

# **Probate and Estate Planning Section**

## **Agenda**

Saturday, March 16, 2013  
8:30 a.m.

University Club of  
Michigan State University  
Lansing, Michigan

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

**NOTICE OF MEETINGS**

**MEETING OF THE COUNCIL OF THE PROBATE AND ESTATE PLANNING  
SECTION**

**-AND-**

**MEETING OF THE SECTION'S COMMITTEE ON SPECIAL PROJECTS**

**March 16, 2013**

**University Club of Michigan State University  
3435 Forest Road  
Lansing, Michigan**

The above stated meetings of the Section will be held at the University Club of Michigan State University, on Saturday, March 16, 2013, at the above address. The Section's Committee on Special Projects meeting will begin at 8:30 a.m., followed immediately thereafter by a meeting of the Council of the Section.

Shaheen I. Imami  
Secretary

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Bloomfield Hills, Michigan 48302-2058  
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**COUNCIL OF THE  
PROBATE AND ESTATE PLANNING SECTION  
OF THE  
STATE BAR OF MICHIGAN**

**Schedule and Location of Future Meetings  
All at University Club, Lansing, MI, except October meeting  
Meetings Begin at 9:00 a.m. unless otherwise noted on Meeting Notice**

*The following is a list of 2012-2013 meeting dates*

September 8, 2012  
**(Annual Meeting Precedes Council Meeting)**

October 27, 2012 -  
Haworth Inn & Conference Center, Holland, Michigan

November 17, 2012

December 15, 2012

January 19, 2013

February 16, 2013

March 16, 2013

April 13, 2013

June 8, 2013

September 21, 2013

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

**March 16, 2013  
Lansing, Michigan**

**Agenda**

- I. Call to Order**
- II. Excused Absences**
- III. Introduction of Guests**
- IV. Minutes of February 16, 2013, Meeting of the Council**
- V. Treasurer Report – James B. Steward**
- VI. Chairperson’s Report – Mark K. Harder**
- VII. Report of the Committee on Special Projects – Marlaine C. Teahan**
- VIII. Standing Committee Reports**
  - A. Internal Governance**
    - 1. Budget – Shaheen I. Imami
    - 2. Bylaws – Nancy H. Welber
    - 3. Awards – Douglas A. Mielock
    - 4. Planning – Thomas F. Sweeney
    - 5. Nominating – Harold G. Schuitmaker
    - 6. Annual Meeting – Thomas F. Sweeney
  - B. Education and Advocacy Services for Section Members**
    - 1. *Amicus Curiae* – David L. Skidmore
    - 2. Probate Institute – Amy N. Morrissey
    - 3. State Bar and Section Journals – Amy N. Morrissey

4. Citizens Outreach – Rebecca A. Schnelz
5. Electronic Communications – William J. Ard

**C. Legislation and Lobbying**

1. Legislation – Christopher A. Ballard
2. Updating Michigan Law – Marguerite Munson Lentz
3. Insurance Committee – Thomas F. Sweeney
4. Artificial Reproductive Technology – Nancy H. Welber

**D. Ethics and Professional Standards**

1. Ethics – J. David Kerr
2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor
3. Specialization and Certification – James B. Steward

**E. Administration of Justice**

1. Court Rules, Procedures and Forms – Marlaine C. Teahan
2. Fiduciary Exception to Attorney Client Privilege – George F. Bearup

**F. Areas of Practice**

1. Real Estate – George F. Bearup
2. Transfer Tax Committee – Nancy H. Welber
3. Charitable and Exempt Organization – Christopher A. Ballard
4. Guardianship, Conservatorship, and End of Life Committee – Constance L. Brigman

**G. Liaisons**

1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips
2. Business Law Section Liaison – John R. Dresser
3. Elder Law Section Liaison – Amy R. Tripp

4. Family Law Section Liaison – Patricia M. Ouellette
5. ICLE Liaison – Jeanne Murphy
6. Law Schools Liaison – William J. Ard
7. Michigan Bankers Association Liaison – Susan Allan
8. Michigan Probate Judges Association Liaison – Hon. Judge David M. Murkowski/Hon. Darlene O’Brien
9. Probate Registers Liaison – Rebecca A. Schnelz
10. SCAO Liaisons – Marlaine C. Teahan
11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz
12. State Bar Liaison – David R. Brake
13. Taxation Section Liaison – Frederick H. Hoops, III

**IX. Other Business**

**X. Hot Topics**

**XI. Adjournment**

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

**Officers for 2012-2013 Term**

Officer	Position
Chairperson	Mark K. Harder
Chairperson Elect	Thomas F. Sweeney
Vice Chairperson	Amy N. Morrissey
Secretary	Shaheen I. Imami
Treasurer	James B. Steward

Council Members for 2012-13 Terms

Council Member	Year elected to current term (partial, first or second full term)	Current term expires	Eligible after Current term?
Teahan, Marlaine C.	2010 (2 <sup>nd</sup> term)	2013	No
Schnelz, Rebecca A.	2010 (2 <sup>nd</sup> term)	2013	No
Brigman, Constance L.	2010 (1 <sup>st</sup> term)	2013	Yes (1 term)
Lentz, Marguerite M.	2010 (1 <sup>st</sup> term)	2013	Yes (1 term)
Allan, Susan M.	2010 (1 <sup>st</sup> term)	2013	Yes (1 term)
O'Brien Hon. Darlene	2010 (1 <sup>st</sup> term)	2013	Yes (1 term)
Murkowski, Hon. David M.	2011 (2 <sup>nd</sup> term)	2014	No
Kerr, J. David	2011 (2 <sup>nd</sup> term)	2014	No
Taylor, Robert M.	2011 (2 <sup>nd</sup> term)	2014	No
Ballard, Christopher A.	2011 (1 <sup>st</sup> term)	2014	Yes (1 term)
Bearup, George F.	2011 (1 <sup>st</sup> term)	2014	Yes (1 term)
Welber, Nancy H.	2011 (1 <sup>st</sup> term)	2014	Yes (1 term)
Ard, W. Josh	2012 (2 <sup>nd</sup> term)	2015	No
Ouellette, Patricia M.	2012 (2 <sup>nd</sup> term)	2015	No
Clark-Kreuer, Rhonda M.	2012 (1 <sup>st</sup> term)	2015	Yes (1 term)
Spica, James P.	2012 (2 <sup>nd</sup> term)	2015	No
Lucas, David P.	2012 (1 <sup>st</sup> term)	2015	Yes (1 term)
Skidmore, David L.	2012 (1 <sup>st</sup> term)	2015	Yes (1 term)

## **Ex Officio Members**

John E. Bos  
Robert D. Brower, Jr.  
Douglas G. Chalgian  
Raymond H. Dresser, Jr.  
Joe C. Foster, Jr.  
George W. Gregory  
Henry M. Grix  
Hon. Philip E. Harter  
Dirk C. Hoffius  
Brian V. Howe  
Raymond T. Huetteman, Jr.  
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  
Russell M. Paquette  
Patricia Gormely Prince  
Douglas J. Rasmussen  
Harold G. Schuitmaker  
John A. Scott  
Fredric A. Sytsma  
Lauren M. Underwood  
W. Michael Van Haren  
Susan S. Westerman  
Everett R. Zack



## 2012-13 Probate and Estate Planning Section Committees

### **Budget Committee**

*Mission: To develop the annual budget and to alert the Council to revenue and spending trends*

Shaheen I. Imami, Chair  
Mark K. Harder  
James B. Steward

### **Bylaws Committee**

*Mission: To review the Section Bylaws and recommend changes to ensure compliance with State Bar requirements, best practices for similar organizations and assure conformity of the Bylaws to current practices and procedures of the Section and the Council*

Nancy H. Welber, Chair  
Christopher A. Ballard  
David P. Lucas

### **Planning Committee**

*Mission: To periodically review and update the Section's Strategic Plan and to annually prepare and update the Council's Biannual Plan of Work*

Thomas F. Sweeney, Chair

### **Nominating Committee**

*Mission: To annually nominate candidates to stand for election as the officers of the Section and members of the Council*

Harold G. Schuitmaker, Chair  
Douglas G. Chalgian  
George W. Gregory

### **Annual Meeting**

*Mission: To arrange the annual meeting at a time and place and with an agenda*

*to accomplish all necessary and proper annual business of the Section*

Thomas F. Sweeney

### **Awards Committee**

*Mission: To periodically award the Michael Irish Award to a deserving recipient and to consult with ICLE concerning periodic induction of members in the George A. Cooney Society*

Douglas A. Mielock, Chair  
Robert D. Brower, Jr.  
Phillip E. Harter  
Brian V. Howe  
Nancy L. Little  
Amy N. Morrissey

### **Committee on Special Projects**

*Mission: The Committee on Special Projects is a working committee of the whole of the Section that considers and studies in depth a limited number of topics and makes recommendations to the Council of the Section with respect to those matters considered by the Committee. The duties of the Chair include setting the agenda for each Committee Meeting, and in conjunction with the Chair of the Section, to coordinate with substantive Committee chairs the efficient use of time by the Committee*

Marlaine C. Teahan, Chair

### **Legislation Committee**

*Mission: In cooperation with the Section's lobbyist, to bring to the attention of the Council recent developments in the Michigan*

*legislature and to further achievement of the Section's legislative priorities, as well as to study legislation and recommend a course of action on legislation not otherwise assigned to a substantive committee of the Section*

Christopher A. Ballard, Chair  
William J. Ard  
George W. Gregory  
Harold G. Schuitmaker  
Mark E. Kellogg  
Sharri L. Rolland Phillips

**Amicus Curiae Committee**

*Mission: To review requests made to the Section to file, and to identify cases in which the Section should file, amicus briefs in pending appeals and to engage and oversee the work of legal counsel retained by the Section to prepare and file its amicus briefs*

David L. Skidmore, Chair  
Patricia M. Ouellette  
Nancy H. Welber  
Kurt A. Olson  
Nazneen H. Syed

**Probate Institute**

*Mission: To consult with ICLE in the planning and execution of the Annual Probate and Estate Planning Institute*

Amy N. Morrissey

**State Bar and Section Journals Committee**

*Mission: To oversee the publication of the Section's Journal and periodic theme issues of the State Bar Journal that are dedicated to probate, estate planning, and trust administration*

Amy N. Morrissey, Chair  
Nancy L. Little, Managing Editor  
Melisa Marie-Werkema Mysliwiec,  
Associate Editor  
Richard C. Mills

**Citizens Outreach Committee**

*Mission: To provide for education of the public on matters related to probate, estate planning, and trust administration, including the publication of pamphlets and online guidance to the public, and coordinating the Section's efforts to educate the public with the efforts of other organizations affiliated with the State Bar of Michigan*

Rebecca A. Schnelz, Chair (Liaison to  
Solutions on Self-help Task Force)  
Rhonda M. Clark-Kreuer  
Hon. Darlene A. O'Brien  
James B. Steward  
Nancy H. Welber  
Phillip E. Harter  
Michael J. McClory  
Michael Dean  
Kathleen M. Goetsch  
Melisa Marie-Werkema Mysliwiec  
Neal Nusholtz  
Michael L. Rutkowski  
Melinda V. Sheets  
Ellen Sugrue Hyman

**Electronic Communications Committee**

*Mission: To oversee all forms of electronic communication with and among members of the Section, including communication via the Section's web site, the Section listserv, and the ICLE Online Community site, to identify emerging technological trends of importance to the Section and its members, and to recommend to the Council best practices to take advantage of technology in carrying out the Section's and Council's mission and work*

William J. Ard, Chair  
Rhonda M. Clark-Kreuer  
Amy N. Morrissey  
Jeanne Murphy (Liaison to ICLE)  
Hon. Darlene A. O'Brien  
Rebecca A. Schnelz  
Phillip E. Harter  
Nancy L. Little  
Stephen J. Dunn  
Neal Nusholtz  
Michael L. Rutkowski  
Serene K. Zeni

**Ethics Committee**

*Mission: To consider and recommend to the Council action with respect to the Michigan Rules of Professional Conduct and their interpretation, application, and amendment*

J. David Kerr, Chair  
William J. Ard  
Robert M. Taylor

**Unauthorized Practice of Law and Multidisciplinary Practice Committee**

*Mission: To help identify the unauthorized practices of law, to report such practices to the appropriate authorities and to educate the public regarding the inherent problems relying on non-lawyers*

Robert M. Taylor, Chair  
William J. Ard  
J. David Kerr  
Patricia M. Ouellette  
Amy Rombyer Tripp

**Court Rules, Procedures and Forms Committee**

*Mission: To consider and recommend to the Council action with respect to the Michigan Court Rules and published court forms, and the interpretation, use, and amendment of them*

Marlaine C. Teahan, Chair (Liaison to SCAO for Estates & Trusts Workgroup)  
Constance L. Brigman (Liaison to SCAO for Guardianship, Conservatorship, and Protective Proceedings Workgroup)  
Rhonda M. Clark-Kreuer  
Hon. David M. Murkowski  
Rebecca A. Schnelz (Liaison to SCAO for Mental Health/Commitment Workgroup)  
David L. Skidmore  
Shaheen I. Imami  
Douglas A. Mielock  
Phillip E. Harter  
James F. ("JV") Anderton

**Updating Michigan Law Committee**

*Mission: To review, revise, communicate and recommend Michigan's trusts and estates law with the goal of achieving and maintaining leadership in promulgating probate laws in changing times.*

Marguerite Munson Lentz, Chair  
Robert P. Tiplady, II, Vice Chair  
Susan M. Allan  
Christopher A. Ballard  
Mark K. Harder  
Shaheen I. Imami  
James P. Spica  
Phillip E. Harter  
Henry P. Lee  
Michael G. Lichterman  
Richard C. Mills  
Christine M. Savage  
Patricia M. Ouellette

**Insurance Ad Hoc Committee**

*Mission: To recommend new legislation related to insurability and the administration of irrevocable life insurance trusts*

Thomas F. Sweeney, Chair  
Mark K. Harder  
James P. Spica  
Stephen L. Elkins  
Stephen C. Rohr  
Geoffrey R. Vernon

**Artificial Reproductive Technology Ad Hoc Committee**

*Mission: TBD*

Nancy H. Welber, Chair  
Christopher A. Ballard  
Larry Waggoner  
Keven DuComb

**Real Estate Committee**

*Mission: To recommend new legislation related to real estate matters of interest and concern to the Section and its members*

George F. Bearup, Chair  
William J. Ard  
Rhonda M. Clark-Kreuer  
J. David Kerr  
David P. Lucas  
James B. Steward  
Douglas A. Mielock  
Stephen J. Dunn  
Mark E. Kellogg  
Michael G. Lichterman  
Katie Lynwood  
Richard C. Mills  
Melisa Marie-Werkema Mysliwicz

**Transfer Tax Committee**

*Mission: To monitor developments concerning Federal and State transfer taxes and to recommend appropriate actions by the Section in response to developments or needs*

Nancy H. Welber, Chair  
Marguerite Munson Lentz  
Thomas F. Sweeney  
George W. Gregory

**Guardianship, Conservatorship, and End of Life Committee**

*Mission: To monitor the need for and make recommendations with respect to statutory and court rule changes in Michigan related to the areas of legally incapacitated individuals, guardianships, and conservatorships*

Constance L. Brigman, Chair  
William J. Ard  
Rhonda M. Clark-Kreuer  
Rebecca A. Schnelz  
Michael J. McClory  
Phillip E. Harter  
Michael W. Bartnik  
Ellen Sugrue Hyman  
Kurt A. Olson

**Specialization and Certification Ad Hoc Committee**

*Mission: To make recommendations to the Section with respect to the creation and implementation of a program that recognizes specialization and certification of specialization in the fields of probate, estate planning, and trust administration*

James B. Steward, Chair  
William J. Ard  
Patricia M. Ouellette  
Ronald A. Berridge  
Wendy Parr Holtvluwer  
Richard J. Siriani  
Serene K. Zeni

**Charitable and Exempt Organization Committee**

*Mission: To educate the Section about charitable giving and exempt organizations and to make recommendations to the Section concerning Federal and State legislative developments and initiatives in the fields*

*of charitable giving and exempt organizations*

Christopher A. Ballard, Chair  
Michael W. Bartnik  
Robin D. Ferriby  
Richard C. Mills  
Tracy A. Sonneborn

**Fiduciary Exception to Attorney Client Privilege Ad Hoc Committee**

*Mission: To review the statutes, case law, and court rules of Michigan and other jurisdictions concerning the scope of the Attorney Client Privilege for communications between trustees and their counsel and if necessary or appropriate, to recommend changes to Michigan law in this area*

George F. Bearup, Chair  
Shaheen I. Imami  
David L. Skidmore  
Michael J. McClory  
Kalman G. Goren  
Serene K. Zeni  
David G. Kovac

**Alternative Dispute Resolution Section Liaison**

Sharri L. Rolland Phillips

**Business Law Section Liaison**

*Mission: The liaison to the Business Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Business Law Section on matters of mutual interest and concern*

John R. Dresser

**Elder Law Section Liaison**

*Mission: The liaison to the Elder Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Elder Law Section on matters of mutual interest and concern*

Amy Rombyer Tripp

**Family Law Section Liaison**

*Mission: The liaison to the Family Law Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Family Law Section on matters of mutual interest and concern*

Patricia M. Ouellette

**ICLE Liaison**

*Mission: The liaison to ICLE is responsible for developing and maintaining bilateral communication between the Section and the Institute for Continuing Legal Education*

Jeanne Murphy

**Law Schools Liaison**

*Mission: The Law Schools Liaison is responsible for developing and maintaining bilateral communication between the Section and the law schools located in the State of Michigan on matters of mutual interest and concern*

William J. Ard

**Michigan Bankers Association Liaison**

*Mission: The liaison to the Michigan Bankers Association is responsible for developing and maintaining bilateral communication between the Section and*

*the Michigan Bankers Association on matters of mutual interest and concern*

Susan M. Allan

**Probate Judges Association Liaisons**

*Mission: The liaisons to the MPJA are responsible for developing and maintaining bilateral communication between the Section and the MPJA on matters of mutual interest and concern*

Hon. David M. Murkowski

Hon. Darlene A. O'Brien

**Probate Registers Liaisons**

*Mission: The liaison to the Michigan Probate and Juvenile Registers Association is responsible for developing and maintaining bilateral communication between the Section and the Probate and Juvenile Registers Association on matters of mutual interest and concern*

Rebecca A. Schnelz

**SCAO Liaisons**

*Mission: The liaisons to SCAO are responsible for developing and maintaining communications between the Section and SCAO on matters of mutual interest and concern*

Marlaine C. Teahan

Constance L. Brigman

Rebecca A. Schnelz

**Solutions on Self-help Task Force  
Liaison**

*Mission: The liaison to the Solutions on Self-help (SOS) Task force is responsible for maintaining bilaterals communications between the Section and the Task Force*

Rebecca A. Schnelz

**State Bar Liaison**

*Mission: The liaison to the State Bar is responsible for maintaining bilateral communication between the Section and the larger State Bar of Michigan,*

*including the Board of Commissioners and staff of the State Bar*

David R. Brake

**Tax Section Liaison**

*Mission: The liaison to the Taxation Section of the State Bar of Michigan is responsible for developing and maintaining bilateral communication between the Section and the Taxation Section on matters of mutual interest and concern*

Frederick H. Hoops, III

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# **ATTACHMENT 1**

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

**February 16, 2013  
Lansing, Michigan**

**Minutes**

**I. Call to Order**

The Chair of the Section, Mark K. Harder, called the meeting to order at 10:22 a.m.

**II. Attendance**

**A. The following officers and members of the Council were in attendance:**

Harder, Mark K.	Kerr, J. David
Imami, Shaheen I.	Lucas, David P.
Morrissey, Amy N.	Lentz, Marguerite M.
Steward, James B.	Murkowski, Hon. David M.
Sweeney, Thomas F.	Ouellette, Patricia M.
Ard, W. Josh	Schnelz, Rebecca A.
Bearup, George F.	Skidmore, David L.
Brigman, Constance L.	Taylor, Robert M.
Clark-Kreuer, Rhonda M.	Teahan, Marlaire C.

A total of 18 council members and officers were present representing a quorum.

**B. The following officers and members of the Council were absent with excuse:**

Welber, Nancy H.	Allen, Susan M.
Ballard, Christopher	Spica, James P.
O'Brien, Hon. Darlene	

**C. The following officers and members were absent without excuse:**

None.

**D. The following ex-officio members of the Council were in attendance:**

Robert D. Brower	Michael S. McClory
George W. Gregory	Douglas A. Mielock
Phillip E. Harter	

**E. Others in attendance:**

Nazneen H. Syed  
Lorraine New  
Julie Paquette  
Ken Seavoy  
Jeanne Murphy  
Keven DuComb  
Steve Elkins  
David Brake  
Amy Tripp  
Chris Caldwell  
Neal Nusholtz

Amy E. Peterman  
Rick Mills  
Sharri L. Rolland Phillips  
Kathleen Goetsch  
Loukas P. Kalliantasis  
Michael Lichterman  
Melissa M. W. Mysliwicz  
Carol M. Hogan  
Geoffrey Vernon

**III. Minutes of the January 19, 2013, Meeting of the Council**

Shaheen I. Imami presented the minutes of the January 19, 2013, Council meeting. Marguerite M. Lentz moved for approval with support from Amy N. Morrissey. The motion was approved on a voice-vote with no nays or abstentions.

**IV. Treasurer's Report**

James B. Steward presented the Treasurer's report. On track with receipts and disbursements, except that travel appears higher than last year based on the increased mileage rate; however, he cannot determine yet if the budget for travel will be exceeded.

**V. Chairperson's Report – Mark K. Harder**

Mark K. Harder presented the Chairperson's report:

- In response to the ruling by the MSC in *Mattison*, Nancy H. Welber, Larry Waggoner, Christopher A. Ballard are appointed to a newly-created sub-committee on post-death, reproductive technology issues.
- Thanks were given to Thomas F. Sweeney and Marguerite M. Lentz for getting information out to the Section at-large regarding recent changes under the Taxpayer Relief Act.
- The passing of Raymond Dresser was noted, along with a gift from the Hearts and Flowers Fund.
- An inquiry was received from the Young Lawyer's Section regarding possible contributions by the Section to its summit. Keven DuComb offered his assistance.

**VI. Report of the Committee on Special Projects – Marlaine C. Teahan**

Marlaine C. Teahan reported that CSP heard from the Rules Committee, the Guardianship Committee, and the Specialization/Certification Committee:

- The Rules Committee requested that the Council vote on and support requested amendments to MCR 5.125(B)(2), MCR 5.208(C)(1), and MCR 5.208(F) which were approved by CSP.
- The proposed amendments to MCR 5.125(C)(6) will be sent back to the Rules Committee for reworking to clarify duties to settlor and notice to claimants
- CSP recommended a proposed corrective amendment to MCL 700.5433 to re-insert into the statute (as a new subsection 1) the provision contained in former-MCL 700.5433 because it was inadvertently omitted from 2012 PA 545.
- CSP recommended revamping the matter in which the proposed specialization initiative is presented to CSP and the Council. Ms. Teahan reported that a discussion occurred regarding whether to continue using CSP as a forum for presenting a possible framework for specialization. It was noted that the history of the Section's consideration of specialization dates to before 2002 when Henry Grix prepared an annual report of the Section that was derived from the Section's strategic planning initiative. James B. Steward, who took over as chair of the committee in 2009, presented an overview of the initiative and purpose of the specialization rules. CSP recommended to suspend further work at the Council-level in order to survey the MSC, the SBM, & other sections with which the Section has liaisons to determine and assess levels of interest in the concept and related issues (e.g., funding) and report back to the Council at the June 2013 meeting.

Ms. Teahan made a motion to adopt a position supporting amendments to MCR 5.125(B)(2), MCR 5.208(C)(1), and MCR 5.208(F), as approved by CSP, with support from Rebecca A. Schnelz. The motion was approved on a Council vote of 18-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM; however, the Council determined that submission of the position to the SBM and the MSC would be held until a more complete package of proposed amendments to Chapter 5 of the Michigan Court Rules is assembled and approved.

Ms. Teahan made a motion to adopt a position to seek an amendment to MCL 700.5433 (as amended by 2012 PA 545), as approved by CSP, with support from Amy N. Morrissey. The motion was approved on a Council vote of 16-2, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

## **VII. Standing Committee Reports**

### **A. Internal Governance**

#### **1. Budget – Shaheen I. Imami**

No report.

#### **2. Bylaws – Nancy H. Welber**

David P. Lucas reported that committee is looking at non-lawyer member issues.

3. Awards – Douglas A. Mielock

No report.

4. Planning – Thomas F. Sweeney

No report.

5. Nominating – Harold G. Schuitmaker

No report.

6. Annual Meeting – Thomas F. Sweeney

No report.

#### **B. Education and Advocacy Services for Section Members**

1. *Amicus Curiae* – David L. Skidmore

David L. Skidmore reported on the MSC's decision in *Mattison*. Mr. Skidmore also reported that the committee is declining a request from Steven G. Cohen for an amicus brief regarding a summary disposition ruling in the Wayne County Probate Court.

2. Probate Institute – Amy N. Morrissey

Amy N. Morrissey reported that registrations are on par with last year. Michael McClory requested \$200.00 from the Hearts and Flowers to donate to Cherry Capital Cycling Club for the cycling event.

3. State Bar and Section Journals – Amy N. Morrissey

No report.

4. Citizens Outreach – Rebecca A. Schnelz

No report.

5. Electronic Communications – William J. Ard

No report.

#### **C. Legislation and Lobbying**

1. Legislation – Christopher A. Ballard

No report.

2. Updating Michigan Law – Marguerite Munson Lentz

No report.

3. Insurance Committee – Thomas F. Sweeney

Thomas F. Sweeney reported on the status of SB 31 and SB 32 regarding insurable interest legislation. Mr. Sweeney stated that the bills resolve questions of insurable interests and broaden class of those covered – and he requested that the Council support the measures. He further indicated that the MPJA does not appear to have a position. Mr. Sweeney made a motion to support SB 31 and SB 32, with support from Marguerite M. Lentz. The motion was approved on a Council vote of 18-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

**D. Ethics and Professional Standards**

1. Ethics – J. David Kerr

No report.

2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor

No report.

3. Specialization and Certification – James B. Steward

No report.

**E. Administration of Justice**

1. Court Rules, Procedures and Forms – Marlaine C. Teahan

Marlaine C. Teahan reported and discussed:

- Probate appeals project related to MCR 5.801 continues to moving forward – the committee is only waiting on the MJA for support.
- ADM File 2012-36 for business courts.
- MSC is close to issuing forms for the Drain Code of 1956.
- Discussion re: enabling legislation for electronic streamlining in courts for records access and filing proposed by HB 4064. The MPJA supports idea, but there are some funding concerns. Ms. Teahan reported that the MSC is looking to form a committee to determine proper fee schedules. Mark K. Harder indicated that the Section would want a seat at the table for such a committee. Michael McClory and Rebecca A. Schnelz discussed the Technology Implementation Committee and E-Filing Advisory Committee – Mr. Harder indicated that the Section might want input on those committees, as well.

## 2. Fiduciary Exception to Attorney Client Privilege – George F. Bearup

George F. Bearup referred to the report attached to the meeting materials. Mr. Bearup stated that the committee is looking at possible amendments to the Michigan Rules of Evidence to deal with the fiduciary exception. He further noted that a model for Michigan may be a Florida statute. He hopes to have something more concrete by the April 2013 meeting.

### F. Areas of Practice

#### 1. Real Estate – George F. Bearup

George F. Bearup reported on the following issues:

- A technical amendment to the recently passed uncapping legislation may be necessary, but the committee needs more information about the history before moving forward.
- A discussion occurred about entireties property in trusts (a Hawaii statute is a possible model, but also looking at a Virginia statute for creditor protection in such property).
- Discussion regarding requirements by some lenders requiring real property to be transferred out of trusts before permitting a refinancing. George Gregory suggested it might have something to do with national securitization of mortgages and a reluctance by lenders to review terms of trusts.
- Discussion regarding the Uniform Transfer on Death Act. W. Josh Ard noted that some creditor-related issues exist that need to be explored.

Mark K. Harder discussed HB 4263 from 2012 (which was pocket-vetoed) which has been given new life. HB 4263 is related to landlord-tenant issues and decedent's estates.

#### 2. Transfer Tax Committee – Nancy H. Welber

No report.

#### 3. Charitable and Exempt Organization – Christopher A. Ballard

No report.

#### 4. Guardianship, Conservatorship, and End of Life Committee – Constance L. Brigman

Constance L. Brigman reported regarding:

- Discussion related to GALs and the scope of duties/representation in light of MCR 5.121. W. Josh Ard will continue to look into the terminology used because of potential confusion to the alleged ward.

- Issues with guardianship transfer statute to deal with venue issues that may arise with states where a judge refuses to permit the ward to leave the state to appear to make the necessary appearance to effectuate the transfer. The particular issue that gave rise to the proposed legislation has been administratively resolved. The basic question is whether venue/jurisdiction can be conditional upon filing.
- Discussion related to a proposed “user guide” for POLST which are attached to the meeting materials. Ms. Brigman noted that it appears to rely on Brad Geller's (with the Michigan State Long Term Care Ombudsman’s office) definitions. Ms. Brigman wanted to remind the Section members that the Ombudsman's guidelines are not law.
- Discussion related to developmentally disabled (“DD”) guardianship bills and a proposal to allow a petition to be filed before the ward reaches 18 years of age. Mark K. Harder stated that SB 144, SB 176, and SB 177 have been introduced to address DD and EPIC guardianships. The Hon. David Murkowski noted that the thinking behind the DD legislation is that a child is already in placement should be to allowed to file a petition to avoid a lapse or gap. Mr. Harder noted that the Section may need to comment by April 1, 2013, because the SBM may take position. As a result, Ms. Brigman will look into the issue and report back to the Council at the March 2013 meeting.

#### **G. Liaisons**

1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips

No report.

2. Business Law Section Liaison – John R. Dresser

No report.

3. Elder Law Section Liaison – Amy R. Tripp

Amy R. Tripp reported that on January 22, 2013, the legislation on Pooled Account Trusts was re-introduced by Rep. Heise (R-Plymouth) and was referred to the newly created House Financial Liability Reform Committee chaired by Rep. Earl Poleski (R-Jackson). Ms. Tripp noted that:

- The bill will amend section 106 of “The Social Welfare Act”. Section 106A describes the subrogation right of the State to recover medical costs paid from State funds when people who have sustained injuries and file suit. Amendments to this section are refining language without substantive changes.
- Section 106B establishes the use of a pooled special needs trust in the State of Michigan. 42 USC §1396(p)(D)(4), subparagraph (c) describes the elements of a pooled special needs trust. There is no requirement that the person with a disability be under age 65 unlike the Self-Settled (D)(4)(a) Special Needs Trust. The pending bill will help resolve

a continuing problem for individuals, who are over the age of 64, attempting to create and fund a pooled trust account.

- A pooled trust is an arrangement with a non-profit organization to administer assets of people with disabilities. The Michigan Department of Human Services (DHS), implemented the federal statute through BEM 401, called an Exception B trust. Historically, the Department of Human Services allowed the transfer of assets into a pooled special needs trust without regard to age or imposing a penalty (period of disqualification) on such transfer. However, within the last few years a penalty on such transfers has been imposed. As a result, many appeals and even litigation has ensued. The passage of 4013 would eliminate these appeals and sources of litigation as the State would definitively set forth statutory guidance to state agencies and the judiciary.
- Currently 17 states allow transfers to pooled account trust for a person over the age of 64 to occur without a penalty.
- The pooled trust allows for the blend of public benefit programs and private dollars which result in an increased quality of life for persons with disabilities.

4. Family Law Section Liaison – Patricia M. Ouellette

No report.

5. ICLE Liaison – Jeanne Murphy

No report.

6. Law Schools Liaison – William J. Ard

No report.

7. Michigan Bankers Association Liaison – Susan Allan

No report.

8. Michigan Probate Judges Association Liaison – Hon. Judge David M. Murkowski/Hon. Darlene O'Brien

No report.

9. Probate Registers Liaison – Rebecca A. Schnelz

Rebecca A. Schnelz reported that SCAO issued a memo indicating that new inventory computations per the new legislation will take effect with deaths that occur on or after March 28, 2013.

10. SCAO Liaisons – Marlaine C. Teahan



No report.

11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz

No report.

12. State Bar Liaison – David R. Brake

No report.

13. Taxation Section Liaison – Frederick H. Hoops, III

No report.

#### **VIII. Other Business**

None.

#### **IX. Hot Topics**

None.

#### **X. Adjournment**

Meeting adjourned by Mark K. Harder at 12:06 p.m.

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# **ATTACHMENT 1**

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**MEMORANDUM**

**TO:** Probate and Estate Planning Counsel - Subcommittee

**FROM:** George F. Bearup

**DATE:** August 9, 2012

**RE:** Should the Fiduciary Exception to the Attorney-Client Privilege  
Extend to Trust and Estate Beneficiaries?

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The attorney-client privilege is one of the “oldest and most established” evidentiary privileges. *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2318 (2011). Nevertheless, the application of the privilege is often opaque when a beneficiary of a trust seeks to uncover communication between a trustee and an attorney. Within this context, courts and legislatures have sharply divided. In some jurisdictions, a beneficiary is prohibited from discovering communication between a trustee and an attorney. In other jurisdictions, a beneficiary may discover such communication, provided the communication was *administrative*. *Wynne v. Humberston*, 27 Beav. 421, 243-424, 54 Eng. Rep. 165, 166 (1858); *Tablot v. Marshfield* 2 Dr. & Sm. 549, 550-551, 62 Eng. Rep. 728, 729 (1865). Ultimately, disagreements center on whether the beneficiary should be considered the attorney’s *client*.

**I. Majority Rule: Only the Fiduciary is the Client**

The majority rule is that the trustee is the client. There are two (2) main reasons that courts and legislatures have supported this rule: (1) a general reluctance to recognize an exception to the attorney-client privilege; and (2) a fiduciary exception to the attorney-client privilege creates too much uncertainty, which discourages open and honest communication, which perhaps even discourages a trustee to seek legal advice. *Huie v. DeShazo*, 922 S.W.2d. (Tex. 1996).

**a. Texas.** In *Huie*, the court explained that without the exclusive right to the attorney-client privilege, the trustee – fearing “second guessing” by the beneficiary – might neglect or avoid legal advice, and thus, the trust would be adversely affected. The court held that “only the trustee, not a trust’s beneficiary, is the client and is entitled to assert the attorney-client privilege.”

**b. California.** In *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594 (Cal. 2000), the court held that “there is no authority under California law for requiring a trustee to produce communications protected by the attorney-client privilege.” To reach its decision the court noted that “a trustee can keep beneficiaries ‘reasonably informed’ and provide ‘a report of information’ without necessarily having to disclose privileged communications.” *Id.*

**c. Massachusetts.** In *Spinner v. Nutt*, 631 N.E.2d 542, 544 (Mass. 1994), the court held that an attorney “advising a trustee owe[s] no duty to beneficiaries, only to their clients – the trustees.” To reach its decision the court explained that “conflicting loyalties” between the beneficiaries and the trustee would interfere with the attorney-client relationship. *Id.* at 544-46.

**d. Florida.** In *First Union Nat’l Bank v. Turney*, 824 So.2d 172 (Fla. Dist. Ct. App. 2001), the court rejected the fiduciary exception. *Id.* at 186 (holding that “an attorney represents a single client, the trustee”). The court noted that without the guarantee of the attorney-client privilege, the trustee might be thrust into conflict with the settlor’s intentions, which are frequently different than the wishes of the beneficiaries. See Louis H. Hamel Jr., “Trustee’s Privileged Counsel: A Rebuttal,” 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, “The Fiduciary Exception to a Trustee’s Attorney/Client Privilege,” 21 ACTEC Notes 236 (1995).

## **II. Minority Rule: The Fiduciary and the Beneficiary are *Both* Clients if the Communication is Administrative.**

The minority rule is that the fiduciary and the beneficiary are *both* clients if the communication is administrative. Courts and legislatures have reached this conclusion because: (1) administrative matters are *ultimately* for the benefit of the beneficiary; and (2) the attorney is generally paid out of *trust funds*. However, the latter (source of payment) rationale lost traction – even in Delaware – as courts and the legislature have recognized that who pays is not determinative of who the client actually is. Del. Code. Ann. Tit. 12, § 3333 (2008)(emphasis added).<sup>1</sup>

**a. Delaware.** In *Riggs Nat’l Bank of Wash. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), the court noted that the beneficiary is the “real” client of the attorney. Accordingly, the court held that trust beneficiaries are privy to attorney-client communication between a trustee and an attorney when the communication pertains to an *administrative* matter.

**b. South Carolina.** In *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. Ct. App. 2005), the court explained that the beneficiary possesses a *client’s* right to the information. However, in 2008, South Carolina reversed course by enacting S.C. Code Ann. Section 62-1-110(2011).<sup>2</sup>

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<sup>1</sup> “Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege. However, in the event that the fiduciary is found to have breached some fiduciary duty, the Court may, in its discretion, deny such fiduciary the right to have some part or all of such fees and expenses paid from such fund and may require the fiduciary to reimburse any such fees and expenses that have previously been paid.”

<sup>2</sup> “Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a

**c. Pennsylvania.** In *Follansbee v. Gerlach*, 56 Pa.D. & C.4<sup>th</sup> 483 (County Ct. 2002), the court reasoned that a beneficiary has an *essential right* to complete information. Accordingly, the court held that a beneficiary may view attorney-client communications with regard to *administrative* matters.

### **III. Minority Rule: How do Courts Determine Whether a Matter is Administrative or Defensive?**

Under the minority rule, the fiduciary and the beneficiary are *both* clients if the communication is administrative. However, it is difficult to determine whether the subject matter of the communication is administrative. Accordingly, most courts tend to focus on two (2) factors in making this determination.

**1. Payment of the Attorney.** Though not dispositive, courts have considered who pays the attorney as a factor in the determination of who the client actually is. In *Riggs*, the court viewed it as a “significant factor.” *Id.* at 711-12 (“the payment of the law firm out of the trust assets [was] a significant factor . . .”). Furthermore, in *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 609 (N.D. Ca. 2000) the court explained that “while generally the fiduciary exception applies to matters of trust administration; the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains to protect itself from liability.” The *Restatement (Second) of Trusts* takes a similar approach when it suggests that a trustee must pay for legal advice out of his own pockets in order to retain the attorney-client privilege.

**2. A Divergence of Interests.** Another way to determine whether a matter is administrative or defensive is to consider whether there exists a divergence of interests. In *Jacob v. Barton*, 877 So. 2d 935, 937 (Fla. Dist. Ct. App. 2004), the court noted that “[t]o the extent that the lawyers’ work concerns the dispute with [the beneficiary], their client is the trustee, not the beneficiary.” *See also Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849, 851 (Fla. Dist. Ct. App. 1993). Clearly, attorney advice after a lawsuit begins will prove a divergence of interests because the communication is defensive.

Also, there is generally a divergence of interests when the issue pertains to trustee compensation. *Wachtel v. Health Net*, 482 F.3d 225, 234 (3d Cir. 2006).

But other bright lines are more elusive. *Black v. Pitney Bowes*, No. 05 Civ. 108 (GEL), 2006 U.S. Dist. LEXIS 92263, at \*3-7 (S.D.N.Y. Dec. 21, 2006). Courts might consider whether the fiduciary has a legitimate personal interest in the legal advice sought. But words like *legitimate*, *personal*, and *interest* all lend themselves to a court’s discretion. *See, e.g., Wachtel v. Health Net, Inc.*, 482 F.3d 225, 232 (3d Cir. 2007).

### **IV. Uniform Rule: The Fiduciary is the Sole Client if the Communication is “Defensive”**

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fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.”

Regardless of jurisdiction, courts and legislatures tend to agree that a fiduciary is the *sole* client if he or she has assumed a defensive posture against the beneficiary. Accordingly, if a fiduciary retains an attorney in a personal, defensive, non-administrative capacity, in anticipation of litigation or after its commencement, the fiduciary is solely entitled to the attorney-client privilege. *Restatement (Second) of Trusts* § 173 cmt. B (1959)(which explains that a trustee retains the attorney-client privilege if the trustee obtains counsel “at his own expense and for his own protection.”); *United-States v. Mett*, 178 F.3d 1058, 1063-64 (9<sup>th</sup> Cir. 1999)(which noted that where a fiduciary seeks advice of counsel for his own personal defense in contemplation of adversarial proceedings against beneficiaries, the trustee has the attorney-client privilege).

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# **ATTACHMENT 2**

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## Report of Guardianship and Conservatorship Committee for February Probate Council

### A. Amending MCL 700.5433 to include the previous language.

I. We discussed the Transfer of Foreign Guardianship/Conservatorship and the previous MCL 700.5433.

II. The filing fee for filing foreign Letters of Authority is \$20.00.

III. This procedure is a “Proof of Authority” statute. Look at the attached chart.

IV. The “Proof of Authority” is from the 2006 version of UPC 5-433. The comments provide that “this section is particularly useful should the protected person own real estate in the enacting jurisdiction. This “Proof of Authority” section is not for transferring a conservatorship from one jurisdiction to another. “Proof of Authority” does not affect the foreign state’s jurisdiction over the conservator. The conservator remains accountable to the appointing court for his actions. This section merely allows the conservator to exercise management powers with respect to assets located in the enacting jurisdiction.

B. A senator contacted me recently in an effort to enact the UAGPPJA. This issue arises out of a request for assistance from a constituent. The constituent's Aunt lives in Missouri and has a public guardian. The family had lost track of the Aunt who has been in Missouri's mental health system. They were not aware of the guardianship. They would like to move their Aunt to Michigan, however, the judge will not permit that unless Michigan adopts the UAGPPJA. The family got this from their Michigan attorney, who got it from the Missouri attorney who got it from the judge, I think. The Michigan court would not allow a guardianship petition to be filed for a person who was **not currently in Michigan**. See below:

700.1301 Territorial application.

Except as otherwise provided in this act, this act applies to all of the following:

...

**(c) An incapacitated individual or minor in this state.**

...

See page 21 of materials for transfer of jurisdiction section that is not in EPIC.

C. Brad Geller published Project Wildcat and the POLST Guidelines were revised in reliance on his interpretations. See attached N.J. case that discusses the ombudsman has no authority over a nursing home and it should not be giving a nursing home directions. Publications by ombudsman are not laws passed by a legislature. I thought it was interesting.



**D. Rhonda and I discussed the role of the GAL. MCL 700.5306a(1)(e) and 700.5303(3) are quoted in PC 626 (10/12) under “You have certain rights...” at bullet point #4:**

**You have the right to have a guardian ad litem appointed to represent you if you are not represented by an attorney.**

Rhonda points out that a lawyer GAL is to disclose the lack of attorney-client privilege. That is correct. I have included MCR 5.121(E)(1) in these materials. It begins on page 3.

However, MCR 5.121(E)(1) only applies to a lawyer guardian ad litem.<sup>1</sup> It does not apply to a GAL who is a social worker. Therefore, when a GAL performs an investigation there is no duty on that person to tell them that anything they say to the GAL can be reported to the court without the proposed ward's permission.

Josh has been put in charge of this project and he will report to the Council. His report begins on page 5 of these materials.

The proposal is to use the term visitor to describe the person whose job it is to meet with the respondent and inquire as to whether they wish to object. This person's role is to assist the court. This person is a visitor.

