PROBATE & ESTATE PLANNING SECTION

Agendas and Attachments for:

Meeting of the Committee on Special Projects (CSP);

Meeting of the Council of the Probate and Estate Planning Section

NOTICE CHANGE IN LOCATION AND TIME:

Saturday, October 19, 2019, 10 a.m.
Zingerman’s Greyline
100 North Ashley Street
Ann Arbor, Michigan  48104
Meeting of the Section’s Committee on Special Projects and
Meeting of the Council of the Probate and Estate Planning Section

Saturday, October 19, 2019
10 a.m.

Zingerman's Greyline
100 North Ashley Street
Ann Arbor, Michigan 48104

The meeting of the Section's Committee on Special Projects (CSP) meeting will begin at 10 a.m. and will end at approximately 11:15 a.m. The meeting of the Council of the Probate and Estate Planning Section will begin at approximately 11:30 a.m. If time allows and at the discretion of the Chair, we will work further on CSP materials after the Council of the Section meeting concludes.

Mark E. Kellogg, Secretary (David P. Lucas, Acting Secretary)
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
Lansing, Michigan 48933
517-377-0890
Email: mkellogg@fraserlawfirm.com
Each meeting starts with the Committee on Special Projects at 9 a.m., followed by the meeting of the Council of the Probate & Estate Planning Section.

**Call for materials**

Due dates for Materials for Committee on Special Projects

All materials are due on or before 5 p.m. of the date falling 9 days before the next CSP meeting. CSP materials are to be sent to Katie Lynwood, Chair of CSP (klynwood@blhlaw.com)

Schedule of due dates for CSP materials, by 5:00 p.m.:

Wednesday, October 9, 2019 (for Saturday, October 19, 2019 meeting)

Due dates for Materials for Council Meeting

All materials are due on or before 5 p.m. of the date falling 8 days before the next Council meeting. Council materials are to be sent to Mark Kellogg (mkellogg@fraserlawfirm.com).

Schedule of due dates for Council materials, by 5 p.m.:

Friday, October 11, 2019 (for Saturday, October 19, 2019 meeting)
### Officers of the Council for 2019-2020 Term

<table>
<thead>
<tr>
<th>Office</th>
<th>Officer</th>
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<tbody>
<tr>
<td>Chairperson</td>
<td>Christopher A. Ballard</td>
</tr>
<tr>
<td>Chairperson Elect</td>
<td>David P. Lucas</td>
</tr>
<tr>
<td>Vice Chairperson</td>
<td>David L.J.M. Skidmore</td>
</tr>
<tr>
<td>Secretary</td>
<td>Mark E. Kellogg</td>
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<tr>
<td>Treasurer</td>
<td>James P. Spica</td>
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### Council Members for 2019-2020 Term

<table>
<thead>
<tr>
<th>Council Member</th>
<th>Year Elected to Current Term (partial, first or second full term)</th>
<th>Current Term Expires</th>
<th>Eligible after Current Term?</th>
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<tbody>
<tr>
<td>Anderton, James F.</td>
<td>2018 (1st term)</td>
<td>2020</td>
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<td>Jaconette, Hon. Michael L.</td>
<td>2017 (2nd term)</td>
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<td>Lichterman, Michael G.</td>
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<td>Malviya, Raj A.</td>
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<td>Olson, Kurt A.</td>
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<td>Caldwell, Christopher J.</td>
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<td>Labe, Robert C.</td>
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<td>Mayoras, Andrew W.</td>
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<td>2022</td>
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<td>Silver, Kenneth</td>
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<td>2022</td>
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Ex Officio Members of the Council

John E. Bos; Robert D. Brower, Jr.; Douglas G. Chalgian; George W. Gregory; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Brian V. Howe; Shaheen I. Imami; Stephen W. Jones; Robert B. Joslyn; James A. Kendall; Kenneth E. Konop; Nancy L. Little; James H. LoPrete; Richard C. Lowe; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; Harold G. Schuitmaker; John A. Scott; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack; Marlaine C. Teahan, Marguerite Munson Lentz
<table>
<thead>
<tr>
<th>Period</th>
<th>Section Initiatives</th>
<th>Respond to Others' Initiatives</th>
<th>Outreach to Section or Community</th>
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<tr>
<td>Fall 2019</td>
<td>Obtain Passage of</td>
<td>-Electronic Wills</td>
<td>-Initiatives to involve younger layers and increase diversity</td>
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<td>-Omnibus EPIC</td>
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<td>-Update information regarding members, committees, etc. on section website</td>
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<td>-ART</td>
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<td>-Modify Voidable Transfers Act to fix glitch</td>
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<td>-Lawyer drafter/beneficiary legislation</td>
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<td>-Premarital property act</td>
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<td>-Delaware tax trap legislation</td>
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<td>Spring 2020</td>
<td>-Statutory authority for private trust companies</td>
<td></td>
<td>-Annual Probate Institute</td>
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<td>-TBE Trusts</td>
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<td>-Community Property Trusts</td>
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<td>Ongoing</td>
<td>-SCAO Meetings</td>
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<td>-Review of Forms and Court Rules for changes needed</td>
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<td>Secondary Priority</td>
<td>-Review Uniform Fiduciary Income and Principal Act</td>
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<td>Future Projects</td>
<td>-Legislative fix for issue of whom the attorney represents—fiduciary/beneficiaries</td>
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<td>-Update supervision of charitable trusts act</td>
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<td></td>
<td>-Legislation to permit charity to serve as trustee of charitable trust</td>
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MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

AGENDA
Saturday, October 19, 2019
Ann Arbor, Michigan
10:00 – 11:00 AM

1. Andy Mayoras – Drafter/beneficiary Ad Hoc Committee – 20 minutes

See attached:
- Memo from Andrew Mayoras (Exhibit 1)
- draft of proposed statute “redlined” (Exhibit 2)
- draft of proposed statute “clean version” (Exhibit 3)

2. Georgette David and Katie Lynwood – Legislative Development and Drafting Committee – 40 minutes

Re: Vehicle Transfer on Death
See attached:
- Memo from Georgette David and Katie Lynwood (Exhibit 4)
- Spreadsheet of Motor Vehicles TOD and State Statutes (Exhibit 5)
- Draft of proposed TOD statute (Exhibit 6)
- “Transfers of Title or Interest” under the Vehicle Code (Exhibit 7)
- MCL 324.80312 “Certificate of title for watercraft…” (Exhibit 8)
- Draft of proposed/revised statutes for the Vehicle Code and Natural Resources and Environmental Protection Act (Exhibit 9)
EXHIBIT 1
MEMO

To: Committee On Special Projects State Bar of Michigan, Probate in the Estate Planning Section

From: Andrew W. Mayoras

Subject: Final Proposed Draft of Statute

Date: October 10, 2019

The Attorney-Beneficiary Drafter Ad Hoc Committee has taken the comments received during the last two session of the Committee on Special Projects into consideration and is now ready to present a final proposed draft of the statute.

Since our discussion in the September meeting, the Committee decided the most appropriate place to suggest inclusion of this new statute would be 700.1215, which is in Article I, Part 2 of EPIC titled “Construction and General Provisions”.

In addition, the Committee elected to omit any suggested revisions to other sections to refer back to this new proposed section as being unnecessary and too cumbersome.

Finally, we made some stylistic and readability edits, which included removing the definition of “knowledge” and instead incorporating the definition for that under MCL 700.7104. Even though that definition now is only applicable to the Michigan Trust Code and not EPIC as a whole, based on Jim Spica’s comments last month at CSP indicating that this definition is expected to be moved to the definition section for EPIC, we felt using that definition is appropriate. We also removed the stray reference to “solicited” that was left over from a prior version, consistent with discussion at CSP.

We welcome any final comments during CSP and expect to present this final version for a vote at the Probate Council Meeting. A final version of the draft statute, as well as a redlined version showing the changes from the last CSP discussion are attached.

AWM/sap
EXHIBIT 2
700.2741215 Gifts to drafting lawyers and other disqualified persons.

(1) Any part of a governing instrument that directly or indirectly makes a substantial gift to a lawyer who drafted the governing instrument, or a person related to a lawyer who drafted the governing instrument, is void, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a governing instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a governing instrument purporting to waive or otherwise avoid the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section, and incurs no personal liability by reason of this section, whether or not the gift is void under this section. Additionally, this section does not directly or indirectly impose liability on a person who honors or relies on a governing instrument that contains or effectuates a gift that is void under this section, unless the person has knowledge that a gift is void under this section. For purposes of this provision, a person has knowledge that a gift is void under this section if one or more of the following apply:
   (a) The person has actual knowledge of it.
   (b) The person has received a notice or notification of it.
   (c) From all the facts and circumstances known to the person at the time in question, the person has reason to know it.

(5) If a part of a governing instrument is invalid by reason of this section, the invalid part is severable and will not affect any other part of the governing instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer. If the invalid part cannot be severed, then the entire governing instrument shall be deemed to have no effect.

(6) For purposes of this section:
   (a) The phrase “lawyer who drafted the governing instrument” refers to an individual who: (i) is or was licensed to practice law in this state or any other, prior to or at the time of the governing instrument was prepared and/or executed, and (ii) directly or indirectly prepared or supervised the preparation and/or execution of the governing instrument. Among other ways, a lawyer is deemed to have prepared, or supervised the execution of, the governing instrument if the preparation, or supervision of the execution, of the governing instrument was performed by an employee, subordinate, partner, co-owner, or another person or lawyer employed by the same firm or company as the lawyer as of the time of preparation and/or execution.
   (b) A person is “related” to an individual if, at the time the lawyer prepared or supervised the preparation or execution of the governing instrument or solicited the gift, the person is:
1. A spouse of the individual;
2. A lineal ascendant or descendant of the individual and/or the individual’s spouse;
3. A sibling of the individual;
4. A spouse of a person described in subparagraph 2. or subparagraph 3.

Additionally, an entity is “related” to a lawyer if the lawyer owns a 50% or greater interest in the entity or otherwise controls the entity.

(c) The term “governing instrument” has the definition set forth in MCL 700.1104(m).

(d) The term “gift” includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift or transfer is outright or in trust; regardless of when the gift or transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity. Further, a transaction which conveys property for substantially less than fair market value is considered to be a gift for purposes of this section.

(e) A gift is considered “substantial” if the value of the gift exceeds $5,000.00 as a result of a single governing instrument or two or more related governing instruments.

(f) The term “knowledge” has the definition set forth in MCL 700.7104.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity. A gift or governing instrument that is not rendered void under this section can still be challenged under other legal grounds.

(8) This section applies only to governing instruments executed on or after October 1, 2019.
700.2602(2) should be changed as follows:

(2) **Except as set forth in section 2724,** a will may provide for the passage of all property that the testator owns at death and all property acquired by the estate after the testator's death.

In 700.2701, the first sentence should be changed as follows:

In the absence of a contrary intention, the rules of construction in this part control the construction of a governing instrument, except as to Section 2724, which controls regardless of contrary intention.

The first sentence of 700.6307 should be changed as follows:

**Except as set forth in Section 2724, on death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survived all owners.**

The first sentence of 700.7801 should be changed as follows:

**Except as set forth in Section 2724, upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article.**
EXHIBIT 3
700.1215 Gifts to drafting lawyers and other disqualified persons.

(1) Any part of a governing instrument that directly or indirectly makes a substantial gift to a lawyer who drafted the governing instrument, or a person related to a lawyer who drafted the governing instrument, is void, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a governing instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a governing instrument purporting to waive or otherwise avoid the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under, and incurs no personal liability by reason of, this section, whether or not the gift is void. Additionally, this section does not directly or indirectly impose liability on a person who honors or relies on a governing instrument that contains or effectuates a gift that is void, unless the person has knowledge that a gift is void under this section.

(5) If a part of a governing instrument is invalid by reason of this section, the invalid part is severable and will not affect any other part of the governing instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer. If the invalid part cannot be severed, then the entire governing instrument shall be deemed to have no effect.

(6) For purposes of this section:
(a) The phrase "lawyer who drafted the governing instrument" refers to an individual who: (i) is or was licensed to practice law in this state or any other, prior to or at the time the governing instrument was prepared and/or executed, and (ii) directly or indirectly prepared or supervised the preparation and/or execution of the governing instrument. Among other ways, a lawyer is deemed to have prepared, or supervised the execution of, the governing instrument if the preparation, or supervision of the execution, of the governing instrument was performed by an employee, subordinate, partner, co-owner, or another person or lawyer employed by the same firm or company as the lawyer as of the time of preparation and/or execution.
(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the preparation or execution of the governing instrument, the person is:
   1. A spouse of the individual;
   2. A lineal ascendant or descendant of the individual and/or the individual’s spouse;
   3. A sibling of the individual;
   4. A spouse of someone described in subparagraph 2. or subparagraph 3.
   Additionally, an entity is "related" to a lawyer if the lawyer owns a 50% or greater interest in the entity or otherwise controls the entity.
(c) The term "governing instrument" has the definition set forth in MCL 700.1104(m).
(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift or transfer is outright or in trust; regardless of when the gift or transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity. Further, a transaction which conveys property for substantially less than fair market value is considered to be a gift for purposes of this section.

(e) A gift is considered "substantial" if the value of the gift exceeds $5,000.00 as a result of a single governing instrument or two or more related governing instruments.

(f) The term "knowledge" has the definition set forth in MCL 700.7104.

(7) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity. A gift or governing instrument that is not rendered void under this section may be challenged under other legal grounds.

(8) This section applies only to governing instruments executed on or after January 1, 2020.
MEMORANDUM

To: Legislative Development and Drafting Committee
From: Katie L. and Georgette D.
Dated: 4/25/2019

We were asked to review legislation from other states and decide if it seemed worthwhile to investigate whether the committee should consider presenting the issue of drafting vehicle transfer on death legislation to the council. We decided that this type of legislations is worthwhile and it seemed appropriate to begin an investigation and discussion.

1. Advantages and Disadvantages.

Some advantages.

A. **Probate avoidance.** The transfer on death designation lets beneficiaries receive assets at the time of the owner’s death without going through probate. Transferring vehicles in Michigan under $60,000 do not require letters of authority and the probate factor is less applicable (although still a probate asset if a probate case is opened).

B. **Ease of asset distribution.** The designation also lets the owner of the asset specify the designated beneficiary, which helps the personal representative distribute the decedent’s assets after death.

C. **Retains owner control over asset.** With TOD designation, the named beneficiary has no access to or control over the owner’s asset as long as the person is alive.

D. **Modifiable and revocable.** TOD is not permanent and can either be revoked or modified.

E. **Creditor Avoidance.** TOD registration may allow for creditor avoidance, which can be an advantage in some instances, especially for lower socio-economic individuals who rely on a safe vehicle for access to employment.

F. **Widely accepted and familiar transfer tool.** Many people are familiar with transfer on death registrations and beneficiary designations for other common assets. Many other typically more valuable assets have TOD registration available including:

   i. Individual Retirement accounts are TOD
   ii. Life Insurance is TOD
   iii. Brokerage and Bank Accounts can be TOD
   iv. Real Property in some states can be TOD
2. **Some disadvantages and complications.**

   A. **Creditor Avoidance.**
   
   B. **Fraud tool.** Another opportunity for fraud upon the elderly, incapacitated and unsophisticated owner, since this type of legislation may allow for titles with TOD to be recorded without the knowledge, intent or consent of the owner/transferor.
   
   C. **Insurance complications.** Would the deceased owner’s insurance coverage remain in effect after death, even if the beneficiary has not re-titled the vehicle? What is the impact if the TOD beneficiary is not insurable and title cannot be transferred?

3. **Some Legislation Issues and Decisions.**

   We reviewed the legislation for 17 states and created a spreadsheet of relevant areas covered by the various statutes. A spreadsheet of the areas that need to be discussed and decisions that need to be made about this type of legislation is attached. Here is a list of some decisions that need to be made along with how Ohio and Indiana handle the issue in their statute, along with Georgette’s and Katie’s opinions.

   Ohio statute – Note that upon the death of a vehicle owner, the title may be transferred to a surviving spouse – does not include all heirs like Michigan. The value of the vehicle must be $65,000 or less.

   A. Where should this legislation be located? Under EPIC or Michigan’s Motor Vehicle Statute? Someplace else?
      
      a. Ohio: Located in their probate code; Title 21 of their code.
      
      
      c. G & K: Michigan does not have a General Transfer on Death Act, similar to Indiana’s. Most states include this under their motor vehicle code. We feel more comfortable drafting under EPIC and believe this type of legislation belongs under non-probate transfers, Article 6, Part II. We would reference this EPIC section in Michigan’s Motor Vehicle Code similar to how the updated Certificate of Trust legislation was placed in the Trust Code (MCL 700.7913), and the new COT statute is referenced in the Conveyances of Real Property code (MCL 565.431, MCL 565.434 and MCL 565.435).

   B. Should the legislation cover all motor vehicles as defined under the Motor Vehicle Code, 257.216 Vehicles subject to registration and certificate of title provisions; exceptions.? This statute is attached.
      
      Should it cover farm equipment; motor homes; recreational vehicles; boats and motorcycles?
a. **Ohio**: the statute applies to:
   i. "motor vehicle" includes manufactured homes, mobile homes, recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds (ORC 4505.01)
   ii. "watercraft" includes: vessel operated by machinery either permanently or temporarily affixed; sailboat other than a sailboard; inflatable, manually propelled vessel that is required by federal law to have a hull identification number meeting the requirements of the United States coast guard; canoe, kayak, pedalboat, or rowboat; any of the following multimodal craft being operated on waters in this state: (1) amphibious vehicle, (2) submersible, and (3) airboat or hovercraft; vessel that has been issued a certificate of documentation with a recreational endorsement under 46 C.F.R. 67. (ORC 1546.01)
   iii. "Outboard motor"

b. **Indiana**: The applicability section, IC 32-17-14-2 states:
   (e) Subject to IC 9-17-3-9(g), this chapter applies to a beneficiary designation for the transfer on death of a motor vehicle or a watercraft.

   *Note, Title 9 is Indiana's Motor Vehicle Code. Below are relevant provisions and a definition of "motor vehicle".*

   i. **IC 9-17-3-9 provides:**
      (g) In general, IC 32-17-14 applies to a certificate of title designating a transfer on death beneficiary. However, a particular provision of IC 32-17-14 does not apply if it is inconsistent with the requirements of this section or IC 9-17-2-2(b).

   **IC 9-17-2-2 Application; contents**
   Sec. 2. (a) A person applying for a certificate of title for a vehicle must submit an application in the form and manner prescribed by the bureau and provide the following information:

   1. A full description of the vehicle, including the make, model, and year of manufacture of the vehicle.
   2. A statement of any liens, mortgages, or other encumbrances on the vehicle.
   3. The vehicle identification number or special identification number of the vehicle.
   4. The former title number, if applicable.
   5. The purchase or acquisition date.
   6. The name and Social Security number or federal identification number of the person.
   7. Any other information that the bureau requires, including a valid permit to transfer title issued under IC 6-1.1-7-10, if applicable.

   (b) This subsection applies only to a person that receives an interest in a vehicle under IC 9-17-3-9. To obtain a certificate of title for the vehicle, the person must do the following:
(1) Surrender the certificate of title designating the person as a transfer on death beneficiary.
(2) Submit proof of the transferor's death.
(3) Submit an application for a certificate of title in the form and manner prescribed by the bureau.


ii. IC 9-13-2-105“Motor vehicle” Sec. 105. (a) "Motor vehicle" means, except as otherwise provided in this section, a vehicle that is self-propelled. The term does not include a farm tractor, an implement of agriculture designed to be operated primarily in a farm field or on farm premises, or an electric personal assistive mobility device. (b) "Motor vehicle", for purposes of IC 9-21, means:
   (1) a vehicle that is self-propelled; or
   (2) a vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.
(c) "Motor vehicle", for purposes of IC 9-32, includes a semitrailer, trailer, or recreational vehicle.


iii. IC 9-13-2-198.5“Watercraft”
Sec. 198.5. "Watercraft" means a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat, or any marine equipment that is capable of carrying passengers, except a ferry.

c. G & K: We feel the definition should be as broad. We’re not sure at this point if it should apply to farm equipment, tugboats, etc. For legislative drafting purposes, it may need to be broader than we intend.

C. Should the legislation authorize the TOD language on the motor vehicle title? By attachment? On the Registration? Both?
   a. Ohio: TOD language will be listed on the certificate of title.
   b. Indiana: TOD language on the certificate of title, even at the time of purchase.
   c. G & K: We agree the certificate of title is the most obvious place. If allowed at the time of purchase, we anticipate pushback from other organizations, such as the automotive industry.

D. Should the legislation allow TOD registration, even if the vehicle is jointly titled?
   a. Ohio: No. The vehicle must be solely owned. (ORC 2131.13(B))
   b. Indiana: Yes. Multiple owners allowed.
c. G & K: Multiple owners should be allowed. Consider including in legislation that surviving joint owner has authority to change TOD beneficiary.

E. Should the legislation allow the TOD beneficiary to be an LLC, Corporation, etc.
   a. Ohio: Yes. TOD may designate one or more persons as the beneficiary.
      "Person" means an individual, corporation, organization or other legal entity. (ORC 2131.13(A)(3))
   b. Indiana: Yes. Under IC 32-17-14-3 (2) "Beneficiary" means a person designated or entitled to receive property because of another person's death under a transfer on death transfer.
      Under IC 32-17-14-3 (2) "Person" means an individual, a sole proprietorship, a partnership, an association, a fiduciary, a trustee, a corporation, a limited liability company, or any other business entity.
   c. G & K: Yes. Note, we are not addressing whether the owner can be anything else than an individual or individuals because we need a living person to trigger the "transfer on death" event.
   d. Michigan definitions:
      "Beneficiary" includes, but is not limited to, the following:
      (i) In relation to a trust, a person that is a trust beneficiary as defined in section 7103.
      (ii) In relation to a charitable trust, a person that is entitled to enforce the trust.
      (iii) In relation to a beneficiary of a beneficiary designation, a person that is a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), of a pension, profit-sharing, retirement, or similar benefit plan, or of another nonprobate transfer at death.
      (iv) In relation to a beneficiary designated in a governing instrument, a person that is a grantee of a deed, devisee, trust beneficiary, beneficiary of a beneficiary designation, donee, appointee, taker in default of a power of appointment, or person in whose favor a power of attorney or power held in an individual, fiduciary, or representative capacity is exercised.
      MCL700.1103(d)

      "Organization" means a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity.
      MCL700.1106(i)

      "Person" means an individual or an organization.
      MCL700.1106(o)
F. Should the legislation establish a value limit on the vehicle for TOD registration and if so, what is the limit and how is it determined?
   a. Ohio: No value limit for a TOD. Note: There is a $65,000 limit when the title is transferred via survivorship, to a surviving spouse.
   b. Indiana: None.
   c. G & K: No value limit for a TOD.

G. Should the legislation require that a lien be resolved before a TOD is added to a vehicle?
   Michigan law (MCL 257.236) allows an heir to transfer the Decedent’s vehicle using a Death Certificate. The Certification From the Heir to a Vehicle (see attached) requires that a lien is terminated first.
   a. Ohio: No. The statute provides that this Section of OH law does not limit the rights of any creditor of the owner against any TOD beneficiary. Note: the lien does not have to be resolved when the title is transferred to a surviving spouse.
   b. Indiana: No.
   c. G & K: Yes, the lien should be resolved. We compared this process to that of a lady bird deed for real property – the transfer of real property with a lady bird deed does not require that a mortgage be paid off first. One difference though is that the lender maintains their lien on the real property and the ability to foreclose. It would be more difficult for a lien holder of a vehicle to repossess a car because it is mobile. But since two of our chosen states have allowed for TOD with an existing lien, we could be persuaded otherwise.
<table>
<thead>
<tr>
<th>STATE</th>
<th>Statute</th>
<th>Year Enacted</th>
<th>Statute location</th>
<th>Vehicles Covered?</th>
<th>TOD on Registration or Title</th>
<th>Joint Own allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>28-2055</td>
<td>2016</td>
<td>Vehicle Titles</td>
<td>Vehicle-broad</td>
<td>By attachment</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>27-14-727</td>
<td>2012</td>
<td>Transportation</td>
<td>Unclear</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>4150.7</td>
<td>?</td>
<td>Vehicle Code</td>
<td>Unclear</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Colorado</td>
<td>42-6-110.5</td>
<td>2016</td>
<td>Transportation &amp; MV</td>
<td>Unclear</td>
<td>Registration</td>
<td>Yes</td>
</tr>
<tr>
<td>Connecticut</td>
<td>246-14-16</td>
<td>2003</td>
<td>Motor Vehicles</td>
<td>Broad</td>
<td>Title</td>
<td>Yes</td>
</tr>
<tr>
<td>Delaware</td>
<td>21 Del. C. Sec 2304</td>
<td>2012</td>
<td>Motor Vehicles</td>
<td>Broad</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>(625 ILCS 5/3-107)</td>
<td>?</td>
<td>Motor vehicles</td>
<td>?</td>
<td>Title</td>
<td>Yes</td>
</tr>
<tr>
<td>Indiana</td>
<td>IC 32-17-14</td>
<td>2012</td>
<td>Property</td>
<td>Broad</td>
<td>Title</td>
<td>Yes</td>
</tr>
<tr>
<td>Kansas</td>
<td>KSA 59-3508</td>
<td>2015</td>
<td>Probate Code</td>
<td>Broad</td>
<td>Title</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>HB492 Chapter 684</td>
<td>2017</td>
<td>Motor Vehicle Code</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Missouri</td>
<td>301.681 RSMo</td>
<td>2004</td>
<td>Motor Vehicles</td>
<td></td>
<td></td>
<td>Yes</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NE.Rev.Stat.30-2715.01</td>
<td>2010, 2017</td>
<td>Motor Vehicles</td>
<td>Motor vehicle</td>
<td>Title</td>
<td>Yes</td>
</tr>
<tr>
<td>Nevada</td>
<td>NRS 482.247</td>
<td>2007</td>
<td>Motor Veh &amp; Trailers</td>
<td>Broad</td>
<td>Title</td>
<td>Yes (no businesses or ten. in common)</td>
</tr>
<tr>
<td>Ohio</td>
<td>ORC 2131.13</td>
<td>2002</td>
<td>Title 21-Miscellaneous</td>
<td>Broad</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>OAC 710:60-5-4 &amp;</td>
<td>2016</td>
<td>Oklahoma Tax Commission</td>
<td>Broad</td>
<td>Title or assignment</td>
<td>Yes</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>710:60-5-77</td>
<td>2016</td>
<td>Chapter 60 Motor Vehicles</td>
<td>Broad</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Vermont</td>
<td>23 VSA 2023</td>
<td>2015</td>
<td>Title 23: Motor Vehicles</td>
<td>Broad</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Virginia</td>
<td>VA Code ANN 46.2-633.2</td>
<td>2013</td>
<td>Title 46.2 Motor Vehicles</td>
<td>Broad</td>
<td>Title</td>
<td>No</td>
</tr>
<tr>
<td>Beneficiaries Allowed</td>
<td>Rev. Trust Beneficiary?</td>
<td>Forms Available</td>
<td>Statute title</td>
<td>Value Limit?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------------------------------</td>
<td>------------------------</td>
<td>-----------------</td>
<td>-------------------------------------------------------------------------------</td>
<td>--------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple-up to 4</td>
<td>Unknown</td>
<td>Yes</td>
<td>Certificate of title; content requirements; transfer on death provision</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One individual</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Transportation; MV Reg &amp; Licensing; UMV Admin, Cert. of Title; Cert. of Title w bene</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One individual</td>
<td>Unknown</td>
<td>Unknown</td>
<td>Certificate of title; arrangements for tot upon death-beneficiary designation forms</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple beneficiaries</td>
<td>Unknown</td>
<td>Yes</td>
<td>Transfer of ownership. Designation of beneficiary. Fees. Penalties.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One beneficiary</td>
<td>Unknown</td>
<td>Yes</td>
<td>Certificate of Title; Transfer -on-death</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Two</td>
<td>Yes</td>
<td>Yes</td>
<td>Contents and effect.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One individual</td>
<td>No</td>
<td>Yes</td>
<td>Transfer on death property act</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Broad</td>
<td>Yes</td>
<td>Yes</td>
<td>Motor vehicles; transfer on death</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple</td>
<td>Unknown</td>
<td>Yes</td>
<td>Vehicle Laws - Certificate of Title - Transfer-on-Death Beneficiary Designation</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint beneficiaries allowed</td>
<td>No</td>
<td>Yes</td>
<td>Certificate of ownership in beneficiary form</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Up to 35</td>
<td>Yes</td>
<td>Yes</td>
<td>Motor vehicle; transfer on death; certificate of title.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple</td>
<td>Unknown</td>
<td>Yes</td>
<td>Certificate of Title in Beneficiary form, etc.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ind., corp, entity</td>
<td>Yes</td>
<td>Yes</td>
<td>TOD of Motor Vehicle, Watercraft, or Outboard Motor</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One</td>
<td>Unclear</td>
<td>Yes</td>
<td>Transfer of Interest in Vehicle</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 One</td>
<td>Unclear</td>
<td>Yes</td>
<td>Transfer of Title on Death</td>
<td>None</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Motor Vehicle TODs
#### Allowed Owners and Beneficiaries

<table>
<thead>
<tr>
<th>State</th>
<th>Ownership</th>
<th>Beneficiaries allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Multiple</td>
<td>The statute suggests 1. The MV Div. ben. designation form</td>
</tr>
<tr>
<td>Arkansas</td>
<td>1-3 persons</td>
<td>1 individual-no businesses, etc. allowed</td>
</tr>
<tr>
<td>California</td>
<td>1 owner</td>
<td>1 TOD beneficiary</td>
</tr>
<tr>
<td>Colorado</td>
<td>Joint owners allowed</td>
<td>One or more specifically named persons or entities</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1 natural person</td>
<td>One beneficiary</td>
</tr>
<tr>
<td>Delaware</td>
<td>1 or more if ten. in com or joint tenants</td>
<td>Multiple</td>
</tr>
<tr>
<td>Illinois</td>
<td>1 owner &amp; not a bus.</td>
<td>One beneficiary</td>
</tr>
<tr>
<td>Indiana</td>
<td>Joint owners/bus allowed</td>
<td>Appears to be one</td>
</tr>
<tr>
<td>Kansas</td>
<td>1 or joint</td>
<td>Multiple</td>
</tr>
<tr>
<td>Maryland</td>
<td>1 owner only-Broad def</td>
<td>1 beneficiary only</td>
</tr>
<tr>
<td>Missouri</td>
<td>Multiple (if joint tenants or tenants by entirety)</td>
<td>Multiple (if joint tenants or tenants by the entirety)</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Joint (up to 35)</td>
<td>Up to 35</td>
</tr>
<tr>
<td>Nevada</td>
<td>Joint owners allowed</td>
<td>Multiple</td>
</tr>
<tr>
<td>Ohio</td>
<td>1 owner</td>
<td>Individual, corporation or entity</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Joint individual owners ok</td>
<td>Unclear but appears to be 1</td>
</tr>
<tr>
<td>Vermont</td>
<td>Joint owners/partners allowed</td>
<td>Unclear, but appears to be multiple</td>
</tr>
<tr>
<td>Virginia</td>
<td>1 natural person only</td>
<td>Unclear but appears to be 1 natural person</td>
</tr>
</tbody>
</table>

**Summary**
- 6 of 17 allow 1 owner
- 10 of 17 allow only single beneficiary
<table>
<thead>
<tr>
<th>State</th>
<th>Lien addressed</th>
<th>Transfer allowed w/ lien</th>
<th>LH consent for transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Yes</td>
<td>Unclear</td>
<td>Yes</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Yes</td>
<td>No</td>
<td>NA</td>
</tr>
<tr>
<td>California</td>
<td>No</td>
<td>Unclear</td>
<td>NA</td>
</tr>
<tr>
<td>Colorado</td>
<td>No</td>
<td>Yes</td>
<td>NA</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Yes</td>
<td>NA</td>
<td>Beneficiary rights subordinate to lienholder</td>
</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>NA</td>
<td>Subject to rights of lienholders</td>
</tr>
<tr>
<td>Illinois</td>
<td>No</td>
<td>Yes</td>
<td>NA</td>
</tr>
<tr>
<td>Indiana</td>
<td>Yes</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Kansas</td>
<td>Yes</td>
<td>Yes, subject to lien</td>
<td>NA</td>
</tr>
<tr>
<td>Maryland</td>
<td>Yes</td>
<td>Yes, subject to lien</td>
<td>NA</td>
</tr>
<tr>
<td>Missouri</td>
<td>Yes</td>
<td>Subject to outstanding security interest</td>
<td>NA</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Yes</td>
<td>Subject to the rights of LH</td>
<td>NA</td>
</tr>
<tr>
<td>Nevada</td>
<td>Yes</td>
<td>Rights of creditors not limited</td>
<td>NA</td>
</tr>
<tr>
<td>Ohio</td>
<td>Yes</td>
<td>No</td>
<td>NA</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Yes</td>
<td>No</td>
<td>NA</td>
</tr>
<tr>
<td>Vermont</td>
<td>Yes</td>
<td>Yes</td>
<td>NA</td>
</tr>
<tr>
<td>Virginia</td>
<td>Yes</td>
<td>No</td>
<td>NA</td>
</tr>
</tbody>
</table>
### Motor Vehicle TODs

**Charity as TOD beneficiary by state**

<table>
<thead>
<tr>
<th>State</th>
<th>Charity as Beneficiary</th>
<th>Miscellaneous information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Unclear from statute. No definition in Chpt. 7</td>
<td>Form does not prohibit</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Not permitted</td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>Unclear from statute. No limitation.</td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>Entities allowed</td>
<td></td>
</tr>
<tr>
<td>Connecticut</td>
<td>No mention. Beneficiary undefined</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>No mention.</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>No mention</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>Unclear, but beneficiary includes &quot;association&quot;</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>Yes, see definitions Neb Rev. Statutes 30-233</td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>The term &quot;charity&quot; not used but allows legal entities</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td>Unclear</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Unclear, but owner needs to be 1 natural person</td>
<td></td>
</tr>
</tbody>
</table>

10/19/2019 Probate Council Meeting
Probate and Estate Planning Section
Bates Page No. 00030
Part 4 TOD Motor Vehicle or Personal Watercraft

MCL 700.6401 Definitions.

