermediate account of a conservator adjudicates as to liabilities
2 concerning the matters considered in connection with the accounts,
3 and an order, after notice and hearing, allowing a final account
4 adjudicates as to all previously unsettled liabilities of the
5 conservator to the protected individual or the protected
6 individual's successors relating to the conservatorship. In
7 connection with any account, the court may require a conservator to
8 submit to a physical check of the estate to be made in any manner
9 the court specifies.

10 (3) If the conservator has disposed of or sold any of the
11 items, the conservator must describe on the account under
12 subsection (1) how the conservator fulfilled the conservator's
13 duties under section 5417(3).

14 (4) If the protected individual's estate includes any
15 merchandise, funeral services, cemetery services, or prepaid
16 contracts for which the protected individual or conservator is the
17 contract buyer or contract beneficiary under the prepaid funeral
18 and cemetery sales act, 1986 PA 255, MCL 328.211 to 328.235, the
19 conservator must file all of the following with the account:

20 (a) A copy of any prepaid contract under the prepaid funeral
21 and cemetery sales act, 1986 PA 255, MCL 328.211 to 328.235.

22 (b) Proof that payments made under a prepaid contract are held
23 in escrow or under a trust agreement in compliance with the prepaid
24 funeral and cemetery sales act, 1986 PA 255, MCL 328.211 to
25 328.235.

26 (c) The most recent escrow statement issued concerning the
27 prepaid contract.

28 (d) Proof of any assignments of life policies or annuity
29 contracts made to purchase merchandise, funeral services, or



1 cemetery services under the prepaid funeral and cemetery sales act,
2 1986 PA 255, MCL 328.211 to 328.235.

3 (5) ~~(2)~~—The conservator shall provide a copy of an account to
4 the protected individual if the individual can be located and is 14
5 years of age or older and to interested persons as specified in the
6 Michigan court rules.

7 (6) If the protected individual objects to an account, the
8 court must appoint a guardian ad litem to visit the protected
9 individual in the same manner as specified in section 5406. The
10 court must appoint legal counsel to represent the protected
11 individual if any of the following are met:

12 (a) The protected individual requests legal counsel.

13 (b) The guardian ad litem believes that appointment of legal
14 counsel is in the best interest of the protected individual.

15 (c) The court otherwise believes it is necessary to protect
16 the interest of the protected individual.

17 Enacting section 1. This amendatory act takes effect 180 days
18 after the date it is enacted into law.

19 Enacting section 2. This amendatory act does not take effect
20 unless all of the following bills of the 102nd Legislature are
21 enacted into law:

22 (a) House Bill No. 4909.

23 (b) House Bill No. 4911.

24 (c) House Bill No. 4912.

25 (d) House Bill No. 5047.



DRAFT 1
SUBSTITUTE FOR
HOUSE BILL NO. 4911

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 5303, 5304, 5306, 5306a, 5312, and 5416 (MCL 700.5303, 700.5304, 700.5306, 700.5306a, 700.5312, and 700.5416), section 5303 as amended by 2017 PA 155, section 5306 as amended by 2019 PA 170, section 5306a as added by 2012 PA 173, and section 5312 as amended by 2000 PA 54.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5303. (1) An individual in his or her own behalf, or any
2 person interested in the individual's welfare, may petition for a
3 finding of incapacity and appointment of a guardian. The petition
4 must contain specific facts about the individual's condition and
5 specific examples of the individual's recent conduct that



1 demonstrate the need for a guardian's appointment.

2 (2) Before a petition is filed under this section, the court
3 shall provide the person intending to file the petition with
4 written information that sets forth alternatives to appointment of
5 a full guardian, including, but not limited to, a limited guardian,
6 conservator, patient advocate designation, do-not-resuscitate
7 order, physician orders for scope of treatment form, or durable
8 power of attorney with or without limitations on purpose,
9 authority, or time period, and an explanation of each alternative.

10 (3) ~~Upon~~ **On** the filing of a petition under subsection (1), the
11 court shall set a date for **initial** hearing. ~~on the issue of~~
12 ~~incapacity.~~ Unless the allegedly incapacitated individual has legal
13 counsel of his or her own choice, the court shall appoint a
14 guardian ad litem ~~to represent the person in the proceeding for the~~
15 **initial hearing. The court may enter a final order on the petition**
16 **at the initial hearing if the court does not set a trial date under**
17 **subsection (4).**

18 (4) **At the initial hearing under subsection (3), the court**
19 **shall set a trial date at least 7 days after the initial hearing**
20 **for the petition under subsection (1) if any of the following**
21 **apply:**

22 (a) **The guardian ad litem requests that the proceeding be set**
23 **for trial.**

24 (b) **The allegedly incapacitated individual or his or her legal**
25 **counsel requests the matter be set for trial.**

26 (c) **Any reason as justice requires.**

27 (5) **If the court sets a trial date at the initial hearing**
28 **under subsection (4), the court shall do both of the following:**

29 (a) **Enter a scheduling order to the extent necessary.**



1 (b) Enter an order that provides, to the extent practicable,
 2 for the attendance of the allegedly incapacitated individual at the
 3 trial if the allegedly incapacitated individual wishes to attend.
 4 An order entered under this subdivision may order any interested
 5 person over whom the court has jurisdiction to facilitate
 6 attendance or move the hearing site under section 5304.

7 Sec. 5304. (1) If necessary, the court may order that an
 8 individual alleged to be incapacitated be examined by a physician
 9 or mental health professional appointed by the court who shall
 10 submit a report in writing to the court at least 5 days before the
 11 hearing set under section 5303. A report prepared as provided in
 12 this subsection ~~shall~~**must** not be made a part of the proceeding's
 13 public record, but ~~shall~~**must** be available to the court or an
 14 appellate court in which the proceeding is subject to review, to
 15 the alleged incapacitated individual, to the petitioner, to their
 16 respective legal counsels, and to other persons as the court
 17 directs. The report may be used as provided in the Michigan rules
 18 of evidence.

19 (2) The alleged incapacitated individual has the right to
 20 secure an independent evaluation, at his or her own expense or, if
 21 indigent, at the expense of ~~the~~**this** state. **An independent**
 22 **evaluation performed at the expense of this state must be performed**
 23 **by a physician or mental health professional.** Compensation for an
 24 independent evaluation at public expense ~~shall~~**must** be in an amount
 25 that, based ~~upon~~**on** time and expense, the court approves as
 26 reasonable.

27 (3) A report prepared under this section ~~shall~~**must** contain
 28 all of the following:

29 (a) A detailed description of the individual's ~~physical~~**or**



1 ~~psychological infirmities, cognitive and functional abilities and~~
2 ~~limitations.~~

3 (b) An explanation of how and to what extent ~~each infirmity~~
4 ~~interferes with the individual's ability to receive or evaluate~~
5 ~~information in making decisions, the individual is able to receive,~~
6 ~~understand, participate in, and evaluate information in making~~
7 ~~decisions.~~

8 (c) ~~A-If the report is being completed by a physician or~~
9 ~~mental health professional, a listing of all medications the~~
10 ~~individual is receiving, the dosage of each medication, and a~~
11 ~~description of the effects each medication has ~~upon~~ on the~~
12 ~~individual's behavior.~~

13 (d) ~~A-If the report is being completed by a physician or~~
14 ~~mental health professional, a prognosis for improvement in the~~
15 ~~individual's condition, including whether it is a permanent or~~
16 ~~temporary condition, and a recommendation for the most appropriate~~
17 ~~rehabilitation plan.~~

18 (e) The signatures **and printed names** of all individuals who
19 performed the evaluations, ~~upon which the report is based, where~~
20 **they are employed, the date of examination on which the report is**
21 **based, the length of time they have known the individual, and the**
22 **length of time they met with the individual.**

23 (f) **Whether the individual has the capacity to assign or**
24 **delegate responsibilities to ensure his or her well-being.**

25 (g) **Whether the individual has executed a document directing**
26 **care or naming an agent to act on his or her behalf, including, but**
27 **not limited to, a power of attorney, patient advocate designation,**
28 **or do-not-resuscitate order.**

29 (h) **If the report is being completed by a visitor, it must**



1 also include, at a minimum, an assessment of the existence of
 2 current formal and informal supports, the ability of supportive
 3 services and benefits to meet any unmet needs, the identification
 4 of any existing concerns regarding the individual's well-being, and
 5 the individual's ability to address those existing concerns.

6 (4) If the court finds that the report prepared under this
 7 section does not substantially comply with the requirements of this
 8 section, the court shall not consider the evaluation.

9 (5) ~~(4)~~The individual alleged to be incapacitated is entitled
 10 to be present at the hearing in person, and to see or hear all
 11 evidence bearing ~~upon~~ on the individual's condition. If the
 12 individual wishes to be present at the hearing, all practical steps
 13 ~~shall~~ must be taken to ensure his or her presence, including, if
 14 necessary, moving the hearing site.

15 (6) ~~(5)~~The individual **alleged to be incapacitated** is entitled
 16 to be represented by legal counsel, to present evidence, to cross-
 17 examine witnesses, including the court-appointed physician or
 18 mental health professional and the visitor, and to trial by jury.

19 (7) ~~(6)~~The issue of incapacity may be determined at a closed
 20 hearing without a jury if requested by the individual alleged to be
 21 incapacitated or that individual's legal counsel.

22 Sec. 5306. (1) The court may appoint a guardian if the court
 23 finds by clear and convincing evidence both that the individual for
 24 whom a guardian is sought is an incapacitated individual and that
 25 the appointment is necessary as a means of providing continuing
 26 care and supervision of the incapacitated individual, with each
 27 finding supported separately on the record. ~~Alternately, the court~~
 28 ~~may dismiss the proceeding or enter another appropriate order.~~

29 (2) **The court shall dismiss the proceeding under subsection**



1 (1) if the court cannot be shown both of the following by clear and
2 convincing evidence:

3 (a) That the individual for whom a guardian is sought is an
4 incapacitated individual.

5 (b) That the appointment is necessary as a means of providing
6 continuing care and supervision of the individual.

7 (3) At any time during the proceedings under subsection (1),
8 the court may stay the guardianship proceedings for a reasonable
9 period of time, based on the needs of the individual, to allow the
10 individual the opportunity to explore the alternatives to
11 appointment of a guardian. If the individual properly names a
12 patient advocate under a patient advocate designation, an attorney
13 in fact under a power of attorney, or a representative payee under
14 a governmental benefit during the stay under this subsection and
15 provides evidence of naming the patient advocate, attorney in fact,
16 or representative payee to the court, the court may dismiss the
17 petition with or without a hearing. This subsection does not
18 prevent the court from ordering a temporary guardianship under
19 section 5312a if the temporary guardianship is limited in scope and
20 the court explicitly finds that the individual has the capacity to
21 execute a power of attorney, patient advocate designation, or
22 designate a representative payee.