The committee would like for Josh to perform the necessary strike throughs and substitutions so that we can recommend them to the Council for a vote in March. If we can get a bill passed before the legislature takes its summer break, then perhaps we can get SCAO to make rules and forms revisions when it meets this fall.

At some point, we would also like to consider GAL and guardian certification. Some states have guardian certification: Washington, Oregon, California, Nevada, Utah, Arizona, Alaska, Texas, Illinois, Florida and New Hampshire. We will discuss this at our committee level.

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<sup>1</sup> (g) "Lawyer-guardian ad litem" means an attorney appointed under section 5213 or 5219 who has the powers and duties referenced by and provided in section 5213.

## 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 lawyer 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 conduct an investigation and shall make a report in open court or file a written report of the **investigation** and recommendations. The guardian ad litem or visitor need not appear personally at the hearing unless required by law or directed by the court. Any written report must be filed with the court at least 24 hours before the hearing or such other time specified by the court. [emphasis added]

### (D) Evidence.

(1) **Reports, Admission Into Evidence.** Oral and written reports of a guardian ad litem or visitor may be received by the court and may be relied on to the extent of their probative value, even though such evidence may not be admissible under the Michigan Rules of Evidence.

(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) **shall be permitted to cross-examine the individual making the report if the person requests such an opportunity.** [emphasis added]

(c) Other interested persons may cross-examine the individual making a report on the contents of the report, if the individual is reasonably available. The court may limit cross-examination for good cause.

### (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.

# Guardian ad Litem Fiasco

Josh Ard

January 28, 2013

## Report to the Guardianship Committee

### Background

Michigan made a serious terminological error in drafting its guardianship legislation. MCL § 700.5305 is based on the Uniform Probate Code. (page 17 of materials) That uniform law uses the term [visitor] to describe a person who performs those functions of visiting the allegedly incapacitated person, explaining rights and procedures, and possibly reporting to the court. The brackets were chosen to indicate that adopting states could choose a term of their own. In retrospect, all the legislature had to do was to choose a term that caused no confusion. The legislature should have only deviated from *visitor* if it had a good reason to do so. The legislature instead made the deleterious choice of the term *guardian ad litem*. This is deleterious because the term was already used for a very different function—representing the interests of a person without or questionably without legal capacity who did not have a conservator or someone else with the power to make a binding decision for that person. Generally, this occurs in litigation involving matters others than capacity. Perhaps an interested party does not have legal capacity to consent to a settlement agreement. In cases such as those the appointment of a guardian ad litem to protect that person's interest may be necessary. This requirement is formalized in MCR 5.121(A):(page 3 of materials)

(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.

That definitely does not describe the constraints on the person appointed under § 5305. (page 7 of materials) The person appointed communicates to the allegedly incapacitated person and may communicate observations to the court, but there is no implication of representation of the person.

*Guardian ad litem* is not the worst possible choice of term. Imagine the confusion if the legislature had chosen the term *judge* for this role. Then we would have to distinguish *judge1* who presides from *judge2* whose role is essentially communication. Nevertheless, *guardian ad litem* was an extremely poor choice.

I have not conducted an historical analysis to discover when Michigan skidded off the road of terminological reasonableness. Presumably, it predated EPIC.

Michigan has compounded the problem in other statutes. §5306 says (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.

Analogous protections for the subjects of protective proceedings continue the confusion:

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. MCL § 700.5406(2) (page 14 of materials)

This expressly says that a visitor may only be a guardian ad litem or a court officer or employee. The basic definition of a visitor in the court rules is not so limited:

(2) *Visitor*. The court may appoint a visitor when authorized by law.

MCR 5.121(A). (page 3 of materials)

There are other statutes that are unnecessarily muddled as well.

It is almost as difficult to explain the differences between *guardian-ad-litem1* and *guardian-ad-litem2* as it would be to explain the differences between *judge1* and *judge2* in the hypothetical example above.

## Recommendations

It is very difficult to use the same term for two very different functions and explain them in a clear matter. The task is not only to explain this to lawyers and judges but to explain matters in a way the lay public, including people of marginal capacity, can understand.

A more reasonable approach is to use two different terms for two different functions. This is what happens in ordinary language (*familial* came into use after *familiar* expanded its sense) and in legal language (Congress created the term *annual percentage rate* to clarify challenges in how the term *interest* was used).

There is no reason I am aware of not to simply use the term *visitor* as is used in the Uniform Probate Code. If so, no changes would need to be made in MCR 5.121. There would have to be a change in MCR 5.403. The tweaking would need to be done primarily in the statutes, however.

If there is a need for some term other than *visitor*, it ought to be a term that is otherwise unemployed. Facetiously, one might consider khedive, Grand Inquisitor, oracle, avatar, interlocutor, etc. Any of these would be better than the current situation.

### **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, 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 for the individual if he or she is unable to afford legal counsel.
- (d) Informing the individual of the name of each person known to be seeking appointment as guardian.
- (e) Asking the individual and the petitioner about the amount of cash and property readily convertible into cash that is in the individual's estate.
- (f) 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 declaration, 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 a particular person being appointed guardian.
  - (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, the 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, the 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.
- (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.

**700.5303 Court appointment of guardian of incapacitated person; petition; alternatives to appointment of full guardian; hearing.**

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 shall 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 declaration, 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.**

## **700.5213 Procedure for court appointment of guardian, temporary guardian, or lawyer-guardian ad litem for minor.**

Sec. 5213. (1) The petitioner shall give notice of the time and place of hearing of a petition for the appointment of a minor's guardian to each of the following:

- (a) The minor, if 14 years of age or older.
- (b) The person who had the principal care and custody of the minor during the 63 days preceding the date of the petition.
- (c) Each living parent of the minor or, if neither of them is living, the adult nearest of kin to the minor.

(2) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of section 5204 or of sections 5205 and 5206 are satisfied, and the minor's welfare will be served by the requested appointment, the court shall make the appointment. In other cases, the court may dismiss the proceeding or make another disposition of the matter that will serve the minor's welfare.

(3) If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the temporary guardian's authority shall not exceed 6 months.

(4) 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 a lawyer-guardian ad litem to represent the minor, giving a consideration to the preference of the minor if the minor is 14 years of age or older.

(5) A lawyer-guardian ad litem appointed under this act **represents** the child and has powers and duties in relation to that representation as set forth in section 17d of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.17d. All provisions of section 17d of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.17d, apply to a lawyer-guardian ad litem appointed under this act. In addition, both of the following apply under this act:

(a) **In a proceeding in which a lawyer-guardian ad litem represents a child, he or she may file a written report and recommendation. The court may read the report and recommendation into evidence unless all parties stipulate the admission. The parties may make use of the report and recommendation for purposes of a settlement conference.**

(b) After a determination of ability to pay, the court may assess all or part of the costs and reasonable fees of a lawyer-guardian ad litem against 1 or more of the parties involved in the proceedings or against the money allocated from marriage license fees for family counseling services under section 3 of 1887 PA 128, MCL 551.103. A lawyer-guardian ad litem shall not be paid a fee unless the court first reviews and approves the fee.

(6) To assist the court in determining a child's best interest, the court may appoint a guardian ad litem for a child involved in a proceeding under this section.

## **700.5406 Procedure concerning hearing and order on original petition.**

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.** [emphasis added]

(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.** [emphasis added]

(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.

NOTE FROM UGPPA:

**SECTION 5-115. GUARDIAN AD LITEM.** At any stage of a proceeding, a court may appoint a guardian ad litem if the court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court shall state on the record the duties of the guardian ad litem and its reasons for the appointment.

Comment

Appointments under this section will be infrequent. If the respondent is currently represented, the attorney representing the respondent should not be appointed as the guardian ad litem because of the conflict of interest, **since there is a distinct difference between the role of the attorney as an advocate and as a guardian ad litem.** It is important that the court, when appointing a guardian ad litem, advise the guardian ad litem of his or her role. This section encourages the giving of such advice by requiring that the court record the duties of the guardian ad litem and its reasons for the appointment. The source of this section is UGPPA (1982) Section 1-403 (UPC Section 1-403(4) (1982)).

...

## **SECTION 5-305. JUDICIAL APPOINTMENT OF GUARDIAN: PRELIMINARIES TO HEARING.**

(a) Upon receipt of a petition to establish a guardianship, the court shall set a date and time for hearing the petition and appoint a **[visitor]**. The duties and reporting requirements of the **[visitor]** are limited to the relief requested in the petition. The **[visitor]** must be an individual having training or experience in the type of incapacity alleged.

### **Alternative A**

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if: (1) requested by the respondent;  
(2) recommended by the **[visitor]**; or  
(3) the court determines that the respondent needs representation.

### **Alternative B**

(b) Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding, regardless of the respondent's ability to pay.

(c) The **[visitor]** shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;
- (2) determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;
- (3) inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and
- (4) inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the **[visitor]** shall:

- (1) interview the petitioner and the proposed guardian;
- (2) visit the respondent's present dwelling and any dwelling in which the respondent will live if the appointment is made;
- (3) obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and
- (4) make any other investigation the court directs.

(e) The **[visitor]** shall promptly file a report in writing with the court, which must include:

- (1) a recommendation as to whether a lawyer should be appointed to represent the respondent;



- (2) a summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;
- (3) recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;
- (4) a statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;
- (5) a statement as to whether the proposed dwelling meets the respondent's individual needs;
- (6) a recommendation as to whether a professional evaluation or further evaluation is necessary; and
- (7) any other matters the court directs.

Legislative Note: Those states that enact Alternative B of subsection (b) which requires appointment of counsel for the respondent in all proceedings for appointment of a guardian should not enact subsection (e)(1).

#### Comment

Alternative provisions are offered for subsection (b).

- Alternative A was favored by the drafting committee. Alternative A relies on an expanded role for the “visitor,” who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues. Appointment of a lawyer, nevertheless, is required under Alternative A when the court determines that the respondent needs representation, or counsel is requested by the respondent or recommended by the visitor.
- Alternative B is derived from UGPPA (1982) Section 2-203 (UPC Section 5-303 (1982)). It is expected that in states enacting Alternative A of subsection (b), counsel will be appointed in virtually all of the cases. Alternative B was favored by the A.B.A. Commission on Legal Problems of the Elderly, which attached great significance to expressly making appointment of counsel “mandatory.” Therefore, for states which wish to provide for “mandatory appointment” of counsel, Alternative B should be enacted.

In Alternative A for subsection (b), then, appointment of counsel for an unrepresented respondent is mandated when requested by the respondent, when recommended by the visitor, or when the court determines the respondent needs representation.

This requirement is in accord with the National Probate Court Standards. National Probate Court Standards, Standard 3.3.5 “Appointment of Counsel” (1993), which provides:

(a) **Counsel** should be appointed by the probate court to **represent the respondent** when:

- (1) requested by an unrepresented respondent;
- (2) recommended by a court visitor;
- (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
- (4) otherwise required by law.

(b) **The role of counsel should be that of an advocate for the respondent.**

Alternative A of subsection (b) follows the National Probate Court Standards, Standard 3.3.5(a)(1) through (a)(3).

Alternative B perhaps may be said to be in accord with the National Probate Court Standards, Standard 3.3.5(a)(4).

The drafting committee for the 1997 UGPPA debated at length whether to mandate appointment of counsel or to expand the **role of the visitor**. The drafting committee concluded that as between the two, the visitor may be more helpful to the court in providing information on a wider variety of issues and concerns, by acting as the **eyes and ears of the court as well as determining the respondent's wishes and conveying them to the court**. The committee was concerned that including mandatory appointment of counsel would cause many to view the Act as a "lawyer's bill" and thus severely handicap the Act's acceptance and adoption. **It is the intent of the committee that counsel for respondent be appointed in all but the most clear cases, such as when the respondent is clearly incapacitated.**

For jurisdictions enacting Alternative A under subsection (b), the visitor needs to be especially sensitive to the fact that if the respondent is incapacitated, then the respondent may not have sufficient capacity to intelligently and knowingly waive appointment of counsel. A court should err on the side of protecting the respondent's rights and appoint counsel in most cases.

Appointment of a visitor is mandatory (subsection (a)), regardless of which alternative is enacted under subsection (b). **The visitor serves as the information gathering arm of the court.** The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise. It is imperative that the visitor have training or experience in the type of incapacity alleged. The visitor must individually meet with the respondent, the petitioner and the proposed guardian. The visitor's report must contain information and recommendations to the court regarding the appropriateness of the guardianship, whether lesser restrictive alternatives might meet the respondent's needs, recommendations about further evaluations, powers to be given the guardian, and the appointment of counsel. If the petition is withdrawn prior to the appointment of the visitor, no appointment of the visitor is necessary.

National Probate Court Standards, Standard 3.3.4 "Court Visitor" (1993) provides:

The probate court should require a court appointee to visit with the respondent in a guardianship petition to (1) explain the rights of the respondent; (2) investigate the facts of the petition; and (3) explain the circumstances and consequences of the action. The visitor should investigate the need for additional court appointments and should file a written report with the court promptly after the visit.

The visitor must visit the respondent in person and explain a number of items to the respondent to the extent the respondent can understand. If the respondent does not have a good command of the English language, then the visitor should be accompanied by an interpreter. The drafters did not mandate that the visitor be able to speak the respondent's primary language, but good practice and due process protections dictate the use of interpreters when needed for the respondent to understand. The phrase "to the extent that the respondent is able to understand" is a recognition that some respondents may be so impaired that they are unable to understand. If assistive devices are needed in order for the visitor to explain to the respondent in a manner necessary so that the respondent can understand, then the visitor should use those assistive devices. The visitor is also charged with confirming compliance with the Americans With Disabilities Act when visiting the respondent's dwelling and the proposed dwelling in which it is expected that the respondent will reside.

Subsection (c)(4) puts the respondent on notice that if the respondent has an estate, costs and expenses are paid from the estate, including attorney's fees and visitor's fees. If there is an estate, those entitled to compensation would be paid from the estate. If there is no estate, those entitled to compensation will ordinarily be compensated by whatever process the enacting state has for indigent proceedings, such as from the county general fund, unless the enacting jurisdiction has made other arrangements. If a conservatorship exists, payment is made pursuant to the procedures provided in Section 5-417, otherwise the guardian must file a fee petition. See Section 5-316. The visitor must talk with the physician or other person who is known to have assessed, treated or advised about the respondent's relevant physical or mental condition. This information is crucial to the court in making a determination of whether to grant the petition, since a professional evaluation will no longer be required in every case. See Section 5-306. If the doctor refuses to talk to the visitor, the visitor may need to seek from the appointing court an order authorizing the release of the information. The visitor's report must be in writing and include a list of recommendations or statements. For states enacting Alternative A to subsection (b), if the visitor does not recommend that a lawyer be appointed, the visitor should include in the report the reasons why a lawyer should not be appointed. States enacting this article should consider developing a checklist for the items enumerated in subsection (e).

**"Visitor" is bracketed in recognition that states use and may wish to substitute different words to refer to this position.**

SECTION 107 5-107. TRANSFER OF JURISDICTION. (1998 UGPPA)

(a) After the appointment of a guardian or conservator or entry of another protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another [county] in this State or to another State if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

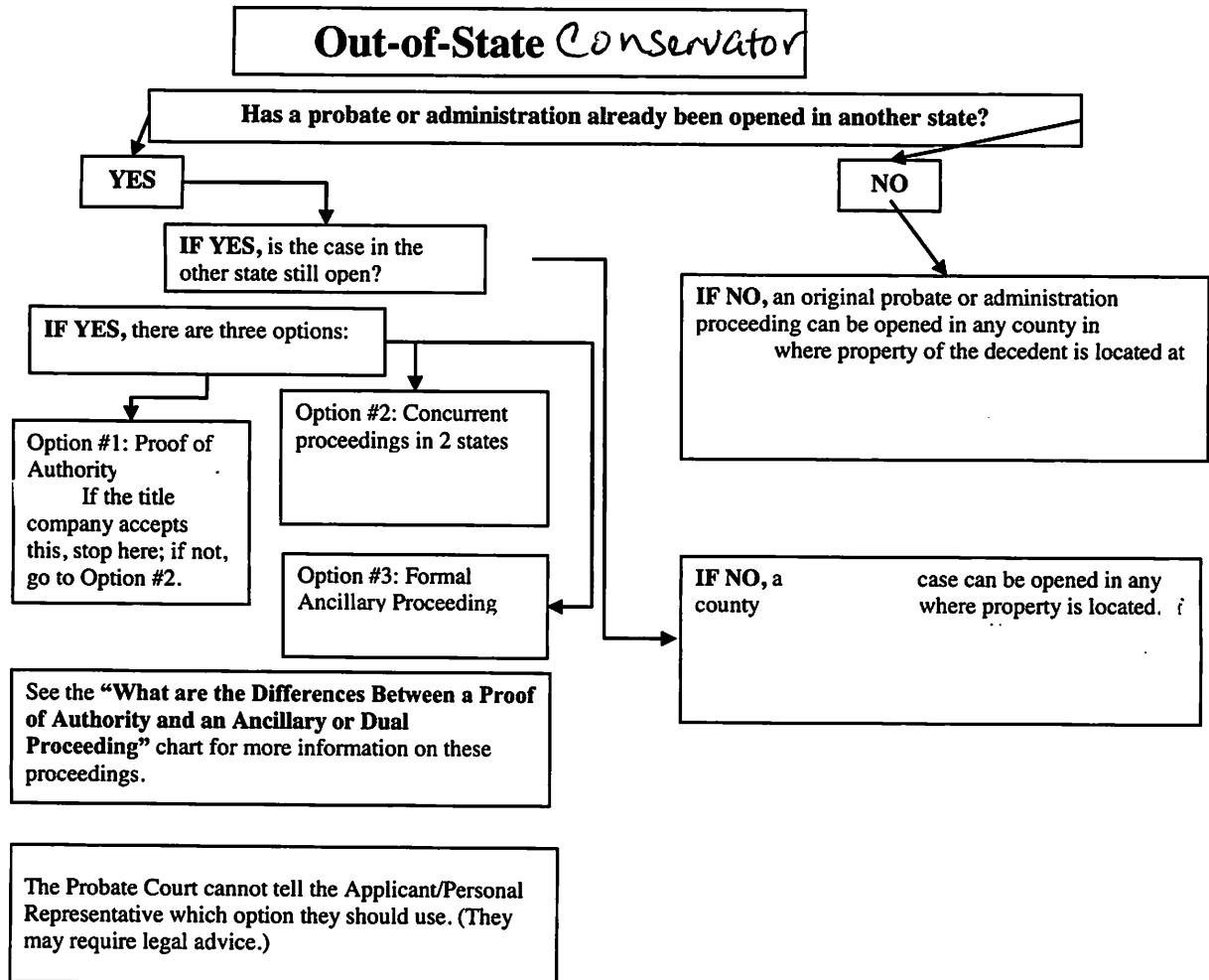
(b) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(c) A guardian, conservator, or like fiduciary appointed in another State may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other State and presentation of a certified copy of the portion of the court record in the other State specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, must be given to the ward or protected person, if the ward or protected person has attained 14 years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this [Act article] were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within 14 days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained 14 years of age, and to all persons given notice of the hearing on the petition.

**Table: Differences Between Proof of Authority and Ancillary or Dual Proceeding**

<b>WHAT ARE THE DIFFERENCES BETWEEN A PROOF OF AUTHORITY AND AN ANCILLARY OR DUAL PROCEEDING?</b>		
<b>Key Questions</b>	<b>Proof of Authority</b>	<b>Ancillary or Dual Proceeding</b>
WHERE is it filed?	Filed in each county where property is located.	Filed in any county where property is located.
WHEN is it filed?	Filed while original domiciliary probate is open.	Filed while original domiciliary probate or administration is open.
WHO files it?	Domiciliary foreign <i>C</i> files the Proof of Authority.	Usually foreign <i>C</i> but could be someone else if proper consent is provided.
IS A CASE OPENED?	No probate or administration proceeding occurs but the court filing fee is paid.	Probate or administration proceeding is open.
WHAT DOCUMENTS need to be filed?	Proof of Authority with a statement including domiciliary foreign <i>C</i> 's address	Pleadings filed are the same as for a <i>Michigan</i> resident,
WHAT DOCUMENTATION is required?	Authenticated copies of any bond given and appointment documents are attached to Proof of Authority of <i>C</i>	Authenticated copies of appointment documents are submitted with Application for Appointment.
ARE LETTERS ISSUED?	No Letters Are Issued.	Letters are Issued.
HOW IS IT CLOSED?	No probate or administration was opened, so no Verified Statement is filed. The domiciliary <i>C</i> may file a copy of any closing documents from the domiciliary proceeding in the other state, but this is not required.	An Ancillary Proceeding is closed in the same manner as a regular probate or administration proceeding.
<b>The probate court cannot advise the personal representative on which proceeding is appropriate, only the differences between them.</b>		

## Flowchart: Out-of-State Conservator



**\*Authentication** is a triple certification used to prove the authenticity of a document so that it can be used as evidence. In probate courts the county clerk first certifies that the attachment is a true and correct copy of the document(s) on file with the court. The probate judge then certifies that the county clerk has the authority to act in his/her capacity. The county clerk then certifies that the probate judge has the authority to act in his/her capacity. Some states call this **Exemplification**.

# Michigan Physician Orders for Scope of Treatment (MI-POST) Pilot

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## *User Guide for Health Care Professionals*

Developed by the Michigan Coalition for Honoring Healthcare Choices  
**PILOT Version 2 December 2012**

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## Introduction

*"It is one thing to be able to undertake a medical action, and another thing to know whether or not you should."* Miles Edwards, M.D.

### Michigan POST Program Overview

Michigan Physician Orders for Scope of Treatment (MI-POST) is a program designed to help health care professionals honor the treatment decisions of their patients<sup>1</sup>. The Michigan Commission on the End of Life Care endorsed POST in 2001, recommending that the POST be developed in Michigan.

*The Purpose of MI-POST* is to:

- Promote a person's autonomy by creating medical orders that reflect the his/her current treatment decisions;
- Facilitate appropriate treatment by emergency medicine and emergency medical services (EMS) personnel; and
- Be compliant with HIPAA in the transfer of patient records between health care settings.

### The MI-POST Form

The MI-POST form transforms a patient's treatment plan into a **medical order**. Emergency medical responders and emergency medicine are to follow these orders unless there is new information from a patient or appropriate surrogate. In the absence of a MI-POST form or other state-specific medical orders form, patients will receive advanced cardiac life support, including cardiopulmonary resuscitation (CPR), endotracheal intubation, and defibrillation by emergency medical personnel based on standard protocols. It is therefore critical, if a person does not wish these treatments, that MI-POST orders are readily available to alert medical personnel. The brightly colored pink MI-POST form should be clearly visible in a person's home, or accompany the patient whenever transferred or discharged.

Because each person has the right to make his or her own health care decisions, the MI-POST form is **always voluntary**. It is usually for patients with advanced illness or frailty and records choices for medical treatment in the patient's **current** state of health. Once initial medical treatment is begun and the risks and benefits of further therapy are clear, the patient's treatment wishes may change, in which case the MI-POST can and should be changed to reflect new preferences and treatment choices.

Michigan Department of Community Health (MDCH) EMS and Trauma Services Section has defined the EMS Scope of Practice so that a Michigan-certified First Responder or EMT shall comply with life-sustaining treatment orders executed by a physician, nurse practitioner or physician assistant in three pilot areas in Michigan covering the Delta, Northwest Regional, and Jackson Medical Control Authorities' geographical areas. Currently, only these Medical Control Authorities participating in the Michigan POST Pilot with explicit permission and approval by the EMS & Trauma Section of the Michigan Department of Community Health may implement the EMS POST Protocol.

In Michigan, the POST form is copyrighted and printed on medium weight pink paper and should not be reproduced or modified without the expressed consent of the Michigan Coalition for Honoring Healthcare Choices. Institutions and communities may seek permission from the Coalition to obtain a camera-ready copy of the POST document to reproduce in their own setting for a specified period and agreed to conditions. The POST form is reviewed periodically as part of a continuous quality improvement process. Use of the Michigan POST form is voluntary.

### *Who Should Have a MI-POST Form?*

The MI-POST form is designed for persons who:

- Are seriously ill with life-limiting advanced illness; and/or
- Have advanced frailty characterized by significant weakness and difficulty with personal care activities; and/or
- May lose the capacity to make their own health care decisions in the next year; and/or
- Have strong preferences about current end-of-life care.

To determine whether a MI-POST form should be considered, clinicians should ask themselves:

"Would I be surprised if this person died or lost decision-making capacity in the next year?" If the answer is "No I would not be surprised," then a goals-of-care discussion and advance care planning with MI-POST is appropriate. A terminal diagnosis is not required for initiating a MI-POST form.

The MI-POST form may also be appropriate for persons who have strong preferences regarding medical interventions, such as persons who want limitations on the use of artificially administered nutrition. These patients can select "No artificial nutrition" in Section C of the MI-POST form. The MI-POST form should also be used to identify and communicate the treatments a patient does want, as well as the treatments that are unwanted.

Unless it is the patient's preference, use of the MI-POST form to limit treatment is **not appropriate** for patients with stable medical or functionally disabling problems who have many years of life expectancy.

### **Comparison of Advance Care Planning Documents**

There are several types of documents in which an individual can make medical treatment wishes and decisions known, as well as identify a substitute decision-maker who can make decisions on the individual's behalf if he or she should become incapacitated. Each document has differing applicability in the healthcare setting. The table below identifies the document, applicable Michigan statute, and advantages and disadvantages of the document.

Form	Advantages	Limitations
<b>An Out-of-Hospital Do Not Resuscitate Form</b> (also known as the Community DNR)	<ul style="list-style-type: none"><li>• Statutory protection for emergency personnel</li><li>• Must be signed by a physician</li></ul>	<ul style="list-style-type: none"><li>• Deals only with CPR in event of absence of heartbeat and breathing.</li><li>• Only applicable to persons in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the Department of Community Health</li><li>• Can only be executed by the individual or his/her legally designated patient advocate</li><li>• Minimal use due to its limitations</li><li>• DNR bracelet has only been implemented on a limited basis</li></ul>
<b>Designation of Patient Advocate Form</b>	<ul style="list-style-type: none"><li>• Designates a Patient Advocate</li><li>• Identify individuals treatment wishes in the event he/she becomes incapacitated</li></ul>	<ul style="list-style-type: none"><li>• Does not direct EMS</li><li>• Hypothetical</li><li>• Only active when patient is incapacitated</li><li>• Documents not always available/difficult to locate</li><li>• Not required to be completed with a healthcare provider</li></ul>

Form	Advantages	Limitations
Living Will	<ul style="list-style-type: none"> <li>Allows individuals to make several wishes known, including for assets and treatment wishes the event he/she becomes incapacitated</li> </ul>	<ul style="list-style-type: none"> <li>Not recognized in Michigan statutes regarding healthcare decisions</li> </ul>
MI-POST	<ul style="list-style-type: none"> <li>Not limited to CPR. Deals with a range of treatments that can direct care in emergent and non-emergent situations</li> <li>Created as a medical standard of care, representing the standard of shared medical decisions and substantially inclusive of MI statutory language</li> <li>Easy to maintain across settings</li> <li>Must be signed by a physician or NP/PA who has a contractual relationship with a Physician</li> <li>Directs EMS in approved Pilot areas</li> <li>Does protect emergency personnel in limiting treatment beyond DNR pre-radio</li> </ul>	<ul style="list-style-type: none"> <li>Does not protect emergency personnel in limiting treatment beyond DNR pre-radio*</li> <li>Advisory in acute care settings to establish resuscitation status (not a medical order)</li> <li>To sign a MI-POST, a probate judge must grant a court-appointed guardian of a legally incapacitated person the ability to sign a DNR and withhold treatments.</li> </ul>

\*ONLY outside of approved Pilot areas or expanded areas-check with your local Medical Control Authority for guidance. Completing an Out-of-Hospital DNR is recommended to accompany the MI-POST for patients in communities outside the State-approved pilot areas.

It is important to note that no form replaces the need for or the importance of the designation of patient advocate. Completing the Designation of Patient Advocate form and identifying a Durable Power of Attorney for Healthcare (DPOAH) are critical for supporting a person's treatment decisions.

#### *The Out-of-Hospital DNR Form*

This form is recommended for use in communities outside of the State-approved MI-POST Pilot areas. While MI-POST may be used in non-pilot facilities, EMS does not have the State's approval to follow the EMS POST Protocol and cannot limit treatments in the field. Completing the Out-of-Hospital DNR form will ensure that those persons who do not want CPR have their decisions honored in transport or if EMS is called.

#### *The Patient Advocate*

The Michigan Supreme Court declared that people have the right to make their own health care decisions.<sup>2</sup> An advance directive is recommended for all capable adults, regardless of their health status. The "Designation of Patient Advocate" form (also known as the "Durable Power of Attorney for Healthcare") is the legal document in Michigan that allows individuals to:

*Appoint a Patient Advocate (health care representative) to make health care decisions if an individual becomes unable to speak for themselves; and complete health care instructions for end-of-life care.*

The Patient Advocate can accept or refuse life-sustaining treatment on behalf of the patient. The Patient Advocate is to act in accordance with the patient's known preferences or in the patient's best

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<sup>2</sup> *In re Martin*, 538 W.W.2d 399 (Mich. 1995).

interest. Medical care for patients without decision-making capacity is enhanced by this legal document because it gives individuals important guidance over his/her medical care if he/she becomes incapacitated. It is important to note that, in the document, the individual must specifically give authority to the Patient Advocate.

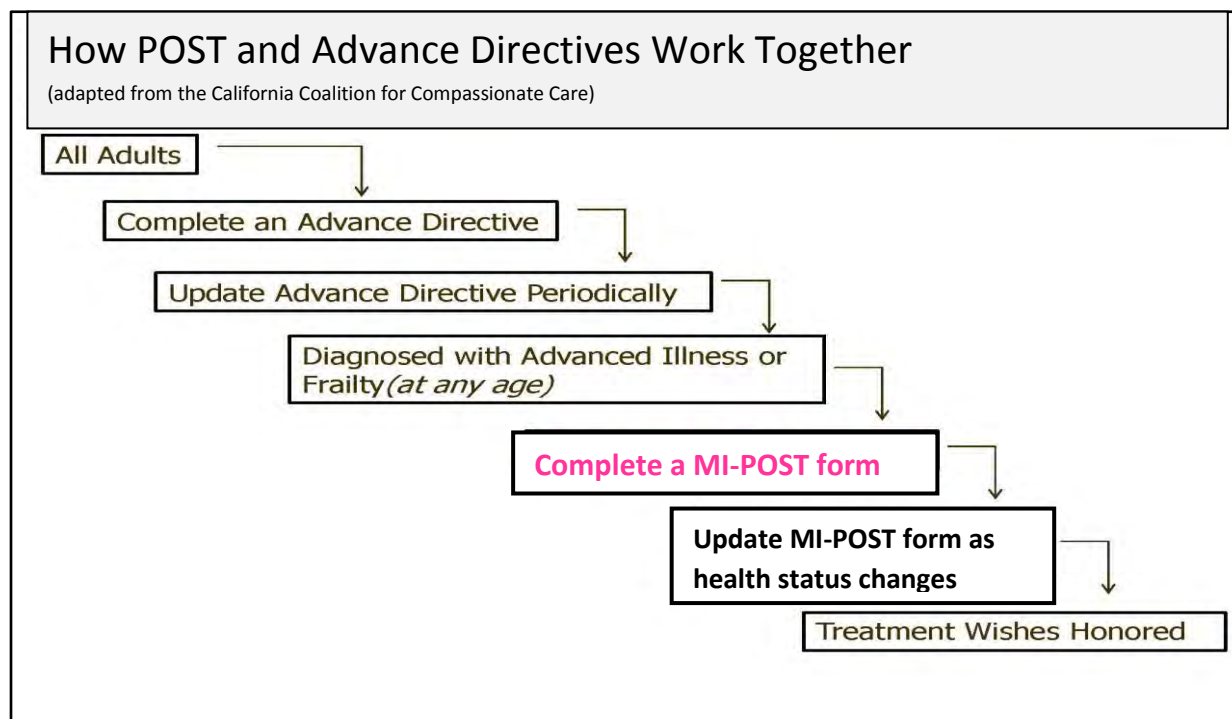
A patient advocate only has authority to act when the individual is “unable to participate in medical treatment ... decisions.” The individual’s attending physician and a second physician or licensed psychologist make that determination<sup>3</sup>.

#### *Key Differences between MI-POST and the Advance Directive*

An advance directive is not a medical order. Since EMS usually cannot limit care in an emergency with only an advance directive, unwanted treatments may be initiated.

The MI-POST is a medical order that directs the initial care of the patient by EMS. The advance directive helps people communicate their treatment preferences in advance of a serious medical condition, and appoints a Patient Advocate to make medical decisions for the patient should they become incapacitated. It allows a patient’s treatment preferences to be known if patients become unable to speak for themselves.

The MI-POST orders should reflect the person’s wishes **now** in his/her **current** state of health. Since the orders will be followed by emergency medical services (EMS), the MI-POST should **not** reflect future wishes for when a patient’s health may have deteriorated. Advance directives are recommended for all capable adults, regardless of their health status. MI-POST forms are recommended for patients with advanced illness or frailty, or patients with strong preferences about medical interventions in their current state of health.



<sup>3</sup> MCL 700.5508

A person with medical decision-making capacity can change his/her MI-POST at any time to reflect changing circumstances. For example, when treatment has been initiated and more medical information becomes available regarding diagnosis, prognosis and potential outcomes, the patient's goals and preferences may change.

If, however, the patient becomes incapacitated, the health care instructions and Patient Advocate appointed in a "Designation of Patient Advocate" play an important role in developing goals for care consistent with the patient wishes in his/her new state of health. The Patient Advocate would participate in updating MI-POST orders to be consistent with a patient's preferences as the patient's health status changes.

**Example:**

An elderly male is becoming frail and wants a MI-POST order to state he does not want resuscitation. At the present time his health and quality of life are such that he would want aggressive treatment, including ventilation, for reversible conditions such as pneumonia. So his current wishes on the MI-POST would be "DNR" and "Advanced Interventions." However, he is afraid of becoming incapacitated and kept alive on tubes and would not want aggressive therapy if he would not recover to good quality of life. The advance directive (with designated representative and specific instructions) is the appropriate way to document wishes to forgo in the future treatments that he would not want in a more incapacitated state. With updated goals of care, a new MI-POST could be created with the representative and health care team to represent the current wishes when his health status and prognosis change.

## **How to Use the MI-POST Form to Record a Patient's Preferences**

### *The Patient Discussion*

The MI-POST form should be completed after careful discussion with the MI-POST facilitator and the patient or the patient's authorized surrogate decision-maker, based on the patient's current treatment preferences.

The discussion may include:

- Patient (when the patient has capacity)
- Patient Advocate
- Court-appointed Guardian with Probate Court approval to make healthcare decisions
- Other Authorized Representative: When the patient lacks capacity and does not have a Patient Advocate designated, it is imperative to make sure that you are working with the appropriate legally authorized representative. **Refer to your health care facility's policy** to identify who can make decisions on the patient's behalf.
  - When filling out the MI-POST form, always specify who the "other" is and his/her relationship to the patient.

### *Determining Appropriate Surrogate*

An authorized representative may be:

- (a) An adult appointed to make health care decisions as a Patient Advocate/ Durable Power of Attorney for Healthcare (DPOAH)
- (b) A court appointed guardian with approval to make health care decisions
- (c) Family/Next-of-kin

If patient lacks capacity, the DPOAH can be activated. If the no DPOAH had been appointed, then the health care professional must rely on a legal surrogate. Facilities may also allow family members or next-of-kin to make decisions on the patient's behalf. However this may only apply to decisions made within that facility and may not be transferrable. Refer to your facilities policies.

### *Family Consent*

Michigan does not have a Family Consent law; however the position of the State Long Term Care Ombudsman Program is that there are two relevant laws, The Michigan Social Welfare Act and the Dignified Death Act.<sup>4</sup>

Michigan's Medicaid provisions are set forth in the Social Welfare Act. This applies to nursing home residents and others enrolled in Medicaid. The Michigan Social Welfare Act reads:

If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given<sup>5</sup>.

The Michigan Dignified Death Act sets forth certain responsibilities for a physician who diagnoses an individual as terminally ill. The Dignified Death Act states that for patients with an advanced illness, in the medical community known as a terminal illness, a patient surrogate may make decisions on behalf of the patient regarding medical treatment. In this context, "Patient surrogate" means a member of the immediate family, the next of kin, or the legal guardian of a patient who has a condition other that prevents the patient from giving consent to medical treatment.<sup>6</sup>

This section of the Dignified Death Act reads:

- (a) If the patient has not designated a patient advocate, that the patient has the option of designating a patient advocate to make medical treatment decisions for the patient in the event the patient is not able to participate in his or her medical treatment decisions because of his or her medical condition.
- (b) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, has the right to make an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment for the patient's reduced life expectancy due to advanced illness.
- (c) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, may choose palliative care treatment including, but not limited to, hospice care and pain management.
- (d) That the patient or the patient's surrogate or patient advocate acting on behalf of the patient may choose adequate and appropriate pain and symptom management as a basic and essential element of medical treatment.

### **Completing and Signing the MI-POST form**

The legally valid signers of the MI-POST form are physicians (M.D. or D.O.), nurse practitioners (NP), and

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<sup>4</sup> Gellar, Brad. Project Wildcat

<sup>5</sup> MCL 400.66h

<sup>6</sup> MCL Section 333.5653 and 333.5655

physician assistants (PA). A nurse practitioner or physician assistant must have a current collaborative/supervisory relationship with a physician, and is bound by organizational policy and/or bylaws<sup>7</sup> relative to their collaborative agreement. **It is important to review organizational policy** to ensure your organization allows NPs and PAs to sign a DNR. One of these professionals must sign the MI-POST for the orders to be valid. The document may be prepared for review and signature by other health care professionals under the direction of the physician, nurse practitioner or physician assistant.

The preparer should fill out the health care professional information on the back of the MI-POST form. The physician/NP/PA must sign the form assuming **full responsibility** for the medical orders and that these orders are an accurate reflection of the current treatment decisions. In signing the MI-POST form, a nurse practitioner or physician assistant must include the name and phone number of the supervising physician under “contact information.”

The signature of the patient, or the patient’s authorized representative if the patient lacks decision-making capacity, is also required. The signature provides evidence that the patient or his/her legal representatives is aware of and agrees with the orders on the form. It also provides a safeguard for the patient that the orders on the form accurately convey his/her decisions.

### **Storing the MI-POST form**

The MI-POST form provides documentation of a patient's current decisions and provides life-sustaining treatment orders that reflect these values. In institutional settings, the MI-POST must be easily accessible and immediately visible to EMS. In home settings, it is recommended that the MI-POST form be attached to the side of the kitchen refrigerator or another prominent location. Caregivers need to know where the MI-POST will be kept and be able to present it to the emergency personnel upon arrival.

### **Receiving a Patient with a MI-POST Form**

For patients in institutional settings, the original form should accompany the patient upon transfer from one setting to another; however a copy is valid. A copy of the MI-POST form should be kept in the individual's medical record. HIPAA permits disclosure of MI-POST orders to other health care professionals across treatment settings. EMS in the Michigan Department of Community Health (MDCH) EMS & Trauma Section approved pilot areas will follow the EMS MI-POST Protocol.

**Facilities receiving a patient with a completed MI-POST are accepting a patient with a set of active standing orders.** The facility should the review the MI-POST with the patient/family at their earliest opportunity (as indicated by policy), and a physician/NP/PA should sign in Section G that the MI-POST form was reviewed. Until such time that the orders are reviewed the facility shall honor these orders. Phone orders may be taken by nursing staff and later counter signed by the physician/NP/PA, as permitted by organizational policy.

In communities outside of the pilot areas utilizing MI-POST should also complete an Out-of-Hospital DNR form to protect the patient who choose to have a DNR, so that EMS may honor the DNR outside of the acute care facility.

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<sup>7</sup> Physician Assistants: as per Senate Bill 384, enacted November 8, 2011. Nurse Practitioners: by organizational policy.

### **Honoring a MI-POST Form**

In an acute care setting, the MI-POST is used by the admitting clinician as evidence of the patient's prior treatment decisions. This information is to be taken into account in determining treatment orders appropriate to this admission. In cases of changes from the MI-POST form to admitting orders, the rationale for doing so is to be documented in the patient's medical record.

In any setting, should new information on the health of the patient become available, the goals of treatment may change. Following discussion with the patient, or if incapable, his/her representative, new orders regarding life-sustaining treatment should be written, dated and signed.

Sometimes a patient is evaluated in a setting (e.g. hospital Emergency Department) and has a MI-POST form completed by a physician/nurse practitioner/physician assistant not on medical staff of the facility.

**It is the responsibility of the receiving organization to incorporate the MI-POST orders into the facility's orders. MI-POST form signatures indicate that the patient has been counseled.**

In the case that a signing physician is no longer practicing in the community, is no longer the patient's physician, or dies, the MI-POST orders remain valid while a patient awaits new orders from his/her new provider.

### **Dealing with Disputes Regarding a MI-POST Form**

Sometimes disputes arise regarding existing treatment orders in a MI-POST form for a patient who no longer has decision-making capacity. These disputes may center on who has decision-making authority and/or what the decision(s) should be. Typically a family member is requesting treatment changes that are inconsistent with the existing MI-POST form.

For EMS, if there is not clarity on the MI-POST form, EMS should contact on-line medical control and follow the direction as given.

For organizations and hospitals, if a family dispute arises concerning the validity of a MI-POST form, the recommendation is to follow organizational policies regarding surrogate decision-making. Ethics consults can also be very helpful for disputes.

### **Revising a MI-POST Form**

The health care professional taking responsibility for the patient's care should review and update the MI-POST orders as needed based on the patient's medical condition and treatment preferences.

This MI-POST should be reviewed periodically and if:

- The patient is transferred from one care setting or care level to another;
- There is a substantial change in the patient's health status; or
- The patient's treatment preferences change.

Sometimes there is a need to follow the orders before a reassessment can be accomplished. As a standing physician order, the MI-POST orders are to be followed until a review is completed by the accepting health care professionals.

### **Section by Section Review of the MI-POST Form**

The MI-POST has seven sections (A – G). One side of the document is the "Physician Orders for Scope of Treatment" (Sections A - D). The other side of the form (E – G) includes a signature section, contact information and directions for healthcare providers.



Side one of the MI-POST form lists three different medical treatment sections and a section on documentation of the discussion and signature of the patient or surrogate decision-maker.

- A - Cardiopulmonary Resuscitation
- B - Medical Interventions
- C - Artificially Administered Nutrition
- D – Documentation of Discussion

The backside of the MI-POST form lists three sections including:

- E - Signature of Patient/Patient Advocate/Court-appointed Guardian/Other Authorized Representative with address and two witnesses
- F – Healthcare Provider Assisting with Completion of MI-POST Form.
- G – Review of this MI-POST form.

## General

Michigan Physician Orders for Scope of Treatment (MI-POST)			
First follow these orders, then contact physician. This is a Medical Order Sheet based on the person's medical condition and treatment decisions. Any section not completed <u>does not</u> invalidate the form and implies full treatment for that section.	Last Name		
	First Name/Middle Initial		
	Date of Birth: (mm/dd/yyyy)	Gender: (circle) <b>M</b> <b>F</b>	Last 4 SSN:

The MI-POST is a medical order based on the patient's medical condition and wishes right now. If the patient requires treatment, the caregiver should first institute any emergency treatment orders recorded on the MI-POST, and then contact the physician. Full treatment options apply for any items not completed. If a section is left blank, full treatment should be provided while clarification is obtained. Note that the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) permits disclosure of the MI-POST form to all health care providers on a need to know basis.