As used in this part:

(a) "Beneficiary or Transfer-on-death beneficiary" means a person or persons specified in a certificate of title of a motor vehicle or personal watercraft who will become the owner or owners of the motor vehicle or personal watercraft upon the death of the present owner of the motor vehicle or personal watercraft.

(b) "Designate or designation in beneficiary form" means to designate, or the designation of, a motor vehicle or personal watercraft in a certificate of title that indicates the present owner of the motor vehicle or personal watercraft and the intention of the present owner with respect to the transfer of ownership on the present owner's death by designating one or more persons as the beneficiary or beneficiaries who will become the owner or owners of the motor vehicle or personal watercraft upon the death of the present owner.

(c) "Motor Vehicle" means a vehicle that has a certificate of title from the Michigan Secretary of State.

(d) "Personal Watercraft" has the same meaning as in MCL 324.80201(o).

MCL 700.6402 Certificate of title in beneficiary form; sole or joint tenancy ownership.

(1) Only an individual or individuals whose certificate of title to a motor vehicle or personal watercraft that shows sole ownership by 1 individual or multiple ownership by 2 or more individuals with right of survivorship or as tenants by the entireties, rather than as tenants in common, may designate such title in beneficiary form.

(2) The designation in beneficiary form of a motor vehicle or personal watercraft shall be shown on the certificate of title by the words "transfer-on-death" or the abbreviation "TOD" after the name of the owner or owners of a motor vehicle or personal watercraft and before the name or names of the transfer-on-death beneficiary or beneficiaries.

(3) The designation of a transfer-on-death beneficiary or beneficiaries on a certificate of title has no effect on the ownership of a motor vehicle or personal watercraft until the death of all owners of the motor vehicle or personal watercraft.

(4) The owner or owners of a motor vehicle or personal watercraft may unanimously cancel or change the designation of a transfer-on-death beneficiary or beneficiaries on a certificate of title at any time without the consent of the transfer-on-death beneficiary or beneficiaries by making an application for a new certificate of title.

(5) A transfer on death designation is not valid until a certificate of title in beneficiary form has been issued by the Michigan Secretary of State.
MCL 700.6403 No consideration, delivery or value limitation.

(1) The designation in beneficiary form of a motor vehicle or personal watercraft certificate of title is not required to be supported by consideration, and the certificate of title in which the designation is made is not required to be delivered to the transfer-on-death beneficiary or beneficiaries in order for the designation in beneficiary form to be effective.

(2) A certificate of title to a motor vehicle or personal watercraft may be designated in beneficiary form, regardless of the vehicle value.

MCL 700.6404 Ownership on death of owner.

(1) On death of a sole owner or the last to die of all multiple owners, ownership of the motor vehicle or personal watercraft designated in beneficiary form passes to the beneficiary or beneficiaries who survived all owners. On proof of death of all owners, and compliance with any applicable requirements of the Michigan Vehicle Code MCL 257.1 et seq., a certificate of title with a designation in beneficiary form may be retitled in the name of the beneficiary or beneficiaries who survived the death of all owners. Multiple beneficiaries surviving the death of all owners hold their interests with right of survivorship. If no beneficiary survives the death of all owners, the motor vehicle or personal watercraft belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

(2) A transfer on death resulting from a certificate of title in beneficiary form is not a testamentary transfer.

(3) This part does not limit the rights of creditors of owners against beneficiaries under other laws of this state.
MCL Index

300-1949-II-TRANSFERS-OF-TITLE-OR-INTEREST - TRANSFERS OF TITLE OR INTEREST (257.233...257.242a)

Section 257.233 - Transfer or assignment of title to, or interest in, registered vehicle; disposition of plates; application for new registration certificate; penalty; indorsement on certificate of title; effective date of transfer; submission of secured receipt.

Section 257.233a - Transfer of title or interest in vehicle; disclosure of odometer mileage.

Section 257.233b - Definitions; disclosure by dealer of damage or repair; exception; grounds for revocation.

Section 257.234 - Presentation of certificate of title and registration certificate to secretary of state; fees; issuance of new certificate of title and registration certificate; mail or delivery; repossession of license plates; payment of transfer fee; compliance with MCL 257.238.

Section 257.235 - Dealer as transferee of vehicle; requirements; duties; liability of dealer or transferee; transfer of title or interest to another dealer; duties of dealer; dealer reassignment of title form; buy back or off lease vehicle.

Section 257.235a - Licensed dealer or junk dealer purchasing vehicle for purpose of destroying or junking vehicle; acceptance and disposition of certificate of title; fee.

Section 257.235b - Possession of certificate of title by inventory lender for vehicle subject to inventory loan; written agreement; release of certificate of title by used or secondhand vehicle dealer's inventory lender; limitation; failure to release vehicle title; registration with secretary of state; applicability of section to certain licensed dealers; applicability of MCL 257.235; definitions.

Section 257.236 - Procuring title to vehicle acquired by operation of law; validity of registration upon death of owner; application for title by surviving spouse or heir; proof of death; certification; petition.

Section 257.236a - Termination of owner's interest by enforcement of security agreement; application for new certificate; certification; holding vehicle for resale; termination of owner's interest by sale pursuant to court process; issuance and contents of new certificate; outstanding certificate.

Section 257.237 - Transfer of registration; issuance of new registration certificate and certificate of title; filing surrendered certificate of title; retention of records.

Section 257.238 - Security interest in vehicle; certificate of title; assignment; termination statement; electronic transactions.

Section 257.239 - Certificate of title; failure to endorse or deliver, penalty.

Section 257.240 - Liability for use or ownership of vehicle after transfer of endorsed certificate of title; conditions; violation of subsection (2); civil infraction; fine; towing and storage fees.

Section 257.241 - Electronic lien title system; establishment, implementation, and operation; contracts; participation of secured parties; inclusion of secured interest or other information in electronic file; execution of release; delivery; assignment of ownership by vehicle dealer; admissibility as evidence of security interest; determination of requirements by secretary of state; establishment, implementation, and operation by July 1, 2016; information to be entered beginning October 1, 2016; definitions.

Section 257.242 - Sale of vehicle for salvage.

Section 257.242a - Regrooved or recut motor vehicle or motorcycle tires; sale or possession with intent to sell prohibited; exception; misdemeanor.
324.80312 Certificate of title for watercraft; issuance; compliance; transfer of ownership; requirements; petition for watercraft not owned; proof of ownership and right of possession; statement of lien.

Sec. 80312. (1) The secretary of state may issue a certificate of title for a watercraft to a person who complies with subsection (2) or (3) if the transfer of ownership of that watercraft is any of the following:

(a) By operation of law including, but not limited to, inheritance, devise, bequest, order in bankruptcy, insolvency, replevin, or execution of sale.

(b) By sale to satisfy a storage or repair charge.

(c) By repossession upon default in performance of the terms of a security agreement.

(d) As provided in subsection (3).

(2) A person applying for a certificate of title under this section shall do all of the following:

(a) Surrender to the secretary of state either a valid certificate of title or the manufacturer's or importer's certificate for the watercraft or, if surrender of a certificate for that watercraft is not possible, present proof satisfactory to the secretary of state of the applicant's ownership of and right of possession to the watercraft.

(b) Pay the fee prescribed in section 80311.

(c) Present to the secretary of state an application for certificate of title.

(3) A person may petition the secretary of state for a certificate or certificates of title for 1 or more registered watercraft that the person does not own, if each of the following circumstances exists:

(a) The record owner of the registered watercraft dies without leaving other property that requires the procurement of letters under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102.

(b) The total value of the deceased owner's interest in all watercraft subject to the petition for a certificate or certificates of title under this section is $100,000.00 or less.

(c) The person petitioning for a certificate or certificates of title under this section is 1 of the following, in the following order of priority:

(i) The surviving spouse of the watercraft owner.

(ii) A person entitled to the certificate or certificates of title in the order specified in section 2103 of the estates and protected individuals code, 1998 PA 386, MCL 700.2103.

(d) The person who petitions for a certificate of title under this section furnishes the secretary of state with proof satisfactory to the secretary of state of each of the following:

(i) The death of the owner of each watercraft for which a certificate of title is sought.

(ii) The petitioner's priority to receive the decedent's interest in each watercraft for which a certificate of title is sought.

(4) A certification by the person, or agent of the person, to whom possession of the watercraft passed, that sets forth the facts entitling that person to possession and ownership of the watercraft, together with a copy of the journal entry, court order, instrument, or other document upon which the claim of possession and ownership is founded, are satisfactory proof of ownership and right of possession. If the applicant cannot produce proof of ownership, the applicant may apply to the secretary of state for a certificate of title and submit evidence that establishes that person's ownership interest in the watercraft. If the secretary of state finds the evidence sufficient, the secretary of state may issue to that person a certificate of title for that watercraft. The office of secretary of state shall examine the records in its possession and, if it determines from that examination that a lien is on the watercraft, and if the applicant fails to provide satisfactory evidence of extinction of the lien, the secretary of state shall furnish a certificate of title that contains a statement of the lien.
Under the Michigan Vehicle Code

Add the following statute:

MCL 257.236b Transfer-on Death of Motor Vehicle

Only an individual or individuals whose certificate of title to a motor vehicle that shows sole ownership by 1 individual or multiple ownership by 2 or more individuals with right of survivorship or as tenants by the entireties, rather than as tenants in common, may designate such title in beneficiary form as provided for in MCL _____.

Under the Natural Resources and Environmental Protection Act

Modify the existing statute:

MCL 324.80312 Transfer-on Death of Personal Watercraft

(1) The secretary of state may issue a certificate of title for a watercraft to a person who complies with subsection (2) or (3) if the transfer of ownership of that watercraft is any of the following:

(a) By operation of law including, but not limited to, transfer-on-death as provided for in MCL _____, inheritance, devise, bequest, order in bankruptcy, insolvency, replevin, or execution of sale.

(b) By sale to satisfy a storage or repair charge.

(c) By repossession upon default in performance of the terms of a security agreement.

(d) As provided in subsection (3).

(2) A person applying for a certificate of title under this section shall do all of the following:

(a) Surrender to the secretary of state either a valid certificate of title or the manufacturer's or importer's certificate for the watercraft or, if surrender of a certificate for that watercraft is not possible, present proof satisfactory to the secretary of state of the applicant's ownership of and right of possession to the watercraft.

(b) Pay the fee prescribed in section 80311.

(c) Present to the secretary of state an application for certificate of title.

(3) A person may petition the secretary of state for a certificate or certificates of title for 1 or more registered watercraft that the person does not own, if each of the following circumstances exists:

(a) The record owner of the registered watercraft dies without leaving other property that requires the procurement of letters under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102.

(b) The total value of the deceased owner's interest in all watercraft subject to the petition for a certificate or certificates of title under this section is $100,000.00 or less.
(c) The person petitioning for a certificate or certificates of title under this section is 1 of the following, in the following order of priority:

(i) The surviving spouse of the watercraft owner.

(ii) A person entitled to the certificate or certificates of title in the order specified in section 2103 of the estates and protected individuals code, 1998 PA 386, MCL 700.2103.

(d) The person who petitions for a certificate of title under this section furnishes the secretary of state with proof satisfactory to the secretary of state of each of the following:

(i) The death of the owner of each watercraft for which a certificate of title is sought.

(ii) The petitioner's priority to receive the decedent's interest in each watercraft for which a certificate of title is sought.

(e) The person who petitions for a certificate of title under this section is a transfer-on-death beneficiary and furnishes the secretary of state with proof satisfactory to the secretary of state of each of the following:

(i) The death of the owner of each watercraft for which a certificate of title is sought.

(ii) The person is entitled to the certificate or certificates of title pursuant to MCL ____________.

(4) A certification by the person, or agent of the person, to whom possession of the watercraft passed, that sets forth the facts entitling that person to possession and ownership of the watercraft, together with a copy of the journal entry, court order, instrument, or other document upon which the claim of possession and ownership is founded, are satisfactory proof of ownership and right of possession. If the applicant cannot produce proof of ownership, the applicant may apply to the secretary of state for a certificate of title and submit evidence that establishes that person's ownership interest in the watercraft. If the secretary of state finds the evidence sufficient, the secretary of state may issue to that person a certificate of title for that watercraft. The office of secretary of state shall examine the records in its possession and, if it determines from that examination that a lien is on the watercraft, and if the applicant fails to provide satisfactory evidence of extinction of the lien, the secretary of state shall furnish a certificate of title that contains a statement of the lien.
Council Materials
I. Call to Order

II. Introduction of Guests

III. Excused Absences

IV. Lobbyist Report—Public Affairs Associates

V. Monthly Reports:
   A. Minutes of Prior Council Meeting (Mark Kellogg)—Attachment 1
   B. Chair’s Report—Attachment 2
      1. Proposed Plan of Work
      2. Follow up on Meeting Days: Friday/Saturday
   C. Committee on Special Projects (Katie Lynwood)
   D. Legislative Analysis & Monitoring Committee (Dan Hilker)
   E. Legislative Development and Drafting Committee (Nathan Piwowarski)

VI. Other Committees Presenting Oral Reports
   A. Court Rules, Forms, and Proceedings (Melisa Mysliwiec)
   B. Guardianship, Conservatorship, and End of Life (Kathy Goetsch)—Attachment 3

VII. Other Committees Presenting Written Reports Only
   A. Uniform Law Commission (James Spica)—Attachment 4
   B. Liaison to the Tax Section (Neal Nusholtz)—Attachment 5

VIII. Other Business

IX. Adjournment

Next Probate Council Meeting: Friday, November 15, 2019, at 9:00 am
Meeting of the Council of the
Probate and Estate Planning Section of the
State Bar of Michigan

September 20, 2019
Lansing, Michigan

Minutes

I. Call to Order

The Chair of the Council, Christopher A. Ballard, called the meeting to order at 10:36 a.m.

II. Introduction of Guests

A. Meeting attendees introduced themselves.

B. The following officers and members of the Council were present: Christopher A. Ballard, Chair; David P. Lucas, Vice Chair; David L.J.M. Skidmore, Secretary; Mark E. Kellogg, Treasurer; Christopher J. Caldwell; Kathleen M. Goetsch; Angela M. Hentkowski; Hon. Michael L. Jaconette; Robert B. Labe; Michael G. Lichterman; Katie Lynwood; Raj A. Malviya; Richard C. Mills; Melisa M.W. Mysliwiec; Lorraine F. New (via remote attendance); Kurt A. Olson; Nathan R. Piwowarski; Christine M. Savage; James F. Anderton (via remote attendance); Neal Nusholtz; and Andrew W. Mayoras. A total of 21 Council officers and members were present, constituting a quorum.

C. The following ex officio members of the Council were present: Marguerite Munson Lentz and Marlaine C. Teahan.

D. The following liaisons to the Council were present: Susan Chalgian and James P. Spica.

E. Others present: David Sprague; Ken Silver; Diane Huff; Rebecca Wrock; Gary Bauer; Georgette David; Carmencita Q. Fulgade-Taylor; Michael D. Shelton; Daniel S. Hilker; Chiara Mattieson; Erin K. Mendez; Buzz Leach (via remote attendance); Deborah Hulverson (via remote attendance); Lisa Anderson (via remote attendance); and Sandra Glazier (via remote attendance).

III. Excused Absences

The following member of the Council was absent: Nazneen S. Hasan.

IV. Lobbyist Report – Public Affairs Associates

Jim Ryan of Public Affairs Associates provided a verbal report regarding the status of the proposed assisted reproductive technology (ART) legislation (to be sponsored by Rep. Fuller)
and EPIC omnibus legislation (to be jointly sponsored by Representatives Fully and Elder) and other matters.

V. Monthly Reports

A. Minutes of Prior Council Meeting (David L.J.M. Skidmore):

It was moved and seconded to approve the Minutes of the June 14, 2019 meeting of the Council, as included in the meeting agenda materials and presented to the meeting. On voice vote, the Chair declared the motion approved.

B. Chair’s Report (Christopher A. Ballard):

The Chair reported on the Council’s proposed plan of work for the current fiscal year and the Chair’s dinner on the evening of Saturday, October 19, 2019, in Ann Arbor. The Chair also led a discussion on whether the Council should continue to meet on Fridays.

C. Treasurer’s Report (Mark E. Kellogg):

The Treasurer reported on the year to date budget and reminded members to timely submit reimbursement requests.

D. Committee on Special Projects (Katie Lynwood):

Katie Lynwood reported on the discussion at the Committee on Special Projects meeting.

The Committee considered a proposal to amend MCL 554.92 to 554.93, made by James P. Spica on behalf of the Legislative Development and Drafting Committee. Mr. Spica circulated a revised memorandum (attached hereto) which provided that the references to “subjection (3)” in the proposed amendments to MCL 554.93(1) and (2) should be replaced with “section (2),” The Committee’s motion is:

That the Council supports the proposed amendments to MCL 554.92 to 554.93 as described in the memorandum from James P. Spica included in the meeting agenda materials, provided that the references to “subjection (3)” in the proposed amendments to MCL 554.93(1) and (2) should be replaced with “section (2),” and grants Mr. Spica on behalf of the Legislative Development and Drafting Committee to make any non-substantive, technical amendments which become necessary during the legislative process.

The Chair stated that since this would be a public policy position of the Section, the vote of the Council would have to be recorded. Following discussion, the Chair called the question, and the Secretary recorded a vote of 18 in favor of the motion, 0 opposed to the motion, 0 abstaining, and 3 not voting.

Ms. Lynwood also reported on the status of the draft legislation intended to address the Mardigian case, which remains before the Drafted/Beneficiary Ad Hoc Committee.
E. Legislative Analysis & Monitoring Committee (Dan Hilker):

Dan Hilker discussed proposed legislation being monitored by the Committee. SB 110 merely clarifies that the Probate Court has the power to address visitation for an individual who has been found to be incapacitated, and the Committee suggests that the Council need not take any position regarding SB 110. Mr. Hilker also discussed the Financial Exploitation and Prevention Act, the Criminal Elder Abuse bill package, and other items.

F. Legislative Development and Drafting Committee (Nathan Piwowarski):

Nathan Piwowarski discussed the status of the work of the Committee. The Committee is awaiting a blueback for the EPIC omnibus legislation from LSB. The Committee is having a dialogue with the Michigan Bankers Association regarding the entireties trust proposal. The Committee is looking for a sponsor of the legislation to amend MCL 554.92 to 554.93. The Committee is working on proposed legislation to permit the transfer of vehicle ownership at death via transfer on death designation.

VI. Other Committees Presenting Oral Reports

A. Outreach Committee (Kathy Goetsch):

Kathy Goetsch reported that the Committee is reviewing proposed educational materials prepared by Michigan Legal Help.

B. Guardianship Committee (Kathy Goetsch):

Kathy Goetsch reported that the Committee expects that new legislation related to guardianships will be referred to the Committee in the near future.

C. Tax Committee (Raj Malviya and James Spica):

Raj Malviya and James Spica reported on the Delaware tax trip issue.

VII. Committees Presenting Written Reports (included in the meeting agenda materials)

A. Uniform Law Commission (James Spica)

B. Tax Section Liaison (Neal Nuscholz)

VIII. Other Business

None.

IX. Adjournment
Seeing no other matters or business to be brought before the meeting, the Chair declared the meeting adjourned at 12:06 p.m.

Respectfully submitted,
David L.J.M. Skidmore, Secretary
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan Legislation Development & Drafting Committee

From: James P. Spica

Re: Proposal to Amend MCL §§ 554.92-.93

Date: June 20, 2019

I. Purpose of the Proposal

The proposal is to make the anti-Delaware-tax-trap provision of the Personal Property Trust Perpetuities Act (PPTPA) elective. This will allow the donee of a qualifying special power of appointment over personal property held in trust to spring the so-called “Delaware tax trap” without having to create a presently exercisable general power of appointment over the property in question.

II. The Delaware Tax Trap

“Delaware tax trap” (Trap) is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d). The Trap provides that assets subject to a power of appointment (first power) are included in the power holder’s (H’s) federal transfer tax base (gift tax base or gross estate depending on whether the triggering exercise is effectively testamentary) to the extent H exercises the power by creating another power over the assets in question (second power) that “under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power.”

Thus, the Trap assumes that applicable local law determines the period during which the vesting of future interests can be postponed or the power of alienation suspended and that, under that law, when one power of appointment, p1, is exercised so as to grant a second power of appointment, p2, the date of the creation of p1 may or may not be

1 The “donee” of a power of appointment is the person to whom the power is granted or by whom it is retained—i.e., the holder of the power. See Mich. Comp. Laws § 556.112(e); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.2(b) (Am. Law Inst. 2011).

2 A “special power” is a power of appointment whose permissible appointees do not include the donee of the power, her estate, her creditors, or the creditors of her estate. See Mich. Comp. Laws § 556.112(i). In other words, a “special power” is a power of appointment that is not a “general power.” See id. § 556.112(h) (defining “general power” as power of appointment whose permissible appointees include donee, her estate, her creditors, or the creditors of her estate); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.3 (Am. Law Inst. 2011). The sense in which a “qualifying special power of appointment” qualifies is described infra in Part VIII apropos of proposed new PPTPA section 2(2)(a).

3 I.R.C. § 2041(a)(3) (emphasis added) (providing estate tax version of Trap); see id. § 2514(d) (providing gift tax version).
determinative of the remotest date on which interests granted by exercise of \( p_2 \) must vest (if at all, to be valid) or assets appointed by exercise of \( p_2 \) must become transferable within the meaning of an applicable rule against suspension of absolute ownership or the power of alienation. If the date of \( p_1 \)'s creation is determinative, the Trap is not sprung. But if the date of \( p_1 \)'s creation is irrelevant, the Trap is sprung, and the assets subject to \( p_2 \) are included in the transfer tax base of the donee of \( p_1 \) upon the granting of \( p_2 \).

The Trap was a legislative response to the peculiarity of Delaware law that allows the exercise of a special power of appointment to restart any applicable perpetuities testing or wait-and-see period; for Delaware is peculiar in applying the common law principle that the period determining the remotest date on which interests granted by exercise of a presently exercisable general power of appointment must vest (if at all, to be valid) is measured from the time the power is exercised (rather than from the time of the power’s creation or deemed creation) to the exercise of any power of appointment, including a testamentary general or special power.\(^4\) Before the enactment of the federal generation-skipping transfer (GST) tax, that peculiarity of Delaware law posed a serious threat to the integrity of the federal transfer tax base as a measure of wealth, a threat that the Trap was designed to neutralize:

In at least one State a succession of powers of appointment, general or limited, may be created and exercised over an indefinite period without violating the rule against perpetuities. In the absence of some special provision in the [Code], property could be handed down from generation to generation without ever being subject to estate tax.\(^5\)

III. Application to Powers Subject to Michigan Law

Now, the Trap refers to postponement of vesting, on the one hand, and suspension of absolute ownership or the power of alienation, on the other,\(^6\) in the disjunctive, but the disjunction has been interpreted as a reference to the particular vesting or alienation requirements actually imposed by local law.\(^7\) Michigan has not had a rule against suspension of absolute ownership or

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\(^6\) Postponement of vesting is the conceptual province of all forms of rule against perpetuities, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules. See, e.g., Gray, supra note 4, § 119; Stephen E. Greer, The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities, 28 Est. Plan. 68, 70–71 (2001). Vesting is irrelevant to rules against suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question, as when trust principal is directed to someone yet unknown or unborn. See Ira Mark Bloom, Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation, 45 Alb. L. Rev. 261, 267–69 (1981). These rules are violated when such a suspension may last longer than a specified period that is often the same as the common law perpetuities testing period of a life in being plus twenty-one years (plus gestation). See, e.g., Bloom, supra, at 268.

the power of alienation since 1949, after which the common law rule against perpetuities (RAP) applied with respect to both real and personal property until the enactment, in 1988, of the Uniform Statutory Rule Against Perpetuities (USRAP), which PPTPA overlies. That makes remoteness of vesting the relevant concern in Michigan for application of the Trap, which means that we can ignore the Trap’s abstract concern with a rule against suspension of absolute ownership or the power of alienation: for our purposes, the Trap might simply provide that assets subject to a special power of appointment (first power) are included in the power holder’s (H’s) transfer tax base to the extent H exercises the power by granting another power over the assets in question (second power) that, under Michigan law, can validly be exercised so as to postpone the vesting of future interests in the assets for a period ascertainable without regard to the date of creation of the first power.

IV. The Relation-Back Principle

Under Michigan law, in the case of any power of appointment other than a presently exercisable general power, the remotest date (if any) on which interests granted by exercise of the power must vest (if at all, to be valid) is reckoned from the time the power was created; in the case of a presently exercisable general power, the remotest such date (if any) is reckoned from the time the power is exercised. This is a particular implication of a more general account of special and testamentary general powers of appointment that is sometimes called the “relation back theory,” but it is a particular implication that is often singled out for mention when the general theory is described, as when we read: “Where an appointment is made under a special power, the appointment is read back into the instrument creating the power (as if the donee were filling in blanks in the donor’s instrument) and the period of perpetuities is computed from the date the power was created.” As a general account of the meaning and effect of special and testamentary general powers, the relation-back theory is open to criticism; but the particular implication of the theory pertaining to perpetuities was thoroughly entrenched in the common law.

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9 See Mich. Comp. Laws § 554.53.
10 See id. §§ 554.92(f), 554.93(3).
11 Assets subject to a general power of appointment are included in the power holder’s federal transfer tax base in any case—i.e., without regard to the Trap. See I.R.C. §§ 2041(a)(1)–(2), 2514(a)–(b). Thus, the Trap is not a trap for the donee of a general power of appointment.
12 Cf. id. § 2041(a)(3) (being the estate tax version of Trap quoted supra note 3); cf. also id. § 2514(d) (regarding gift tax version).
14 See Restatement (Third) of Prop.: Wills & Other Donative Transfers § 17.4 cmt. f (Am. Law Inst. 2011).
17 I.e., the principle described supra in the text accompanying note 13.
18 See, e.g., Gray, supra note 4, §§ 474.2, at 467, 514-15; Borron, supra note 16, § 1274.
If we suppose a finite perpetuities-limitation period, like either the common law testing period (of a life in being plus twenty-one years plus gestation)\(^{19}\) or the so-called “wait-and-see period” specified in the USRAP,\(^{20}\) it is easy to see how, in the case of a special power of appointment, the relation-back principle meets the policy concern that motivated the Trap:\(^{21}\) the terminus of a finite period measured from the date that the “first power” contemplated by the Trap came into existence (or from an earlier date on which that power is deemed to have come into existence under the relation-back principle) is bound to fall earlier (on the timeline) than the terminus of the same period measured from a date later than the date on which the first power came into existence, as when, for example, the period is measured—as it is in Michigan when a presently exercisable general power is exercised\(^{22}\) (and in Delaware in any case)\(^{23}\)—from the date on which the “second power” is exercised. Moving a finite period along the timeline is like laying down a ruler—the point at which one end is placed rigidly determines the point at which the other end falls.

V. The Threat of Infinity

But what if the ruler is infinitely long? In that case, the point at which we place the nearer end does not determine where the farther end falls—because there is no farther end! PPTPA creates an infinitely long ruler: apart from its anti-Trap provision, and excepting certain personal property previously held in trusts that were irrevocable on September 25, 1985, PPTPA makes the USRAP and all other RAP-like rules inapplicable with respect to personal property held in any trust that was revocable on or created after May 28, 2008.\(^{24}\) So, if PPTPA did not make an anti-Trap exception, given that Michigan does not have rule against suspension of absolute ownership or the power of alienation,\(^{25}\) any “second power” over personal property subject to a trust of the right vintage that might be created by the exercise of a “first power” within the meaning of the Trap could be used to postpone vesting for a period without end.

If there is any sense in which the farther end (to continue the ruler metaphor) of an endless period is “ascertainable,” what is ascertained must be merely that there is no farther end, and that is a realization to which the position of the period’s nearer end (if it has one) is evidently irrelevant—the terminus of a period that has a beginning but no end cannot be drawn nearer by moving the period’s origin to an earlier place on the timeline. Thus, under PPTPA, but for the effect of the anti-Trap provision, the remotest date on which interests granted by exercise of any “second power” contemplated by the Trap must vest (if at all, to be valid) would be “ascertainable,” if at all, “without regard to the date of creation of the first power” (or any other event), and the Trap would, therefore, include the assets subject to the second power in the

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\(^{19}\) See, e.g., Gray, supra note 4, § 201, at 191 (famously formulating the RAP); see also id. §§ 220-21 (regarding periods of gestation).


\(^{21}\) I.e., the policy concern expressed in the legislative history quoted supra text accompanying note 5.

\(^{22}\) See supra note 13.

\(^{23}\) See supra notes 4–5 and accompanying text.

\(^{24}\) See Mich. Comp. Laws §§ 554.93(1)–(2), 554.94.

\(^{25}\) See supra notes 8–9 and accompanying text.
transfer tax base of the holder of the first power upon exercise of the first power to grant the second.\textsuperscript{26}

\section*{VI. Status Quo}

That is why PPTPA makes an anti-Trap exception, in section 3(3), for the case in which a nonfiduciary\textsuperscript{27} special power of appointment over personal property held in trust is exercised to create, a "second power."\textsuperscript{28} In that case, the period during which the vesting of a future interest in the property may be postponed by the exercise of the second power is determined under a modified USRAP (having a 360-year wait-and-see period) by reference to the date on which the first power was created.\textsuperscript{29} By requiring interests created by exercise of the second power to vest—and powers of appointment created by an exercise of the second power to be irrevocably exercised or otherwise to terminate—within a finite testing period under the USRAP, PPTPA section 3(3) prevents the value of assets subject to the second power from being included by the Trap in the transfer tax base of the donee of the first power when she exercises the first power to create the second (in case the instrument that creates the second power, by exercising the first, does not itself avert the Trap by placing limitations on exercise of the second power).\textsuperscript{30}

Now, the anti-Trap provision (PPTPA section 3(3)) does not apply when a "first power" is exercised to create a presently exercisable general power of appointment: section 2(e) excludes presently exercisable general powers from the extension of the term "second power" as defined for purposes of PPTPA.\textsuperscript{31} That makes Trap springing elective to the extent the donee of a special power of appointment is able\textsuperscript{32} and willing to create a presently exercisable general power over the trust assets in question.\textsuperscript{33} And there are situations in which it can be advantageous to spring

\footnotesize{\textsuperscript{26} See I.R.C. §§ 2041(a)(3), 2514(d). See also James P. Spica, A Trap for the Wary: Delaware’s Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity), 43 Real Prop. Tr. & Est. L.J. 673, 682 (2009).

\textsuperscript{27} Powers that are to be exercised only in a fiduciary capacity are not treated as powers of appointment under the federal transfer taxes. See, e.g., Treas. Reg. § 20.2041-1(b)(1) (dispositive powers exercisable only in fiduciary capacity not treated as powers of appointment under I.R.C. § 2041).

\textsuperscript{28} See Mich. Comp. Laws § 554.92(b), (e).

\textsuperscript{29} See id. § 554.93(3), 554.75(2).

\textsuperscript{30} See Spica, supra note 26, at 683.

\textsuperscript{31} See Mich. Comp. Laws § 554.92(e).

\textsuperscript{32} Unless the instrument granting a power of appointment manifests a contrary intent, a power of appointment can ordinarily be exercised to grant further powers of appointment in permissible appointees. See, e.g., Restatement (Third) of Prop.: Wills & Other Donative Transfers § 19.14 (Am. Law Inst. 2011); see also id. § 17.1 (defining “power of appointment” circularly to include power to “designate recipients of . . . powers of appointment over the appointive property”); Unif. Powers of Appointment Act § 102(13) (Unif. Law Comm’n 2013) (defining “power of appointment” circularly to include power to “designate a recipient of . . . another power of appointment”). On the other hand, the donor a power of appointment can definitely rule out particular uses of the power, including the creation of further powers; for an exercise of a power must comply “with the requirements, if any, of the creating instrument as to the manner, time, and conditions of the exercise of the power.” Mich. Comp. Laws § 556.115(2); see also Hannan v. Slush, 5 F.2d 718, 722 (E.D. Mich. 1925); Restatement (Second) of Property: Donative Transfers §12.1 (Am. Law Inst. 1986).

\textsuperscript{33} See James P. Spica, Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities, 40 ACTEC L.J. 347, 379-80 (2014).}
the Trap, as when, for example, a special power holder's death would otherwise be a "taxable termination" within the meaning of the federal GST tax and the attributable GST tax would be more than the attributable estate tax under the Trap.\textsuperscript{34} Trap springing can also be advantageous when the effective exclusion amount available to the holder ($H$) of a testamentary special power of appointment is ample enough to cover appreciated assets subject to the power: in that case, an exercise of the power to grant another power so as to spring the Trap, will be without transfer tax effect, thanks to the effective exclusion of the unified credit, but the appointed assets will have been acquired by $H$'s appointees "from a decedent" within the meaning of Code section 1014 and, hence, qualify for the so-called "step up" in basis.\textsuperscript{35} In situations like these, the power holder can spring the Trap under PPTPA in its current form, but only by exercising her power so as to grant a presently exercisable general power of appointment.\textsuperscript{36}

\section*{VII. The Problem}

Sometimes in the context of GST-tax planning, creation of a presently exercisable general power of appointment does not seem extravagant: indeed, if there is a lot of wealth involved, strategic placement of a presently exercisable general power will often yield transfer tax benefits in addition to attracting the federal estate or gift tax when GST tax would otherwise be payable.\textsuperscript{37} But with recent increases in the effective exclusion of the unified credit, planners are increasingly seeking estate-tax inclusion for reasons that have nothing to do with transfer taxation, particularly as a way of obtaining the "step up." In \textit{that} context, creating a presently exercisable general power may seem extravagant; for there is no transfer tax advantage to weigh against the fact that granting such a power gives the donee the legal ability to scrap arrangements set by the default terms of the affected trust. And the latter consideration may loom large in any case, so that even in the context of GST-tax planning, the holder of a special power of appointment may prefer to spring the Trap without abandoning her takers in default to the discretion of the donee of a presently exercisable general power; she would prefer to spring the Trap without having to create such a power.

