PROBATE & ESTATE PLANNING SECTION

Supplemental Attachment for

Saturday, October 18, 2025

Meeting of the Council of the Probate and Estate Planning Section

Evergreen Resort
7839 46 1/2 Road, Cadillac, Michigan 49601

Or *via* Zoom

Probate & Estate Planning Section of the
State Bar of Michigan

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

Saturday, October 18, beginning at 9 AM
at Evergreen Resort, 7839 46 1/2 Road, Cadillac, Michigan 49601

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

to a Zoom meeting.
When: Oct 18, 2025, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/cRGvoDsqQMyWh3xT-pK1Fw#/registration

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, email your name and phone number to Susan Chalgian schalgian@mielderlaw.com, we will put your name in a zoom user list that will identify you by name when you call in.

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

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

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Guardianship, Conservatorship and End of Life Committee Report re: Meeting of 10-13-25

ATTACHMENT 1

Guardianship, Conservatorship and End of Life

Committee Report re: Meeting of 10-13-25

Present:

Sandra Glazier
Georgette David
James Steward
Hon. Milton Mack
Hon. Avery Rose

The committee met via Zoom to review Senate Bills 585, 586, 220, 221, 222 and House Bills 4727, 4728, 4677, 4696 and 4697.

SB 220, 221 and 222:
It was decided the SB 220, 221 and 222 should be deferred until substitute bills are introduced in the House. SB 220, 221 and 222 have been passed by the Senate without changes, but changes are presently contemplated and expected to be soon introduced in the house.

HB 4696 and 4697:
It was felt that HB 4696 and 4697 should be referred to the Children's Law Section for input.

SB 585:
With regard to SB 585, it was felt that obtaining appraisals in all circumstances might (i) put a strain on finances that might not be merited and (ii) might be too restrictive, in that the cost of obtaining an appraisal on commercial property might be too costly and both might not provide a realistic opinion of value under circumstances where the properties have deferred maintenance or other issues that could impact the value at sale. In some areas of the state, the use of 2 x SEV might result in an inflated value. Since an independent indication of value might benefit the court's analysis of whether to approve a proposed sale, It was felt that in lieu of the language appearing at lines 23 – 25 of the bill, on page 5, something along the following lines might be proposed instead:

> ... which must include an appraisal of the value conducted by a professional licensed under article 26 of the occupational code, 1980 PA 299, MCL 339.2601 to 399.2637, or opinion of value or market analysis conducted by a real estate broker licensed under article _____, of the occupational code, _____, and otherwise determines that the sale, disposal, mortgage, pledge, or lien is in the protected individual's best interest. The appraisal, opinion of value or market analysis shall have been performed within the preceding 6 months. The requirement to include an appraisal, opinion of value or market analysis may be excused by the court for good cause.

The committee would recommend opposing the legislation as drafted, but could support with the modification identified above (or similar).

SB 586:
Based upon studies conducted by the court, it has been shown that approximately 83% of guardianships function fine without the need for court intervention. Most guardians are family members who already find performing their duties as fiduciaries for members of their family difficult. Most of the guardianships are for persons with mental illness as opposed to being for the elderly. Getting a hearing on a petition to move a legally incapacitated adult may result in a delay of 6 to 8 weeks, depending on the court involved. During that period alternate housing arrangements may be lost. There are times when an individual must be moved in short order, such as when the property is lost, the landlord won't renew a lease or it becomes otherwise dangerous for the individual to remain in their historical residence. Hospitals often petition for appointment of a guardian for placement purposes. The court can (and sometimes does) restrict the ability to change a residence or otherwise place limitations on what a guardian may do. It was felt that leaving the mechanism for addressing this issue to the court, when concerns exist, is a better approach and that this bill should be opposed.

This is the type of issue that should be addressed as part of the court's determination of whether there are less restrictive options, such that the power to change residence might not be included among the powers granted to the guardian without a further order of the court.