23 (4) ~~(2)~~—The court shall grant a guardian only those powers and
24 only for that period of time as is necessary to provide for the
25 demonstrated need of the incapacitated individual. The court shall
26 design the guardianship to encourage the development of maximum
27 self-reliance and independence in the individual. If the court is
28 aware that an individual has executed a patient advocate
29 designation under section 5506, the court shall not grant a



1 guardian any of the same powers that are held by the patient
 2 advocate. A court order establishing a guardianship shall specify
 3 any limitations on the guardian's powers and any time limits on the
 4 guardianship.

5 (5) ~~(3)~~—If the court finds by clear and convincing evidence
 6 that an individual is incapacitated and lacks the capacity to do
 7 some, but not all, of the tasks necessary to care for himself or
 8 herself, the court may appoint a limited guardian to provide
 9 guardianship services to the individual, but the court shall not
 10 appoint a full guardian.

11 (6) ~~(4)~~—If the court finds by clear and convincing evidence
 12 that the individual is incapacitated and is totally without
 13 capacity to care for himself or herself, the court shall specify
 14 that finding of fact in an order and may appoint a full guardian.

15 (7) ~~(5)~~—If an individual executed a patient advocate
 16 designation under section 5506 before the time the court determines
 17 that he or she became a legally incapacitated individual, a
 18 guardian does not have and shall not exercise the power or duty of
 19 making medical or mental health treatment decisions that the
 20 patient advocate is designated to make. If, however, a petition for
 21 guardianship or for modification under section 5310 alleges and the
 22 court finds that the patient advocate designation was not executed
 23 in compliance with section 5506, that the patient advocate is not
 24 complying with the terms of the designation or with the applicable
 25 provisions of sections 5506 to 5515, or that the patient advocate
 26 is not acting consistent with the ward's best interests, the court
 27 may modify the guardianship's terms to grant those powers to the
 28 guardian.

29 (8) ~~(6)~~—If the court finds by clear and convincing evidence



1 that the individual is incapacitated, that the person that has the
 2 care and custody of the incapacitated individual denied another
 3 person access to the incapacitated individual, and that the
 4 incapacitated individual desires contact with the other person or
 5 that contact with the other person is in the incapacitated
 6 individual's best interest, the court may appoint a limited
 7 guardian to supervise access with the other person.

8 Sec. 5306a. (1) An individual for whom a guardian is sought or
 9 has been appointed under section 5306 has all of the following
 10 rights:

11 (a) To object to the appointment of a successor guardian by
 12 will or other writing, as provided in section 5301.

13 (b) To have the guardianship proceeding commenced and
 14 conducted in the place where the individual resides or is present
 15 or, if the individual is admitted to an institution by a court, in
 16 the county in which the court is located, as provided in section
 17 5302.

18 (c) To petition on his or her own behalf for the appointment
 19 of a guardian, as provided in section 5303.

20 (d) To have legal counsel of his or her own choice represent
 21 him or her on ~~the~~ **either of the following:**

22 **(i) The** petition to appoint a guardian, as provided in sections
 23 5303, 5304, and 5305.

24 **(ii) If applicable, a professional guardian's petition to**
 25 **permanently remove the individual from the individual's permanent**
 26 **residence, as provided in section 5314a.**

27 (e) If he or she is not represented by legal counsel, to the
 28 appointment of a guardian ad litem, ~~to represent the individual on~~
 29 ~~the petition to appoint a guardian,~~ as provided in section 5303.



1 (f) To an independent evaluation of his or her capacity by a
2 physician or mental health professional, at public expense if he or
3 she is indigent, as provided in section 5304.

4 (g) To be present at the hearing on the petition to appoint a
5 guardian and to have all practical steps taken to ensure this,
6 including, if necessary, moving the hearing site, as provided by
7 section 5304.

8 (h) To see or hear all the evidence presented in the hearing
9 on the petition to appoint a guardian, as provided in section 5304.

10 (i) To present evidence and cross-examine witnesses in the
11 hearing on the petition to appoint a guardian, as provided in
12 section 5304.

13 (j) To a trial by jury on the petition to appoint a guardian,
14 as provided in section 5304.

15 (k) To a closed hearing on the petition to appoint a guardian,
16 as provided in section 5304.

17 (l) If a guardian ad litem is appointed, to be personally
18 visited by the guardian ad litem, as provided in section 5305.

19 (m) If a guardian ad litem is appointed, to an explanation by
20 the guardian ad litem of the nature, purpose, and legal effects of
21 a guardian's appointment, as provided in section 5305.

22 (n) If a guardian ad litem is appointed, to an explanation by
23 the guardian ad litem of the individual's rights in the hearing
24 procedure, as provided in section 5305.

25 (o) If a guardian ad litem is appointed, to be informed by the
26 guardian ad litem of the right to contest the petition, to request
27 limits on the guardian's powers, to object to a particular person
28 being appointed guardian, to be present at the hearing, to be
29 represented by legal counsel, and to have legal counsel appointed



1 if the individual is unable to afford legal counsel, as provided in
2 section 5305.

3 (p) To be informed of the name of each person known to be
4 seeking appointment as guardian, including, if a guardian ad litem
5 is appointed, to be informed of the names by the guardian ad litem
6 as provided in section 5305.

7 (q) To require that proof of incapacity and the need for a
8 guardian be proven by clear and convincing evidence, as provided in
9 section 5306.

10 (r) To the limitation of the powers and period of time of a
11 guardianship to only the amount and time that is necessary, as
12 provided in section 5306.

13 (s) To a guardianship designed to encourage the development of
14 maximum self-reliance and independence as provided in section 5306.

15 (t) To prevent the grant of powers to a guardian if those
16 powers are already held by a valid patient advocate, as provided in
17 section 5306.

18 (u) To periodic review of the guardianship by the court,
19 including the right to a hearing and the appointment of an attorney
20 if issues arise upon the review of the guardianship, as provided in
21 section 5309.

22 (v) To, at any time, seek modification or termination of the
23 guardianship by informal letter to the judge, as provided in
24 section 5310.

25 (w) To a hearing ~~within~~ **not later than** 28 days ~~of~~ **after**
26 requesting a review, modification, or termination of the
27 guardianship, as provided in section 5310.

28 (x) To the same rights on a petition for modification or
29 termination of the guardianship including the appointment of a



1 visitor as apply to a petition for appointment of a guardian, as
2 provided in section 5310.

3 (y) To personal notice of a petition for appointment or
4 removal of a guardian, as provided in section 5311.

5 (z) To written notice of the nature, purpose, and legal
6 effects of the appointment of a guardian, as provided in section
7 5311.

8 (aa) To choose the person who will serve as guardian, if the
9 chosen person is suitable and willing to serve, as provided in
10 section 5313.

11 (bb) To consult with the guardian about major decisions
12 affecting the individual, if meaningful conversation is possible,
13 as provided in section 5314.

14 (cc) To ~~quarterly~~ visits by the guardian, as provided in
15 section 5314.

16 (dd) ~~To have the guardian notify the court within 14 days of a~~
17 ~~change in the individual's residence, as provided in section 5314.~~
18 **If the guardian is not a professional guardian, to have the**
19 **guardian notify the court not later than 14 days after a change in**
20 **the individual's permanent residence, as provided in section 5314a.**

21 (ee) **If the guardian is a professional guardian, to have the**
22 **court consider a separate petition, as provided in section 5314a,**
23 **if a professional guardian seeks to move the individual to a new**
24 **permanent residence.**

25 (ff) ~~(ee)~~ To have the guardian secure services to restore the
26 individual to the best possible state of mental and physical well-
27 being so that the individual can return to self-management at the
28 earliest possible time, as provided in section 5314.

29 (gg) ~~(ff)~~ To have the guardian take reasonable care of the



1 individual's clothing, furniture, vehicles, and other personal
2 effects, as provided in section 5314.

3 (2) A guardian ad litem shall inform the ward in writing of
4 his or her rights enumerated in this section. The state court
5 administrative office and the ~~office of services to the aging~~
6 ~~created in section 5 of the older Michiganians act, 1981 PA 180,~~
7 ~~MCL 400.585,~~ **aging and adult services agency created under**
8 **Executive Reorganization Order No. 2015-1, MCL 400.227,** shall
9 promulgate a form to be used to give the written notice under this
10 section, which ~~shall~~ **must** include space for the court to include
11 information on how to contact the court or other relevant personnel
12 with respect to the rights enumerated in this section.

13 Sec. 5312. ~~(1) If an individual does not have a guardian, an~~
14 ~~emergency exists, and no other person appears to have authority to~~
15 ~~act in the circumstances, the court shall provide notice to the~~
16 ~~individual alleged to be incapacitated and shall hold a hearing.~~
17 ~~Upon a showing that the individual is an incapacitated individual,~~
18 ~~the court may exercise the power of a guardian, or appoint a~~
19 ~~temporary guardian with only the powers and for the period of time~~
20 ~~as ordered by the court. A hearing with notice as provided in~~
21 ~~section 5311 shall be held within 28 days after the court has acted~~
22 ~~under this subsection.~~

23 ~~(2) If an appointed guardian is not effectively performing the~~
24 ~~guardian's duties and the court further finds that the legally~~
25 ~~incapacitated individual's welfare requires immediate action, the~~
26 ~~court may appoint, with or without notice, a temporary guardian for~~
27 ~~the legally incapacitated individual for a specified period not to~~
28 ~~exceed 6 months.~~

29 ~~(3) A temporary guardian is entitled to the care and custody~~



1 ~~of the ward, and the authority of a permanent guardian previously~~
 2 ~~appointed by the court is suspended as long as a temporary guardian~~
 3 ~~has authority. A temporary guardian may be removed at any time. A~~
 4 ~~temporary guardian shall make reports as the court requires. In~~
 5 ~~other respects, the provisions of this act concerning guardians~~
 6 ~~apply to temporary guardians.~~

7 (1) An interested person may file a petition to appoint an
 8 emergency guardian for an allegedly incapacitated individual under
 9 this subsection. If a petition is filed under this subsection, the
 10 petitioner shall give notice, except as otherwise provided in
 11 subsection (2), as provided by section 5311, and the court shall
 12 appoint a guardian ad litem under section 5305. The court shall
 13 conduct a hearing on a petition under this subsection as soon as
 14 possible and not later than 7 days after the court receives the
 15 petition. Except as otherwise provided in subsection (2), following
 16 the hearing under this subsection, the court may appoint an
 17 emergency guardian if the court finds by a preponderance of the
 18 evidence that all of the following apply:

19 (a) An emergency exists that is likely to result in
 20 substantial harm to the allegedly incapacitated individual's
 21 physical health, safety, or welfare.