\section*{VIII. Mechanics of the Proposal}

The proposal below makes that possible, but it also does a little clean-up job by moving the anti-Trap provision from section 3 of PPTPA to section 2; for the terms defined in section 2 appear only in the anti-Trap provision of existing section 3(3), which means that in its current form, the statute violates the Legislative Service Bureau (LSB) style imperative according to which interpretation provisions\textsuperscript{38} defining terms that only appear in one section of an act should appear


\textsuperscript{35} See I.R.C. § 1014(a)(1), (b)(9); Treas. Reg. § 1.1014-2(b).

\textsuperscript{36} See supra notes 31--33 and accompanying text.

\textsuperscript{37} See Spica, supra note 33, at 377-78.

\textsuperscript{38} "Modern statutes frequently contain (usually, in the case of English statutes, at the end) a set of provisions with the marginal note 'Interpretation.' These usually take one of two forms, stating either that a particular word of phrase 'means ... .' (or 'has the meaning hereby assigned to it') or that a particular word or phrase 'includes ... .')." Rupert Cross, \textit{Statutory Interpretation} 119 (John Bell & George Engle eds., 3d ed. 2005).}
not in a separate “Definitions” section (like existing PPTPA section 2), but at the end of the section in which the defined terms occur. It is probably just due to PPTPA’s dense complexity that the LSB missed this solecism initially, but, in any case, they will be glad to have the matter put right, and it is easily put right by moving the current section 3(3) into a new section 2(1) and putting the statutory definitions in a new subsection (3).

New section 2(2) is the provision that will allow the donee of a special power of appointment over personal property held in trust to spring the Trap without having to create a presently exercisable general power. But in order to keep the mere availability of the election described in section 2(2) from vitiating the anti-Trap provision in section 2(1), new section 2(2)(a) requires that the “second power” in question must have been created by the exercise of a “first power” that was not itself created by the exercise of either a “nonexcluded first power” or a “nonexcluded second-order fiduciary power.” That limitation complicates the section tremendously, but it makes the availability of the election out of anti-Trap protection safe, in the circumstances contemplated by PPTPA, for those who need such protection.

But for the section 2(2)(a) limitation, if the donee of a special power over personal property held in trust, \( p_1 \), exercised \( p_1 \) to grant a like power, \( p_2 \), and did \textit{not} opt out of anti-Trap treatment for interests granted by exercise of \( p_2 \), the donee of \( p_2 \) could be permitted (if the terms of the instrument exercising \( p_1 \) to grant \( p_2 \) did not provide otherwise)\(^{39}\) to exercise \( p_2 \) so as to grant another like power, \( p_3 \), and \textit{opt out of anti-Trap treatment for interests granted by exercise of} \( p_3 \), for (as is \textit{necessary} for effective anti-Trap protection), as far as the statute is concerned, what is a “second power” within the meaning of the anti-Trap provision in respect of one power of appointment may be a “first power” in respect of another.\(^{40}\) Since in that case, \( p_2 \) could validly be exercised to grant an additional “second power” that would be eligible for the section 2(2) election, \( p_2 \) \textit{could be} validly exercised to postpone the vesting of future interests in the assets subject to \( p_2 \) \textit{forever}, which, again, is a period ascertainable, if at all, without regard to the date of creation of \( p_1 \);\(^{41}\) and so, regardless of the fact that the donee of \( p_1 \) did \textit{not} opt out of anti-Trap treatment for interests granted by exercise of \( p_2 \), the Trap would be sprung upon the exercise of \( p_1 \) to grant \( p_2 \).\(^{42}\)

That would mean the anti-Trap provision was broken: it would mean that in attempting to make it possible for the donee of \( p_1 \) to spring the Trap, if she wished to, without having to create a presently exercisable general power in the donee of \( p_2 \), we had succeeded in making it impossible for PPTPA’s anti-Trap provision to disarm the Trap in any case!\(^{43}\) The proposal averts that result by imposing the limitation embodied in new section 2(2)(a). The result is that whereas would-be settlors owning assets outright or wielding general powers of appointment and, in some cases, their fiduciaries can create Trap-springing options—thanks to new section 2(2)—by granting special powers of appointment, the donees of “second powers” as to which the section 2(2) election was \textit{not} made, cannot.

\(^{39}\) See supra note 32.  
\(^{40}\) See Mich. Comp. Laws § 554.92(b) (defining “first power” for PPTPA’s purposes).  
\(^{41}\) See supra Part V.  
\(^{42}\) See supra Part II.  
\(^{43}\) The possible pitfall described in the text regarding PPTPA is one into which legislatures in other states have fallen regarding their own perpetuities reform statutes. See 20 Pa. Cons. Stat. § 6107.1(b)(3) (2018).
IX. The Proposal

A bill to amend 2008 PA 148, entitled “personal property trust perpetuities act,” by amending sections 2 and 3 as amended by 2012 PA 484 to allow the donee of a qualifying special power of appointment over personal property held in trust deliberately to spring the so-called “Delaware tax trap” without having to create a presently exercisable general power of appointment over the property in question.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

554.92 Exercise of second power; determination under uniform statutory rule against perpetuities

Sec. 2.

(1) Except as provided in subsection (2), the period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. Except as provided in subsection (2), a nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.

(2) To the extent a second power is created or has property subjected to it by the exercise of a first power, subsection (1) does not apply to any future interest created by exercise of the second power if both of the following apply:

(a) The first power was not itself created or augmented by the exercise of either a nonexcluded first power or a nonexcluded second-order fiduciary power.

(b) The instrument exercising the first power to subject property to or create the second power expressly declares that subsection (1) shall not apply to any future interest created by exercise of the second power or otherwise clearly indicates that the donee of the first power intends to spring the so-called Delaware tax trap by subjecting property to or creating the second power. For purposes of an express declaration that subsection (1) shall not apply, subsection (1) may be referred to as the anti-Delaware-tax-trap provision of the personal property trust perpetuities act.

(3) As used in this act section:

(a) "Fiduciary" means, with respect to a power of appointment, that the power is held by a trustee in a fiduciary capacity.

(b) "First power" means a nonfiduciary, nongeneral power of appointment over personal property held in trust that is exercised so as to subject the property to, or to create, another power of appointment.

(c) "Nonexcluded first power" means a first power any future interest created by the exercise of which is subject to subsection (1) because the power was itself created or
augmented by the exercise of a nonfiduciary, nongeneral power of appointment and the
election described in subsection (2) was not made by the donor of the power.
(d) "Nonexcluded second-order fiduciary power" means a second-order fiduciary power
that is created or has property subjected to it by the exercise of one of the following:
   (i) A nonexcluded first power.
   (ii) A fiduciary power of appointment that was created or had property subjected to it
        by the exercise of a nonexcluded first power.
   (iii) A fiduciary power of appointment whose creation or control over property subject
        to the power is traceable through an unbroken succession of previous exercises of fiduciary
        powers to the exercise of a fiduciary power that was created or had property subjected to it
        by the exercise of a nonexcluded first power.
(ee) "Nonfiduciary" means, with respect to a power of appointment, that the power of
appointment is not held by a trustee in a fiduciary capacity.
(ef) "Second-order fiduciary power" means a fiduciary power of appointment that is
created or has property subjected to it by the exercise of one of the following:
   (i) A first power.
   (ii) A fiduciary power of appointment that was created or had property subjected to it
        by the exercise of a first power.
   (iii) A fiduciary power of appointment whose creation or control over property subject
        to the power is traceable through an unbroken succession of previous exercises of
        fiduciary powers to the exercise of a fiduciary power that was created or had property
        subjected to it by the exercise of a first power.
(eg) "Second power" means a power of appointment over personal property held in trust,
other than a presently exercisable general power, that is created or to which property is
subjected by the exercise of either a first power or a second-order fiduciary power.
(fh) "Uniform statutory rule against perpetuities" means the uniform statutory rule against
perpetuities, 1988 PA 418, MCL 554.71 to 554.78.

554.93 Personal property held in trust; interest in or power of appointment over; validity;
exercise of second power; determination under uniform statutory rule against perpetuities

Sec. 3. (1) Except as provided in subsection (3), section 2, an interest in, or power of
appointment over, personal property held in trust is not invalidated by a rule against any of
the following:
   (a) Perpetuities.
   (b) Suspension of absolute ownership.
   (c) Suspension of the power of alienation.
   (d) Accumulations of income.
(2) Except as provided in subsection (3), section 2, all of the following may be indefinitely
suspended, postponed, or allowed to go on with respect to personal property held in trust:
   (a) The vesting of a future interest.
   (b) The satisfaction of a condition precedent to the exercise of a general power of
appointment.
   (c) The exercise of a nongeneral or testamentary power of appointment.
   (d) Absolute ownership.
   (e) The power of alienation.
(f) Accumulations of income.

(3) The period during which the vesting of a future interest in property may be postponed by the exercise of a second power shall be determined under the uniform statutory rule against perpetuities by reference to the time of the creation of the power of appointment that subjected property to, or created, the second power. Except as provided in subsection (2), a nonvested interest, general power of appointment not presently exercisable because of a condition precedent, or nongeneral or testamentary power of appointment created, or to which property is subjected, by the exercise of the second power is invalid, to the extent of the exercise of the second power, unless the interest or power satisfies the uniform statutory rule against perpetuities measured from the time of the creation of the power of appointment that subjected property to, or created, the second power.

JPS
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COUNCIL AGENDA ITEM V. B. 1. (2019-2020 Plan of Work - Chair)
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                      -Lawyer drafter/beneficiary legislation  
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                      -Delaware tax trap legislation | -Electronic Wills | -Initiatives to involve younger layers and increase diversity  
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                      -Legislation to permit charity to serve as trustee of charitable trust | | |
MEMORANDUM

To: Probate Council

From: Kathleen Goetsch

Date: 10/9/2019

Re: EPIC modifications proposed by Elder Abuse Task Force

I have reviewed the proposals of the Elder Abuse Task Force to revise parts of EPIC, in particular, the Guardian and Conservator sections. I offer this report as my analysis and summary of the recommendations. This summary addresses only proposed modifications to EPIC, it does not address any proposed modifications to criminal statutes or the court rules.

This report is strictly my own work. It is being shared with the guardianship committee at the same time as it is being forwarded to Council Officers for preparation of the October meeting materials. Obviously as of this writing the committee has not weighed in on any of my comments. We will be considering these proposals over the next several weeks.

These proposals are far reaching and substantially modify elements of EPIC. If these proposals are seriously considered by the legislature now or in the future, I think it is important for the guardianship committee and counsel have as much information and analysis as possible before deciding whether or not to take a public policy position.

One of the key factors throughout these proposals is the fact that conservatorships and guardianship in particular, involves important due process rights. The individual subject to the petition, and if appointed a guardian, faces restrictions on their basic human rights because a 3rd party is now making decisions for that person. Due care to protect due process must be exercised when these petitions are considered and ruled upon.
A copy of the Elder Abuse Task Force recommendations has been included with the meeting packet. I invite comments, questions or concerns from Council Members and anyone else reading these materials. Your comments, questions concerns will be shared with the committee.

1. **Family Rights Act Subcommittee Report:**

   The Subcommittee concludes that “there appears to be as many counties as ways that a probate court can determine whether a family member (or anyone with statutory priority) is suitable.” I don’t know that this is a bad thing. I realize that as an attorney we do like to be able to give our client some idea about the likelihood of success of an argument advanced. However, limiting a court’s application of discretion is not the wisest way to legislate similar outcomes based on similar facts.

   There is a current inconsistency between .5313 and .5409 in that .5409 (appointment of conservator), in subsection 2 uses the phrase “the protected person’s best interests”. But the “best interests” criteria is only applicable if there are 2 or more suitable people who have equal priority. There is no similar “best interests” in the current version of .5313 – appointment of a guardian.

   The proposed modifications completely drop or ignore the concept of “best interests”. The proposed modifications attempt to define the term “suitability” and require the court to make specific findings about suitability. Suitability is defined in new subsections 5 – 8 in .5313 and new subsections 3 – 8 in .5409. A new term is introduced “interpersonal disputes” and cannot be used as the sole reason for failure of a court to follow the statutory priorities. The proposed modifications to .5313 & .5409 appear to me to be more concerned about strictly adhering to the statutory priorities, while statutorily ignoring the “best interests” of the individual who is the subject of the petition. I believe there is more emphasis placed on “family rights” than the rights of the subject of the petition.

   A new subsection 2 is added to .5414, which would allow a court to act on an “informal letter” to the court concerning a conservatorship. Currently “informal letters” are statutorily recognized only in guardianships.

   Most troubling to me is the proposed amendment to .5314 – proposed new subsection k, which limits the ability of the guardian and/or court to restrict the ability to “communicate, visit or interact with a person” . . . Subsection 4 of new section k does allow a guardian to provide written notice to an individual why their “interaction” is being restricted, so long as, the guardian gives the notice on a SCAO approved form within 7 days of the restriction. Subsection 5 states that failure to give the notice may be cause for the guardian’s removal. I firmly believe that under the current law, a court may remove a guardian for unreasonably restricting contact with their ward. My concern is that this requirement goes beyond notice to interested
persons – and expands it to a much larger class of “persons”, which could include a more remote relative or a neighbor or “friend” that has taken undue advantage of the adult. The proposal also does not define the terms “interaction” or “restrict”.

Also very troubling is the inclusion of subsection 1. Section k: (1) the Adult expressed in a valid Power of Attorney, Patient Advocate Designation, or any other writing or communication that the adult does not wish to communicate, visit or interact with the individual. This potentially complicates drafting a POA and/or PAD beyond belief. This may create an affirmative duty on attorneys to engage in discussions with their clients about their “preferences for interaction with others”. I think subsection (1) should be totally struck.

Other proposed modifications to the “Family Rights Act” include

> requiring a judge to make specific findings on the record why a person is restricted to filing a request for modification no sooner than 182 days pursuant to .5310(3).
> requiring an annual review of a guardianship rather than every 3 years as is the current law pursuant to .5309. Interestingly, there is no similar proposal to requiring an “annual” allowance of an account of a conservator. Under current law a conservator’s account must be heard after the 1st account is filed and thereafter, hearings are only required every 3 years.
> require the guardian to notify interested persons of a change in the ward’s address within 14 days of the change (currently, the guardian is required only to notify the court of the change.).
> add a new SCAO Form “Notice of Rights to Family Members”
> add subsection k to .5314 -Powers and Duties of Guardian.
> add a mediation option to .5303 & .5408. Mediation would require the consent of the subject of the petition and the GAL. I think the court already has the power to authorize/order mediation, and likely is not used enough. I find very troubling the language requiring the presence of the individual subject to the petition at mediation unless “the court shows by clear and convincing evidence that being present at the mediation poses a significant risk of physical or psychological harm to the adult.” This appears to attempt to place the burden of proof on the court, rather than on the parties.

2. **Accounting Form Statute, Court Rule and SCAO Forms.**

The proposed changes would require a guardian overseeing property to file an inventory and annual accounting just as a conservator does.

The proposed changes would also require “robust” documentation of expenditures in excess of $1000.00 reported in the accounting. This requirement will likely take some tweaking, such as, if you group together such things as “utilities” “medical” “house maintenance” you very likely will exceed $1000.00 so it will be necessary to make sure there is proper documentation. Also, if you give the protected individual regular spending money – is a check to the protected person sufficient documentation?
A potentially challenging item is identifying on the inventory items of “special or sentimental value”. By whose definition is the item “special or sentimental”? And what if it is an item that has significant monetary value, and may need to be liquidated to generate money for care? Will this likely increase litigation about the sale of particular items? Will a child claim “momma always promised me the Chippendale dining room set” or the “gold coin collection”. Will this serve as an opportunity to object to an accounting that reveals an item of special or sentimental value was sold for purposes of paying expenses of care of the protected person? Will this proposal create a duty on a conservator to do Medicaid planning? How else will you protect the $75,000.00 Chippendale Dining Room suite? Or the painting that is now worth $80,000.00 that was given to the protected person by a “starving” artist, as “rent” for staying in the spare bedroom for a year?

These issues may be ultimately defined by published case law. But is that what these proposed reforms are meant to do – create appellate issues?

3. Emergency Guardianship/Removal from the Home

It appears that this sub-committee may have been divided either into 2 distinct sub-committees - one addressing the Emergency/Temporary Guardian statutes and a separate sub-committee addressing permanent removal from the home.

EPIC currently recognizes appointment of an emergency and/or temporary guardian in .5312. The current statute does not specify any standard of proof necessary for the appointment of a temporary guardian pursuant to an emergency. An emergency must be alleged or plead and if the court finds there is an emergency, then upon a “showing” that the person is an incapacitated person the court may appoint a temporary guardian. The proposed modifications are:

- Require that the court must first find by a preponderance of evidence that an emergency exists and that notice was given to the individual.
- Creates an entirely new subsection 2, allowing a court to appoint an emergency guardian without notice to the individual. Appointment without notice to the individual requires either an affidavit or ex-parte testimony showing by clear and convincing evidence that an emergency exists.
- Restricts the emergency guardians appointment to no longer than 28 days and can be extended only 1 time for an additional 28 days. A court must hold a hearing with proper notice within 28 days after acting “under this section”. A court could allow an emergency guardian to act for up to 56 days without a “full” hearing pursuant to .5311.
- Adds a final subsection 5 stating the appointment of an emergency guardian is not a determination that a basis exists for the appointment of a guardian pursuant to .5303.
This proposal would re-write the current .5312 and address only true emergency situations. It establishes standards for determining an emergency and a higher standard to appoint an emergency guardian without notice to the individual. It retains the restriction that a temporary appointment is good for no longer than 28 days and must be limited in scope to those matters affected by the emergency.

The proposal carves out a separate .5312a – which separately address the concept of a “temporary” guardian. It provides:

- Appointment of a temporary guardian pursuant to .5201a & this section
  I do not find a .5201a section (.5201 deals with minor guardianships & 5202a deals with minor guardianships originating in another state). There is a 5301a – which addresses adult guardianships originating in another state.
- Subsections 2 & 3 of the new .5312a are the same as subsections 2 & 3 of the current .5312 and addresses the appointment of a temporary guardian if an appointed guardian is not effectively performing their duties.

Section .5304 Evaluation and Report is substantially re-drafted requiring more detailed reporting, and adds sections (f – h) requiring a visitor to report on the individuals “ability to delegate responsibilities, affirmatively report the existence of POA’s, PAD’s DNR or other relevant documents and what if any supports and services are available to meet unmet needs of the individual. These latter reporting requirements may help the court assess whether the individual is truly in need of a guardian, or are they simply lacking available supportive services.

Subsection .5306 remains substantially the same as the current .5306 with 2 notable changes:

- Carved our from subsection (1) which currently ends with “Alternately the court may dismiss the proceedings or enter another appropriate order” and adds a completely new subsection (2), clearly stating that a court shall dismiss the proceeding if there is not clear and convincing evidence presented that the person is incapacitated and the appointment is necessary as a means of providing continuing care and supervision.
- A totally new concept appears in new subsection (3) – authorizing a court to grant a stay of proceedings to allow the individual an opportunity to explore and acquire alternatives to the appointment of a guardian. Upon the individual showing to the court that they have properly appointed a legal agent, the court may dismiss the petition without further hearing. The court retains the authority under this section to appoint a temporary guardian, limited in scope, with the explicit finding that the individual has the capacity to execute a DPOA, PAD or otherwise name a legal agent.

Subsection .5306a is modified to reflect each of the modifications recommended by the subcommittee. It should be noted that more than one subcommittee has tinkered with .5306a to include their various recommendations. Someone is going to have to meticulously review
the final drafts to assure that .5306a incorporates all the modifications to the individual’s notice of rights.

4. **Ward Placement Subcommittee:**

The changes proposed by this sub-committee are substantial. The committee recommends and entirely new section .5314a which would limit the guardian’s ability to “permanently” remove an individual subject to a guardianship without first consulting with the individual. It would require a petition to the court for the removal, documenting that the individual is either in favor of the move or objects to it. If the individual does not object to the removal, the court must appoint a GAL to investigate & report back to the court. If the GAL reports that the individual does not object to the removal, the court may sign the order for removal without hearing – or the court may elect to set the matter for hearing. If the individual objects then the court must appoint an attorney for the individual and proceed with a hearing.

The proposal provides for an ex-parte procedure, requiring affidavits and/or ex-parte testimony, if failure to move the individual promptly would pose a threat to the safety or security of the person. If the court finds by clear and convincing evidence that delaying the change is likely to result in substantial harm, then the court shall grant the ex-pare request and hold a hearing within 7 days of the order to determine if the order shall be made permanent. A proposed guardian may request the authority to remove the individual at an initial hearing on the petition for guardianship.

The proposal codifies the criteria to be used by the guardian in deciding about a move. The guardian is prohibited from considering their own convenience as a primary reason for the change.

The proposal also requires a guardian to consult with the ward about the proposed move.

Of concern to me - is that it appears that notice of an intended permanent move is required to be given only to the individual subject to the guardianship. This of course can be addressed in the court rules – but the statute seems to address only notice to the individual.

I am also concerned that the statute mandates granting an ex-parte request. I’m not comfortable with a statute that mandates a judicial finding based on affidavits and ex-parte testimony. I suspect most judges will not find the clear and convincing standard has been met thus requiring a hearing. And assuming that all interested parties are notified of the hearing, you may not have consensus among the interested parties, and essentially you put the judge in the position of being the guardian and making the decision regarding a permanent move.
5. **Guardianship Certification Subcommittee**

This proposal makes significant changes to .5106 – the statute dealing with appointment of a professional guardian. It requires that “professional guardians & conservators” must be certified. The certification process will be set forth by the Administrative Order of the Michigan Supreme Court. Attorneys who are serving for no more than 3 individuals as guardian and/or conservator are exempt from certification. Also exempt is someone (non-attorney) who serves for no more than 2 individuals and receives no compensation for their services. Another category of people exempt from certification is an individual related by blood, adoption, marriage including step and half relations. I do not believe the latter 2 categories of individuals qualify to be considered “professional” guardian or conservator.

It will also require professional guardians to visit each ward monthly. While apparently requiring non-professionals to visit only every 3 months. A certified guardian is prohibited from delegating their visiting duties to an individual who is not certified. However pursuant to subsection (8) of the proposal, “if due to extenuating circumstances a non-agency guardian is unable to complete a monthly required visit the non-certified guardian may delegate that responsibility to an appropriate and trustworthy individual.

The proposal refers to “agency” guardians and “non-agency” guardian and attempts to restrict delegation of certain decision-making authority to support staff of both types of guardians. The proposal however requires both agency and non-agency guardians to be certified, unless they fall within one of the exemptions, so I do not see the need to distinguish between agency and non-agency guardians. I believe that in an effort to emphasize the need to have the “certified guardian” accountable and responsible to their wards, these modifications are too restrictive and get bogged down in minutia that is not necessary.

My greater concern about this provision is that rather than encouraging a strong group of competent professional guardians, it will instead create a “cottage-industry”. I fear we will see more agency type professional guardians and fewer individual professional guardians. Certification and continuing education can be expensive and time consuming. It may create a situation where it is cost prohibitive for an individual to become certified. Many of the cases that professional guardians are appointed are the high conflict, volatile, time intensive cases—individuals are not going to “volunteer” to take on these volatile cases.

6. **GAL SCAO/Courts Subcommittee:**

This subcommittee made recommendations for modifications to the statutes governing GAL appointment and duties. Specifically, the duties and obligations of the GAL are expanded greatly to include a number of things not currently required, such as, impediments to the individual subject to the petition to be able to attend the court hearing, if the individual does not want a particular person[s] appointed, if there is any special or sentimental property that
the individual identifies, how long the GAL spent speaking with the individual, as well as, a host of other requirements.

The proposed modifications also make it clear that a GAL may be appointed in subsequent proceedings affecting the guardianship or conservatorship. The court may appoint a “Special GAL” whose duties are defined by the appointing order.

Significant changes are the requirement that the written report and testimony of the GAL are admissible only to the extent of the Michigan Rules of Evidence. A report that relies on hearsay will not be admissible. A GAL’s oral report will not be “admitted” to the extent that it relies on or reports hearsay evidence. The proposed changes also mandate that the report be in writing, submitted 7 days prior to the hearing (which may cause issues especially if the GAL is appointed only 14 – 18 days prior to the hearing), and that the GAL must attend the hearing.
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POLICY & LEGISLATION COMMITTEE
Family Rights Act Subcommittee Report
Summary of Proposed Legislative Changes
August 19, 2019

1. Codify case law definition of suitable, require specific findings of unsuitability, apply suitability factors when determining between persons of equal priority, and require application of the statutory priorities when ruling on a petition to modify a guardianship or conservatorship. [MCL 700.5313 and 700.5409]

The problem is that there appears to be as many counties as ways that a probate court can determine whether a family member (or anyone with statutory priority) is suitable. The initial idea was to increase the current preponderance of the evidence standard when determining a person is not suitable to a clear and convincing standard. Some on the committee felt that this increase in the standard only helps on appeal and few people have the resources or want to wait a year for relief. There is case law (Redd, 321 Mich App 398 (2017); Gerstler, 324 Mich App 494 (2018); Van Poppelen, 2018 unpublished COA Docket # 340224) defining the term suitable, and thus the committee decided to codify this language in the statute along with some suitability factors in order to create some clear uniformity around the state. The amendments also provide factors to weigh when deciding between persons of equal priority and prohibit the disqualification of person simply because there are interpersonal disputes. In addition, the proposed amendments also clarify that a subsequent motion to modify a guardianship by a family member would be reviewed under the statutory priority language, thus avoiding the argument that the family member has to show the current professional guardian is unsuitable. Finally, the amendments remove the discretion of the probate court to bypass the priority list when determining who to appoint as a conservator.

One of the subcommittee members, Health Care Association of Michigan (HCAM) supports more flexibility and discretion for the probate court to pass over people with priority, and thus does complete consensus on this language could not be reached.

2. Amend the Estates and Protected Individuals Code (EPIC) to allow for informal letters to court regarding guardianships and conservatorships. [MCL 700.5310 and 700.5414]

One of the complaints we receive frequently from citizens is that they do not have the resources to petition for guardianship or conservatorship or do not know how to even begin the process. Currently, EPIC does allow for an informal letter to the
court for guardianships. The proposed amendments extend this same access to conservatorships.

3. **State Court Administrative Office (SCAO) Form for rights of a protected individual's or ward's family members.**

Many of the people who call our office do not have any idea of their rights under EPIC and, again, don't have the resources or ability to hire an attorney to learn these rights. SCAO already has a form that lists the rights for a ward or protected individual. This new SCAO form simply lists the rights for family members under EPIC.

4. **Protections and Procedures for visitation of wards by family members and other individuals. [MCL 700.5314(l) and 400.11]**

Currently, the courts and guardians have unfettered discretion in imposing visitation limitations on family members or friends of a ward. The proposed amendments require the following: (1) a clear and convincing standard before the court can impose a visitation limitation; and (2) a good cause standard for the guardian who then must detail the reasons for the limitation, explain why no reasonable alternative exists, and then provide the written reasons to the court and the family member within 7 days or the limitation is lifted and the guardian may be subject to removal.

In addition, the proposed language would amend the social welfare act and include a definition of isolation in order to protect disabled wards from a guardian who improperly attempts to limit visitation with family members. This amendment to MCL 400.11 did not receive consensus among the committee. The Health Care Association of Michigan (HCAM) believes that the health care facilities that they represent do not isolate people, but it is concerned that their facilities are required by state and federal regulations to protect a person and that this could be construed as violating the isolation definition. No consensus language was reached in the committee to address this concern.

5. **Add a mediation option before appointing a guardian or conservator.** [MCL 700.5303 and 700.5408]

Although this currently exists in the Michigan Court Rules (MCR 5.143), the proposed amendments include similar language in EPIC to encourage this option instead of a full guardianship or conservatorship. This language requires the ward or protected individual to agree to the mediation to avoid being pressured into this process by the court. This is the main change from the current court rules. The court rules do not provide this added protection for the ward or protected individual.
6. Limit the ability of a probate court to prohibit a family (or the ward and other persons interested in the ward's welfare) member from filing a petition to modify or terminate a guardianship for 182 days. [MCL 700.5310]

Currently, the probate court has unfettered discretion to prohibit a family from filing a petition to modify or terminate a guardianship for 182 days. No findings or reasoning is required by the court. The proposed amendment would require the probate court to provide specific findings on the record and narrow the reasons for imposing the prohibition to be based on prior interaction with the court.

7. Require the Probate Court to review guardianships annually. [MCL 700.5309]

Currently, the court is only required to review a guardianship after the first year and then every three years thereafter. The proposed amendment would require the court to review guardianships annually to protect the ward.

8. Notify family members and other interested parties of a change in the ward's place of residence subject to the visitation restrictions. [MCL 700.5314]

Currently, a guardian must notify the court within 14 days of moving the residence of a ward. The proposed amendment would require that same notification to be also given to interested persons. Some of the complaints we receive at the office are family members who don't know where their loved one has been moved to because the guardian is not required to notify them. This amendment would eliminate that problem.
MCL 700.5313

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

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

(a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.
(b) A person the individual subject to the petition chooses to serve as guardian.
(c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
(d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

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

(a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.
(b) An adult child of the legally incapacitated individual.
(c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.
(d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.
(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.

(5) A person is suitable to serve if the person is able to provide for the care, custody, and control of the individual subject to the guardianship. A person with priority must be appointed unless specific findings on the record are made as to the person's inability to provide for the care, custody, and control of the individual.
subject to the guardianship. In making such a determination, the court shall also provide findings of fact on the record, including but not limited to, the following factors:

(a) Preference of the individual subject to the guardianship, including who should serve and not serve as guardian.

(b) Availability to the individual subject to the guardianship.

(c) History and relationship with the individual subject to the guardianship.

(d) Criminal history that is relevant to the care, custody, and control of the individual subject to the guardianship.

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

(f) Ability to fulfill duties regardless of interpersonal disputes between interested parties or others with an interest in the welfare of the individual subject to guardianship.

(g) Ability to meet the requirements of Section 5410.

(6) Interpersonal disputes alone shall not be the basis for finding a person with priority, under subsections (2) and (3), is unsuitable.

(7) In deciding between two persons with equal priority, the court shall weigh the factors in subsection (5)(a)-(f) with specific findings on the record. The court may appoint two people to serve as co-guardians. Unless the order of appointment and letters of authority otherwise state, co-guardians must act jointly. Co-guardians may delegate their authority to each other pursuant to MCL 700.5103.

(8) The court shall, in response to a petition for guardianship by the ward or a person interested in the ward’s welfare as provided in Section 5310, consider the ward’s or a person interested in the ward’s welfare petition for guardianship using the priorities and language under this section.

MCL 700.5409

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

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

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

(c) The protected individual’s spouse.

(d) An adult child of the protected individual.

(e) A parent of the protected individual or a person nominated by the will of a deceased parent.
(f) A relative of the protected individual with whom he or she has resided for more than 6 months before the petition is filed.

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

(h) If none of the persons listed in subdivisions (a) to (g) are suitable and willing to serve, any person that the court determines is suitable and willing to serve.

(2) A person named in subsection (1)(a), (c), (d), (e), or (f) may designate in writing a substitute to serve instead, and that designation transfers the priority to the substitute.

(3) A person is suitable to serve if the person is able to provide for the care, custody, and control of the individual subject to the conservatorship. A person with priority must be appointed unless specific findings on the record are made as to the person’s inability to provide for the care, custody, and control of the individual subject to the conservatorship. In making such a determination, the court shall also provide findings of fact on the record, including by not limited to, the following factors:

(a) Preference of the individual subject to the guardianship, including who should serve and not serve as conservator.

(b) Availability to the individual subject to the guardianship.

(c) History and relationship with the individual subject to the guardianship.

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

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

(f) Ability to fulfill duties regardless of interpersonal disputes between interested parties or others with an interest in the welfare of the individual subject to guardianship.

(g) Ability to meet the requirements of Section 5410.

(4) Interpersonal disputes alone shall not be the basis for finding a person with priority is unsuitable.

(5) In deciding between two persons with equal priority, the court shall weigh the factors in subsection (3) with specific findings on the record. The court may appoint two people to serve as co-conservators. Unless the order of appointment and letters of authority otherwise state, co-conservators must act jointly. Co-conservators may delegate their authority to each other pursuant to subsection (2).

(6) The court shall, in response to a petition for conservatorship by the protected individual or an interested person in the protected individual’s welfare as provided in Sections 5415 and 5414, consider the protected individual’s or interested person’s petition for conservatorship using the priorities and language under this section.

MCL 700.5414

(1) The court may remove a conservator for good cause, upon notice and hearing, or accept a conservator's resignation. Upon the conservator's death, resignation, or
removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of the predecessor.

(2) The protected person or a person interested in the protected person's welfare may petition for an order removing the conservator, appointing a successor conservator, modifying the conservatorship's terms, or terminating the conservatorship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

SCAO Form for rights of a ward or protected individual's family members.

NOTICE OF RIGHTS TO FAMILY MEMBERS
OF ALLEGED INCAPACITATED INDIVIDUAL

Notice that a Petition for Guardian or Conservator has been filed: A petition has been filed in this court asking that a guardian or conservator be appointed to help your family member make personal or financial decisions.