HB 4727 and 4728

The committee felt that licensure of professional guardians or conservators wasn't an approach that would help to address the issue of bad actors. By the time a professional guardian is appointed, the incapacitated individual may have run through all available and appropriate family members. Bad actors aren't limited to professional guardians & conservators and often are found to exist among family members. Some family members simply don't fully understand their fiduciary duties. It was also felt that the court's could act quicker in rectifying bad actions, through removal by the court, rather than administrative remedies processed by a licensing board. If certification was tied to and resulted in higher pay to guardians & conservators, the committee might re-evaluate its position, so that there was a benefit that might entice qualified persons to be willing to serve as professional guardians for indigent incapacitated individuals. The current reimbursement amount for guardians of indigent individuals is $83 a month. It is often a money losing proposition, and adding in the extra cost of certification doesn't merit or address the real (or perceived problem). Members expressed concern that adding more requirements (and expenses) might reduce the pool of available guardians and conservators. In many jurisdictions it has become increasing more difficult to find willing persons or entities willing to act as fiduciaries, particularly for indigent individuals.

Instead, the committee proposed that the legislature consider the following:

A. Require all appointed guardians (and conservators) to attend a training session. Kent county provides zoom or recorded training at least bimonthly for court appointed guardians so that they can gain a better understanding of reporting and other fiduciary duties attendant to their appointment. Other courts also provide such training for their appointed guardians (and conservators).
B. All guardians should be required to go through a criminal and CPS background check;
C. If the professional guardian is a corporation, the corporation should be required to provide a surety bond or sufficient proof of insurance covering breaches of fiduciary duty. In this regard, MCL 700.5106(3) already explicitly provides that "The court shall not appoint a professional guardian or professional conservator unless the professional guardian or professional conservator files a bond in an amount and with the conditions as determined by the court".

If the guardian or conservator is an individual (or financial institution, such as a trust company or bank), bonding may not be required. The concern with regard to company provided bond (as opposed to out of the assets of the individual's estate), relates to the concern that if the company dissolves or otherwise disappears, obtaining a remedy for the individual may be difficult. When a specific individual is appointed (professional or otherwise) there is at least someone that can be held liable.

HB4677 & HB 4676:

The following language included in the proposed HB 4677 with regard to including supportive decision-making (as an amendment to EPIC) was felt to be inappropriate based upon the language utilized and as a standalone concept.

> As used in this subsection, "supported decision-making" means a process through which incapacitated individuals work with friends, family members, and professionals who help them understand the situation and choices they face so they may make their own decisions.

The following language is included in the proposed HB 4676 with regard to including supportive decision-making (as an amendment to the mental health code).

> As used in this subdivision, "supported decision making" means a process through which an individual with a developmental disability works with friends, family members, and professionals who help the individual understand the situation and choices the individual faces so the individual may make the individual's own decisions.

This was discussed in a prior report from this committee dated 2-27-25.

If a person has been determined to be incapacitated (or if they never had capacity to start with) are unable to make their own decisions. Supportive decision-making is a concept that may work for individuals who have at least some capacity, but may benefit from someone providing assistance to generating options and analyze the potential consequences of those options.

The February 2025 report by this committee is not changed. As indicated in a prior report from this committee dated 2-27-25, at that time the committee reviewed two proposed bills:

> The committee reviewed and provided input with regard to the two draft bills. It is noteworthy that the first bill proposes changes to the Mental Health Code, while the second proposed changes to EPIC. The pathway and requirements for the grant of a guardianship under these two statutory provisions are very different. Before guardianship (limited or plenary) under the mental health code (commonly referred to as those for developmentally disabled adults) requires that the individual's limitation be such that they are found to have never had capacity and that the disability will continue for the duration of the individual's life.
>
> Michigan, unlike most other jurisdictions, distinguishes the process for appointment of a guardian under the mental health code (DDP) as opposed to that under EPIC (which contemplates an individual who had capacity at some point, but lost it, or whose incapacity is not anticipated to last for the duration of the individual's life). Therefore, the risks of exploitation and the processes utilized for evaluating whether the appointment of a full or limited guardian are different under the mental health code than they are under EPIC. Since an individual who meets the requirements of being found to be developmentally disabled never had capacity [usually], the use of a power of attorney or supportive decision making is inappropriate. Moreover, if the person is determined to be developmentally disabled under the mental health code you can't then flip them from guardianship under the mental health code to one under EPIC, and in actuality if a guardianship is commenced under EPIC and it is determined that the individual is developmentally disabled, then the guardianship must be dismissed under EPIC and adjudicated pursuant to the Mental Health Code.
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> In In re Rosebush, 195 Mich App 675 (1992) the court addressed the termination or refusal to receive lifesaving medical treatment. In that case the court found that:
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> The right to refuse lifesaving medical treatment is not lost because of the incompetence or the youth of the patient. However, because minors and other incompetent patients lack the legal capacity to make decisions concerning their medical treatment, someone acting as a surrogate must exercise the right to refuse treatment on their behalf. never been competent. (internal citations omitted).
>
> But went on to indicate that the court should not involve itself in medical decisions made by surrogates unless there is a disagreement. In reviewing the case, as a whole,

while it uses the terminology of “surrogate”, in essence the court recognized the family members who were making the decisions as “substitute” as opposed to “supportive” decision makers, in finding that

> ...our Legislature enacted MCL 700.496; MSA 27.5496, which allows competent adults to appoint a patient advocate to make medical-treatment decisions, including the withdrawal of life-sustaining treatment, on their behalf. While the statute provides for judicial intervention under certain limited circumstances, we believe that this legislation demonstrates that the overriding public policy of this state is to respect the roles played by the patient, family, physicians, and spiritual advisors in the making of decisions regarding medical treatment, as well as the policy that courts need not delve into that decision-making process unless necessary to protect the patient's interests. Although the legislation applies only to competent adults, we are satisfied that the public policy of judicial nonintervention also extends to decisions concerning the medical treatment of incompetent persons and minors. In re LHR, supra. We therefore hold that, in general, judicial involvement in the decision to withhold or withdraw life-sustaining treatment on behalf of a minor or other incompetent patient need occur only when the parties directly concerned disagree about treatment, or other appropriate reasons are established for the court's involvement. See Guidelines for State Court Decision Making, supra, pp 101-122.

While the decision of a competent adult patient regarding the cessation of life-sustaining measures will generally control that patient's care, a different standard must necessarily guide the surrogate of an incompetent patient, including the parent of an immature minor child, where the incompetent or the minor has never expressed his wishes. Two basic standards have evolved for surrogates to decide whether to withdraw or withhold consent to life-sustaining treatment: the "substituted judgment" standard and the "best interests" standard. See generally, Guidelines for State Court Decision Making, supra, pp 72-78; Meisel, supra, ch 9. In re Rosebush, Id. (Emphasis added).

The Court in Rosebush went on to distinguish between patients who were formerly competent or was a minor of mature judgment versus a patient who was never competent, because having ever lacked capacity, because under those circumstances the surrogate must make a good faith determination of what would serve the incompetent patient’s best interests as opposed to trying to implement what the patient would have wanted.

In addition, in Persinger v Holtz, 248 Mich App 499 (2001), the court addressed the level of capacity required to enter into a contract (which is exactly what Designations of Patient Advocates and Powers of Attorney are). The court recognized that

Generally, a power of attorney is a written instrument by which a principal authorizes and appoints an agent, known as an attorney in fact, and delegates to the agent the power to perform acts on behalf of, in the place of, and instead of the principal. It is a legal document recognized by law as evidence of an agency relationship between the principal and the agent. A firmly embedded principle in our jurisprudence is that legal documents must be executed by one possessing the mental competence to reasonably understand the nature and effect of his action.