22 (b) No other person appears to have authority to act in the
 23 circumstances.

24 (c) There is a basis that both the individual is an
 25 incapacitated individual and appointment of an emergency guardian
 26 is necessary as a means of providing continuing care and
 27 supervision of the individual.

28 (2) On the filing of a petition to appoint an emergency
 29 guardian under subsection (1), the court may appoint an emergency



1 guardian for an allegedly incapacitated individual without notice
2 to the allegedly incapacitated individual only if the court
3 determines from an affidavit showing, by clear and convincing
4 evidence, that all of the following apply:

5 (a) An emergency exists that is likely to result in imminent
6 and substantial harm to the allegedly incapacitated individual's
7 physical health, safety, or welfare.

8 (b) No other person appears to have authority to act in the
9 circumstances.

10 (c) There is a basis that both the individual is an
11 incapacitated individual and appointment of an emergency guardian
12 is necessary as a means of providing continuing care and
13 supervision of the individual.

14 (3) If the court appoints an emergency guardian under
15 subsection (2), the court shall do all of the following:

16 (a) Appoint a guardian ad litem for the allegedly
17 incapacitated individual under section 5305.

18 (b) Not later than 48 hours after the appointment of an
19 emergency guardian under this subsection, order the petitioner to
20 give notice by personal service of the appointment to the allegedly
21 incapacitated individual and service as required by court rule to
22 all interested persons.

23 (c) Not later than 7 days after the appointment of an
24 emergency guardian under this subsection, hold a hearing on whether
25 the conditions for the appointment of the emergency guardian exist.

26 (4) If the court finds conditions exist for the appointment of
27 the emergency guardian at a hearing under this section, and the
28 individual wishes to contest the appointment, the court must set a
29 date for a hearing and enter an order consistent with section 5306.



1 (5) An order appointing an emergency guardian under this
 2 section expires 28 days after the appointment. However, the court
 3 may extend an order appointing an emergency guardian under this
 4 section once for an additional 28 days if the court finds by a
 5 preponderance of the evidence, upon an affidavit by the appointed
 6 emergency guardian or following a hearing set at the discretion of
 7 the court, that the conditions that led to the appointment of the
 8 emergency guardian still exist.

9 (6) An emergency guardian may exercise only the powers
 10 specified by the court.

11 (7) The court may remove an emergency guardian at any time.

12 (8) An appointment of an emergency guardian under this section
 13 is not a determination that a basis exists for an appointment of a
 14 guardian under section 5306(1).

15 Sec. 5416. (1) In relation to powers conferred by this part or
 16 implicit in the title acquired by virtue of the proceeding, a
 17 conservator shall act as a fiduciary and observe the standard of
 18 care applicable to a trustee.

19 (2) A conservator for an individual that is subject to a
 20 conservatorship for a reason other than minority has the duty to
 21 take all steps within the scope of the conservator's authority to
 22 ensure the individual attends any hearing concerning the
 23 individual's conservatorship if the individual wishes to attend the
 24 hearing in a manner as provided in section 5406.

25 Enacting section 1. This amendatory act takes effect 180 days
 26 after the date it is enacted into law.

27 Enacting section 2. This amendatory act does not take effect
 28 unless all of the following bills of the 102nd Legislature are
 29 enacted into law:



- 1 (a) House Bill No. 4909.
- 2 (b) House Bill No. 4910.
- 3 (c) House Bill No. 4912.
- 4 (d) House Bill No. 5047.



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H01151'23 (H-1) Draft 1

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DRAFT 1
SUBSTITUTE FOR
HOUSE BILL NO. 4912

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
by amending sections 5414 and 5415 (MCL 700.5414 and 700.5415) and
by adding section 5312a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 **Sec. 5312a. (1) The court may appoint a temporary guardian**
2 **under section 5301a or this section.**

3 **(2) If a guardian has not been appointed or an appointed**
4 **guardian is not effectively performing the guardian's duties and**
5 **the court further finds that the alleged incapacitated individual**
6 **or ward's welfare requires immediate action, the court may appoint**
7 **a temporary guardian under this section for a specified period not**
8 **to exceed 6 months. The court shall not appoint a temporary**



1 guardian under this subsection unless either of the following
2 conditions is met:

3 (a) Oral or written notice of the hearing was provided to all
4 interested persons.

5 (b) If the petitioner has not provided notice of the hearing
6 to all interested persons, the petitioner submits a written
7 explanation to the court to detail the efforts, if any, that the
8 petitioner has made to provide notice and the reason why provided
9 notice should not be required.

10 (3) A temporary guardian is entitled to the care and custody
11 of the ward, and the authority of a permanent guardian previously
12 appointed by the court is suspended while a temporary guardian has
13 authority. A temporary guardian may be removed at any time. A
14 temporary guardian shall make reports as the court requires. In
15 other respects, the provisions of this act concerning guardians
16 apply to temporary guardians.

17 Sec. 5414. (1) The court may remove a conservator for good
18 cause, ~~upon~~ on notice and hearing, or accept a conservator's
19 resignation. ~~Upon~~ On the conservator's death, resignation, or
20 removal, the court may appoint another conservator. A conservator
21 ~~se~~ appointed under this subsection succeeds to the title and powers
22 of the predecessor.

23 (2) The protected individual or a person interested in the
24 protected individual's welfare may petition for an order removing
25 the conservator, appointing a successor conservator, modifying the
26 terms of the conservatorship, or terminating the conservatorship. A
27 request for this order under this subsection may be made by
28 informal letter to the court. A person who knowingly interferes
29 with transmission of a request described in this subsection to the



1 court is subject to a finding of contempt of court. A petition for
 2 an order appointing a successor conservator under this subsection
 3 is subject to the priority of appointment under section 5409.

4 Sec. 5415. (1) A person interested in the welfare of an
 5 individual for whom a conservator is appointed may file a petition
 6 in the appointing court for an order to do any of the following:

7 (a) Require bond or security or additional bond or security,
 8 or reduce bond.

9 (b) Require an accounting for the administration of the trust.

10 (c) Direct distribution.

11 (d) Remove the conservator and appoint a temporary or
 12 successor conservator.

13 (e) Grant other appropriate relief.

14 (2) A conservator may petition the appointing court for
 15 instructions concerning fiduciary responsibility. ~~Upon~~ ~~On~~ notice
 16 and hearing, the court may give appropriate instructions or make an
 17 appropriate order.

18 **(3) A petition for an order appointing a successor conservator**
 19 **under subsection (1) is subject to the priority of appointment**
 20 **under section 5409.**

21 Enacting section 1. This amendatory act takes effect 180 days
 22 after the date it is enacted into law.

23 Enacting section 2. This amendatory act does not take effect
 24 unless all of the following bills of the 102nd Legislature are
 25 enacted into law:

26 (a) House Bill No. 4909.

27 (b) House Bill No. 4910.

28 (c) House Bill No. 4911.

29 (d) House Bill No. 5047.



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SUBSTITUTE FOR
HOUSE BILL NO. 4911

A bill to amend 1998 PA 386, entitled "Estates and protected individuals code," by amending sections 5303, 5304, 5306, 5306a, 5312, and 5416 (MCL 700.5303, 700.5304, 700.5306, 700.5306a, 700.5312, and 700.5416), section 5303 as amended by 2017 PA 155, section 5306 as amended by 2019 PA 170, section 5306a as added by 2012 PA 173, and section 5312 as amended by 2000 PA 54.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 5303. (1) An individual in his or her own behalf, or any
2 person interested in the individual's welfare, may petition for a
3 finding of incapacity and appointment of a guardian. The petition
4 must contain specific facts about the individual's condition and
5 specific examples of the individual's recent conduct that



1 demonstrate the need for a guardian's appointment.

2 (2) Before a petition is filed under this section, the court
3 shall provide the person intending to file the petition with
4 written information that sets forth alternatives to appointment of
5 a full guardian, including, but not limited to, a limited guardian,
6 conservator, patient advocate designation, do-not-resuscitate
7 order, physician orders for scope of treatment form, or durable
8 power of attorney with or without limitations on purpose,
9 authority, or time period, and an explanation of each alternative.

10 (3) ~~Upon~~ **On** the filing of a petition under subsection (1), the
11 court shall set a date for **initial** hearing. ~~on the issue of~~
12 ~~incapacity.~~ Unless the allegedly incapacitated individual has legal
13 counsel of his or her own choice, the court shall appoint a
14 guardian ad litem ~~to represent the person in the proceeding.~~ **for the**
15 **initial hearing. The court may enter a final order on the petition**
16 **at the initial hearing if the court does not set a trial date under**
17 **subsection (4).**

18 (4) At the initial hearing under subsection (3), the court
19 shall set a trial date at least 7 days after the initial hearing
20 for the petition under subsection (1) if any of the following
21 apply:

22 (a) The guardian ad litem requests that the proceeding be set
23 for trial.

24 (b) The allegedly incapacitated individual or his or her legal
25 counsel requests the matter be set for trial.

26 (c) Any reason as justice requires.

27 (5) If the court sets a trial date at the initial hearing
28 under subsection (4), the court shall do both of the following:

29 (a) Enter a scheduling order to the extent necessary.



1 (b) Enter an order that provides, to the extent practicable,
 2 for the attendance of the allegedly incapacitated individual at the
 3 trial if the allegedly incapacitated individual wishes to attend.
 4 An order entered under this subdivision may order any interested
 5 person over whom the court has jurisdiction to facilitate
 6 attendance or move the hearing site under section 5304.

7 Sec. 5304. (1) If necessary, the court may order that an
 8 individual alleged to be incapacitated be examined by a physician
 9 or mental health professional appointed by the court who shall
 10 submit a report in writing to the court at least 5 days before the
 11 hearing set under section 5303. A report prepared as provided in
 12 this subsection ~~shall~~**must** not be made a part of the proceeding's
 13 public record, but ~~shall~~**must** be available to the court or an
 14 appellate court in which the proceeding is subject to review, to
 15 the alleged incapacitated individual, to the petitioner, to their
 16 respective legal counsels, and to other persons as the court
 17 directs. The report may be used as provided in the Michigan rules
 18 of evidence.

