

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

**February 13, 2016
Lansing, Michigan**

Minutes

I. Call to Order

The Chair of the Section, Shaheen I. Imami, called the meeting to order at 10:21 a.m.

II. Attendance

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

Shaheen I. Imami
James B. Steward
Marguerite Munson Lentz
Christopher A. Ballard
Susan M. Allan
George F. Bearup
Constance L. Brigman
Christopher J. Caldwell
Rhonda M. Clark-Kreuer
Kathleen M. Goetsch
Michael G. Lichterman
David P. Lucas
Michele C. Marquardt
Richard C. Mills
Lorraine F. New
David L.J.M. Skidmore
Geoffrey R. Vernon
Nancy H. Welber

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

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

Marlaine C. Teahan
Hon. Michael L. Jaconette
Mark E. Kellogg
Katie Lynwood
Raj A. Malviya

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

None.

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

George W. Gregory
Kenneth E. Konop
Susan S. Westerman

E. **Others in attendance:**

Becky Bechler
Jeanne Murphy
Patricia M. Ouellette
Sueann T. Mitchell
James P. Spica
J. David Kerr
Carol Sewell
Joann Kline
Rob Labe
Andy Mayoras
Scott Robbins
Nazneen Syed
Neal Nusholtz
John Roy Castillo
Kurt A. Olson
Rockwell Gust
Ryan Bourjaily

III. **Minutes of the January 16, 2016 Meeting of the Council**

The minutes of the January 16, 2016 Meeting of the Council were attached to the Agenda for this meeting, which was posted on the Section's web page prior to the meeting. Ms. Lentz moved that the minutes be approved. The motion was seconded. The motion was approved on a voice-vote with no nays and no abstentions.

IV. **Treasurer's Report – Christopher Ballard**

The Treasurer's report was attached to Agenda. Revenue from dues is slightly ahead of last year. Expenses are on track with last year.

V. **Chairperson's Report – Shaheen I. Imami**

- Mr. Imami reported that he received an inquiry regarding advertising in the Probate Journal. A law firm that advertised in State Bar Journal wanted to advertise in Probate Journal. If you have any comments, please let Mr. Imami know.

- Ms. Bechler gave a legislative update.
 - SB 633, 634 (probate appeals) passed in the Senate. The bills have been assigned to the House Judiciary Committee. Mr. Imami and Ms. Bechler met with the committee chair, Rep. Kesto. He would like to be a sponsor and Sen. Schuitmaker agreed.
 - SB 597, 598 (qualified dispositions in trust act) passed in the Senate and have been assigned to the House Judiciary Committee.
 - HB 5034 (FADAA) passed in the House, was moved out of Senate Judiciary Committee and should move on Senate floor soon.
 - SB 551 (funeral representatives bill) passed in the Senate and was assigned to the House Judiciary Committee. A hearing is scheduled for Tuesday Feb 16th.
 - The proposal to limit liability for trustees of irrevocable life insurance trusts has been reviewed and revised by the Legislative Services Bureau.
 - SB 558, 559, and 560 (repeal of dower) passed the Senate and have been assigned to the House Judiciary Committee.
- Mr. Imami reported that he attended the Section Leaders lunch last month at the State Bar and the SBM Task Force Town Hall at end of last month. The State Bar is interested in promoting self-help. The Council discussed whether the State Bar's efforts are in the best interests of the public and the profession. In connection with the issues raised, Mr. Imami asked the Citizen's Outreach Committee to revise their mission statement to clarify that the committee's purpose is to help the public understand how lawyers can help them.

VI. Report of the Committee on Special Projects – David P. Lucas

Mr. Lucas reported that Geoffrey Vernon presented to CSP a list of proposed changes to EPIC/MTC and Nancy Welber continued the discussion on ART.

At CSP, Constance Brigman presented three brochures for approval, and after discussion, CSP recommended that the Council approve the brochures as changed. Mr. Lucas moved that the Council approved the brochures as changed, and Ms. Lentz supported the motion. The motion was passed on a voice vote, with no objections or abstentions. The brochures as approved are attached to these minutes as Attachment A.