Established law is replete with examples of this competency requirement, particularly in the area of contract law. Persons entering into business contracts and settlement agreements, opening bank accounts and changing insurance policy beneficiaries must, generally, possess "sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged." Similarly, persons executing deeds of conveyance must have sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others.

A person executing a will must have testamentary capacity, i.e., "`be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make.'" Consistent with this longstanding precedent, as well as the purpose of a power of attorney, statutory inferences, and sound public policy, we hold that powers of attorney must be executed by mentally competent persons.

A primary purpose of a power of attorney is to evidence the delegation of authority to perform particular legal acts, which the principal could personally perform, to an appointed agent. Consequently, the principles governing the law of agency are applicable to legal issues involving powers of attorney. A fundamental requirement of such an agency relationship is that the parties to the agreement consent to its creation. Similarly, an essential component of the relationship is the principal's right to control, at least at some point, the conduct and actions of his agent. These consent and control elements are significant because the principal is bound by, and liable for, the agent's lawful actions performed under the auspices of the principal's actual or apparent authority. Consequently, requiring that the principal be mentally competent to consent to, render a degree of control over, and appreciate the significance and consequences of the resulting agency relationship is consonant with the purpose of a power of attorney.

A principal may not be capable of exerting control over an agent who is operating under a properly executed durable power of attorney if the principal becomes incapacitated at some time following its execution.

Further, review of related statutes supports the conclusion that the principal must be mentally competent at the time the power of attorney is executed
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Similarly, MCL 700.5506, pertaining to the designation of a patient advocate for purposes of medical treatment, custody, and care decisions, specifically requires the patient to be of sound mind at the time the designation is made. These statutes clearly imply the requirement that the principal be mentally competent at the inception of the agency relationship, i.e., at the time the power of attorney is executed.

Finally, requiring the principal of a power of attorney to be mentally competent at the time of its execution advances important public policy concerns. We are hard pressed to conceive of a more effective and efficient means by which to devastate and destroy the estate of a vulnerable person than through a durable general power of attorney. Sanctioning the execution of a power of attorney by a mentally incompetent principal would give license to those who have the power or inclination to coerce, cajole, or dupe such a person into effectively relinquishing rights to their property, finances, and other assets with minimal effort. Considering the nature, breadth, and consequences of a power of attorney, public policy interests are served by the requirement that the principal have the ability to engage in thoughtful deliberation and use reasonable judgment with regard to its formation.

Persinger, Id. (internal citations omitted).

For these reasons it was felt that by definition if a person is determined to be developmentally disabled, then they never had capacity and inclusion of the new language set forth in the proposed draft legislation under the mental health code is inappropriate and that other protections and options are already provided for under that code. Unlike a guardianship under EPIC, a guardianship granted under the mental health code requires significant evaluations and information regarding the individual's ability. MCL 330.1612 mandates that:

(1) The petition for the appointment of a guardian for an individual who has a developmental disability shall be accompanied by a report that contains all of the following:

(a) A description of the nature and type of the respondent's developmental disability.
(b) Current evaluations of the respondent's mental, physical, social, and educational condition, adaptive behavior, and social skills. These evaluations shall take into account the individual's abilities.
(c) An opinion as to whether guardianship is needed, the type and scope of the guardianship needed, and a specific statement of the reasons for the guardianship.

(d) A recommendation as to the most appropriate rehabilitation plan and living arrangement for the individual and the reasons for the recommendation.

(e) The signatures of all individuals who performed the evaluations upon which the report is based. One of the individuals shall be a physician or psychologist who, by training or experience, is competent in evaluating individuals with developmental disabilities.

(f) A listing of all psychotropic medications, plus all other medications the respondent is receiving on a continuous basis, the dosage of the medications, and a description of the impact upon the respondent's mental, physical and educational conditions, adaptive behavior, and social skills.