## Section A - CARDIOPULMONARY RESUSCITATION (CPR)

<b>A</b> <small>Check one</small>	<b>CARDIOPULMONARY RESUSCITATION (CPR): Person has no pulse AND is not breathing.</b>	
	<input type="checkbox"/> Attempt Resuscitation/CPR	<input type="checkbox"/> DO NOT Attempt Resuscitation/CPR (DNR/No CPR)

These orders apply **only** when the patient has no pulse and is not breathing. This section does not apply to any other medical circumstances. For example, this section does not apply to a patient in respiratory distress because he/she is still breathing. Similarly, this section does not apply to a patient who has an irregular pulse and low blood pressure because he/she has a pulse. For these situations, the first responder should refer to section B, described below and follow the indicated orders.

This section has nothing to do with other types of medical care, addressed in other sections below.  
NOTE: It is not a matter of having the POWER to resuscitate, but having the CHOICE to attempt resuscitation.

If **Attempt Resuscitation/CPR** is elected, full CPR measures should be carried out and 9-1-1 should be called. Treatment may include:

- Cardiopulmonary resuscitation (CPR),
- Endotracheal intubation,
- Oral/intravenous medications,
- Intravenous fluids,
- Electrical therapy (external pacing<sup>8</sup>/electrical cardioversion<sup>9</sup>/defibrillation<sup>10</sup>); and
- Other advanced cardiac life-support measures as appropriate to the person's clinical condition and wishes for full treatment.

There are instances in which it is appropriate to select "Attempt Resuscitation/CPR" in Section A, but limit treatments in Section B. For example, one might select "Attempt Resuscitation/CPR" in Section A but exclude mechanical ventilation.

If **DO NOT Attempt Resuscitation/CPR** is selected, the person should understand no resuscitative efforts will be given. If it is intended to apply in a community setting, the requirements of the Michigan Do No Resuscitate Procedures Act (DNRPA) are satisfied in the MI-POST form by having the patient or the Patient Advocate sign (Section E), the physician sign (Section D) and the required witnesses sign (Section E). A separate DNR form does not need to be completed except for facilities outside of the State-approved pilot.

All parties should understand that even if a DNR election is made, that comfort measures and other treatments will always be provided.

## Section B - MEDICAL INTERVENTIONS

<div style="font-size: 2em; font-weight: bold; margin-bottom: 5px;">B</div> <div style="font-size: 0.8em; margin-top: 5px;">Check one</div>	<b>MEDICAL INTERVENTIONS: Person has pulse and/or is breathing.</b>
	<p><b>ALL patients will receive comfort measures.</b></p> <p><input type="checkbox"/> <b>Advanced Interventions:</b> Use intubation, advanced invasive airway interventions, mechanical ventilation, cardioversion and other advance interventions as medically indicated. <i>Transfer to hospital if indicated; includes intensive care.</i></p> <p><input type="checkbox"/> <b>Limited Interventions:</b> DO NOT use intubation, advanced invasive airway interventions, or mechanical ventilation. Use medical treatment, IV fluids and cardiac monitor as indicated. <i>Transfer to hospital if indicated. Avoid intensive care.</i></p> <p><input type="checkbox"/> <b>Comfort Measures Only:</b> Use medication by any route, positioning, wound care and other measures to relieve pain and suffering. Use oxygen, suction manual treatment of airway obstruction and non-invasive respiratory assistance as needed for comfort. <i>Only transfer to hospital if comfort needs cannot be met in current location.</i></p> <p><b>Additional orders:</b> _____</p>

### General Instructions Regarding Level of Medical Interventions

These orders apply to the patient who has a pulse and/or is breathing. This section provides orders for situations that are not covered in Section A and were developed in accordance with EMS protocol.

Health care professionals should first administer the level of Medical Interventions ordered on the MI-POST form and then contact the physician/nurse practitioner/physician assistant. Only one box may be

<sup>8</sup> "External cardiac pacing" is the delivery of an electrical pulse that stimulates the heart to beat faster.

<sup>9</sup> "Electrical cardioversion" is the delivery of a higher voltage single electrical shock that synchronizes the heart beat and slows the heart rate when it is too fast.

<sup>10</sup> "Defibrillation" is a type of cardioversion that is of a higher voltage yet and that synchronizes the cells of the heart to beat together when they are functioning chaotically and independent of each other. Without this intervention, the patient/resident will most likely die.

checked.

*Advanced Interventions:* Determine if all life-sustaining treatments are desired. This would be the choice of people who want medical treatment if they became ill, go to hospital if needed, have blood tests to monitor chronic disease, aggressively treat acute medical crises, even to the extent of using intensive care, respiratory support with a ventilator, surgery, etc. EMS is called if needed. If called, EMS will follow EMS protocol. The person is transferred to a hospital, if needed, for appropriate medical care.

Note: Some patients with advanced illness might want all measures including intensive care treatment and temporary life support such as mechanical ventilation but would not want to be resuscitated if these attempts fail and their heart stops. Thus a patient can request DNR in Section A and request Advanced Interventions in Section B.

*Limited Interventions:* This section allows a patient to receive all aggressive medical care but stops at the point of intubation. The patient's preferences reflect a desire to be hospitalized if needed, but avoid mechanical ventilation and generally avoid ICU care.

Individuals choosing this setting may have a chronic or terminal illness that they recognize to be fatal but are still hopeful of partial recovery and feel they still have a reasonable quality of life. Some patients will choose to use hospital services in hopes of prolonging life. Some patients may want hospitalization and treatments for reversible conditions or exacerbations of their underlying illness with the goal of restoring them to their current state of health; e.g., hospitalization for dehydration, pneumonia.

Beyond the choice of hospitalization, the quality of life and life goals are such that they would still like to have illnesses diagnosed and treated to the extent possible within the facility in which they live, or at home. Thus diagnostic tests and therapies would be limited to those available at the site of their residence. Diagnostic tests would include, but are not limited to; X-rays, blood tests, simple diagnostic tests such as ECG, and would include medications and intravenous fluids necessary to treat an acute illness from which one might anticipate recovery to their baseline condition. Caregivers would consider the use of oxygen, suction, etc. as appropriate. The patient would not be transported to a hospital unless indicated by a physician because acute skills are required to enhance comfort (e.g., treat intractable pain) or facilitate testing not available at a non-hospital setting. If transported by EMS, basic life support is appropriate because no new treatment will be initiated during transport.

*Comfort Measures Only:* Allows patients to ease any pain or distress associated with their condition, or with the dying process. This section is often chosen when the patient's goals are to maximize comfort through symptom management, and avoid hospitalizations unless necessary to ensure comfort needs are met. Medicines to ease pain, shortness of breath, nausea, lung congestion, anxiety, delirium or any other symptom can be used to the extent needed to relieve the symptom and provide comfort. Antibiotics may be used as a comfort measure. Positioning, wound care, warmth and other measures to relieve pain and suffering are appropriate comfort measures. The caregivers will consider the use of oxygen, airway suctioning, and manual treatment of airway obstruction, as appropriate. Oral and body hygiene, and reasonable efforts to offer food and fluids are important.

Sometimes it is necessary to transfer patients to the hospital to control their suffering. Examples include pain management, wound care (e.g. immediate and ongoing pain relief, control of bleeding, cleaning, wound closing and dressing as needed to optimize hygiene), and stabilization of any fracture by splinting and/or surgery (with the goal to control pain). If transported by EMS, basic life support is appropriate

because no new treatment will be initiated during transport.

If appropriate, consider a palliative care or hospice care referral or make treatment plan for providing comfort care (e.g. pain and symptom management orders).

### **Additional Considerations for the Discussion Needed to Complete Section B**

If the patient is wishing to avoid mechanical ventilation in Part B but at the same time wants CPR (when they have no pulse and are not breathing), the health care professional signing the MI-POST should clarify the patient's understanding of CPR to ensure he or she is aware that CPR often includes intubation and often people are on a ventilator following CPR.

As noted earlier, the **MI-POST form** should reflect patient's preferences for care based upon their **current** condition. To illustrate, two separate patients with advanced COPD may have similar responses to a discussion about their wishes regarding resuscitation: "I want you to try everything, but I don't want to end up a vegetable or kept alive on a machine." This statement necessitates further exploration of the patient's wishes. For example:

**Patient #1:** After further discussion regarding prognosis, what CPR entails, the likelihood of CPR restoring the patient to a quality of life acceptable to her, Patient #1 might clarify that she wants all measures which might maintain and extend life as well as all measures to potentially restore life in the event of a cardiopulmonary arrest. However, if at any future time Patient #1's medical condition required ongoing mechanical ventilation to maintain life, she would not want life support measures. To reflect this patient's goals, Patient #1's MI-POST form should be completed as follows: Section A - Attempt Resuscitation/CPR; Section B - Full Treatment. This will accurately reflect Patient #1's current preferences. Patient #1 should also complete an **Advance directive** to indicate her **future** treatment preferences.

**Patient #2:** After further discussion, Patient #2 might clarify that he wants all measures short of intubation and mechanical ventilation to maintain and or restore life to current condition and does not want anyone to attempt resuscitation in the event of loss of pulse and respirations. Patient #2's MI-POST form should be completed as follows: Section A - Do Not Attempt Resuscitation/CPR; Section B - Limited Interventions. These orders accurately reflect his current preferences.

Remember, patients' preferences regarding medical interventions may change based on their evolving medical condition or simply because they change their minds. MI-POST forms should be updated as soon as a health care professional is aware of a change in the patient's preferences as these are medical orders that will be acted upon by EMS personnel.

It is very important to document the patient's goals of care and details of the discussion upon which the orders are based in the medical record. This is helpful if the validity of the MI-POST is questioned and may provide comfort for family members.

Additional clarifying orders to the patient's preferences can be written under **Additional orders:** e.g. "ICU treatment for sepsis but no intubation/mechanical ventilation for respiratory failure."

## **Section C – ARTIFICIALLY ADMINISTERED NUTRITION**

<b>C</b>  Check one	<b>ARTIFICIALLY ADMINISTERED NUTRITION: Always offer food by mouth if feasible.</b>
	<input type="checkbox"/> Long-term artificial nutrition <input type="checkbox"/> Defined trial period of artificial nutrition <input type="checkbox"/> No artificial nutrition
	Additional orders: _____

This section allows the physician to record person instructions regarding artificially administered hydration and nutrition for persons who cannot take fluids by mouth. While Michigan law allows a person a choice about artificially administered hydration and nutrition, oral fluids and nutrition must always be offered to the person if medically feasible. If the person wants long-term artificial nutrition, that box is checked. If there are limitations ordered for artificially administered nutrition, check the *No artificial nutrition* OR the *Defined trial period of artificial nutrition* box. Additional orders may also be specified.

*Defined trial period of artificial nutrition* would be chosen by a patient who chose *Do Not Resuscitate* in Section A, but who chose *Full Treatment* in Section B. This circumstance might include situations where there is temporary loss of ability to swallow or take in adequate food to sustain life, a situation from which recovery is expected or at least possible. Temporary use of a feeding tube would be expected to yield return to health and to normal ability to swallow and eat. The anticipated length of time designated for the “defined trial” should be discussed with the patient or decision maker prior to initiation of the therapy.

*Note:* No data has shown that artificial feeding through a tube achieves the goals for which it is initiated in patients with advanced progressive dementia or Parkinson’s disease, who have stopped accepting food and fluids as a part of their neurological deterioration. Feeding tubes do not prevent aspiration pneumonia (getting food or oral contents into the windpipe and the lungs, leading to pneumonia), rarely improve nutrition or hydration, and do not generally prolong life. They introduce a whole host of medical complications to a person’s care. The decision to use a feeding tube is a very complex one, and should be discussed with the physician most familiar with the patient’s total health circumstances, or with a palliative care specialist, before proceeding.

## Section D - DOCUMENTATION OF DISCUSSION and Physician, Nurse Practitioner, or Physician Assistant Signature

<b>D</b>	<b>DOCUMENTATION OF DISCUSSION</b>	
	Discussed with: <input type="checkbox"/> Patient <input type="checkbox"/> Patient Advocate (DPOAH)	<input type="checkbox"/> Court-appointed Guardian <input type="checkbox"/> Other Authorized Representative (specify): _____
	Patient Goals: _____	
	<b>SIGNATURE OF PHYSICIAN, NURSE PRACTITIONER OR PHYSICIAN ASSISTANT</b>	
	<i>My signature below indicates to the best of my knowledge that the orders are consistent with the patient’s medical condition and goals of care.</i>	
	Signature (mandatory) _____	Phone Number _____
	Name (print/type) _____	Date (mm/dd/yyyy) _____
	<b>COMPLETE BELOW IF SIGNED BY NURSE PRACTITIONER OR PHYSICIAN ASSISTANT</b>	
Name of Physician of contract: _____	Physician Phone Number: _____	
<b>SEND ORIGINAL FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED</b>		
<b>HIPAA PERMITS DISCLOSURE OF POST TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY</b>		

Upon completion of the orders, the facilitator checks the box indicating with whom the orders were

discussed (i.e., the patient when competent or capacitated, the Patient Advocate, the court-appointed guardian with judicial permission to make such decisions, or other authorized representative). The facilitator then records the patient's goals that serve as the basis for the patient's treatment decisions. If available, attach copies of advance directives or guardianship documents to the MI-POST form.

At the bottom of the page, the physician or nurse practitioner/physician assistant operating in a supervisory relationship with a physician **must** sign the form. The signer should include a printed name, telephone number and the date the orders were written. A nurse practitioner/physician assistant also provides the name of the supervising physician. **If the MI-POST form is not signed it cannot be treated as a valid order and EMS personnel cannot limit EMS services.** Phone orders may be taken by nursing staff and later counter signed by the physician/NP/PA if permitted by organizational policy.

The bottom of the form includes a reminder that the original form should accompany the patient when transferred or discharged. It is very important that the form follow the patient. It allows the receiving facility to have the same information regarding the medical indication and person preferences for life-sustaining treatment. It also increases the likelihood that these orders will be respected in the new care setting.

## The Reverse Side of the MI-POST Form

### Section E – SIGNATURES

HIPAA PERMITS DISCLOSURE OF POST TO OTHER HEALTH CARE PROFESSIONALS AS NECESSARY		
E	<b>SIGNATURES</b>	
	<input type="checkbox"/> Patient	<input type="checkbox"/> Court-appointed Guardian
	<input type="checkbox"/> Patient Advocate (DPOAH)	<input type="checkbox"/> Other Authorized Representative (specify):
	Print Name	Signature
		Date (mm/dd/yyyy)
	Address	Phone Number
		Alternate Phone Number
	The patient and/or the patient's authorized representative may revoke these directions at any time.	
Witness (1) Signature:		Print Name
Witness (2) Signature :		Print Name

The form must be signed by the patient, Patient Advocate, appointed guardian with authorization to make healthcare decisions, or other authorized representative. The printed name and date are entered, as well as the address, phone number, and alternate telephone number of the signer. This information is important to collect in circumstances in which the signer needs to be notified. The signature is witnessed by two witnesses who are 18 years of age or older, at least one of whom is not the declarant's spouse, parent, child, grandchild, sibling, or presumptive heir<sup>11</sup>. Healthcare facility staff may serve as witnesses.

<sup>11</sup> Michigan Do-Not-Resuscitate Procedure Act. Act 193, Eff. Aug. 1, 1996.

## Section F: HEALTH CARE PROVIDER ASSISTING WITH COMPLETION OF MI-POST FORM

F	<b>HEALTHCARE PROVIDERS ASSISTING WITH COMPLETION OF POST FORM</b>		
	Preparer's Name (print)	Preparer's Signature	Date (mm/dd/yyyy)

If a health care professional assists in completing the MI-POST, his/her name, signature and date should be recorded in this section. The professional acknowledges, by signing this section, that the orders are consistent with the patient/surrogate preferences.

### HOW TO CHANGE THE MI-POST FORM

HOW TO CHANGE THIS FORM
<p>The POST form should be reviewed periodically and if:</p> <ul style="list-style-type: none"> <li>The patient/resident is transferred from one care setting or care level to another;</li> <li>There is a substantial change in patient/resident health status such as: <ul style="list-style-type: none"> <li>Improved Condition</li> <li>Advanced Progressive Illness</li> <li>Extraordinary Suffering</li> <li>Permanent Unconsciousness</li> <li>Close to death</li> </ul> </li> <li>The patient's/resident's treatment decisions change.</li> </ul> <p>If this form is revoked, write "VOID" on both sides in large letters, then sign and initial the form. After voiding the form, a new form may be completed. <i>If no new form is completed, full treatment and resuscitation shall be provided.</i></p>

The MI-POST form should be reviewed periodically and if:

- The person is transferred from one care setting or care level to another;
- There is substantial change in the person's health status such as improvement, advanced progressive illness, extraordinary suffering, permanent unconsciousness, or close death; or
- There is a change in the person's treatment decisions.

#### Voiding a MI-POST Form

A person with capacity, or the valid surrogate of a person without capacity, can void his/her MI-POST and request alternative treatment.

If the MI-POST is changed or revoked, draw a diagonal line through the front and back page of the MI-POST and write "VOID" in large letters on both pages. After voiding the MI-POST form, a new MI-POST form should be completed reflecting the new medical indications and treatment wishes of the patient. A voided form may be destroyed after clear documentation of the action in the patient's healthcare record. Follow voiding procedures of the facility (e.g., determine if copy of voided MI-POST scanned/stored).

If there is no new MI-POST form completed, then resuscitation and advanced interventions will be provided.

## Section G: REVIEW OF MI-POST FORM

G	REVIEW OF THIS POST FORM			
	Date	Reviewer Name	Location of Review	Outcome of Review
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed
				<input type="checkbox"/> No change <input type="checkbox"/> Form voided <input type="checkbox"/> New Form completed



This section records the review of MI-POST. The orders should be reviewed by the attending physician/nurse practitioner/physician assistant immediately after a patient is transferred from one setting to another. This review includes the date, the reviewer's name, and the location of the review. The outcome of the review is also recorded by checking either the box indicating *no change*, or one of the two boxes indicating that the old form has been voided and a new form completed or not completed. The reviewer may also wish to record in the healthcare record why the form was voided.

### **DIRECTIONS FOR HEALTH CARE PROFESSIONALS**

This section provides a basic summary of directions to instructions to health care professionals regarding signing the form, validity, verbal orders and form maintenance. A reminder is included to send the original forms with the person whenever transferred or discharged.

<b>DIRECTIONS FOR HEALTH CARE PROFESSIONALS</b>
<ul style="list-style-type: none"> <li>• POST must be completed by a healthcare professional based on patient decisions and medical indications.</li> <li>• POST must be signed by a Physician to be valid. Verbal orders are acceptable with follow-up signature by physician in accordance with facility policy.</li> <li>• A Physician's Assistant or Nurse Practitioner may sign the POST if working under the direction of a physician.</li> <li>• Use of original forms is strongly encouraged. Photocopies, electronic forms, and faxes of signed POST form are valid.</li> </ul> <p>Healthcare providers should maintain a copy of the POST in the patient's chart</p>
<b>SEND ORIGINAL FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED</b>

### **Frequently Asked Questions**

*Q: What if a patient has a Michigan Out of Hospital Do-Not-Resuscitate form which is included in the Michigan DNR Procedures Act and then wants a MI-POST?*

A: The patient may have both, but it's important to ensure that the forms do not contradict one another. Because it meets witnessing requirements, the MI-POST serves as an acceptable alternate to the out of hospital DNR form in the three pilot programs of Delta, Northwest Regional, and Jackson Medical Control Authorities. Outside of the state-approved Pilot areas, it is recommended that the patient have an Out-of-Hospital DNR form as well as a MI-POST.

*Q: What if a person has a MI-POST but wants to travel from his or her residence?*

A: The MI-POST document is not yet a statewide form. This document may only be followed in the three pilot areas by emergency systems. An Advance directive is recommended. The MI-POST document will need to be presented to emergency personnel if called. This means that this document will need to be taken with a person if he or she leaves the residence. If the MI-POST document is not presented, EMS will start emergency care.

*Q: Does a patient need to be qualified as defined in the Michigan statute to have a MI-POST document?*

A: No. The MI-POST document is created as a medical standard of care. It represents the standard of good medical decisions and is "substantially" the same as the Out-of-Hospital Do Not Resuscitate declaration in the Michigan DNR Procedures Act.

*Q: Will only patients who do not want resuscitation have a MI-POST document?*

A: No. MI-POST has other treatment option from advance interventions to comfort measures. MI-POST is also appropriate for those wanting full treatment including CPR, to communicate those decisions clearly.

*Q: Who can sign the MI-POST on behalf of the patient?*



A: The MI-POST must be signed by the person for whom it is completed, or by his/her Patient Advocate documented in a Designation of Patient Advocate/Durable Power of Attorney for Healthcare (DPOAH) form. If no DPOAH has been executed, a court-appointed guardian with authorization to make healthcare decisions or other authorized representative can sign as per organizational policy.

*Q: Can any medical personnel besides those who can sign the orders assist the patient in completing the MI-POST?*

A: There are many healthcare providers who are appropriate to assist the patient or surrogate in completing the MI-POST. It is recommended that the healthcare provider be trained and knowledgeable in MI-POST, palliative care and end-of-life issues. This can include Case Managers, Social Workers, Nurses and other appropriate healthcare professionals. A health care professional who assists in the completion of a MI-POST is referred to as a "POST facilitator."

### **Contact Information**

For more information on MI-POST, please contact Carolyn Stramecki at [sstramecki@honoringhealthcarechoicesmi.org](mailto:sstramecki@honoringhealthcarechoicesmi.org).

# **Health Care Decision-Making For a Resident In a Nursing Home**

**Policy Statement of the Michigan State Long Term Care  
Ombudsman Program**

**January, 2013**

**by Bradley Geller, J.D.**

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# **Health Care Decision-Making For a Resident In a Nursing Home**

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## **Introduction**

The law has long been clear that an adult who is able to give informed consent to medical treatment – who understands her or his condition, treatment options, intended effects and possible side effect of these choices – has sole right and authority to make those decisions.

Residency in a nursing home does not affect this right.

The law concerning who has authority to make medical decisions if an adult lacks the ability to do so has evolved over the years through new laws and court decisions.

The process has been episodic, non-comprehensive, and incomplete. The state of the law today can be compared to a jigsaw puzzle with some pieces missing and other pieces not fitting well with one another.

The situation is understandably confusing to long-term care residents, to family members, to health care providers, to long-term care ombudsman and to state officials charged with overseeing the quality of nursing home care.

For a number of years, surveyors cited nursing homes if every resident did not have either an advance directive or a guardian. However, this was a misinterpretation of the law, with adverse consequences for residents and for nursing homes.

Nursing home staff can be under the misimpression that a patient advocate has authority immediately upon the signing of an advance directive, or that a guardianship preempts almost all rights of a resident.

Historically, some nursing homes have pushed for guardianship for the convenience of the nursing home rather than the needs of the residents.

It is the aim of this Statement to clarify this broad area of the law, which we term surrogate decision-making.

It must be noted the Centers for Medicare and Medicaid Services published changes to surveyor guidance for F-tag 155 (advance directives)

and F-tag 309 (quality of care – review of resident at or approaching end of life), effective November 30, 2012.

These changes **do not** alter state law regarding who can make health decisions for an individual who becomes unable to make them her or himself. Indeed, the new language underscores the importance of properly recognizing those who are so empowered.

The sole focus of these materials is health care decision-making. There are different laws and different mechanisms for decision-making concerning an individual's property and financial affairs.

The Policy Statement is in three parts: Advance Directives, Family Decision-Making, and Guardianship. Information on voluntary and involuntary psychiatric hospitalization is beyond the scope of this paper.

For ease of reading, the information is presented in a question-and-answer format. Citations are to Michigan law (MCL); federal statute (42 USC) or federal regulation (42CFR).

The statement is directed toward nursing home administrators, social workers, directors of nursing, and admissions personnel; and to nursing home surveyors in the Bureau of Health Systems, Michigan Department of Licensing and Regulation.

The Michigan State Long Term Care Ombudsman Program has developed other materials on surrogate decision-making for residents of long term care facilities and their families.

These publications include the booklet, ***Advance Directives: Planning for Medical Care in the Event of Loss of Decision-Making Ability***. The booklet, which has questions-and-answers, and fill-in-the-blank forms, is Appendix A to this paper, and has been accessible on-line.

In addition to English, the booklet is available in Spanish, Arabic, Chinese, Korean, German and Italian.

These materials or others can be used by nursing homes to help fulfill federally mandated responsibilities to educate staff; to provide community education; and to assist willing residents to complete an advance directive.

In reviewing the particulars of the law, it is important to keep in mind the grand purpose of this statutory and regulatory scheme concerning

surrogate decision-making: to honor the wishes, values and dignity of the individual.

It is also important to recognize there can be an unfortunate chasm between the law as it is written, and the law as it is practiced.

If upon reading this policy paper, you have further questions, please contact the State Long Term Care Ombudsman Program at (517) 373-3697 or [gellerb@michigan.gov](mailto:gellerb@michigan.gov).

Finally, I thank Sarah Slocum, Michigan State Long Term Care Ombudsman, for her unflagging advocacy and support.

B.G.





## **Part 1**

# **Advance Directives**

### **What is an advance directive?**

An advance directive is a signed and witnessed document in which an individual voluntarily provides input or direction concerning future medical care decisions in the event the individual become unable to participate in these decisions.

### **Are there different types of advance directives?**

**Yes.** But to avoid unnecessary confusion, this statement focuses on the most prevalent type of advance directive, a “durable power of attorney for health care.” This type of document is also known as a “health care proxy,” or a “patient advocate designation.”

### **What is a durable power of attorney for health care?**

A durable power of attorney for health care is a document whereby an individual voluntarily chooses another person to make medical decisions for her or him, during any time she or he “unable to participate in medical treatment decisions.” MCL 700.5506 *et seq.*

### **What is a nursing home’s obligation concerning advance directives for a new resident?**

Under the Federal Patient Self-Determination Act, a nursing home which participates in Medicare or Medicaid must give written information to a new resident about the resident’s right under Michigan law to make

decisions about her or his medical care, and the right to sign an advance directive. 42 USC 1395cc(f)(1)((A)(i); 42 USC 1396a(w)(1)(A)(i); 42CFR 489.102(a)(1); 42 CFR 483.10(b)(8).

**What if an incoming resident does not have the capacity to understand this information?**

The nursing home has an obligation to give the information to family or a surrogate for the resident empowered under state law to receive information about a nursing home's policies and procedures. 42 CFR 489.102(c).

**Must a nursing home help a resident toward having an advance directive?**

Yes. A nursing home has a responsibility "to offer assistance if a resident wishes to execute one or more directive(s)." CMS Surveyor Guidance to F Tag 155, p. 4.

During a periodic survey, surveyors must interview staff to determine "how staff help the resident or legal representative document treatment choices and formulate an advance directive." CMS Surveyor Guidance Investigative Protocol for 42 CFR 483.10(B)(4) and (8).

**Can a nursing home provide educational materials about advance directives to an applicant or resident?**

Yes.

**What about making fill-in-the-blanks forms available?**

A nursing home should instruct a resident about options for completing an advance directive, including how to obtain fill-in-the-blanks forms.

If a nursing home makes available fill-in-the-blank forms, the home should ensure residents are aware there is no standard form for a durable power of attorney for health care, and that the resident has other options.

**Can a nursing home require an applicant or a resident to have an advance directive?**

**No.** It is an individual's a choice whether to have an advance directive. A nursing home cannot condition admission or continued stay on a resident having or not having an advance directive. 42 USC 1395cc(f)(1)(C); 42 USC 1996a(w)(1)(C); 42 CFR 489.102(a)(3).

This is echoed in state law. MCL 700.5512(2)

**How does a nursing home know if an incoming resident already has an advance directive?**

The nursing home must determine whether an incoming resident whether she or he has an advance directive. The nursing home should ask the resident, or if the resident is unable to understand, should ask family or other surrogate.

**What is the obligation of the nursing home if an incoming resident already has an advance directive?**

The nursing home has an obligation to make an advance directive a prominent part of the resident's medical record. 42 USC 1395cc(f)(1)(B); 42 USC 1396a(w)(1)(B). 42 CFR 489.102(a)(2).

This is true for a new resident or a long-term resident.

**Can a nursing home require an incoming resident to complete a new advance directive?**

**No.** A nursing home cannot require a resident to replace an advance directive with one written on the nursing home's own form. The nursing

home must make the existing advance directive part of the resident's medical record. Any corporate policy to the contrary is invalid.

**Is there a statewide site where a durable power of health care can be filed?**

**Yes.** Through legislation passed in 2012, The Michigan Department of Community Health is contracting with Gift of Life of Michigan, an organ donation agency, to establish a statewide registry for durable powers of attorney for health care. MCL 333.10301.

Participation is voluntary on the part of the individual, and it is free. Nursing homes will have electronic access to this information at no cost.

**When will the registry be in operation?**

The registry, known as *Peace of Mind*, will be open to registrants by mid-2013, and to providers in 2014.

**Can an individual also include in a durable power of attorney for health care wishes concerning future medical treatment?**

Yes, an individual has a choice whether to include general wishes, specific wishes or no wishes at all. MCL 700.5507(1).

**Who is able to have a durable power of attorney?**

An individual must be 18 years old or older, and of "sound mind." MCL 700.5506. In this context, sound mind means the individual realizes he is giving another person authority to make health care decisions if she or he cannot, and she or he knowingly chooses this person.

**Is there a standard form for a durable power of attorney for health care?**

**No.** There are a number of forms available from different organizations. An individual can instead have a lawyer draft the document. A hand-written document can be valid if properly signed and witnessed.

**What are the requirements of a valid durable power of attorney for healthcare?**

The document must be signed by the individual, and witnessed by two persons. Nursing home staff members are prohibited from serving as a witness for a resident. MCL 700.5506(4).

**Does the document have to be notarized?**

**No.** There is neither a requirement nor suggestion in the law that the document be notarized.

**What is the person designated in a durable power of attorney for health care called?**

The person is called a “patient advocate.” MCL 700.5506(2).

**Can an individual choose more than one patient advocate to serve at the same time?**

**No.** Under this statute, an individual can only choose one person to serve at any one time.

**Can an individual name a second person to serve if the first person cannot?**

**Yes.** An individual can appoint one person as patient advocate, and a second person to serve as patient advocate **if** the first person does not accept, is incapacitated, resigns or is removed. MCL 700.5507(2).

The second person is commonly known as a “successor patient advocate.”

A patient advocate or successor patient advocate does not have power to delegate her or his powers to someone not named in the document.

**What if an individual does choose two or more patient advocates to serve at the same time?**

The document is not invalid. You may request the designated patient advocates inform you who will serve as the primary contact person.

**Does a patient advocate have authority to make decisions immediately upon the individual signing the durable power of attorney?**

**No.** This is misconception as serious as it is popular.

Upon signing a durable power of attorney for health care, the individual retains the right to make medical care decisions for herself or himself just as before.

One criteria for compliance with 42 CFR 483.10(b)(4) and (8) is if the facility has “documented when the resident is determined not to have decision-making capacity and **therefore** decision-making is transferred to the health care agent or legal representative.” CMS Surveyors Guidance. (emphasis added)

**Can an individual give a patient advocate immediate access to medical records?**

Yes. Indeed, the document might explicitly reference HIPPA, and serve as a release under that statute.

**What must occur before a patient advocate has authority to act for the individual?**

First, the patient advocate must be given a copy of the document. Second, the patient advocate must sign an “acceptance,” a document whereby the person agrees to properly undertake her or his duties. MCL 700.5507(3).

**Is there standard language for the acceptance?**

The general language of the acceptance is set forth in law. MCL 700.5507(4).

**When does the patient advocate have to sign the acceptance?**

The patient advocate can sign the acceptance when the individual signs the durable power of attorney for health care, or at any time thereafter.

**What else must occur before a patient advocate has authority to act?**

A patient advocate only has authority to act when the individual is “unable to participate in medical treatment ... decisions.” MCL 700.5508(1).

**Who determines whether the individual has become unable to participate in medical treatment decisions?**

The individual’s attending physician and a second physician or licensed psychologist make that determination. MCL 700.5508(1).



**Must the attending physician and the other physician or psychologist examine the individual before making the determination?**

**Yes.** MCL 700.5508(1). They need not conduct the examination at the same time as one another.

**What must the physicians or psychologist do upon making their determination?**

The physicians or psychologist must put their determination in writing, make the writing part of the resident's medical record, and review the determination at least once a year. MCL 700.5508(1).

**How is a durable power of attorney described after the physicians or physician and psychologist have made their determination?**

If the individual is deemed unable to participate in medical treatment decisions, a popular expression is that the durable power of attorney for health care has been "triggered."

**Is there a standard form for the physicians or psychologist to use?**

**No.** It is up to the nursing home to develop a form for this purpose.

**Are the two physicians or physician and psychologist determining the individual is incompetent?**

**No.** Only a court, after notice and a hearing, can determine an individual is "incapacitated" in a legal sense. MCL 700.1105(a); MCL 700.5306(1)

**What powers can an individual give her or his patient advocate?**

An individual can give a patient advocate the power to make any care, custody and medical decisions the individual herself or himself could make.

**Can an individual give a patient advocate power to withhold or withdraw life-sustaining care?**

Yes. To do so, the individual must explicitly state in the document that she or he is giving the patient advocate that power. MCL 700.5509(1)(e).

**What treatments could a patient advocate withhold or withdraw if given this authority?**

Examples include resuscitation, antibiotics, respirator care and tube feeding. A patient advocate could also opt for hospice care. MCL 5509(1)(f).

**Can a patient advocate determine which relatives can visit a resident or talk with a resident by telephone?**

No. A resident has the right to speak on the telephone and to have visitors of his or her choice.

**What is the duty of the patient advocate?**

A patient advocate has a duty to take reasonable steps to follow the desires and instructions of the individual, whether expressed in the document or orally in the past. MCL 700.5509(b).

**What if the first patient advocate cannot be found?**

The health care provider can call upon the successor patient advocate.

**What happens if an individual regains the ability to participate in medical treatment decisions?**

If an individual regains the ability to participate in medical treatment decisions, the authority of the patient advocate is suspended for as long as the individual remains able to participate. MCL 700.5509(2).

**Who determines an individual has regained the ability to participate in medical treatment decisions?**

The law is silent on this issue. One might assume the attending physician can make this determination.

**What happens if the individual again loses the ability to participate in medical treatment decisions?**

The determination an individual has once again become unable to participate in medical treatment must be made by two physicians or a physician and psychologist. MCL 700.5509(2)

**Is there any time limit after which a durable power of attorney is not valid?**

No. The only exception is if the document, itself, states a time limit.

**How often must the physicians or physician and psychologist review their determination?**

If the individual has been determined to be unable to participate in treatment decisions, the attending physician and second physician or psychologist are to review the determination at least once a year. MCL 700.5508(1).

**Can an individual revoke a durable power of attorney for health care?**

Yes.

**Does a revocation need to be in writing?**

**No.**

**Can an individual revoke a designation even after two physicians have determined that she or he is unable to participate in treatment decisions?**

**Yes.**

The law reads, "... even if the individual is unable to participate in medical treatment decisions, a patient may revoke a patient advocate designation at any time and in any manner by which he or she is able to communicate an intent to revoke" it. MCL 700.5510

**Can an individual partially revoke a durable power of attorney for health care?**

In effect, yes. Even if an individual is unable to participate in medical treatment decisions, she or he can express a desire to receive specific life - extending procedures, and those wishes are binding on the patient advocate. MCL 700.5511(1)

**What is a nursing home's obligation if a resident revokes a durable power of attorney for health care?**

If a nursing home administrator or staff member witnesses a revocation that is not in writing, that person must describe the circumstances in writing, and sign it. MCL 700.5510(1)(d).

The nursing home or physician must then note the revocation in the resident's medical records and bedside chart, and attempt to contact the patient advocate. MCL 700.5501(1)(d).

**Can a resident sign a new durable power of attorney after revoking one?**

Yes, if the resident is of “sound mind.”

An individual might be unable to participate in treatment decisions, but still be able to understand giving another person authority to make those decisions.

**What if a resident has more than one document?**

The most recent, validly signed document should be followed if there is any inconsistency between the two documents. MCL 700.5510(1)(e).

**Does a patient advocate have any authority after the death of the individual?**

Yes, but only to the extent the durable power of attorney for health care empowers the patient advocate to make an organ or body donation. MCL 700.5510(1)(d).

**What if dispute arises concerning a durable power of attorney for health care?**

The following disputes can be resolved through petition to the probate court:

- 1) Whether or not an individual is able to participate in medical treatment decisions. MCL 700.5508(2).
- 2) Whether or not an individual has revoked a durable power of attorney for health care. MCL 700.5510(1)(d)
- 3) Whether or not the patient advocate is acting consistent with the individual’s wishes and otherwise consistent with the individual’s best interests. MCL 700.5511(5).

**Does a nursing home have an obligation to honor a durable power of attorney for health care?**

**Yes.**

If a durable power of attorney for health care is properly signed and witnessed, if a proper determination has been made the resident is unable to participate in medical treatment decisions, if the patient advocate is acting in the resident's best interest, and if the directions of the patient advocate are within sound medical practice, a nursing home is obligated to follow those directions. MCL 700.5511(3).

**How will a surveyor evaluate compliance with this obligation?**

When a surveyor does a record review, he or she must determine "whether any treatments or interventions have been ordered (e.g., unplanned hospitalizations or placement of a feeding tube) that are inconsistent with the resident's documented acceptance or refusal of treatment or with any advance directive." CMS Guidance to Surveyors.

To comply with 42 CFR 483.10(b)(4) and (8), the facility must have "monitored the care and services given to the resident to ensure they are consistent with the resident's documented choices and goals." CMS Guidance to Surveyors.

**Can a nursing home or a physician be successfully sued for following the instructions of a patient advocate?**

If a health care provider reasonably believes the patient advocate has authority to make a decision, the health care provider has the same liability as if the individual had made the decision herself or himself. MCL 700.5511(2).

**What else does law require of nursing homes?**

A nursing home has an obligation to provide for "education of staff and the community on issues concerning advance directives." 42 USC 1395cc(f)(1)(E); 42 USC 1396a(w)(1)(E).

**Can the State Long Term Ombudsman Program assist nursing homes in training nursing home staff?**

**Yes.** The SLTCOP will consider requests to provide written materials, to participate in in-service training, and to address larger groups at conferences.

**Are there advance directives other than a durable power of attorney for health care?**

**Yes.** One type is a “living will.” In a living will, an individual states her or his wishes for care if terminally ill and not able to participate in treatment decisions.

Although 47 states have laws making living wills legally binding, Michigan does not have such a law.

**Can an individual still have a living will?**

**Yes.** The document can provide good evidence of the wishes of an individual. This may be particularly important for an individual who has outlived closed friends and relatives, and has no one to appoint as a patient advocate.

**What is an “advance directive for mental health care?”**

An individual can sign a durable power of attorney for health care that is limited to mental health treatment decisions. There are provisions in the law that are different for this type of advance directive.

**What these differences?**

In an advance directive for mental health care, the determination of inability to participate in mental health decisions must be made by a physician and a mental health professional. MCL 700.5515(2). The individual can choose the physician or mental health professional, or both.

The individual can provide for a 30-day “cooling-off” period, whereby the patient advocate retains authority to make decisions for 30 days after a revocation. MCL 700.5515(d).

A mental health professional need not comply with a provision of the document if the life of the individual or another person is in danger. MCL 700.5511(4)(e).

### **Are there other differences?**

An individual may wish to be quite specific in her or his mental health advance directive. She or he might specify the hospital to which she or he wants to go, indicate a choice of treating psychiatrist, and list effective medications and dosage.

### **Can an individual include wishes for mental health care within a more general durable power of attorney for health care?**

Yes, if the individual so chooses.

### **Can individual have both a mental health advance directive and a general durable power of attorney for health care?**

Yes. The individual can choose one person to be patient advocate for mental health issues and a different person to be patient advocate for all other medical decisions.

### **Where can someone obtain further information?**

A booklet entitled, *Advance Directive For Mental Health Care*, with questions-and-answers and a fill-in-the-blanks forms is available online in English, Spanish and Arabic:

[https://www.michigan.gov/mdch/0,4612,7-132-2941\\_4868\\_41752---,00.html](https://www.michigan.gov/mdch/0,4612,7-132-2941_4868_41752---,00.html)



**What is a “do-not-resuscitation declaration?”**

An individual can sign a standard form stating that if breathing and heartbeat stop, she or he wants no efforts made at resuscitation.

This document is intended for individuals living at home or assisted living. It is **not** applicable to individuals while in a nursing home or hospital.

**Is a do-not-resuscitate declaration the same as a “do-not-resuscitate order?”**

**No.** A do-not-resuscitate order is a notation in the medical chart of a nursing home resident or hospital patient.

The notation is made by a physician at the request of a resident, a hospital patient, a patient advocate (if the patient advocate has been given authority to withhold life-sustaining treatment), or other person with legal authority.

## **Part 2**

### **Family Decision-Making**

#### **What is a general family consent law?**

A general family consent law provides that if an individual is not able to participate in a medical treatment decisions, and does not have a patient advocate or guardian, a family member can make the decision for the individual.

#### **Which family member can make the decision?**

A general family consent statute sets forth a priority for family members; first, the spouse; second an adult child or children; third, parents; fourth, siblings.

#### **Does Michigan have a general family consent statute?**

**No**, Michigan, is not among the states that have such a law.

#### **Has a general family consent statute been considered by the Michigan legislature?**

**Yes**. The first time was in 1992, House Bill 5553, introduced by Rep. Perry Bullard and 20 co-sponsors.

A revised version was introduced in 1997 as Senate Bill 671. Senator Chris Dingell and five co-sponsors introduced the bill. Neither bill became law.

**Will a general family consent statute be re-considered by the Michigan legislature?**

It is possible a bill will be introduced at some point in the future. Nursing homes and other health care providers would have opportunity to comment on the bill as it was being considered in the legislative process.

**Are there any laws in Michigan that empower family members to make medical treatment decisions?**

Not all providers and advocates agree on an answer to that question. The position of the State Long Term Care Ombudsman Program is there are two relevant laws.

**What is the first law?**

The Michigan Social Welfare Act provides, in part,

If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given. MCL 400.66h (The entire section of the law is Appendix B.)

**How is this law relevant?**

Michigan's Medicaid provisions are set forth in the Social Welfare Act. The provision cited above thus applies to nursing home residents and others enrolled in Medicaid, we believe.

**Which family member has priority under this statute?**

The term "nearest relative" is not defined.

**Does the power to consent to treatment for a resident mean a family member can refuse treatment?**

Certainly, the family member has the right to withhold consent.

If the nursing home believes the family member is not acting in the best interests of the resident, the nursing home can petition the probate court for appointment of a guardian.

**How does the nursing home determine an individual is not of sound mind or not in a condition to make decisions?**

The statute provides no guidance.

A mini-mental exam is wholly inadequate. And the test is not whether the resident agrees with the physician or family.

**What, then is best?**

The best approach may be to rely on the opinion of the attending physician and one other physician or psychologist, who would document their determination in the resident's medical record. This parallels the determination under a durable power of attorney for health care.

It is critically important that a nursing home not turn to a family member if the resident is still able to participate in the treatment decision.