You have certain rights before, after, and at the court hearing on the petition to appoint a guardian or conservator for your family member:

Family or Interested Person's Rights in Guardianship Proceedings Generally:

• A parent of an unmarried legally incapacitated individual has the right to appoint a guardian by will or other writing. [MCL 700.5301]
• A spouse of a married legally incapacitated individual may appoint a guardian by will or other writing. [MCL 700.5301]
• The court shall review a guardianship not later than 1 year after the guardian's appointment and not later than every 3 years after each review. [MCL 700.5309]
• An interested person in the ward's welfare may petition for an order removing, modifying or terminating a guardian with the court by informal letter. [MCL 700.5310]
• Spouse, parents, and adult children must be provided notice of a hearing to appoint or remove a guardian. [MCL 700.5311]
• Spouse, adult child, parent, or relative have priority to be appointed guardian over any other person other than a previously appointed guardian or the protected individual's wishes. [MCL 700.5313]
• Receive, at least annually from a guardian, a report on the condition of the ward as well as information about medical and mental treatments, living arrangements, services received, recommendations about the continuation of guardianship, lists the guardian's visits, the execution of a do-not-resuscitate order, and the execution of a nonopioid directive. [MCL 700.5314]
• Any interested person may object to a pending petition for guardian or conservator orally at a hearing or by filing an serving a paper which conforms to MCR 5.113. [MCR 5.119(B)]

Family or Interested Person's Rights in Conservatorship Proceedings Generally:

• Spouse, parents, and adult children must be provided notice of a hearing to appoint or remove a conservator. [MCL 700.5405]
• Any person may request permission to participate in a proceeding on a petition for conservator or another protective order, and the court may grant the request, with or without a hearing. [MCL 700.5406]
• Spouse, adult child, parent, or relative have priority to be appointed conservator over any other person other than a previously appointed conservator or the protected individual's wishes. [MCL 700.5409]
• An interested person may petition for a proceeding against a surety for breach of the obligation of the conservator's bond. [MCL 700.5411]

• A person interested in the welfare of an individual for who a conservator is appointed may file a petition with court to require or reduce bond, require an accounting, direct distribution, remove a conservator and appoint a temporary conservator, and other relief. [MCL 700.5414]

• Any interested person may object to a pending petition for guardian or conservator orally at a hearing or by filing an serving a paper which conforms to MCR 5.113. [MCR 5.119(B)]

• The conservator shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules. [MCL 700.5417]

• The conservator shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules. [MCL 700.5418]

• An interested person may petition the court to terminate a conservatorship. [MCL 700.5431]

• Within 14 days after the appointment, an interested person is entitled to notice of the appointment and the right to object to the appointment of a temporary conservator in this state who was appointed conservator in another state. [MCL 700.5433]

MCL 700.5314

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize
the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property.

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

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

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

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

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

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

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

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

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

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

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

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

(i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the physician orders for scope of treatment form.
(ii) Consult directly with the ward's attending physician as to specific medical
indications that may warrant reaffirming the physician orders for scope of
treatment form.

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

(i) Institute a proceeding to compel a person under a duty to support the ward or to
pay money for the ward's welfare to perform that duty.

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

(j) The duty to report the condition of the ward and the ward's estate that is
subject to the guardian's possession or control, as required by the court, but not less
often than annually. The guardian shall also serve the report required under this
subdivision on the ward and interested persons as specified in the Michigan court
rules. A report under this subdivision must contain all of the following:

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

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

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

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

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

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

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

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

(ix) Services received by the ward.

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

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

(k) If a conservator is appointed, the duty to pay to the conservator, for
management as provided in this act, the amount of the ward's estate received by the
ward in excess of the amount the guardian expends for the ward's current
support, care, and education. The guardian shall account to the conservator for the
amount expended.

(l) A guardian for an adult may not restrict the ability of the adult to
communicate, visit, or interact with a person, unless:

(1) The adult expressed in a valid power of attorney, patient advocate
designation, or any other writing or communication that the adult does not
wish to communicate, visit or interact with the individual.
(2) The court, through a specific order, finds by clear and convincing evidence that the restrictions are necessary because interaction with the individual poses a risk of physical, psychological, or financial harm to the adult;
(3) A personal protection order or other court order instead of a guardianship is in effect that limits contact between the adult and a person; or
(4) The guardian has good cause to believe restriction is necessary because interaction with the person poses a risk of physical, psychological, or financial harm to the adult and within seven days sends the person, court, and health facility, as defined by MCL 333.20106(1), or licensed adult foster care facility, as defined by MCL 400.703(4), where the resident resides written notice, on a form created by the Michigan Supreme Court Administrator's Office, specifically identifying the reasons for the restrictions and why less restrictive options were not reasonably available.
(5) Failure of the guardian to provide the form as specified in subsection (4) lifts the restriction after seven days and may subject the guardian to removal.
(6) An individual who has been restricted from interacting with a person subject to a guardianship may petition for the restriction to be removed. The court shall not order the restriction to remain in place unless it is shown by clear and convincing evidence that the:
   (a) restriction is necessary because interaction with the individual poses a risk of physical, psychological, or financial harm to the person subject to the guardianship; and
   (b) a less restrictive option is not reasonably available.

MCL 400.11
As used in this section and sections 11a to 11f:
   (a) "Abuse" means harm or threatened harm to an adult's health or welfare caused by another person. Abuse includes, but is not limited to, nonaccidental physical or mental injury, sexual abuse, isolation, or maltreatment.
   (b) "Adult in need of protective services" or "adult" means a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.
   (c) "Exploitation" means an action that involves the misuse of an adult's funds, property, or personal dignity by another person.
   (d) "Isolation" includes an act committed to prevent an adult from having desired contact with family, friends, or other persons of his or her choosing; an act committed to prevent an adult from receiving his or her mail, telephone calls, or electronic messages; an act of physical or chemical restraint of an adult committed to prevent contact with visitors, family, friends, or other persons of his or her choosing; and an act that restricts, places, or confines an adult in a restricted area for the purpose of social deprivation or preventing desired contact with family, friends, or persons of his or her choosing. Isolation does not include an act carried
out according to a valid personal protection order, medical isolation prescribed by a
licensed physician caring for the adult, or an action taken according to a valid legal
order or statute, or according to an order prescribed by licensed medical personnel,
authorized by a federal or state statute, regulation, guideline, or administrative
policy.*

(e) "Neglect" means harm to an adult's health or welfare caused by the
inability of the adult to respond to a harmful situation or by the conduct of a person
who assumes responsibility for a significant aspect of the adult's health or welfare.
Neglect includes the failure to provide adequate food, clothing, shelter, or medical
care. A person shall not be considered to be abused, neglected, or in need of
emergency or protective services for the sole reason that the person is receiving or
relying upon treatment by spiritual means through prayer alone in accordance with
the tenets and practices of a recognized church or religious denomination, and this
act shall not require any medical care or treatment in contravention of the
stated or implied objection of that person.

(f) "Protective services" includes, but is not limited to, remedial, social, legal,
health, mental health, and referral services provided in response to a report of
alleged harm or threatened harm because of abuse, neglect, or exploitation.

(g) "Vulnerable" means a condition in which an adult is unable to protect
himself or herself from abuse, neglect, or exploitation because of a mental or
physical impairment or because of advanced age.

*The addition of the isolation definition does not have consensus among the
subcommittee. The Health Care Association of Michigan (HCAM) believes that the
health care facilities that they represent do not isolate people, but it is concerned
that their facilities are required by state and federal regulations to protect a person
and that this could be construed as violating the isolation definition. No consensus
language was reached in the committee to address this concern.

700.5303

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

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

(3) Upon the filing of a petition under subsection (1), the court shall set a date for
hearing on the issue of incapacity. Unless the allegedly incapacitated individual has
legal counsel of his or her own choice, the court shall appoint a guardian ad litem to represent the person in the proceeding.

(4) Upon the consent of the allegedly incapacitated individual and the guardian ad litem, a court may order the parties to mediation at any time after a petition is filed. Upon making a determination that the individual is incapacitated, the court may order the parties to mediation to resolve any other aspect of a guardianship petition without the individual's or guardian ad litem's consent to the mediation. The allegedly incapacitated individual shall be present at any mediation unless the court shows by clear and convincing evidence that being present at the mediation poses a significant risk of physical or psychological harm to the adult.

700.5406

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

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

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

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

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

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

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

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

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

(7) After hearing, upon finding that a basis for a conservator's appointment or another protective order is established by clear and convincing evidence, the court shall make the appointment or other appropriate protective order.

(8) Upon the consent of the individual to be protected, a court may order the parties to mediation at any time after a petition is filed. Upon making a determination that the individual to protected needs assistance under MCL 700.5401(3), the court may order the parties to mediation to resolve any other aspect of the conservatorship or protective order. The individual to be protected shall be present at any mediation unless the court shows by clear and convincing evidence that being present at the mediation poses a significant risk of physical, psychological, or financial harm for the individual.

MCL 700.5310

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

(2) The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

(3) Except as otherwise provided in the order finding incapacity, upon receiving a petition or request under this section, the court shall set a date for a hearing to be held within 28 days after the receipt of the petition or request. After making specific findings on the record that there is a need to limit the ability of a person from filing a petition based on prior interaction with the court, an order finding incapacity may specify a minimum period, not exceeding 182 days, during which a petition or request for a finding that a ward is no longer an incapacitated individual, or for an order removing the guardian, modifying the guardianship's terms, or terminating the guardianship, shall not be filed without special leave of the court.

(4) Before removing a guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating a guardianship, and following the same procedures to safeguard the ward's rights as apply to a petition for a guardian's appointment, the court may send a visitor to the present guardian's residence and to the place where the ward resides or is detained to observe conditions and report in writing to the court.
MCL 700.5309

The court shall review a guardianship not later than 1 year after the guardian's appointment and annually thereafter.

MCL 700.5314

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence. Subject to MCL 700.5314(1), the guardian shall also notify interested parties within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property.

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

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

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

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

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

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

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

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

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

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

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

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

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

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

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

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.
(ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward's support, care, and education. The guardian shall not use money from the ward's estate for room and board that the guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by court order made on notice to at least 1 of the ward's next of kin, if notice is possible. The guardian shall exercise care to conserve any excess for the ward's needs.

(j) The duty to report the condition of the ward and the ward’s estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:

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

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

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

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

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

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

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

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

(ix) Services received by the ward.

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

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

(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.
1. Codify case law definition of suitable, require specific findings of unsuitable, apply additional suitability factors when determining between persons of equal priority and determining unsuitability, and require application of the statutory priorities when ruling on a petition to modify a guardianship or conservatorship.

MCL 700.5313

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

(2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:
   (a) A person previously appointed, qualified, and serving in good standing as guardian for the legally incapacitated individual in another state.
   (b) A person the individual subject to the petition chooses to serve as guardian.
   (c) A person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition.
   (d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney.

(3) If there is no person chosen, nominated, or named under subsection (2), or if none of the persons listed in subsection (2) are suitable or willing to serve, the court may appoint as a guardian an individual who is related to the individual who is the subject of the petition in the following order of preference:
   (a) The legally incapacitated individual's spouse. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased spouse.
   (b) An adult child of the legally incapacitated individual.
   (c) A parent of the legally incapacitated individual. This subdivision shall be considered to include a person nominated by will or other writing signed by a deceased parent.
   (d) A relative of the legally incapacitated individual with whom the individual has resided for more than 6 months before the filing of the petition.
(e) A person nominated by a person who is caring for the legally incapacitated individual or paying benefits to the legally incapacitated individual.

(4) If none of the persons as designated or listed in subsection (2) or (3) are suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian as provided in section 5106.

(5) A person is suitable to serve if the person is able to provide for the care, custody, and control of the individual subject to the guardianship. A person with priority must be appointed unless specific findings on the record are made as to the person's inability to provide for the care, custody, and control of the individual subject to the guardianship. In making such a determination, the court shall also provide findings of fact on the record, including but not limited to, the following factors:

(a) Preference of the individual subject to the guardianship, including who should serve and not serve as guardian.
(b) Availability to the individual subject to the guardianship.
(c) History and relationship with the individual subject to the guardianship.
(d) Criminal history that is relevant to the care, custody, and control of the individual subject to the guardianship.
(e) Personal history, including but not limited to employment, training, skills, stability that will facilitate fulfillment of duties.
(f) Ability to fulfill duties regardless of interpersonal disputes between interested parties or others with an interest in the welfare of the individual subject to guardianship.
(g) Ability to meet the requirements of Section 5410.

(6) Interpersonal disputes alone shall not be the basis for finding a person with priority, under subsections (2) and (3), is unsuitable.

(7) In deciding between two persons with equal priority, the court shall weigh the factors in subsection (5)(a)-(f) with specific findings on the record. The court may appoint two people to serve as co-guardians. Unless the order of appointment and letters of authority otherwise state, co-guardians must act jointly. Co-guardians may delegate their authority to each other pursuant to MCL 700.5103.

(8) The court shall, in response to a petition for guardianship by the ward or a person interested in the ward's welfare as provided in Section 5310, consider the ward's or a person interested in the ward's welfare petition for guardianship using the priorities and language under this section.
MCL 700.5409

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

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

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

(c) The protected individual's spouse.

(d) An adult child of the protected individual.

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

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

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

(h) If none of the persons listed in subdivisions (a) to (g) are suitable and willing to serve, any person that the court determines is suitable and willing to serve.

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

(3) A person is suitable to serve if the person is able to provide for the care, custody, and control of the individual subject to the conservatorship. A person with priority must be appointed unless specific findings on the record are made as to the person's inability to provide for the care, custody, and control of the individual subject to the conservatorship. In making such a determination, the court shall also provide findings of fact on the record, including by not limited to, the following factors:

(a) Preference of the individual subject to the guardianship, including who should serve and not serve as conservator.

(b) Availability to the individual subject to the guardianship.

(c) History and relationship with the individual subject to the guardianship.

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

(e) Personal history, including but not limited to employment, training, skills, stability that will facilitate fulfillment of duties.
(f) Ability to fulfill duties regardless of interpersonal disputes between interested parties or others with an interest in the welfare of the individual subject to guardianship.

(g) Ability to meet the requirements of Section 5410.

(4) Interpersonal disputes alone shall not be the basis for finding a person with priority is unsuitable.

(5) In deciding between two persons with equal priority, the court shall weigh the factors in subsection (3) with specific findings on the record. The court may appoint two people to serve as co-conservators. Unless the order of appointment and letters of authority otherwise state, co-conservators must act jointly. Co-conservators may delegate their authority to each other pursuant to subsection (2).

(6) The court shall, in response to a petition for conservatorship by the protected individual or an interested person in the protected individual’s welfare as provided in Sections 5415 and 5414, consider the protected individual’s or interested person’s petition for conservatorship using the priorities and language under this section.
2. Amend EPIC to allow for informal letters to court regarding guardianships and conservatorships.

MCL 700.5310(2) [maintain existing language] –

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

(2) The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

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

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

MCL 700.5414

(1) The court may remove a conservator for good cause, upon notice and hearing, or accept a conservator's resignation. Upon the conservator's death, resignation, or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of the predecessor.

(2) The protected person or a person interested in the protected person's welfare may petition for an order removing the conservator, appointing a successor conservator, modifying the conservatorship's terms, or terminating the conservatorship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.
3. **SCAO Form for rights of a ward or protected individual's family members.**

**NOTICE OF RIGHTS TO FAMILY MEMBERS OF ALLEGED INCAPACITATED INDIVIDUAL**

Notice that a Petition for Guardian or Conservator has been filed: A petition has been filed in this court asking that a guardian or conservator be appointed to help your family member make personal or financial decisions.

You have certain rights before, after, and at the court hearing on the petition to appoint a guardian or conservator for your family member:

**Family or Interested Person's Rights in Guardianship Proceedings Generally:**

- A parent of an unmarried legally incapacitated individual has the right to appoint a guardian by will or other writing. [MCL 700.5301]
- A spouse of a married legally incapacitated individual may appoint a guardian by will or other writing. [MCL 700.5301]
- The court shall review a guardianship not later than 1 year after the guardian's appointment and not later than every 3 years after each review. [MCL 700.5309]
- An interested person in the ward's welfare may petition for an order removing, modifying or terminating a guardian with the court by informal letter. [MCL 700.5310]
- Spouse, parents, and adult children must be provided notice of a hearing to appoint or remove a guardian. [MCL 700.5311]
- Spouse, adult child, parent, or relative have priority to be appointed guardian over any other person other than a previously appointed guardian or the protected individual's wishes. [MCL 700.5313]
- Receive, at least annually from a guardian, a report on the condition of the ward as well as information about medical and mental treatments, living arrangements, services received, recommendations about the continuation of guardianship, lists the guardian's visits, the execution of a do-not-resuscitate order, and the execution of a nonopioid directive. [MCL 700.5314]
- Any interested person may object to a pending petition for guardian or conservator orally at a hearing or by filing an serving a paper which conforms to MCR 5.113. [MCR 5.119(B)]

**Family or Interested Person's Rights in Conservatorship Proceedings Generally:**

- Spouse, parents, and adult children must be provided notice of a hearing to appoint or remove a conservator. [MCL 700.5405]
- Any person may request permission to participate in a proceeding on a petition for conservator or another protective order, and the court may grant the request, with or without a hearing. [MCL 700.5406]
- Spouse, adult child, parent, or relative have priority to be appointed conservator over any other person other than a previously appointed conservator or the protected individual's wishes. [MCL 700.5409]
- An interested person may petition for a proceeding against a surety for breach of the obligation of the conservator's bond. [MCL 700.5411]
- A person interested in the welfare of an individual for who a conservator is appointed may file a petition with court to require or reduce bond, require an accounting, direct distribution, remove a conservator and appoint a temporary conservator, and other relief. [MCL 700.5414]
- An interested person may object to a pending petition for guardian or conservator orally at a hearing or by filing an serving a paper which conforms to MCR 5.113. [MCR 5.119(B)]
- The conservator shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules. [MCL 700.5417]
• The conservator shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules. [MCL 700.5418]

• An interested person may petition the court to terminate a conservatorship. [MCL 700.5431]

• Within 14 days after the appointment, an interested person is entitled to notice of the appointment and the right to object to the appointment of a temporary conservator in this state who was appointed conservator in another state. [MCL 700.5433]
4. **Protections and Procedures for visitation of wards by family members.**

MCL 700.5314(1) [add new language]

(1) A guardian for an adult may not restrict the ability of the adult to communicate, visit, or interact with a person, unless:

1. The adult expressed in a valid power of attorney, patient advocate designation, or any other writing or communication that the adult does not wish to communicate, visit or interact with the individual.

2. The court, through a specific order, finds by clear and convincing evidence that the restrictions are necessary because interaction with the individual poses a risk of physical, psychological, or financial harm to the adult;

3. A personal protection order or other court order instead of a guardianship is in effect that limits contact between the adult and a person; or

4. The guardian has good cause to believe restriction is necessary because interaction with the person poses a risk of physical, psychological, or financial harm to the adult and within seven days sends the person, court, and health facility, as defined by MCL 333.20106(1), or licensed adult foster care facility, as defined by MCL 400.703(4,) where the resident resides written notice, on a form created by the Michigan Supreme Court Administrator's Office, specifically identifying the reasons for the restrictions and why less restrictive options were not reasonably available.

5. Failure of the guardian to provide the form as specified in subsection (4) lifts the restriction after seven days and may subject the guardian to removal.

6. An individual who has been restricted from interacting with a person subject to a guardianship may petition for the restriction to be removed. The court shall not order the restriction to remain in place unless it is shown by clear and convincing evidence that the:

   a. restriction is necessary because interaction with the individual poses a risk of physical, psychological, or financial harm to the person subject to the guardianship; and

   b. a less restrictive option is not reasonably available.

MCL 400.11 [amend existing language to the Social Welfare Act]

As used in this section and sections 11a to 11f:
(a) "Abuse" means harm or threatened harm to an adult's health or welfare caused by another person. Abuse includes, but is not limited to, nonaccidental physical or mental injury, sexual abuse, isolation, or maltreatment.

(b) "Adult in need of protective services" or "adult" means a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.

(c) "Exploitation" means an action that involves the misuse of an adult's funds, property, or personal dignity by another person.

(d) "Isolation" includes an act committed to prevent an adult from having desired contact with family, friends, or other persons of his or her choosing; an act committed to prevent an adult from receiving his or her mail, telephone calls, or electronic messages; an act of physical or chemical restraint of an adult committed to prevent contact with visitors, family, friends, or other persons of his or her choosing; and an act that restricts, places, or confines an adult in a restricted area for the purpose of social deprivation or preventing desired contact with family, friends, or persons of his or her choosing. Isolation does not include an act carried out according to a valid personal protection order, medical isolation prescribed by a licensed physician caring for the adult, or an action taken according to a valid legal order or statute, or according to an order prescribed by licensed medical personnel, authorized by a federal or state statute, regulation, guideline, or administrative policy, *\text{**}

(e) (d) "Neglect" means harm to an adult's health or welfare caused by the inability of the adult to respond to a harmful situation or by the conduct of a person who assumes responsibility for a significant aspect of the adult's health or welfare. Neglect includes the failure to provide adequate food, clothing, shelter, or medical care. A person shall not be considered to be abused, neglected, or in need of emergency or protective services for the sole reason that the person is receiving or relying upon treatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, and this act shall does not require any medical care or treatment in contravention of the stated or implied objection of that person.

(f) (e) "Protective services" includes, but is not limited to, remedial, social, legal, health, mental health, and referral services provided in response to a report of alleged harm or threatened harm because of abuse, neglect, or exploitation.

(g) (f) "Vulnerable" means a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age.

*The addition of the isolation definition does not have consensus among the committee. The Health Care Association of Michigan (HCAM) believes that the health care facilities that they represent do not isolate people, but it is concerned that their facilities are required by state and federal regulations to protect a person and that this could be construed as violating the isolation definition. No consensus language was reached in the committee to address this concern.*
5. **Add a mediation option before appointing a guardian or conservator.**

700.5303

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

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

(3) Upon the filing of a petition under subsection (1), the court shall set a date for hearing on the issue of incapacity. Unless the allegedly incapacitated individual has legal counsel of his or her own choice, the court shall appoint a guardian ad litem to represent the person in the proceeding.

(4) Upon the consent of the allegedly incapacitated individual and the guardian ad litem, a court may order the parties to mediation at any time after a petition is filed. Upon making a determination that the individual is incapacitated, the court may order the parties to mediation to resolve any other aspect of a guardianship petition without the individual's or guardian ad litem's consent to the mediation. The allegedly incapacitated individual shall be present at any mediation unless the court shows by clear and convincing evidence that being present at the mediation poses a significant risk of physical or psychological harm to the adult.

700.5406

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

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

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

(4) A guardian ad litem, physician, mental health professional, or visitor appointed under this section who meets with, examines, or evaluates an individual who is the subject of a petition in a protective proceeding shall do all of the following:
   (a) Consider whether there is an appropriate alternative to a conservatorship.
   (b) If a conservatorship is appropriate, consider the desirability of limiting the scope and duration of the conservator's authority.
   (c) Report to the court based on the considerations required in subdivisions (a) and (b).

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

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

(7) After hearing, upon finding that a basis for a conservator's appointment or another protective order is established by clear and convincing evidence, the court shall make the appointment or other appropriate protective order.

(8) Upon the consent of the individual to be protected, a court may order the parties to mediation at any time after a petition is filed. Upon making a determination that the individual to protected needs assistance under MCL 700.5401(3), the court may order the parties to mediation to resolve any other aspect of the conservatorship or protective order. The individual to be protected shall be present at any mediation unless the court shows by clear and convincing evidence that being present at the mediation poses a significant risk of physical, psychological, or financial harm for the individual.
6. Limit the ability of a probate court to prohibit a family member (or the ward and other persons interested in the ward's welfare) from filing a petition to modify or terminate a guardianship for 182 days.

MCL 700.5310

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

(2) The ward or a person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating the guardianship. A request for this order may be made by informal letter to the court or judge. A person who knowingly interferes with the transmission of this kind of request to the court or judge is subject to a finding of contempt of court.

(3) Except as otherwise provided in the order finding incapacity, upon receiving a petition or request under this section, the court shall set a date for a hearing to be held within 28 days after the receipt of the petition or request. After making specific findings on the record that there is a need to limit the ability of a person from filing a petition based on prior interaction with the court, an order finding incapacity may specify a minimum period, not exceeding 182 days, during which a petition or request for a finding that a ward is no longer an incapacitated individual, or for an order removing the guardian, modifying the guardianship's terms, or terminating the guardianship, shall not be filed without special leave of the court.

(4) Before removing a guardian, appointing a successor guardian, modifying the guardianship's terms, or terminating a guardianship, and following the same procedures to safeguard the ward's rights as apply to a petition for a guardian's appointment, the court may send a visitor to the present guardian's residence and to the place where the ward resides or is detained to observe conditions and report in writing to the court.
7. Require the Probate Court to review guardianships annually.

MCL 700.5309
The court shall review a guardianship not later than 1 year after the guardian's appointment and not later than every 3 years after each review, annually thereafter.

8. Notify family members of a change in the ward's place of residence subject to the visitation restrictions.

MCL 700.5314
If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward’s care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence. Subject to MCL 700.5314(l), the guardian shall also notify interested parties within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

* * *
MEMORANDUM

To: Legislative Bureau
From: Nicole Shannon, Chair of Accounting Form Subcommittee
Subject: Accounting Form Statute, Court Rule, and SCAO Form

MEMBERS

Tom Clement and Nathan Piwowarski

WHAT IS THE LAW NOW?

- Guardians are only required to file an inventory and annual account if ordered by the court.
- All conservators are required to file an inventory and annual account.
- There is no requirement that receipts or invoices be included with the annual accounting.
- There is no requirement that guardians or conservators identify items of sentimental value such as photo albums, personal correspondence, or family heirlooms.
- The courts are not required to conduct a substantive examination of the inventory or account.

WHAT DOES THE PROPOSED LEGISLATION DO?

- All conservators and guardians with authority over personal or real property must file and serve an inventory and annual account.
- The inventory must note any items of special or sentimental value.
- The annual account must include robust documentation for expenses in excess of $1000.
- Interested parties may object to the inventory and account within 28 days.
- The judge (or their designee, such as the Probate Register) must review the annual accounts and find that the fiduciary properly filed, served, and documented all items on the account.
- In a guardianship, if any party objects or if the judge finds that the fiduciary has not complied with the statute or otherwise questions the filing, the matter will be set for a hearing.
• Conservators will continue to be required to petition for entry of all accounts. Guardians will have their accounts entered unless the court sets it for hearing due to objection or on the court’s own initiative.

WHY ARE THE CHANGES NEEDED?

Currently, there are no accounting requirements for guardians. Individuals subject to guardianship and interested parties often want to know what is happening to the individual’s property and finances. By providing transparency, the expectation is that all parties and the court can assess whether a guardian is operating appropriately. By requiring documentation of expenses of over $1000, guardians will be forced to provide evidence they are fulfilling their fiduciary duty. The court will serve as a check on the guardianship by ensuring that guardians meet the documentation requirements. Finally, identifying items of special or sentimental value in the inventory and account will trigger additional duties under the new proposed legislation concerning removal from the home.

STATUTORY CHANGES

600.834 Probate register or deputy probate register; powers in uncontested matter or hearing; entry of judgment prohibited; restriction on powers; orders and acts; trial or hearing of issues.

Sec. 834.

(1) Except as provided in subsection (2), a probate register or deputy probate register is competent to exercise any of the following powers in an uncontested matter or hearing if authorized by general order of the probate judge or chief probate judge of the county in which the probate register or deputy probate register was appointed:

(a) Determine whether the petitioner or the petitioner’s attorney has complied with the requirements of law and supreme court rules.
(b) Take acknowledgments.
(c) Administer oaths.
(d) Set hearings.
(e) Sign notices, citations, and subpoenas.
(f) Take testimony required by law or supreme court rules in all of the following matters:
   (i) Appointment of a fiduciary of an estate of a deceased or minor.
   (ii) Admission to probate of a will, codicil, or other testamentary instrument.
   (iii) Determination of heirs.
   (iv) Sale, mortgage, or lease of property.
   (v) Assignment of residue of an estate or any part of the residue of an estate.
(vi) Setting and approval of bonds.
(vii) Removal of fiduciaries.
(viii) Issuing of a license to marry, if the issuance of the license is authorized under section 1 of 1897 PA 180, MCL 551.201.
(g) Perform an act or issue an order as specified in the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8102, if that act authorizes the probate register to do so.
(2) A probate register or deputy probate register shall not enter a judgment. A probate register or deputy probate register shall not exercise any power provided in subsection (1) if the matter or hearing is:
(a) For a commitment to, or incarceration in, an institution or facility.
(b) For appointment of a guardian of a legally incapacitated individual or the appointment of a conservator for a reason other than minority, except for performing acts or issuing orders as specified in XXX PA XXX, MCL 700.5314b and 700.5418.
(c) For or involves a developmentally disabled person.
(3) An order made by a probate register or deputy probate register shall be made over the name of the probate judge for whom the order is made, and the probate register or deputy probate register shall place his or her signature under the name of the judge. An act done or order made by the probate register or deputy probate register authorized under this section shall have the same validity, force, and effect as though done or made by the judge.
(4) Upon the oral or written request of an interested party made before commencement or during the hearing of the proceeding, the proceeding shall be taken immediately before the judge for trial or hearing of the issues.

700.5314a Inventory and records.

Sec. 5314a.

(1) Within 56 days after appointment or within another time period specified by court rule, a guardian with any authority over the real or personal property of the individual must prepare and file with the appointing court a complete inventory of the estate subject to the guardianship together with an oath or affirmation that the inventory is believed to be complete and accurate so far as information permits. The guardian must file, along with the inventory, account statements that reflect the value of depository and investment accounts dated within 30 days the inventory's date. The guardian shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules.

(2) The guardian must keep suitable records of the administration and exhibit those records on the request of an interested person.
(3) The guardian must identify on the inventory any items of special personal or sentimental value, including by way of example but not limited to family heirlooms, photo albums, or collections. To the extent meaningful conversation permits, the guardian must make an inquiry with the individual subject to the guardianship as to what items the individual identifies as having special personal or sentimental value. These items must include items identified by a guardian ad litem subject to section 5305. If the guardian is unable to locate an item identified as having special personal or sentimental value at the time of filing the inventory, the guardian must state that on the inventory.

(4) The inventory must list any merchandise, funeral services, cemetery services, or prepaid contracts for which the individual or guardian is the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act, Act 255 of 1986. If the guardianship estate includes such assets, the guardian must file, with the inventory:

(a) a copy of any prepaid contract,

(b) proof that payments made under a prepaid contract are held in escrow or pursuant to a trust agreement in compliance with Act 255 of 1986,

(c) the most recent escrow statement issued concerning the prepaid contract,

and

(d) proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under Act 255 of 1986.

(5) The inventory must list property with reasonable detail and the type and amount of any encumbrance.

(6) The inventory must be served on all interested parties. Any interested party may object to the inventory and set the matter for hearing.

700.5314b Accounts.

Sec. 5341b.

(1) A guardian shall account to the court for administration of the property not less than annually unless the court directs otherwise, upon resignation or removal, and at other times as the court directs. The guardian must file, along with the account, account statements that reflect the value of depository and investment accounts dated within 30 days of the inventory's date and receipts, invoices, or other documentation for expenses in excess of $1000. The account must be in the form as provided by the State Court Administrative Office, or substantially
similar. The account must detail assets including those identified in MCL 700.5314a, debts, gross income, and expenses. On termination of the protected individual's minority or disability, a guardian with any authority over the real or property of the individual, including money, shall account to the court or to the formerly protected individual or that individual's successors. Subject to appeal or vacation within the time permitted, an order after notice and hearing allowing an intermediate account of a guardian adjudicates as to liabilities concerning the matters considered in connection with the accounts, and an order, after notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the guardian to the protected individual or the protected individual's successors relating to the guardianship. In connection with any account, the court may require a guardian to submit to a physical check of the estate in any manner the court specifies. The guardian must provide information on the status of any items identified in MCL 700.5314a. If the guardian has disposed of or sold any of the items, the guardian must describe on the account how they fulfilled their duties under MCL 700.5314a(9).

(2) If the individual's estate includes any merchandise, funeral services, cemetery services, or prepaid contracts for which the individual or guardian is the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act, Act 255 of 1986, the guardian must file, with the account:

(a) a copy of any prepaid contract,

(b) proof that payments made under a prepaid contract are held in escrow or pursuant to a trust agreement in compliance with Act 255 of 1986,

(c) the most recent escrow statement issued concerning the prepaid contract, and

(d) proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under Act 255 of 1986.

(3) The guardian shall provide a copy of an account and account statements to the protected individual if the individual can be located and is 14 years of age or older and to all interested persons as specified in the Michigan court rules. The individual and any interested person may object and set the matter for hearing. If the individual subject to the guardianship objects, a guardian ad litem must be appointed to visit the individual. If the individual requests an attorney, the guardian ad litem believes that appointment of an attorney is in the best interest of
the individual, or if the court otherwise orders, an attorney must be appointed. The individual has the right to retain their own counsel if they choose.

(4) Upon receipt of an annual account under subsection (1), the judge must either set the matter for hearing or make the following findings of fact:

(a) The account includes sufficient documentation that the estate's assets are to the extent possible correctly titled to the fiduciary in the fiduciary in its fiduciary capacity if necessary.

(b) The guardian has filed a copy of the corresponding financial institution statement or verification of funds on deposit that reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period or there is good cause to waive the requirement.

(c) The guardian has filed documentation for expenses over $1000.

(d) Fees and costs are reasonable and should be allowed.

(e) On the face of the filing it appears to meet the requirements of subsection (1) and (2).

(f) The guardian properly filed and served the account and required documentation on all interested parties.

700.5417 Inventory and records.

Sec. 5417.

(1) Within 56 days after appointment or within another time period specified by court rule, a conservator shall prepare and file with the appointing court a complete inventory of the estate subject to the conservatorship together with an oath or affirmation that the inventory is believed to be complete and accurate so far as information permits. The conservator must file, along with the inventory, account statements that reflect the value of depository and investment accounts dated within 30 days the inventory's date. The conservator shall provide a copy of the inventory to the protected individual if the individual can be located and is 14 years of age or older and to interested persons as specified in the Michigan court rules.

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

(3) The conservator must identify on the inventory any items of special personal or sentimental value, including by way of example but not limited to family heirlooms, photo albums, or collections. To the extent meaningful conversation permits, the conservator must make an inquiry with the individual subject to the
conservatorship as to what items the individual identifies as having special personal or sentimental value. If the conservator is unable to locate an item identified as having special personal or sentimental value at the time of filing the inventory, the conservator must state that on the inventory. Conservators shall make all reasonable efforts to identify and honor the individual’s wishes to preserve items of special personal or sentimental value in the overall context of the individual’s estate, including items so identified in the inventory and annual accounts, and shall take reasonable steps to safeguard such property. Failure to comply with this subsection is grounds for removal as conservator.