(2) Psychological tests upon which an evaluation of the respondent's mental condition have been based may be performed up to 1 year before the filing of the petition.

(3) If a report does not accompany the petition, the court shall order appropriate evaluations to be performed by qualified individuals who may be employees of the state, the county, the community mental health services program, or the court. The court may order payment for evaluations of respondents by a public agency that treats or serves the developmentally disabled. State compensation for evaluations paid for by public mental health agencies shall be determined under sections 302 to 310, and sections 800 to 842. Compensation for an evaluation shall be in an amount that is reasonable and based upon time and expenses. The report shall be prepared and filed with the court not less than 10 days before the hearing.

(4) A report prepared under this section shall not be made part of the public record of the proceedings but shall be available to the court or an appellate court to which the proceedings may be appealed, to the respondent, the petitioner, their attorneys, and to other individuals the court directs.

Pursuant to MCL 330.1618, the court must do the following:

(1) The court, at a hearing convened under this chapter for the appointment of a guardian, shall do all of the following:

(a) Inquire into the nature and extent of the general intellectual functioning of the respondent asserted to need a guardian.

(b) Determine the extent of the impairment in the respondent's adaptive behavior.

(c) Determine the respondent's capacity to care for himself or herself by making and communicating responsible decisions concerning his or her person.

(d) Determine the capacity of the respondent to manage his or her estate and financial affairs.

(e) Determine the appropriateness of the proposed living arrangements of the respondent and determine whether or not it is the least restrictive setting suited to the respondent's condition.

(f) If the respondent is residing in a facility, the court shall specifically determine the appropriateness of the living arrangement and determine whether or not it is the least restrictive suited to the respondent's condition.

(2) The court shall make findings of fact on the record regarding the matters specified in subsection (1).

(3) If it is determined that the respondent possesses the capacity to care for himself or herself and the respondent's estate, the court shall dismiss the petition.

(4) If it is found by clear and convincing evidence that the respondent is developmentally disabled and lacks the capacity to do some, but not all, of the tasks necessary to care for himself or herself or the respondent's estate, the court may appoint a partial guardian to provide guardianship services to the respondent, but the court shall not appoint a plenary guardian.

(5) If it is found by clear and convincing evidence that the respondent is developmentally disabled and is totally without capacity to care for himself or herself or the respondent's estate, the court shall specify that finding of fact in any order and may appoint a plenary guardian of the person or of the estate or both for the respondent.

Emphasis added.

The requirements for appointment of a guardian under EPIC are far less stringent. Therefore, some of the safeguards that are already baked into the mental health code may be lacking under EPIC.

It was reported that in Wayne County 90 % of the DDP guardianships are limited. However, even when a DDP guardianship is limited, legal and medical decisions must always remain with the guardian because having found the person to be developmentally disabled that individual never had capacity.

It was also indicated that paragraph (g) relating to the appointment of a limited guardian or conservator under article V of EPIC was inconsistent with case law and statute when dealing with developmentally disabled adults.

Moreover, the right to reserve powers to the individual, under the statute, isn't exhaustive and it was felt the proposed language was therefore not needed.

Of significant concern was the potential that the modifications proposed might encourage or otherwise facilitate exploitation.

Moreover, will a surgeon or doctor accept the signature of a DDP because they have help from a helpful friend. Members of the committee felt that such acceptance was highly unlikely.

As indicated earlier in the minutes, Michigan has a separate pathway than other states that have a unified pathway to guardianship for developmentally disabled adults and others. Further, if a limited guardianship (as opposed to a plenary) is granted, the guardian should attempt to get input from the individual if they can participate.

If only supportive decision-making is utilized for a person who is developmentally disabled, who will get accountings? How can they select a representative payee? It was felt that if the legislature wanted to do something helpful with regard to developmentally disabled guardianships under the mental health code, make all guardianships (plenary and partial) permanent, but subject to review every three years. By requiring that partial guardianships under the mental health code expire every 5 years, the process discourages the use of limited guardianship for developmentally disabled adults.