**What is the second law?**

The Michigan Dignified Death Act, MCL 333.5652 *et seq.*, sets forth certain responsibilities for a physician who diagnoses an individual as terminally ill.

**When did the law go into effect?**

The law went into effect in 1997. The entire Act is Appendix C.

### **What is a major responsibility of the physician under the law?**

If the physician is recommending treatment, the physician must provide information to the patient on the recommended course of treatment and alternatives to that treatment. MCL 333.5654.

### **What other information must the physician provide?**

If the physician is recommending treatment, the physician must provide information to the patient that she or he has the right to -

- Make “an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment”
- Choose palliative care, including hospice care
- Choose “adequate and appropriate pain and symptom management.”

MCL 333.5655.

### **What if the patient is unable to give consent?**

The law provides that the same information described above be provided to the patient’s *patient advocate* or the *patient surrogate*.

### **What is a patient advocate?**

A patient advocate is a person appointed by an individual to make medical decisions if the individual cannot participate. The appointment is made through a *durable power of attorney for health care*. MCL 700.5506 *et seq.*

### **How does this law define patient surrogate?**

For an adult, a “patient surrogate means ... a member of the immediate family, the next of kin, or the legal guardian. MCL 333.5653(g).

**Can an immediate family member or next of kin can make decisions to consent to, refuse authorization for, or withdraw medical treatment?**

There is certainly implication in this law that if an individual is terminally ill and unable to give informed consent, and does not have a guardian or patient advocate, that a family member can make those decisions.

**Is that how the law is interpreted by the Michigan Department of Community Health?**

**Yes.** A brochure entitled, *Michigan Dignified Death Act*, published by the Michigan Department of Community Health in July, 2003, states -

If you do not name an advocate, your doctor may let a patient surrogate make decisions for you. A court can also name a surrogate. A surrogate may be member of your immediate family or next of kin."

**How does a nursing home determine an individual is unable to give informed consent?**

As with the Social Welfare Act provision, the best course is likely to have that decision made by the attending physician and one other physician or psychologist, who would put their determination in the resident's medical record.

**Which family members have priority?**

The law does not address this. One can presume immediately family members have priority over other relatives.

If the spouse and children of the resident agree on a course of treatment, priority is not an issue.

### **What if immediate family members disagree?**

If there is conflict that cannot be resolved informally, the nursing home has two options.

Each county has a community dispute resolution center. At minimal cost, family members can agree to *mediation*. The mediator has no power to make decisions, only to help family members in conflict explore whether agreement can be reached.

If all else fails, the nursing home has the option of going to probate court and petitioning for guardianship.

### **What if the resident is not terminally ill and not enrolled in Medicaid?**

In such case, there is no statutory authority for a nursing home to rely on a family member to make decisions for a resident who cannot participate in that decision.

### **Can a nursing home still turn to a family member to make decisions?**

There are customs whereby a family member authorizes treatment in circumstances when an individual cannot make decisions for herself or himself. These customs are likely followed very often in outpatient, nursing home and hospital settings.

### **How can a nursing home determine if it can rely on a family member to authorize treatment?**

This is an issue of risk-management, best addressed by counsel for the nursing home.

### **What are the risks?**

The risks are potential lawsuits from other family members, and citations from the Michigan Department of Licensing and Regulatory Affairs. The risk of lawsuit is minimal if immediate family members agree on a course of treatment

## Part 3

# Guardianship

### **Is there one guardianship system for all adults?**

**No.** Provisions in the Estates and Individuals Code apply to all adults except adults with an alleged developmental disability. MCL 700.5301 *et seq.*

Provisions in the Mental Health Code apply only to adults with an alleged developmental disability. MCL 330.1600, *et seq.* The definition of “developmental disability” is Appendix C.

### **Are the provisions of the two laws the same?**

No. Although both types of guardianship are handled by the probate court, there are significant difference in procedure and terminology.

### **What are some of the differences?**

A proceeding under the Mental Health Code requires a psychosocial evaluation known as a “612 report.” All respondents have a lawyer appointed to represent them. A partial guardianship lasts for a maximum of 5 years unless a new proceeding is initiated.

Information in this policy statement focuses on guardianships brought under the Estates and Individuals Code.



### **What is a *guardian*?**

A guardian is a person or company appointed by a probate court to make decisions for an individual if there is clear and convincing evidence the individual is unable to make informed decisions about her or his care, **and** that guardianship is necessary. MCL 700.5306(1).

### **What is an *informed decision*?**

The term is not defined in the law. Generally, if an individual understands the choices she or he can make, and understands the risks of each choice, she or is making an informed decision.

Prior to 1989, the law referred to an inability to make “responsible decisions.” The term was changed in the law because guardianship is **not** appropriate merely because family or health care provider believe an individual is not making the best or safest decision.

### **How many adults in Michigan have a guardian?**

According to statistics published by the State Court Administrative Office, 53,882 adults had a guardian at the end of 2011. It is not known how many of these individuals reside in nursing homes.

### **What is the difference between a guardian and a *conservator*?**

A conservator is a person appointed by a probate court for an individual who cannot manage his or her money or property effectively. MCL 700.5401(3).

An individual can have a guardian, or a conservator or both. The guardian and conservator can be the same person, or different persons, depending on circumstances.

### **Can a court give a guardian power to handle an individual’s money if a conservator is not appointed?**

**Yes.** MCL 700.5314(d)(ii).

**If an individual has a durable power of attorney for health care, is guardianship necessary?**

**Rarely.** If a patient advocate under a durable power of attorney for health care is performing her or his duties, a court **cannot** give a guardian power to make medical treatment decisions. MCL 700.5306(2).

**What if a court appoints a guardian because the court is unaware a durable power of attorney for health care exists?**

In such circumstances, the patient advocate and not the guardian has authority to make medical decisions. MCL 700.5306(5).

**Does every resident who does not have a patient advocate need a guardian?**

**No.** This is a long-standing and common misunderstanding.

A nursing home should never be cited because a resident who is able to participate in medical decisions has neither a patient advocate nor a guardian.

**Who can apply for guardianship?**

Anyone interested in the welfare of the individual can petition for guardianship, if the petitioner believes guardianship is appropriate. MCL 700.5303(1).

**What happens upon a petition for guardian being filed with the court?**

Court staff set a date for a court hearing. MCL 700.5303(3). The time between petition and hearing can be two weeks or more, depending on the court's caseload.

**Can a judge appoint a guardian before a court hearing is held and the respondent receives?**

**No, never.**

**What else happens upon a petition being filed?**

Court staff will send a *guardian ad litem* to the nursing home to talk with the resident before the hearing date. MCL 700.5303(3). Under the Mental Health Code, the court immediately appoints a lawyer for the respondent.

**Does the guardian ad litem have any power to make decisions for the resident?**

**No.**

**What will the guardian ad litem talk to the resident about?**

The guardian ad litem will explain guardianship, rights the individual has in the process, and ask if the resident objects to guardianship or to the individual seeking guardianship. MCL 700.5305.

**Must the guardian ad litem provide written material to the resident?**

**Yes.** Under a law passed in 2012, the guardian ad litem, must hand the respondent written information explaining the rights the individual has. MCL 5306a(2). The type of information the guardian ad litem must convey is shown in the pamphlet, *Your Rights in the Guardianship Process*, Appendix E.

A guardian has long had the obligation to orally explain these rights to the respondent. MCL 700.5305.

**What does the guardian ad litem do after speaking with the resident?**

The guardian ad litem will likely talk with the petitioner, may review the medical record, and may talk with staff.

### **What then?**

If the individual does not object to guardianship or to the individual seeking appointment as guardian, and does not request limits on the guardian's powers, the guardian ad litem will provide information and make recommendations to the judge.

The guardian ad litem will advise the judge whether there are alternatives to guardianship, whether guardianship is appropriate, what powers the guardian should have, who should serve as guardian, and whether mediation should be considered. MCL 700.5305(e).

### **What if the resident does not want a guardian?**

If the individual does not want a guardian, objects to the person nominated as guardian, wants limits on the guardian's powers, or requests a lawyer, the guardian ad litem reports this to the judge.

In any of these circumstances, the judge is obligated to appoint a lawyer to represent the individual. MCL 700.5305(3), (4). At that point, the role of the guardian ad litem ends. MCL 700.5305(5).

### **Does the individual have the right to attend the court hearing?**

**Yes.** MCL 5304(4).

The guardian ad litem should ask if the resident wants to be at the hearing, and if so, determine what accommodations the individual might need. These could include a wheelchair, an assistive listening device or an interpreter.

### **Does a nursing home have an obligation to transport a resident to court?**

**Yes.** If the resident is enrolled in Medicaid and wishes to attend the hearing but has no transportation, the nursing home has an obligation to arrange transport:

Where needed services are not covered by the Medicaid State plan, nursing facilities are still required to attempt to obtain these services. For example, if a resident requires transportation services that are not covered under a Medicaid state plan, the facility is required to arrange these services. This could be achieved, for example, through obtaining volunteer assistance.

The type of conditions to which the facility should respond with social services by staff or referral include, among several others:

- ***Presence of legal or financial problems***

State Operations Manual, Appendix PP: Guidance to Surveyors for Long Term Care Section Facilities, Interpretive Guidelines to 42 CFR 483.15(g)(1) (emphasis added)

**If the judge determines the individual meets the standards for appointment of a guardian, who has priority to serve?**

Assuming the individual does not already have a guardian appointed in another state, first priority is a person chosen or nominated by the individual, if that person is suitable and willing to serve. MCLA 700.5313(2). This has long been the law, but was underscored in legislation passed in 2012.

**What if the individual does not choose or has not nominated a person to serve?**

Second priority is a family member suitable and willing to serve. MCL 700.5313(3). Family disagreement about who should serve can be referred to mediation.

**In what circumstances can a court appoint a professional guardian?**

**Only** if the individual does not make a viable choice and there are no family members willing and able to serve is the judge permitted to appoint a professional guardian. MCL 700.5106(2).

**Are professional guardians licensed, certified or registered?**

**No.** There is no regulation of professional guardians. There have been very serious issues with a number of professional guardians, some of whom are responsible for hundreds of individuals.

**What role can a nursing home play concerning the appointment of professional guardians?**

A nursing home should never nominate a professional guardian to serve unless the home checks that the person, partnership or agency has an unsullied reputation and can well handle the duties of a guardian.

**Can a judge appoint more than one person as guardian?**

**Yes.** The persons appointed are known as *co-guardians*.

**Can each guardian make a decision independently?**

The *letters of guardianship* issued by the court will ideally indicate whether the co-guardians must act together or can act independently.

**Do all guardians have the same powers?**

**No.** The law requires the judge to limit the powers of a guardian to the demonstrated needs of the individual. MCL 700.5306(2). The applicable section in the Mental Health Code mirrors EPIC. MCL 330.1602(1).

The law now requires a judge to specify the powers of a guardian in the court *order*, which will be echoed in the letters of guardianship. MCL 700.5314.

**If a resident has a guardian, should a nursing home keep a copy of the letters of guardianship in the medical file?**

**Yes.**

The letters of guardianship should show what powers the court has granted to the guardian. For example, a *limited guardian* might not have the power to make some medical treatment decisions.

**Does an individual maintain some rights under guardianship?**

**Yes.** An individual does not cease to be “his or her own person” because of guardianship.

Unless the letters of guardianship are to the contrary, a resident retains the right to have visitors of her or his choice, to use the telephone privately, to practice her or his religion, and to enjoy other rights set forth in federal and state law.

Many of those rights can be found at 42 USC sec. 1395i-3(c); 42 USC sec. 1396r(c); and MCL 333.20201.

**What about an individual with a guardian under the Mental Health Code?**

Under the Mental Health, Code an individual with a partial guardian “retains all legal and civil rights” except those the court specifically grants to the partial guardian or designates as legal disabilities. MCL 330.1620(2).

**What are some general responsibilities of a guardian?**

A guardian is required to visit the individual at least every three months, and, if communication is possible, to talk with the individual before making major decisions. MCL 700.5314.

A guardian is required to make decisions in the individual’s best interests, and to arrange appropriate medical and social services to restore the individual to the best possible physical and mental well-being. MCL 700.5314.

The provision in the Mental Health Code is MCL 330.1602.

**Are there other general responsibilities?**

**Yes.** A guardian has the responsibility to see that rights of the resident to dignity and good care are respected by a nursing home. Federal law provides guardians have the right to assert the rights of residents. 42 USC sec, 1395i-3(c)(1)(C); 42 USC sec.1396r(c)(1)(C).

A guardian can call the **Long Term Care Ombudsman Program** to assist her or him in effecting this goal. The toll-free telephone number is **1-(866) 485-9393**.

**What are a guardian's general responsibilities to the probate court?**

A guardian also has a duty to report to the court once a year concerning the condition of the individual, and to account to the court for any money in the guardian's control. MCL 700.5314(e).

The guardian also has a responsibility to inform the court of a change in her or his residence, and a change in the individual's residence. MCL 700.5314(a).

**Is there a time limit on guardianship?**

Under the Estates and Individuals Code, there is no time limit unless a termination date is included in the court order.

Under the Mental Health Code, a *partial guardianship* can last no more than 5 years. At that point a new petition for guardianship must be brought, if appropriate. MCL 330.1626.

**Can a nursing home pay a guardian to have an individual reside in its nursing home?**

**No.** Such payments constitute a felony, punishable by 4 years in prison, a \$30,000 fine, or both. MCL 333.21792(1).



**Can a nursing home request a guardian sign a nursing home admissions contract?**

**Yes.** Under the Estates and Individuals Code, if the guardian has authority to determine where an individual lives, she or he can sign the admissions contract. MCL 700.5314(a), (d)(ii).

**In signing the contract, to what is the guardian agreeing?**

The guardian is agreeing to use the individual's funds the guardian controls to pay the nursing home bill.

The guardian is not agreeing to be a guarantor using her or his own funds. Requiring that would violate both state and federal law:

With respect to admissions practices, a nursing home must ... (ii) not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in the facility. 42 USC sec.1396r(c)(5)(A).

**Does a guardian under the Mental Health Code have the same power to sign an admissions contract?**

**No.** A guardian for an individual with a developmental disability must request explicit court authority in order to put the individual in a facility. MCL 330.1623.

**Can a guardian complete and sign an application for Medicaid?**

**Yes.** Form DHS -1171, page S.

A guardian has a responsibility to submit an application for a resident who is, or will soon be, eligible for Medicaid.

**Can a guardian move a resident to another nursing home?**

Yes, if the guardian has authority to determine where the individual resides. The guardian should consider the trauma such a transfer could cause the individual.

**Does the nursing home have any obligation if the guardian decides to move the resident?**

**Yes.**

A nursing home must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. 42 USC sec. 1396r(c)(2)(C)

**Does a guardian have access to the resident's medical records?**

**Yes,** if the guardian's powers include authority to make medical decisions.

**Can a nursing home give a professional guardian access to the records of residents who do not have a guardian?**

**No.** This is a serious violation of a resident's rights under federal and state law. 42CFR Parts 160 and 164; 42 USC 1396r(c)(1)(A)(iii); MCL 333.20175(1); MCL 333.20201(2)(b).

**Does a guardian have authority to prevent relatives from visiting a resident?**

**No,** except if a court order explicitly excludes someone. Otherwise,

A nursing home must ... permit immediate access to a resident, subject to the resident's right to deny or withdraw consent at any time, by immediate family or other relatives of the resident. 42 USC Sec. 1396r(c)(3)(B).

**Can a guardian with powers over medical treatment choose an attending physician and specialists for a resident?**

**Yes.**

**What is the general scope of a guardian's authority over medical decisions?**

Generally, a guardian "may give consent or approval that is necessary to enable the ward to receive medical or professional care, counsel, treatment, or service." MCL 700.5314(c).

This includes physical examinations, wound care, medications, surgery, dental care, eye care, physical therapy, occupational therapy and speech therapy among other treatments.

**Are there exceptions?**

**Yes.** For instance, a guardian cannot authorize electroconvulsive treatment (ECT) unless the guardian has explicit authority from the court to do so, and two psychiatrists deem it appropriate. MCL 330.1717.

**Can a guardian authorize psychotropic medication for a resident?**

**Yes.**

It is critical the guardian consult with the physician prescribing the medication about the dose, the intended effects and side effects of any medication. The guardian can refuse a suggested medication.

The more information the guardian has, the better. For instance, recent reports have discussed the danger of psychotropic medication intended to treat schizophrenia being prescribed for dementia.

**Can a guardian approve inpatient mental health treatment?**

A full guardian has the power to admit the resident as a *formal voluntary patient* if the resident "assents." MCL 330.1415. This term is not

defined in Michigan law. At the very least it means a guardian cannot admit an individual as a voluntary patient if the individual expresses an objection.

If the individual does object, the guardian must seek a *commitment order* from the probate court. MCL 330.1423 *et seq.*

### **What if an individual has neither a guardian nor a patient advocate?**

Despite any “behaviors” exhibited by a resident, a nursing home can not arrange for in-patient psychiatric treatment without authority from the resident, a legal representative of the resident, or a commitment proceeding.

### **Does a guardian have the right to authorize a do-not-resuscitate order in a resident’s chart?**

Judges differ in their view on whether a guardian has this power. The same is true for the power to withhold or withdraw any life-sustaining treatment, such as respirator, tube feeding, or antibiotics; and the power to authorize hospice care.

There are judges who make a forceful argument a guardian has these powers under the Michigan Dignified Death Act, if the resident is terminally ill.

### **Does it matter whether the guardian is a family member or a professional guardian?**

To some judges, family members have greater discretion in making end-of-life decisions.

### **What is the nursing home or the guardian is unsure of the guardian’s powers?**

A guardian has the right to return to court to seek specific authority from the judge to make a particular decision. A nursing home can request a guardian do so.

**Who provides information during the annual assessment of the resident?**

Residents should be the primary source of information for resident assessment items. Should the resident not be able to participate in the assessment, the resident's family, significant other, and guardian or legally authorized representative should be consulted.

Center for Medicare and Medicaid Services, *RAI Version 3.0 Manual*, page 3-4.

**Does this apply to Section Q, "Participation in Assessment and Goal-Setting?"**

**Yes.**

Residents should be asked about inviting family members, significant others, and/or guardian/legally authorized representative to participate, and if they desire that they be involved in the assessment process. *Ibid*, page Q-1.

Having a guardian "should not create a presumption that the resident is not able to comprehend and communicate their wishes." *Ibid*, page Q-5.

**What if an individual answers question Q-0500 in the affirmative?**

If an individual answers "yes" to the question, "Do you want to talk to someone about the possibility of leaving the facility and returning to live and receive services in the community?" the nursing home should start the process toward referral to a waiver agent.

**Can a guardian prevent the referral?**

CMS has answered that question informally:

A referral to the local contact agency should be made if the resident wishes, even if they have a legal guardian, durable power of attorney for health care or a legally authorized representative, in accordance with state law.

MDS 3.0 Section Q Implementation Questions and Answers, from Informing LTC Choice Conference and E-mails, September 22, 2010

**Can a guardian prevent a resident from moving to the community?**

If the guardian has power to determine where the individual lives, the guardian will need to approve a transition to the community.

**What information does a guardian need to evaluate the feasibility of a resident moving from the nursing home?**

A guardian should be fully informed of programs available to eligible individuals, such as home and community based waiver services, home help services, and aid and attendance benefits through the Veterans Administration.

**Where can a guardian obtain this information?**

A guardian can contact the local Area Agency on Aging, a local waiver agent, the county office of the Department of Human Services, and the Veterans Administration.

**Is there further information available about the duties of a guardian to the individual and to the court?**

Yes. The publication, *Handbook for Guardians of Adults, 10<sup>th</sup> edition, 2012* is available online.

[www.berriencounty.org/uploaded/trialcourt/guardians\\_handbook.pdf](http://www.berriencounty.org/uploaded/trialcourt/guardians_handbook.pdf)

**If the nursing home believes a guardian is not performing his or her duties, what can be done?**

If a guardian doesn't visit the resident, or return telephone calls from the nursing home, or pay the patient pay amount each month; if the guardian unduly restricts the rights of the resident or otherwise doesn't act in the resident's best interest, the nursing home can petition the probate court and request a new guardian be appointed.

The nursing home has this right whether the guardian is a family member or a professional.

**What court form would a nursing home use?**

The court form is called a *Petition for Modification / Termination of a Guardianship*. The form should be available from the probate court.

**What if the nursing home believes a guardian is abusing or exploiting a resident?**

The nursing home should immediately call **Adult Protective Services**, at **1-(855) 444-3911** and report the suspected activity. The nursing home should also file a report with the Bureau of Health Systems, and consider petitioning the probate court for appointment of a new guardian.

**Does a resident have the right to request the court modify or terminate the guardianship?**

**Yes.** The resident can always petition the court or write the judge a letter. Neither the guardian nor the nursing home can interfere in any way with this request. MCL 700.5310(2).

**Are there any court fees if the resident asks for a modification or termination of a guardianship?**

**No.**

### **Why might a resident request action from the probate court?**

The individual might have needed a guardian because of a stroke or closed head injury. She or he may have recovered sufficiently to want to make her or his own decisions.

### **Why else might a resident request action from the probate court?**

The individual might be unhappy with decisions of the guardian and want a different guardian or further limits on the guardian's powers.

For instance, if the resident wishes to move to the community but the guardian objects, the resident can go to court to request a modification of the guardianship.

### **Can a resident hire a lawyer to represent her or him in this process?**

**Yes.** An individual always has the right to hire a lawyer in seeking to modify or terminate a guardianship.

If the individual seeks a modification or termination but does not have a lawyer, the court must appoint a lawyer for her or him.

### **What happens upon the court receiving a petition or letter?**

The court will schedule a hearing and follow a process similar to that for an initial petition for guardianship. The individual has all the same rights in the process. MCL 700.5310(3), (4). Many of these rights are set forth in ***Your Rights in the Guardianship Process***, Appendix E.

### **How does a guardian get paid?**

If a resident is enrolled in Medicaid, the guardian can charge a maximum of \$60.00 per month. This amount is deducted from the resident's patient pay amount, and Medicaid pays the nursing home the additional \$60.00. Bridges Eligibility Manual (BEM) 546, Post-Eligibility Patient Pay Amounts, p. 7.



**Can a guardian use a resident's personal needs funds to pay her or himself?**

**No.**

**What if a resident is not enrolled in Medicaid?**

The guardian can fix her or his fees, which are subject to approval each year by the probate court. Michigan Court Rules 5.313(F).

**When do the powers of a guardian end?**

The powers of a guardian generally end upon the death of the resident. MCL 700.5308.

**What if a nursing home has questions about guardianship?**

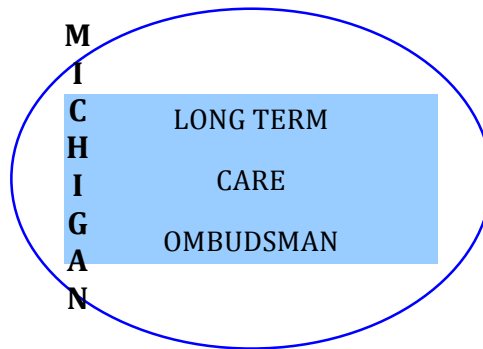
A nursing home can telephone the probate court.

If court staff are unable to answer a question, they may be able to refer the caller to an agency that can answer it.

## APPENDIX A

# Advance Directives

*Planning for Medical Care in the Event of  
Loss of Decision-Making Ability*



Bradley Geller

Michigan State Long Term Care  
Ombudsman Program  
1-866-485-9393



# Advance Directives

*Planning for Medical Care in the Event of  
Loss of Decision-Making Ability*

- Durable Power of Attorney for Health Care
- Living Will
- Do-Not-Resuscitate Declaration
- Declaration of Anatomical Gift



## Foreword

We all value the right to make decisions for ourselves. Whether we term this autonomy, liberty or independence, it is central to our concept of dignity.

One important area in which we exercise independence is in choosing the medical treatment we receive. Few would deny a competent adult has the right to consent to or refuse particular medical treatments or medically related services.

Unfortunately, due to illness or injury, we may not remain able to participate in treatment decisions. Such disability may be temporary or permanent.

No one likes to consider the possibility of becoming unable to make decisions. It is easy to put off thinking about that happening, and what treatment we would like in those circumstances.

As difficult as it is to confront these issues, by doing so we can help ensure our wishes are honored in the future.

Once you determine your wishes, the process of planning is relatively simple and inexpensive or free. This pamphlet contains information on advance directives to assist you. The fill-in-the-blanks forms at the end of the pamphlet are but one option should you choose to proceed.

# Questions and Answers About Advance Directives

## A. Introduction

### **What is an *advance directive*?**

An advance directive is a written document in which you specify what type of medical care you want in the future, or who you want to make decisions for you, should you lose the ability to make decisions for yourself.

### **Why is there a need for advance directives?**

Years ago, most individuals died in their own homes. Today, there is greater chance of dying in a hospital or nursing home.

Expanding technology has increased the treatment choices we face, and improved public health has increased life expectancy. Decisions may have to be made concerning our care at a time we can no longer communicate our wishes.

### **What are the advantages of having an advance directive?**

We each have our own values, wishes and goals. Having an advance directive provides you some assurance your personal wishes concerning medical and mental treatment will be honored at a time when you are not able to express them. Having an advance directive may also prevent the need for a guardianship imposed through the probate court.



**Must I have an advance directive?**

No. The decision to have an advance directive is purely voluntary. No family member, hospital or insurance company can force you to have one, or dictate what the document should say if you decide to write one. A hospital or nursing home or hospice organization cannot deny you service because you do or don't have an advance directive.

**Are there different types of advance directives?**

Yes. Three types are a durable power of attorney for health care, a living will, and a do-not-resuscitate declaration.

There is also a declaration of anatomical gift, to take effect when you die.

**Can I have more than one type of advance directive?**

Yes. You may choose to have any number of advance directives, or to have none at all.

**B. Durable Power of Attorney For Health Care****What is a *durable power of attorney for health care*?**

A durable power of attorney for health care, also known as a health care proxy or a patient advocate designation, is a document in which you appoint another individual to make medical treatment and related personal care decisions for you.

You can, in addition, choose to give your patient advocate power to make decisions concerning mental health care you may need.

Finally, you can empower your patient advocate to donate specific organs or your entire body upon your death.

**Is a durable power of attorney for health care legally binding?**

Yes.

**Who is eligible to have a durable power of attorney for health care?**

You must be at least 18 years old, and you must understand you are giving another person power to make certain decisions for you should you become unable to make them.

**What is the person to whom I give decision-making power called?**

That person is known as your *patient advocate*.

**When can the patient advocate act in my behalf?**

Your patient advocate can make decisions for you only when you become unable to participate in medical treatment decisions yourself. Until that time, you make your own decisions directly.

If you choose to give your patient advocate power to make decisions about mental health treatment, your patient advocate can only act if you cannot give informed consent to mental health treatment.

**How might I become unable to participate in medical or mental health decisions?**

You might have a temporary loss of ability to make or communicate decisions if, for example, you had a stroke or were knocked unconscious in a car accident. You might suffer permanent loss through a degenerative condition, such as dementia.

You might become unable to make mental health decisions if a condition such as severe depression or schizophrenia affected your mood or thought process.

**Who determines I am no longer able to participate in these decisions?**

The doctor responsible for your care and one other doctor or psychologist who examines you will make that determination in the case of medical decisions.

After examining you, a doctor and a mental health professional (physician, psychologist, registered nurse or masters-level social worker) must each make the determination in respect to mental health treatment. You may in the document choose the doctor and mental health professional you wish to make this determination.

**What if my religious beliefs prohibit an examination by a doctor?**

You should state in your durable power of attorney document your religious beliefs prohibit an examination by a doctor, and how you want it determined you are unable to participate in health care decisions.

### **What powers can I give a patient advocate?**

You can give a patient advocate power to make those personal care decisions you normally make for yourself. For example, you can give your patient advocate power to consent to or refuse medical treatment for you; arrange for mental health treatment, home health care or adult day care; or admit you to a hospital, nursing home or home for the aged.

You can also authorize your patient advocate to make a gift of your organs or body, to be effective upon your death.

### **Will my patient advocate have power to handle my financial affairs?**

You can give your patient advocate power to arrange for medical and personal care services, and to pay for those services using your funds. Your patient advocate will not have general power to handle all your property and finances.

If you wish another person to handle all your property and financial affairs should you become incapacitated, you could seek a lawyer's help to draft a *durable power of attorney for finances* or a *living trust*.

### **Can I give my patient advocate the right to withhold or withdraw treatment that would allow me to die?**

Yes, but you must express in a clear and convincing manner the patient advocate is authorized to make such decisions, and you must acknowledge these decisions could or would allow your death.

**Can I authorize my patient advocate to decide to withhold or withdraw food and water administered through tubes?**

Yes. If you want to give your patient advocate this authority, describe in the document the specific circumstances in which he or she can act - terminal illness, and permanent unconsciousness, for example.

**Do I have the right in the document to express other wishes?**

Yes. You might, for example express your wishes concerning other types of care you want during terminal illness. You could also express a desire not to be placed in a nursing home and a desire to die at home. Your patient advocate has a duty to try to follow your wishes.

**What are my options about mental health care?**

First, you have a choice whether or not to give your patient advocate any powers concerning mental health care.

If you choose to give your patient advocate powers concerning mental health care, you should specify clearly which powers he or she can exercise. Some powers to consider are outpatient treatment, hospitalization, administration of psychotropic medication, and electro-convulsive therapy (ECT).

You can also provide greater detail - what hospital you prefer and what medications you want or don't want, for instance.

**What are my options concerning organ donation?**

You can choose whether or not to give your patient advocate this power.

If you wish your patient advocate to have this power, you can specify which organs you want donated, or whether your whole body is to be donated. You can specify where or to whom you wish your organs donated.

You can also complete the separate form in this booklet, *Declaration of Anatomical Gift*. If you state your wishes both in the durable power of attorney and in the declaration of anatomical gift, make sure your wishes are the same in both documents.

### **Is it important to express my specific wishes in an advance directive?**

Your wishes cannot be followed if no one is aware of them. It can also be a burden for your advocate to make a decision for you without guidance. If you have specific desires, make these clear to your patient advocate in talking to him or her. Also consider including these wishes in the document.

### **What is the duty of my patient advocate?**

Your patient advocate has a duty to take reasonable steps to follow your desires and instructions, oral and written, expressed while you were able to participate.

### **Are there exceptions?**

A mental health professional can refuse to honor your wishes concerning a specific mental health treatment, location or professional, if there is a psychiatric emergency endangering your life or the life of another person.

**What if I don't express any specific wishes concerning medical treatment?**

Your patient advocate must then make decisions about medical care in what he or she sees as your best interest.

**Will a hospital or nursing home allow my patient advocate to review my records?**

Yes. A patient has the right to inspect and copy his or her hospital or nursing home records. Your patient advocate has the same right you have, once you are unable to participate in treatment decisions.

The form in this pamphlet allows a patient advocate to have access to your medical records at any time after you appoint him or her.

**Whom can I appoint as patient advocate?**

Any person age 18 or older is eligible; you can appoint your spouse, an adult child, a friend or other individual. You should choose someone you trust, who can handle the responsibility, and who is willing to serve.

It is a good idea to speak with the individual you propose to name as patient advocate before you complete and sign the document.

**Can I appoint a second person to serve as patient advocate in case the first person is unable to serve?**

Yes. It is a good idea to do so. There is no provision in law to allow more than one person to serve at the same time.

**What must I do to have a valid durable power of attorney for health care?**

The declaration must be in writing, signed by you, and witnessed by two adults.

There are restrictions on who can be a witness. You need witnesses who are not family members, not your doctor or proposed patient advocate, not an employee of a health facility or program where you are a patient or client.

**What does a patient advocate need to do before acting in my behalf?**

Before the patient advocate can act, he or she must sign an *acceptance*. This can be done at the time you complete the document or at a later time. The general language of the acceptance is set forth in law.

**Is there a required form for the document?**

No. You may choose to use the sample form in this pamphlet. There are a number of organizations that provide different, free forms.

Make sure in completing any document you type or print clearly.

**Must I use a fill-in-the-blanks form?**

No. You may write out your own document or have a lawyer draft a document for you. Using the form in this pamphlet is one option you have.



**Once I sign a durable power of attorney, may I change my mind?**

Yes. You may want to name a different patient advocate or alter the expression of your wishes. So long as you are of sound mind, you can sign a new document and then destroy the old one.

Regardless of your physical or mental condition, you can revoke or cancel the durable power of attorney by indicating in any way the document does not reflect your current wishes. Also, any spoken wish to have a specific life-extending treatment provided must be honored by a patient advocate, even if the wish contradicts a written directive.

**Are there different rules for mental health treatment?**

Yes. You can choose to waive your right to immediately revoke the durable power of attorney insofar as mental health treatment. In such case, your revocation is effective 30 days after you communicate your intent.

**Can my patient advocate refuse to act in my behalf?**

Yes. A patient advocate can revoke his or her Acceptance at any time. If so, your named successor would become patient advocate.

**What if there is a dispute when my patient advocate is making decisions for me?**

If an interested person disputes whether the patient advocate is acting in your best interests, or has the authority to act in your behalf, the interested person may petition the local probate court to resolve the dispute.

**What if I regain the ability to participate in medical or mental health decisions?**

The powers of your patient advocate are suspended during the time you are able to participate in decisions.

**What if I have no one to appoint as a patient advocate?**

You can still complete a living will or a do-not-resuscitate declaration, or both.

## **C. Living Will**

**What is a *living will*?**

A living will is a written document in which you inform doctors, family members and others what type of medical care you wish to receive should you become terminally ill or permanently unconscious.

**When will a living will take effect?**

A living will only takes effect after a doctor diagnoses you as terminally ill or permanently unconscious and determines you are unable to make or communicate decisions about your care.

## **How is a living will different from a durable power of attorney for health care?**

Although there can be overlap, the focus of a durable power is on *who* makes the decision; the focus of a living will is on *what* the decision should be.

A living will is limited to care during terminal illness or permanent unconsciousness, while a patient advocate may also have authority in circumstances of temporary disability.

A durable power of attorney for health care may be more flexible because your patient advocate can respond to unexpected circumstances, but a living will might be honored without the presence of a third person making the actual decision.

## **What might a living will say?**

You might express your wishes in general terms - "Do whatever is necessary for my comfort, but nothing further." Or, "I authorize all measures be taken to prolong my life."

You might instead state whether or not you wish specific medical interventions, such as a respirator, cardiopulmonary resuscitation (CPR), surgery, antibiotic medication, and blood transfusions. You could authorize experimental or non-traditional treatment.

Whichever approach you choose, you should express your wishes concerning food and water administered through tubes.

**Is a living will legally binding on health care providers?**

Although 47 states have statutes giving living wills legal force, Michigan has not passed such a law. However, based on a Michigan court decision, there is an argument living wills are binding in this state. No one, however, can provide absolute assurance your wishes will be honored.

**Is it worth having a living will?**

Yes. It is particularly important to have a living will if you don't have a durable power of attorney for health care. Your wishes cannot be honored if they are not known.

**Can I have both a durable power of attorney for health care and a living will?**

Yes. Your patient advocate can read your living will as an expression of your wishes. The living will might also be valuable if your patient advocate were unavailable when a decision needed to be made.

If you have both documents, make sure your wishes expressed in the documents are consistent.

**What are the requirements for a living will?**

Since there is no state law, there are no formal requirements. But it is strongly recommended the document be entitled, "Living Will;" be dated; signed by you; and signed by two witnesses who are not family members.

## **D. Do-Not-Resuscitate Declaration**

### **What is a *do-not-resuscitate declaration*?**

A do-not-resuscitate declaration (DNR declaration) is a written document in which you express your wish that if your breathing and heartbeat cease, you do not want anyone to attempt to resuscitate you.

### **For whom might such a document be particularly useful?**

A hospice patient who is home to die as peacefully as possible might wish to sign a DNR declaration.

### **Must I be terminally ill before signing a DNR declaration?**

No. For example, you may be in good health but still not want to be resuscitated should your heart and lungs fail.

### **Are such documents legally binding?**

Yes. A Michigan law provides these documents are valid in settings *other* than hospitals or nursing homes.

### **Are there standard forms for a DNR declaration?**

Yes. One form provides spaces for your doctor to sign, for you to sign, and for two witnesses to sign.

There is an alternate form for individuals who have religious beliefs against using doctors. Both forms are included in this booklet.

**Can my patient advocate sign the form instead of me?**

If your patient advocate has authority to act, he or she can sign the form instead of you.

**Is it necessary to have a DNR declaration if I have a durable power of attorney or living will?**

Perhaps. A durable power of attorney for health care and a living will only take effect when you are unable to participate in treatment decisions. If you are competent until the moment your heart and breathing stop, these documents will never take effect.

**What else can be done to prevent unwanted resuscitation?**

Ask your relatives in advance not to call 9-1-1 or the police if your breathing should stop. If you are under the care of a registered nurse, she or he has the authority to pronounce death.

**What about when I am in a nursing home or hospital?**

These facilities can set their own policies about resuscitation. Upon admission or afterward, you should express your wishes on this issue and ask that these wishes be reflected on your medical chart.

## **E. General Information**

### **In general, what should I do before completing an advance directive?**

Take your time; these are difficult decisions. Think about what treatment you would like under various circumstances in the future. Consider whom you might choose as your patient advocate, and make sure that person is willing to serve.

Discuss the issue with family members. Talk with your minister, rabbi, priest or other spiritual leader if you feel it would be helpful.

### **Should I also talk with my doctor?**

Yes! Bring the subject up with your doctor. Have a discussion about the benefits and burdens of various types of treatment. Express at least your general wishes and make sure the doctor is comfortable with carrying them out.

### **Are there issues to which I should give particular attention?**

Yes. Many people have strong feelings about the administration of food and water. If you become unable to swallow, food and water can be supplied by a tube down your throat, a tube surgically placed into your stomach, or intravenously. Consider in what circumstances, if any, you wish such procedures withheld or withdrawn.

### **What should I do with an advance directive after it is signed?**

Give the original durable power of attorney for health care to your patient advocate (or at least make sure she or he knows where it is). Give a photostatic copy to your doctor and keep a copy yourself. Let people know whom you have chosen as your patient advocate.

**Is there a statewide registry of advance directives?**

Yes. Individuals have the right to voluntarily have their advance directive on a registry, to which health providers will have access. There is no cost. The registry is operated by Gift of Life Michigan.

**What about a living will?**

Keep the original of a living will. Give a copy to family members who are close to you, a friend and your doctor. Keep a list of these people.

Your doctor should make the documents part of your medical record. If you enter a hospital or nursing home, try to see to it the facility has a copy.

**What about a do-not-resuscitate declaration?**

Always keep the order with you at home, and in plain sight. Give a copy to family members who might be with you at your death.

**After I sign one or more advance directives, should I continue to discuss the issue of my care?**

Yes. Sit down with the person you have chosen as patient advocate. The clearer picture he or she has of your wishes, the better. If some time has passed since you signed the document, discuss the issue again.

It is almost always a good idea for you to make relatives and friends aware of your desires.

**When I should review an advance directive?**

Since medical technology is constantly changing, and since there may be changes in your outlook, it would be wise to review your advance



directives once a year. Upon review, you can decide to keep the document, write a new one, or have no advance directive at all.

If you decide to keep the advance directive, you can put your initials and the date on the bottom.

### **What should I do if I write a new advance directive?**

Whether you choose a different person to be your patient advocate or alter your wishes for care, try to get back copies of the old document and destroy them. Distribute copies of the new document.

### **What are the responsibilities of health care facilities?**

Hospitals, nursing homes, hospice organizations and home health agencies receiving federal funds have an obligation to inform incoming patients of their rights to consent to or refuse treatment, including the right to have advance directives.

A health care facility cannot force you to sign an advance directive, or refuse to care for you if you have signed one.

If given an advance directive, the hospital or nursing home must make it part of your medical record.

### **Will the hospital or nursing home honor my advance directive?**

If the facility has no reason to question the document's authenticity, has evidence you are no longer able to participate in treatment decisions, and believes a patient advocate is acting consistent with your wishes, the facility would likely comply.

Be aware even though you have an advance directive, there is no absolute assurance your wishes will be honored.

**What if I decide not to have an advance directive?**

Decisions would still have to be made for you should you become unable to make them. Sometimes, a doctor or hospital will accept a spouse or child as an informal decision-maker. In some situations, a family member has authority by law. At other times a guardianship proceeding will have to be initiated in probate court.



## **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

I, \_\_\_\_\_, am of sound mind and I

(Print or type your full name)

voluntarily make this designation.

### **APPOINTMENT OF PATIENT ADVOCATE**

I designate \_\_\_\_\_, my \_\_\_\_\_

(Insert name of patient advocate)

(Spouse, child, friend ...)

living at \_\_\_\_\_

\_\_\_\_\_  
(Address and telephone number of patient advocate)

as my patient advocate. If my first choice cannot serve, I designate

\_\_\_\_\_, my \_\_\_\_\_,

(Name of successor patient advocate)

(Spouse, child, friend ... )

living at \_\_\_\_\_

\_\_\_\_\_  
(Address and telephone number of successor patient advocate)

to serve as my patient advocate.

My patient advocate or successor patient advocate must sign an acceptance before he or she can act. I have discussed this appointment with the individuals I have designated as patient advocate and successor patient advocate.

## **GENERAL POWERS**

My patient advocate or successor patient advocate shall have power to make care, custody and medical treatment decisions for me if my attending physician and another physician or licensed psychologist determine I am unable to participate in medical treatment decisions.

In making decisions, my patient advocate shall try to follow my previously expressed wishes, whether I have stated them orally, in a living will, or in this designation.

My patient advocate has authority to consent to or refuse treatment on my behalf, to arrange medical and personal services for me, including admission to a hospital or nursing care facility, and to pay for such services with my funds.

My patient advocate shall have access to any of my medical records to which I have a right, immediately upon signing an Acceptance. This shall serve as a release under the Health Insurance Portability and Accountability Act.

Immediately upon signing an Acceptance, my patient advocate shall have access to my birth certificate and other legal documents needed to apply for Medicare, Medicaid, and other government programs.

**POWER REGARDING LIFE-SUSTAINING TREATMENT**

(OPTIONAL)

I expressly authorize my patient advocate to make decisions to withhold or withdraw treatment which would allow me to die, and I acknowledge such decisions could or would allow my death. My patient advocate can sign a do-not-resuscitate declaration for me. My patient advocate can refuse food and water administered to me through tubes.

---

(Sign your name if you wish to give your patient advocate this authority)

## POWER REGARDING MENTAL HEALTH TREATMENT

(OPTIONAL)

I expressly authorize my patient advocate to make decisions concerning the following treatments if a physician and a mental health professional determine I cannot give informed consent for mental health care:

(check one or more consistent with your wishes)

☐ outpatient therapy

☐ my admission as a formal voluntary patient to a hospital to receive inpatient mental health services. I have the right to give three days notice of my intent to leave the hospital.

☐ my admission to a hospital to receive inpatient mental health services

☐ psychotropic medication

☐ electro-convulsive therapy (ECT)

☐ I give up my right to have a revocation effective immediately. If I revoke my designation, the revocation is effective 30 days from the date I communicate my intent to revoke. Even if I choose this option, I still have the right to give three days notice of my intent to leave a hospital if I am a formal voluntary patient.