(4) The inventory must list any merchandise, funeral services, cemetery services, or prepaid contracts for which the individual or guardian is the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act, Act 255 of 1986. If the guardianship estate includes such assets, the guardian must file, with the inventory:

(a) a copy of any prepaid contract,

(b) proof that payments made under a prepaid contract are held in escrow or pursuant to a trust agreement in compliance with Act 255 of 1986,

(c) the most recent escrow statement issued concerning the prepaid contract,

and

(d) proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under Act 255 of 1986.

(5) The inventory must list property with reasonable detail and the type and amount of any encumbrance.

(6) The inventory must be served on all interested parties. Any interested party may object to the inventory and set the matter for hearing.

700.5418 Accounts.

Sec. 5418.

(1) A conservator shall account to the court for administration of the trust not less than annually unless the court directs otherwise, upon resignation or removal, and at other times as the court directs. The conservator must file, along with the account, account statements that reflect the value of depository and investment accounts dated within 30 days of the inventory’s date and receipts, invoices, or other documentation for expenses in excess of $1000. The account must be in the form as provided by the State Court Administrative Office, or substantially similar. The account must detail
assets including those identified in the inventory per MCL 700.5418, debts, gross income, and expenses. On termination of the protected individual's minority or disability, a conservator shall account to the court or to the formerly protected individual or that individual's successors. Subject to appeal or vacation within the time permitted, an order, after notice and hearing, allowing an intermediate account of a conservator adjudicates as to liabilities concerning the matters considered in connection with the accounts, and an order, after notice and hearing, allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected individual or the protected individual's successors relating to the conservatorship. In connection with any account, the court may require a conservator to submit to a physical check of the estate to be made in any manner the court specifies. The conservator must provide information on the status of any items identified in MCL 700.5317(3). If the conservator has disposed of or sold any of the items, the guardian must describe on the account how they fulfilled their duties under MCL 700.5417(3).

(2) If the individual's estate includes any merchandise, funeral services, cemetery services, or prepaid contracts for which the individual or conservator is the contract buyer or contract beneficiary under the Prepaid Funeral and Cemetery Sales Act, Act 255 of 1986, the conservator must file, with the account:

(a) a copy of any prepaid contract,

(b) proof that payments made under a prepaid contract are held in escrow or pursuant to a trust agreement in compliance with Act 255 of 1986,

(c) the most recent escrow statement issued concerning the prepaid contract, and

(d) proof of any assignments of life policies or annuity contracts made to purchase merchandise, funeral services, or cemetery services under Act 255 of 1986.

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

COURT RULE CHANGES

The court rule would be amended to reflect the statutory changes. Specific items of note include:
1. A 28 day window to object upon service of an inventory or account, with
permission for untimely objections as justice so requires.
2. Conservatorships will continue to have accounts set for hearing.
Guardianships will only have accounts set for hearing upon objection, a
failure to find that the guardian meets the statutory requirements, or for any
other reason as justice requires.


(A) Reports. A guardian shall file a written report annually within 56 days after the anniversary of
appointment and at other times as the court may order. Reports must be in the form approved by the state court
administrator. The guardian must serve the report on the persons listed in MCR 5.125(C)(24).

(B) Inventories.
(1) Filing and Service. Within 56 days after appointment, a conservator or, guardian of a legally incapacitated
individual with authority over the real or personal property of the individual shall file with the court a verified
inventory of the estate of the protected person, serve copies on the persons required by law or court rule to be
served, and file proof of service with the court.

(2) Contents. The guardian or conservator must provide the name and address of each financial institution
listed on the inventory. The address for a financial institution shall be either that of the institution's main
headquarters or the branch used most frequently by the guardian or conservator. Property that the protected
individual owns jointly or in common with others must be listed on the inventory along with the type of
ownership and value.

(C) Accounts.
(1) Filing, Service. A guardian of a legally incapacitated individual with authority over the real or personal
property of the individual or conservator must file an annual account unless ordered not to by the court. The
provisions of the court rules apply to any account that is filed with the court, even if the account was not
required by court order. The account must be served on interested persons, and proof of service must be filed
with the court. When required, an accounting must be filed within 56 days after the end of the accounting
period.

(2) Accounting Period. The accounting period ends on the anniversary date of the issuance of the letters of
authority, unless the conservator selects another accounting period or unless the court orders otherwise. If the
guardian or conservator selects another accounting period, notice of that selection shall be filed with the court.
The accounting period may be a calendar year or a fiscal year ending on the last day of a month. The guardian
or conservator may use the same accounting period as that used for income tax reporting, and the first
accounting period may be less than a year but not longer than a year.

(3) Hearing.
(a) On filing, a conservatorship account may be set for hearing or the hearing may be deferred to a later
time.
(b) A guardianship account must be set for hearing if:
(i) The protected individual or any interested person files an objection;
(ii) The court does not find that the guardian met the requirements of 700.5314b(3); or
(iii) Justice so requires for any other reason.

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a
minor conservatorship where the assets are restricted or in a conservatorship where no assets have been
received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted
account must be filed with the court within 28 days of the conservator’s qualification or as otherwise ordered by
the court. The conservator must file with the court an annual verification of funds on deposit with a copy of the
corresponding financial institution statement attached.

(6) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to
a personal representative shall be to a guardian or conservator. A copy of the corresponding financial institution
statement or a verification of funds on deposit must be filed with the court, either of which must reflect the
value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting
period, unless waived by the court for good cause.

(6) Periodic Review. The court shall either review or allow accounts annually, unless no account is required
under MCR 5.409(C)(1) or (C)(4). Accounts shall be set for hearing to determine whether they will be allowed at
least once every three years.
(D) Service and Notice, Objections. A copy of the inventory and account must be served on to the interested persons as provided by these rules. Notice of hearing to approve the account must be served on to interested persons as provided in subchapter 5.100 of these rules. The copy of the inventory or account served on interested persons must include a notice that any objections to the account should be filed with the court and noticed for hearing. Objections must be filed within 28 days of service of the inventory or account. A court must allow untimely objections as justice so requires.

(E) Procedures. The procedures prescribed in MCR 5.203, 5.204 and 5.310(E) apply to guardianship and conservatorship proceedings, except that references to a personal representative shall be to a guardian or conservator, as the situation dictates.

(F) Death of Ward. If an individual who is subject to a guardianship or conservatorship dies, the guardian or conservator must give written notification to the court within 14 days of the individual's date of death. If accounts are required to be filed with the court, a final account must be filed within 56 days of the date of death.

COURT FORMS

In light of these changes, we propose making the following amendments to existing court forms:

1. Inventory PC674. Amend to include language that makes it applicable to guardians. Include a table listing in the inventory for items of special or sentimental value, along with whether they have been located. Include a notice to interested parties of their right to object.

2. Account (short form) PC583 and Account (long form) PC584. Amend to include an order at the bottom reflecting the requirements of MCL 700.5314b. Amend to include specific table listing for items of special or sentimental value. The Nevada account form accompanies this report as a potential model for the accounting. The Nevada form has the advantages of allowing a Judge or Register to quickly determine what specific expenses have been handled.

3. NEW FORM: Creation of a general "Objection" form in the model of the current Petition and Order PC586. This will give pro se litigants a SCAO form to enter their objections in all contexts.

NES
In the matter of 
First, middle, and last name 
The ward’s or protected individual’s current address and telephone no. are: 

1. I, __________________________________________, am the ____________________________, Title of the estate and submit the following as my account, which covers the period from ____________________________ to ____________________________ (may not exceed 12 months).

2. The interested persons, addresses, and their representatives are identical to those appearing on the initial application/ petition, except as follows: (For each person whose address changed, list the name and new address; attach separate sheet if necessary.)

3. SUMMARY

Balance on hand from last account, or value of inventory if first account........................................ $ ______________ 
(Beginning net asset value from Schedule A or ending balance from last accounting or inventory.)

Add income in this accounting period .............................................................. $ ______________ 
(Gross income/interest/money received from Schedule B)

Total assets accounted for .............................................................. $ ______________ 
(Add totals from Schedules A and B.)

Subtract disbursements in this accounting period .............................................................. $ ______________ 
(Total from Schedule C. You must attach receipts for expenses over $250. All other receipts must be available upon request.)

Add or subtract adjustments to the value of the assets .............................................................. $ ______________ 
(Total from Schedule D. Show as negative number if total value decreased.)

Add or subtract adjustments as a result of any asset sales .............................................................. $ ______________ 
(Total from Schedule E. Show as negative number if total value decreased)

Total balance of assets remaining (itemize and describe in Schedule A.)........................................ $ ______________ 

4. This account lists all income and other receipts and expenses and other disbursements that have come to my knowledge.

NOTE: In guardianships and conservatorships, except as provided by MCR 5.409(C)(4), you must present to the court copies of corresponding financial institution statements or you must file with the court a verification of funds on deposit, either of which must reflect the value of all liquid assets held by a financial institution dated within 30 days after the end of the accounting period.
5. I discovered the following assets belonging to the ward or protected individual since the last inventory or accounting:


6. The following claims have been filed on behalf of the ward or protected individual (including any demands for payment or return of property):


7. My fiduciary fees incurred during this accounting period (including fees that have already been approved and/or paid for this accounting period) are $_____________. Attached is a written description of the services performed.

8. Attorney fees incurred during this accounting period (including fees that have already been approved and/or paid for this accounting period) are $_____________. Attached is a written description of the services performed.

I declare under the penalties of perjury that this account has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

Date

Attorney signature
Attorney name (type or print) Bar no.
Address
City, state, zip

Fiduciary signature
Fiduciary name (type or print) Address
City, state, zip

NOTICE TO INTERESTED PERSONS

1. You must bring to the court's attention any objection you have to this account. Except in guardianships and conservatorships, the court does not normally review the account without an objection.

2. You have the right to review proofs of income and disbursements at a time reasonably convenient to the fiduciary and yourself.

3. You may object to all or part of an accounting by filing a written objection with the court before the court allows the account. You must pay a $20.00 filing fee to the court when you file the objection. (See MCR 5.310[C].)

4. If an objection is filed and is not otherwise resolved, the court will conduct a hearing on the objection.

5. You must serve the objection on the fiduciary or his/her attorney.
**Schedule A: Assets**

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<thead>
<tr>
<th>Asset</th>
<th>Value</th>
<th>Asset</th>
<th>Value</th>
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</thead>
<tbody>
<tr>
<td>Vehicles</td>
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<td>Jewelry</td>
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<td>Artwork</td>
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<td>Furniture</td>
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<td>Other</td>
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<td>Checking account(s)</td>
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<td>Savings account(s)</td>
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<td>Certificates of deposit</td>
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<td>Money market account(s)</td>
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<td>Life insurance (cash value)</td>
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<td>Life insurance (cash value)</td>
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<td>Trust (Individual’s interest)</td>
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<td>Other</td>
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<td>Retirement account(s)</td>
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<td>Bonds</td>
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<td>Mutual funds</td>
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<td>Mutual funds</td>
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<tr>
<td>Individual stock shares</td>
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<td>Individual stock shares</td>
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<tr>
<td>Real estate (not including home)</td>
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<td>Real estate (not including home)</td>
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<td>Other</td>
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<thead>
<tr>
<th>Liabilities</th>
<th>Amount Owed</th>
<th>Liabilities</th>
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<tbody>
<tr>
<td>Mortgage loan(s)</td>
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<td>Home equity loan(s)</td>
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<td>Car loan(s)</td>
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<td>Real estate loan(s)</td>
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<td>Other loan(s)</td>
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<td>Credit card debt</td>
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<td>Other debt</td>
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**Beginning Net Asset Value** $  
**Ending Net Asset Value** $
## Schedule B: Gross income

List gross income, interest, receipts, refunds received.

If additional sheets are required, indicate on Schedule "See attached sheets."

<table>
<thead>
<tr>
<th>Date</th>
<th>Description of Income</th>
<th>Amount Received</th>
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Total income this page

Total income from additional pages

Total Income =
### Schedule C: Disbursements

You must attach receipts for any expense over $250. All other receipts must be available for review. Include details such as expense type, payee, check #, and the last four digits of account paid from.

If additional sheets are required, indicate on Schedule "See attached sheets."

<table>
<thead>
<tr>
<th>Date</th>
<th>Detailed description of transaction</th>
<th>Expense</th>
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<tbody>
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Total this page

Total from previous expense pages +

Running expense total =
### Schedule D: Adjustments to value of assets

If additional sheets are required, indicate on Schedule "See attached sheets."

<table>
<thead>
<tr>
<th>Date</th>
<th>Description of Adjustment</th>
<th>Amount (+/-)</th>
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**Total of adjustments**

### Schedule E: Adjustments due to asset sales

If additional sheets are required, indicate on Schedule "See attached sheets."

<table>
<thead>
<tr>
<th>Date</th>
<th>Description of Adjustment</th>
<th>Amount (+/-)</th>
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**Total of adjustments**
MEMORANDUM

To: Legislative Bureau
From: Hon. John D. Tomlinson, Chair of Emergency Removal form the Home Subcommitte
Subject: Emergency Guardianship/Removal from the Home

MEMBERS
Emily Miller, Nicole Shannon, Michael Moody, Alison Hirschel, Nathan Piwowarski, Thomas Clement, Lindsey Hall

Our work is essentially complete. Since the last meeting, we have met once. We have approved a revision to MCR 5.403(C) that conforms the applicable court rule to the statutory changes we had previously approved to MCL 700.5312.

The only open issue is discussion whether there needs to be similar language added to the statutes governing conservatorships.

The process that we have developed differs from current practice in the following particulars:

• There are now both “emergency” and “temporary” guardians. An emergency guardian is for someone who does not presently have a guardian (i.e., it’s a new petition). A temporary guardian is for someone who has a guardian (i.e, from another state or a guardian from Michigan who is incapacitated or unavailable).

• If someone requests an emergency guardian, the Court should schedule a hearing, provide notice, and appoint a GAL to meet with the ward. If it determines by a preponderance that an emergency exists that is likely to result in substantial harm to the adult’s physical health, safety or welfare, that no other person has the authority to act under the circumstances, and there is reason to believe the basis for appointment of a guardian under MCL 700.5303 exists, the Court may appoint an emergency guardian.

• An emergency guardian can be appointed without notice if the Court determines from an affidavit or ex parte testimony that, by clear and convincing evidence, an emergency exists that is likely to result in imminent and substantial harm to the adult’s physical health, safety and welfare, that no other person has the authority to act under the circumstances, and there is reason to believe the basis for appointment of a guardian under MCL 700.5303 exists.
If the Court proceeds under this section, it has to give the individual and the guardian ad litem notice of the appointment within 48 hours and hold a hearing within 7 days.

- Emergency guardianships are good for 28 days.

- MCR 5.121 would permit examination of the guardian ad litem.

- MCR 5.121 that would prohibit the Court from appointing the guardian ad litem as attorney for the ward if the guardian ad litem has already filed a report with the Court that is contrary to the ward’s current position.

- MCL 700.5304 would permit evaluations by physicians, mental health professionals and visitors. We have also provided greater detail for the required contents of the reports to provide courts with more detailed information to assist in its decision-making.
DATE: August 14, 2019

SUB-COMMITTEE: SCAO & Courts – Attorney General Elder Abuse Task Force

SUB-SUB-COMMITTEE: Review the process for emergency petitions for guardianship/conservatorship requiring a full hearing with the ward present and medical testimony.

MEMBERSHIP: Judge John Tomlinson (chair), Emily Miller, Alison Hirsche!, Tom Clement, Nathan Piwowarski & Michael Moody

GOALS: Review the process for emergency petitions for guardianship, the quality and type of evidence required (including medical evidence) that addresses both functional capacity and the necessity of appointment, due process requirements for the respondent (including right to counsel of their choice and the right to participate in hearings) and the need to maximize the respondent’s abilities and self-reliance through temporary (rather than plenary) guardianships.

RECOMMENDATIONS:

MCR 5.403(C)

(C) Emergency Guardian for Incapacitated Individual Where no Current Appointment; Guardian Ad Litem. A petition for an emergency guardian for an alleged incapacitated individual shall specify in detail the emergency situation requiring the emergency guardianship. The Court shall comply with the requirements of 700.5312 with regard to notice to an alleged incapacitated individual, the appointment of a guardian ad litem and subsequent hearings.

MCL 700.5312 Appointment of Emergency Guardian.

(1) Upon filing an emergency petition to appoint a guardian, the Court may appoint an emergency guardian after a hearing. The court shall provide reasonable notice to the individual alleged to be incapacitated as required by Section 5311, appoint a guardian ad litem pursuant to Section 5305 and schedule a hearing. If, following the hearing, the Court finds by a preponderance of the evidence, an emergency exists that is likely to result in substantial harm to the adult’s physical health, safety or welfare, no other person appears to have authority to act in the circumstances and there is reason to believe that a basis for appointment exists under Section 5303, the court may appoint an emergency guardian.

(2) Upon the filing of an emergency petition to appoint a guardian, the court may appoint an emergency guardian for an individual alleged to be incapacitated without notice to the individual alleged to be incapacitated only if the court determines from an affidavit or ex parte testimony showing, by clear and convincing evidence, that an emergency exists that is likely to result in imminent and substantial harm to the adult’s physical health, safety or welfare, no other person appears to have authority to act in the circumstances and there is reason to believe that a basis for appointment exists under Section 5303. If the court appoints an emergency guardian pursuant to this subsection, the court must appoint a guardian ad litem pursuant to Section 5305, give notice
within 48 hours to the individual alleged to be incapacitated and any other person the court determines, and hold a hearing on the appropriateness of the appointment within 7 days.

(3) The appointment of an emergency guardian shall be effective for 28 days. The emergency guardian shall exercise only the powers specified by the court. The emergency guardian shall make any report the court requires. The emergency guardian’s authority may be extended once, for not more than 28 days, if the court determines the conditions for appointment of an emergency guardian continue. A hearing with notice as provided in section 5311 shall be held within 28 days after the court has acted under this section.

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

(5) Appointment of an emergency guardian under this section is not a determination that a basis exists for appointment of a guardian under Section 5303.

MCL 700.5312a Appointment of Temporary Guardian.

(1) The Court may appoint a temporary guardian pursuant to Section 5201a and this Section.

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

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

Section 700.5304 Evaluation and Report; Hearing.

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

(2) The alleged incapacitated individual has the right to secure an independent evaluation, at his or her own expense or, if indigent, at the expense of the state. Compensation for an independent evaluation at public expense shall be in an amount that, based upon time and expense, the court approves as reasonable.

(3) A report prepared under this section shall contain all of the following:
(a) A detailed description of the nature, type and extent of the individual's cognitive and functional abilities and limitations.
(b) An explanation of how and to what extent the individual is able to receive, understand, participate in, and evaluate information in making decisions.
(c) If the report is being completed by a physician or mental health professional, a listing of all medications the individual is receiving that may affect cognition, the dosage of each medication, and a description of the effects each medication has upon the individual's behavior.
(d) A prognosis for improvement in the individual's condition, including whether it is a permanent or temporary condition, and a recommendation for the most appropriate treatment, support and rehabilitation plan if the report is being completed by a physician or mental health professional.
(e) The signatures and printed names of all individuals who performed the evaluation, where they are employed, the date of examination upon which the report is based, the length of time they have known the individual and the length of time that they met with the individual.
(f) The individual's ability to assign or delegate responsibilities to ensure their well-being.
(g) Whether the individual has executed a document directing care or naming an agent to act on his or her behalf, including, but not limited to a power of attorney, patient advocate designation, or do not resuscitate order.
(h) If the report is being completed by a visitor, it shall also include, at a minimum, an assessment of the existence of current formal and informal supports, the availability of supportive services and benefits to address any unmet needs, the identification of any existing concerns regarding the individual's well-being and the individual's ability to address those existing concerns.
(4) If the Court finds that the report does not substantially comply with the requirements of this section then the evaluation shall not be considered by the Court.
(5) The individual alleged to be incapacitated is entitled to be present at the hearing in person, and to see or hear all evidence bearing upon the individual's condition. If the individual wishes to be present at the hearing, all practical steps shall be taken to ensure his or her presence, including, if necessary, moving the hearing site.
(5) The individual is entitled to be represented by legal counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or mental health professional and the visitor, and to trial by jury.
(7) The issue of incapacity may be determined at a closed hearing without a jury if requested by the individual alleged to be incapacitated or that individual's legal counsel.

700.5306 Court appointment of guardian of incapacitated person; findings; appointment of limited guardian; effect of patient advocate designation.

(1) The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record.
(2) The court shall dismiss the proceeding if it cannot be shown by clear and convincing evidence that both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual.
(3) If, at any time during the proceedings, the Court may stay the guardianship proceedings for a reasonable period of time, based on the needs of the individual, to allow them the opportunity to explore the alternatives to appointment of a guardian. If the individual properly names a legal agent during the stay and provides evidence of such designation to the court, then the court may dismiss the petition with or without a hearing. This provision does not prevent the Court from ordering a temporary guardianship pursuant to Section 5312 provided it limited in scope and explicitly finds that the individual has the capacity to execute a power of attorney, patient advocate designation, health care power of attorney or otherwise name a legal agent.

(4) The court shall grant a guardian only those powers and only for that period of time as is necessary to provide for the demonstrated need of the incapacitated individual. The court shall design the guardianship to encourage the development of maximum self-reliance and independence in the individual. If the court is aware that an individual has executed a patient advocate designation under section 5506, the court shall not grant a guardian any of the same powers that are held by the patient advocate. A court order establishing a guardianship shall specify any limitations on the guardian's powers and any time limits on the guardianship.

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

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

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

700.5306a Rights of individual for whom guardian is sought or appointed; form.

(1) An individual for whom a guardian is sought or has been appointed under section 5306 has all of the following rights:
(a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.
(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section 5302.
(c) To petition on his or her own behalf for the appointment of a guardian, as provided in section 5303.
(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint, modify or terminate a guardian, as provided in sections 5303, 5304, 5305, 5310 and 5311.

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

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

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

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

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

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

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

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

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

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

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel of choice, and to have legal counsel appointed if the individual is unable to afford legal counsel, as provided in section 5305.

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

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

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

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

(t) To a stay the guardianship proceedings for a reasonable period of time, based on the needs of the individual, to allow an opportunity to designate an agent of their choosing if found to have capacity to execute a power of attorney, patient advocate designation, health care power of attorney or otherwise name a legal agent as provided in Section 5306.

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

(v) To periodic review of the guardianship by the court, including the right to a hearing and the appointment or choice of an attorney if issues arise upon the review of the guardianship, as provided in section 5309.

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

(x) To a hearing within 28 days of requesting a review, modification, or termination of the guardianship, as provided in section 5310.
(y) To the same rights on a petition for modification or termination of the guardianship, including the appointment of a visitor and counsel of choice, as apply to a petition for appointment of a guardian, as provided in section 5310.

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

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

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

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

(ddd) To quarterly visits by the guardian, as provided in section 5314.

(ee) To have the guardian notify the court within 14 days of a change in the individual's residence, as provided in section 5314.

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

(gg) To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects, as provided in section 5314.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this section. The state court administrative office and the office of services to the aging created in section 5 of the older Michiganders act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give the written notice under this section, which shall include space for the court to include information on how to contact the court or other relevant personnel with respect to the rights enumerated in this section.
In the matter of

Alleged Incapacitated Individual

XXX-xx

Date of birth Race Sex Address of alleged incapacitated individual where now found

1. I, __________________________, am interested in this matter

Name (type or print)

and make this petition as ____________________________

State interest/relationship

2. An action within the jurisdiction of the family division of circuit court involving the family or family members of the person named above has been previously filed in ________________ Court, Case Number ________________, was assigned to Judge ________________ and __________ remains __________ is no longer ________ pending.

3. The adult is a resident of ________________

City, village, or township ________________ County State

and has a home address and telephone number of ________________

Address

City State Zip Telephone no.

4. The adult has

☐ a patient advocate/power of attorney for health care. (Specify name and address below.)

☐ a power of attorney. (Specify name and address below.)

☐ a conservator. (Specify name and address below.)

5. ☐ The patient advocate designation was not executed in compliance with MCL 700.5506.

☐ The patient advocate is not complying with the terms of the designation or of MCL 700.5506 to MCL 700.5512.

☐ The patient advocate is not acting consistent with the ward's best interests.

6. The adult lacks sufficient understanding or capacity to make or communicate informed decisions because of

☐ mental illness. ☐ mental deficiency. ☐ physical illness or disability.

☐ chronic intoxication. ☐ chronic drug use. ☐ ________________

7. Specific facts about the adult's recent condition or conduct that lead me to believe the adult needs a guardian are

(Attach a separate sheet if more space is needed.)

8. The name, address, and telephone number of the person/agency (if any) who currently has care and custody of the adult are ________________
9. The adult □ is □ is not entitled to receive Veterans Administration benefits. The Veterans Administration claimant number is ________________________________.

10. The alleged incapacitated individual has
   □ a spouse whose name and address are listed below.
   □ adult child(ren) whose name(s) and address(es) are listed below.
   □ living parent(s) whose name(s) and address(es) are listed below.
   □ no spouse, adult child(ren), or parent(s). The names and addresses of presumptive heirs are listed below.
   □ none of the above (must notify Attorney General - see instructions for the address of the Attorney General).

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<tr>
<th>NAME</th>
<th>RELATIONSHIP</th>
<th>ADDRESS AND TELEPHONE NUMBER</th>
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11. None of the adults named above is under any legal incapacity except __________________________.

Give name, legal incapacity, and representative of the person, if any

12. I REQUEST that the court determine the adult is an incapacitated individual and appoint __________________________ who has priority as __________________________, □ full guardian with all powers provided by statute. □ limited guardian with the following powers:

   □ 13a. I REQUEST that a temporary guardian be appointed for the alleged incapacitated individual after a hearing because no other person appears to have the authority to act in the circumstances and the following emergency exists that is likely to result in substantial harm to the alleged incapacity individual's physical health, safety or welfare: __________________________.

   □ 13b. I REQUEST that a temporary emergency guardian be appointed for the alleged incapacitated individual before a hearing and an [ ] affidavit is attached explaining in detail that no other person appears to have the authority to act in the circumstances and an emergency exists that is likely to result in imminent and substantial harm to the alleged incapacity individual's physical health, safety or welfare.

   □ 13c. I REQUEST that a temporary guardian be appointed because the legally incapacitated individual's welfare requires immediate action as a result of the current guardian not effectively performing the guardian's duties as follows: __________________________.
I declare under the penalties of perjury that this petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

[Signature]

Date

[Attorney name (type or print)]

Bar no.

[Petitioner signature]

[Petitioner address]

City, state, zip

Telephone no.

[Alleged incapacitated individual's name, address, and telephone no.]

[Signature of alleged incapacitated individual]

STATE OF MICHIGAN

PROBATE COURT

COUNTY OF

REPORT OF PHYSICIAN OR MENTAL HEALTH PROFESSIONAL

In the matter of ________________________, alleged incapacitated individual

1. I am a licensed ☐ physician ☐ mental health professional ☐ visitor, my specialty is __________ and I am employed at ____________________________ .

2. I have known the individual since __________ and I last examined the individual on __________.

3. Based on the examination and record, the following is a detailed description of the nature, type and extent of the individual’s cognitive and functional abilities and/or limitations (may attach comments on a separate sheet of paper):

   ____________________________________________________________________________

   ____________________________________________________________________________

   ____________________________________________________________________________

3a. If the individual's condition causes cognitive and functional abilities and/or limitations, please indicate its temporal nature: ☐ Permanant ☐ Temporary and Likely to Resolve Within __________

4. The following is an explanation of how and to what extent the individual is able to receive, participate and/or evaluate information in making decisions and be self-reliant:

   ____________________________________________________________________________

   ____________________________________________________________________________

   ____________________________________________________________________________

5. [For physicians and mental health professionals] The following is a list of all medications taken by the individual that may affect cognition, the dosage of each medication, and a description of the effects of each medication upon the individual's behavior:

   ____________________________________________________________________________

6. I believe that the individual has the ability to make informed decisions as indicated below (check all that apply):

   Determining Where to Live ☐ ☐ ☐ Can Participate ☐ ☐ ☐ Unknown
<table>
<thead>
<tr>
<th>Handling Personal Finances</th>
<th>Able</th>
<th>Unable</th>
<th>Can Participate</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consenting to Supportive Services</td>
<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
<td>Authorizing/Refusing Medical Treatment</td>
<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
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<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
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<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
<td>Authorize Release of Personal Information</td>
<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
<td>Ability to Assign/Delegate Responsibility</td>
<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
<tr>
<td>Other:</td>
<td>Able</td>
<td>Unable</td>
<td>Can Participate</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

7. The following is a recommendation for the most appropriate treatment, support or rehabilitation plan: (may attach comments on a separate sheet of paper):

8. [For visitors] The following is an assessment of the existence of current formal and informal supports and the availability of supportive services and benefits to address any unmet needs as well as any existing concerns regarding the individual's well-being and ability to address those concerns:

9. To the best of my knowledge, the individual has executed the following (check all that apply):

   - [ ] Patient Advocate Designation
   - [ ] Power of Attorney
   - [ ] Do No Resuscitate Order
   - [ ] Health Care Power of Attorney
   - [ ] Representative Payee
   - [ ] Other:

10. [ ] Further comments are attached on a separate sheet of paper.

   By signing this form I acknowledge that it supports the Court's mandate to design any guardianship to encourage the development of maximum self-reliance and independence in the individual, including any limitations on a guardian's power and any time limits on the guardianship.

   Date

   Signature

   Address

   Name (type or print)

   City, state, zip

   Telephone no.

   USE NOTE: If this form is being filed in the circuit court Family division, please enter the court name and county in the upper left-hand corner of the form.

   Do not write below this line - For court use only

PC-620 (07/11) REPORT OF PHYSICIAN OR MENTAL HEALTH PROFESSIONAL

MCL 700.53D, MCR 5.405
MEMORANDUM

To: Legislative Bureau
From: Alison Hirschel, Chair of Ward Placement Subcommittee
Subject: Ward Placement

MEMBERS

Hon. John D. Tomlinson, Michelle Roberts, Rachel Richards, and Nicole Shannon

Purpose of the Proposed Statutory Changes

The proposed statutory changes address the concern that individuals under guardianship are frequently removed from their homes after a guardian is appointed even when the move is not necessary or conducive to the individual’s well-being. When the individual is forced to leave home, he or she also often loses access to almost all of his or her valued possessions and may be separated from family, friends, and important activities and networks. These moves may be initiated for the convenience of the guardian or because of a lack of familiarity with services and supports that may be available to assist the individual in his or her home.

The goals of the proposed statutory language are to ensure an individual remains at home if possible and consistent with the well-being and preferences of the individual; ensure guardians explore all reasonably available and affordable supports and services that could enable the individual to remain at home; reinforce guardians’ obligations to discuss plans to move in advance with the individual if meaningful communication is possible; require notice, a hearing if the individual objects to the move or the move is to an out-of-state location, and court approval for any permanent move; and provide additional protections for the individual’s personal property if a move is necessary.

Current Law

- The guardian may establish the individual’s place of residence. MCL 700.5314(a).
- The guardian must notify the court within 14 days of a change in the individual’s residence. MCL 700.5306a(1)(dd), MCL 700.5314(a).
- The guardian must report at least annually regarding the ward’s present living arrangement and changes in his or her living arrangement that occurred in the past year. MCL 700.5314(j).
- The guardian must take reasonable care of the individual’s clothing, furniture, vehicles, and other personal effects. MCL 700.5306a(1)(ff), MCL 700.5314(b).
- The guardian must consult with the individual before making a major decision. MCL 700.5314

Proposed Protections

Amend MCL 700.7305 Guardian ad litem; duties; compensation; legal counsel
• Requires the guardian ad litem to inform the individual alleged to be incapacitated that if a guardian is appointed, he or she may have the power to sell, transfer, or dispose of real and personal property and to make decisions about where the individual will live.
• Requires the guardian ad litem to determine if the individual has preferences about retaining important real or personal property.

Amend MCL 700.5306a Rights of individual for whom guardian is sought or appointed; form
• Reinforces right of individual to be maintained in his or her home if possible.
• Reinforces right of individual to consult with the guardian about changes in residence and the sale, transfer, or disposal of real or personal property.

Amend MCL 700.5314 Powers and duties of guardian
• Clarifies guardian’s right to sell, transfer, or dispose of personal property for fair value only after consultation with the individual if meaningful communication is possible.
• Establishes necessity for a protective proceeding before selling or disposing of personal property of significant monetary value.

Create New Section MCL 700.5314a
• Requires guardians to maintain legally incapacitated individuals in their own homes if possible and consistent with the well-being and preferences of the individual.
• Requires guardians to explore all reasonable available and affordable supports and services to enable the individual to remain in his or her home.
• Requires guardians to attempt to consult with the individual regarding removal from his or her primary residence, provide at least 14 days’ advance written notice, and petition the court for approval of the move.
• Requires the court to appoint a guardian ad litem to visit the individual and determine if he or she objects to the move. If the individual objects, the court must appoint counsel if the individual is unrepresented and schedule a hearing.
• Prohibits moving the individual without order of the court.
• If the guardian asserts that the individual’s physical health, safety or welfare is endangered, the guardian may seek and emergency ex parte order or make a motion during the hearing on the initial petition for guardianship. The court must grant the petition or motion if it finds by clear and convincing evidence that delaying the change in the primary residence will result in substantial harm to the individual. If an ex parte order is granted, the court must schedule a hearing within 7 days to determine if the move will be permanent.
• Prohibits a guardian moving an individual out of state without a petition, hearing, and order of the court.
• Requires the guardian to make all reasonable efforts to identify and preserve personal property of sentimental or monetary value.
Proposed Statutory Language (changes in *bold italics*)

700.5305 Guardian ad litem; duties; compensation; legal counsel.

Sec. 5305.

(1) The duties of a guardian ad litem appointed for an individual alleged to be incapacitated include all of the following:

(a) Personally visiting the individual.