People are concerned about even getting a guardianship for their developmentally disabled children once they reach the age of majority. Different courts are requiring different documentation every 5 years. It's getting there that is burdensome and time consuming. Parents don't want to put limits on their children. However, once the parents are gone it is generally realized that the parents were giving a lot more oversight than the parents might have realized and then it falls apart leaving the now adult developmentally disabled child more vulnerable to exploitation.

Michigan's statute provides protections that aren't available in other jurisdictions. In a DDP guardianship you have a psychologist who is providing the court all the information on areas of functioning, its far more specific definition and provision of information than what happens under EPIC. Developmentally disabled adults represent some of the more vulnerable members of our population.

The second bill, is the de facto arrangement, under EPIC. It was felt that it doesn't offer much, because the alternatives are those that are supposed to be explored before the filing of a petition. Nonetheless, the committee largely found that the added language in Section (2) if the word "incapacitated" on line 11 was eliminated, wouldn't be objectionable, provided SCAO is required to develop a form that lays out each of the listed options and explains what each such option entails. Doing so would also free up the court resources.
There was far greater concern about exploitation under the first proposal (relating to a proposed change in the mental health code) than under the second (relating to a change to EPIC).

At the time this committee reviewed these bills in February 2025, a majority of those in attendance felt that the elimination of the word "incapacitated" might remove some of the concerns expressed. However, during our meeting of October 13, 2025 it was expressed that there were real concerns that supportive decision making might result in individual's being left more vulnerable to undue influence and those who favored including it as an option in the written notice provided by the court (provided the word incapacitated was eliminated) In any case it was felt that the concept of supportive decision making should have legislative "guard rails" to provide better protection for the person for whom the concept of supportive decision making might be applied, if it is to be included as an option in these statutes.

James Steward noted HB 4677 isn't tie-barred to a bill that would provide protections for the disabled person with regard to so-called Supported Decision-making such as is included in at least some of the statutes adopted by other states. All the Bill does is provide a general definition of "supported decision-making". He provided a Texas bill as an example. Texas adopted its SUPPORTED DECISION-MAKING AGREEMENT ACT, a copy of which is attached to this report (without endorsement but by way of example only), which includes various rules and protections for the disabled person. Section 1357.051 of the Texas statute provided that:

> An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following . . . [emphasis added]

A Utah supported decision making statute provides some of the following protections:

- requiring a person, with or without help, to understand an SDMA before they can use it;
- identifying who can and cannot be a supporter;
- requiring a supporter to disclose an actual or perceived conflict of interest, and allowing the person to cancel a transaction from which a supporter benefits unless it is fair to the person;
- not allowing a supporter to overly influence or make a decision for the person;
- information access and confidentiality requirements;
- maintaining a supporter's responsibility to report suspected abuse, neglect, or exploitation;
- requiring a guardian's permission if a protected person wants to use an SDMA in an area covered by the guardianship;
- liability protection if a third-party acts on an SDMA in good faith; and
- specifying situations under which a supported decision-making agreement may be terminated.

Others raised concern that supportive decision making (while perhaps appropriate in some circumstances) may provide a disservice to the individual, because it may make it more difficult for the disabled individual to function when the family member providing such supports is no longer available. The push for supportive decision making largely comes from parents of developmentally disabled adults or the parents of individuals who have suffered a traumatic brain injury (TBI). As to the first group, those individuals may be more malleable to operating under a supportive decision making arrangement/agreement; as to the second, often those who were good decision makers before a TBI often have gaps in their memory and awareness of deficits that may not make them good candidates for supportive decision making. In any event, concern was expressed that both categories of individual may be more vulnerable to undue influence or coercion.

The consensus of the committee was that in its present form HB 4677 should be opposed.