---

(Sign your name if you wish to give your patient advocate this authority)

## POWER REGARDING ORGAN DONATION

(OPTIONAL)

I expressly authorize my patient advocate to make a gift of the following

(check any that reflect your wishes)

☐ any needed organs or body parts for the purposes of transplantation, therapy, medical research or education

☐ only the following listed organs or body parts for the purposes of transplantation, therapy, medical research or education:

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☐ my entire body for anatomical study

☐ (optional) I wish my gift to go to -

---

(Insert name of doctor, hospital, school, organ bank or individual)

The gift is effective upon my death. Unlike other powers I give to my patient advocate, this power remains after my death.

---

(Sign your name if you wish to give your patient advocate this authority)



## STATEMENT OF WISHES

My patient advocate has authority to make decisions in a wide variety of circumstances. In this document, I can express general wishes regarding conditions such as terminal illness, permanent unconsciousness, or other disability; specify particular types of treatment I do or not want in such circumstances; or I may state no wishes at all. If you have chosen to give your patient advocate power concerning mental health treatment, you can also include specific wishes about mental health treatment such as a preferred mental health professional, hospital or medication.

A. My wishes are as follows (you may attach more sheets of paper):

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**or**

B. I choose not to express any wishes in this document. This choice shall not be interpreted as limiting the power of my patient advocate to make any particular decision in any particular circumstance.

I may change my mind at any time by communicating in any manner that this designation does not reflect my wishes or that I do not want my patient advocate to have authority to make decisions for me.

It is my intent no one involved in my care shall be liable for honoring my wishes as expressed in this designation or for following the directions of my patient advocate.

Photocopies of this document can be relied upon as though they were originals.

### **SIGNATURE**

I sign this document voluntarily, and I understand its purpose.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

(Your signature)

---

---

(Your address and telephone number)

## STATEMENT REGARDING WITNESSES

I have chosen two adult witnesses who are not named in my will; who are not my spouse, parent, child, grandchild, brother or sister; who are not my physician or my patient advocate; who are not an employee of my life or health insurance company, an employee of a home for the aged where I reside, an employee of community mental health program providing me services or an employee at the health care facility where I am now.

## STATEMENT AND SIGNATURE OF WITNESSES

We sign below as witnesses. This declaration was signed in our presence. The declarant appears to be of sound mind, and to be making this designation voluntarily, without duress, fraud or undue influence.

_____	_____
(Print name)	(Signature of witness)

\_\_\_\_\_  
(Address)

_____	_____
(Print name)	(Signature of witness)

\_\_\_\_\_  
(Address)

## ACCEPTANCE BY PATIENT ADVOCATE

**(1) This designation shall not become effective** unless the patient is unable to participate in decisions regarding the patient's medical or mental health, as applicable. If this patient advocate designation includes the authority to make an anatomical gift as described in section 5506, the authority remains exercisable after the patient's death.

**(2) A patient advocate shall not exercise powers** concerning the patient's care, custody and medical or mental health treatment that the patient, if the patient were able to participate in the decision, could not have exercised in his or her own behalf.

**(3) This designation cannot be used** to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

**(4) A patient advocate may make a decision** to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

**(5) A patient advocate shall not receive compensation** for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.

**(6) A patient advocate shall act in accordance** with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical or mental health treatment decisions are presumed to be in the patient's best interests.

**(7) A patient may revoke his or her designation** at any time or in any manner sufficient to communicate an intent to revoke.

**(8) A patient may waive his or her right to revoke** the patient advocate designation as to the power to make mental health treatment decisions, and if such waiver is made, his or her ability to revoke as to certain treatment will be delayed for 30 days after the patient communicates his or her intent to revoke.

**(9) A patient advocate may revoke his or her acceptance** to the designation at any time and in any manner sufficient to communicate an intent to revoke.

**(10) A patient admitted to a health facility or agency has the rights** enumerated in Section 20201 of the Public Health Code, Act No. 368 of the Public Acts of 1978, Being Section 333.20201 of the Michigan Compiled Laws.

I, \_\_\_\_\_, understand the above

(Name of patient advocate)

conditions and I accept the designation as patient advocate or successor

patient advocate for \_\_\_\_\_, who signed a

(Name of patient)

durable power of attorney for health care on the following date:

\_\_\_\_\_.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_  
(Signature of patient advocate or successor patient advocate)



# Living Will

I, \_\_\_\_\_ am of sound mind,  
and I voluntarily make this declaration.

If I become terminally ill or permanently unconscious as determined by my doctor and at least one other doctor, and if I am unable to participate in decisions regarding my medical care, I intend this declaration to be honored as the expression of my legal right to authorize or refuse medical treatment.

My desires concerning medical treatment are -

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(attach additional sheets if wish)

My family, the medical facility, and any doctors, nurses and other medical personnel involved in my care shall have no civil or criminal liability for following my wishes as expressed in this declaration.

I may change my mind at any time by communicating in any manner that this declaration does not reflect my wishes.



Photostatic copies of this document, after it is signed and witnessed, shall have the same legal force as the original document.

I sign this document after careful consideration. I understand its meaning and I accept its consequences.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_

(Your signature)

\_\_\_\_\_  
(Your address)

#### **STATEMENT OF WITNESSES**

We sign below as witnesses. This declaration was signed in our presence. The declarant appears to be of sound mind, and to be making this designation voluntarily, without duress, fraud or undue influence.

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Signature of Witness)

\_\_\_\_\_  
(Address)

## **DO-NOT-RESUSCITATE DECLARATION**

I have discussed my health status with my physician,  
\_\_\_\_\_. I request that in the event my heart and  
breathing should stop, no person shall attempt to resuscitate me.

This order is effective until it is revoked by me.

Being of sound mind, I voluntarily execute this order, and I understand  
its full import.

\_\_\_\_\_  
(Declarant's signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Type or print declarant's full name)

\_\_\_\_\_  
(Signature of person who signed for declarant, if applicable)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Type or print full name)

\_\_\_\_\_  
(Physician's signature)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Type or print physician's full name)

## ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

---

(Witness signature)

---

(Date)

---

(Type or print witness's name)

---

(Witness signature)

---

(Date)

---

(Type or print witness's name)

**THIS FORM WAS PREPARED PURSUANT TO, AND IN COMPLIANCE WITH, THE  
MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT**

## **DO-NOT-RESUSCITATE DECLARATION**

I request that in the event my heart and breathing should stop, no person shall attempt to resuscitate me.

This order is effective until it is revoked by me.

Being of sound mind, I voluntarily execute this order, and I understand its full import.

---

(Declarant's signature)

---

(Date)

---

(Type or print declarant's full name)

---

(Signature of person who signed for declarant, if applicable)

---

(Date)

---

(Type or print full name)

## ATTESTATION OF WITNESSES

The individual who has executed this order appears to be of sound mind, and under no duress, fraud, or undue influence. Upon executing this order, the individual has (has not) received an identification bracelet.

_____	_____
(Witness signature)	(Date)

\_\_\_\_\_  
(Type or print witness's name)

_____	_____
(Witness signature)	(Date)

\_\_\_\_\_  
(Type or print witness's name)

**THIS FORM WAS PREPARED PURSUANT TO, AND IN COMPLIANCE WITH, THE  
MICHIGAN DO-NOT-RESUSCITATE PROCEDURE ACT**

# Declaration of Anatomical Gift

I, \_\_\_\_\_, am of sound mind, and I voluntarily make this declaration. In the hope I may help others, I make the following anatomical gift to take effect upon my death: (You may check any one box, or both boxes A and C)

☐ A. Any needed organs or body parts for the purposes of transplantation, therapy, medical research or education.

☐ B. Only the following listed organs or body parts for the purposes of transplantation, therapy, medical research or education: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

☐ C. My entire body for anatomical study.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_

(Your Signature)

\_\_\_\_\_  
(Address)

## OPTIONAL

I wish my gift to go to \_\_\_\_\_.

(Insert name of doctor, hospital, school, organ bank or individual)

I wish to have my body at my funeral: yes ☐

no ☐

## STATEMENT OF WITNESSES

This declaration was signed in our presence by the declarant or at his or her direction. We sign below as witnesses in the presence of the declarant.

_____	_____
(Print Name)	(Signature of Witness)

_____
(Address)

_____	_____
(Print Name)	(Signature of Witness)

_____
(Address)

## Appendix B

### Social Welfare Act (excerpt)

#### **400.66h Hospitalization; consent to surgical operation, medical treatment; first aid.**

Nothing in this act shall be construed as empowering any physician or surgeon, or any officer or representative of the state or county departments of social welfare, in carrying out the provisions of this act, to compel any person, either child or adult, to undergo a surgical operation, or to accept any form of medical treatment contrary to the wishes of said person. If the person for whom surgical or medical treatment is recommended is not of sound mind, or is not in a condition to make decisions for himself, the written consent of such person's nearest relative, or legally appointed guardian, or person standing in loco parentis, shall be secured before such medical or surgical treatment is given. This provision is not intended to prevent temporary first aid from being given in case of an accident or sudden acute illness where the consent of those concerned cannot be immediately obtained.

1957, Public Act 286 (emphasis added)





## **Appendix C**

### **Michigan Dignified Death Act**

#### **333.5651 Short title of part.**

This part shall be known and may be cited as the “Michigan dignified death act”.

#### **333.5652 Legislative findings; Michigan dignified death act.**

(1) The legislature finds all of the following:

(a) That patients face a unique set of circumstances and decisions once they have been diagnosed as having a reduced life expectancy due to advanced illness.

(b) That published studies indicate that patients with reduced life expectancy due to advanced illnesses fear that in end-of-life situations they could receive unwanted aggressive medical treatment.

(c) That patients with reduced life expectancy due to advanced illnesses are often unaware of their legal rights, particularly with regard to controlling end-of-life decisions.

(d) That the free flow of information among health care providers, patients, and patients' families can give patients and their families a sense of control over their lives, ease the stress involved in coping with a reduced life expectancy due to advanced illness, and provide needed guidance to all involved in determining the appropriate variety and degree of medical intervention to be used.

(e) That health care providers should be encouraged to initiate discussions with their patients regarding advance medical directives during initial consultations, annual examinations, and hospitalizations, at diagnosis of a chronic illness, and when a patient transfers from 1 health care setting to another.

(2) In affirmation of the tradition in this state recognizing the integrity of patients and their desire for a humane and dignified death, the Michigan legislature enacts the "Michigan dignified death act". In doing so, the legislature recognizes that a well-considered body of common law exists detailing the relationship between health care providers and their patients. This act is not intended to abrogate any part of that common law. This act is intended to increase awareness of the right of a patient who has a reduced life expectancy due to advanced illness to make decisions to receive, continue, discontinue, or refuse medical treatment. It is hoped that by doing so, the legislature will encourage better communication between patients with reduced life expectancy due to advanced illnesses and health care providers to ensure that the patient's final days are meaningful and dignified.

### **333.5653 Definitions.**

(1) As used in this part:

(a) "Advanced illness", except as otherwise provided in this subdivision, means a medical or surgical condition with significant functional impairment that is not reversible by curative therapies and that is anticipated to progress toward death despite attempts at curative therapies or modulation, the time course of which may or may not be determinable through reasonable medical prognostication. For purposes of section 5655(b) only, "advanced illness" has the same general meaning as "terminal illness" has in the medical community.

(b) "Health facility" means a health facility or agency licensed under article 17.

(c) "Hospice" means that term as defined in section 20106.

(d) "Medical treatment" means a treatment including, but not limited to, palliative care treatment, or a procedure, medication, surgery, a diagnostic test, or a hospice plan of care that may be ordered, provided, or withheld or withdrawn by a health professional or a health facility under generally accepted standards of medical practice and that is not prohibited by law.

(e) "Patient" means an individual who is under the care of a physician.

(f) "Patient advocate" means that term as described and used in sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515.

(g) "Patient surrogate" means the parent or legal guardian of a patient who is a minor or a member of the immediate family, the next of kin, or the legal

guardian of a patient who has a condition other than minority that prevents the patient from giving consent to medical treatment.

(h) "Physician" means that term as defined in section 17001 or 17501.

(2) Article 1 contains general definitions and principles of construction applicable to all articles in this code.

### **333.5654 Recommended medical treatment for advanced illness; duty of physician to inform orally; limitation or modification of disclosed information.**

(1) A physician who has diagnosed a patient as having a reduced life expectancy due to an advanced illness and is recommending medical treatment for the patient shall do all of the following:

(a) Orally inform the patient, the patient's patient surrogate, or, if the patient has designated a patient advocate and is unable to participate in medical treatment decisions, the patient advocate acting on behalf of the patient in accordance with sections 5506 to 5515 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506 to 700.5515, about the recommended medical treatment and about alternatives to the recommended medical treatment.

(b) Orally inform the patient, patient surrogate, or patient advocate about the advantages, disadvantages, and risks of the recommended medical treatment and of each alternative medical treatment described in subdivision (a) and about the procedures involved.

(2) A physician's duty to inform a patient, patient surrogate, or patient advocate under subsection (1) does not require the disclosure of information beyond that required by the applicable standard of practice.

(3) Subsection (1) does not limit or modify the information required to be disclosed under sections 5133(2) and 17013(1).

### **333.5655 Recommended medical treatment for advanced illness; duty of physician to inform orally and in writing; requirements.**

In addition to the requirements of section 5654, a physician who has diagnosed a patient as having a reduced life expectancy due to an advanced illness and is recommending medical treatment for the patient shall, both orally and in writing, inform the patient, the patient's patient surrogate, or,

if the patient has designated a patient advocate and is unable to participate in medical treatment decisions, the patient advocate, of all of the following:

(a) If the patient has not designated a patient advocate, that the patient has the option of designating a patient advocate to make medical treatment decisions for the patient in the event the patient is not able to participate in his or her medical treatment decisions because of his or her medical condition.

(b) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, has the right to make an informed decision regarding receiving, continuing, discontinuing, and refusing medical treatment for the patient's reduced life expectancy due to advanced illness.

(c) That the patient, or the patient's patient surrogate or patient advocate, acting on behalf of the patient, may choose palliative care treatment including, but not limited to, hospice care and pain management.

(d) That the patient or the patient's surrogate or patient advocate acting on behalf of the patient may choose adequate and appropriate pain and symptom management as a basic and essential element of medical treatment.

### **333.5656 Updated standardized written summary; development; publication; contents; availability to physicians.**

(1) By July 1, 2002, the department of community health shall develop and publish an updated standardized, written summary that contains all of the information required under section 5655.

(2) The department shall develop the updated standardized, written summary in consultation with appropriate professional and other organizations. The department shall draft the summary in nontechnical terms that a patient, patient surrogate, or patient advocate can easily understand.

(3) The department shall make the updated standardized, written summary described in subsection (1) available to physicians through the Michigan board of medicine and the Michigan board of osteopathic medicine and surgery created in article 15. The Michigan board of medicine and the Michigan board of osteopathic medicine and surgery shall notify in writing each physician subject to this part of the requirements of this part and the availability of the updated standardized, written summary within 10 days after the updated standardized, written summary is published.

**333.5657 Availability of form to patient, patient surrogate, or patient advocate; compliance with MCL 333.5656; placement of signed form in patient's medical record; signed form as bar to civil or administrative action.**

(1) If a physician gives a copy of the standardized, written summary developed and published before July 1, 2002 or a copy of the updated standardized, written summary made available under section 5656 to a patient with reduced life expectancy due to advanced illness, to the patient's patient surrogate, or to the patient advocate, the physician is in full compliance with the requirements of section 5655.

(2) A physician may make available to a patient with reduced life expectancy due to advanced illness, to the patient's patient surrogate, or to the patient advocate a form indicating that the patient, patient surrogate, or patient advocate has been given a copy of the standardized, written summary developed and published under section 5656 before July 1, 2002 or a copy of the updated standardized, written summary developed and published under section 5656 on or after July 1, 2002 and received the oral information required under section 5654. If a physician makes such a form available to a patient, to the patient's patient surrogate, or to the patient advocate, the physician shall request that the patient, patient's patient surrogate, or patient advocate sign the form and shall place a copy of the signed form in the patient's medical record.

(3) A patient, a patient's patient surrogate, or a patient advocate who signs a form under subsection (2) is barred from subsequently bringing a civil or administrative action against the physician for providing the information orally and in writing under section 5655 based on failure to obtain informed consent.

**333.5658 Prescription of controlled substance; immunity from administrative and civil liability.**

....

**333.5659 Life insurer, health insurer, or health care payment or benefits plan; prohibited acts.**

.....

### **333.5660 Scope of part; limitation.**

This part does not do the following:

- (a) Impair or supersede a legal right a parent, patient, patient advocate, legal guardian, or other individual may have to consent to or refuse medical treatment on behalf of another.
- (b) Create a presumption about the desire of a patient who has reduced life expectancy due to advanced illness to receive or refuse medical treatment, regardless of the ability of the patient to participate in medical treatment decisions.
- (c) Limit the ability of a court making a determination about a decision of a patient who has reduced life expectancy due to advanced illness to take into consideration all of the following state interests:
  - (i) The preservation of life.
  - (ii) The prevention of suicide.
  - (iii) The protection of innocent third parties.
  - (iv) The preservation of the integrity of the medical profession.
- (d) Condone, authorize, or approve suicide, assisted suicide, mercy killing, or euthanasia.

### **333.5661 Fraud resulting in death of patient; violation as felony; penalty.**

(1) An individual shall not, by fraud, cause or attempt to cause a patient, patient surrogate, or patient advocate to make a medical treatment decision that results in the death of the patient with the intent to benefit financially from the outcome of the medical treatment decision. As used in this subsection, “fraud” means a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, that deceives and is intended to deceive another so that he or she acts upon it to his or her legal injury.

(2) An individual who violates subsection (1) is guilty of a felony, punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

1996, Public Act 594, as amended (emphasis added)

## **Appendix D**

### **Mental Health Code (Excerpt)**

MCL sec. 330.1100a

(21) "Developmental disability" means either of the following:

(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

(i) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

(ii) Is manifested before the individual is 22 years old.

(iii) Is likely to continue indefinitely.

(iv) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

(A) Self-care.

(B) Receptive and expressive language.

(C) Learning.

(D) Mobility.

(E) Self-direction.

(F) Capacity for independent living.

(G) Economic self-sufficiency.

(v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.





## **Appendix E**

# **YOUR RIGHTS IN THE GUARDIANSHIP PROCESS**

**INFORMATION PRESENTED BY THE MICHIGAN STATE  
LONG TERM CARE OMBUDSMAN PROGRAM**

## **Introduction**

### **Why am I receiving this pamphlet?**

You are being provided this information because someone has asked the probate court to appoint a guardian for you, or because you already have a guardian.

You have a number of rights to help ensure you only have a guardian if you need one.

### **What is a guardian?**

A guardian is a person or company appointed by a probate court to make decisions for you if there is convincing evidence you are unable to make informed decisions for yourself.

A guardian can only be appointed if necessary to provide for your care.

### **What decisions can a guardian make for me?**

A judge can give a guardian power to decide where you live, to make medical treatment decisions for you, to arrange services and to decide how your money is spent.

### **Do I lose rights if a guardian is appointed?**

Yes. For instance, if a guardian is given power to decide where you live, you lose the right to make that decision for yourself.

## **Do all guardians have the same powers?**

No. For example, a judge could grant a guardian power to make medical decisions for you, but not the power to decide where you live or to handle your money.

## **What are some responsibilities of a guardian if one is appointed for me?**

Your guardian is required to visit you at least every three months, and to talk with you before making major decisions.

Your guardian is required to make decisions in your best interests, and to arrange appropriate medical, housing and social services so you can regain as much self-care as is possible.

## **The Guardianship Petition**

### **How is a guardian appointed?**

The first step is that someone interested in your welfare files a petition in probate court.

At the same time you are receiving this pamphlet, you are being given a copy of the petition.

### **What is the purpose of the petition?**

The petition sets forth information why the petitioner believes you need a guardian.

## **What happens upon a petition for guardianship being filed with the court?**

Court staff set a date for a court hearing. The hearing may be very soon or a few weeks away.

The judge cannot appoint a guardian for you without a hearing.

## **The Guardian Ad Litem**

### **What else happens upon a petition being filed?**

Court staff will send a person to your home to talk with you before the hearing date. This person, known as a guardian ad litem, is the person who handed you this pamphlet.

The guardian ad litem has no power to make decisions for you, only to collect information.

### **What will the guardian ad litem talk to me about?**

The guardian ad litem will explain guardianship and your rights in the process.

If you do not object to guardianship, the guardian ad litem will provide information to the judge whether guardianship is appropriate and about who should serve as guardian.

## **Your Rights**

### **Can I choose the person to be my guardian?**

Yes, you have this right. Tell the guardian ad litem of your choice.

### **Do I have the right to attend the court hearing?**

Yes, you always have the right to be at the hearing.

Tell the guardian ad litem if you want to attend the court hearing. Tell the guardian ad litem if you need transportation to get to the hearing, and if you need any help such as a wheelchair, a special hearing device or an interpreter in the courtroom.

### **What if I have signed a durable power of attorney for health care in the past?**

Make sure you make the guardian ad litem aware of the document. Give him or a copy of the document if you have one.

### **If I do not want a guardian, what do I do?**

It is very important you tell the guardian ad litem if you do not want a guardian, or if you do not want a particular person to serve as guardian, or if you want the guardian's powers limited in any way.

### **What will the guardian ad litem do then?**

By law, the guardian ad litem must report your wishes to the court, and court staff must appoint a lawyer to represent you. This will not cost you any money.

### **Hiring a Lawyer**

#### **Can I hire my own lawyer instead of having the court appoint a lawyer?**

Yes. You also always have the right to hire a lawyer.

#### **What is the role of my lawyer?**

Whether the lawyer is court appointed or chosen by you, your lawyer must strongly argue for your wishes, regardless of what anyone else thinks is best for you.

#### **Do I have the right to get a professional evaluation of my ability to make decisions?**

Yes. You can choose a doctor, psychologist, nurse or social worker to do the evaluation. If you cannot afford the cost of the evaluation, the court will pay for it.

## **The Court Hearing**

### **What is the purpose of the court hearing?**

The person who filed the petition must present evidence and prove that you cannot make informed decisions for yourself, and that guardianship is necessary to meet your needs.

### **What if I disagree with the evidence presented?**

You or your lawyer have a right to dispute any evidence presented, and you or your lawyer has a right to present witnesses and other evidence on your behalf.

If you have asked for a professional evaluation, you can decide whether to present the results to the judge.

### **Who decides whether I need a guardian?**

The judge will usually make the decision whether there is clear and convincing evidence you cannot make informed decisions over one or more areas of your life. The judge will also determine whether guardianship is necessary to meet your needs.

If you have exercised your right to have a jury trial, the jury will decide those questions.



### **Who decides what powers the guardian will have?**

The judge or jury will also determine what powers the guardian will have, based on your needs.

### **What if the judge or jury decides I need a guardian, but I disagree?**

You have a right to appeal the decision to the Circuit Court.

### **How do I know what powers my guardian has?**

The court order signed by the judge, and the letters of guardianship given to the guardian, must show the powers the guardian has.

You can ask court staff or the guardian for a copy of the letters of guardianship.

## **After a Guardian is Appointed**

### **If I have a guardian, do I lose all my rights?**

No. For example, generally you maintain the right to speak your mind, to practice your religion and to see family and friends of your choice.

**If a guardian is given authority to make medical treatment decisions for me, are there limits in the types of decisions the guardian can make?**

Yes. For instance, a guardian does not have authority to hospitalize you for mental health treatment unless you assent.

A guardian can only authorize electroconvulsive therapy (ECT) if your guardian is given that authority and two psychiatrists agree it is appropriate.

**Can a guardian have a do-not-resuscitate order put in my nursing home chart or hospital chart?**

The law does not adequately address the powers of a guardian concerning end-of-life care.

Judges disagree whether a guardian has the power to agree to a DNR order, or to withhold or withdraw treatment that is keeping you alive.

**How can I know whether my guardian has such power?**

It is best to ask the judge to specify in the court order and letters of guardianship whether the guardian has this power, and in what circumstances.

### **If I object to a guardian's decisions, what can I do?**

You can write a letter to the probate judge, or you can file a petition with the court. There is no cost. You can ask the judge to -

- End the guardianship, or
- Limit the guardian's powers, or
- Name another person as guardian.

### **Can I hire a lawyer to represent me?**

Yes. You do not lose that right just because you have a guardian.

If you do not hire a lawyer, request the judge appoint one for you. The judge is required to do so.

### **Will there be another court hearing?**

Yes. You have all the same rights you had during the first hearing.

### **What if I have questions about guardianship?**

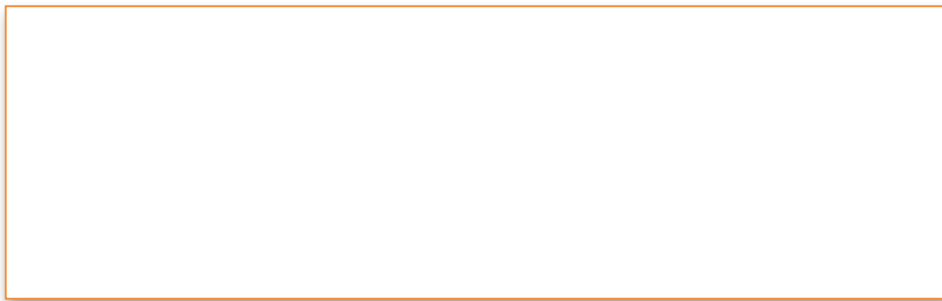
You can telephone the probate court.

Court staff can provide information such as rights you have under the law, the name of your guardian ad litem or lawyer, and the date of your court hearing.

**What if court staff are unable to answer my questions?**

If staff are unable to answer a question, they may be able to refer you to a person or agency that can answer it.

**What is the name and phone number of the probate court?**

A large empty rectangular box with an orange border, intended for handwritten text. A horizontal black line extends from the right side of the box.



Bradley Geller currently serves as an assistant state long term care ombudsman in Michigan. He began a career in law and aging in 1974.

In developing a legal services project for older adults in a three county area in 1978, he represented individuals facing guardianship. He wrote a client-oriented pamphlet on guardianship, which became a chapter in his 1982 book, *Changes and Choices Legal Rights of Older Adults*. State legislators have distributed more than 500,000 copies to constituents.

As counsel to the Michigan House Judiciary Committee, he drafted the Michigan Guardianship Reform Act of 1988 and designed project Joshua, detailing changes in court forms, court rules and jury instructions. He participated in drafting statutes creating the durable power of attorney for health care, the do-not-resuscitate procedures act, and the Michigan Statutory Will, while creating a legislative agenda for older adults.

As counsel to the Washtenaw County Probate Court for ten years, he managed the adult guardianship and conservator system, and initiated Project Dignity. The project's goals were the promotion of alternatives to full guardianship; the education of guardians, conservators and guardians ad litem; the use of mediation; and the creation of a volunteer guardianship program.

He has participated on the Michigan Probate Rules Committee, the Probate Forms Committee and the Michigan Law Revision Commission. He envisioned and was a member of the Michigan Supreme Court Task Force on Guardianship and Conservatorship.

Throughout the years, he has pursued legislative, investigative and educational efforts to improve the structure and functioning of the guardianship system.

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

IN THE MATTER OF  
  
THE ESTATE OF  
  
ANN F. McNIERNEY,  
  
AN ADJUDICATED  
  
INCAPACITATED PERSON.

SUPERIOR COURT OF NEW JERSEY  
  
CHANCERY DIVISION  
  
BERGEN COUNTY  
  
DOCKET No. BER-P-89-10  
  
CIVIL ACTION  
  
OPINION

**Argued: June 18, 2010**

**Decided: June 21, 2010**  
**Honorable Peter E. Doyne, A.J.S.C.**

Anne S. Burris, Esq. and Sergio S. Simoes, Esq. appearing on behalf of the plaintiffs, Mary Ellen Hannigan and Edward McNierney, Jr. (Lindabury, McCormick, Estabrook & Cooper, P.C.).

Patrick J. McNierney appearing pro se.

Robert J. Maloof, Esq. appearing as the court appointed attorney for Ann F. McNierney (Robert J. Maloof, L.L.C.).

Elizabeth Speidel, Esq. appearing on behalf of the State of New Jersey Department of the Public Advocate, Ombudsman for the Institutionalized Elderly (State of New Jersey).

**Introduction**

Before the court is a request by the plaintiffs, Mary Ellen Hannigan and Edward McNierney, Jr. (“Mary Ellen” and “Edward” individually; “plaintiffs” or “guardians” collectively), two of Ann F. McNierney’s (“Ann” or “incapacitated”) children and her

guardians, seeking the court's instruction with respect to the scope of their authority as plenary guardians to control the visitation rights of their mother.<sup>1</sup>

### **Procedural and Factual Background**

Ann is a seventy-eight year old widow who suffers from dementia. She has five children: Edward (52 years old), Patrick McNierney (48), Mary Ellen (46), Brian McNierney (45), and Anne Marie Tarleton (42) ("Patrick", "Brian" and "Anne Marie" respectively).

In or about August 2006, Edward J. McNierney, Sr. ("Edward Sr.") was admitted to Valley Hospital and received an emergency tracheotomy. Edward Sr.'s long struggle with emphysema was in its final stage. [Mary Ellen Certification, Sept. 21, 2006, ¶¶2-3.] At this time, Ann was involved in a "multi-jurisdictional car chase which required the Police to literally run into her vehicle to stop her", thereby demonstrating she could no longer care for herself. [Mary Ellen Cert., ¶5.] Ann was thereafter hospitalized at the Bergen Regional Medical Center ("BRMC") on August 31, 2006. The plaintiffs certified Ann suffered from delusions.

On October 3, 2006, Kevin P. Kelly, Esq. ("Kelly"), counsel for plaintiffs, filed a verified complaint and order to show cause why Ann should not be declared incapacitated. Robert J. Maloof, Esq. ("Maloof") was appointed as counsel for Ann. Submitted with the order to show cause were certifications of consent from all the siblings waiving their rights to serve as guardians of Ann in favor of Mary Ellen and

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<sup>1</sup> "Plenary" and "general" guardian shall be used interchangeably to connote a guardian with full authority encompassed by statute.



Edward, as well as reports of two doctors who examined Ann and found she was unfit and unable to govern herself or manage her affairs.

On October 25, 2006, Patrick filed an answer and a response to Mary Ellen's certification. In same, Patrick revoked his earlier consent to the plaintiffs serving as guardians asserting Mary Ellen made many false statements in her certification. He additionally requested he be considered as the guardian. According to Patrick's opposition, he was concerned about his siblings being named guardian as Edward had had a "drunk driving incident and [was required] to attend Alcoholics Anonymous meetings." In addition, Patrick stated "Edward's graduation from college was not in good academic standing, (with a final Grade Point Average of approx. 1.95), [and] I was concerned about his ability to understand the duties and limitations of guardianship." [Patrick's Answer, Pg. 19–20.] As noted, Edward is now 52. Furthermore, Patrick was concerned with Mary Ellen being guardian as she had apparently received a loan from Ann to open a flower store which subsequently failed resulting in litigation between mother and daughter.

On November 9, 2006, Maloof submitted a report acknowledging Ann was incapacitated and recommending a guardian *ad litem* be appointed to determine who should serve as guardian.

By way of new counsel Lan Hoang, Esq. ("Hoang") of the then Gibbons, Del Deo, Dolan, Griffinger & Vecchione ("Gibbons"), on November 13, 2006, the plaintiffs submitted certifications in response to Patrick's answer and assertions. Counsel asserted Ann should be declared incapacitated; the plaintiffs should be named as co-guardians, not Patrick; and the appointment of a guardian *ad litem* was an unnecessary expense as the

plaintiffs “are the most appropriate individuals to serve as Mrs. McNierney’s guardians.” [Plaintiff’s letter brief, November 13, 2006, Pg. 10.] Counsel also sought legal fees pursuant to R. 4:42-9(a)(2).

On November 22, 2006, the parties signed a consent order declaring Ann incapacitated and appointing Mary Ellen and Edward as temporary guardians, posting bond in the amount of \$500,000, pending the return of the final judgment for guardianship. The same permitted the plaintiffs immediate authority to relocate Ann from BRMC to Brighton Gardens (“Brighton”). Final judgment was thereafter executed on December 4, 2006 declaring Ann incapacitated and appointing the plaintiffs as her guardians.

The final judgment, in relevant part, provided:

- The plaintiffs are to serve as co-guardians over the person and property of Ann, posting bond in the amount of \$500,000;
- The co-guardians shall have all powers vested pursuant to N.J.S.A. 3B:12-48;
- All prior powers of attorney are revoked;
- The co-guardians shall advise Brian, Patrick and Anne Marie of all significant developments with respect to Ann.

On December 23, 2006, Edward Sr. passed away. His assets passed to Ann. Letters of Guardianship were issued to the plaintiffs on January 16, 2007.

Ann was thereafter relocated to Brighton, an assisted living facility. Brighton came under new management on or about December 1, 2008, and was renamed Emeritus.<sup>2</sup>

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<sup>2</sup> For the sake of simplicity, when referencing the facility, the court will use “Brighton”.

Thereafter, although unsupported by affidavits or certifications, former counsel for plaintiffs indicates the staff at Brighton provided the plaintiffs with “numerous reports . . . that their mother became agitated and upset during and after visits from her son, Patrick.” [Complaint, March 8, 2010, ¶6.] As a result, plaintiffs decided, at the recommendation of staff at Brighton, an aide should supervise Patrick’s visits.

Although the plaintiffs purportedly attempted to contact Patrick to set up a visitation schedule, according to them, he would not discuss this issue. Patrick contests this allegation stating his then attorney, Donald McHugh, Esq. (“McHugh”) had discussed his visitation schedule with Brighton’s counsel, Brian Rath, Esq. (“Rath”) and plaintiffs’ counsel, Hoang. The plaintiffs nonetheless decided to schedule an aide on Sunday afternoons, when Patrick apparently regularly visited, and communicated the same to Brighton and Patrick.

Brighton thereafter advised the plaintiffs Patrick was disregarding the visitation schedule and was acting strangely during his visits, including waking up Ann at 11:00 pm. The staff purported they felt threatened by Patrick’s behavior. Plaintiffs provide neither affidavits nor information as to who made these suggestions or the nature of the purported threats. [Patrick’s Answer, Pg. 12.] Patrick denies the allegations.

On December 29, 2007, Mary Ellen updated Ann’s “Generalized Service Plan” at Brighton to indicate “Ann’s Son Patrick can not visit her anymore, if he does we are to call the authorities to have him removed.” [OOIE Brief, Exhibit A.] Apparently, in the spring of 2008 the plaintiffs advised Patrick he could no longer visit their mother unless he abided by the visitation schedule and supervised visits. Patrick refused to do the same and thus was denied access by Brighton.

On four occasions that spring, Brighton staff contacted the police regarding Patrick's unauthorized visits. According to Patrick, the police did not acknowledge either the facility or the guardians as having authority to bar Patrick's visitation. Consequently, he was not arrested on any of these occasions. Thereafter, Patrick's counsel, McHugh, sent a letter to the Paramus Police Department, Brighton, and Michelle Santiago, an employee at Brighton, stating "if the current unwarranted threats are followed through, I must and will respond in kind", referencing the department's statement to Patrick heralding his arrest for criminal trespass. [Patrick's Answer, Pg. 38; May 21, 2008 Letter to Paramus Police Department.]

Patrick contacted the New Jersey Department of Health and Senior Services ("DHSS") on or about April 28, 2008, to report he was denied visitation. DHSS thereafter contacted Brighton to gather more information on the effects of Patrick's visits on Ann. DHSS purportedly told Brighton the guardians had the authority to determine access to the ward. Patrick was also advised by Brighton and the Paramus Police he would be arrested for criminal trespassing if he continued to come to the facility without arranging for an aide to supervise the visit.

On or about May 13, 2008, Patrick filed a complaint with the Office of the Ombudsman for the Institutionalized Elderly ("OOIE") stating Brighton "was violating Ann F. McNierney's right to visitors of her own choosing."<sup>3</sup> [Complaint, ¶4.] McHugh

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<sup>3</sup> In their brief, the OOIE provides "investigation was opened . . . after we received a complaint alleging that Mrs. McNierney's co-guardians, Ed McNierney and Mary Ellen Hannigan, were restricting visitation with Mrs. McNierney by her son Patrick McNierney, in part, by instructing Brighton Gardens at Paramus . . . to prohibit Patrick from visiting his mother." [OOIE Brief, Pg. 4.]

contacted Brighton on or about May 16, 2008 and was advised again of the plaintiffs' full authority concerning visitation.

According to counsel for the OOIE, the OOIE investigated the matter from May to September meeting with Ann, Patrick, Edward and Mary Ellen, as well as reviewing the facility records and speaking with staff. [OOIE Brief, Pg. 4.]

On September 16, 2008, Field Investigator Frederick Golz ("Golz") apparently advised Brighton he had investigated the matter and for the next sixty days Patrick was entitled to supervised visits on Sundays from 1–5 p.m. The visits were to take place in a common space with a personal aide paid for by the guardians, in an effort to determine whether Patrick's visits were disruptive to Ann. [OOIE Brief, Pg 5.] According to plaintiffs, Golz stated the plaintiffs, as guardians, lacked the authority to restrict visitors. This period was set to end November 15, 2008.

Golz's report was issued to the plaintiffs, Patrick and Grace Cosgrove, the administrator at Brighton. [Orlowksi Certification, May 25, 2010, ¶13.] Plaintiffs assert they did not receive any communications from the OOIE after November. The OOIE provides from November 2008 until February 2009 its findings and recommendations were conveyed "to all interested parties." [OOIE Brief, Pg. 5.]

After the 60 days ended, Brighton permitted Patrick unlimited visits, as per the OOIE's decision. The "OOIE concluded that Mrs. McNierney welcomed the visits of her son Patrick (though she was sometimes confused as to who he was), and that she had enjoyed a close relationship with Patrick while still residing in her marital home." [OOIE Brief, Pg 4–5.] Patrick's visits were found not disruptive to Ann or the other residents at Brighton. [OOIE Brief, Pg. 5.] The OOIE apparently told Brighton to defer to them, as

opposed to the guardians, on visitation issues. Brighton thereafter refused to provide the plaintiffs information on Patrick's visits and Ann's reactions to the same.

Plaintiffs provide, on November 23, 2008, as noted by the staff, Patrick visited Ann despite her stating she did not want to see him. For the days following the visit Ann seemed especially agitated and apparently told staff she had been assaulted and raped. On November 25, Ann was brought to the emergency room for unrelated health reasons. Brighton staff failed to report her above mentioned statements to the hospital staff.

Plaintiffs voiced concerns "they could no longer effectively monitor the effect of Patrick's visits on their mother's well-being and make decisions regarding visitation in her best interests." [Complaint, ¶16.] As such, plaintiffs contacted Ombudsman Deborah Branch ("Branch") in or around December 2008. They were then told to contact Assistant Public Advocate Jo Astrid Glading ("Glading") which they did in early 2009.

The plaintiffs emailed John Donadio ("Donadio") the Executive Director of Brighton on February 21, 2009 providing a background as to Ann's recent hospital stay and medical conclusions. Importantly, the email set forth:

Mom was also seen by another psychiatrist. He confirmed that mom suffers from severe dementia and is not lucid and cannot express clear thoughts or make rational choices. We continue to give due to [sic] all of mom's expressed preferences as we decide all matters relating to her and continue to take all 6 psychiatric evaluations we have of mom's level of functioning into consideration when doing so. We allow mom to make as many decisions as possible while protecting her from the possible harmful effects of bad decisions she does not fully understand.

...

Should you wish to challenge our authority as General Guardians, attempt to override our instructions and act in our place by creating your own visitation schedules, please do so in the Court to which we are fully answerable in our duty as General Guardians.

The plaintiffs also outlined visitation restrictions discussed below.

According to the OOIE, however, on February 21, 2009 Mary Ellen also emailed the then-Ombudsman Branch providing the co-guardians had decided to limit all visitation to Sundays between 1–4 p.m. and forbid anything be left with Ann, including photos and gifts, without their consent. Those who did not abide by these restrictions would be asked to leave Brighton. The email also states any challenges to the co-guardians “authority as General Guardians” should be addressed in court. [OOIE Brief, Exhibit C.]

On February 24, 2009, the plaintiffs wrote a letter to Glading complaining about the investigation conducted by the OOIE. Glading apparently referred the plaintiffs to Gwen Orlowski (“Orlowski”), who was then Director of the Division of Elder Advocacy at the Department of the Public Advocate (and currently is the Ombudsman).<sup>4</sup> Orlowski reviewed the investigatory file from March 2009 to July 2009.<sup>5</sup> [OOIE Brief, Pg. 6.]

On or about March 15, 2009, Branch told Brighton to follow her directions, not the guardians’. [OOIE Brief, Exhibit C.] Branch purportedly had not been in contact with the plaintiffs nor did she respond to their email dated February 21, 2009. [OOIE Brief, Exhibit C.]

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<sup>4</sup> According to the OOIE’s brief, Orlowski was appointed Ombudsman for the Institutionalized Elderly on or about December 22, 2009.

<sup>5</sup> The brief provides “March 2010 and July 2010”. However, as at the time of this decision July 2010 has yet to arrive, the court assumes this was a typographical error and 2009 was intended.

Plaintiffs also reported the alleged assault and rape to the OOIE. With respect to this allegation, the OOIE responded by letter on May 1, 2009 stating there was insufficient evidence to verify the charges. Plaintiffs provide “[r]egardless of the truth of their mother’s allegation . . . their mother’s behavior following Patrick’s visit further demonstrates that their concern about the visits on their mother’s emotional well being is warranted.” [Complaint, ¶14.] According to plaintiffs, Ann’s anxiety and agitation medication was increased at this time.

Patrick asserts any allegation Ann did not want to see him is either false or a misunderstanding based on a staff member mishearing or misconstruing his conversations with his mother. He adds it is “very odd” of the plaintiffs to make allegations of assault and rape without any evidence to justify the same. [Patrick’s Answer, Pg. 43.]

On July 31, 2009, plaintiffs received a letter from Orłowski writing on behalf of Glading. Orłowski indicated she had reviewed “their” original complaint from May 13, 2008 and the Public Advocate’s interpretation of In re M.R., 135 N.J. 155 (1994).<sup>6</sup> She agreed with the findings of the OOIE that plenary guardians lack the authority to make decisions regarding the visitation rights of their ward and indicated the plaintiffs would have to make application to this court to restrict the visits of Patrick.

On October 12, 2009, Anne was sent to Valley Hospital because of abdominal pain. She was discharged soon thereafter and it was recommended she receive physical and occupational therapy, services not provided at Brighton. As such, on October 20, 2009, Ann was relocated to Van Dyck Manor Nursing Home (“Van Dyck”) to receive

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<sup>6</sup> The court notes, according to what has been provided by counsel, Patrick filed a complaint on May 13, 2008, not the plaintiffs.



those services. Ann was to reside in a unit specifically for those who suffer memory impairments. However, no special units were available upon her arrival. As such, Ann currently has a twenty-four hour live-in aide until such a time that she can be transferred.

On March 8, 2010, then counsel on behalf of the plaintiffs, Amy E. Duff, Esq. (“Duff”) filed a one-count verified complaint seeking instructions regarding the scope of the guardianship. This application is the focal point of this decision and from which much of the above stated information was gleaned. Specifically, plaintiffs request, although prospectively, clarity as to whether a plenary guardian has the authority to make decisions regarding visitation, to ascertain if they must defer to the OOIE’s direction should it become an issue at Van Dyck. Plaintiffs assert the OOIE position is contrary to N.J.S.A. 3B:12-24.1(a), N.J.S.A. 3B:12-48, and N.J.S.A. 3B:12-57.