19 (2) The alleged incapacitated individual has the right to
 20 secure an independent evaluation, at his or her own expense or, if
 21 indigent, at the expense of ~~the~~**this** state. **An independent**
 22 **evaluation performed at the expense of this state must be performed**
 23 **by a physician or mental health professional.** Compensation for an
 24 independent evaluation at public expense ~~shall~~**must** be in an amount
 25 that, based ~~upon~~**on** time and expense, the court approves as
 26 reasonable.

27 (3) A report prepared under this section ~~shall~~**must** contain
 28 all of the following:

29 (a) A detailed description of the individual's ~~physical~~**or**



1 ~~psychological infirmities.~~**cognitive and functional abilities and**
 2 **limitations.**

3 (b) An explanation of how and to what extent ~~each infirmity~~
 4 ~~interferes with the individual's ability to receive or evaluate~~
 5 ~~information in making decisions.~~**the individual is able to receive,**
 6 **understand, participate in, and evaluate information in making**
 7 **decisions.**

8 (c) ~~A~~**If the report is being completed by a physician or**
 9 **mental health professional, a listing of all medications the**
 10 **individual is receiving, the dosage of each medication, and a**
 11 **description of the effects each medication has ~~upon~~ on the**
 12 **individual's behavior.**

13 (d) ~~A~~**If the report is being completed by a physician or**
 14 **mental health professional, a prognosis for improvement in the**
 15 **individual's condition, including whether it is a permanent or**
 16 **temporary condition, and a recommendation for the most appropriate**
 17 **rehabilitation plan.**

18 (e) The signatures **and printed names** of all individuals who
 19 performed the evaluations, ~~upon which the report is based.~~**where**
 20 **they are employed, the date of examination on which the report is**
 21 **based, the length of time they have known the individual, and the**
 22 **length of time they met with the individual.**

23 (f) Whether the individual has the capacity to assign or
 24 delegate responsibilities to ensure his or her well-being.

25 (g) Whether the individual has executed a document directing
 26 care or naming an agent to act on his or her behalf, including, but
 27 not limited to, a power of attorney, patient advocate designation,
 28 or do-not-resuscitate order.

29 (h) If the report is being completed by a visitor, it must



1 also include, at a minimum, an assessment of the existence of
 2 current formal and informal supports, the ability of supportive
 3 services and benefits to meet any unmet needs, the identification
 4 of any existing concerns regarding the individual's well-being, and
 5 the individual's ability to address those existing concerns.

6 (4) If the court finds that the report prepared under this
 7 section does not substantially comply with the requirements of this
 8 section, the court shall not consider the evaluation.

9 (5) ~~(4)~~—The individual alleged to be incapacitated is entitled
 10 to be present at the hearing in person, and to see or hear all
 11 evidence bearing ~~upon~~ on the individual's condition. If the
 12 individual wishes to be present at the hearing, all practical steps
 13 ~~shall~~ must be taken to ensure his or her presence, including, if
 14 necessary, moving the hearing site.

15 (6) ~~(5)~~—The individual **alleged to be incapacitated** is entitled
 16 to be represented by legal counsel, to present evidence, to cross-
 17 examine witnesses, including the court-appointed physician or
 18 mental health professional and the visitor, and to trial by jury.

19 (7) ~~(6)~~—The issue of incapacity may be determined at a closed
 20 hearing without a jury if requested by the individual alleged to be
 21 incapacitated or that individual's legal counsel.

22 Sec. 5306. (1) The court may appoint a guardian if the court
 23 finds by clear and convincing evidence both that the individual for
 24 whom a guardian is sought is an incapacitated individual and that
 25 the appointment is necessary as a means of providing continuing
 26 care and supervision of the incapacitated individual, with each
 27 finding supported separately on the record. ~~Alternately, the court~~
 28 ~~may dismiss the proceeding or enter another appropriate order.~~

29 (2) **The court shall dismiss the proceeding under subsection**



1 (1) if the court cannot be shown both of the following by clear and
2 convincing evidence:

3 (a) That the individual for whom a guardian is sought is an
4 incapacitated individual.

5 (b) That the appointment is necessary as a means of providing
6 continuing care and supervision of the individual.

7 (3) At any time during the proceedings under subsection (1),
8 the court may stay the guardianship proceedings for a reasonable
9 period of time, based on the needs of the individual, to allow the
10 individual the opportunity to explore the alternatives to
11 appointment of a guardian. If the individual properly names a
12 patient advocate under a patient advocate designation, an attorney
13 in fact under a power of attorney, or a representative payee under
14 a governmental benefit during the stay under this subsection and
15 provides evidence of naming the patient advocate, attorney in fact,
16 or representative payee to the court, the court may dismiss the
17 petition with or without a hearing. This subsection does not
18 prevent the court from ordering a temporary guardianship under
19 section 5312a if the temporary guardianship is limited in scope and
20 the court explicitly finds that the individual has the capacity to
21 execute a power of attorney, patient advocate designation, or
22 designate a representative payee.

23 (4) ~~(2)~~—The court shall grant a guardian only those powers and
24 only for that period of time as is necessary to provide for the
25 demonstrated need of the incapacitated individual. The court shall
26 design the guardianship to encourage the development of maximum
27 self-reliance and independence in the individual. If the court is
28 aware that an individual has executed a patient advocate
29 designation under section 5506, the court shall not grant a



1 guardian any of the same powers that are held by the patient
 2 advocate. A court order establishing a guardianship shall specify
 3 any limitations on the guardian's powers and any time limits on the
 4 guardianship.

5 (5) ~~(3)~~—If the court finds by clear and convincing evidence
 6 that an individual is incapacitated and lacks the capacity to do
 7 some, but not all, of the tasks necessary to care for himself or
 8 herself, the court may appoint a limited guardian to provide
 9 guardianship services to the individual, but the court shall not
 10 appoint a full guardian.

11 (6) ~~(4)~~—If the court finds by clear and convincing evidence
 12 that the individual is incapacitated and is totally without
 13 capacity to care for himself or herself, the court shall specify
 14 that finding of fact in an order and may appoint a full guardian.

15 (7) ~~(5)~~—If an individual executed a patient advocate
 16 designation under section 5506 before the time the court determines
 17 that he or she became a legally incapacitated individual, a
 18 guardian does not have and shall not exercise the power or duty of
 19 making medical or mental health treatment decisions that the
 20 patient advocate is designated to make. If, however, a petition for
 21 guardianship or for modification under section 5310 alleges and the
 22 court finds that the patient advocate designation was not executed
 23 in compliance with section 5506, that the patient advocate is not
 24 complying with the terms of the designation or with the applicable
 25 provisions of sections 5506 to 5515, or that the patient advocate
 26 is not acting consistent with the ward's best interests, the court
 27 may modify the guardianship's terms to grant those powers to the
 28 guardian.

29 (8) ~~(6)~~—If the court finds by clear and convincing evidence



1 that the individual is incapacitated, that the person that has the
 2 care and custody of the incapacitated individual denied another
 3 person access to the incapacitated individual, and that the
 4 incapacitated individual desires contact with the other person or
 5 that contact with the other person is in the incapacitated
 6 individual's best interest, the court may appoint a limited
 7 guardian to supervise access with the other person.

8 Sec. 5306a. (1) An individual for whom a guardian is sought or
 9 has been appointed under section 5306 has all of the following
 10 rights:

11 (a) To object to the appointment of a successor guardian by
 12 will or other writing, as provided in section 5301.

13 (b) To have the guardianship proceeding commenced and
 14 conducted in the place where the individual resides or is present
 15 or, if the individual is admitted to an institution by a court, in
 16 the county in which the court is located, as provided in section
 17 5302.

18 (c) To petition on his or her own behalf for the appointment
 19 of a guardian, as provided in section 5303.

20 (d) To have legal counsel of his or her own choice represent
 21 him or her on ~~the~~ **either of the following:**

22 **(i) The** petition to appoint a guardian, as provided in sections
 23 5303, 5304, and 5305.

24 **(ii) If applicable, a professional guardian's petition to**
 25 **permanently remove the individual from the individual's permanent**
 26 **residence, as provided in section 5314a.**

27 (e) If he or she is not represented by legal counsel, to the
 28 appointment of a guardian ad litem, ~~to represent the individual on~~
 29 ~~the petition to appoint a guardian,~~ as provided in section 5303.



1 (f) To an independent evaluation of his or her capacity by a
2 physician or mental health professional, at public expense if he or
3 she is indigent, as provided in section 5304.

4 (g) To be present at the hearing on the petition to appoint a
5 guardian and to have all practical steps taken to ensure this,
6 including, if necessary, moving the hearing site, as provided by
7 section 5304.

8 (h) To see or hear all the evidence presented in the hearing
9 on the petition to appoint a guardian, as provided in section 5304.

10 (i) To present evidence and cross-examine witnesses in the
11 hearing on the petition to appoint a guardian, as provided in
12 section 5304.

13 (j) To a trial by jury on the petition to appoint a guardian,
14 as provided in section 5304.

15 (k) To a closed hearing on the petition to appoint a guardian,
16 as provided in section 5304.

17 (l) If a guardian ad litem is appointed, to be personally
18 visited by the guardian ad litem, as provided in section 5305.

19 (m) If a guardian ad litem is appointed, to an explanation by
20 the guardian ad litem of the nature, purpose, and legal effects of
21 a guardian's appointment, as provided in section 5305.

22 (n) If a guardian ad litem is appointed, to an explanation by
23 the guardian ad litem of the individual's rights in the hearing
24 procedure, as provided in section 5305.

25 (o) If a guardian ad litem is appointed, to be informed by the
26 guardian ad litem of the right to contest the petition, to request
27 limits on the guardian's powers, to object to a particular person
28 being appointed guardian, to be present at the hearing, to be
29 represented by legal counsel, and to have legal counsel appointed



1 if the individual is unable to afford legal counsel, as provided in
2 section 5305.

3 (p) To be informed of the name of each person known to be
4 seeking appointment as guardian, including, if a guardian ad litem
5 is appointed, to be informed of the names by the guardian ad litem
6 as provided in section 5305.

7 (q) To require that proof of incapacity and the need for a
8 guardian be proven by clear and convincing evidence, as provided in
9 section 5306.

10 (r) To the limitation of the powers and period of time of a
11 guardianship to only the amount and time that is necessary, as
12 provided in section 5306.