VII. Standing Committee Reports

A. Internal Governance

1. Budget – Marguerite Munson Lentz—No report.
2. Bylaws – Nancy H. Welber—No report.
3. Awards – Amy N. Morrissey—No report.
4. Planning – James B. Steward

Mr. Steward reported that the Chair's Dinner is scheduled for October 9, 2016 at the

Grand Hotel on Mackinac Island. The Council meeting will be held on Columbus Day, October 10, 2016.

5. Nominating – Mark K. Harder

Mr. Imami gave the report. Please send any suggestions for nominees to Mark Harder.

6. Annual Meeting – James B. Steward—No report.

B. Legislation and Lobbying

1. Legislative Analysis and Monitoring Committee – Michele C. Marquardt—No report.
2. Legislation Development & Drafting Committee – Geoffrey R. Vernon—No report.
3. Insurance Legislation Ad Hoc Committee – Geoffrey R. Vernon—No report.
4. Artificial Reproductive Technology Ad Hoc Committee – Nancy H. Welber

Ms. Welber reported that Prof Waggoner will be at next month's CSP meeting to discuss gestational carriers.

C. Education and Advocacy Services for Section Members

1. Amicus Curiae – David L. Skidmore

Mr. Skidmore reported that the committee received a request from William Horton for an amicus brief in a case involving the Rhea Brody Living Trust. Mr. Skidmore read the names of the law firms involved in the case; no Council members were recused. The Committee recommended that an amicus brief not be filed at this time.

2. Probate Institute – Marlaine C. Teahan

Ms. Murphy gave the report. So far, 166 have registered for the Institute compared with 140 last year at this time. In addition, 19 have registered for the add-on seminar with Steven Gorin.

3. State Bar and Section Journals – Richard C. Mills—No report.
4. Citizens Outreach – Constance L. Brigman

Ms. Brigman reported that a draft mission statement has been given to Mr. Imami for review.

5. Electronic Communications – Michael G. Lichterman

Mr. Lichterman encouraged Council members and guests to visit the Section's web pages and report any errors to him. Mr. Lichterman noticed some errors and those were corrected quickly.

6. Membership – Raj A. Malviya—No report.

D. Ethics and Professional Standards

1. Ethics & Unauthorized Practice of Law– Katie Lynwood—No report.

E. Administration of Justice

1. Litigation, Proceedings, and Forms – David L. Skidmore—No report.

F. Areas of Practice

1. Real Estate – Mark E. Kellogg—No report.

2. Transfer Tax Committee – Lorraine F. New

Ms. New reported on the ongoing saga of new IRS Form 8971. If an estate must file Form 706, the executor must complete and give copies of Form 8971 to each beneficiary. IRS had extended the deadline for compliance with this new filing requirement to Feb 29, 2016. Now the IRS has extended the deadline again to March 31, 2016. The Form and instructions are published, but create more questions with few answers. The IRS' latest pronouncement is Notice 2016-19.

3. Charitable and Exempt Organization – Christopher J. Caldwell—No report.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer—No report.

VIII. Other Reports

G. Liaisons

1. Alternative Dispute Resolution Section Liaison – Milton J. Mack, Jr. —No report.

2. Business Law Section Liaison – John R. Dresser—No report.

3. Elder Law and Disability Rights Section Liaison – Amy Rombyer Tripp

Mr. Steward reported that he filed an amicus in a recent case, *Estate of Margaret Marie Roush*.

4. Family Law Section Liaison – Patricia M. Ouellette—No report.

5. ICLE Liaison – Jeanne Murphy

Ms. Murphy reported that 240 people registered for the Drafting Estate Planning Documents seminar. It is the most popular estate planning seminar.