On April 12, 2010, Patrick filed an extensive objection to plaintiffs’ request for instructions. To begin, Patrick asserts the complaint was filed in retaliation for his questioning Anne Marie whether the fees paid to plaintiffs’ counsel for the initial guardianship application had been returned to the estate as they were “subsequently rejected by the court as being excessive.” Patrick recounts the final judgment did not provide for fees to Gibbons and Anne Marie had provided a check, from Edward Sr.’s account, for \$40,000 to counsel when the action was initiated. Patrick adds Ann’s funds have been used to support the current application and if they were not approved by the court, he requests the court order they be returned.<sup>7</sup>

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<sup>7</sup> As Patrick’s requests were not presented by cross application, they will not be formally addressed. R. 1:6-2(a); R. 4:52.

With respect to the substantive issues in question, Patrick asserts the guardians were not given the authority to deny access to Ann in the final judgment. Furthermore, Brighton's "Residents' Rights"; the OOIE's "Nursing Home Residents' Bill of Rights" pursuant to N.J.S.A. 30:13-5; and the "Manual for Guardians" ("Manual") issued by the Supreme Court Judiciary-Surrogates Liaison Committee, all provide Ann has the right to choose her visitors. Patrick reads the Manual to provide for the payment of legal fees from the ward's funds only by court approval. He adds, as no order provided for fees, these payments were not lawfully provided.

Finally, Patrick seeks the court order: (1) all legal fees paid to Hinkle and Gibbons be reimbursed to Ann, (2) the cost of a 24 hour live-in aide be refunded to Ann as this expense was unnecessary and would have been avoided if she had stayed at Brighton, and (3) the cost of the aid in 2008, to supervise Patrick's visits, be returned to Ann's funds. Maloof provided his report to the court on April 21, 2010. In same he concludes:

[P]roofs to support either position are lacking . . . the real issue is the ward's right to visitation with her immediate family. No medical documentation is available to shed light on the question whether Ann McNierney has the mental capacity to make a rational choice on the issue of visitation; nor is there evident a qualified professional opinion as to the impact of visitations by family members on Ann's physical and mental condition.

However, Maloof acknowledges Ann has expressed a desire to be visited by her children. Since Maloof's obligation is to advocate for Anne's preferences, not her best interest, he suggests the visits be permitted, as well as the appointment of a guardian *ad litem*.

Maloof apparently engaged in several conversations with the Ombudsman Orlowski who allegedly provided “her office has no authority to issue an order regarding the right of any individual to visit an elderly ward that is institutionalized in a facility such as a nursing home or an assisted living compound. . . . No order was issued to that facility but merely recommendations.” [Maloof Report, Pg. 6.]

The OOIE filed a notice of appearance on April 21, 2010. This court responded on April 23, 2010, providing the Ombudsman may submit a brief on the issue of whether guardians have the authority to determine visitation, as opposed to whether these co-guardians may limit Patrick’s visits.

By way of a letter dated April 28, 2010, S. Paul Prior, Esq. (“Prior”) of Hinkle indicated the plaintiffs terminated the firm’s representation and shall proceed in a pro se capacity. The court thereafter informed counsel he must submit a motion to withdraw. Such a motion was submitted and set to return on May 28, 2010. Prior to this date, although counsel failed to notify the court, Anne Burris (“Burris”) of Lindabury, McCormick, Estabrook & Cooper, P.C. (“Lindabury”) was substituted for Prior.

On April 29, 2010, Audrey L. Anderson, Esq. (“Anderson”), General Counsel for the Department of the Public Advocate, Division of Elder Advocacy, Ombudsman for the Institutionalized Elderly, requested this court adjourn the matter to allow the OOIE adequate time to brief the relevant issue. Anderson received the consent of all parties involved. The matter was rescheduled to be heard on June 18, 2010.

Patrick filed a response to Maloof’s report on April 30, 2009. Patrick contests or comments on several remarks made by Maloof, as well as the letter attached as an exhibit written by Orlowski. Of relevance, Patrick states the plaintiffs have gifted “significant

funds” from his parents’ joint account and he was excluded from these distributions, contrary to that which was reported by the plaintiffs. He states the Ombudsman’s role, as defined on the Office’s website, is to protect the elderly “by intervening in or instituting proceedings involving their interests” and thus is “better prepared to protect the interests of our mother than either of the guardians by employing qualified, licensed professionals.” [Patrick Letter, April 29, 2010, Pg. 4.] Patrick also points out despite plaintiffs’ assertions of ample evidence of the effect of Patrick’s visits on Ann, none has been provided nor are there certifications or affidavits to that effect. As such, Patrick concludes by requesting a guardian *ad litem* be appointed to work with the Ombudsman and prevent continuous and excessive legal fees from being required.

From March 2010 to May 2010, Orlowski was invited by the plaintiffs to visit Ann at Van Dyck. On May 17, 2010 such a visit was made, along with Elizabeth Speidel, Esq. (“Speidel”), an Assistant Deputy Public Advocate for the Office of the Ombudsman. Also present was Ann’s nurse, Rita Broni (“Broni”), Mary Ellen, and Mary Ellen’s attorney Sergio D. Simoes, Esq. (Simoes”). [Reply Brief, Pg. 4.] Ann was interviewed for 20-25 minutes. According to plaintiffs’ counsel, Orlowski never interviewed Patrick nor observed any of his visits with Ann.<sup>8</sup> Ann was apparently very fragile and confused during the May meeting believing her deceased husband had been in the room and her deceased parents lived across the hallway. Several other incidents are reported as well. [Reply Brief, Pg. 4.]

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<sup>8</sup> When questioned during oral argument whether the Ombudsman had purposefully refrained from advising the court as to the nature of the May 17 visit to Ann, Speidel indicated, at the guardians’ request and as a result of the OOIE’s extensive involvement in this matter, the current Ombudsman felt it important to visit Ann. When challenged, counsel added it was not a “fact-finding mission” but just a “visit”.

On May 28, 2010, counsel on behalf of the OOIE submitted its brief in response to plaintiffs' application. Presumably based on their earlier investigation and their meeting with Ann, the OOIE provides:

[A] general guardian cannot make the broad determination that he or she will be making all decisions as to visitation without demonstrating with clear and convincing evidence that the ward does not have the capacity to make that decision herself at this time and that there is no evidence as to what decision she would make if she had capacity.

[OOIE Brief, Pg. 3-4.]

Counsel for the plaintiffs filed the reply on June 1, 2010 along with the certifications of Mary Ellen and Broni, a Certified Nursing Assistant and Ann's primary caretaker. Broni states Patrick's visits are often disruptive to Ann as he appears to not understand the extent of her memory loss and constantly tries to remind her of things. [Broni Certification, ¶7.] Specifically, Broni recounts Patrick gave Ann the phone to talk to strangers, told Ann he would never marry or have kids because Ann and Edward Sr. always fought, and reminded Ann her husband was dead. [Rita Certification, ¶7-10.] All these situations resulted in Ann being very upset for several days, at least according to Broni.

Counsel for the plaintiffs asserts the co-guardians "have always endeavored to elicit from Ms. McNierney what her wishes would be, and thereafter, act accordingly, when such wishes are not adverse to her well being or in her best interests." [Reply Brief, Pg. 5.] She adds,

Ms. McNierney however, is unable to make decision or judgment on her own or for her own best interest or safety. Thus, the objective of this application is not to permanently restrict Patrick from access to his mother, but to clarify the

authority of the co-guardians to monitor, oversee, and schedule visitations so that disruptions to her are kept to a minimum and so that her treatment and care are preserved.

[Reply Brief, Pg. 5.]

As such, counsel seeks to confirm the co-guardians' authority over Ann's visitation. Counsel posits this is a legal, not a factual determination, and thus despite Maloof's suggestion, a guardian *ad litem* is improper; Patrick improperly relies on the Manual which is non-binding; the OOIE has exceeded its authority in stating the co-guardians cannot oversee visitation as they were established to investigate matters concerning health care facilities, not guardians and their wards.

On June 20, 2010, Patrick filed an unauthorized sur-reply. Making his way through the OOIE's submissions, Patrick first states it does not appear Edward has counsel, but rather only Mary Ellen is represented by Lindabury. Second, he argues Broni is not an expert with respect to determining "harmful behavior" but rather a lay person. In addition, Broni is paid by the plaintiffs and thus implies her assertions would obviously be consistent with theirs.

Patrick counters Broni's allegations of being disruptive by arguing she lacks the qualifications to evaluate his ability to understand his mother's condition or her condition. He adds several of her statements are "clearly and utterly false, rais[ing] serious questions as to her competency to serve as an aide for my mother." [Patrick Surreply, June 10, 2010, Pg. 6, ¶9.] Patrick concludes stating plaintiffs' allegations are not verifiable by any expert witness and "the reliance by Anne Burris to establish a causal nexus based solely on a lay witness, and not an expert witness, opens the door to

disciplinary action against Anne Burris.” [Patrick Surreply, Pg. 8.] Accordingly, Patrick requests legal fees to Lindabury be denied.

Oral argument was entertained on June 18, 2010. During colloquy with Speidel, counsel for the OOIE, several positions were clarified. Speidel indicated the letters to Brighton, Patrick and the plaintiffs, in response to the OOIE’s investigation, were intended as recommendations, and not as directives. When questioned as to whether this position was made clear to the relevant parties, counsel responded “[t]he way our Office works is we don’t have any governing authority over facilities.” The following inquiries were also made:

Question: “Do you now wish to be heard for the proposition your client has and had no authority to make a direction that the facility should follow your suggestion or your directive?”

Answer: “Our role, at all times, is to advocate for the position of a resident. So, what we were doing in that case, was advocating on behalf of the resident and her rights to visitation.”

Question: “And would that role encompass a criticism of a guardian’s actions?”

Answer: “Yes. There are times that it would.”

Question: “And would it encompass the authority to direct the guardian to do x or y?”

Answer: “I do not believe we have the authority to direct the guardian to do anything.”

Question “Are you satisfied then that your client made clear that it had no authority to direct the guardian to do anything?”

Answer: “Yes. ...”

Question: “Would you agree with me, Ms. Speidel, that at least from the papers, it appears the Brighton facility understood your ‘suggestion’ as a direction?”

Answer: “It seems as though they [Brighton] viewed it as a direction.”

Speidel admitted, multiple voices speaking with purported authority created confusion in this case. She added, however, her “Office does not see itself as any substitution for the court.” Importantly, the following colloquy took place:

Question: “Is it your position, or your client’s position, that it has the right to overrule the directives of the guardian as it relates to visitation.”

Answer: “No. Our role is as advocate for the resident. And we do not feel we can override what the guardian says. If there are issues between somebody who comes to us and the guardian, than that has to be resolved with the court.”

Question: “So whether it is federal law that you seek to review, or state law, you view your client’s role as either advisory, as a mediator, as a facilitator, but not as a director as it pertains to the guardian’s role concerning visitation.”

Answer: “Correct.”

## **Law**

### Plenary guardian

“‘General guardian’ means an individual or agency appointed by a court of competent jurisdiction to make all decisions in a person's life pursuant to N.J.S.A. 3B:12-12(a).<sup>9</sup> N.J.A.C. 10:43-1.3. “The New Jersey guardian of an incompetent’s person and property is required to provide for the care, safe-keeping and support of the incompetent.”<sup>10</sup> Gay v. Stengel, 61 N.J. Super. 411 (App. Div. 1961).

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<sup>9</sup> Examining this codification, there appears to be no section “a”. In addition, N.J.S.A. 3B:12-12 only covers the “Jurisdiction of surrogate to appoint guardians for minors”. This definition, nonetheless, is provided in the definitions section of the provisions of the New Jersey Department of Human Services, Division of Development Disabilities.

<sup>10</sup> In 1997, the New Jersey Legislature amended N.J.S.A. 3B:1-2. The amendment replaced the term “mental incompetent” with “incapacitated person” and applied same to the entire statute. 1997 N.J. Laws 379. As such, when not referencing a quotation, the proper term “incapacitated person” shall be utilized.



There are several provisions of the New Jersey Statutes Annotated that address the authority and responsibility of a plenary guardian. To begin, N.J.S.A. 3B:12-24.1, on the “[d]etermination by the court of need for guardianship services”, states:

General Guardian. If the court finds that an individual is incapacitated as defined in N.J.S.A. 3B:1-2 and is without capacity to govern himself or manage his affairs, the court may appoint a general guardian **who shall exercise all rights and powers of the incapacitated person**. The general guardian of the estate shall furnish a bond conditioned as required by the provisions of N.J.S.A. 3B:15-1 et seq., unless the guardian is relieved from doing so by the court.

[(Emphasis added).]

N.J.S.A. 3B:12-48 addresses the power a guardian may exercise stating:

A guardian of the estate of . . . an incapacitated person has all of the powers conferred upon the guardian by law and the provisions of this chapter **except as limited by the judgment**. These powers shall specifically include the right to file or defend any litigation on behalf of the ward, including but not limited to, the right to bring an action for divorce or annulment on any grounds authorized by law.

[(Emphasis added).]

The instant judgment provided the plaintiffs were appointed to serve as co-guardians over the person and property of Ann, were to post bond in the amount of \$500,000, and had “all powers vested pursuant to N.J.S.A. 3B:12-48.” Thus, the order provided no limitations to the plaintiffs’ general guardianship.

N.J.S.A. 3B:12-57 elaborates providing the powers and duties of a guardian of the person:

f. [A] guardian of the person of a ward shall exercise **authority over matters relating to the rights and best interest of the ward's personal needs, only to the**

**extent adjudicated by a court of competent jurisdiction.** In taking or forbearing from any action affecting the personal needs of a ward, **a guardian shall give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry.** To the extent that it is consistent with the terms of any order by a court of competent jurisdiction, the guardian shall:

- (3) provide for the care, comfort and maintenance and, whenever appropriate, the education and training of the ward;
- (4) subject to the provisions of subsection c. of N.J.S.3B:12-56, **give or withhold any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service;**

...

g. In the exercise of the foregoing powers, the guardian shall encourage the ward to participate with the guardian in the decision-making process to the maximum extent of the ward's ability in order to encourage the ward to act on his own behalf whenever he is able to do so, and to develop or regain higher capacity to make decisions in those areas in which he is in need of guardianship services, to the maximum extent possible.

[(Emphasis added).]

The statute was amended in 2005 to:

[C]larify that a guardian of the person of a ward is required to exercise authority over matters relating to the rights and best interest of a ward's personal needs **only to the extent ordered by the court.** This section provides that a guardian is required to give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry. **This section also provides that to the extent that it is consistent with the terms of any order by a court, the guardian shall:** take custody; **provide for visitation;** provide for the care, comfort, maintenance and education; provide for necessary consents or approvals; provide for possessions; institute

any necessary actions; develop a plan of supportive services; and receive money and tangible personal property.

[Statement to Senate, No. 224 (dated: December 1, 2005) (emphasis added).]

Although the guardian has the authority over matters relating to the rights and best interests of the ward, as stated above, this is guided by a ward's self-determination or rather, the guardian should defer to the preferences of its ward if not contrary to the ward's best interest.

Incompetent persons have a common-law right of self-determination, the same as that of competent persons, except that the right of self-determination of adjudicated incompetents **must be balanced by the court with concern for their best interests.** In re M.R., 135 N.J. 155, 167 (1994). This is because an adjudicated incompetent, "like a minor child, is a ward of the state, and the state's parens patriae power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests." In re Conroy, 98 N.J. 321, 364–65 (1985). The decision maker's responsibility is to carefully balance the incompetent's right to self-determination with considerations of best interests and the protection of the incompetent's person and property. See M.R., supra, 135 N.J. at 167.

The incompetent's right to self-determination must be preserved to the extent possible. Some elderly nursing home patients, who are generally incompetent and unable to govern their own affairs, have lucid periods during which they can once again communicate their wishes clearly. See Conroy, supra, 98 N.J. at 382. Even those who are generally incompetent vary widely in their degree of alertness and in their ability to communicate. Thus, a patient may be competent to make a decision regarding a course of medical treatment "even if the patient previously had been adjudicated an incompetent and had a general guardian appointed pursuant to N.J.S.A. 3B:12-25." Id.

If a patient is not competent to make a particular decision, the guardian has a duty to determine subjectively, to the extent possible, the course an incompetent would have taken regarding a particular decision if competent and apply a substituted judgment or subjective test. Conroy, supra, at 361–64. If some trustworthy evidence of an incompetent's intent can be found, but not enough to fully determine subjective intent, this can be taken into account in determining the incompetent's best interests, and a limited-objective test should be used. M.R., supra, 135 N.J. at 167; Conroy, supra, 98 N.J. at 365-66.

[Matter of Roche, 296 N.J. Super. 583, 588–589 (Ch. Div. 1996) (emphasis added).]

The above provides the groundwork to evaluate the current question presented. However, as the court sees the question presented, it need only determine whether “a” guardian may control the visitation rights of its ward, not whether “these” guardians may do so under the facts as presented.

#### Patient's Bill of Rights

In 1976 the New Jersey Legislature determined “that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents.” N.J.S.A. 30:13-1. N.J.S.A. 30:13-5 discusses the rights of nursing home residents. Specifically, it states “[e]very resident of a nursing home shall . . . [h]ave the right to unrestricted communication, including personal visitation with any persons of his choice, at any reasonable hour.” N.J.S.A. 30:13-5(h). The legislative findings in support of the statute state “that the well-being of nursing home residents in the State of New Jersey requires a delineation of the responsibilities of nursing homes and a declaration of a bill of rights for such residents.” N.J.S.A. 30:13-1.

Manual for Guardians

In the 1990's, Chief Justice Robert N. Wilentz requested recommendations from the Judiciary-Surrogates Liaison Committee Concerning Guardianships ("JSLCCG") to better address guardianship matters. The February 1995 "Report of the Supreme Court Committee on Court Appointment of Fiduciaries" discusses a report issued by the JSLCCG recommending training materials be provided by the court to guardians at the time of their appointment. As of April 4, 2004 a "manual" was created for this purpose.<sup>11</sup>

Office of the Ombudsman for the Institutionalized Elderly

In January of 2006, the Legislature reconstituted the Department of the Public Advocate ("DPA") and the Division of Elder Advocacy ("DEA") See N.J.S.A. 52:27EE-2(a). The Office of the Ombudsman for the Institutionalized Elderly ("OOIE"), which was already in existence, was then subsumed within the DEA. See N.J.S.A. 52:27EE-61 to -65. [OOIE Brief, Pg. 1.]<sup>12</sup> The current hierarchy is as follows: the OOIE is a part of the DEA, which is a division of the DPA.<sup>13</sup>

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<sup>11</sup> The above information was provided by the AOC Civil Practice Division.

<sup>12</sup> Orlowski certifies the DPA, as per N.J.S.A. 52:27EE-5(f), has the authority to "issue subpoenas to compel the attendance and testimony of witnesses or the production of books, papers and other documents." Citing to N.J.S.A. 52:27EE-63(a), (c), -64(a)-(c), Orlowski implicates certain authority as a result of her position as Director of Elder Advocacy. Specifically, to "represent the public interest in such administrative and court proceedings as the Public Advocate deems shall best serve the interests of elderly adults." [Orlowski Certification, May 25, 2010, ¶ 5.] The Court notes, however, as of December 22, 2009, Orlowski was appointed the Ombudsman for the Institutionalized Elderly and no longer is the Director of the Division of Elder Advocacy.

Orlowski notes "public interest" is defined as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:27EE-12.

Finally Orlowski states the Ombudsman for the Institutionalized Elderly is charged under the Federal Older American Act, 42 U.S.C. 3058g(a)(1)(E) (2000). This position is called a "State Long-Term Care Ombudsman". The functions include:

- (A) identify, investigate, and resolve complaints that—
  - (i) are made by, or on behalf of, residents; and
  - (ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents

(including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—

- (I) providers, or representatives of providers, of long-term care services;
- (II) public agencies; or
- (III) health and social service agencies;
- (B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;
- (C) inform the residents about means of obtaining services provided by providers or agencies described in subparagraph (A)(ii) or services described in subparagraph (B);
- (D) ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;
- (E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;
- (F) provide administrative and technical assistance to entities designated under paragraph (5) to assist the entities in participating in the program;
- (G)
  - i) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;
  - (ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and
  - (iii) facilitate public comment on the laws, regulations, policies, and actions;
- (H)
  - (i) provide for training representatives of the Office;
  - (ii) promote the development of citizen organizations, to participate in the program; and
  - (iii) provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and
- (I) carry out such other activities as the Assistant Secretary determines to be appropriate.

<sup>13</sup> The DEA, according to N.J.S.A. 52:27EE-63:

[M]ay protect the interests of the elderly by:

- a. intervening in or instituting proceedings involving the interests of the elderly before any department, commission, agency, or board of the State leading to an administrative adjudication or administrative rule as defined in section 2 of P.L.1968, c.410 (C.52:14B-2);
- b. instituting litigation on behalf of the elderly when authorized to do so by the Public Advocate; and
- c. commencing negotiation, mediation, or alternative dispute resolution prior to, or in lieu of, the initiation of any litigation.

N.J.S.A. 52:27EE-64 provides for the “additional powers and duties” of the DEA stating:

Codified in 1977, N.J.S.A. 52:27G-1 provides:

[T]here should be established as an agency of the State Government the Office of the Ombudsman for the Institutionalized Elderly, to receive, investigate and resolve complaints concerning certain health care facilities serving the elderly, and to initiate actions to secure, preserve and promote the health, safety and welfare, and the civil and human rights, of the elderly patients, residents and clients of such facilities.

The “Ombudsman” is the administrator and chief executive officer of the Office of the Ombudsman for the Institutionalized Elderly. N.J.S.A. 52:27G-2.

The Office’s objective is “that of promoting, advocating and insuring, as a whole and in particular cases, the adequacy of the care received, and the quality of life experienced, by elderly patients, residents and clients of facilities within this State.”

N.J.S.A. 52:27G-6. The Office is to investigate, respond and resolve any complaints;

- 
- a. The Division of Elder Advocacy shall report to the Governor and the Legislature on recommendations that will further the State's ability to secure, preserve, and promote the health, safety, and welfare of New Jersey's elderly.
  - b. The Division of Elder Advocacy shall have the authority to hold a public hearing on the subject of any investigation or study. The division shall hear testimony from agency and program representatives, the public in general, and such others as may be deemed appropriate.
  - c. The Division of Elder Advocacy shall have access to the records and facilities of every agency, funded entity, or other recipient of public funds to the extent that any such records and facilities are related to the expenditure of public funds, provided that the division complies with all privacy and confidentiality protections applicable to those records and facilities, notwithstanding any contrary provision of law. Notwithstanding the foregoing, the Division of Elder Advocacy shall have access to any facility or institution, whether public or private, offering health or health-related services for the institutionalized elderly which is subject to regulation, visitation, inspection or supervision by any government agency, provided such access is permitted by State or federal law. All agencies shall cooperate with the Division of Elder Advocacy and, when requested, shall provide specific information in the form requested.

however the statute refers specifically to complaints against facilities and/or their employees, not individual persons or guardians. N.J.S.A. 52:27G-7.

Importantly, it is the responsibility of the Office to:

c. **[R]ecommend to the relevant government agency changes** in the rules and regulations adopted or proposed by such government agency, which do or may adversely affect the health, safety, welfare or civil or human rights of any patient, resident or client in a facility.

h. [R]eport to the Governor and the Legislature on or before September 30 of each year, which report shall summarize its activities for the preceding fiscal year, document the significant problems in the systems of care and services for the elderly, indicate and analyze the trends in such systems of care and services, and set forth any opinions or recommendations which will further the State's capacity in resolving complaints, encouraging quality care and ensuring the health, safety, welfare or civil and human rights of elderly patients, residents and clients of facilities, including **suggestions or recommendations for legislative consideration and for changes in the policy or rules and regulations of government agencies**. The annual report shall be available to the public.

[N.J.S.A. 52:27G-9 (emphasis added).]

#### DHSS

The Health Care Facilities Planning Act, N.J.S.A. 26:2H, provides for the responsibilities and regulations health care facilities, including assisted-living facilities, must provide their patients. The “Declaration of Public Policy” generally provides:

[T]he State Department of Health shall have the central responsibility for the development and administration of the State's policy with respect to health planning, hospital and related health care services and health care facility cost containment programs, and all public and private institutions, whether State, county, municipal, incorporated or not incorporated, serving principally as residential health care facilities, nursing or maternity homes or as facilities



for the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition, shall be subject to the provisions of this act.

[N.J.S.A. 26:2H-1.]

Although a patient's rights to visitation do not appear to be specifically codified, the rights of a domestic partner to visit are explicitly provided inferring domestic partners are entitled to equal rights under the law as a spouse or familial relation. As such, this codification may provide a useful parallel to the facts of this case, regarding access to a parent. It states:

a. A health care facility . . . shall allow a patient's domestic partner . . . the children of the patient's domestic partner, and the domestic partner of the patient's parent or child to visit, **unless** one of the following conditions is met:

- (1) No visitors are allowed;
- (2) The health care facility **reasonably determines that the presence of a particular visitor would endanger the health or safety of a patient, a member of the staff of the facility, or another visitor to the facility, or would significantly disrupt the operations of the facility;** or
- (3) The patient has indicated to health care facility staff that the patient does not want the person to visit.

b. The provisions of subsection a. of this section shall not be construed as prohibiting a health care facility from otherwise establishing reasonable restrictions upon visitations, including restrictions upon the hours of visitation and number of visitors.

[N.J.S.A. 26:2H-12.22 (emphasis added).]

### Analysis

To begin, the defendant asserts his right to visit his mother has been improperly restricted. Defendant correctly argues plaintiffs' allegations of problems, abuse, agitation, and causing harm are speculative and "not supported by any verifiable facts or

any statements from any witnesses. The mere allegation that our mother was seen agitated AFTER my visit to her does not create a causal nexus for the source of her agitation and my visit to her.” [Patrick’s Answer, Pg. 7, 25.] In addition, substantially all allegations made are based on apparent events which occurred over two years ago.

The court agrees with this proposition. However, the plaintiffs seek a very narrow determination. Specifically, clarity as to whether a plenary guardian has the authority to make decisions regarding visitation, particularly as to a ward living in a residential facility. The plaintiffs do not seek a court determination on the authority to restrict Patrick from visiting Ann. As such, although Patrick correctly points out evidence as to allegations of abuse and agitation appear to be lacking, these proofs are not required for the determination currently posed.

By way of summary, the DHSS was involved in this matter in April 2008 when Patrick contacted them to report he was denied visitation. The DHSS apparently thereafter contacted Brighton to gather information on Ann’s response to Patrick’s visits. The DHSS then told Brighton the guardian determines who may see the ward. Thereafter, no party makes mention of the DHSS’s involvement in this matter.

As discussed above, it appears the DHSS is to provide certain regulations for “the prevention, diagnosis, or treatment of human disease, pain, injury, deformity or physical condition.” N.J.S.A. 26:2H-1. Subsumed within this legislation are certain rights, including those specified above for domestic partners. However, beyond the same, while the DHSS may, though there is no evidence it has, dictate what an assisted living facility must do, this is not the relevant question. Rather, the focus here is on the extent of a plenary guardian’s authority. Thus, while a facility may be required to provide visitation,

which is within the DHSS's realm, whether the guardian may then restrict the same is not within its scope of authority.

Nonetheless, the DHSS maintained a limited role in this conflict. The input made, importantly, informed the facility the guardian has discretion concerning visitors. Accordingly, a more detailed and evaluative discussion of the scope and extent of the DHSS's authority are not necessary.

The OOIE, on the other hand, has become significantly involved in this family dispute. To begin, on or about May 13, 2008, Patrick filed a complaint with the OOIE again stating Brighton was violating Ann's rights to choose her visitors. The OOIE then sent an investigator to Brighton who determined Patrick should have supervised visits for sixty days to evaluate the issue. The OOIE states this was merely a suggestion and not an order. However, the OOIE purportedly told Brighton to defer to their "suggestions" as opposed to the directions of the guardians.

The guardians were thereafter denied access to records of Ann's visitors. Finding no reports had been made of the alleged assault and abuse of Ann, the plaintiffs reported the allegations to the OOIE in the winter of 2008. The OOIE responded by letter stating the OOIE lacked sufficient evidence to properly investigate the allegations.

McHugh states in his letter to plaintiffs' counsel dated May 21, 2008 "[t]his is not a situation for the Ombudsman's involvement since there is no allegation of abuse of the elder by the institution which is the sole jurisdiction of the Ombudsman's Office. They do not serve as a mediator in a family feud." This court agrees.

In its brief, the OOIE argues "an individual retains her fundamental rights after she is adjudicated incapacitated and appointed a general guardian" and "when making a

decision on behalf of a ward, the guardian is required to preserve the fundamental rights of the ward to the greatest extent possible.” The OOIE provides a guardian is appointed to assist and encourage but not to control a ward.<sup>14</sup>

Importantly, there are additional fundamental rights, counsel asserts, incapacitated individuals maintain such as the right to vote, see IMO Absentee Ballots Case by Five Residents of Trenton Psychiatric Hospital, 331 N.J. Super. 31 (App. Div. 2000) (holding voters who are involuntarily committed residents of a psychiatric hospital are presumed

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<sup>14</sup> For this proposition counsel cites to an unpublished opinion In re Goldemberg, No. BER-P-460-05, which was decided by this court on February 7, 2006. Rule 1:36-3 states “[n]o unpublished opinion shall constitute precedent or be binding upon any court.” For thoroughness alone, this court will briefly discuss Goldemberg.

In this opinion this court discussed the role and use of a limited guardianship to “protect the person while limiting the intrusion on the incapacitated person’s autonomy and independence.” It acknowledged:

Individuals like [the ward] suffering from dementia, may retain some competent mental functioning, such that their best interest might be better served by limited guardianship. The doctrine of the least restrictive alternate should be considered when an individual’s liberty interests are at issue, and where not contraindicated by health and safety concerns. This would permit each individual’s particular disability to be addressed, while respecting the individual’s right to the dignity of self determination.

[(Internal citation omitted).]

Thus, it is recognized where a “limited” guardianship is in place, the incapacitated may still possess the competence to make certain decisions.

On the other hand, where there is a plenary guardianship, these rights are not necessarily preserved. This court found:

Incompetent persons have a common-law right of self-determination, the same as that of competent persons, except that the right of self-determination of the adjudicated incompetents must be balanced by the court with concern for their best interests...The decision maker’s responsibility is to carefully balance the incompetent’s right to self-determination with considerations of best interests and the protection of the incompetent’s person and property.

[In the Matter of Roche, 296 N.J. Super. 513, 588 (Ch. Div. 1996).]

Therefore, it appears, where best interests and self-determination align, the wishes of an incapacitated should be followed.

competent and therefore to challenge their votes requires a particularized showing of incompetence), and privacy rights, see In re Grady, 85 N.J. 235, 261 (1981) (finding sterilization of an incapacitated nineteen year old called for court intervention, as opposed to the parental guardians ability to decide alone). Lastly, the freedom of association is protected by the First and Fourteenth Amendments of the United States Constitution and applies to visits with family. Shaumbaugh v. Wolk, 302 N.J. Super. 380 (Ch. Div. 1996) (holding a hearing should be held to determine whether a mother, who was committed to a psychiatric unit, desires to be visited by her daughter where the daughter was restricted from visiting her by her step-father).

Understanding these rights and the balance with best interests, the Ombudsman further cites to the guardianship statute and the regard due to a ward's preferences and involvement in the decision-making process "to the maximum extent of the award's ability". See N.J.S.A. 3B:12-57(f), (g). The OOIE applies a three-prong test, usually employed in the context of privacy issues and disputes over physical autonomy. The first prong "assumes a person retains the capacity to exercise their fundamental rights unless the challenger shows specific incapacity by clear and convincing evidence." See M.R., supra, 135 N.J. at 168-69; IMO Absentee Ballots, supra, 247 N.J. Super. at 470; D.R., supra, 331 N.J. Super. at 38. Counsel cites to M.R. and the proposition although a person is generally incapacitated does not direct they are incapacitated for all purposes. Rather, the decision as to what an incapacitated can determine is fact-specific and must consider the potential risks associated with the decision. Id. at 169.

Upon demonstrating clear and convincing evidence of a lack of capacity to make a specific decision, the court employs the second, or "substituted judgment", prong. In re

Conroy, supra, 98 N.J. at 360. When exercising substituted judgment, the guardian must effectuate, as far as possible, the decision the patient would have made if competent, as determined from their actions, statements, prior relevant decisions, or intent. Id. at 361-63.

Where there is no evidence as to how the ward would decide, the final prong requires an analysis of the ward's "best interest". Id. at 364-66.

The OOIE concludes "given the broad request of the guardians to give them the authority to make all decisions regarding visitation" and the potential for the same to violate Ann's fundamental rights of self-determination, the OOIE request this court deny the request pending further evidence. For example, as set out above, clear and convincing evidence Ann can not make the decision; if this is satisfied, whether she would decide this way if she had capacity; and if her decision is unknown, whether denial of certain visitation is in her best interest.

The OOIE provided incapacitated individuals are entitled to fundamental rights, such as voting. However, the legal support cited for this proposition is not factually parallel to the facts at hand. In In re Absentee Ballots, the Appellate Division held "voters who are involuntarily committed residents of a psychiatric hospital pursuant to N.J.S.A. 30:4-24 to -80 are presumed competent to vote. Therefore, they cannot be challenged as voters nor their ballots segregated, absent a particularized showing of incompetence." Supra, 331 N.J. Super. 31, 34 (App. Div. 2000). The court explicitly stated the individuals were not presumed incapacitated and thus can not be challenged as voters. In this case, Ann's incapacity is not in question. Thus, apparently, the OOIE attempts to argue despite incapacity, certain rights remain.

This conclusion is supported by In re Grady, also cited by the OOIE, when the Supreme Court addressed whether a nineteen year old with severe mental retardation was able to decide between sterilization or procreation. Supra, 85 N.J. at 250-251. The Supreme Court determined:

[B]ecause of her severe mental impairment, Lee Ann does not have the ability to make a choice between sterilization and procreation, or between sterilization and other methods of contraception a choice which she would presumably make in her “best interests” had she such ability. But her inability should not result in the forfeit of this constitutional interest or of the effective protection of her “best interests.” If the decision whether or not to procreate is “a valuable incident of her right of privacy, as we believe it to be, then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice.” To preserve that right and the benefits that a meaningful decision would bring to her life, it may be necessary to assert it on her behalf. . . . The question of who besides the parents has standing to represent the purported interests of the incompetent can await future determination. Nevertheless, we believe that an appropriate court must make the final determination whether consent to sterilization should be given on behalf of an incompetent individual. It must be the court's judgment, and not just the parents' good faith decision, that substitutes for the incompetent's consent.

[Ibid. (internal citations omitted).]

The Supreme Court’s distinguished In re Quinlan, 70 N.J. 10, cert. denied, 429 U.S. 922 (1976), from the facts in Grady. Specifically, the Court found the “only practical way to preserve the comatose patient's right to discontinue artificial life-support was to allow the guardian and family ‘to render their best judgment, subject to . . . qualifications . . . as to whether she would exercise it in these circumstances.’” Grady, supra, 85 N.J. at 251. In Grady, however, the court felt the issue of sterilization,

especially with respect to incapacitated persons, had historically been abused. Thus, “[s]ince the sterilization decision involves a variety of factors well suited to rational development in judicial proceedings, a court can take cognizance of these factors and reach a fair decision of what is the incompetent's best interest”, as opposed to deferring to parental guardians. Id. at 252. The best interest standard is then evaluated at length by the Court. Id. at 262–67.<sup>15</sup>

Although these cases provide guidance concerning guardianship authority, as this court need not determine whether the current co-guardians are permitted to restrict Patrick’s visitation, but rather only whether a guardian may do so, further discussion of or elaboration on Grady or Quinlan is unnecessary. Furthermore, although these cases reflect a respect for the fundamental rights of incapacitated individuals, the factual context is so dissimilar from the matter at hand as to provide little illumination on the issue presented.

As provided above, the OOIE is to “to receive, investigate and resolve complaints **concerning certain health care facilities** serving the elderly, and to initiate actions to secure, preserve and promote the health, safety and welfare, and the civil and human rights, of the elderly patients, residents and clients **of such facilities.**” N.J.S.A. 52:27G-1

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<sup>15</sup> The Court outlines a four-step evaluation process a trial court should follow when determining whether to authorize the sterilization of an incapacitated person. First, as it “is ultimately the duty of the court rather than the parents to determine the need for sterilization...the court must be satisfied that sterilization is in the best interests of the incompetent person”. Id. at 264. Second, the court should appoint an independent guardian *ad litem* as soon as possible and receive independent medical and psychological evaluations by qualified professional. Ibid. Third, “the trial judge must find that the individual lacks capacity to make a decision about sterilization and that the incapacity is not likely to change in the foreseeable future. ...The trial court should be reluctant to substitute its consent for any person who may be capable of making a decision for himself. Therefore, the proponent of sterilization should have the burden of proving by *clear and convincing evidence* that the person to be sterilized lacks the capacity to consent or withhold consent.” Id. at 265 (internal citations omitted). Lastly, “the trial court must be persuaded by *clear and convincing* proof that sterilization is in the incompetent person's best interests.” Id. at 266.



(emphasis added). Sections G-6 and G-7 thereafter provide the Office is to investigate complaints against facilities, etc. Here, Patrick did present the OOIE with a complaint against the facility as they denied him access to his mother. However, this restriction was provided by the guardian, not the facility. Thus, the issue presented is not the extent to which a facility must follow the guardian, but rather, whether the guardian has discretion over visitation. This again, as discussed in the context of the DHSS, is not within the scope of responsibilities of the OOIE.

The OOIE may appropriately attempt to determine whether a facility is abusing or creating a situation in which it is risking the safety and welfare of its patients. Nothing in the enabling legislation appears to reference or discuss the OOIE's role with respect to enforcing the rights of a ward against the guardian. However, a facility, which is subject to the OOIE, is required to bow to the discretion of the guardian who is, in essence, stepping into the shoes of his or her ward.

In the present case, although the OOIE addressed its communications to Brighton, as Brighton was abiding by the expressed preferences of the guardian, Brighton did not engage in any abuse or otherwise impair the health and safety of Ann. Rather, Brighton attempted to follow the wishes of Ann, as expressed through her guardian. Were these wishes deemed to be inappropriate or abusive, Brighton, the defendant, or possibly the OOIE should have sought the appropriate relief from the court. The OOIE lacked authority to dictate what actions the guardian could exercise with regard to visitation, thereafter command Brighton to confer with them on future visitation decisions, and restrict the guardians' access to files and reports concerning Ann.

Importantly, the OOIE is granted the task of informing the Legislature and relevant government agencies of suggested changes in rules and regulations. N.J.S.A. 52:27G-9. This responsibility should permit the OOIE to take the necessary steps to address the current difficulty or request the Legislature examine the scope of a guardian's authority to determine rights which may conflict with the obligations of a facility. This, however, does not appear to have been done.

In addition to the authority of the DHSS and the OOIE, Patrick appears to rely almost entirely on the Manual. [Def. Answer, Pg. 21.] He argues if it were correct a plenary guardianship trumps the regulatory rights outlined in N.J.S.A. 26:2H-1; N.J.A.C. 8:36-1 to -21, "then why [would] the above mentioned 'Statement of Resident's rights' ... be posted in both the assisted living areas *and* the dementia wing." [Def. Answer, Pg. 26.] Finally, Patrick states if the plaintiffs wish to limit or deny visitation, they need to apply to the court for a restraining order. [Def. Answer, Pg. 28.] Patrick provides no legal authority supporting the proposition a guardian must seek a restraining order to limit visitation to its ward.

To begin, the Manual was issued by the Supreme Court Judiciary-Surrogates Liaison Committee in an effort to provide guidance for guardians. This court has been unable to identify a directive the Manual is to be given the force of law or is anything other than a useful layman's guide to the responsibilities of a guardian. It was not passed by the Legislature and is not authoritative with respect to the law or legal interpretation.

What is evident, however, is a guardian should look to the Manual as a precept for appropriate behavior. Therefore, although Patrick rightly examined the Manual for direction, he incorrectly, but understandably, viewed it as the rule of law. As discussed at

length above, there are numerous provisions of the New Jersey Statutes Annotated which discuss the authority of guardians and subsequent case law which elaborate on these principles. Furthermore, and importantly, there is nothing in the Manual which contradicts that which is set forth herein.

Patrick adds the plaintiffs must seek a restraining order to bar or limit his visitation. However, to the contrary, as this court's prior judgment established, and as will be discussed further below, a plenary guardian subsumes the rights of his or her ward. Thus, the guardian is capable of making all decisions with respect to financial and personal matters without further court intervention. On the other hand, one who objects to those actions or decisions may seek a restraining order or the removal or replacement of the guardian. As such, the burden lies with the challenger, in this case Patrick, not the converse.

Lastly, a plenary guardian has "all of the powers conferred upon the guardian by law and the provisions of this chapter **except as limited by the judgment.**" N.J.S.A. 3B:12-48 (emphasis added). The judgment herein provides no limit to the guardians' authority. The Legislature appears to have intended the guardian make all decisions with the consideration of the ward's preferences and consent, where the same can be expressed and completely obtained. Roche, supra, 296 N.J. Super. at 588-589.

In Shambaugh v. Wolk, 302 N.J. Super. 380, 406 (Ch. Div. 1996), the court was asked to determine whether a daughter had certain visitation rights with her institutionalized mother despite her stepfather's efforts to limit the same. The court determined the "plaintiff continues to enjoy the right to visitational access to and privacy with her natural mother to the extent that her natural mother thus consents, on her own,

and without undue or inappropriate interference.” Id. Interestingly, the court made clear to differentiate a situation where the mother still had the ability to make such determinations, and those where a guardian or healthcare agent had been appointed. Specifically, the court emphasized this was not a guardianship situation and thus, visitational access was warranted “but only to the extent to which [the mother] affirmatively consents.” Id. at 403. Deductively, therefore, it may be concluded where a guardian is in place, the wishes or consent of the incapacitated do not carry the same level of persuasion or influence, but rather should be considered along with the individual’s best interests. Ibid. (stating “defendant’s stated concerns about his wife’s mental competency and physical condition may ultimately warrant a different result than the decision herein reached.”).

Thus, the guardian is expected to fulfill both the preferences of the incapacitated and their best interests. Where those two considerations are mutually exclusive the guardian must make a decision. Should a party disagree with the choice elected or if the guardian is not fulfilling his or her statutory responsibilities, that individual may seek the court’s intervention.

### **Conclusion**

A guardian is appointed by the court who determines the extent to which the guardian may exercise decision-making choices with respect to his or her ward. Here, a state agency has unreasonably interfered without authority. It has acted to restrict the autonomy of the guardian not previously limited by the court. Had the plaintiffs’ not filed the current request, it could be suggested the agency’s actions created disorder in the realm of guardianships by attempting to act in an unauthorized jural manner. These

actions, albeit in good faith, have engendered confusion and uncertainty for the guardians, interested parties, facilities and others. As such, this decision is afforded to reestablish the rights of plenary guardians to utilize the appropriate discretion to determine the visitation rights of his or her ward. Should anyone disagree with the determinations of the guardian, he or she may seek the court's intervention.

For the foregoing reasons, this court finds the plaintiffs, as plenary guardians, possess the authority to control, monitor and schedule visitation with the incapacitated consistent with N.J.S.A. 3B:12-57.