13 (s) To a guardianship designed to encourage the development of
14 maximum self-reliance and independence as provided in section 5306.

15 (t) To prevent the grant of powers to a guardian if those
16 powers are already held by a valid patient advocate, as provided in
17 section 5306.

18 (u) To periodic review of the guardianship by the court,
19 including the right to a hearing and the appointment of an attorney
20 if issues arise upon the review of the guardianship, as provided in
21 section 5309.

22 (v) To, at any time, seek modification or termination of the
23 guardianship by informal letter to the judge, as provided in
24 section 5310.

25 (w) To a hearing ~~within not later than~~ 28 days ~~of after~~
26 requesting a review, modification, or termination of the
27 guardianship, as provided in section 5310.

28 (x) To the same rights on a petition for modification or
29 termination of the guardianship including the appointment of a



1 visitor as apply to a petition for appointment of a guardian, as
2 provided in section 5310.

3 (y) To personal notice of a petition for appointment or
4 removal of a guardian, as provided in section 5311.

5 (z) To written notice of the nature, purpose, and legal
6 effects of the appointment of a guardian, as provided in section
7 5311.

8 (aa) To choose the person who will serve as guardian, if the
9 chosen person is suitable and willing to serve, as provided in
10 section 5313.

11 (bb) To consult with the guardian about major decisions
12 affecting the individual, if meaningful conversation is possible,
13 as provided in section 5314.

14 (cc) To ~~quarterly~~ visits by the guardian, as provided in
15 section 5314.

16 (dd) ~~To have the guardian notify the court within 14 days of a~~
17 ~~change in the individual's residence, as provided in section 5314.~~
18 **If the guardian is not a professional guardian, to have the**
19 **guardian notify the court not later than 14 days after a change in**
20 **the individual's permanent residence, as provided in section 5314a.**

21 (ee) **If the guardian is a professional guardian, to have the**
22 **court consider a separate petition, as provided in section 5314a,**
23 **if a professional guardian seeks to move the individual to a new**
24 **permanent residence.**

25 (ff) ~~(ee)~~ To have the guardian secure services to restore the
26 individual to the best possible state of mental and physical well-
27 being so that the individual can return to self-management at the
28 earliest possible time, as provided in section 5314.

29 (gg) ~~(ff)~~ To have the guardian take reasonable care of the



1 individual's clothing, furniture, vehicles, and other personal
2 effects, as provided in section 5314.

3 (2) A guardian ad litem shall inform the ward in writing of
4 his or her rights enumerated in this section. The state court
5 administrative office and the ~~office of services to the aging~~
6 ~~created in section 5 of the older Michiganians act, 1981 PA 180,~~
7 ~~MCL 400.585,~~ **aging and adult services agency created under**
8 **Executive Reorganization Order No. 2015-1, MCL 400.227,** shall
9 promulgate a form to be used to give the written notice under this
10 section, which ~~shall~~ **must** include space for the court to include
11 information on how to contact the court or other relevant personnel
12 with respect to the rights enumerated in this section.

13 Sec. 5312. ~~(1) If an individual does not have a guardian, an~~
14 ~~emergency exists, and no other person appears to have authority to~~
15 ~~act in the circumstances, the court shall provide notice to the~~
16 ~~individual alleged to be incapacitated and shall hold a hearing.~~
17 ~~Upon a showing that the individual is an incapacitated individual,~~
18 ~~the court may exercise the power of a guardian, or appoint a~~
19 ~~temporary guardian with only the powers and for the period of time~~
20 ~~as ordered by the court. A hearing with notice as provided in~~
21 ~~section 5311 shall be held within 28 days after the court has acted~~
22 ~~under this subsection.~~

23 ~~(2) If an appointed guardian is not effectively performing the~~
24 ~~guardian's duties and the court further finds that the legally~~
25 ~~incapacitated individual's welfare requires immediate action, the~~
26 ~~court may appoint, with or without notice, a temporary guardian for~~
27 ~~the legally incapacitated individual for a specified period not to~~
28 ~~exceed 6 months.~~

29 ~~(3) A temporary guardian is entitled to the care and custody~~



1 ~~of the ward, and the authority of a permanent guardian previously~~
 2 ~~appointed by the court is suspended as long as a temporary guardian~~
 3 ~~has authority. A temporary guardian may be removed at any time. A~~
 4 ~~temporary guardian shall make reports as the court requires. In~~
 5 ~~other respects, the provisions of this act concerning guardians~~
 6 ~~apply to temporary guardians.~~

7 (1) An interested person may file a petition to appoint an
 8 emergency guardian for an allegedly incapacitated individual under
 9 this subsection. If a petition is filed under this subsection, the
 10 petitioner shall give notice, except as otherwise provided in
 11 subsection (2), as provided by section 5311, and the court shall
 12 appoint a guardian ad litem under section 5305. The court shall
 13 conduct a hearing on a petition under this subsection as soon as
 14 possible and not later than 7 days after the court receives the
 15 petition. Except as otherwise provided in subsection (2), following
 16 the hearing under this subsection, the court may appoint an
 17 emergency guardian if the court finds by a preponderance of the
 18 evidence that all of the following apply:

19 (a) An emergency exists that is likely to result in
 20 substantial harm to the allegedly incapacitated individual's
 21 physical health, safety, or welfare.

22 (b) No other person appears to have authority to act in the
 23 circumstances.

24 (c) There is a basis that both the individual is an
 25 incapacitated individual and appointment of an emergency guardian
 26 is necessary as a means of providing continuing care and
 27 supervision of the individual.

28 (2) On the filing of a petition to appoint an emergency
 29 guardian under subsection (1), the court may appoint an emergency



1 guardian for an allegedly incapacitated individual without notice
2 to the allegedly incapacitated individual only if the court
3 determines from an affidavit showing, by clear and convincing
4 evidence, that all of the following apply:

5 (a) An emergency exists that is likely to result in imminent
6 and substantial harm to the allegedly incapacitated individual's
7 physical health, safety, or welfare.

8 (b) No other person appears to have authority to act in the
9 circumstances.

10 (c) There is a basis that both the individual is an
11 incapacitated individual and appointment of an emergency guardian
12 is necessary as a means of providing continuing care and
13 supervision of the individual.

14 (3) If the court appoints an emergency guardian under
15 subsection (2), the court shall do all of the following:

16 (a) Appoint a guardian ad litem for the allegedly
17 incapacitated individual under section 5305.

18 (b) Not later than 48 hours after the appointment of an
19 emergency guardian under this subsection, order the petitioner to
20 give notice by personal service of the appointment to the allegedly
21 incapacitated individual and service as required by court rule to
22 all interested persons.

23 (c) Not later than 7 days after the appointment of an
24 emergency guardian under this subsection, hold a hearing on whether
25 the conditions for the appointment of the emergency guardian exist.

26 (4) If the court finds conditions exist for the appointment of
27 the emergency guardian at a hearing under this section, and the
28 individual wishes to contest the appointment, the court must set a
29 date for a hearing and enter an order consistent with section 5306.



1 (5) An order appointing an emergency guardian under this
 2 section expires 28 days after the appointment. However, the court
 3 may extend an order appointing an emergency guardian under this
 4 section once for an additional 28 days if the court finds by a
 5 preponderance of the evidence, upon an affidavit by the appointed
 6 emergency guardian or following a hearing set at the discretion of
 7 the court, that the conditions that led to the appointment of the
 8 emergency guardian still exist.

9 (6) An emergency guardian may exercise only the powers
 10 specified by the court.

11 (7) The court may remove an emergency guardian at any time.

12 (8) An appointment of an emergency guardian under this section
 13 is not a determination that a basis exists for an appointment of a
 14 guardian under section 5306(1).

15 Sec. 5416. (1) In relation to powers conferred by this part or
 16 implicit in the title acquired by virtue of the proceeding, a
 17 conservator shall act as a fiduciary and observe the standard of
 18 care applicable to a trustee.

19 (2) A conservator for an individual that is subject to a
 20 conservatorship for a reason other than minority has the duty to
 21 take all steps within the scope of the conservator's authority to
 22 ensure the individual attends any hearing concerning the
 23 individual's conservatorship if the individual wishes to attend the
 24 hearing in a manner as provided in section 5406.

25 Enacting section 1. This amendatory act takes effect 180 days
 26 after the date it is enacted into law.

27 Enacting section 2. This amendatory act does not take effect
 28 unless all of the following bills of the 102nd Legislature are
 29 enacted into law:



- 1 (a) House Bill No. 4909.
- 2 (b) House Bill No. 4910.
- 3 (c) House Bill No. 4912.
- 4 (d) House Bill No. 5047.



DAW

Final Page
H01151'23 (H-1) Draft 1

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DRAFT 1
SUBSTITUTE FOR
HOUSE BILL NO. 5047

A bill to amend 1998 PA 386, entitled
"Estates and protected individuals code,"
(MCL 700.1101 to 700.8206) by amending the title and by adding part
5A of article V.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 TITLE
2 An act to codify, revise, consolidate, and classify aspects of
3 the law relating to wills and intestacy, relating to the
4 administration and distribution of estates of certain individuals,
5 relating to trusts, and relating to the affairs of certain
6 individuals under legal incapacity; to provide for the powers and
7 procedures of the court that has jurisdiction over these matters;
8 to provide for the validity and effect of certain transfers,



DAW

H02674'23 (H-1) Draft 1

s_04908_10062023

1 contracts, and deposits that relate to death; to provide procedures
 2 to facilitate enforcement of certain trusts; **to establish the**
 3 **office of state guardian;** and to repeal acts and parts of acts.

4 ARTICLE V

5 PART 5A

6 OFFICE OF STATE GUARDIAN

7 Sec. 5531. As used in this part:

8 (a) "Adult protective services" means the office, division, or
 9 unit of the department that is charged with investigation of abuse,
 10 neglect, or exploitation of vulnerable individuals under the social
 11 welfare act, 1939 PA 280, MCL 400.1 to 400.119b.

12 (b) "Attorney general" means the department of attorney
 13 general.

14 (c) "Board" means the office of state guardian board created
 15 in section 5532.

16 (d) "Department" means the department of health and human
 17 services.

18 (e) "Executive director" means the executive director of the
 19 board appointed by the governor under section 5532.