(b) Explaining to the individual the nature, purpose, and legal effects of a guardian's appointment.

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

(i) The right to contest the petition.

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

(A) A do-not-resuscitate order.

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

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

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

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

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

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

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

(new) Informing the individual that if a guardian is appointed, the guardian may have the power to sell, transfer, or otherwise dispose of both real and personal property and to make determinations about where the individual will live.

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

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

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

(i) Whether there are 1 or more appropriate alternatives to the appointment of a full guardian or whether 1 or more actions should be taken in addition to the appointment of a guardian. Before informing the court of his or her determination under this subparagraph, the guardian ad litem shall consider the appropriateness of at least each of the following as alternatives or additional actions:
(A) Appointment of a limited guardian, including the specific powers and limitation on those powers the guardian ad litem believes appropriate.

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

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

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

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

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

(v) Whether the individual wishes limits placed on the guardian’s powers.

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

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

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

(ix) Whether the individual has expressed any preferences about retaining any important real or personal property and the value, if known, of any such property.

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

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

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

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

700.5306a Rights of individual for whom guardian is sought or appointed; form.

Sec. 5306a.

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

(a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.
(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section 5302.

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

(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian, as provided in sections 5303, 5304, and 5305.

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

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

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

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

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

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

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

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

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

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

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed if the individual is unable to afford legal counsel, as provided in section 5305.

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

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

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

(s) To a guardianship designed to encourage the development of maximum self-reliance and independence as provided in section 5306 including maintaining the individual in his or her home and community, if possible, with appropriate, affordable, and available services.

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

(u) To periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arise upon the review of the guardianship, as provided in section 5309.
(v) To, at any time, seek modification or termination of the guardianship by informal letter to the judge, as provided in section 5310.

(w) To a hearing within 28 days of requesting a review, modification, or termination of the guardianship, as provided in section 5310.

(x) To the same rights on a petition for modification or termination of the guardianship including the appointment of a visitor as apply to a petition for appointment of a guardian, as provided in section 5310.

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

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

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

(bb) To consult with the guardian about major decisions affecting the individual, including a change in residence and the sale, transfer, or disposal of real and personal property, if meaningful conversation is possible, as provided in section 5314.

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

(dd) To have the guardian notify the court within 14 days of a change in the individual’s residence, as provided in section 5314.

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

(ff) To have the guardian take reasonable care of the individual’s clothing, furniture, vehicles, and other personal effects, as provided in section 5314.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this section. The state court administrative office and the office of services to the aging created in section 5 of the older Michiganians act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give the written notice under this section, which shall include space for the court to include information on how to contact the court or other relevant personnel with respect to the rights enumerated in this section.

700.5314 Powers and duties of guardian.

Sec. 5314.

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state as provided in section 5314a. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after
each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and shall sell, transfer, or dispose of personal property for fair value only after consultation with the individual if meaningful communication is possible. The guardian shall commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property or personal property of significant monetary value, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property or personal property of significant monetary value in the context of the individual's estate.

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

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

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

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

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

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

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

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

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

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

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

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

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

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

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.

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

(j) The duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:

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

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

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

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

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

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

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

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

(ix) Services received by the ward.

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

(xi) A recommendation as to the need for continued guardianship.
(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.

Proposed New Section: MCL 700.5314a Protections Regarding Removal from the Home
Sec. 5314a

(1) The guardian shall maintain legally incapacitated individuals in their own homes if possible and consistent with the well-being and preferences of the individual. If an individual is removed from his or her primary residence temporarily, the guardian shall make all reasonable efforts to return the individual to his or her home at the earliest opportunity consistent with the individual's wishes. Temporary removal of the individual from his or her primary residence for the purpose of receiving health care or supervision, engaging in family or social activities, or for other reasons including the well-being or convenience of the individual does not relieve the guardian of the obligations set forth in this section regarding permanent removal from the home. A guardian may not primarily consider his or her own convenience or benefit when making a decision to remove the ward from his residence or selecting a new residence for the ward.

(2) Guardians shall explore reasonably available and affordable supports and services that could enable the individual to remain in his or her primary residence.

(3) The guardian shall not permanently remove a legally incapacitated individual from his or her primary residence without attempting to consult with the individual and honor the individual's preferences to the greatest extent possible. If the guardian seeks to proceed with a move, the guardian shall provide at least 14 days' prior written notice to the individual and file a petition with the court for approval of the move. The petition shall provide information about:

(a) the individual's current primary residence,

(b) the proposed new residence,

(c) the reason for the proposed move,

(d) whether the move is to a more or less restrictive setting,

(e) the efforts made or resources explored to enable the individual to remain in his or her current residence,

(f) whether the guardian has engaged in meaningful communication with the individual about the proposed move, and

(g) whether the individual objects to or supports the proposed move.

(4) Upon the filing of a petition to change the primary dwelling of the individual, if the petition asserts that the individual objects to the proposed move, the court shall schedule a
hearing and appoint counsel unless the legally incapacitated individual is already represented by counsel. If the petition does not assert that the individual objects to the proposed move, the court shall appoint a guardian-ad-litem who shall personally visit the individual to determine whether the individual objects to the move. If the guardian-ad-litem reports that the individual objects, or the individual files objections to the petition, the court shall schedule a hearing and appoint counsel if the legally incapacitated individual is not already represented by counsel. Upon receipt of the guardian-ad-litem’s report, if the individual has not filed an objection, the court shall enter an order granting the petition or, in the court’s discretion, set the matter for a hearing. The guardian shall not move the individual until the court enters an order on the petition.

(5) If the guardian determines that failure to move the individual more promptly is likely to be detrimental to the individual’s physical health, safety or welfare, the guardian may file an emergency ex parte petition prior to any move and explain the urgency of the circumstances that necessitate a more immediate order. The guardians shall provide affidavits or ex parte testimony in support of the motion. The motion shall be granted if the court determines by clear and convincing evidence that delaying the change in the primary residence is likely to result in substantial harm to the individual’s physical health, safety, or welfare. If the ex parte motion is granted, the court shall hold a hearing within 7 days of the order to determine whether the move shall be made permanent unless or until further order of the court. The court shall appoint a guardian ad litem pursuant to subsection 4. The guardian ad litem must file and serve his or her report by a date and time ordered by the court that is prior to the hearing.

(6) A nominated guardian may make a motion on the record for authority to move the individual during a hearing on an initial petition for guardianship. The motion shall be granted if the court determines by clear and convincing evidence that delaying the change in the primary residence is likely to result in substantial harm to the individual’s physical health, safety, or welfare.

(7) The guardian may not move the legally incapacitated individual out of state without order of the court. If the guardian petitions to move the legally incapacitated individual out of state, a guardian ad litem shall be appointed and the court shall schedule a hearing regardless of whether or not the individual files objections or expresses dissatisfaction with the proposed move.

(8) In exercising the guardian’s power to establish the individual’s place of residence, the guardian shall:

(a) Select a residential setting the guardian believes the adult would select if the adult were able. If the guardian does not know and cannot reasonably determine what setting the individual would likely select, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the individual, the guardian shall choose a residential setting that is consistent with the adult’s best interest.
(b) Give priority to a residential setting in a location that will allow the individual to interact with persons and participate in activities important to the individual and meet the individual's needs in the least restrictive manner reasonably feasible.

(9) If removal from the primary residence necessitates the sale, transfer, or disposal of real or significant personal property and if meaningful communication is possible, the guardian shall consult with the individual prior to taking any action to dispose of the property. Guardians shall make all reasonable efforts to identify and honor the individual's wishes to preserve personal property of sentimental or monetary value in the overall context of the individual's estate, including items identified in the inventory and annual accounts, and shall take reasonable steps to safeguard it. Failure to comply with this subsection is grounds for removal as guardian.
Proposed Statutory Language (changes in bold italics)

700.5305 Guardian ad litem; duties; compensation; legal counsel.

Sec. 5305.

(1) The duties of a guardian ad litem appointed for an individual alleged to be incapacitated include all of the following:
   (a) Personally visiting the individual.
   (b) Explaining to the individual the nature, purpose, and legal effects of a guardian’s appointment.
   (c) Explaining to the individual the hearing procedure and the individual’s rights in the hearing procedure, including, but not limited to, all of the following:
      (i) The right to contest the petition.
      (ii) The right to request limits on the guardian’s powers, including a limitation on the guardian’s power to execute on behalf of the ward either of the following:
         (A) A do-not-resuscitate order.
         (B) A physician orders for scope of treatment form.
      (iii) The right to object to a particular person being appointed guardian.
      (iv) The right to be present at the hearing.
      (v) The right to be represented by legal counsel.
      (vi) The right to have legal counsel appointed for the individual if he or she is unable to afford legal counsel.
   (d) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a do-not-resuscitate order on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a do-not-resuscitate order executed on his or her behalf.
   (e) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a physician orders for scope of treatment form on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a physician orders for scope of treatment form executed on his or her behalf.
   (new) Informing the individual that if a guardian is appointed, the guardian may have the power to sell, transfer, or otherwise dispose of both real and personal property and to make determinations about where the individual will live.
   (f) Informing the individual of the name of each person known to be seeking appointment as guardian.
   (g) Asking the individual and the petitioner about the amount of cash and property readily convertible into cash that is in the individual’s estate.
   (h) Making determinations, and informing the court of those determinations, on all of the following:
      (i) Whether there are 1 or more appropriate alternatives to the appointment of a full guardian or whether 1 or more actions should be taken in addition to the appointment of a guardian. Before informing the court of his or her determination under this subparagraph, the guardian ad litem shall consider the appropriateness of at least each of the following as alternatives or additional actions:
(A) Appointment of a limited guardian, including the specific powers and limitation on those powers the guardian ad litem believes appropriate.

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

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

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

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

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

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

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

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

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

(ix) Whether the individual has expressed any preferences about retaining any important real or personal property and the value, if known, of any such property.

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

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

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

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

700.5306a Rights of individual for whom guardian is sought or appointed; form.

Sec. 5306a.

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

(a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.
(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section 5302.

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

(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian, as provided in sections 5303, 5304, and 5305.

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

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

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

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

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

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

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

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

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

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

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed if the individual is unable to afford legal counsel, as provided in section 5305.

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

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

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

(s) To a guardianship designed to encourage the development of maximum self-reliance and independence as provided in section 5306 including maintaining the individual in his or her home and community, if possible, with appropriate, affordable, and available services.

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

(u) To periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arise upon the review of the guardianship, as provided in section 5309.
(v) To, at any time, seek modification or termination of the guardianship by informal letter to
the judge, as provided in section 5310.

(w) To a hearing within 28 days of requesting a review, modification, or termination of the
guardianship, as provided in section 5310.

(x) To the same rights on a petition for modification or termination of the guardianship
including the appointment of a visitor as apply to a petition for appointment of a guardian, as
provided in section 5310.

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

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

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

(bb) To consult with the guardian about major decisions affecting the individual, including a
change in residence and the sale, transfer, or disposal of real and personal property, if
meaningful conversation is possible, as provided in section 5314.

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

(dd) To have the guardian notify the court within 14 days of a change in the individual's
residence, as provided in section 5314.

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

(ff) To have the guardian take reasonable care of the individual's clothing, furniture, vehicles,
and other personal effects, as provided in section 5314.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this
section. The state court administrative office and the office of services to the aging created in
section 5 of the older Michiganians act, 1981 PA 180, MCL 400.585, shall promulgate a form to
be used to give the written notice under this section, which shall include space for the court to
include information on how to contact the court or other relevant personnel with respect to the
rights enumerated in this section.

700.5314 Powers and duties of guardian.

Sec. 5314.

If meaningful communication is possible, a legally incapacitated individual's guardian shall
consult with the legally incapacitated individual before making a major decision affecting the
legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is
granted powers by the court under section 5306, the guardian is responsible for the ward's care,
custody, and control, but is not liable to third persons because of that responsibility for the ward's
acts. In particular and without qualifying the previous sentences, a guardian has all of the
following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of
residence in or outside this state as provided in section 5314a. The guardian shall visit the ward
within 3 months after the guardian's appointment and not less than once within 3 months after
each previous visit. The guardian shall notify the court within 14 days of a change in the ward’s place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and shall sell, transfer, or dispose of personal property for fair value only after consultation with the individual if meaningful communication is possible. The guardian shall commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property or personal property of significant monetary value, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property or personal property of significant monetary value in the context of the individual's estate.

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

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

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

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

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

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

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

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

(i) Not more than 14 days before executing the physician orders for scope of treatment form, visits the ward and, if meaningful communication is possible, consults with the ward about executing the physician orders for scope of treatment form.
(ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the physician orders for scope of treatment form.

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

(i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the physician orders for scope of treatment form.
(ii) Consult directly with the ward's attending physician as to specific medical indications that may warrant reaffirming the physician orders for scope of treatment form.

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

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.
(ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward's support, care, and education. The guardian shall not use money from the ward's estate for room and board that the guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by court order made on notice to at least 1 of the ward's next of kin, if notice is possible. The guardian shall exercise care to conserve any excess for the ward's needs.

(j) The duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:

(i) The ward's current mental, physical, and social condition.
(ii) Improvement or deterioration in the ward's mental, physical, and social condition that occurred during the past year.
(iii) The ward's present living arrangement and changes in his or her living arrangement that occurred during the past year.
(iv) Whether the guardian recommends a more suitable living arrangement for the ward.
(v) Medical treatment, including mental health treatment, received by the ward.
(vi) Whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order on behalf of the ward during the past year.
(vii) Whether the guardian has executed, reaffirmed, or revoked a nonopioid directive form on behalf of the ward during the past year.
(viii) Whether the guardian has executed, reaffirmed, or revoked a physician orders for scope of treatment form on behalf of the ward during the past year.
(ix) Services received by the ward.
(x) A list of the guardian's visits with, and activities on behalf of, the ward.
(xi) A recommendation as to the need for continued guardianship.
(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.

Proposed New Section: MCL 700.5314a Protections Regarding Removal from the Home

Sec. 5314a

(1) The guardian shall maintain legally incapacitated individuals in their own homes if possible and consistent with the well-being and preferences of the individual. If an individual is removed from his or her primary residence temporarily, the guardian shall make all reasonable efforts to return the individual to his or her home at the earliest opportunity consistent with the individual's wishes. Temporary removal of the individual from his or her primary residence for the purpose of receiving health care or supervision, engaging in family or social activities, or for other reasons including the well-being or convenience of the individual does not relieve the guardian of the obligations set forth in this section regarding permanent removal from the home. A guardian may not primarily consider his or her own convenience or benefit when making a decision to remove the ward from his residence or selecting a new residence for the ward.

(2) Guardians shall explore reasonably available and affordable supports and services that could enable the individual to remain in his or her primary residence.

(3) The guardian shall not permanently remove a legally incapacitated individual from his or her primary residence without attempting to consult with the individual and honor the individual's preferences to the greatest extent possible. If the guardian seeks to proceed with a move, the guardian shall provide at least 14 days' prior written notice to the individual and file a petition with the court for approval of the move. The petition shall provide information about:

(a) the individual's current primary residence,
(b) the proposed new residence,
(c) the reason for the proposed move,
(d) whether the move is to a more or less restrictive setting,
(e) the efforts made or resources explored to enable the individual to remain in his or her current residence,
(f) whether the guardian has engaged in meaningful communication with the individual about the proposed move, and
(g) whether the individual objects to or supports the proposed move.

(4) Upon the filing of a petition to change the primary dwelling of the individual, if the petition asserts that the individual objects to the proposed move, the court shall schedule a
hearing and appoint counsel unless the legally incapacitated individual is already represented by counsel. If the petition does not assert that the individual objects to the proposed move, the court shall appoint a guardian-ad-litem who shall personally visit the individual to determine whether the individual objects to the move. If the guardian-ad-litem reports that the individual objects, or the individual files objections to the petition, the court shall schedule a hearing and appoint counsel if the legally incapacitated individual is not already represented by counsel. Upon receipt of the guardian-ad-litem’s report, if the individual has not filed an objection, the court shall enter an order granting the petition or, in the court’s discretion, set the matter for a hearing. The guardian shall not move the individual until the court enters an order on the petition.

(5) If the guardian determines that failure to move the individual more promptly is likely to be detrimental to the individual’s physical health, safety or welfare, the guardian may file an emergency ex parte petition prior to any move and explain the urgency of the circumstances that necessitate a more immediate order. The guardians shall provide affidavits or ex parte testimony in support of the motion. The motion shall be granted if the court determines by clear and convincing evidence that delaying the change in the primary residence is likely to result in substantial harm to the individual’s physical health, safety, or welfare. If the ex parte motion is granted, the court shall hold a hearing within 7 days of the order to determine whether the move shall be made permanent unless or until further order of the court. The court shall appoint a guardian ad litem pursuant to subsection 4. The guardian ad litem must file and serve his or her report by a date and time ordered by the court that is prior to the hearing.

(6) A nominated guardian may make a motion on the record for authority to move the individual during a hearing on an initial petition for guardianship. The motion shall be granted if the court determines by clear and convincing evidence that delaying the change in the primary residence is likely to result in substantial harm to the individual’s physical health, safety, or welfare.

(7) The guardian may not move the legally incapacitated individual out of state without order of the court. If the guardian petitions to move the legally incapacitated individual out of state, a guardian ad litem shall be appointed and the court shall schedule a hearing regardless of whether or not the individual files objections or expresses dissatisfaction with the proposed move.

(8) In exercising the guardian’s power to establish the individual’s place of residence, the guardian shall:

(a) Select a residential setting the guardian believes the adult would select if the adult were able. If the guardian does not know and cannot reasonably determine what setting the individual would likely select, or the guardian reasonably believes the decision the adult would make would unreasonably harm or endanger the welfare or personal or financial interests of the individual, the guardian shall choose a residential setting that is consistent with the adult’s best interest.
(b) Give priority to a residential setting in a location that will allow the individual to interact with persons and participate in activities important to the individual and meet the individual’s needs in the least restrictive manner reasonably feasible.

(9) If removal from the primary residence necessitates the sale, transfer, or disposal of real or significant personal property and if meaningful communication is possible, the guardian shall consult with the individual prior to taking any action to dispose of the property. Guardians shall make all reasonable efforts to identify and honor the individual’s wishes to preserve personal property of sentimental or monetary value in the overall context of the individual’s estate, including items identified in the inventory and annual accounts, and shall take reasonable steps to safeguard it. Failure to comply with this subsection is grounds for removal as guardian.
Proposed Statutory Language for Removal from the Home Subcommittee

700.5305 Guardian ad litem; duties; compensation; legal counsel.

Sec. 5305.

(1) The duties of a guardian ad litem appointed for an individual alleged to be incapacitated include all of the following:
   (a) Personally visiting the individual.
   (b) Explaining to the individual the nature, purpose, and legal effects of a guardian's appointment.
   (c) Explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including, but not limited to, all of the following:
      (i) The right to contest the petition.
      (ii) The right to request limits on the guardian's powers, including a limitation on the guardian's power to execute on behalf of the ward either of the following:
         (A) A do-not-resuscitate order.
         (B) A physician orders for scope of treatment form.
      (iii) The right to object to a particular person being appointed guardian.
      (iv) The right to be present at the hearing.
      (v) The right to be represented by legal counsel.
      (vi) The right to have legal counsel appointed for the individual if he or she is unable to afford legal counsel.
   (d) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a do-not-resuscitate order on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a do-not-resuscitate order executed on his or her behalf.
   (e) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a physician orders for scope of treatment form on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a physician orders for scope of treatment form executed on his or her behalf.
   (f) Informing the individual of the name of each person known to be seeking appointment as guardian.
   (g) Asking the individual and the petitioner about the amount of cash and property readily convertible into cash that is in the individual's estate.
   (h) Making determinations, and informing the court of those determinations, on all of the following:
      (i) Whether there are 1 or more appropriate alternatives to the appointment of a full guardian or whether 1 or more actions should be taken in addition to the appointment of a guardian. Before informing the court of his or her determination under this subparagraph, the guardian ad litem shall consider the appropriateness of at least each of the following as alternatives or additional actions:
(A) Appointment of a limited guardian, including the specific powers and limitation on those powers the guardian ad litem believes appropriate.

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

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

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

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

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

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

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

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

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

   (ix) Whether the individual has expressed any preferences about retaining any important real or personal property and the value, if known, of any such property.

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

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

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

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

700.5306a Rights of individual for whom guardian is sought or appointed; form.

Sec. 5306a.

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

   (a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.
(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section 5302.

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

(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian, as provided in sections 5303, 5304, and 5305.

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

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

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

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

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

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

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

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

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

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

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem of the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing, to be represented by legal counsel, and to have legal counsel appointed if the individual is unable to afford legal counsel, as provided in section 5305.

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

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

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

(s) To a guardianship designed to encourage the development of maximum self-reliance and independence as provided in section 5306 including maintaining the individual in his or her home and community, if possible, with appropriate, affordable, and available services.

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

(u) To periodic review of the guardianship by the court, including the right to a hearing and the appointment of an attorney if issues arise upon the review of the guardianship, as provided in section 5309.
(v) To, at any time, seek modification or termination of the guardianship by informal letter to the judge, as provided in section 5310.
(w) To a hearing within 28 days of requesting a review, modification, or termination of the guardianship, as provided in section 5310.
(x) To the same rights on a petition for modification or termination of the guardianship including the appointment of a visitor as apply to a petition for appointment of a guardian, as provided in section 5310.
(y) To personal notice of a petition for appointment or removal of a guardian, as provided in section 5311.
(z) To written notice of the nature, purpose, and legal effects of the appointment of a guardian, as provided in section 5311.
(aa) To choose the person who will serve as guardian, if the chosen person is suitable and willing to serve, as provided in section 5313.
(bb) To consult with the guardian about major decisions affecting the individual, including a change in residence and the sale, transfer, or disposal of real and personal property, if meaningful conversation is possible, as provided in section 5314.
(cc) To quarterly visits by the guardian, as provided in section 5314.
(dd) To have the guardian notify the court within 14 days of a change in the individual's residence, as provided in section 5314.
(ee) To have the guardian secure services to restore the individual to the best possible state of mental and physical well-being so that the individual can return to self-management at the earliest possible time, as provided in section 5314.
(ff) To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects, as provided in section 5314.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this section. The state court administrative office and the office of services to the aging created in section 5 of the older Michiganians act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give the written notice under this section, which shall include space for the court to include information on how to contact the court or other relevant personnel with respect to the rights enumerated in this section.

700.5314 Powers and duties of guardian.

Sec. 5314.

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:
(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state as provided in section 5314a. The guardian shall visit the ward within 3 months after the guardian's appointment and not less than once within 3 months after
each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and shall sell, transfer, or dispose of personal property for fair value only after consultation with the individual if meaningful communication is possible. The guardian shall commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property or personal property of significant monetary value, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property or personal property of significant monetary value in the context of the individual's estate.

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

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

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

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

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

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

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

(f) The power to execute, reaffirm, and revoke a nonopioid directive form on behalf of a ward.
(g) The power to execute, reaffirm, and revoke a physician orders for scope of treatment form on behalf of a ward. However, a guardian shall not execute a physician orders for scope of treatment form unless the guardian does all of the following:
   (i) Not more than 14 days before executing the physician orders for scope of treatment form, visits the ward and, if meaningful communication is possible, consults with the ward about executing the physician orders for scope of treatment form.
   (ii) Consults directly with the ward's attending physician as to the specific medical indications that warrant the physician orders for scope of treatment form.

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:
   (i) Visit the ward and, if meaningful communication is possible, consult with the ward about reaffirming the physician orders for scope of treatment form.
   (ii) Consult directly with the ward's attending physician as to specific medical indications that may warrant reaffirming the physician orders for scope of treatment form.

(i) If a conservator for the ward's estate is not appointed, the power to do any of the following:
   (i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.
   (ii) Receive money and tangible property deliverable to the ward and apply the money and property for the ward's support, care, and education. The guardian shall not use money from the ward's estate for room and board that the guardian or the guardian's spouse, parent, or child have furnished the ward unless a charge for the service is approved by court order made on notice to at least 1 of the ward's next of kin, if notice is possible. The guardian shall exercise care to conserve any excess for the ward's needs.

(j) The duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:
   (i) The ward's current mental, physical, and social condition.
   (ii) Improvement or deterioration in the ward's mental, physical, and social condition that occurred during the past year.
   (iii) The ward's present living arrangement and changes in his or her living arrangement that occurred during the past year.
   (iv) Whether the guardian recommends a more suitable living arrangement for the ward.
   (v) Medical treatment, including mental health treatment, received by the ward.
   (vi) Whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order on behalf of the ward during the past year.
   (vii) Whether the guardian has executed, reaffirmed, or revoked a nonopioid directive form on behalf of the ward during the past year.
   (viii) Whether the guardian has executed, reaffirmed, or revoked a physician orders for scope of treatment form on behalf of the ward during the past year.
   (ix) Services received by the ward.
   (x) A list of the guardian's visits with, and activities on behalf of, the ward.
   (xi) A recommendation as to the need for continued guardianship.
(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.

Proposed New Section: MCL 700.5314a Protections Regarding Removal from the Home

Sec. 5314a

(1) The guardian shall maintain legally incapacitated individuals in their own homes if possible and consistent with the well-being and preferences of the individual. If an individual is removed from his or her primary residence temporarily, the guardian shall make all reasonable efforts to return the individual to his or her home at the earliest opportunity consistent with the individual’s wishes. Temporary removal of the individual from his or her primary residence for the purpose of receiving health care or supervision, engaging in family or social activities, or for other reasons including the well-being or convenience of the individual does not relieve the guardian of the obligations set forth in this section regarding permanent removal from the home. A guardian may not primarily consider his or her own convenience or benefit when making a decision to remove the ward from his residence or selecting a new residence for the ward.

(2) Guardians shall explore reasonably available and affordable supports and services that could enable the individual to remain in his or her primary residence.

(3) The guardian shall not permanently remove a legally incapacitated individual from his or her primary residence without attempting to consult with the individual and honor the individual’s preferences to the greatest extent possible. If the guardian seeks to proceed with a move, the guardian shall provide at least 14 days’ prior written notice to the individual and file a petition with the court for approval of the move. The petition shall provide information about:

(a) the individual’s current primary residence,
(b) the proposed new residence,
(c) the reason for the proposed move,
(d) whether the move is to a more or less restrictive setting,
(e) the efforts made or resources explored to enable the individual to remain in his or her current residence,
(f) whether the guardian has engaged in meaningful communication with the individual about the proposed move, and
(g) whether the individual objects to or supports the proposed move.

(4) Upon the filing of a petition to change the primary dwelling of the individual, if the petition asserts that the individual objects to the proposed move, the court shall schedule a hearing and appoint counsel unless the legally incapacitated individual is already represented by counsel. If the petition does not assert that the individual objects to the proposed move, the court shall
appoint a guardian-ad-litem who shall personally visit the individual to determine whether the
individual objects to the move. If the guardian-ad-litem reports that the individual objects, or the
individual files objections to the petition, the court shall schedule a hearing and appoint counsel
if the legally incapacitated individual is not already represented by counsel. Upon receipt of the
guardian-ad-litem’s report, if the individual has not filed an objection, the court shall enter an
order granting the petition or, in the court’s discretion, set the matter for a hearing. The guardian
shall not move the individual until the court enters an order on the petition.

(5) If the guardian determines that failure to move the individual more promptly is likely to be
detrimental to the individual’s physical health, safety or welfare, the guardian may file an
emergency ex parte petition prior to any move and explain the urgency of the circumstances that
necessitate a more immediate order. The guardians shall provide affidavits or ex parte testimony
in support of the motion. The motion shall be granted if the court determines by clear and
convincing evidence that delaying the change in the primary residence is likely to result in
substantial harm to the individual’s physical health, safety, or welfare. If the ex parte motion is
granted, the court shall hold a hearing within 7 days of the order to determine whether the move
shall be made permanent unless or until further order of the court. The court shall appoint a
guardian ad litem pursuant to subsection 4. The guardian ad litem must file and serve his or her
report by a date and time ordered by the court that is prior to the hearing.

(6) A nominated guardian may make a motion on the record for authority to move the individual
during a hearing on an initial petition for guardianship. The motion shall be granted if the court
determines by clear and convincing evidence that delaying the change in the primary residence is
likely to result in substantial harm to the individual’s physical health, safety, or welfare.

(7) The guardian may not move the legally incapacitated individual out of state without order of
the court. If the guardian petitions to move the legally incapacitated individual out of state, a
guardian ad litem shall be appointed and the court shall schedule a hearing regardless of whether
or not the individual files objections or expresses dissatisfaction with the proposed move.

(8) In exercising the guardian’s power to establish the individual’s place of residence, the
guardian shall:

(a) Select a residential setting the guardian believes the adult would select if the adult were able.
If the guardian does not know and cannot reasonably determine what setting the individual
would likely select, or the guardian reasonably believes the decision the adult would make would
unreasonably harm or endanger the welfare or personal or financial interests of the individual,
the guardian shall choose a residential setting that is consistent with the adult’s best interest.

(b) Give priority to a residential setting in a location that will allow the individual to interact with
persons and participate in activities important to the individual and meet the individual’s needs in
the least restrictive manner reasonably feasible.

(9) If removal from the primary residence necessitates the sale, transfer, or disposal of real or
significant personal property and if meaningful communication is possible, the guardian shall
consult with the individual prior to taking any action to dispose of the property. Guardians shall

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make all reasonable efforts to identify and honor the individual’s wishes to preserve personal property of sentimental or monetary value in the overall context of the individual’s estate, including items identified in the inventory and annual accounts, and shall take reasonable steps to safeguard it. Failure to comply with this subsection is grounds for removal as guardian.
MEMORANDUM

To: Legislative Bureau
From: Salli Pung, Chair of Guardianship Certification Subcommittee
Subject: Guardianship Certification Subcommittee

The Guardianship Certification Subcommittee was tasked with proposing updates to EPIC for guardianship certification requirements. The subcommittee recommends requiring individuals and professional guardianship agency employees to be a national certified guardian or national master guardian with the Center for Guardianship Certification (CGC) and maintain this registration as required by CGC. This certification requires adherence to the National Guardianship Association (NGA) standards of practice and ethical principles, which require the guardian to meet monthly with the person subject to guardianship.

What is currently required?

1. EPIC does not require certification for guardians. EPIC currently requires quarterly visits by the guardian.

What are the proposed changes to EPIC?

1. Adding language to require a professional guardianship agency to employ individuals who obtained guardianship certification. [5106(4)]
2. Adding language to require certification of individuals serving as a guardian, conservator, or both. [5106 (5)]
3. Adding language to allow for limited exceptions to certification. [5106 (6)]
4. Changing language to require monthly visits by guardians as required by the National Guardianship Association (NGA) standards. [5106 (8), 5306(a)(1)(cc), and 5314]
5. Adding language to prohibit the non-agency guardian or conservator from delegating decision making authority to administrative/clerical staff or other professionals. [5106 (10)]
6. Adding language to prohibit certified individuals employed by a professional guardianship agency from delegating decision making authority to administrative/clerical staff or other professionals. [5106 (11)]

Why are these changes necessary?

1. Certification of guardians will set professional standards for those serving as a guardian, conservator or both while providing additional protections and oversight.
2. Certification will also improve service delivery for individuals subject to guardianship.

Proposed changes to EPIC

700.5106 Appointment or approval of professional guardian or professional conservator as guardian or conservator; findings; bond; compensation or other benefits; schedule of visitation; care; appointment of nonbanking corporation to act as fiduciary in state.

Sec. 5106.

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

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

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

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

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

(4) A court shall not appoint a professional guardianship agency to serve as a guardian, conservator, or both, under this act unless the agency employs individuals who obtained guardianship certification as set forth by Administrative Order of the Michigan Supreme Court.

(5) A court shall not appoint an individual to serve as guardian, conservator, or both, under this act unless the individual has obtained guardianship certification as set forth by Administrative Order of the Michigan Supreme Court or the individual meets the exception criteria set forth in subsection (6).

(6) A court may appoint an individual as a guardian, conservator, or both, under this act without obtaining guardianship certification as set forth in subsection (5) if:

(a) The individual is related to the legally incapacitated individual or protected individual by blood, adoption, or marriage, including step- or half- relations; or
(b) The individual will serve as guardian, conservator, or both, for no more than two legally incapacitated individuals or protected individuals and receives no compensation for providing those services; or
(c) The individual is licensed and in good standing with the State Bar of Michigan and will serve as guardian, conservator, or both, for no more than three legally incapacitated individuals or protected individuals.

(7) A professional guardian or professional conservator appointed under this section shall not receive as a result of that appointment a benefit beyond compensation specifically authorized for that type of fiduciary by this act or the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106. This subsection does not prevent a person from providing compensation or other benefits, from a source other than the estate of the ward, developmentally disabled individual, incapacitated individual, or protected individual, to a professional guardian or professional conservator appointed or approved under this section. If a professional guardian or professional conservator appointed or approved under this section receives or is to receive compensation or other benefits as a result of that appointment from a person other than this state, a political subdivision of this state, or a trust created under section 5407(2), the professional guardian or professional conservator shall file with the appointing or approving court a written statement of the compensation or other benefit received or to be received, including the source of the compensation or other benefit, in a form and in a manner prescribed by the Michigan court rules. The professional guardian or professional conservator shall serve a copy of the form described in this subsection to the ward, developmentally disabled individual, incapacitated individual, or protected individual and to interested persons.

(8) A guardian appointed under this section shall visit the ward within 1 month after the guardian's appointment and not less than once a month after each previous visit. A certified guardian shall not delegate required visitation to another individual unless that individual is certified. If due to extenuating circumstances, a non-certified guardian is unable to complete a monthly required visit, the non-certified guardian may delegate that responsibility to an appropriate and trustworthy individual.

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

(10) A non-agency guardian may utilize support staff and other professionals, under the guardian's active and direct supervision, to perform office functions and client services. Support staff and professionals may be used to gather and provide necessary information to the non-agency guardian regarding a legally incapacitated individual or protected individual and to make recommendations to the non-agency guardian based on their knowledge and expertise. The non-agency guardian shall not delegate decision making authority to support staff, professionals, or other
persons regarding execution of contracts or informed consent decisions, including but not limited to medical, mental health, placement, or care planning decisions.