Plaintiffs' counsel shall prepare and submit an appropriate form of order in conformity with this decision pursuant to the five day rule.

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# **ATTACHMENT 3**

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PROBATE & ESTATE PLANNING SECTION  
Respectfully submits the following position on:

\*  
MCL 700.543

\*

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 16. The number who voted opposed to this position was 2.

## **Report on Public Policy Position**

**Name of section:**

Probate & Estate Planning Section

**Contact person:**

Shaheen I. Imami

**E-Mail:**

[sii@probateprince.com](mailto:sii@probateprince.com)

**Regarding:**

MCL 700.543

**Date position was adopted:**

February 16, 2013

**Process used to take the ideological position:**

Position adopted after discussion and vote at a scheduled meeting.

**Number of members in the decision-making body:**

23

**Number who voted in favor and opposed to the position:**

16 Voted for position

2 Voted against position

0 Abstained from vote

5 Did not vote

**Position:**

Voted to seek the amendment MCL 700.5433 to re-insert language which was deleted upon the passage of 2012 PA 545.

**Explanation of the position, including any recommended amendments:**

To re-insert language previously contained in MCL 700.5433 which was deleted upon the passage of 2012 PA 545.

To amend MCL 700.5433 to read as follows:

Proposed Amended MCL 700.5433 to include new subsection (1):

(1) If a conservator has not been appointed in this state and a petition in a protective proceeding is not pending in this state, a conservator appointed in the state in which the protected individual resides may file in a court of this state, in a county in which property belonging to the protected individual is located, an authenticated copy of letters of appointment and of any bond.



After the filing, the domiciliary foreign conservator may exercise as to property in this state all the powers of a conservator appointed in this state and may maintain an action or proceeding in this state subject to any conditions imposed upon nonresident parties generally.

(2) If a conservator has not been appointed in this state and a petition in a protective proceeding is not pending in this state, a conservator appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary conservator in this state on filing with a court in this state an application for appointment, an authenticated copy of letters of appointment in the other state, and an acceptance of appointment. Letters of conservatorship for the temporary conservator expire 28 days after the date of appointment.

(3) Within 14 days after appointment as temporary conservator under subsection (2), the conservator shall give notice to all interested persons of his or her appointment and the right to object to the appointment. On filing proof of service of the notice with the court, the temporary conservator shall be appointed full conservator and the court shall issue letters of conservatorship accordingly.

(4) If an objection is filed to a conservatorship under this section, the conservatorship continues unless a court in this state enters an order removing the conservator.

**The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.**

[http://www.legislature.mi.gov/\(S\(ilwhhp2tma3unr55pjlm45\)\)/mileg.aspx?page=getObject&objectName=mcl-700-5433](http://www.legislature.mi.gov/(S(ilwhhp2tma3unr55pjlm45))/mileg.aspx?page=getObject&objectName=mcl-700-5433)

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# **ATTACHMENT 4**

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PROBATE & ESTATE PLANNING SECTION

Respectfully submits the following position on:

\*

SB 0031 & SB 0032

\*

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 18. The number who voted opposed to this position was 0.

## Report on Public Policy Position

**Name of section:**

Probate & Estate Planning Section

**Contact person:**

Shaheen I. Imami

**E-Mail:**

[sii@probateprince.com](mailto:sii@probateprince.com)

**Bill Number:**

[SB 0031](#) (Schuitmaker) Insurance; life; insurable interests; amend insurance code to provide for insurable interest of trustees. Amends [1956 PA 218](#) (MCL [500.100](#) - [500.8302](#)) by adding sec. 2210a.

[SB 0032](#) (Schuitmaker) Probate; trusts; insurable interest amendments to the Michigan trust code; provide for. Amends [1998 PA 386](#) (MCL [700.1101](#) - [700.8206](#)) by adding sec. 7114.

**Date position was adopted:**

February 16, 2013

**Process used to take the ideological position:**

Position adopted after discussion and vote at a scheduled meeting.

**Number of members in the decision-making body:**

23

**Number who voted in favor and opposed to the position:**

18 Voted for position

0 Voted against position

0 Abstained from vote

5 Did not vote

**Position:**

Support

**Explanation of the position, including any recommended amendments:**

Support the passage of SB 31 & SB 32 regarding insurable interests.

**The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.**

<http://legislature.mi.gov/doc.aspx?2013-SB-0031>

<http://legislature.mi.gov/doc.aspx?2013-SB-0032>

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# **ATTACHMENT 5**

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PROBATE & ESTATE PLANNING SECTION

Respectfully submits the following position on:

\*

Long Term Care Ombudsman

\*

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and electronic vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 20. The number who voted opposed to this position was 0.

## **Report on Public Policy Position**

**Name of section:**

Probate & Estate Planning Section

**Contact person:**

Shaheen I. Imami

**E-Mail:**

[sii@probateprince.com](mailto:sii@probateprince.com)

**Regarding:**

Proposed Letter to Legal Division of Governor's Office re: Long Term Care Ombudsman

**Date position was adopted:**

March 6, 2013

**Process used to take the ideological position:**

Position adopted after an electronic discussion and vote.

**Number of members in the decision-making body:**

23

**Number who voted in favor and opposed to the position:**

20 Voted for position

0 Voted against position

1 Abstained from vote

2 Did not vote

**Explanation of the position, including any recommended amendments:**

The Probate & Estate Planning Section has concerns regarding the adoption and dissemination of certain "policy" statements from the office of the Michigan State Long Term Care Ombudsman. Specifically, the Probate & Estate Planning Section is concerned with the manner in which policy statements are being adopted and the legal interpretations contained in such statements. The position of the Probate & Estate Planning Section is shared by the Michigan Probate Judges' Association.

Mr. Michael F. Gadola  
Office of the Governor - Legal Division  
111 S. Capitol Ave.  
PO Box 30013  
Lansing, MI48909

Dear Mr. Gadola:

On behalf of the Probate & Estate Planning Section of the State Bar of Michigan and the Michigan Probate Judges Association (MPJA), we are writing to you to express the concerns of our organizations related to information being disseminated by Mr. Bradley Geller in his role as Assistant State Long Term Care Ombudsman in Michigan.

In January 2013, Mr. Geller published and disseminated a Policy Statement of the Michigan State Long Term Care Ombudsman's Program entitled "Health Care Decision-Making for a Resident in a Nursing Home." Mr. Geller refers to this publication as Project Wildcat (the "Policy Statement"). Although Project Wildcat was disseminated as a Policy Statement of the State Long Term Care Ombudsman ("Ombudsman"), it is our understanding that such Policy Statement was not promulgated pursuant to the Administrative Procedures Act of 1969, which includes "policy" in its definition of a "rule" subject to the requirements of the Act.

Our concern is not only the failure of Mr. Geller and the Ombudsman to follow the procedures necessary to promulgate a Policy Statement, but also the content of the Policy Statement. Mr. Geller attempts to interpret Michigan law in the Policy Statement, particularly in areas of the law in which clear authority is absent. Mr. Geller may express his personal views of the law in many forums, but to express his opinions in an Ombudsman's Policy Statement as the proper interpretation of Michigan law is not within his authority and puts the executive branch of our government at risk. For Mr. Geller to share his opinions in a Policy Statement being relied upon by nursing homes across the State of Michigan is inappropriate and alarming to members of our organizations.

In an email recently posted by Mr. Geller on the listserv of the Elder Law Section of the State Bar of



Michigan, in conjunction with the completion of Project Wildcat, Mr. Geller expresses the following:

*"The purpose of this endeavor is to offer Michigan nursing homes a comprehensive, understandable presentation of the (not always logical) law of surrogate decision-making in healthcare."*

Of the Policy Statement, Mr. Geller also writes to certain interested persons:

*"I recently mailed you a copy of Project Wildcat, a policy paper of the Michigan State Long Term Care Ombudsman Program. The policy paper discusses the STCO's view of the state of the law in surrogate decision-making for health care care [sic]."*

*The information is directed primarily at nursing home administrators and nursing home social workers.*

*The policy paper was not promulgated by the Michigan Department of Community Health, the Michigan Department of Licensing and Regulatory Affairs or the Michigan Office of Services to the Aging, and these agencies are not responsible for its content.*

*The Michigan Long Term Care Ombudsman Program, while part of state government, has a role defined in large part by the federal Older Americans Act. Under the Act, the ombudsman program independently advocates for and with residents in long term care facilities, with the aim of improving residents' quality of care and quality of life."*

Mr. Geller suggests that the Policy Statement, Project Wildcat, was created as part of the Ombudsman's role under the Older American's Act, but he acknowledges that the Policy Statement addresses the Ombudsman's view of the "state of the law in surrogate decision-making for health care." This is a matter of State law, not Federal law.

Other initiatives in Michigan are relying upon Mr. Geller's Policy Statement as authority. For example, the Michigan Physician's Orders for Scope of Treatment (MI-POST) program, which was initiated by the Michigan Coalition for Honoring Healthcare Choices, has relied upon Mr. Geller's Policy Statement as authority for its position that a "surrogate" may refuse life sustaining care for an

incompetent person in a nursing home. In this context, a surrogate would be a person other than a patient, patient advocate or guardian.

A quote from the recently published Guidelines of the Michigan Coalition for Honoring Healthcare Choices is as follows:

*"Family Consent*

*Michigan does not have a Family Consent law; however the position of the State Long Term Care Ombudsman Program is that there are two relevant laws, The Michigan Social Welfare Act and the Dignified Death Act.<sup>4</sup>*

*<sup>4</sup> Gellar [sic], Brad. Project Wildcat"*

And as you know, the POST form allows a surrogate to withdraw life-sustaining treatment from a person who may or may not be terminally ill.

Our goal in writing you is two-fold. We seek a full retraction of the Policy Statement disseminated by Mr. Geller on behalf of the Ombudsman's office; we do not believe it accurately interprets Michigan law, nor should Mr. Geller be interpreting State law and giving the weight of law to his personal positions. Furthermore, we do not believe the Policy Statement was properly promulgated. The applicable sections of the Administrative Procedures Act are appended to this correspondence. We also request future oversight of the activities of Mr. Geller, the Ombudsman's office, and materials being disseminated by the Ombudsman and its representatives.

We believe that there are others who share these serious concerns. Thank you for your attention to this important matter.

Very truly yours,

Attachment

cc: James K. Haveman, Director, Department of Community Health

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# **ATTACHMENT 2**

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**Probate and Estate Planning Council**  
**Treasurer's Report**  
**for 3-16-2013**

**Income/Expense Report**

Attached is the income and expense report for January 2013 (unaudited). The dues revenue at the end of January 2013 is about \$700 higher than January 2012, and we remain on target with the projected revenue as shown in the budget.

Travel expenses continue to run higher than last year, but we budgeted more for that expense this year, so we remain within budget at present. I will continue to watch that expense item.

The lobbying expense line includes the February payment, because that was made at the end of January and so shows up on this report. It also includes November, because that billing that misdirected. Overall that expense line remains as budgeted.

Also note that the names of the "listserv" line has been changed to "electronic communications" and will include e-blast expenses which were previously under "other".

I've also included a note about our "Amicus fund" item which is now allocated from our fund balance to cover extra amicus brief expenses that could arise in excess of the regular budgeted amicus brief line item due to expected litigation over interpretation questions involving the new Michigan Trust Code.

**Expense Reimbursement Requests**

Please keep in mind that the State Bar wants all expenses submitted to the State Bar of Michigan within 30 days of when the expense was incurred.

Also, as previously noted, the Bar has revised the expense reimbursement form to include the new mileage rate on some of the lines. This is available on the State Bar website at:

<http://www.michbar.org/generalinfo/pdfs/sectexp.pdf>

**Hearts and Flowers Fund:**

We received a Thank You card from the Dresser family for our donation of \$100 to the Sturgis Area Community Foundation in memory of Raymond H. Dresser, Jr.

Jim Steward  
Council Treasurer

**Probate and Estate Planning Section  
Treasurer's Report as of January 1, 2013**

	November	December	January	FY to Date Actual	Budget 2012-13	Variance	Year to Date Percentage
<b>Revenue</b>							
Membership Dues	\$ 43,050	\$ 6,580	\$ 3,220	\$ 115,150	\$115,000	\$ 150	100%
Publishing Agreements				\$ -	\$350	\$ (350)	0%
Other				\$ -	\$350	\$ (350)	0%
Total Receipts	\$43,050	\$6,580	\$3,220	\$ 115,150	\$115,700	\$ (550)	100%
<b>Disbursements</b>							
Journal			\$ 3,750	\$ 3,750	\$27,500	\$ (23,750)	14%
Chairperson's Dinner	\$ 4,406			\$ 4,406	\$6,500	\$ (2,094)	68%
Travel	\$ 3,269	\$ 1,083	\$ 2,143	\$ 6,494	\$18,000	\$ (11,506)	36%
Lobbying		\$ 2,500	\$ 7,500	\$ 12,500	\$30,000	\$ (17,500)	42%
Meetings	\$ 2,414			\$ 2,414	\$12,000	\$ (9,586)	20%
Long-range Planning				\$ -	\$1,000	\$ (1,000)	0%
Publishing Agreements				\$ -	\$0	\$ -	0%
Support for Annual Institute			\$ 250	\$ 250	\$13,000	\$ (12,750)	2%
Amicus Briefs				\$ -	\$10,000	\$ (10,000)	0%
Electronic Communications*	\$ 75		\$ 75	\$ 225	\$1,400	\$ (1,175)	16%
Postage				\$ -	\$100	\$ (100)	0%
Telephone		\$ 49		\$ 49	\$250	\$ (201)	20%
Other**			\$ 75	\$ 150	\$100	\$ 50	150%
Total Disbursements	\$10,164	\$3,632	\$13,793	\$30,238	\$119,850	\$ (89,612)	25%
Increase				\$ 84,912	\$ (4,150)	\$ 89,062	

**Additional Information**

Fund Balance\*\*\* \$ 285,917

\*includes e-blast & other electronic communications to members

\*\*includes copying costs

\*\*\*includes \$25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

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# **ATTACHMENT 3**

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# memo



## DuComb Law, PLLC

To: MI Probate & Estate Planning Council  
From: Keven DuComb  
CC:  
Date: 3/16/2013  
Re: Funding Request: Young Lawyers Section Summit

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**OVERVIEW:** The Young Lawyers Section of the State Bar of Michigan is holding its annual Young Lawyers Summit on June 8, 2013 at the Greektown Casino in Detroit. They have solicited partnerships from other sections. Partnership involves staffing a table and providing information to attendees about the Probate & Estate Planning (P&EP) Section, its benefits, and activities. At the February 16, 2013 meeting of the P&EP Council, some members expressed interest in having the Section participate due to an apparent increase in younger attorneys taking on estate planning and probate work. I volunteered to look into the options and draft a funding proposal for the activity.

**PARTNERSHIP:** There are three “partnership” levels. The standard “vendor” level seems sufficient for the Section’s purposes. This level provides the Section with a table and admission for one Section member to serve as representative of the Section.

### FUNDING:

- “Vendor” Level - \$100
- Vinyl Banner for the Section - \$20-\$50 (3’x6’)
- Printing P&EP Section pamphlets - \$100 (?)
- Printing ICLE pamphlets - \$100 (?)
- Optional “swag” (i.e., freebies like flash drives) and/or printing alternative – 100 flash drives for \$390

### DISCUSSION:

- Partnership fee is mandatory.
- It is possible that the Section has a banner available for table events, if any member recalls its location. Otherwise, the idea would be that this would be available for any similar events. Large vinyl banners to attach to the front of the table are cheaper (and likely more durable) than cardboard “table-top” type

# memo

- signage. Available from [bannersonthecheap.com](http://bannersonthecheap.com). Is there a section logo saved in a .jpeg or .png file?
- Discussion with Rebecca Schnelz regarding the potential availability of the newly revamped Section pamphlets: they are still under review. Update from Rebecca? Estimate of printing costs?
  - Discussion with ICLE (Jeff/Jeanne) regarding potential participation in the event or whether they would want to provide any materials advertising the Institute or Certificate program. Update from Jeanne? Does ICLE have some of these materials made already? Cost estimate?
  - Addition/Alternative – Branded Flash Drive. Many of us are familiar with the “branded” thumb drive concept from the Institute where ICLE provides a thumb drive containing all of the printed materials. This “preloading” feature is an option for promotional materials, as well. For instance, we could load the updated pamphlets onto flash drives rather than printing the pamphlets. That way, participants get a “freebie” in addition to having some information.
  - There were 106 attendees at last year’s YLS Summit, which is why I used the quote for 100 flash drives. However, we probably need some printed materials on the table, as well, just to fill the space.

## FUNDING REQUEST:

- Option 1: open-ended request for discretionary use of no more than \$600 to cover the partnership fee, banner and flash drives. Dependent on ICLE “donating” some additional printed materials for the table.
- Option 2: Fine tune the request based upon discussion at 3/16/13 Section meeting or through updated written proposal supplied at the 4/13/13 Section meeting.
- Additional thoughts/motions.



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# **ATTACHMENT 4**

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**PROBATE & ESTATE PLANNING SECTION**

**OFFICERS**

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Mark K. Harder  
Warner Norcross & Judd LLP  
85 E 8th St Ste 310  
Holland, MI 49423-3528

**CHAIR ELECT**

Thomas F. Sweeney, Birmingham

**VICE CHAIR**

Amy N. Morrissey, Ann Arbor

**SECRETARY**

Shaheen I. Imami, Farmington  
Hills

**TREASURER**

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**IMMEDIATE PAST CHAIR**

George W. Gregory, Troy

**COMMISSIONER LIAISON**

David R. Brake, Lansing

February 26, 2013

Members of the Representative Assembly  
State Bar of Michigan  
Michael Franck Building  
306 Townsend St.  
Lansing, MI 48933-2012

Re: Inventory Attorney

Ladies and Gentlemen:

At its Spring Meeting the Representative Assembly will consider the Inventory Attorney proposal made by the Master Lawyer's Section.

If the inventory attorney concept is approved by the Representative Assembly, the Council of the Probate and Estate Planning Section requests that all proceedings involving a disabled or deceased attorney under MCR 9.119(G) be heard in the Probate Court and not in the Circuit Court. The Council believes that any guardianship, conservatorship, or probate proceedings involving the disabled or deceased attorney already will be in the Probate Court and that if proceedings under the proposed MCR 9.119(G) are initiated, the Probate Court is the most logical Court for those proceedings.

The Probate and Estate Planning Section has taken no position whether the Inventory Attorney proposal should be adopted.

If Members of the Representative Assembly have questions or would like further information, please contact me, or J. David Kerr of Mt. Pleasant, who serves as the Chair of the Ethics Committee of the Probate and Estate Planning Section.

Very truly yours,



Mark K. Harder  
Chair

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# **ATTACHMENT 5**

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## HOUSE BILL No. 4013

On January 22, 2013 the legislation on Pooled Account Trusts was re-introduced by Rep. Heise (R-Plymouth) and was referred to the newly created House Financial Liability Reform Committee chaired by Rep. Earl Poleski (R-Jackson).

The bill will amend section 106 of "The Social Welfare Act". Section 106A describes the subrogation right of the State to recover medical costs paid from State funds when people who have sustained injuries and file suit. Amendments to this section are refining language without substantive changes.

Section 106B establishes the use of a pooled special needs trust in the State of Michigan. 42 USC §1396(p)(D)(4), subparagraph (c) describes the elements of a pooled special needs trust. There is no requirement that the person with a disability be under age 65 unlike the Self-Settled (D)(4)(a) Special Needs Trust. The pending bill will help resolve a continuing problem for individuals, who are over the age of 64, attempting to create and fund a pooled trust account.

A pooled trust is an arrangement with a non-profit organization to administer assets of people with disabilities. The Michigan Department of Human Services (DHS), implemented the federal statute through BEM 401, called an Exception B trust. Historically, the Department of Human Services allowed the transfer of assets into a pooled special needs trust without regard to age or imposing a penalty (period of disqualification) on such transfer. However, within the last few years a penalty on such transfers has been imposed. As a result, many appeals and even litigation has ensued. The passage of 4013 would eliminate these appeals and sources of litigation as the State would definitively set forth statutory guidance to state agencies and the judiciary.

Currently 17 states allow transfers to pooled account trust for a person over the age of 64 to occur without a penalty.

The pooled trust allows for the blend of public benefit programs and private dollars which result in an increased quality of life for persons with disabilities.

# HOUSE BILL No. 4013

January 22, 2013, Introduced by Rep. Heise and referred to the Committee on Financial Liability Reform.

A bill to amend 1939 PA 280, entitled  
"The social welfare act,"  
by amending section 106 (MCL 400.106), as amended by 2006 PA 144,  
and by adding section 106b.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1       Sec. 106. (1) A medically indigent individual is defined as:

2       (a) An individual receiving family independence program  
3       benefits or an individual receiving supplemental security income  
4       under title XVI or state supplementation under title XVI subject to  
5       limitations imposed by the director according to title XIX.

6       (b) Except as provided in section 106a, an individual who  
7       meets all of the following conditions:

8       (i) The individual has applied in the manner the ~~family~~  
9       ~~independence agency~~ **DEPARTMENT** prescribes.

1           (ii) The individual's need for the type of medical assistance  
2 available under this act for which the individual applied has been  
3 professionally established and payment for it is not available  
4 through the legal obligation of a public or private contractor to  
5 pay or provide for the care without regard to the income or  
6 resources of the patient. The state department is subrogated to any  
7 right of recovery that a patient may have for the cost of  
8 hospitalization, pharmaceutical services, physician services,  
9 nursing services, and other medical services not to exceed the  
10 amount of ~~funds~~ **MONEY** expended by the state department for the care  
11 and treatment of the patient. The patient or other person acting in  
12 the patient's behalf shall execute and deliver an assignment of  
13 claim or other authorizations as necessary to secure the right of  
14 recovery to the department. A payment may be withheld under this  
15 act for medical assistance for an injury or disability for which  
16 the individual is entitled to medical care or reimbursement for the  
17 cost of medical care under sections 3101 to 3179 of the insurance  
18 code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179, or under  
19 another policy of insurance providing medical or hospital benefits,  
20 or both, for the individual unless the individual's entitlement to  
21 that medical care or reimbursement is at issue. If a payment is  
22 made, the state department, to enforce its subrogation right, may  
23 do either of the following: (a) intervene or join in an action or  
24 proceeding brought by the injured, diseased, or disabled  
25 individual, the individual's guardian, personal representative,  
26 estate, dependents, or survivors, against ~~the~~ **A** third person who  
27 may be liable for the injury, disease, or disability, or against

1 contractors, public or private, who may be liable to pay or provide  
2 medical care and services rendered to an injured, diseased, or  
3 disabled individual; (b) institute and prosecute a legal proceeding  
4 against a third person who may be liable for the injury, disease,  
5 or disability, or against contractors, public or private, who may  
6 be liable to pay or provide medical care and services rendered to  
7 an injured, diseased, or disabled individual, in state or federal  
8 court, either alone or in conjunction with the injured, diseased,  
9 or disabled individual, the individual's guardian, personal  
10 representative, estate, dependents, or survivors. The state  
11 department may institute the proceedings in its own name or in the  
12 name of the injured, diseased, or disabled individual, the  
13 individual's guardian, personal representative, estate, dependents,  
14 or survivors. As provided in section 6023 of the revised judicature  
15 act of 1961, 1961 PA 236, MCL 600.6023, the state department, in  
16 enforcing its subrogation right, shall not satisfy a judgment  
17 against the third person's property that is exempt from levy and  
18 sale. The injured, diseased, or disabled individual may proceed in  
19 his or her own name, collecting the costs without the necessity of  
20 joining the state department or ~~the~~**THIS** state as a named party.  
21 The injured, diseased, or disabled individual shall notify the  
22 state department of the action or proceeding entered into upon  
23 commencement of the action or proceeding. An action taken by ~~the~~  
24 **THIS** state or the state department in connection with the right of  
25 recovery afforded by this section does not deny the injured,  
26 diseased, or disabled individual any part of the recovery beyond  
27 the costs expended on the individual's behalf by the state

1 department. The costs of legal action initiated by ~~the~~**THIS** state  
2 shall be paid by ~~the~~**THIS** state. A payment shall not be made under  
3 this act for medical assistance for an injury, disease, or  
4 disability for which the individual is entitled to medical care or  
5 the cost of medical care under the worker's disability compensation  
6 act of 1969, 1969 PA 317, MCL 418.101 to 418.941; except that  
7 payment may be made if an appropriate application for medical care  
8 or the cost of the medical care has been made under the worker's  
9 disability compensation act of 1969, 1969 PA 317, MCL 418.101 to  
10 418.941, entitlement has not been finally determined, and an  
11 arrangement satisfactory to the state department has been made for  
12 reimbursement if the claim under the worker's disability  
13 compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941, is  
14 finally sustained.

15 (iii) The individual has an annual income that is below, or  
16 subject to limitations imposed by the director and because of  
17 medical expenses falls below, the protected basic maintenance  
18 level. The protected basic maintenance level for 1-person and 2-  
19 person families shall be at least 100% of the payment standards  
20 generally used to determine eligibility in the family independence  
21 program. For families of 3 or more persons, the protected basic  
22 maintenance level shall be at least 100% of the payment standard  
23 generally used to determine eligibility in the family independence  
24 program. These levels shall recognize regional variations and shall  
25 not exceed 133-1/3% of the payment standard generally used to  
26 determine eligibility in the family independence program. **FOR**  
27 **PURPOSES OF THIS SUBPARAGRAPH, ANNUAL INCOME DOES NOT INCLUDE**



1 **INCOME ASSIGNED TO A POOLED TRUST DESCRIBED IN SECTION 106B.**

2 (iv) The individual, if a family independence program related  
3 individual and living alone, has liquid or marketable assets of not  
4 more than \$2,000.00 in value, or, if a 2-person family, the family  
5 has liquid or marketable assets of not more than \$3,000.00 in  
6 value. The state department shall establish comparable liquid or  
7 marketable asset amounts for larger family groups. Excluded in  
8 making the determination of the value of liquid or marketable  
9 assets are the values of: the homestead; clothing; household  
10 effects; \$1,000.00 of cash surrender value of life insurance,  
11 except that if the **INSURED'S** health ~~of the insured~~ makes  
12 ~~continuance of~~ **CONTINUING** the insurance desirable, the entire cash  
13 surrender value of life insurance is excluded from consideration,  
14 up to the maximum provided or allowed by federal regulations and in  
15 accordance with state department rules; the fair market value of  
16 tangible personal property used in earning income; an amount paid  
17 as judgment or settlement for damages suffered as a result of  
18 exposure to agent orange, as defined in section 5701 of the public  
19 health code, 1978 PA 368, MCL 333.5701; ~~and a space or plot~~  
20 purchased for the purposes of burial for the person; **AND ASSETS,**  
21 **WITHOUT REGARD TO VALUE, HELD BY, OR TRANSFERRED TO, A TRUSTEE OF A**  
22 **POOLED TRUST AS DESCRIBED IN SECTION 106B FOR THE BENEFIT OF THE**  
23 **INDIVIDUAL.** For individuals related to the title XVI program, the  
24 appropriate resource levels and property exemptions specified in  
25 title XVI shall be used.

26 (v) The individual is not an inmate of a public institution  
27 except as a patient in a medical institution.

1           (vi) The individual meets the eligibility standards for  
2 supplemental security income under title XVI or for state  
3 supplementation under the act, subject to limitations imposed by  
4 the director according to title XIX; or meets the eligibility  
5 standards for family independence program benefits; or meets the  
6 eligibility standards for optional eligibility groups under title  
7 XIX, subject to limitations imposed by the director according to  
8 title XIX.

9           (2) As used in this act:

10           (a) "Medicaid contracted health plan" means a managed care  
11 organization with whom the state department contracts to provide or  
12 arrange for the delivery of comprehensive health care services as  
13 authorized under this act.

14           (b) "Medical institution" means a state licensed or approved  
15 hospital, nursing home, medical care facility, psychiatric  
16 hospital, or other facility or identifiable unit of a listed  
17 institution certified as meeting established standards for a  
18 nursing home or hospital in accordance with the laws of this state.

19           (c) "Title XVI" means title XVI of the social security act, 42  
20 USC 1381 to ~~1382j and 1383 to 1383f~~. **1385.**

21           (3) An individual receiving medical assistance under this act  
22 or his or her legal counsel shall notify the state department when  
23 filing an action in which the state department may have a right to  
24 recover expenses paid under this act. If the individual is enrolled  
25 in a medicaid contracted health plan, the individual or his or her  
26 legal counsel shall provide notice to the medicaid contracted  
27 health plan in addition to providing notice to the state

1 department.

2 (4) If a legal action in which the state department, a  
3 medicaid contracted health plan, or both ~~has~~**HAVE** a right to  
4 recover expenses paid under this act is filed and settled after  
5 November 29, 2004 without notice to the state department or the  
6 medicaid contracted health plan, the state department or the  
7 medicaid contracted health plan may file a legal action against the  
8 individual or his or her legal counsel, or both, to recover  
9 expenses paid under this act. The attorney general shall recover  
10 any cost or attorney fees associated with a recovery under this  
11 subsection.

12 (5) The state department has first priority against the  
13 proceeds of the net recovery from the settlement or judgment in an  
14 action settled in which notice has been provided under subsection  
15 (3). A medicaid contracted health plan has priority immediately  
16 after the state department in an action settled in which notice has  
17 been provided under subsection (3). The state department and a  
18 medicaid contracted health plan shall recover the full cost of  
19 expenses paid under this act unless the state department or the  
20 medicaid contracted health plan agrees to accept an amount less  
21 than the full amount. If the individual would recover less against  
22 the proceeds of the net recovery than the expenses paid under this  
23 act, the state department or medicaid contracted health plan, and  
24 the individual shall share equally in the proceeds of the net  
25 recovery. As used in this subsection, "net recovery" means the  
26 total settlement or judgment less the costs and fees incurred by or  
27 on behalf of the individual who obtains the settlement or judgment.

1        SEC. 106B. (1) THE STATE DEPARTMENT SHALL ESTABLISH RULES,  
2        REGULATIONS, AND POLICIES THAT ARE IN COMPLIANCE WITH, AND NOT MORE  
3        RESTRICTIVE THAN, EXISTING FEDERAL LAW, REGULATIONS, AND POLICIES  
4        WITH REGARD TO THE TREATMENT OF A POOLED TRUST DESCRIBED IN THIS  
5        SECTION.

6        (2) THE STATE DEPARTMENT SHALL NOT IMPOSE A PENALTY ON AN  
7        INDIVIDUAL, OR DELAY ELIGIBILITY FOR MEDICAL ASSISTANCE, FOR  
8        ENTERING INTO A JOINDER AGREEMENT, TRANSFERRING ASSETS TO A POOLED  
9        TRUST, OR BOTH.

10       (3) A JOINDER AGREEMENT MAY BE ENTERED INTO BY A DISABLED  
11       INDIVIDUAL OF ANY AGE, OR ON BEHALF OF A DISABLED INDIVIDUAL, BY  
12       ANY OF THE FOLLOWING:

13       (A) WITH THE PERMISSION OR CONSENT, OR BOTH, OF THE DISABLED  
14       INDIVIDUAL, A PARENT.

15       (B) WITH THE PERMISSION OR CONSENT, OR BOTH, OF THE DISABLED  
16       INDIVIDUAL, A GRANDPARENT.

17       (C) A GUARDIAN.

18       (D) A CONSERVATOR.

19       (E) A COURT.

20       (F) A PERSON NAMED AS ATTORNEY-IN-FACT THROUGH A DURABLE POWER  
21       OF ATTORNEY THAT AUTHORIZES THE ATTORNEY-IN-FACT TO ENTER INTO A  
22       JOINDER AGREEMENT OR SIMILAR AGREEMENT.

23       (4) AS USED IN THIS SECTION:

24       (A) "BENEFICIARY" MEANS A DISABLED INDIVIDUAL WHO HAS THE  
25       RIGHT TO RECEIVE SERVICES AND BENEFITS OF A POOLED TRUST.

26       (B) "DISABILITY" MEANS A PHYSICAL OR MENTAL IMPAIRMENT AS  
27       DESCRIBED IN SECTION 1614 OF THE SOCIAL SECURITY ACT, 42 USC 1382C.

1 (C) "DISABLED INDIVIDUAL" MEANS AN INDIVIDUAL WITH A  
2 DISABILITY.

3 (D) "JOINDER AGREEMENT" MEANS AN AGREEMENT BETWEEN A TRUSTEE  
4 AND A BENEFICIARY THAT CONTAINS THE TERMS AND CONDITIONS OF THE  
5 RELATIONSHIP BETWEEN THE TRUSTEE AND THE BENEFICIARY.

6 (E) "POOLED TRUST" MEANS A TRUST THAT MEETS ALL OF THE  
7 FOLLOWING CRITERIA:

8 (i) THE TRUSTEE MAINTAINS AN ACCOUNT FOR EACH BENEFICIARY.

9 (ii) THE TRUSTEE POOLS ACCOUNTS FOR PURPOSES OF INVESTMENT AND  
10 MANAGEMENT OF FUNDS.

11 (iii) THE TRUSTEE USES FUNDS IN THE BENEFICIARY'S ACCOUNT FOR  
12 THE SOLE BENEFIT OF THE BENEFICIARY.

13 (iv) UPON THE DEATH OF A BENEFICIARY, THE TRUSTEE MAY RETAIN  
14 ASSETS THAT REMAIN IN THE BENEFICIARY'S ACCOUNT, WITHOUT LIMIT TO  
15 DOLLAR AMOUNT, IN THE POOLED TRUST. WITH RESPECT TO ASSETS THAT  
16 REMAIN IN THE BENEFICIARY'S ACCOUNT AND THAT ARE NOT RETAINED BY  
17 THE TRUST, THE TRUSTEE SHALL REIMBURSE THIS STATE IN AN AMOUNT  
18 EQUAL TO THE TOTAL AMOUNT OF MEDICAL ASSISTANCE PAID BY THIS STATE  
19 ON BEHALF OF THE BENEFICIARY BEFORE DISTRIBUTING THOSE ASSETS TO  
20 OTHER INDIVIDUALS OR USING THOSE ASSETS FOR ANY OTHER PURPOSE.

21 (F) "TRUSTEE" MEANS A NONPROFIT ORGANIZATION THAT MANAGES A  
22 POOLED TRUST. A DETERMINATION OF THE INTERNAL REVENUE SERVICE, THE  
23 DEPARTMENT OF TREASURY, OR BOTH, REGARDING THE NONPROFIT STATUS OF  
24 AN ORGANIZATION OPERATING A POOLED TRUST IS SUFFICIENT TO SATISFY  
25 THE NONPROFIT REQUIREMENT OF 42 USC 1396P(D)(4)(C).

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# **ATTACHMENT 6**

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State Bar of Michigan

306 Townsend St., Lansing MI 48933-2012, (800) 968-1442

Payee Name

Street

City

State

Michigan

Zip Code

E-mail

Phone

Section  
Expense Reimbursement Form

Select a Section

Staple receipts to back of form as required.  
For electronic transmittal, scan and PDF  
receipts and send with form by e-mail.  
Policies and procedures on reverse side.

Please Provide Account Number	Amount
Amount Total	

Date	Description & Purpose (Note start & end point for mileage.)	Mileage			Lodging/ Other Travel	Meals (Self + attach list of guests)	Miscellaneous (i.e. copying, phone, etc.)	TOTAL
		Rate	Mileage	Reimbursement				
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00
		0.555		\$0.00				\$0.00

I certify that the reported expense was actually incurred  
while performing my duties for the State Bar of Michigan as

Date

Title

Signature

Grand Total

\$0.00

Date

Title

Approved by (signature)

Reset Form

Print Form

## Section Expense Reimbursement Policies and Procedures

### General Policies

1. Requests for reimbursement of individual expenses should be submitted as soon as possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.
2. All out of pocket expenses must be itemized.
3. Detailed receipts are recommended for all expenses but required for expenses over \$25.
4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.
5. Spouse expenses are generally not reimbursable.
6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement of mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.
7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.
8. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.
  - A. Tickets should be at the best rate available for as direct a path as possible.

- B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.
- C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.
- D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. If the State Bar of Michigan is

paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

### Specific Policies

1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.



## **CSP Agenda – Probate and Estate Planning Council**

**March 16, 2013**

**8:30 a.m.**

1. Update to Michigan Law Committee – Rob Tiplady/Meg Lentz
  - Finish review of Section 5 of the revised draft of Qualified Dispositions in Trust Act.
  - Discuss revisions in draft to coordinate with decanting legislation and comments made at previous CSP meetings.
  - Move ahead to sections 6, 3, 7, 8, and 9.

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# **ATTACHMENT 1**

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## § 1. Short Title

This act shall be known and may be cited as the “qualified dispositions in trust act.”

## § 2. Definitions

As used in this act:

(1) “Advisor” means a person who is given authority by the terms of a trust instrument to remove and/or to appoint one or more trustees or to direct, consent to, approve or veto a trustee’s actual or proposed investment or distribution decisions. A person shall be considered an advisor even if that person is denominated by another title, such as trust protector. Any person may serve as an advisor except that a transferor and any person who is related or subordinate to that transferor within the meaning of Section 672(c) of the Internal Revenue Code, 26 USC 672(c), may act as an advisor only in connection with investment decisions.

(2) “Claim” means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(3) “Creditor” means, with respect to a transferor, a person who has a claim.

(4) “Debt” means liability on a claim.

(5) “Disposition” means a transfer of property that either creates a new fiduciary relation between at least 1 trustee and a trust beneficiary or newly subjects property to a preexisting fiduciary relation between at least 1 trustee and a trust beneficiary. The transfer may be by conveyance or assignment, by exercise of a power of appointment (including a power to substitute 1 trustee for another or to add 1 or more new trustees) or a power of revocation or amendment or (except as provided below) by disclaimer, release or relinquishment. A disposition, however, shall not include a disclaimer, release or relinquishment of property that was previously the subject of a qualified disposition. For this purpose, as between a given trustee and a given beneficiary, a new fiduciary relation is created whenever the terms of the governing trust instrument are materially altered (including alteration by an election described in section 5(e)) with respect to the trust beneficiary in question.

(6) “Distribution decision” means any decision regarding the distribution of trust property to or for the benefit of a trust beneficiary. Distribution decision also includes a decision regarding whether to make or guaranty a loan to or for the benefit of any trust beneficiary.

(7) “Fiduciary disposition” means a disposition made by a trustee acting in a fiduciary capacity. “Fiduciary qualified disposition” means a qualified disposition made by a trustee acting in a fiduciary capacity.

(8) “General power of appointment” means a general power as defined in section 2(h) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(h), provided that a power exercisable in favor of the donee, his estate, his creditors or the creditors of his estate that is limited by an ascertainable standard, as that term is defined in section 7103(b) of the Michigan

trust code, 2009 PA 46, MCL 700.7103(b), shall not be considered a general power of appointment.

(9) “Investment decision” means any decision regarding whether or not to purchase, sell, exchange, tender or pledge any trust property. Investment decision also includes decisions regarding other transactions affecting the ownership of or rights in any trust property, other than distribution decisions. Unless otherwise provided in the trust instrument, investment decision shall include a decision regarding whether to make or guaranty a loan to or on behalf of any entity in which the trust owns an interest, directly or indirectly, in the entity’s debt or equity.

(10) “Organization” means that term as defined in section 1106(h) of the estates and protected individuals code, 2000 PA 54, MCL 700.1106(h).

(11) “Person” means that term as defined in section 1106(n) of the estates and protected individuals code, 2000 PA 54, MCL 700.1106(p).

(12) “Property” means that term as defined in section 1106(u) of the estates and protected individuals code, 2000 PA 54, MCL 700.1106(u).

(13) “Qualified disposition” means a disposition after which the subject property is:

(a) Owned by 1 or more trustees at least 1 of whom is a qualified trustee; and

(b) Governed by a trust instrument (including a trust instrument as modified by an election described in section 5(e)) under which the transferor only has rights, powers and interests which are permitted by section 4(2) of this act.

However, a disposition is not a qualified disposition to the extent that, at the time of the disposition, the transferor is in arrears on a child support obligation by more than 30 days.

(14) “Qualified trust beneficiary” means that term as defined in section 7103(g) of the Michigan trust code, 2009 PA 46, MCL 700.7103(g).

(15) “Qualified trustee” means a person other than the transferor who:

(a) In the case of a natural person, is a resident of this state or, in all other cases, is authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the Office of Financial and Insurance Regulation, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision or any successor thereto; and

(b) Maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state, including, at a minimum, maintaining records for the trust on an exclusive or nonexclusive basis and preparing or arranging for the preparation of fiduciary income tax returns (if any) for the trust.

(16) “Retirement benefit” means an interest in one of the following types of assets if payable to the trust as a beneficiary or owned by the trust: a qualified or nonqualified annuity; a benefit under a qualified or nonqualified plan of deferred compensation; any account in, or benefit payable under, any pension, profit-sharing, stock bonus or other qualified retirement plan; any individual retirement account or trust; and any and all benefits under any plan or arrangement that is established under sections 401, 403, 408, 408A, 457, or similar provision of the Internal Revenue Code, 26 USC 401, 403, 408, 408A, 457.

(17) “Special power of appointment” means a special power as defined in section 2(i) of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112(i).

(18) “Spouse” and “former spouse” means only a person to whom the transferor was married at, or before, the time the qualified disposition is made.

(19) “Transferor” means:

(a) A person (and in the case of several owners of undivided interests, each of several persons) who, as a beneficial owner of certain property, or as the holder of a general power of appointment over certain property, directly or indirectly, makes a disposition of the property or causes a disposition to be made; or

(b) In the case of a fiduciary disposition, the person or persons who, as of the time of the fiduciary disposition, most recently fit the description in paragraph (a) of this subsection with respect to the property subject to the fiduciary disposition.

(20) “Trust beneficiary” means that term as defined in section 7103(l) of the Michigan trust code, 2009 PA 48, MCL 700.7103(l).

(21) “Trust instrument” means an instrument appointing a qualified trustee or qualified trustees for the property that is the subject of a disposition that:

(a) Expressly incorporates the law of this state to govern the validity, construction and administration of the trust;

(b) Is irrevocable; and

(c) Provides that the interest of the transferor or other trust beneficiary in the trust property may not be transferred, assigned, pledged or mortgaged, whether voluntarily or involuntarily, before the qualified trustee or qualified trustees actually distribute trust property to the trust beneficiary, and that provision of the trust instrument shall be deemed to be a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)) or any successor provision.

§3. Jurisdiction; Venue.

(a) The probate court shall have exclusive jurisdiction over any action regarding the validity of the trust, whether a transfer is a qualified disposition or the extent of the

transferor's interest in, or the income from, a qualified disposition. The probate court shall have concurrent jurisdiction over any action brought pursuant to section 5(b) of this act.

(b) Venue for a proceeding under section 3(a) is in the place of registration, if the trust is registered, or any place where the trust properly could be registered, if the trust is not registered.

#### § 4. Interests of transferor

(1) The transferor shall have only the powers and rights that are conferred by the trust instrument. Except as permitted by subsection 2, a transferor shall have no powers or rights with respect to the property that is the subject of a qualified disposition or the income therefrom, and any agreement or understanding purporting to grant or permit the retention of any greater powers or authority shall be void.