20 (f) "Indigent" means an individual who is unable, without
 21 substantial financial hardship to the individual or to the
 22 individual's dependents, to pay a competent, qualified professional
 23 guardian on the individual's own. Substantial financial hardship is
 24 rebuttably presumed if the ward receives personal public
 25 assistance, including under the food assistance program, temporary
 26 assistance for needy families, Medicaid, or disability insurance,
 27 resides in public housing, or earns an income less than 140% of the
 28 federal poverty guideline.

29 Sec. 5532. (1) The office of state guardian board is created



1 as an autonomous entity within the department. The board shall
2 exercise its powers, duties, functions, and responsibilities under
3 this part independently of the department, except that the
4 procurement and related management functions of the board must be
5 performed under the direction and supervision of the department

6 (2) The board consists of the following members, appointed by
7 the governor:

8 (a) One member from a list of 3 or more individuals
9 recommended by the attorney general.

10 (b) One member from a list of 3 or more individuals
11 recommended by the senate majority leader.

12 (c) One member from a list of 3 or more individuals
13 recommended by the speaker of the house of representatives.

14 (d) One member from a list of 3 or more individuals
15 recommended by the chief justice of the supreme court.

16 (e) One member from a list of 3 or more individuals
17 recommended by the agency that implements and administers the
18 program for the protection and advocacy of the rights of persons
19 with developmental disabilities under section 931 of the mental
20 health code, 1974 PA 258, MCL 330.1931.

21 (f) One member who is a probate judge.

22 (g) One member who is a probate court register.

23 (h) One member from a list of 3 or more individuals
24 recommended by the department's behavioral physical health and
25 aging administration representing the interests of vulnerable
26 adults as that term is defined in section 145m of the Michigan
27 penal code, 1931 PA 328, MCL 750.145m.

28 (i) One member from adult protective services.

29 (j) One member who is a professional guardian.



1 (k) One member who is a professional conservator.

2 (l) One member who is a licensed master's social worker as that
3 term is defined in section 18501 of the public health code, 1978 PA
4 368, MCL 333.18501.

5 (m) One member who is recommended by the state long-term care
6 ombudsman established under section 6 of the older Michiganians
7 act, 1981 PA 180, MCL 400.586.

8 (n) One member who is recommended by a community mental health
9 authority as that term is defined in section 100a of the mental
10 health code, 1974 PA 258, MCL 330.1100a, to represent the interests
11 of community mental health services programs as that term is
12 defined in section 100a of the mental health code, 1974 PA 258, MCL
13 330.1100a.

14 (3) The governor shall appoint the executive director of the
15 board to a 4-year term. The executive director is a voting member
16 of the board. The executive direction shall do all of the
17 following:

18 (a) Maintain the records of the board.

19 (b) Employ, supervise, and retain staff, with the approval of
20 the board.

21 (c) Act as an interested party, on appearance, in any
22 guardianship or conservatorship matter.

23 (d) Issue licenses under section 5534.

24 (e) Supervise investigations and disciplinary proceedings.

25 (f) Coordinate meetings and activities of the board and act as
26 an ex-officio.

27 (g) Other duties as assigned by the board.

28 (4) The governor shall appoint the first members to the board
29 not later than 180 days after the effective date of the amendatory



1 act that added this part.

2 (5) Members of the board shall serve for terms of 4 years or
3 until a successor is appointed, whichever is later, except that of
4 the members first appointed, the members provided for in subsection
5 (2) (a) to (e) shall serve for 2 years, the members provided for in
6 subsection (2) (f) to (j) shall serve for 3 years, and the members
7 provided for in subsection (2) (k) to (n) shall serve for 4 years.

8 (6) If a vacancy occurs on the board, the governor shall make
9 an appointment for the unexpired term in the same manner as the
10 original appointment.

11 (7) The governor may remove a member of the board for
12 incompetence, dereliction of duty, malfeasance, misfeasance, or
13 nonfeasance in office, or any other good cause.

14 (8) The executive director shall call the first meeting of the
15 board. At the first meeting, the board shall elect from among its
16 members a chairperson and other officers as it considers necessary
17 or appropriate. After the first meeting, the board shall meet at
18 least quarterly.

19 (9) A majority of the members of the board constitute a quorum
20 for the transaction of business at a meeting of the board. A
21 majority of the members present and serving are required for
22 official action of the board.

23 (10) The business that the board may perform must be conducted
24 at a public meeting of the board held in compliance with the open
25 meetings act, 1976 PA 267, MCL 15.261 to 15.275.

26 (11) A writing prepared, owned, used, in the possession of, or
27 retained by the board in the performance of an official function is
28 exempt from disclosure under section 13(1) (d) of the freedom of
29 information act, 1976 PA 442, MCL 15.243.



1 (12) Members of the board shall serve without compensation.
2 However, members of the board may be reimbursed for their actual
3 and necessary expenses incurred in the performance of their
4 official duties as members of the board.

5 Sec. 5533. The board shall do all of the following:

6 (a) Set minimum standards for licensure of professional
7 guardians and professional conservators.

8 (b) Ensure that professional guardians and professional
9 conservators maintain compliance with minimum standards of
10 practice.

11 (c) Adopt a written process for receiving or initiating
12 complaints against guardians and conservators. The board may
13 initiate complaints.

14 (d) Adopt a process for receipt of requests for technical
15 assistance from guardians and conservators.

16 (e) Adopt a process to refer appropriate complaints regarding
17 guardians and conservators to the attorney general or another
18 investigatory agency, including, but not limited to, adult
19 protective services or a law enforcement agency, for investigation.

20 (f) Adopt a process to refer wards or interested persons to an
21 agency that provides legal representation or advocacy for wards.

22 (g) Establish rules concerning the discipline of guardians and
23 conservators who fail to meet licensure standards, breach their
24 fiduciary duties, or otherwise engage in misconduct.

25 (h) Adopt a process for the executive director, on behalf of
26 the board, to contract with professional guardians to provide
27 guardianship services to eligible indigent wards or prospective
28 wards and maintain minimum standards for contracting professional
29 guardians.



1 (i) Collect uniform and consistent data regarding service
2 delivery that must be made available, on a quarterly basis, to the
3 legislature and the supreme court in a format that is not
4 identifiable by individual ward or protected individual to protect
5 confidentiality. The data under this subdivision must include all
6 of the following:

7 (i) The number of wards under a guardianship.

8 (ii) The number of protected individuals under a
9 conservatorship.

10 (iii) The number of wards under a partial guardianship.

11 (iv) The number of wards under a full guardianship.

12 (v) The number of guardians and conservators licensed under
13 this part.

14 (vi) For each professional guardian, the number of wards to
15 whom the professional guardian was appointed.

16 (vii) For each professional conservator, the number of
17 protected individuals to whom the professional conservator was
18 appointed.

19 (j) Consult with and assist other public or private agencies
20 or organizations to implement the intent of this part.

21 (k) Make recommendations to the legislature and the supreme
22 court on matters relating to the board's responsibilities under
23 this part.

24 (l) Conduct contested case hearings under the administrative
25 procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, as
26 required to administer licensing and discipline under this part.

27 (m) Modify any minimum requirement under this part with the
28 approval of the board.

29 (n) Promulgate any other rules that are necessary and



1 appropriate to enable the board to fulfill its role and efficiently
2 administer this part.

3 Sec. 5534. (1) A person shall not serve as a professional
4 guardian or professional conservator unless the person is issued a
5 license under this section by the executive director.

6 (2) The executive director shall not issue a professional
7 guardian license or professional conservator license unless the
8 applicant meets all of the following conditions:

9 (a) The applicant holds a certification from the National
10 Center for Guardianship Certification.

11 (b) The applicant submits a criminal background check to the
12 department of state police.

13 (c) The applicant has not been found liable in a civil action
14 that involved fraud, misrepresentation, material omission,
15 misappropriation, theft, exploitation, abuse, neglect, sexual
16 assault, or conversion.

17 (3) A professional guardian or professional conservator who is
18 an individual shall report to the executive director not later than
19 30 days after any of the following events have occurred:

20 (a) Conviction of a felony.

21 (b) A substantiated case on the central registry as those
22 terms are defined in section 2 of the child protection law, 1975 PA
23 238, MCL 722.622.

24 (c) Conviction of a misdemeanor related to child abuse or
25 neglect, vulnerable adult abuse or neglect, controlled substances,
26 criminal sexual conduct, domestic violence, stalking, embezzlement,
27 or crimes of theft or dishonesty.

28 (d) Filing of bankruptcy.

29 (e) Entry of a personal protection order against the



1 professional guardian or professional conservator.

2 (f) Entry of an order from the probate court to surcharge the
3 professional guardian's or the professional conservator's bond or
4 entry of a judgment against the professional guardian or
5 professional conservator in any court.

6 (g) Finding by the probate court that the professional
7 guardian or professional conservator breached the professional
8 guardian's or the professional conservator's fiduciary duties.

9 Sec. 5535. (1) The executive director shall contract with
10 professional guardians to provide guardianship services for an
11 indigent ward who is any of the following:

12 (a) At significant risk of harm from abuse, neglect,
13 exploitation, abandonment, self-harm, or self-neglect.

14 (b) In imminent danger of loss of, or significant reduction
15 in, public services that are necessary for the ward to live
16 successfully in the most integrated and least restrictive
17 environment that is appropriate in light of the ward's needs and
18 values.

19 (c) Homeless or at risk of homelessness.

20 (2) Except as otherwise provided in this subsection, a
21 professional guardian that contracts with the executive director
22 under this section shall not serve as a professional guardian for
23 more than 26 wards total, or for a professional guardian that is an
24 organization, not more than 36 wards for each employee who holds a
25 license issued under section 5534, including those wards for whom
26 guardianship services are not provided for under a contract in
27 accordance with this section. The executive director may allow a
28 professional guardian to serve as guardian for more than 30 wards
29 if all of the following conditions are met:



1 (a) The professional guardian requests that a guardianship is
2 necessary in an emergency or unusual circumstance.

3 (b) The professional guardian does not serve as guardian for
4 more than 3 consecutive months or more than 4 months in 12 months.

5 (3) The executive director shall develop a fee schedule for
6 the payment of contracting professional guardians under this
7 section. The fee schedule must include all of the following:

8 (a) Case-weighting guidelines that provide for greater
9 compensation for the first 3 months of a new guardianship.

10 (b) Higher compensation if the case is complex at the time of
11 appointment.

12 (c) Allow for adjustment during the guardianship if the
13 complexity of the case changes.

14 Sec. 5536. (1) The executive director shall establish
15 procedures to do all of the following:

16 (a) Review complaints against guardians and conservators to
17 determine whether the guardian or conservator has failed to meet
18 licensure standards, breached the guardian's or the conservator's
19 fiduciary duties, or otherwise engaged in misconduct.