(11) Certified individuals employed by professional guardianship agencies shall not delegate decision making authority to support staff, professionals or other persons regarding execution of contracts or informed consent decisions, including but not limited to medical, mental health, placement or care planning decisions.

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

700.5306a Rights of individual for whom guardian is sought or appointed; form.

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

(cc) To monthly visits by the guardian, as provided in section 5314.

700.5314 Powers and duties of guardian.

Sec. 5314.

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 1 month after the guardian's appointment and not less than once a month after each previous visit pursuant to section 5106(8). The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.
Proposed changes to EPIC from Guardianship Certification Subcommittee

700.5106 Appointment or approval of professional guardian or professional conservator as guardian or conservator; findings; bond; compensation or other benefits; schedule of visitation; care; appointment of nonbanking corporation to act as fiduciary in state.

Sec. 5106.

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

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

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

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

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

(4) A court shall not appoint a professional guardianship agency to serve as a guardian, conservator, or both, under this act unless the agency employs individuals who obtained guardianship certification as set forth by Administrative Order of the Michigan Supreme Court.

(5) A court shall not appoint an individual to serve as guardian, conservator, or both, under this act unless the individual has obtained guardianship certification as set forth by Administrative Order of the Michigan Supreme Court or the individual meets the exception criteria set forth in subsection (6).

(6) A court may appoint an individual as a guardian, conservator, or both, under this act without obtaining guardianship certification as set forth in subsection (5) if:

(a) The individual is related to the legally incapacitated individual or protected individual by blood, adoption, or marriage, including step- or half- relations; or

(b) The individual will serve as guardian, conservator, or both, for no more than two legally incapacitated individuals or protected individuals and receives no compensation for providing those services; or
(c) The individual is licensed and in good standing with the State Bar of Michigan and will serve as guardian, conservator, or both, for no more than three legally incapacitated individuals or protected individuals.

(7) A professional guardian or professional conservator appointed under this section shall not receive as a result of that appointment a benefit beyond compensation specifically authorized for that type of fiduciary by this act or the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106. This subsection does not prevent a person from providing compensation or other benefits, from a source other than the estate of the ward, developmentally disabled individual, incapacitated individual, or protected individual, to a professional guardian or professional conservator appointed or approved under this section. If a professional guardian or professional conservator appointed or approved under this section receives or is to receive compensation or other benefits as a result of that appointment from a person other than this state, a political subdivision of this state, or a trust created under section 5407(2), the professional guardian or professional conservator shall file with the appointing or approving court a written statement of the compensation or other benefit received or to be received, including the source of the compensation or other benefit, in a form and in a manner prescribed by the Michigan court rules. The professional guardian or professional conservator shall serve a copy of the form described in this subsection to the ward, developmentally disabled individual, incapacitated individual, or protected individual and to interested persons.

(8) A guardian appointed under this section shall visit the ward within 1 month after the guardian’s appointment and not less than once a month after each previous visit. A certified guardian shall not delegate required visitation to another individual unless that individual is certified. If due to extenuating circumstances, a non-certified guardian is unable to complete a monthly required visit, the non-certified guardian may delegate that responsibility to an appropriate and trustworthy individual.

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

(10) A non-agency guardian may utilize support staff and other professionals, under the guardian’s active and direct supervision, to perform office functions and client services. Support staff and professionals may be used to gather and provide necessary information to the non-agency guardian regarding a legally incapacitated individual or protected individual and to make recommendations to the non-agency guardian based on their knowledge and expertise. The non-agency guardian shall not delegate decision making authority to support staff, professionals, or other persons regarding execution of contracts or informed consent decisions, including but not limited to medical, mental health, placement, or care planning decisions.

(11) Certified individuals employed by professional guardianship agencies shall not delegate decision making authority to support staff, professionals or other persons regarding execution of contracts or informed consent decisions, including but not limited to medical, mental health, placement or care planning decisions.
(12) For the purposes of the statutory authorization required by section 1105(2)(e) of the banking code of 1999, 1999 PA 276, MCL 487.11105, to act as a fiduciary in this state, if the court appoints a for-profit or nonprofit, nonbanking corporation organized under the laws of this state to serve in a fiduciary capacity that is listed in subsection (1), the nonbanking corporation is authorized to act in that fiduciary capacity. The authorization under this subsection confers the fiduciary capacity only to the extent necessary in the particular matter of each appointment and is not a general grant of fiduciary authority. A nonbanking corporation is not authorized to act in any other fiduciary capacity.

700.5306a Rights of individual for whom guardian is sought or appointed; form.
Sec. 5306a. (1) An individual for whom a guardian is sought or has been appointed under section 5306 has all of the following rights: ....
(cc) To monthly visits by the guardian, as provided in section 5314.

700.5314 Powers and duties of guardian.
Sec. 5314.
If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order: (a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within 1 month after the guardian's appointment and not less than once a month after each previous visit pursuant to section 5106(8). The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.
MEMORANDUM

To: Scott Teter  
Cc: SCAO/Courts Committee  
From: Nicole Shannon  
Subject: GAL SCAO/Courts subcommittee (Kaye Scholle, Nathan Piwowarski, Judge John Tomlinson).  
Date: August 9, 2019

Introduction

This subcommittee was formed to address the new situations in which Guardians Ad Litem are appointed, as well as to make improvements to the system.

What is the law now?

- Guardians ad litem (GALs) are appointed whenever there is an initial petition, petition to modify, or petition to terminate on an EPIC adult guardianship or conservatorship.
- The duties of a guardian ad litem are vague under current statute, with most agreeing they serve as “the eyes and ears of the court.”
- GALs provide reports to the court and advise individuals subject to guardianship and conservatorship petitions of their rights.
- GAL reports are explicitly not required to follow the rules of evidence.
- There is no clear duty to ensure attendance of the individual at the hearing, aside from the court moving the location.
- Statute currently states that a GAL “represents” the individual, when this is not accurate.

What changes does the new legislation make?

- The new legislation is a wholesale rewrite of the GAL statute, but only redline edits to other statutes and court rules.
- GAL duties and reporting requirements are now clearly defined by statute. GALs appointed in situations other than an initial petition, petition to modify, or petition to terminate, are now given statutory governance.
- GALs are now required to provide the court with information that is useful, but was not previously required, such as how long they met with the individual, a prioritization of potential fiduciaries, and whether the individual has transportation issues that could prevent them from attending court.
- Codifies an initial hearing/trial date model. Many Probate Courts already handle their dockets in this way. If the matter is uncontested, the court can enter an order at the initial hearing. If the matters is contested, the court
must set a date for trial, enter a scheduling order as needed, and take steps to provide for attendance of the individual at trial.

- Requires parties over whom the court has personal jurisdiction to assist in ensuring the individual subject to the petition attends if they desire.
- Updates MCL 700.5314 to make explicit that a guardian has authority over real and personal property if no conservator is appointed.
- Requires a GAL to identify whether the appointment of a visitor with appropriate knowledge, training, and education such as a social worker, mental health professional, or medical professional could provide the court with the information on whether alternatives to guardianship or a limited guardianship is appropriate.
- Includes the GAL/counsel requirements for adult conservatorships.
- Eliminates language that says the GAL "represents" the individual.
- Clarifies that when counsel is appointed, retained counsel can appear by filing a substitution or a motion to substitute (as is the case in other civil litigation)
- Clarifies that an individual has the right to retain the counsel of their choice at any stage of the proceedings, regardless of findings of incapacity.
- Revised court rule to come in line with the proposed statute, particularly regarding:
  - GAL reports must be written
  - GAL must personally appear for examination to have their written report admitted
  - Written report and testimony are only admissible to the extent of the Michigan Rules of Evidence
- Requires that a GAL report on a contested matter be limited to reporting that the matter is contested and whether the individual requires accommodations to attend the hearing.
- Creates a Special Guardian Ad Litem that is permitted to address narrow issues that are likely to be inadequately otherwise addressed.

Why are the changes necessary?

Currently, GAL practice and expertise varies widely across the state. The subcommittee was in agreement on what good GAL practice looks like, and we set out to codify it. Additionally, the proposal takes a number of steps that should improve attendance of the individual subject to the petition.

Some courts appear to have an overreliance on GAL reports, to the point that they are sometimes treated like a federal magistrate's report and recommendation. This proposal sought to ensure that the judge remains the true trier of fact, but that GALs can continue to serve the important process of advising individuals subject to petitions of their rights. In an ideal world, a GAL would be a combination attorney, social worker, and special investigator. GALs are expected to know, based on a brief
meeting, whether someone is appropriate for a guardianship, what alternatives there are, and what family dynamics are at play. These are all more appropriate issues for a full hearing.

Currently, GAL reports and testimony are explicitly exempt from the Michigan Rules of Evidence under Court Rule. This means that individuals sometimes end up subject to guardianship based on double or triple hearsay. Given the serious deprivation of rights, it seems that we should ensure that the due process bar is higher, not lower, than other civil litigation.

If an individual is contesting a guardianship, their attorney should be directing the proceedings on their behalf, not the GAL. The proposal ensures that a GAL report shall be limited to advising the court that the case is contested and whether the individual has any transportation barriers. This way the trier of fact is not needlessly influenced by the GAL report and potential recommendations (which often include a recommendation for a full guardianship) before the individual has an opportunity to work with counsel and mount their case.

A GAL can often serve a helpful purpose, particularly when there are numerous pro se interested parties. The creation of a Special Limited GAL permits a court to appoint a GAL for a narrow purpose, while safeguarding against the issues outlined in the paragraph above.

Proposed changes:

Sec. 5303.

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

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

(3) Upon the filing of a petition under subsection (1), the court shall set a date for initial hearing. Unless the allegedly incapacitated individual has legal counsel of
his or her own choice, the court shall appoint a guardian ad litem for the purposes of the initial hearing.

(4) (a) At the initial hearing, the court shall set a trial date for the petition under subsection (1) if:
   (i) The guardian ad litem reports that the alleged incapacitated individual contests any part of the petition;
   (ii) The alleged incapacitated individual or their legal counsel requests that the matter be set for trial;
   (iii) There is any other reason as justice so requires.
    
    (b) If the court sets a trial date at the initial hearing, the court shall:
   (i) Enter a scheduling order under MCR 2.401 to the extent necessary;
   (ii) Enter an order that provides, to the extent practicable, for the attendance of the alleged incapacitated individual at the trial if the individual wishes to attend. Such an order may include ordering interested parties over whom the court has jurisdiction to facilitate attendance or moving the hearing site under section 5304(4).

700.5304 Evaluation and report; hearing.
Sec. 5304.

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

(2) The alleged incapacitated individual has the right to secure an independent evaluation, at his or her own expense or, if indigent, at the expense of the state. Compensation for an independent evaluation at public expense shall be in an amount that, based upon time and expense, the court approves as reasonable.

(3) A report prepared under this section shall contain all of the following:
   (a) A detailed description of the individual's physical or psychological infirmities.
   (b) An explanation of how and to what extent each infirmity interferes with the individual's ability to receive or evaluate information in making decisions.
   (c) A listing of all medications the individual is receiving, the dosage of each medication, and a description of the effects each medication has upon the individual's behavior.
   (d) A prognosis for improvement in the individual's condition and a recommendation for the most appropriate rehabilitation plan.
(e) The signatures of all individuals who performed the evaluations upon which the report is based.

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

(5) The individual is entitled to be represented by legal counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or mental health professional and the visitor, and to trial by jury.

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

Section 5305.

(1) A guardian ad litem appointed for any purpose has the following duties:
   (a) Impartially gather information as directed by statute and the court.
   (b) Seek information from the individual, and if communication is possible, communicate in a manner the individual is best able to understand. If communication is not possible or there are barriers to communication, the guardian ad litem must note that in the report.
   (c) Interview the individual in person at the individual's location and out of the presence of any interested person.
   (d) Advise the individual that they do not represent the individual as an attorney and that no attorney-client relationship has been created.
   (e) Identify whether the individual wishes to be present at the hearing. If the individual does not wish to be present at the hearing, identify the reasons why the individual does not wish to be present.
   (f) Identify any barriers to attending hearings at the place where court is held or otherwise fully participating in the hearing, including the need for assistive technology, transportation, or other support. If the individual wishes to attend, whether the individual has identified a plan for how they will attend.
   (g) Identify whether the individual plans to retain counsel or wants appointed counsel. If the individual does not plan to retain counsel or request appointed counsel, the guardian ad litem must make a recommendation as to whether counsel should be appointed.
   (h) Identify whether a disagreement or dispute related to the petition might be resolved through court ordered mediation.

(2) A guardian ad litem appointed for the purposes of an initial petition, petition to modify, or petition to terminate, has the following duties:
(a) Explain to the individual the nature, purpose, and legal effects of a guardian's appointment.[NS2]
(b) Explain who has filed the petition and who, if anyone, has been nominated as guardian.
(c) Explain to the individual the hearing procedure and the individual's rights in the hearing procedure, as identified in section 5306a(2), including but not limited to the following:[NS3]
   (i) The right to contest the petition, in whole or in part.[NS4]
   (ii) The right to request limits on the guardian's powers.[NS5]
   (iii) The right to be present at the hearing. If the individual is unable to attend the hearing at the location court proceedings typically are held, the right for the hearing at another location.[NS6]
   (iv) The right to request a reasonable accommodation to allow them to participate as fully as possible at the hearing, including with assistive technology or other support.
   (v) The right to be represented by legal counsel of their choice. If the individual is unable to secure legal counsel of their choice, the right to have legal counsel appointed.[NS7]
   (vi) The right to request an independent medical evaluation.[NS8]
(d) Explain to the individual that if a guardian is appointed the guardian may have the power to take certain actions on behalf of the individual. A guardian ad litem must inform the individual that a guardian may have the following powers, and, if meaningful communication is possible, discern if the individual objects to a guardian having the powers:
   (i) Executing a do-not-resuscitate order.[NS9]
   (ii) Executing a physician orders for scope of treatment form.[NS10]
   (iii) Consenting to any and all medical treatment.
   (iv) Consenting to placement decisions, including moving the individual to a nursing facility or adult foster care home.
   (v) Choosing whether the individual can marry or divorce.
   (vi) Handling any and all financial and property matters, including the sale or disposal of personal and real property such as the individual's home and belongings. The guardian ad litem should also inquire as to whether there are any items of special or sentimental value over the individual would not want sold or otherwise disposed of, such as family photos, collections, personal correspondence, or pets, as well as the location of those items.
(e) Identify whether:
   (i) The individual objects to the particular individual proposed as guardian, if any.[NS11]
(ii) If a guardian were appointed, a list of who the individual would want to serve, in order of preference.

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

(3) A guardian ad litem appointed under subsection (2) must file a written report with the court and in the form as required by the State Court Administrative Office:

(a) If the individual subject to the petition contests the petition, the report shall be confined to the following:

(i) That the individual contests the petition;

(ii) Whether the individual has retained counsel or wishes for counsel to be appointed;

(iii) Whether the individual has any barriers to attending court at the place it is usually held.

(b) If the individual subject to the petition does not contest the petition, the report shall include the following:

(i) The date and time they met with the individual.

(ii) How long they met with the individual.

(iii) Where they met the individual.

(iv) Whether they were able to meaningfully communicate with the individual and any barriers to communication.

(v) Who, if anyone, was present for the interview besides the individual.

(vi) Whether the individual wishes to be present at the hearing. If they wish to be present at the hearing but have a barrier to fully participating, whether that barrier can be resolved by moving the location of the hearing and/or using assistive technology or other support.[NS12]

(vii) Whether the individual has identified a plan for how they will attend.

(viii) Whether the individual plans to retain counsel or has requested appointed counsel. If the individual has not indicated they wish to be represented by counsel, a recommendation as to whether an attorney should be appointed to represent the respondent.[NS13]

(ix) Whether the individual has a power of attorney, patient advocate designation, physician orders for scope of treatment, benefits payee, trustee, or other fiduciary, with or without limitations on purpose, authority, or duration.[NS14]

(x) Whether a disagreement or dispute related to the guardianship petition might be resolved through court ordered mediation.[NS15]

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

(xii) Whether the individual wishes to contest the guardianship or potential powers of a guardian as specified in subsection (1)(c).

(xiii) Whether the individual objects to the particular individual proposed as guardian or any other person who may be considered to serve as guardian.

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

(xv) An estimate of amount of cash and property readily convertible into cash that is in the individual’s estate.

(4) If a guardian ad litem is appointed for any purpose besides an initial petition, petition to terminate, or petition to modify, they must provide a written report to the court that includes, at a minimum the information in subsection 2(a) or 2(b)(i-x) as applicable. A special limited guardian ad litem is not required to provide a written report unless ordered to do so by the court.

(5) A guardian ad litem must file the report under subsection (2) or (3) with the court and serve it on all interested parties at least 7 days prior to the date of the hearing. The court may order the report be filed and served less than 7 days prior to the hearing only if the petition is made on an emergency basis under MCL 700.XXXX.

(6) The trier of fact shall not consider evidence included in a report or the testimony of a guardian ad litem that is not otherwise admissible under the Michigan Rules of Evidence. If the guardian ad litem does not personally appear for examination, the report shall not be admitted into evidence.

(7) The court shall not order compensation of the guardian ad litem unless the guardian ad litem states in the guardian ad litem’s written report that they have complied with subsection (1), subsection (2) or (3) as applicable, and subsection (4).

(8) A guardian ad litem must not be appointed as legal counsel for the individual if the guardian ad litem’s report or recommendation to the court is in conflict with the wishes of the individual.

(9) If the individual subject to the petition has not already secured legal counsel, the court shall appoint legal counsel if:
   (a) The individual subject to the petition requests legal counsel;
   (b) The individual subject to the petition objects to any part of the petition for guardianship or potential authority of a guardian; or
   (c) The guardian ad litem determines it is in the individual subject to the petition’s best interest to have legal counsel, and if legal counsel has not been secured, the court shall appoint legal counsel. If the individual subject to the petition is indigent this state shall bear the expense of appointed legal counsel.
(10) If the individual subject to the petition has legal counsel appointed or retained, the appointment of a guardian ad litem terminates. The report of the guardian ad litem shall not be admitted into evidence subsequent to the appearance or appointment of counsel for the individual subject to the petition. [NS19]

(11) After appointment or retention of counsel for the individual subject to the petition, the court may for good cause shown, appoint a special limited guardian ad litem to provide information on a narrowly-defined issue that will likely otherwise be inadequately addressed. A special guardian ad litem is exempt from subsections 1-4. The court may order that a special limited guardian ad litem provide a written report. That report shall contain whatever information the court deems necessary to adequately address the issue leading to the appointment of the special limited guardian ad litem. A special limited guardian ad litem shall not communicate directly with the individual subject to the petition and must instead communicate through counsel to the individual subject to the petition, unless counsel otherwise gives consent.

(12) An individual alleged to be incapacitated or an individual subject to guardianship has the right to retain counsel of choice at any stage, regardless of findings regarding their capacity. Retained counsel shall file a substitution of counsel or a motion to substitute if counsel has already been appointed.

Sec. 5306a.

(1) An individual for whom a guardian is sought or has been appointed under section 5306 has all of the following rights:
(a) To object to the appointment of a successor guardian by will or other writing, as provided in section 5301.
(b) To have the guardianship proceeding commenced and conducted in the place where the individual resides or is present or, if the individual is admitted to an institution by a court, in the county in which the court is located, as provided in section 5302.
(c) To petition on his or her own behalf for the appointment of a guardian, as provided in section 5303.
(d) To have legal counsel of his or her own choice represent him or her on the petition to appoint a guardian, as provided in sections 5303, 5304, and 5305.
(e) If he or she is not represented by legal counsel, to the appointment of a guardian ad litem as provided in section 5303.
(f) To an independent evaluation of his or her capacity by a physician or mental health professional, at public expense if he or she is indigent, as provided in section 5304.
(g) To be present at the hearing on the petition to appoint a guardian and to have all practical steps taken to ensure this, including, if necessary, moving the hearing
site, as provided by section 5304. If a guardian has been appointed, for the guardian
to take all steps within the scope of their authority to ensure the individual attends
the hearing if the individual so desires as provided in section 5304(4).

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

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

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

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

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

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

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

(o) If a guardian ad litem is appointed, to be informed by the guardian ad litem
of the right to contest the petition, to request limits on the guardian's powers, to object
to a particular person being appointed guardian, to be present at the hearing, to be
represented by legal counsel, and to have legal counsel appointed if the individual is
unable to afford legal counsel, as provided in section 5305.

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

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

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

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

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

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

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

(w) To a hearing within 28 days of requesting a review, modification, or
termination of the guardianship, as provided in section 5310.

(x) To the same rights on a petition for modification or termination of the
guardianship including the appointment of a visitor as apply to a petition for
appointment of a guardian, as provided in section 5310.
(y) To personal notice of a petition for appointment or removal of a guardian, as provided in section 5311.

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

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

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

(cc) To monthly visits by the guardian, as provided in section 5314.

(dd) To have the guardian notify the court within 14 days of a change in the individual's residence, as provided in section 5314.

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

(ff) To have the guardian take reasonable care of the individual's clothing, furniture, vehicles, and other personal effects, as provided in section 5314.

(2) A guardian ad litem shall inform the ward in writing of his or her rights enumerated in this section. The state court administrative office and the office of services to the aging created in section 5 of the older Michiganians act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give the written notice under this section, which shall include space for the court to include information on how to contact the court or other relevant personnel with respect to the rights enumerated in this section.

Sec. 5314.

If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order:

(a) The custody of the person of the ward and the power to establish the ward's place of residence in or outside this state. The guardian shall visit the ward within one month after the guardian's appointment and not less than once each month after each previous visit. The guardian shall notify the court within 14 days of a change in the ward's place of residence or a change in the guardian's place of residence.

(b) If entitled to custody of the ward, the duty to make provision for the ward's care, comfort, and maintenance and, when appropriate, arrange for the ward's training and education. The guardian shall secure services to restore the ward to the best possible state of mental and physical well-being so that the ward can
return to self-management at the earliest possible time. Without regard to custodial rights of the ward's person, the guardian shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects and commence a protective proceeding if the ward's other property needs protection. If a guardian commences a protective proceeding because the guardian believes that it is in the ward's best interest to sell or otherwise dispose of the ward's real property or interest in real property, the court may appoint the guardian as special conservator and authorize the special conservator to proceed under section 5423(3). A guardian shall not otherwise sell the ward's real property or interest in real property. Unless a conservator is appointed, a guardian has the duty to maintain an individual's real property.

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

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

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

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

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

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

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

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

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

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

(h) If a guardian executes a physician orders for scope of treatment form under subdivision (f), not less than annually after the physician orders for scope of treatment is first executed, the duty to do all of the following:

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

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

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

(i) Institute a proceeding to compel a person under a duty to support the ward or to pay money for the ward's welfare to perform that duty.

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

(j) The duty to report the condition of the ward and the ward's estate that is subject to the guardian's possession or control, as required by the court, but not less often than annually. The guardian shall also serve the report required under this subdivision on the ward and interested persons as specified in the Michigan court rules. A report under this subdivision must contain all of the following:

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

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

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

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

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

(vi) Whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order on behalf of the ward during the past year.
(vii) Whether the guardian has executed, reaffirmed, or revoked a nonopioid directive form on behalf of the ward during the past year.
(viii) Whether the guardian has executed, reaffirmed, or revoked a physician orders for scope of treatment form on behalf of the ward during the past year.
(ix) Services received by the ward.
(x) A list of the guardian's visits with, and activities on behalf of, the ward.
(xi) A recommendation as to the need for continued guardianship.
(k) If a conservator is appointed, the duty to pay to the conservator, for management as provided in this act, the amount of the ward's estate received by the guardian in excess of the amount the guardian expends for the ward's current support, care, and education. The guardian shall account to the conservator for the amount expended.
(l) The duty to take all steps within the scope of their authority to ensure the individual attends the any hearings concerning their guardianship if the individual so desires as provided in section 5304(4).

Sec. 5406.

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

(2) Upon receipt of a petition for a conservator's appointment or another protective order for a reason other than minority, the court shall set a date for hearing. Unless the individual to be protected has chosen counsel, or is mentally competent but aged or physically infirm, the court shall appoint a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may direct that the individual alleged to need protection be examined by a physician or mental health professional appointed by the court, preferably a physician or mental health professional who is not connected with an institution in which the individual is a patient or is detained. The individual alleged to need protection has the right to secure an independent evaluation at his or her own expense. The court may send a visitor to interview the individual to be protected. The visitor may be a guardian ad litem or a court officer or employee.

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

(4) A guardian ad litem, physician, mental health professional, or visitor appointed under this section who meets with, examines, or evaluates an individual who is the subject of a petition in a protective proceeding shall do all of the following:
(a) Consider whether there is an appropriate alternative to a conservatorship.  
(b) If a conservatorship is appropriate, consider the desirability of limiting the  
scope and duration of the conservator's authority.  
(c) Report to the court based on the considerations required in subdivisions (a) and  
(b).  
(5) The appointment of a guardian ad litem under this subsection 2 is subject to  
requirements of section 5305. Any references to “guardian” shall be construed as  
references to “conservator” or other protective proceeding or fiduciary.  
(6) The individual to be protected is entitled to be present at the hearing in person.  
If the individual wishes to be present at the hearing, all practical steps must be  
taken to ensure the individual's presence including, if necessary, moving the site of  
the hearing. The individual is entitled to be represented by counsel, to present  
evidence, to cross-examine witnesses, including a court-appointed physician or other  
qualified person and a visitor, and to trial by jury. The issue may be determined at  
a closed hearing or without a jury if the individual to be protected or counsel for the  
individual so requests.  
(6) Any person may request for permission to participate in the proceeding, and  
the court may grant the request, with or without hearing, upon determining that  
the best interest of the individual to be protected will be served by granting the  
request. The court may attach appropriate conditions to the permission.  
(7) After hearing, upon finding that a basis for a conservator's appointment or  
another protective order is established by clear and convincing evidence, the court  
shall make the appointment or other appropriate protective order.  

Sec. 5415.  

(1) A person interested in the welfare of an individual for whom a conservator is  
appointed may file a petition in the appointing court for an order to do any of the  
following:  
(a) Require bond or security or additional bond or security, or reduce bond.  
(b) Require an accounting for the administration of the trust.  
(c) Direct distribution.  
(d) Remove the conservator and appoint a temporary or successor conservator.  
(e) Grant other appropriate relief.  
(2) A conservator may petition the appointing court for instructions concerning  
fiduciary responsibility. Upon notice and hearing, the court may give appropriate  
instructions or make an appropriate order.  
(3) Upon receipt of a petition under this section, the court shall appoint a guardian  
ad litem. The appointment of a guardian ad litem for an individual subject to a  
conservatorship for reason other than minority under is subject to requirements of  
section 5305. Any references to “guardian” shall be construed as references to  
“conservator” or other protective proceeding or fiduciary.  

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

(2) A conservator for an individual subject to a conservatorship for reason other than minority has the duty to take all steps within the scope of their authority to ensure the individual attends the any hearings concerning their conservatorship if the individual so desires as provided in section 5406(5).

**RULE 5.121 GUARDIAN AD LITEM; VISITOR**

(A) Appointment.

(1) Guardian Ad Litem. The court shall appoint a guardian ad litem when required by law. If it deems necessary, the court may appoint a guardian ad litem to appear for and represent the interests of any person in any proceeding. The court shall state the purpose of the appointment in the order of appointment. The order may be entered with or without notice.

(2) Visitor. The court may appoint a visitor when authorized by law.

(B) Revocation. If it deems necessary, the court may revoke the appointment and appoint another guardian ad litem or visitor.

(C) Duties. Before the date set for hearing, the guardian ad litem or visitor shall gather information and shall make a written report with the required information. The written report must be filed with the court and served on all interested parties and the individual subject to the petition at least 7 days before the hearing unless otherwise ordered due to an emergency.

(D) Evidence.

(1) Reports, Admission Into Evidence. Written reports and testimony of a guardian ad litem or visitor may be received by the court and may be relied on to the extent they are admissible under the Michigan Rules of Evidence and statute. Written reports shall not be entered into evidence if the guardian ad litem does not personally appear for examination.

(2) Reports, Review and Cross-Examination.

(a) Any interested person shall be afforded an opportunity to examine and controvert reports received into evidence.
(b) The person who is the subject of a report received under subrule (D)(1) and other interested persons shall be permitted to cross-examine the individual making the report.

(E) Attorney-Client Privilege.

(1) During Appointment of Guardian Ad Litem. When the guardian ad litem appointed to represent the interest of a person is an attorney, that appointment does not create an attorney-client relationship. Communications between that person and the guardian ad litem are not subject to the attorney-client privilege. The guardian ad litem must inform the person whose interests are represented of this lack of privilege as soon as practicable after appointment. The guardian ad litem may report or testify about any communication with the person whose interests are represented.

(2) Later Appointment as Attorney. If the appointment of the guardian ad litem is terminated and the same individual is appointed attorney, the appointment as attorney creates an attorney-client relationship. The attorney-client privilege relates back to the date of the appointment of the guardian ad litem.
MEMORANDUM

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
From: James P. Spica
Re: Uniform Law Commission Liaison Report
Date: October 10, 2019

The Uniform Electronic Wills Act has been issued in final form for consideration by state legislatures. It is available on the ULC website at:


JPS
DETROIT 40411-1 1416338v13
UNIFORM ELECTRONIC WILLS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTY-EIGHTH YEAR
ANCHORAGE, ALASKA
JULY 12-18, 2019

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

September 30, 2019
ABOUT ULC

The Uniform Law Commission (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 128th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC’s efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
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- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.
DRAFTING COMMITTEE ON UNIFORM ELECTRONIC WILLS ACT
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UNIFORM ELECTRONIC WILLS ACT

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UNIFORM ELECTRONIC WILLS ACT

Prefatory Note

Electronic Wills Under Existing Statutes. People increasingly turn to electronic tools to accomplish life’s tasks, including legal tasks. They use computers, tablets, or smartphones to execute electronically a variety of estate planning documents, including pay-on-death and transfer-on-death beneficiary designations and powers of attorney. Some people assume that they will be able to execute all their estate planning documents electronically, and they prefer to do so for efficiency, cost savings, or other reasons. Indeed, a few cases involving wills executed on electronic devices have already arisen.

An early case involved a testator’s signature typed in a word processing document, which was then printed in hard copy. In Taylor v. Holt, 134 S.W.3d 830 (Tenn. 2003), the testator typed his signature in a cursive font at the end of the electronic text of his will and then printed the will. Two witnesses watched him type the signature on the will, and then they signed the printed copy of the will. The court had no trouble concluding that the typed signature qualified as the testator’s signature. The statute defined signature to include a “symbol or methodology executed or adopted by a party with intention to authenticate a writing . . . .” TENN. CODE ANN. § 1-3-105(27) (1999). In Taylor the will was not attested or stored electronically, but the case illustrates a situation in which the substitution of electronic tools for traditional pen and paper can lead to litigation.

In a more recent Ohio case, In re Estate of Javier Castro, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013), the testator dictated a will to his brother, who wrote the will with a stylus on a Samsung Galaxy Tablet. The testator then signed the will on the tablet, using the stylus, as did the two witnesses. The probate court had to decide whether the electronic writing on the tablet met the statutory requirement that a will be “in writing.” The court concluded that it did and admitted the will to probate. In Castro, the testator and all witnesses were in the same room and signed using a stylus rather than typing a signature. The Uniform Electronic Wills Act (“the E-Wills Act”) gives effect to such a will and clarifies that the will meets the writing requirement. In Castro, the testator and witnesses had not signed an affidavit, so the will was not self-proving. Under the E-Wills Act, if a notary is present with the testator and witnesses, the will can be made self-proving. An alternative provided under the E-Wills Act allows a notary present electronically to prepare the self-proving affidavit.

An even more recent case illustrates what may be anticipated to be the most common electronic will scenario: that of a will prepared without witnesses and stored electronically. Shortly before his death by suicide, Duane Horton (a 21-year-old man) handwrote a journal entry stating that a document titled “Last Note” was on his phone. The journal entry provided instructions for accessing the note, and he left the journal and phone in his room. The Last Note included apologies and personal comments relating to his suicide as well as directions relating to his property. Mr. Horton typed his name at the end of the document. After considering the text of the document and the circumstances surrounding Mr. Horton’s death, the probate and appeals court applied Michigan’s harmless error statute and concluded that the note was a document that could be treated as executed in compliance with Michigan’s requirements for execution of a will.
In re Estate of Horton, 925 N.W. 2d 207 (Mich. 2018). Under the E-Wills Act, the note would be considered a will only if the state had adopted the harmless error provision of Section 6 and a court determined that the decedent intended the electronic writing to be the decedent’s will and therefore excused the lack of witnesses.

Although existing statutes might validate wills like the ones in Castro and Taylor, litigation may be necessary to resolve the question of validity. Further, the results will be haphazard if no clear policy exists and given statutory variation across the states. States that have adopted the harmless error rule for will execution could use that rule to validate an electronic will, as the court did in In re Horton. However, harmless error requires a judicial decision based on clear and convincing evidence, so relying on harmless error could increase costs for parties and courts. Further, in the United States, only 11 states have enacted harmless error statutes. In a state that has not adopted a harmless error statute, a court might adopt the doctrine judicially, as endorsed by RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.2 (1999), or might use the doctrine of substantial compliance to validate a will that did not comply with the execution formalities. See, e.g., In re Will of Ranney, 589 A.2d 1339 (N.J. 1991) (adopting substantial compliance prior to New Jersey’s adoption of a harmless error statute). However, courts are reluctant to adopt exceptions to statutory execution formalities. See, e.g., Litevich v. Probate Court, Dist. Of West Haven, 2013 WL 2945055 (Sup. Ct. Conn. 2013); Davis v. Davis-Henriques, 135 A.3d 1247 (Conn. App. 2016) (rejecting arguments that the court apply harmless error). As more people turn to electronic devices to conduct personal business, statutory guidance on execution of electronic wills can streamline the process of validating those wills.