(2) A trust instrument may allow or provide for any or all of the following rights, powers or interests, none of which grants or shall be deemed to be, either alone or in any combination, a power to revoke a trust:

(a) The transferor's power to direct the investment decisions of the trust;

(b) The transferor's power to veto a distribution from the trust;

(c) A special power of appointment exercisable by will or other written instrument of the transferor effective only upon the transferor's death;

(d) The transferor's potential or actual receipt of income, including rights to the income retained in the trust instrument;

(e) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust as those terms are defined in section 664 of the internal revenue code, 26 USC 664, and any successor provision thereto; and the transferor's right, at any time and from time to time by written instrument delivered to the trustee, to release the transferor's interest in that trust, in whole or in part, in favor of a charitable organization that has or charitable organizations that have a succeeding beneficial interest in the trust;

(f) The transferor's potential or actual receipt of income or principal from a grantor-retained annuity trust or grantor-retained unitrust as those terms are defined in section 2702 of the internal revenue code, 26 USC 2702, and any successor provision thereto or the transferor's receipt each year of a percentage (not to exceed 5 percent) specified in the governing instrument of the initial value of the trust property (which may be described either as a percentage or a fixed amount) or their value determined from time to time pursuant to the governing instrument.

(g) The transferor's potential or actual receipt or use of principal if the potential or actual receipt or use of principal would be the result of a trustee's acting:

A. Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d);

B. Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k); or

C. At the direction of an advisor acting: (i) Pursuant to a discretionary trust provision within the meaning of section 7103(d) of the Michigan trust code, 2009 PA 46, MCL 700.7103(d); or (ii) Pursuant to a support provision within the meaning of section 7103(k) of the Michigan trust code, 2009 PA 46, MCL 700.7103(k).

(h) The transferor's right to remove a trustee or advisor and to appoint a new trustee or advisor;

(i) The transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of that term as described in section 2702(c) of the internal revenue code, 26 USC 2702(c), and any successor provision thereto, or the transferor's possession and enjoyment of a qualified annuity interest within the meaning of that term as described in United States Treasury Regulation Section 25.2702-5(c)(8), 26 CFR 25.2702-5(c)(8), and any successor provision thereto;

(j) The transferor's potential or actual receipt of income or principal to pay, in whole or in part, income taxes due on income of the trust if the potential or actual receipt of income or principal is pursuant to a provision in the trust instrument that expressly provides for the payment of those taxes and if the potential or actual receipt of income or principal would be the result of a qualified trustee's or qualified trustees' acting:

A. In the qualified trustee's or qualified trustees' discretion or pursuant to a mandatory direction in the trust instrument; or

B. At the direction of an advisor who is acting in the advisor's discretion; and

(k) After the transferor's death, the ability of a qualified trustee to pay the transferor's debts, the expenses of administering the transferor's estate, or any estate or inheritance tax imposed on or with respect to the transferor's estate, no matter the source of the qualified trustee's ability.

(l) The transferor's actual or potential receipt of any minimum required distributions as defined in 26 USC 4974(b) with respect to any retirement benefit.

## § 5. Avoidance of qualified dispositions

- (a) Notwithstanding any other provision of this act or any other law to the contrary, with respect to any qualified disposition, a creditor or other person shall have only the rights provided in section 5 and section 7 of this act.

- (b) Any action brought at law or in equity by a creditor or other person for an attachment or other provisional remedy against property that is the subject of a qualified disposition or for avoidance of a qualified disposition shall:
- i. only be brought pursuant to sections 4 and 5 of the Michigan uniform fraudulent transfers act, 1998 PA 434, MCL 566.34 and 566.35;
  - ii. in the case of a creditor whose claim arose after a qualified disposition, involve a qualified disposition that was made with actual intent to defraud the creditor; and
  - iii. be proved by clear and convincing evidence.
- (c) Notwithstanding any law to the contrary, no creditor or other person shall bring or maintain an action under subsection (b) of this section unless the action is commenced within the periods prescribed in this subsection (c):
- i. If the claim arose before the qualified disposition was made, upon the later of:
    1. 2 years after the qualified disposition was made or the obligation was incurred; or,
    2. 1 year after the qualified disposition or obligation was or could reasonably have been discovered by the claimant, if the person who is or may be liable for any claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, although the action would otherwise be barred by the period of limitations; or
  - ii. If the claim arose concurrent with or subsequent to the qualified disposition, 2 years after the qualified disposition is made.
- (d) A trust beneficiary's interest in a qualified disposition or in property that is the subject of a qualified disposition shall not be considered marital property, shall not be considered, directly or indirectly, part of the trust beneficiary's real or personal estate, and shall not be awarded to the trust beneficiary's spouse in a judgment for divorce or separate maintenance notwithstanding any other law. Unless otherwise agreed to in writing by the parties to the marriage, this subsection does not apply to a transferor's interest in a qualified disposition with respect to property transferred (i) after the transferor's marriage, or (ii) within 30 days before the transferor's marriage. To the extent that this section does not apply to a beneficiary's interest, subsections (b) and (c) shall not be interpreted as limiting the transferor's spouse's property division claims.
- (e) For purposes of this Act, a fiduciary qualified disposition is deemed made as of the time the property that is subject to that disposition was first transferred to the



trustee who is making the fiduciary qualified disposition (or any predecessor of that trustee in an unbroken succession of fiduciary ownership of the property) in a form that meets the requirements of a qualified disposition, provided that if the property that is subject to the qualified disposition was originally transferred to the trustee making that disposition (or a predecessor trustee described above) prior to the effective date of this act in a form that would otherwise meet the requirements of a qualified disposition, the qualified disposition shall be deemed to have been made as of the effective date of this act.

If a trustee of an existing trust proposes to make a qualified disposition that would otherwise not conform to the requirements of a qualified disposition due to the original transferor's nonconforming powers of appointment, the trustee may modify the trust instrument by delivering to the qualified trustee an irrevocable written election to modify the transferor's nonconforming power(s) to conform to the requirements of section 4(2)(c) or section 4(2)(k) of this Act.

For purposes of this Act, the irrevocable written election must include:

- i. a description of the transferor's modified powers of appointment, and
- ii. the transferor's written consent to the modification.

The original transferor's consent is not a disposition within the meaning of section 2(5) of this Act.

- (f) With respect to any qualified disposition, no creditor or other person shall have any claim or cause of action at law or in equity against any of the following:
  - i. the trustee of a trust that is the subject of a qualified disposition,
  - ii. an advisor of a trust that is the subject of a qualified disposition, or
  - iii. any person involved in the counseling, drafting, preparation, execution or funding of a trust that is the subject of a qualified disposition.
- (g) In circumstances where more than 1 qualified disposition is made by means of the same trust instrument, then with respect to a prior qualified disposition:
  - i. The making of a subsequent qualified disposition shall be disregarded in determining whether a creditor's claim is extinguished as provided in subsection (c) of this section.
  - ii. The making of a subsequent qualified disposition shall be disregarded in determining, as provided in subsection (d) of this section, whether a trust beneficiary's interest in a qualified disposition or in property that is the subject of a qualified disposition (1) is considered marital property, (2) is considered part of a trust beneficiary's real or personal

estate, or (3) may be awarded to the trust beneficiary's spouse in a judgment of divorce.

Any distribution to a trust beneficiary is deemed to have been made from the most recent qualified disposition.

- (h) In any action against a trustee of a trust that is the result of a qualified disposition, if a court takes any action declining to apply the law of this state in determining the validity, construction or administration of the trust, or the effect of a spendthrift provision in the trust instrument, the trustee shall immediately upon the court's action and without the further order of any court, cease in all respects to be trustee of the trust. The former trustee shall have no power or authority other than to convey the trust property to the successor trustee.

If the trust instrument does not provide for a successor trustee and the trust would otherwise be without a trustee, the probate court, upon the request of any qualified trust beneficiary of the trust, shall appoint a successor trustee upon the terms and conditions as it determines to be consistent with the purposes of the trust and this statute.

#### § 6. Affidavit Requirement

- (1) For purposes of this section 6, a "qualified affidavit" shall mean an affidavit given by the transferor that is notarized and in which the transferor states under oath that at the time of the transfer of the property to the trust:
  - (a) The transferor has full right, title, and authority to transfer the property to the trust;
  - (b) The transfer of the property to the trust will not render the transferor insolvent;
  - (c) The transferor does not intend to defraud a creditor by transferring the property to the trust;
  - (d) The transferor does not know of or have reason to know of any pending or threatened court actions against the transferor, except for those court actions identified by the transferor on an attachment to the affidavit;
  - (e) The transferor is not involved in any administrative proceedings, except for those administrative proceedings identified on an attachment to the affidavit;
  - (f) The transferor is not currently in arrears on a child support obligation by more than 30 days;
  - (g) The transferor does not contemplate filing for relief under the bankruptcy provisions of Title 11 of the United States Code; and
  - (h) The property being transferred to the trust was not derived from unlawful activities.

- (2) The transferor shall sign a qualified affidavit before making a qualified disposition.
- (3) The qualified affidavit is defective if it materially fails to meet the criteria set forth in subsection (1), provided that a qualified affidavit is not defective due to any of the following:
  - (a) Nonsubstantive variances from the language set forth in subsection (1);
  - (b) Statements or representations in addition to those set forth in subsection (1) if the statements or representations do not contradict those required by subsection (1); or
  - (c) Technical errors in administering an oath if the errors were not the fault of the transferor and the transferor reasonably relied upon another person to prepare or administer the oath.
- (4) Notwithstanding any other provision of this section 6, a qualified affidavit shall not be required:
  - (a) From the settlor in the case of a fiduciary qualified disposition;
  - (b) From a transferor who is neither the settlor nor a trust beneficiary of the qualified disposition; or
  - (c) In connection with dispositions that are part of, required by, or the direct result of a prior qualified disposition supported by a qualified affidavit that otherwise complies with the requirements of subsection (1).
- (5) If a qualified affidavit is required by this section 6, and a transferor fails to timely sign a qualified affidavit or signs a defective affidavit, then the failure or defect may be considered as evidence in any proceeding commenced pursuant to section 5(b) to the extent permitted by the Michigan Rules of Evidence, but the validity of the qualified disposition shall not be affected in any other way due to the failure or defect.
- (6) For the purposes of this section 6, “settlor” means that term as defined in section 7103(i) of the Michigan trust code, 2009 PA 48, MCL 700.7103(i).

#### § 7. Effect of avoidance of qualified dispositions

- (1) A qualified disposition shall be avoided only to the extent necessary to satisfy the transferor’s debt to the creditor at whose instance the disposition had been avoided.
- (2) If all or any portion of a qualified disposition is avoided as provided in subsection (1), then:
  - (a) If the court is satisfied that a trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition, both of the following apply:

(i) The trustee shall have a lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including reasonable attorney fees, properly incurred by the trustee in the defense of any action to avoid the qualified disposition. The lien shall have priority over all other liens against the property, whether or not the other liens accrued or were recorded before the accrual of the lien created by this Act.

(ii) The qualified disposition shall be avoided subject to the proper fees, costs, preexisting rights, claims and interests of the trustee (and of any predecessor trustee that has not acted in bad faith).

(b) If the court is satisfied that a trust beneficiary has not acted in bad faith, the avoidance of the qualified disposition shall be subject to the right of the trust beneficiary to retain any distribution made prior to the creditor's commencement of an action to avoid the qualified disposition. For purposes of this Act, it shall be presumed that the trust beneficiary, including a trust beneficiary who is also a transferor of the trust, did not act in bad faith merely by creating the trust or by accepting a distribution made in accordance with the terms of the trust.

(c) For purposes of this subsection (2), it shall be presumed that the trustee did not act in bad faith merely by accepting the property.

(3) A creditor shall have the burden of proving by clear and convincing evidence that a trustee or trust beneficiary acted in bad faith as required under subsection (2), except that, in the case of a trust beneficiary who is also the transferor, the burden on the creditor shall be to prove that the transferor-beneficiary acted in bad faith by a preponderance of the evidence. The preceding sentence provides substantive not procedural rights under Michigan law.

(4) For purposes of this act, levy, attachment, garnishment, notice of lien, sequestration or other legal or equitable process shall be permitted only in those circumstances permitted by the express terms of this act.

(5) Notwithstanding any other provision of this act or MCL 556.123, a creditor shall have no right against the interest of a trust beneficiary in a trust (or portion of a trust) that was a qualified disposition solely because the trust beneficiary has the right to authorize or direct the trustee to pay all or part of the trust property in satisfaction of estate or inheritance taxes imposed upon or with respect to the trust beneficiary's post-death estate, or the debts of the trust beneficiary's post-death estate, or the expenses of administering the trust beneficiary's post-death estate, unless the trust beneficiary actually directs the payment of the taxes, debts or expenses, and then only to the extent of the direction.

(6) Where a husband and wife make a qualified disposition of property and, immediately before the qualified disposition, the property, any part of the property, or any accumulation to the property was, pursuant to applicable law, owned by them as tenants by the entireties, then notwithstanding the qualified disposition and except where the provisions of the trust instrument may expressly provide to the contrary, that property, any part of that property, and any accumulation to that property shall, while held in trust during the lifetime of both spouses, be treated as though it were tenancy by the entireties property and be dealt with in a manner consistent with that applicable law but in every other respect shall be dealt with in accordance

with the terms of the trust instrument. Furthermore, in any action concerning whether a creditor of either or both spouses may recover the debt from the trust, upon avoidance of the qualified disposition, the sole remedy available to the creditor with respect to trust property treated as though it were tenancy by the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties.

(7) Subject to all of the foregoing provisions of this section, and except as otherwise expressly provided in subsection (6), upon avoidance of a qualified disposition to the extent permitted under subsection (1), the sole remedy available to the creditor shall be an order directing the trustee to transfer to the transferor the amount necessary to satisfy the transferor's debt to the creditor at whose instance the disposition has been avoided.

#### § 8. Qualified Trustees

a. In the event that a person serving as qualified trustee ceases to meet the requirements of a qualified trustee and there remains no trustee that meets the requirements of a qualified trustee, the person serving as qualified trustee shall be deemed to have resigned as of the time of the cessation, and thereupon the successor qualified trustee provided for in the trust instrument shall become a qualified trustee of the trust upon the successor qualified trustee's acceptance of trusteeship, or in the absence of any successor qualified trustee provided for in the trust instrument, the probate court shall, upon petition of any interested person, appoint a successor qualified trustee.

b. In the case of a disposition to more than 1 trustee, a disposition that is otherwise a qualified disposition shall not be treated as other than a qualified disposition solely because not all of the trustees are qualified trustees.

c. A disposition that was a qualified disposition shall not cease to be treated as a qualified disposition as a result of a subsequent vacancy in the position of qualified trustee, provided that a successor qualified trustee is appointed (or a proceeding for the appointment of a successor qualified trustee is commenced) within a reasonable time after the person(s) with authority to appoint a qualified trustee or commence a proceeding to appoint a qualified trustee know of the vacancy.

#### § 9. Restraint on Alienation

a. A trust beneficiary shall have no power or capacity to make any transfer whatsoever of any of the income from a trust (or portion of a trust) that is a qualified disposition by his or her order, voluntary or involuntary, and whether made upon the order or direction of any court or courts, whether of bankruptcy or otherwise.

b. Except as otherwise provided in this act, the interest of a beneficiary in a trust (or portion of a trust) that is a qualified disposition shall not be subject to any process of attachment issued against the beneficiary, and shall not be taken in execution under any form of legal process directed against the beneficiary or against the trustee, or the trust estate, or any part of the income thereof, but the whole of the trust estate and the income of the trust estate shall go to and be applied by the trustee solely for the benefit of the beneficiary, free, clear, and discharged

of and from any and all obligations of the beneficiary whatsoever and of all responsibility therefor.

c. The trustee of a qualified disposition shall disregard and defeat every assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of this section. The trustee is entitled to reimbursement for all costs and expenses associated with carrying out this duty. No trustee shall be liable for, and no trust beneficiary or any successor thereto shall have any claim or cause of action at law or in equity against a trustee, for any breach of this duty.

#### § 10. Application of act

This act shall apply to qualified dispositions made on or after the effective date of this act.

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# **ATTACHMENT 2**

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The following changes to court rules and forms are proposed to accomodate the new foreign guardianship laws.

Also, please find attached relevant statutory sections.

Rule 5.108 Time of Service

- (A) Personal. Personal service of a petition or motion must be made at least 7 days before the date set for hearing, or an adjourned date, unless a different period is provided or permitted by court rule. This sub-rule applies regardless of conflicting statutory provisions.
- (B) Mail. Service by mail of a petition, or motion must be made at least 14 days before the date set for hearing, or an adjourned date. Service by mail of an application by a foreign guardian or conservator of another state must be made at least 14 days following the guardian or conservator's appointment in this state.
- (C) Exception: Foreign Consul. This rule does not affect the manner and time for service on foreign consul provided by law.
- (D) Computation of Time. MCR 1.108 governs computation of time in probate proceedings.
- (E) Responses. A written response or objection may be served at any time before the appointment, hearing or at a time set by the court.



Rule 5.125(C) Interested Persons Defined

(1)-(18)[Unchanged.]

(19) The persons interested in a petition or application for appointment of a guardian for a minor are

- (a) the minor, if 14 years of age or older;
- (b) if known by the petitioner, each person who had the principal care and custody of the minor during the 63 days preceding the filing of the petition;
- (c) the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor~~[:]~~;
- (d) the nominated guardian[:] and
- (e) if known by the petitioner, a guardian or conservator serving under an appointment from another state.

(20)-(21)[Unchanged.]

(22) The persons interested in a petition or application for appointment of a guardian of an alleged incapacitated individual are

- (a) the alleged incapacitated individual,
- (b) if known, a person named as attorney in fact under a durable power of attorney,
- (c) the alleged incapacitated individual's spouse,
- (d) the alleged incapacitated individual's adult children and the individual's parents,
- (e) if no spouse, child, or parent is living, the presumptive heirs of the individual,
- (f) the person who has the care and custody of the alleged incapacitated individual,~~and~~
- (g) the nominated guardian[,] and

- (h) if known by the petitioner, a guardian or conservator serving under an appointment from another state.

(23)[Unchanged.]

- (24) The persons interested in a petition or application for the appointment of a conservator or for a protective order are
- (a) the individual to be protected if 14 years of age or older,
  - (b) the presumptive heirs of the individual to be protected,
  - (c) if known, a person named as attorney in fact under a durable power of attorney,
  - (d) the nominated conservator, ~~and~~
  - (e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending [,] and
  - (f) if known by the petitioner, a guardian or conservator serving under an appointment from another state.

(25)-(33)[Unchanged.]

Note: Same comment as before that we add the “application” to incorporate the application for appointment as a foreign guardian or conservator to the list of interested persons.

We added the foreign guardian or conservator to persons that a petitioner would need to need to notify, because a foreign guardian or conservator cannot apply for transfer if they know of a pending petition in this state.

Rule 5.403 Proceedings on Temporary Guardianship

(A) Limitation. The court may appoint a temporary guardian ~~only~~ pursuant to an application to transfer a foreign guardianship or in the course of a proceeding for permanent guardianship.

(B)-(D)[Unchanged.]

Note: Since the foreign guardian is a temporary guardian until the 28-days notice period is up, this limitation must be amended. See section 5202a(2). The guardian is merely a temporary guardian until 28-day notice period has passed.

STATE OF MICHIGAN  
PROBATE COURT  
COUNTY OF

APPLICATION/

PETITION FOR  
APPOINTMENT OF GUARDIAN OF  
INCAPACITATED INDIVIDUAL

FILE NO.

- (A)** In the matter of \_\_\_\_\_, Alleged incapacitated individual **XXX-XX-** Last four digits of SSN
- (B)**

Date of birth	Race	Sex	Address of alleged incapacitated individual where now found
---------------	------	-----	---
- (C)** 1. I, \_\_\_\_\_, am interested in this matter  
Name (type or print)  
and make this petition as \_\_\_\_\_.  
State interest/relationship
- (D)** ☐ 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.
- (E)** 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.
- ☐ The individual is a citizen of the following foreign country: \_\_\_\_\_
- (F)** 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.)  
\_\_\_\_\_  
Name and address
- (G)** ☐ 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.
- (H)** 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. ☐ \_\_\_\_\_.
- (I)** 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.)  
\_\_\_\_\_  
\_\_\_\_\_
- (J)** 8. The name, address, and telephone number of the person/agency (if any) who currently has care and custody of the adult are \_\_\_\_\_.

(SEE SECOND PAGE)

**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

**K** 9. The adult ☐ is ☐ is not entitled to receive Veterans Administration benefits. The Veterans Administration claimant number is \_\_\_\_\_.

- L** 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, 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).

NAME	ADDRESS AND TELEPHONE NUMBER				RELATIONSHIP	AGE/DOB (if minor)
	Street address					
	City	State	Zip	Telephone no.		
	Street address					
	City	State	Zip	Telephone no.		
	Street address					
	City	State	Zip	Telephone no.		

**M** 11. None of the adults named above is under any legal incapacity except \_\_\_\_\_.

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

**N** 12. **I REQUEST** that the court determine the adult is an incapacitated individual and appoint \_\_\_\_\_ Name \_\_\_\_\_

\_\_\_\_\_ Address \_\_\_\_\_

City \_\_\_\_\_ Zip \_\_\_\_\_ Telephone no. \_\_\_\_\_, who has priority as \_\_\_\_\_

Priority relationship \_\_\_\_\_, ☐ full guardian with all powers provided by statute.  
☐ limited guardian with the following powers: \_\_\_\_\_

**O** ☐ 13. No other person appears to have authority to act in the circumstances. I request that a temporary guardian be appointed pending a hearing on this petition because of the following emergency: \_\_\_\_\_

**P** 14. I am not aware of any pending petitions for the appointment of a guardian for the alleged incapacitated individual in this state. I am a guardian appointed in another state and I request to be appointed guardian in this state.

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

Attorney _____	Date _____
Attorney _____ Bar no. _____	Petitioner signature _____
Attorney _____	Petitioner address _____
City, state _____ Telephone no. _____	City, state, zip _____ Telephone no. _____

**Q** ☐ 15. **THE ALLEGED INCAPACITATED INDIVIDUAL** In the event the court finds that I require a \_\_\_\_\_

\_\_\_\_\_ name, address, and telephone no. \_\_\_\_\_

\_\_\_\_\_ Date \_\_\_\_\_ Signature of alleged incapacitated individual \_\_\_\_\_

# INSTRUCTIONS FOR COMPLETING "PETITION FOR APPOINTMENT OF GUARDIAN OF INCAPACITATED INDIVIDUAL"

Please type or print neatly using black or blue ink.

Items A through Q must be read and filled in (when required) before your petition can be filed with the court. Please read the instruction for each item. Then fill in the correct information for that item on the form.

- A** Enter the name of the individual who you believe needs a guardian.
- B** Enter the date of birth, race, and sex of the individual named in **A**. Enter the address where the individual is currently located. This address may or may not be the home of the individual. For example, if the individual is currently in the hospital, enter the address of the hospital.
- C** Enter your name in the first line and your relationship to the individual (or your interest) on the second line.
- D** Check this box if there is or has been a case in the family division of the circuit court involving the individual in **A**. Examples of a family division case are personal protection, abuse or neglect, or a name change. If you have checked this box, enter the name of the court, the case number of the action, the name of the judge assigned to that case. Then place a check in the box indicating whether that case is still pending or not.
- E** Enter the city, village, or township and county and state the individual is a resident of and the full home address and telephone number of the individual.
- F** Check the boxes that apply and provide the name(s) and address(es).
- G** If the individual has a patient advocate and you believe there is a problem, check only the boxes that apply.
- H** Check the boxes that you believe apply to the individual.
- I** **Explain in as much detail as possible** specific examples of the individual's conduct that lead you to believe he or she needs a guardian. Give specific examples of his or her conduct that supports what you checked in **H** and that demonstrate the need for a guardian. **This information is extremely important for the court in making a decision about the need to appoint a guardian.** Use additional sheets of paper if needed.
- J** Enter the name, address, and telephone number of the person or agency who currently has care and custody of the individual. If there is no one, leave blank.
- K** Check whether the individual is or is not entitled to receive Veterans Administration benefits. If you checked that the individual is entitled to benefits, enter his or her VA claimant number.
- L - M** Check all the boxes that apply and enter the names, relationships, addresses and telephone numbers of each relative of the individual. If any of the adults named in **L** are under legal incapacity, enter the names in **M**. If you check the last box in **L** (item 10), you must notify the Attorney General by sending a copy of this form to: Attorney General, Public Administration, PO Box 30755, Lansing, Michigan 48909.
- N** Enter the name, address, and telephone number of the person you want to be appointed as guardian of the individual. Enter the relationship, if any, that this person has to the individual. Check the box for either a full guardian or a limited guardian.
- O** Check the box if there is an emergency requiring the appointment of a temporary guardian before the hearing on this petition is held.
- P** Enter today's date, sign your name, and enter your address and telephone number.
- Q** If the individual wants to nominate someone to be his/her guardian, check the box and enter the name, address, and telephone number of the person the individual is nominating. The individual must sign and date the form.

STATE OF MICHIGAN  
PROBATE COURT  
COUNTY OF \_\_\_\_\_

APPLICATION/

PETITION FOR  
☐ APPOINTMENT OF CONSERVATOR  
☐ PROTECTIVE ORDER

FILE NO. \_\_\_\_\_

- (A)** Estate of \_\_\_\_\_, **XXX-XX-**  
Individual alleged to need protection Last four digits of SSN
- (B)** 1. I, \_\_\_\_\_, am interested in this matter  
Name  
and make this petition as \_\_\_\_\_.  
State interest/relationship
- (C)** 2. The individual was born \_\_\_\_\_, resides in \_\_\_\_\_ County  
Date  
at \_\_\_\_\_  
Address  
\_\_\_\_\_ and has property in \_\_\_\_\_ County.  
City, state, zip
- (D)** ☐ 3. An action within the jurisdiction of the family division of circuit court involving the family or family members of the above individual has been previously filed in \_\_\_\_\_ Court, Case Number \_\_\_\_\_, was assigned to Judge \_\_\_\_\_, and ☐ remains ☐ is no longer pending.
- (E)** 4. The individual has ☐ a power of attorney. (Specify name and address below.)  
☐ a guardian. (Specify name and address below.)  
☐ a representative payee for social security. (Specify name and address below.)
- Name and address \_\_\_\_\_
- (F)** 5. ☐ a. The individual is an adult unable to manage his/her property and business affairs effectively because of  
☐ mental illness ☐ chronic use of drugs ☐ detention by a foreign power  
☐ mental deficiency ☐ chronic intoxication ☐ disappearance  
☐ physical illness or disability ☐ confinement ☐ \_\_\_\_\_  
and either  
☐ the adult has property that will be wasted or dissipated unless proper management is provided, or  
☐ the adult or his/her dependents are in need of money for support, care, and welfare, and protection is necessary to obtain or provide money.  
☐ b. The adult petitioner is mentally competent but because of age or physical infirmity is unable to manage his/her property and affairs effectively, and recognizing the disability, requests appointment of a conservator.  
☐ c. The individual is a minor who  
☐ owns money or property that requires management or protection that cannot otherwise be provided.  
☐ has or may have business affairs that may be jeopardized or prevented by minority.  
☐ needs money for support and education, and protection is necessary or desirable to obtain or provide money.  
☐ d. I am the guardian of the ward and it is in the ward's best interests to sell or otherwise dispose of the ward's real property or interest in real property.
- (G)** 6. The statements in item 5 are supported by the following facts: \_\_\_\_\_  
(Attach a separate sheet.)

(SEE SECOND PAGE)

**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

**H** 7. The individual to be protected has an estate approximately valued at:

\$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_  
Real property Personal property Insurance Monthly income

**I** 8. The individual to be protected is receiving the following benefits from governmental agencies:  
☐ Social Security \$ \_\_\_\_\_ ☐ SSI \$ \_\_\_\_\_ ☐ Veterans Administration \$ \_\_\_\_\_, claimant number \_\_\_\_\_  
☐ MDHS \$ \_\_\_\_\_ ☐ Other: \_\_\_\_\_ \$ \_\_\_\_\_

**J** 9. The individual to be protected has  
☐ a spouse whose name and address are listed below.  
☐ child(ren) whose name(s) and address(es) are listed below.  
☐ descendants of deceased child(ren) whose name(s) and address(es) are listed below.  
☐ if no child(ren) or descendants of deceased child(ren), parents whose name(s) and address(es) are listed below.  
☐ if none of the above, presumptive heirs whose name(s) and address(es) are listed below.  
☐ none of the above (must notify the Attorney General - see instructions for the address of the Attorney General).

NAME	ADDRESS AND TELEPHONE NUMBER				RELATIONSHIP	AGE/DOB (if minor)
	Street address					
	City	State	Zip	Telephone no.		
	Street address					
	City	State	Zip	Telephone no.		

**K** 10. None of the persons named above are under any legal incapacity except \_\_\_\_\_.

Name, incapacity, and representative of the person, if any

**L** 11. The individual is currently found at \_\_\_\_\_ Telephone no. \_\_\_\_\_  
Address or location

**M** ☐ 12. It is necessary that a preliminary protective order be entered pending the regular hearing because \_\_\_\_\_.

**I REQUEST** that the court:

**N** ☐ 13. Appoint \_\_\_\_\_, Name, address, and telephone no. \_\_\_\_\_, who has priority as \_\_\_\_\_, as conservator of the estate to be protected.  
Priority relationship

**O** ☐ 14. Preserve and apply the individual's property pending the appointment of a conservator as follows: \_\_\_\_\_.

**P** ☐ 15. Enter a protective order that provides \_\_\_\_\_.

**Q** ☐ 16. Appoint the guardian as special conservator with authority to sell or otherwise dispose of the ward's real property or interest \_\_\_\_\_.

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

**R** Attorney signature \_\_\_\_\_ Date \_\_\_\_\_  
Attorney name (typed) \_\_\_\_\_ Bar no. \_\_\_\_\_ Petitioner signature \_\_\_\_\_  
Attorney address \_\_\_\_\_ Petitioner address \_\_\_\_\_  
City, state, zip \_\_\_\_\_ Telephone no. \_\_\_\_\_ City, state, zip \_\_\_\_\_ Telephone no. \_\_\_\_\_

**S** ☐ 17. **NOMINATE TO BE PROTECTED:** I am 14 years of age or older. I nominate as my conservator \_\_\_\_\_.

Name, \_\_\_\_\_

Date \_\_\_\_\_

Signature of person to be protected \_\_\_\_\_

I am not aware of any pending petitions for the appointment of a conservator for the protected individual in this state. I am a conservator appointed in another state and I request to be appointed conservator in this state.



## INSTRUCTIONS FOR COMPLETING "PETITION FOR APPOINTMENT OF CONSERVATOR"

**Please type or print neatly in black or blue ink.** Items A through S must be read and filled in (when required) before your petition can be filed with the court. Please read the instruction for each item. Then fill in the correct information for that item on the form.

- (A)** Enter the name of the individual who you believe needs a conservator.
- (B)** Enter your name in the first line. Enter your relationship to the individual (or your interest) in the second line.
- (C)** Enter the date the individual was born; what county the individual is a resident of; the address of the place where the individual normally lives, and the county the individual's property is in.
- (D)** Check this box if there is or has been a case in the family division of the circuit court involving the individual in **(A)**. Examples of a family division case are personal protection, abuse or neglect, or a name change. If you have checked this box, enter the name of the court, the case number of the action, the name of the judge assigned to that case. Then place a check in the box indicating whether that case is still pending or not.
- (E)** Check the boxes that apply and provide the name(s) and address(es). If the individual has a power of attorney and you have a copy of the document, make a copy for the court.
- (F)** Check the boxes that you believe apply to the individual.
- (G)** **Explain in as much detail as possible** the specific facts about the individual's conduct or condition that lead you to believe he or she needs a conservator. Give specific examples of his or her conduct that supports what you checked in **(F)** and that demonstrate the need for a conservator. **This information is extremely important for the court in making a decision about the need to appoint a conservator.** If you are the guardian asking for authority to sell or otherwise dispose of your ward's real property, state the reasons why it is in the ward's best interest to do so.
- (H)** Specify the approximate value of any real property, personal property, insurance, and monthly income of the individual. An example of real property is a house. Examples of personal property are home furnishings, bank accounts, and checking accounts.
- (I)** Check whether the individual is currently receiving benefits from governmental agencies and the amount(s).
- (J) - (K)** Check all the boxes that apply and enter the names, relationships, addresses and telephone numbers of each relative of the individual. If any of the adults named in **(J)** are under legal incapacity, enter the names in **(K)**. If you check the last box in **(J)** (item 9), you must notify the Attorney General by sending a copy of this form to: Attorney General, Public Administration, PO Box 30755, Lansing, Michigan 48909.
- (L)** Enter the address and telephone number where the individual is currently located. This address and telephone number may or may not be the home of the individual. For example, if the individual is currently in the hospital, enter the name, address, and telephone number of the hospital.
- (M)** If there is an emergency that requires that a preliminary protective order be entered before the hearing, check the box and state the reason(s).
- (N)** Enter the name, address, and telephone number of the person you want to be appointed as conservator of the individual. Enter the relationship, if any, that this person has to the individual. If you are the guardian asking for authority to sell or otherwise dispose of your ward's real property, leave this blank and complete **(Q)**.
- (O)** Check this box only if you checked **(M)**.
- (P)** Check this box if you want the individual's property protected but you do not want a conservator appointed.
- (Q)** Check this box if you want the the guardian appointed special conservator to dispose of real property.
- (R)** Enter today's date, sign your name, and enter your address and telephone number.
- (S)** If the individual wants to nominate someone to be the conservator, check the box and enter the name, address, and telephone number of the person the individual is nominating. The individual must sign and date the form.

**STATE OF MICHIGAN  
PROBATE COURT  
COUNTY OF**

**PETITION FOR APPOINTMENT OF  
GUARDIAN OF MINOR**

**FILE NO.**

In the matter of \_\_\_\_\_, a minor  
Last four digits of SSN **XXX-XX-**

**USE NOTE:** If a parent is incarcerated and under the jurisdiction of the Michigan Department of Corrections, the petitioner must comply with MCR 2.004(B).

1. I, \_\_\_\_\_, am interested in the welfare of the minor and make this  
Name (type or print)  
petition as \_\_\_\_\_.  
Relationship to minor (i.e. grandparent, uncle, friend, limited guardian, etc.)

2. The minor was born \_\_\_\_\_, is ☐ female, ☐ male, is unmarried, resides in \_\_\_\_\_  
Date County  
at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_  
Address City/Township State Zip  
and is presently located in \_\_\_\_\_ at \_\_\_\_\_  
County Address (if different than above)  
City/Township State Zip

☐ The minor is a citizen of the following foreign country: \_\_\_\_\_

3. ☐ The minor is a member of an Indian tribe, or is eligible for membership in an Indian tribe and is a biological child of a member of an Indian tribe. The name of the tribe is \_\_\_\_\_.  
☐ The minor is not an Indian child as defined in MCR 3.002(5).  
☐ It is unknown whether the minor is an Indian child as defined in MCR 3.002(5).

4. The persons interested in this proceeding are:

NAME	RELATIONSHIP	ADDRESS AND TELEPHONE NUMBER			
	Father/DOB _____	Street address			
		City	State	Zip	Telephone no.
	Mother/DOB _____	Street address			
		City	State	Zip	Telephone no.
	Conservator	Street address			
		City	State	Zip	Telephone no.
	Guardian	Street address			
		City	State	Zip	Telephone no.
	Person with care/ custody of minor*	Street address			
		City	State	Zip	Telephone no.

\* Also list persons who had principal care and custody of the minor during the 63 days before filing the petition.

(SEE SECOND PAGE)

**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

4. (continued) If neither parent is living, the names and addresses of the minor's grandparents and nearest of kin who are adults are:

NAME	ADDRESS AND TELEPHONE NUMBER				RELATIONSHIP
	Street address				
	City	State	Zip	Telephone no.	
	Street address				
	City	State	Zip	Telephone no.	

None of these persons is under any legal incapacity except \_\_\_\_\_  
Name, incapacity, and representative of the person, if any

☐ 5. An action within the jurisdiction of the family division of circuit court involving the family or family members of the minor has been previously filed in \_\_\_\_\_ Court, Case Number \_\_\_\_\_, was assigned to Judge \_\_\_\_\_, and ☐ remains ☐ is no longer pending.

6. The minor is in need of a guardian because

a. ☐ the parental rights of both parents or of the surviving parent have been terminated or suspended by

☐ death.  
☐ disappearance.  
☐ confinement in a place of detention.  
☐ judicial determination of mental incompetency.

☐ a previous court order other than an order appointing a limited guardian of the minor.  
☐ judgment of divorce or separate maintenance.

OR

b. ☐ the parent(s) permit(s) the minor to reside with another person and the parent(s) do/does not provide the other person with legal authority for the care and maintenance of the minor and the minor is not residing with a parent at this time.

OR

c. ☐ the biological parents of the minor were never married to each other and \_\_\_\_\_, the custodial parent ☐ died ☐ has disappeared since \_\_\_\_\_, and the other parent has not been granted legal custody by court order. The proposed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

☐ 7. A temporary guardian is necessary because \_\_\_\_\_.

**IREQUEST:**

8. \_\_\_\_\_, whose address and telephone number are \_\_\_\_\_  
Name Address  
\_\_\_\_\_, be appointed guardian of the minor.  
City/Township State Zip Telephone no.

☐ 9. The court order \_\_\_\_\_ ☐ reasonable support for ☐ parenting time with ☐ contact with the minor.  
I declare under the penalty 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.

Date	_____	Date	_____
Signature of petitioner	_____	Signature of petitioner	_____
Address	_____	Address	_____
City, state, zip	_____	City, state, zip	_____

☐ 10. I am 14 years of age or older and I request to be appointed guardian of the minor \_\_\_\_\_ as my guardian,  
Name  
who lives at \_\_\_\_\_  
Address City State Zip

Date	_____	Signature of minor	_____
Attorney signature	_____	Address	_____
Attorney name (type or print)	_____	City, state, zip	_____
Bar no.	_____	Telephone no.	_____

10. I am not aware of any pending petitions for the appointment of a guardian for the minor in this state. I am a guardian appointed in another state and I request to be appointed guardian in this state.

- (e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending [,] and
- (f) if known by the petitioner, a guardian or conservator serving under an appointment from another jurisdiction.

(25)-(33)[Unchanged.]

Act No. 545  
Public Acts of 2012  
Approved by the Governor  
January 2, 2013  
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January 2, 2013  
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**STATE OF MICHIGAN  
96TH LEGISLATURE  
REGULAR SESSION OF 2012**

Introduced by Senator Schuitmaker

**ENROLLED SENATE BILL No. 539**

AN ACT to amend 1998 PA 386, entitled "An act to codify, revise, consolidate, and classify aspects of the law relating to wills and intestacy, relating to the administration and distribution of estates of certain individuals, relating to trusts, and relating to the affairs of certain individuals under legal incapacity; to provide for the powers and procedures of the court that has jurisdiction over these matters; to provide for the validity and effect of certain transfers, contracts, and deposits that relate to death; to provide procedures to facilitate enforcement of certain trusts; and to repeal acts and parts of acts," by amending sections 5313 and 5433 (MCL 700.5313 and 700.5433), section 5313 as amended by 2000 PA 463, and by adding sections 5202a and 5301a.

*The People of the State of Michigan enact:*

Sec. 5202a. (1) If a guardian has not been appointed in this state and a petition for the appointment of a guardian is not pending in this state, a guardian appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in this state on filing with a court in this state an application for appointment, an authenticated copy of the guardian's appointment in the other state, and an acceptance of appointment. Letters of guardianship for the temporary guardian expire 28 days after the date of appointment.

(2) Within 14 days after appointment as temporary guardian under subsection (1), the guardian shall give notice to all interested persons of his or her appointment and the right to object to the appointment. On filing proof of service of the notice with the court, the temporary guardian shall be appointed full guardian and the court shall issue letters of guardianship accordingly.

(3) If an objection is filed to a guardianship under this section, the guardianship continues unless a court in this state enters an order removing the guardian.

Sec. 5301a. (1) If a guardian has not been appointed in this state and a petition for the appointment of a guardian is not pending in this state, a guardian appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in this state on filing with a court in this state an application for appointment, an authenticated copy of the guardian's appointment in the other state, and an acceptance of appointment. Letters of guardianship for the temporary guardian expire 28 days after the date of appointment.

(2) Within 14 days after appointment as temporary guardian under subsection (1), the guardian shall give notice to all interested persons of his or her appointment and the right to object to the appointment. On filing proof of service of the notice with the court, the temporary guardian shall be appointed full guardian and the court shall issue letters of guardianship accordingly.

(3) If an objection is filed to a guardianship under this section, the guardianship continues unless a court in this state enters an order removing the guardian.

Sec. 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, 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.



Sec. 5433. (1) If a conservator has not been appointed in this state and a petition in a protective proceeding is not pending in this state, a conservator appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary conservator in this state on filing with a court in this state an application for appointment, an authenticated copy of letters of appointment in the other state, and an acceptance of appointment. Letters of conservatorship for the temporary conservator expire 28 days after the date of appointment.

(2) Within 14 days after appointment as temporary conservator under subsection (1), the conservator shall give notice to all interested persons of his or her appointment and the right to object to the appointment. On filing proof of service of the notice with the court, the temporary conservator shall be appointed full conservator and the court shall issue letters of conservatorship accordingly.

(3) If an objection is filed to a conservatorship under this section, the conservatorship continues unless a court in this state enters an order removing the conservator.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Say E Randall

Clerk of the House of Representatives

Approved

Governor

**ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)**  
**Act 386 of 1998**

**700.5212 Court appointment of guardian of minor; qualifications; priority of minor's nominee.**

Sec. 5212. The court may appoint as guardian a person whose appointment serves the minor's welfare, including a professional guardian described in section 5106. If the minor is 14 years of age or older, the court shall appoint a person nominated by the minor, unless the court finds the appointment contrary to the minor's welfare.

**History:** 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2000, Act 463, Eff. June 1, 2001.

**Popular name:** EPIC

# ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)

## Act 386 of 1998

### 700.5409 Appointment of conservator.

Sec. 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.

**History:** 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2000, Act 463, Eff. June 1, 2001.

**Popular name:** EPIC



**ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)**  
**Act 386 of 1998**

**700.5313 Guardian; qualifications.**

Sec. 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, 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, designated by the individual who is the subject of the petition, including a designation made in a durable power of attorney. If a specific designation is not made or a person designated is not suitable or willing to serve, the court may appoint as a guardian a person named as attorney-in-fact through a durable power of attorney.

(3) If a person is not designated under subsection (2) or a person designated under subsection (2) is not 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) is 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.

**History:** 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2000, Act 54, Eff. Apr. 1, 2000;—Am. 2000, Act 312, Eff. Jan. 1, 2001;—Am. 2000, Act 463, Eff. June 1, 2001.

**Popular name:** EPIC

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**ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)**

**Act 386 of 1998**

**700.5433 Foreign conservator; proof of authority; bond; powers.**

Sec. 5433. If a conservator has not been appointed in this state and a petition in a protective proceeding is not pending in this state, a conservator appointed in the state in which the protected individual resides may file in a court of this state, in a county in which property belonging to the protected individual is located, an authenticated copy of letters of appointment and of any bond. After the filing, the domiciliary foreign conservator may exercise as to property in this state all the powers of a conservator appointed in this state and may maintain an action or proceeding in this state subject to any conditions imposed upon nonresident parties generally.

**History:** 1998, Act 386, Iff. Apr. 1, 2000.

**Popular name:** EPIC