20 (b) Obtain the information necessary to investigate a
21 complaint by filing an appearance as an interested party in the
22 relevant court proceeding.

23 (c) Respond to complaints, conduct investigations and
24 hearings, and take administrative action consistent with this part.

25 (d) Make findings as to whether a guardian or conservator has,
26 or has not, failed to meet licensure standards, breached the
27 guardian's or the conservator's fiduciary duties, or otherwise
28 engaged in misconduct.

29 (e) Issue appropriate disciplinary orders when there are



1 findings of wrongdoing and dismiss complaints without merit.

2 (f) Refer appropriate complaints to the attorney general or
3 another law enforcement agency.

4 (2) If the executive director determines that a nonpublic
5 court file exists and that it is relevant to a pending complaint,
6 the executive director may request that the court release the
7 nonpublic court file to the executive director. On request of the
8 executive director, the court shall release the nonpublic court
9 file to the executive director.

10 (3) The executive director may request a law enforcement
11 officer to provide all available information about a given
12 complaint filed against a professional guardian or professional
13 conservator after a law enforcement officer has completed an
14 investigation regarding that complaint against the professional
15 guardian or professional conservator. An investigation is
16 considered completed after a prosecutor issues or declines to issue
17 charges. A law enforcement officer may redact information if needed
18 to protect the safety of witnesses or preserve the integrity of an
19 investigation.

20 (4) If the executive director finds that a professional
21 guardian or professional conservator fails to meet the conditions
22 under section 5534, after an opportunity for a hearing under the
23 administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to
24 24.328, the executive director shall reduce the findings and
25 decision to writing and shall issue and cause to be served on the
26 professional guardian or professional conservator charged with the
27 failure a copy of the findings and an order requiring the person to
28 cease and desist from the violation. In addition, the executive
29 director may order any of the following:



1 (a) Revocation of the license of the professional guardian or
2 professional conservator.

3 (b) The suspension of the professional guardian or
4 professional conservator, subject to the following:

5 (i) The suspension must not be less than 30 days, with
6 conditions relevant to the failure to meet the conditions under
7 section 5534.

8 (ii) If the suspension exceeds 179 days, the suspension must
9 remain until further order of the executive director.

10 (c) Reprimand with conditions relevant to the failure to meet
11 the conditions under section 5534.

12 (d) Probation.

13 (e) Restitution.

14 (5) If the executive director determines or has reasonable
15 cause to suspect that a ward has been or is being abused,
16 neglected, or exploited as a result of a filed complaint or during
17 the course of an investigation of a complaint, the executive
18 director shall immediately report the determination or suspicion to
19 adult protective services.

20 (6) The executive director shall develop and distribute
21 educational resources. The educational resources may be, but are
22 not limited to, written materials, web materials, videos, and in-
23 person trainings. The education resources must include, but are not
24 limited to, the following:

25 (a) Training materials for nonprofessional guardians and
26 nonprofessional conservators, including, but not limited to:

27 (i) Training on duties as a guardian.

28 (ii) Training on duties as a conservator.

29 (iii) Training on maximizing independence and autonomy.



1 (b) Resources on alternatives to guardianship, including, but
2 not limited to, the following:

3 (i) Supported decision making.

4 (ii) Power of attorney.

5 (iii) Designations of patient advocate.

6 (iv) Representative payees.

7 (c) Resources on supports and services, including, but not
8 limited to, the following:

9 (i) Home and community-based services.

10 (ii) Area agencies on aging.

11 (iii) Centers for independent living.

12 (iv) Community mental health.

13 (d) Resources on caregiver support.

14 (e) Resources on common issues in guardianship and
15 conservatorship, including, but not limited to, the following:

16 (i) Dementia.

17 (ii) Mental illness.

18 (iii) Traumatic brain injury.

19 (iv) Developmental disabilities.

20 (v) Substance use disorders.

21 Sec. 5537. The attorney general may do any of the following:

22 (a) Subpoena documents from any probate court, guardian,
23 conservator, or other fiduciary.

24 (b) Intervene on behalf of the public and participate as an
25 interested party, at any stage of the proceeding, in any guardian,
26 conservator, or protective proceeding.

27 (c) Investigate any complaint referred by the executive
28 director and make recommendations to the executive director and law



1 enforcement about the complaint.

2 Sec. 5538. (1) The office of state guardian fund is created
3 within the state treasury.

4 (2) The state treasurer may receive money or other assets from
5 any source for deposit into the fund. The state treasurer shall
6 direct the investment of the fund. The state treasurer shall credit
7 to the fund interest and earnings from fund investments.

8 (3) Money in the fund at the close of the fiscal year remains
9 in the fund and does not lapse to the general fund.

10 (4) The department is the administrator of the fund for
11 auditing purposes.

12 (5) The department shall expend money from the fund, on
13 appropriation, to reimburse the attorney general for expenses
14 incurred related to investigations under and enforcement of this
15 part.

16 Enacting section 1. This amendatory act does not take effect
17 unless all of the following bills of the 102nd Legislature are
18 enacted into law:

19 (a) House Bill No. 4909.

20 (b) House Bill No. 4910.

21 (c) House Bill No. 4911.

22 (d) House Bill No. 4912.



ATTACHMENT 3

Tax Nugget

To: Probate and Estate Planning Council

From: J.V. Anderton on behalf of the Tax Committee

RE: October 2023 Tax Nugget

This month's Tax Nugget is a reminder that there is still an estate tax levied in 12 states plus Washington DC (some of which are de-coupled from the federal estate tax exemption amount), and an inheritance tax on the books in six states. Lists for both are below (and yes, Maryland does make appearance on both lists). So, if you have a client with assets or intended beneficiaries in these locales, you might want to make a connection with a practitioner in that jurisdiction.

States with separate estate tax: Connecticut, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington

States with inheritance tax: Iowa, Kentucky, Maryland, Nebraska, New Jersey, Pennsylvania

ATTACHMENT 4

MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: Marguerite Munson Lentz
Re: September 8, 2023, Roundtable Discussion of the Doctrine of Merger and MCT Section 7603(3)
Dated: October 4, 2023

This memorandum is a response to the memorandum of James P. Spica dated September 9, 2023.

Fact Scenario

Spouse 1 and Spouse 2 are married to each other and create a joint trust. The joint trust provides that while both settlors are alive, either settlor can revoke the joint trust, and upon revocation, each spouse receives that spouse's contributions back. Upon the death of one spouse ("deceased spouse" or "DS"), the terms of the joint trust provide that the trust continues for the surviving spouse ("SS"), SS is the sole trustee, SS can withdraw all of the assets during SS's life, and SS can revoke the trust. If SS does not revoke the trust, any assets at SS's death that have not been withdrawn are distributable to the children, *per stirpes*.

DS is the only spouse that contributed assets to the joint trust. DS is the trustee until DS's death.

Mr. Spica's Argument

Mr. Spica asserts that at DS's death, since SS is the trustee and has a currently exercisable power of withdrawal, that SS as trustee only owes a duty to SS and therefore there should be a merger of interest. The effect of this merger is that the trust ceases to exist, and the assets must be probated as part of DS's estate.

Mr. Spica's argument appears to rest on the following:

- 1) The common law doctrine of merger has been obliterated for a revocable trust with respect to the settlor by statute, but has not been obliterated for a trust for a beneficiary who is the sole trustee and also has a currently exercisable power of withdrawal over the entire trust.
- 2) A person cannot be a beneficiary with rights under a trust if the trustee owes no duty to that beneficiary. Since the trustee's duties are solely owed to the beneficiary with the presently exercisable power of withdrawal under MCL 700.7603(3), no other beneficiary has any rights under the trust.
- 3) The merger doctrine would cause the joint trust to fail at the time of DS's death, and without an existing trust, the assets fail to avoid probate.

Possible Effects of Mr. Spica's Argument

One kind of a marital trust gives SS all of the income from the trust and provides that SS has a general power over the assets of the marital trust. IRC 2056(b)(5). Many of such trusts named the SS as the sole trustee of the marital trust. Those kinds of trust have been prepared for decades. It seems imprudent to suggest now that such a marital trust terminated at the moment of DS's death and should have been

included in DS's probate estate. Depending on the terms of DS's Will, the marital deduction may thereby be lost.¹

Many couples have preferred the joint trust concept because it matches their concept of the marriage as a partnership with commingling of the assets, and satisfies their desire to avoid probate at either spouse's death.

MML's Position

I respectfully disagree with Mr. Spica.

- 1) Mr. Spica assumes that if the doctrine of merger applies, the joint trust fails at the point of DS's death, and therefore the joint trust's assets should be probated as part of DS's estate. According to Mr. Spica's argument, the doctrine of merger applies because the beneficiary has an unlimited power of withdrawal and is the trustee at the moment of DS's death (T-1). But EPIC does not so provide. Instead, MCL 700.7701(1) states that a person named as successor trustee in the trust agreement must take some action to accept the trust by either substantially complying with the trust's method of acceptance, accepting delivery of the trust property, exercising powers, or performing duties as trustee indicating acceptance. The named trustee may reject the trust (MCL 700.7701(2))² and may take certain actions like preserving the trust property before accepting the trust (MCL 700.7701(3)). Since the named trustee has the power to reject the trust, the trust agreement by its terms cannot deem SS to have accepted the trusteeship at the moment of DS's death before SS has an opportunity to accept or reject the trust. If SS is named as the successor trustee, SS's acceptance or rejection will be after DS's death (T-1) at T-2. T-2 may be only a split second after T-1, but it is a different time. Suppose Mr. Spica is correct that the trust merges at T-2 because SS is now trustee and beneficiary with a current power of withdrawal. If the legal title and beneficial ownership have now merged into one person, the merger would occur at T-2, and the legal and beneficiary ownership would unite in the one person of SS, not in DS. If the merger doctrine does apply, the trust is still in effect on T-1, but the assets now belong to SS on T-2. So, no probate through DS's estate would be needed, although SS may need to reassign all of the assets to the joint trust as SS's contributions to avoid probate at SS's death.³

¹ The drafters of EPIC imply that such a marital trust would continue and not be terminated by the doctrine of merger. See MCL 700.7815. In Section 7815(3) a trust beneficiary who is not the settlor and who as trustee has the power to make discretionary distributions among the trust beneficiaries is by statute limited to exercising such power pursuant to an ascertainable standard. However, Section 7815(5)(a) provides that the exercise of a similar power held by the settlor's spouse over a trust for which a marital deduction was allowed under IRC 2056(b)(5) or (7) is not so limited. If SS's unlimited power to distribute the marital trust assets to SS causes a termination of the marital trust by the doctrine of merger, Section 7815(5) is not needed (and is nonsensical) since no trust would exist.