Goals of the E-Wills Act. Estate planning lawyers, notaries, and software providers are among those interested in electronic wills. As of 2019, state legislatures in Arizona, California, the District of Columbia, Florida, Indiana, New Hampshire, Texas, and Virginia have considered bills authorizing electronic execution of wills. Arizona, Indiana, and Florida have adopted new electronic wills legislation, and Nevada has revised its existing electronic wills statute.

Given the flurry of activity around this issue, the Uniform Law Commission became concerned that inconsistency would follow if states modified their will execution statutes without uniformity. The mobile population in the United States makes interstate recognition of wills important, and if state law on this question is not uniform, that recognition will be a significant issue. The E-Wills Act seeks:

- To allow a testator to execute a will electronically, while maintaining the safeguards wills law provides for wills executed on something tangible (usually paper);
- To create execution requirements that, if followed, will result in a valid will without a court hearing to determine validity, if no one contests the will; and
- To develop a process that would not enshrine a particular business model in the statutes.

The E-Wills Act seeks to preserve the four functions served by will formalities, as described in John H. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 489 (1975) (citing Lon Fuller, Consideration and Form, 41 COL. L. REV. 799 (1941), which discussed the channeling function in connection with contract law, and Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 5-13 (1941), which
identified the other functions. Those four functions are:

- **Evidentiary** – the will provides permanent and reliable evidence of the testator’s intent.
- **Channeling** – the testator’s intent is expressed in a way that is understood by those who will interpret it so that the courts and personal representatives can process the will efficiently and without litigation.
- **Ritual (cautionary)** – the testator has a serious intent to dispose of property in the way indicated and the instrument is in final form and not a draft.
- **Protective** – the testator has capacity and is protected from undue influence, fraud, delusion and coercion. The instrument is not the product of forgery or perjury.

**Electronic Execution of Estate Planning Documents.** In commercial and other contexts not involving a will, the Uniform Electronic Transactions Act (1999) (UETA) validates the use of electronic signatures. UETA§ 7(a). However, UETA contains an express exception for wills and testamentary trusts, making the E-Wills Act necessary if a legislature wants to permit electronic wills. UETA§ 3(b). As of 2019, all but three states have adopted UETA, with most of the enactments occurring in 2000 and 2001. The federal Electronic Signatures in Global and National Commerce Act (E-SIGN) includes a similar exception. 15 U.S.C. 7003(a)(1).

Many documents authorizing nonprobate transfers of property are already executed electronically, and property owners have become accustomed to being able to use electronic beneficiary designations in connection with various will substitutes. The idea of permitting an electronic designation to control the transfer of property at death is already well accepted.
UNIFORM ELECTRONIC WILLS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Electronic Wills Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

[(2) “Electronic presence” means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.]

(3) “Electronic will” means a will executed electronically in compliance with Section 5(a).

(4) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to affix to or logically associate with the record an electronic symbol or process.

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(7) “Will” includes a codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate
succession.

**Legislative Note:** A state that permits an electronic will only if executed with the witnesses in the physical presence of the testator should omit paragraph (2) and renumber the remaining paragraphs accordingly. See also the Legislative Note to Section 5.

**Comment**

**Paragraph 2. Electronic Presence.** An electronic will may be executed with the testator and all of the necessary witnesses present in one physical location. In that case the state’s rules concerning presence for non-electronic wills, which may require line-of-sight presence or conscious presence, will apply. See Section 3. Because the E-Wills Act does not provide a separate definition of physical presence, a state’s existing rules for presence will apply to determine physical presence.

An electronic will is also valid if the witnesses are in the electronic presence of the testator, see Section 5. This definition provides for the meaning of electronic presence. Permitting electronic presence will make it easier for testators in remote locations and testators with limited mobility to execute their wills. The witnesses and testator must be able to communicate in “real time,” a term that means “the actual time during which something takes place.” MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/real-time (last visited Sept. 22, 2019). The term is used in connection with electronic communication to mean that the people communicating do so without a delay in the exchange of information. For statutes using the term “real-time,” see, e.g., CONN. GEN. STAT. ANN. § 16A-47b (2019) (real-time energy reports); COLO. REV. STAT. ANN. § 24-33.5-2102 (2019) (“communicate in real-time during an incident”); FLA. STAT. ANN. § 117.201(2) (2019) (in definition of “audio-visual communication technology” for online notarizations); ILL. STAT. ch. 220 § 5/16-107 (2019) (real-time pricing for utilities).

In the definition of electronic presence, “to the same extent” includes accommodations for people who are differently-abled. The definition does not provide specific accommodations due to the concern that any attempt at specificity would be too restrictive and to allow the standards to keep current with future advances in technology.

**Paragraph 5. Sign.** The term “logically associated” is used in the definition of sign, without further definition. Although Indiana has defined the term in its electronic wills statute, IND. CODE § 29-1-21-3(13) (defining logically associated as meaning that documents are “electronically connected, cross referenced, or linked in a reliable manner”), most statutes do not define the term. Most notably, the Uniform Electronic Transactions Act and the Revised Uniform Law on Notarial Acts (RULONA) use the term without defining it, due to the concern that an attempt at definition would be over- or under-inclusive as technology develops. Although often used in connection with a signature, the term is used in RULONA and in the E-Wills Act to refer both to a document that may be logically associated with another document as well as to a signature logically associated with a document. See also Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seg.
Paragraph 7. Will. The E-Wills Act follows the Uniform Probate Code (UPC) in providing that the term “will” includes instruments that may not involve the disposition of property. The common law definition of “will” is well established, and a definition in the E-Wills Act might result in inadvertent changes to the common law understanding.

SECTION 3. LAW APPLICABLE TO ELECTRONIC WILL; PRINCIPLES OF EQUITY. An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this [act].

Comment

The first sentence of this Section is didactic, and emphatically ensures that an electronic will is treated as a traditional one for all purposes.

In this Section “law” means both common law and statutory law. Law other than the E-Wills Act continues to supply rules related to wills, unless the E-Wills Act modifies a state’s other law related to wills.

The common law requires that a testator intend that the writing be the testator’s will. The Restatement explains, “To be a will, the document must be executed by the decedent with testamentary intent, i.e., the decedent must intend the document to be a will or to become operative at the decedent's death.” RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (g) (1999).

A number of protective doctrines attempt to ensure that a document being probated as a will reflects the intent of the testator. Wills statutes typically include capacity requirements related to mental capacity and age. A minor cannot execute a valid will. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.1 (mental capacity), § 8.2 (age) (2003). Other requirements for validity may be left to the common law. A writing that appears to be a will may be challenged based on allegations of undue influence, duress, or fraud. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 8.3 (Undue Influence, Duress, or Fraud) (2003). The statutory and common law requirements that apply to wills in general also apply to electronic wills.

Laws related to qualifications to serve as a witness also apply to electronic wills. For some of those requirements see, e.g., UPC § 2-505.

SECTION 4. CHOICE OF LAW REGARDING EXECUTION. A will executed electronically but not in compliance with Section 5(a) is an electronic will under this [act] if executed in compliance with the law of the jurisdiction where the testator is:

6
(1) physically located when the will is signed; or

(2) domiciled or resides when the will is signed or when the testator dies.

Comment

Under the common law, the execution requirements for a will depended on the situs of real property, as to the real property, and the domicile of the testator, for personal property. See Restatement (Second) of Property: Wills & Don. Trans. § 33.1, comment (b) (1992). The statutes of many states now treat as valid a will that was validly executed under the law of the state where the will was executed or where the testator was domiciled. For example, UPC § 2-506 states that a will is validly executed if executed according to “the law at the time of execution of the place where the will is executed, or of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.” For a non-electronic will, the testator will necessarily be in the state where the will is executed. Many state statutes also permit the law of the testator’s domicile when the testator dies to apply. See Restatement (Third) of Property: Wills & Don. Trans. § 3.1, comment (e) (1999).

Some of the state statutes permitting electronic wills treat an electronic will as executed in the state and valid under the state law even if the testator is not physically in the state at the time of execution. See, e.g., Nev. Rev. Stat. 133.088(1)(e) (2019) (stating that “the document shall be deemed to be executed in this State” if certain requirements are met, even if the testator is not within the state). Thus, someone domiciled and living outside Nevada could execute a Nevada will without leaving home. The Uniform Law Commission concluded that a state should not be required to accept an electronic will as valid if the state’s domiciliary executed the will without being physically present in the state authorizing electronic wills.

Section 4 reflects the policy that a will valid where the testator was physically located should be given effect using the law of the state where executed. The E-Wills Act does not require a state to give effect to a will executed by a testator using the law of another state unless the testator resides, is domiciled, or is physically present in the other state when the testator executes the will.

Example: Gina lived in Connecticut and was domiciled there. During a trip to Nevada Gina executes an electronic will, following the requirements of Nevada law. The will is valid in Nevada and also in Connecticut, because Gina was physically present in a state that authorizes electronic wills when she executed her will. Now assume that Gina never leaves the state of Connecticut. While at home she goes online, prepares a will, and executes it electronically using Nevada law. The will is valid in Nevada but not in Connecticut, unless Connecticut adopts the E-Wills Act.

This rule is consistent with current law for non-electronic wills. The rule is necessary, because otherwise someone living in a state that authorizes electronic wills might execute a will there and then move to a state that does not authorize electronic wills and be forced to make a new will or die intestate if unable or unwilling to execute another will. An electronic will executed in compliance with the law of the state where the testator was physically located should
be given effect, even if the testator later moves to another state, just as a non-electronic will would be given effect. A rule that would invalidate a will properly executed under the law of the state where the testator was physically present at the time of execution, especially if the testator was domiciled there, could trap an unwary testator and result in intestacy.

Example: Dennis lived in Nevada for 20 years. He met with a lawyer to have a will prepared, and when the will was ready for execution his lawyer suggested executing the will from his house, using the lawyer's electronic platform. Dennis executed the will in compliance with Nevada law in force at the time of execution, using the lawyer's electronic platform and providing the required identification. The lawyer had no concerns about Dennis's capacity and no worries that someone was unduly influencing him. Two years later Dennis moved to Connecticut where his daughter lived. Dennis died in Connecticut, with the Nevada will as his last valid will. Connecticut should give effect to Dennis's will, regardless of whether its execution would have otherwise been valid under Connecticut law.

SECTION 5. EXECUTION OF ELECTRONIC WILL.

(a) Subject to Section 8(d)[and except as provided in Section 6], an electronic will must be:

(1) a record that is readable as text at the time of signing under paragraph (2);

(2) signed by:

(A) the testator; or

(B) another individual in the testator’s name, in the testator’s physical presence and by the testator’s direction; and

(3) [either:

(A)] signed in the physical [or electronic] presence of the testator by at least two individuals[, each of whom is a resident of a state and physically located in a state at the time of signing and] within a reasonable time after witnessing:

[(A)] [(i)] the signing of the will under paragraph (2); or

[(B)] [(ii)] the testator’s acknowledgment of the signing of the will under paragraph (2) or acknowledgement of the will [or;

(B) acknowledged by the testator before and in the physical [or electronic]
presence of a notary public or other individual authorized by law to notarize records electronically].

(b) Intent of a testator that the record under subsection (a)(1) be the testator’s electronic will may be established by extrinsic evidence.

**Legislative Note:** A state should conform Section 5 to its will-execution statute.

A state that enacts Section 6 (harmless error) should include the bracketed language at the beginning of subsection (a).

A state that permits an electronic will only when the testator and witnesses are in the same physical location, and therefore prohibits remote attestation, should omit the bracketed words “or electronic” from subsection (a)(3) and Section 8(c).

A state that has enacted Uniform Probate Code Section 2-502 or otherwise validates an unattested but notarized will should include subsection (a)(3)(B).

**Comment**

The E-Wills Act does not duplicate all rules related to valid wills, and except as otherwise provided in the E-Wills Act, a state’s existing requirements for valid wills will apply to electronic wills. Section 5 follows the formalities required in UPC § 2-502. A state with different formalities should modify this Section to conform to its requirements. Under Section 5 an electronic will can be valid if executed electronically, even if the testator and witnesses are in different locations.

Some states allow a will to be self-proved if the testator and witnesses sign an affidavit detailing the procedures followed in executing the will. The UPC treats the self-proving affidavit as creating a conclusive presumption that the signature requirements were met and a rebuttable presumption that other requirements for a valid will were met. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment (r) (1999). Rather than create extra requirements to validate an electronic will, the E-Wills Act creates extra requirements to make an electronic will self-proving when the testator and witnesses are in different locations. See Section 8.

**Requirement of a Writing.** Statutes that apply to non-electronic wills require that a will be “in writing.” The RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 3.1, comment i (1999), explains:

- **i. The writing requirement.** All the statutes, including the original and revised versions of the Uniform Probate Code, require a will to be in writing. The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the
paint on the fender of a car would be in writing, but one “written” by waving a finger in the air would not be.

UPC § 2-502 requires that a will be “in writing” and the comment to that section says, “Any reasonably permanent record is sufficient.” The E-Wills Act requires that the provisions of an electronic will be readable as text (and not as computer code, for example) at the time the testator executed the will. The E-Wills Act incorporates the requirement of writing by requiring that an electronic will be readable as text.

One example of an electronic record readable as text is a will inscribed with a stylus on a tablet. See In re Estate of Javier Castro, Case No. 2013ES00140, Court of Common Pleas Probate Division, Lorain County, Ohio (June 19, 2013). An electronic will may also be a word processing document that exists on a computer or a cell phone but has not been printed. Under the E-Wills Act, the issue for these wills is not whether a writing exists but whether the testator signed the will and the witnesses attested it.

The Uniform Law Commission decided to retain the requirement that a will be in writing. Thus, the E-Wills Act does not permit an audio or audio-visual recording of an individual describing the individual’s testamentary wishes to constitute a will. However, an audio-visual recording of the execution of a will may provide valuable evidence concerning the validity of the will.

The use of a voice activated computer program can create text that can meet the requirements of a will. For example, a testator could dictate the will to a computer using voice recognition software. If the computer converts the spoken words to text before the testator executes the will, the will meets that requirement that it be a record readable as text at the time of execution.

Electronic Signature. In Castro, the testator signed his name as an electronic image using a stylus. A signature in this form is a signature for purposes of the E-Wills Act. The definition of “sign” includes a “tangible symbol” or an “electronic symbol or process” made with the intent to authenticate the record being signed. Thus, a typed signature would be sufficient if typed with the intent that it be a signature. A signature typed in a cursive font or a pasted electronic copy of a signature would also be sufficient, if made with the intent that it be a signature. As e-signing develops, other types of symbols or processes may be used, with the important element being that the testator intended the action taken to be a signature validating the electronic will.

Requirement of Witnesses. Wills law includes a witness requirement for several reasons: (1) evidentiary—to identify persons who can answer questions about the voluntariness and coherence of the testator and whether undue influence played a role in the creation and execution of the will, (2) cautionary—to signal to the testator that signing the document has serious consequences, and (3) protective—to deter coercion, fraud, duress, and undue influence. Section 5 requires witnesses for a validly executed will.
Will substitutes—tools authorizing nonprobate transfers—typically do not require witnesses, and a testator acting without legal assistance may not realize that witnesses are necessary for an electronic will. The harmless error doctrine has been used to give effect to an electronic will executed without witnesses when the testator’s intent was clear. In the electronic will context these cases have typically involved suicides that occurred shortly after the creation of the electronic document. See, e.g., In re Estate of Horton, 925 N.W. 2d 207, 325 Mich.App. 325 (2018). A state concerned that electronic wills will be invalidated due to lack of witnesses should consider adopting the harmless error provision in Section 6 of the E-Wills Act, even if the state has not adopted a similar provision for judicially correcting harmless error in execution.

Remote Witnesses. Because electronic wills may be executed via the internet, the question arises whether the witnesses to the testator’s signature must be in the physical presence of the testator or whether electronic presence such as via a webcam and microphone will suffice. Some online providers of wills offer remote witnessing as a service. The E-Wills Act does not include additional requirements for electronic wills executed with remote witnesses, but Section 8 imposes additional requirements before a will executed with remote witnesses can be considered self-proving.

The usefulness of witnesses who can testify about the testator’s apparent state of mind if a will is challenged for lack of capacity or undue influence may be limited, because a witness who observes the testator sign the will may not have sufficient contact with the testator to have knowledge of capacity or undue influence. This is true whether the witnesses are in the physical or electronic presence of the testator. Nonetheless, the current legal standards and procedures address the situation adequately and remote attestation should not create significant new evidentiary burdens. The E-Wills Act errs on the side of not creating hurdles that result in denying probate to wills that represent the intent of their testators.

Reasonable Time. The witnesses must sign within a reasonable time after witnessing the testator sign or acknowledge the signing or the will. The Comment to UPC § 2-502 notes that the statute does not require that the witness sign before the testator dies, but some cases have held that signing after the testator’s death is not “within a reasonable time.” In Matter of Estate of Royal, 826 P. 2d 1236 (1992), the Supreme Court of Colorado held that attestation must occur before the testator’s death, citing cases in several states that had reached the same result. Other cases have held a will valid even though a witness signed after the testator’s death. See, e.g., In re Estate of Miller, 149 P.3d 840 (Idaho 2006). For electronic wills, a state’s rules applicable to non-electronic wills apply.

Notarized Wills. A small number of states permit a notary public to validate the execution of a will in lieu of witnesses. Paragraph (3)(b) follows UPC § 2-502(a)(3)(B) and provides that a will can be validated if the testator acknowledges the will before a notary, even if the will is not attested by two witnesses. Because remote online notarization includes protection against tampering, other states may want to include the option for the benefit of additional security.
[SECTION 6. HARMLESS ERROR.]

Alternative A

A record readable as text not executed in compliance with Section 5(a) is deemed to comply with Section 5(a) if the proponent of the record establishes by clear-and-convincing evidence that the decedent intended the record to be:

(1) the decedent’s will;
(2) a partial or complete revocation of the decedent’s will;
(3) an addition to or modification of the decedent’s will; or
(4) a partial or complete revival of the decedent’s formerly revoked will or part of the will.

Alternative B

[Cite to Section 2-503 of the Uniform Probate Code or comparable provision of the law of this state] applies to a will executed electronically.

End of Alternatives]

Legislative Note: A state that has enacted Uniform Probate Code Section 2-503 or another harmless error rule for a non-electronic will, should enact Alternative B. A state that has not enacted a harmless error rule may not want to add a harmless error rule solely for an electronic will, but if it does, it should enact Alternative A.

Comment

The harmless error doctrine was added to the UPC in 1990. Since then 11 states have adopted the rule. The Comments to UPC § 2-503 describe the development of the doctrine in Australia, Canada, and Israel, and cite to a number of studies and articles. See, also, RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS § 3.3 (1999); John H. Langbein, Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion 38 ADEL. L. REV. 1 (2017); John H. Langbein, Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law, 87 COLUM. L. REV. 1 (1987).

The focus of the harmless error doctrine is the testator’s intent. A court can excuse a defect in the execution formalities if the proponent of the defective will can establish by clear
and convincing evidence that the testator intended the writing to be the testator’s will. The will formalities serve as proxies for testamentary intent, and harmless error doctrine replaces strict compliance with the formalities with direct evidence of that intent.

The harmless error doctrine may be particularly important in connection with electronic wills because a testator executing an electronic will without legal assistance may assume that an electronic will is valid even if not witnessed. The high standard of proof that the testator intended the writing to serve as will should protect against abuse.

A number of cases both in the United States and in Australia have involved electronic wills written shortly before the testator committed suicide. The circumstances surrounding the writing have led the courts in those cases to use harmless error to validate the wills, despite the lack of witnesses. See In re Estate of Horton, 925 N.W. 2d 207 (Mich. 2018) (involving an electronic document titled “Last Note”); In re Yu, [2013] QSC 322 (Queensland Sup. Ct.) (involving a document written on an iPhone and beginning, “This is the Last Will and Testament…”).

Although in these cases the wills have been given effect, a will drafted in contemplation of suicide may be subject to challenge based on concerns about capacity. Even if a state adopts the harmless error doctrine, the other requirements for a valid will, including testamentary capacity and a lack of undue influence, will apply.

SECTION 7. REVOCATION.

(a) An electronic will may revoke all or part of a previous will.

(b) All or part of an electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will expressly or by inconsistency; or

(2) a physical act, if it is established by a preponderance of the evidence that the testator, with the intent of revoking all or part of the will, performed the act or directed another individual who performed the act in the testator’s physical presence.

Comment

Revocation by physical act is permitted for non-electronic wills. The difficulty with physical revocation of an electronic will is that multiple copies of an electronic will may exist. Although a subsequent will may revoke an electronic will, a testator may assume that a will may be deleted by using a delete or trash function on a computer, as well as by other physical means. Guided by the goal of giving effect to the intent of most testators, the E-Wills Act permits revocation by physical act.
Although a will may be revoked by physical act, revocation by subsequent will under subsection (a)(1) is the preferred, and more reliable, method of revocation. The lack of a certain outcome when revocation by physical act is used makes this form of revocation problematic.

**Physical Act Revocation.** The E-Wills Act does not define physical act, which could include deleting a file with the click of a mouse or smashing a flash drive with a hammer. If an electronic will is stored with a third party that provides a designated mechanism for revocation, such as a delete button, and the testator intentionally pushes the button, the testator has used a physical act. If a testator prints a copy of an electronic will, writing “revoked” on the copy would be a physical act. Typing “revoked” on an electronic copy would also constitute a physical act, if the electronic will had not been notarized in a manner that locked the document.

Sending an email that says, “I revoke my will,” is not a physical act performed on the will itself because the email is separate from the will. The email could revoke the will under subsection (a)(1) as a subsequent will, if the email met the formalities required under Section 5(a) or met the burden of proof under Section 6. Of course, if there were a separate physical act, such as deleting an electronic will on an electronic device, such an email could be useful evidence in interpreting the testator’s intent.

If a testator uses a physical act to revoke an electronic will, the party arguing that the testator intended to revoke the will must prove the testator’s intent.

**Multiple Originals.** Although multiple copies of an electronic will may exist, a physical act performed on one of them by the testator with the intent to revoke will be sufficient to revoke the will. Traditional law applicable to duplicate originals supports this rule. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment f, ¶ 2 (1999) is illustrative:

If the testator executed more than one copy of the same will, each duplicate is considered to be the testator’s will. The will is revoked if the testator, with intent to revoke, performs a revocatory act on one of the duplicates. The testator need not perform a revocatory act on all the duplicates.

**Intent to Revoke.** Revocation by physical act requires that the testator intend to revoke the will. The E-Wills Act uses a preponderance of the evidence standard, which may be more likely to give effect to the intent of testators with electronic wills than would a clear and convincing evidence standard. A testator might assume that by deleting a document the testator has revoked it, and a higher evidentiary standard could give effect to wills that testators intended to revoke. The standard may increase the risk of a false positive but should decrease the risk of a false negative. The preponderance of the evidence standard is consistent with the law for non-electronic wills. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1 (1999).

**Example:** Alejandro executes a will electronically, using a service that provides witnesses and a notary. A year later Alejandro decides to revoke the will, but he is not ready to make a new will. He goes to the website of the company that is storing his will, enters his login information, and gets to a page that gives him the option to revoke the will by pressing a button labeled revoke. He affirms the decision when a pop-up screen asks if he is certain he wants to revoke his
will. When Alejandro dies, his sister (the beneficiary of the electronic will) produces a copy he had sent her. The company provides information indicating that he had revoked the will, following the company’s protocol to revoke a will. The evidence is sufficient to establish that Alejandro intended to revoke his will, and under the E-Wills Act Alejandro’s compliance with the company’s protocol would qualify as a physical act revocation. His sister will be unsuccessful in her attempt to probate the copy she has.

Example: Yvette writes a will on her electronic tablet and executes it electronically, with two neighbors serving as witnesses. She saves a copy on her home computer. The will gives her estate to her nephew. Some years later Yvette decides she would prefer for her estate to be divided by her two intestate heirs, the nephew and a niece. Yvette deletes the will file on her computer, forgetting that she had given her tablet, which still has the will on it, to her nephew. She deleted the file with the intent to revoke her will, and she tells one of the witnesses as well as her niece that she has done so. When she dies her nephew produces the tablet and asserts that the will is her valid will. Her niece and the witness can testify that Yvette intended to revoke her will by the physical act of deleting the duplicate original on her computer. Under the E-Wills Act, a court could reasonably conclude that a preponderance of the evidence supports a finding of a physical act revocation. If the will on the computer had been deleted but the only person who could testify about Yvette’s intent was the niece, the court might conclude that the niece’s self-interest made her testimony less persuasive. The evidence in that case might not meet the preponderance of the evidence standard, especially if the niece had access to Yvette’s computer.

Lost Wills. A testator’s accidental deletion of an electronic will should not be considered revocation of the will. However, the common law “lost will” presumption may apply. Under the common law, if a will last known to be in the possession of the testator cannot be found at the testator’s death, a presumption of revocation may apply. The soft presumption is that the testator destroyed the will with the intent to revoke it. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DON. TRANS. § 4.1, comment j (1999). The presumption can be overcome with extrinsic evidence that provides another explanation for the will’s disappearance. A house fire might have destroyed the testator’s files. A testator may have misplaced or inadvertently discarded files; age or poor health may make such inadvertence more likely. A person with motive to revoke and access to the testator’s files might have destroyed the will. The presumption does not apply if the will was in the possession of someone other than the testator.

If the document cannot be found and the presumption of revocation is overcome or does not apply, the contents of the will can be proved through a copy or testimony of the person who drafted the will.

Physical Act by Someone Other than Testator. A testator may direct someone else to perform a physical act on a will for the purpose of revoking it. The testator must be in the physical presence of the person performing the act, not merely in the person’s electronic presence. The use of “physical presence” is intended to mean that the state’s rules on presence in connection with wills apply—either line of sight or conscious presence. UPC § 2-507(a)(2) relies on conscious presence.
SECTION 8. ELECTRONIC WILL ATTESTED AND MADE SELF-PROVING

AT TIME OF EXECUTION.

(a) An electronic will may be simultaneously executed, attested, and made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under subsection (a) must be:

(1) made before an officer authorized to administer oaths under law of the state in which execution occurs [or, if fewer than two attesting witnesses are physically present in the same location as the testator at the time of signing under Section 5(a)(2), before an officer authorized under [cite to Revised Uniform Law on Notarial Acts Section 14A (2018) or comparable provision of the law of this state]]; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under subsection (a) must be in substantially the following form:

I, ____________, the testator, and, being sworn, declare to the undersigned officer that I sign this instrument as my electronic will, I willingly sign it or willingly direct another individual to sign it for me, I execute it as my voluntary act for the purposes expressed in this instrument, and I am [18] years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, ____________, and ____________,

(name) (name)

witnesses, being sworn, declare to the undersigned officer that the testator signed this instrument.
as the testator’s electronic will, that the testator willingly signed it or willingly directed another individual to sign for the testator, and that each of us, in the physical [or electronic] presence of the testator, signs this instrument as witness to the testator’s signing, and to the best of our knowledge the testator is [18] years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

Certificate of officer:

State of

[County] of

Subscribed, sworn to, and acknowledged before me by ___________ , (name)

the testator, and subscribed and sworn to before me by ___________ and (name)

___________, witnesses, this _____ day of ___, ___. (name)

(Seal)

(Signed)

(Capacity of officer)

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this [act] is deemed a signature of the electronic will under Section 5(a).
**Legislative Note:** A state that has not enacted the Uniform Probate Code should conform Section 8 to its self-proving affidavit statute. The statements that the requirements for a valid will are met and the language required for the notary’s certification should conform with the requirements under state law.

A state that has authorized remote online notarization by enacting the 2018 version of the Revised Uniform Law on Notarial Acts should cite to Section 14A of that act in subsection (b)(1). A state that has adopted a non-uniform law allowing remote online notarization should cite to the relevant section of state law in subsection (b)(1).

A state that does not permit an electronic will to be executed without all witnesses being physically present should omit the bracketed language in subsection (b)(1) and the words “or electronic” in subsection (c) and Section 5(a)(3).

**Comment**

If an officer authorized to administer oaths (a notary) is in a state that has adopted Section 14A of RULONA or a comparable statute, the notary need not be physically present. However, if the state has not adopted a statute allowing remote online notarization, the notary must be physically present in order to administer the oath under the law of that state.

**Remote Online Notarization.** Section 14A of RULONA provides additional protection through a notarization process referred to as “remote online notarization.” In remote online notarization, the person signing a document appears before a notary using audio-video technology. Depending on state law, the document can be paper or digital, but the signer and the notary are in two different places. Extra security measures are taken to establish the signer’s identity.

The E-Wills Act requires additional steps to make an electronic will with remote attestation self-proving. If the testator and necessary witnesses are in the same physical location, the will can be made self-proving using a notary who can notarize an electronic document but who is not authorized to use remote online notarization. However, if anyone necessary to the execution of the will is not in the same physical location as the testator, the will can be made self-proving only if remote online notarization is used.

**Signatures on Affidavit Used to Execute Will.** Subsection [(d)][(e)] addresses the problem that arises when a testator and witnesses sign an affidavit, mistakenly thinking they are signing the will itself. UPC § 2-504(c) incorporated this provision into the UPC in 1990 to counteract judicial interpretations in some states that had invalidated wills where this mistake had occurred.

**Time of Affidavit.** Under the UPC a will may be made self-proving at a time later than execution. The E-Wills Act does not permit the execution of a self-proving affidavit for an electronic will other than at the time of execution of the electronic will. An electronic will has metadata that will show the date of execution, and if an affidavit is logically associated with an electronic will at a later date, the date of the electronic will and the protection provided by the
self-proving affidavit may be uncertain. If a testator fails to make an electronic will self-proving simultaneously with the will’s execution, the testator can later re-execute the electronic will. The additional burden on the testator is justified given the possible confusion and loss of protection that could result from a later completion of an affidavit.

SECTION 9. CERTIFICATION OF PAPER COPY. An individual may create a certified paper copy of an electronic will by affirming under penalty of perjury that a paper copy of the electronic will is a complete, true, and accurate copy of the electronic will. If the electronic will is made self-proving, the certified paper copy of the will must include the self-proving affidavits.

Legislative Note: A state may need to change its probate court rules to expand the definition of what may be filed with the court to include electronic filings.

Court procedural rules may require that a certified paper copy be filed within a prescribed number of days of the filing of the application for probate. A state may want to include procedural rules specifically for electronic wills.

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. TRANSITIONAL PROVISION. This [act] applies to the will of a decedent who dies on or after [the effective date of this [act]].

Comment

An electronic will may be valid even if executed before the effective date of the E-Wills Act, if it meets the E-Wills Act’s requirements and the testator dies on or after the effective date.

SECTION 12. EFFECTIVE DATE. This [act] takes effect . . . .
COUNCIL AGENDA ITEM VII. B. (Neal Nusholtz)
To: Probate Section
From: Neal Nusholtz, Liaison to the Tax Section
Re: September 18, 2019 - Tax Section Council Meeting, Annual Meeting and Chairs Dinner 3-5:30 p.m.

Rather than include the table of tax law changes, updated State and Federal Tax law changes can be found here:

http://connect.michbar.org/tax/pubpolicy/highlights

Attached are the schedules for the May 21, 2020, 33rd Annual Tax Conference and the ICLE Tax Law Series for FY 2019.
Tax Conference, 33rd Annual
Thursday, May 21, 2020
Inn at St. John’s, Plymouth

CSI due date is November 19, 2019

Full Schedule

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<th>Time</th>
<th>Event</th>
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<tr>
<td>9:00am - 10:00am</td>
<td>Continental Breakfast, Exhibitor Showcase, and Registration</td>
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<tr>
<td>9:00am - 9:50am</td>
<td>Early Bird Session: Working with the IRS or Ethics</td>
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<td>• Bullets</td>
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<td>(Speakers TBD)</td>
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<td>9:50am - 10:00pm</td>
<td>Vendor Visits and Networking Break</td>
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<td>10:00am - 10:10am</td>
<td>Welcome and Introductions</td>
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<td>James H. Combs</td>
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<td>Chair, State Bar of Michigan Taxation Section Council</td>
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<td>Chair, Tax Conference</td>
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<td>Lansing</td>
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<tr>
<td>10:10am - 11:10am</td>
<td>Washington Update: Current Tax Legislative Developments</td>
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<td>• Implementation of tax reform</td>
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<td>• Makeup and priorities of the new Congress</td>
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<td>• Tax reform primer</td>
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<td>• Possible federal tax changes</td>
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<tr>
<td>2:55pm - 3:30pm</td>
<td>Vendor Visits and Networking Break</td>
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<td>3:45pm - 4:30pm</td>
<td>Michigan Tax Policy and Administration 2020</td>
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Lance R. Wilkinson  
Michigan Department of Treasury  
Lansing  
Stewart Binke  
Michigan Department of Treasury  
Lansing

1. **FIT Topic**

   - **Topic**
     - Tax Issues Relating to the Cannabis Industry (Beyond § 280E)
   - **Presenters**
     - James Combs (Honigman)
     - Julie Rhoades (Dickinson Wright)
   - **Moderator**
     - Emily Murphy (Plante Moran)

   Status: 1st Conference call completed. On schedule to record 10/10/19

2. **Real Estate Tax Topic**

   - **Topic:**
     - Hot topics in Real Estate Taxes
   - **Presenters**
     - Peter Kulick (Dickinson Wright)
     - Valerie Grunduski (Plante Moran)
   - **Moderator**
     - Andrea Crumback (Mika Meyers)

   Status: 1st Conference call scheduled. On schedule to record 11/12/19

3. **Estate and Gift Tax Topic**

   - **Topic:**
     - Planning for the Future of the Federal Estate and Gift Tax
   - **Presenters**
     - Raj Malviya (Miller Johnson)
     - Lauren Jeltema (Warner Norcross + Judd)
   - **Moderator**
     - Nick Papasifakis (Clark Hill)

   Status - On schedule to film 2/13/20

4. **SALT Topic**

   - **Recommended Topic:**
     - State tax controversies
   - **Presenters**
     - Stephanie LaFave (Deloitte)
     - Lynn Gandhi (Honigman)
   - **Moderator**
     - Greg Nowak (Miller Canfield)

   Status: On schedule to film 3/10/19