² A trust does not fail for want of a trustee. Rather than terminating a trust without a trustee, the Michigan Trust Code provides that a vacancy in a trusteeship of a sole trustee for a non-charitable trust generally must be filled (MCL 700.7704(2)), either as provided by the terms of the trust or as appointed by the court (MCL 700.7704(3)).

³ Another example of the timing difference between right of a fiduciary to act and duty the fiduciary owes is with respect to an agent under a durable power of attorney. The agent named in the durable power of attorney "has the authority, rights, responsibilities, and limitations" as provided in the power. MCL 700.5501(3). The authority under a durable power of attorney may be immediately exercisable or may only be exercisable upon the principal's incapacity. MCL 700.5501(1). Assume the principal signs an immediately exercisable durable power of attorney. The agent's right to act begins when the principal signs the document (T-1). However, the duties the agent owes to

- 2) Moreover, at neither T-1 nor T-2 are all interests in the trust united in SS. As Mr. Spica points out, MCL 700.7603(3) provides “While a trust is not revocable and while a person has a currently exercisable power of withdrawal over the entire principal of the trust, the duties of a trustee are owned exclusively to the person.” Mr. Spica reads MCL 700.7603(3) as obliterating any duty owed to anyone other than the holder of the presently exercisable withdrawal power. That is not accurate, however. Regardless of whether MCL 700.7603(3) obliterates any duty owed to another beneficiary, there are duties with respect to creditors. See MCL 700.7605(1); 700.7606. Per the Reporter’s Commentary, 7605(1) would apply to the portion of the joint trust revocable by DS. MCL 700.7103(f) defines a “power of withdrawal” as a presently exercisable general power of appointment with two exceptions, but it does not say whether the power of withdrawal can trump the rights of creditors. If 7605 means anything, it must mean that a presently exercisable power of withdrawal cannot be over assets that are payable to creditors. Thus, at the moment of DS’s death, not all of the assets and duties are solely owed to SS. The trust must last at least long enough to determine if there are creditors who have rights to be paid from the joint trust.
- 3) Mr. Spica assumes that a beneficiary cannot have a right if the trustee owes no duty to that beneficiary. MCL 700.7603 does not equate rights of beneficiary with duties. MCL 700.7603(1) provides that subject to MCL 700.7603(2)(incapacitated settlor), the “rights of the trust beneficiaries are subject to the control of “ the settlor, whereas “the duties of the trustee are owed exclusively to” the settlor. If rights cannot exist without a corresponding duty, then the first phrase of making rights “subject to” the settlor would be superfluous, and the language in 7603(1) would follow the language of 7603(3). In contrast, 7603(3) does not mention “rights” of beneficiaries at all. It only mentions duties of the trustee being owed solely to the holder of the presently exercisable power of withdrawal. Notwithstanding 7603(3), the other trust beneficiaries still have interests in the trust. A qualified trust beneficiary may be entitled to notice of a proceeding affecting the trust, as is the holder of a power of appointment. MCR 5.125(C)(33). Qualified trust beneficiaries can include takers in default of an exercise of a power of appointment. See comment of UTC Reporter quoted in the Reporter’s Comment following MCL 700.7103.⁴

the principal apply “if and when” the agent acts as the attorney in fact. MCL 700.5501(4). Once the agent starts to act (T-2), the agent has to comply with the fiduciary duties owed to the principal, but the agent has no requirement to start to act under the durable power of attorney.

⁴ Mr. Spica argues elsewhere that a fiduciary’s right requires a corresponding duty—and a corresponding person to whom the duty is owed—in James M. Spica, “Special Advanced Session: Jurisprudence for Trust and Estate Lawyers, 57th Annual Probate & Estate Planning Institute, at 18-1. There, he argues that a funeral representative appointed pursuant to MCL 700.3206 has certain rights and powers concerning the declarant’s funeral arrangements (assuming the rights and powers are not rebutted or superseded as provided in the statute). Mr. Spica then asserts that the funeral representative’s rights must mean that duties are owed to someone, but that someone cannot be the declarant who is deceased at the time the funeral representative can first exercise any rights under Section 3206. Mr. Spica points to the statutory inclusion of “funeral representative” as a fiduciary to conclude that under MCL 700.1212 and MCL 700.1308, the duties must be owed to the heirs, devisees, and beneficiaries of the declarant. However, Mr. Spica’s argument is circular. Each of Sections 1212 and 1308 contain the phrase “for whom that person is a fiduciary”; neither section says for whom a particular fiduciary is a fiduciary. Those sections cannot be the sections that determine “for whom a fiduciary is a fiduciary.” I read the phrase “heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary” as a limitation on when those sections apply. If the fiduciary did not owe a duty to any “heir, devisee, beneficiary, protected individual, or ward, then Sections 1212 and 1308 would not apply. Mr. Spica reads these sections as implying a fiduciary must

- 4) Mr. Spica argues that the doctrine of merger does not apply to the settlor of a revocable trust because the MTC says so in MCL 700.7603(1). Mr. Spica appears to be arguing that for revocable trusts, the MTC has changed the common law of the doctrine of merger, but that the MTC does not change the law for SS as trustee/current beneficiary/holder of withdrawal power. However, the Reporter's Comment does not agree with Mr. Spica's analysis. The Reporter's Comment following MCL 700.7402 discusses the doctrine of merger. The conclusion in the Reporter's Comment is not that the MTC changed the doctrine of merger to revocable trusts, but that the doctrine does not apply to the settlor/trustee/holder of power to revoke. Despite all of the settlor's powers, there are still remainder beneficiaries that prevent the doctrine of merger applying. The Reporter's Comment to MCL 700.7603(3) provides: "Subsection (3) gives the person with the power to withdraw all of the trust property all of the rights of a settlor." If the drafters thought that SS's position would be different than DS's position over the same trust, then neither MCL 700.7603(3) nor the Reporters' Comment would make any sense.⁵

owe a duty to someone on this list. I disagree that a fiduciary's duties must be owed to someone on this list. A few examples will suffice.

A trustee is a fiduciary, but contrary to Mr. Spica's reading of Sections 1212 and 3208, the trustee does not owe duties to any heirs, devisee, protected individual, or ward. By statute, the trustee's duty of loyalty is to the beneficiaries of the trust. MCL 700.7802(1).

Consider the agent under a power of attorney. The agent is a fiduciary under the common law, and under EPIC, must act in accordance with "standards of fiduciaries exercising powers under a durable power of attorney." See MCL 700.5501(3)(a) and the following Reporter's Comment and Annotations in the Michigan Probate Sourcebook. An agent may be included in the EPIC definition of "fiduciary" (MCL 700.1104(e): (" 'fiduciary' includes, but is not limited to, . . ."). But the agent owes no duties to the principal's heirs, devisees, protected individual, or ward. The agent's duties are only owed to the principal.

Last example, a charitable trust where the trustee may name the charitable beneficiaries. Potential charities that might be named are not qualified trust beneficiaries. MCL 700.7110(1) only applies to expressly named charities. Sections 1212 and 3208 would not make the settlor's heirs, devisees, protected individual, or ward, or any particular charity as the person to whom the trustee owes a duty. Instead, the attorney general or the settlor (but not the settlor's heirs, assigns, or beneficiaries) may enforce the trust (MCL 700.7405(3)).

Unlike with a charitable trust (where the attorney general could force the trustee to act in accordance with the terms of the trust), Section 3206 does not provide a mechanism to force the funeral representative to make the funeral arrangements. Instead, if the funeral representative fails to act quickly enough, then others are permitted to act.

The funeral representative is like the agent under the durable power of attorney—a right to act, but no duty to commence acting. I submit that with both the agent under the durable power of attorney and the funeral representative, there is a right without a corresponding duty to act. Similarly with the joint trust, SS has the right to act, even though the SS does not owe duties to the remainder beneficiaries. Since there is no requirement for SS to have a duty to the remainder beneficiaries to correspond with SS's rights, there should be no reason to conclude that the remainder beneficiaries are no longer beneficiaries of the trust merely because SS owes no current duty to them. Since the remainder beneficiaries are still beneficiaries of the trust, the trust should not fail under the doctrine of merger.

⁵ The Uniform Trust Code provides that a trust is created only if "the same person is not sole trustee and sole beneficiary." UTC § 402(a)(5). UTC Comment on this section states: "Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of *all* beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficiary interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is

- 5) Finally, Mr. Spica’s argument elevates the common law doctrine of merger over the express purposes of the Michigan Trust Code. MCL 700.8201 provides that the purposes and policies of the Michigan Trust Code include the following: “To make more comprehensive and to clarify the law governing trusts in this state” (MCL 700.8201(2)(a)) and “To foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust” (MCL 700.8201(2)(c)). As stated in the Reporter’s Comment, the MTC was “intended to be a single-source, comprehensive body of law with respect to the creation, administration, modification, and termination of trusts.”

The MTC section dealing with division of consolidation of trusts (MCL 700.7417) does not mention the doctrine of merger. Although the MTC is intended to be a comprehensive statute dealing with, among other things, termination of trusts, none of the sections on modification or termination of trusts mentions an automatic termination of a trust by the doctrine of merger. See MCL 700.7410 through MCL 700.7417.

The “terms of the trust” are defined as “the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.” MCL 700.1107(k).

The terms of the trust prevail over the provisions of the MTC except as provided in MCL 700.7105(2).

The Settlor’s intent has long been the polestar for interpretation of trusts. “A court must ascertain and give effect to the settlor’s intent when resolving a dispute concerning the meaning of a trust.” *Williams v Herbert (In re Herbert Trust)*, 303 Mich App 456, at 458 (2013), *leave to appeal denied* 497 Mich 868 (2014).

In the joint trust in the scenario above, the terms of the trust do not provide for a termination based on the doctrine of merger. Indeed, the terms of the joint trust provide that the trust should continue after DS’s death. Based on the strong direction in both the common law and the MTC to effectuate the settlor’s intent, the joint trust should not terminate, but should continue in accordance with its terms.

sole trustee, sole beneficiary for life, and with the remainder payable to the settlor’s probate estate. On the doctrine of merger generally, see Restatement (Third) of Trust Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trust Section 341 (1959).”