6. Law Schools Liaison – William J. Ard—No report.

7. Michigan Bankers Association Liaison – Susan M. Allan—No report.
8. Michigan Probate Judges Association Liaisons – Hon. Judge David M. Murkowski, Hon. Michael L. Jaconette—No report.
9. Probate Registers Liaison – Rebecca A. Schnelz—No report.
10. SCAO Liaisons – Constance L. Brigman, Michele C. Marquardt, Rebecca A. Schnelz—No report.
11. Solutions on Self-Help Task Force Liaison – Kathleen M. Goetsch—No report.
12. State Bar Liaison – Richard J. Siriani—No report.
13. Taxation Section Liaison – George W. Gregory

The next meeting of the Taxation Section is Tuesday, February 16, 2016.

IX. **Other Business**

X. **Hot Topics**

XI. **Adjournment**

The meeting was adjourned by Chairperson Shaheen I. Imami at 11:24 am.

ATTACHMENT A

Durable Power of Attorney

Frequently Asked Questions

State Bar of Michigan Probate and Estate Planning Section

DISCLAIMER: This brochure is for informational purposes only. The information provided in this brochure is not legal advice. You can get legal advice from a lawyer who is a member of the State Bar of Michigan. You can find legal help at <http://michbar.directory.zeekbeek.com/sbm>. You can find a lawyer who knows about durable powers of attorney by searching for a lawyer in your area and using the practice area search terms “estate planning” or “elder law.” The information in this brochure may be modified or rendered incorrect by future legislative or judicial developments and may not be applicable to any individual reader’s facts and circumstances.

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“What is a Power of Attorney?”

A power of attorney is a document that allows you to give someone the authority to manage your financial affairs. This person is called your agent. Your agent can take care of your financial affairs as long as you are competent.

A "**durable**" power of attorney is a power of attorney that remains in effect when you are unable to make your own financial decisions (no longer competent).¹ If you want your agent to have authority when you are unable to make your own financial decisions, your power of attorney document must be durable.² This is done by adding a clause to the document that makes it clear that you intend for this power of attorney to remain effective after your subsequent disability, incapacity, or by the lapse of time.

“What Can Your Agent Do?”

An agent can:

- sign your checks
- make deposits for you
- pay your bills
- contract for medical or other professional services
- sell your property
- get insurance for you
- do all the things you do to manage your everyday affairs

You can give your agent authority to do anything you could do. Or, you can limit your agent's authority to do only certain things, such as sell your home.

“How Do I Make Sure My Durable Power of Attorney is Valid?”

You must sign the durable power of attorney before you become unable to do so (incapacitated) or it will not be valid. If you are incapacitated, it means you have a mental or physical condition that prevents you from taking care of your own financial affairs. You must sign your durable power of attorney in front of a notary or two witnesses.³ Also, your agent must sign an acknowledgement of responsibilities and duties before exercising authority. The law sets forth the language that must be included in an acknowledgement of responsibilities and duties.⁴

“Why Do I Need a Durable Power of Attorney if My Spouse and I Own Everything Jointly?”

If you and your spouse own a bank account jointly, then your spouse can sign checks and withdraw money from your joint bank accounts whether you are able to or not. However, the same is not true about your jointly owned stock or home. Your spouse needs your consent and signature in order to make changes to the legal title of your jointly owned home or stock. Your spouse does not have legal authority to name or change a beneficiary on your life insurance or retirement benefits either. To provide your consent and signature to these legal transactions after your disability or incapacity, your spouse must be named as your agent under a durable power of attorney.

“May I Make a Durable Power of Attorney That is Effective Immediately?”

Yes, a durable power of attorney may express your intent to make it effective immediately.

“Can I Make a Durable Power of Attorney That Becomes Effective Only if I Become Incapacitated?”

Yes, a durable power may express your intent to make it effective upon your disability or incapacity. You should also explain in the document how you would like your disability or incapacity determined.

“How Do I Cancel a Durable Power of Attorney?”

You can cancel (revoke) your durable power of attorney, but only when you are able (competent). You must sign a written document that says the durable power of attorney is revoked. You should sign the document in front of a notary public or two witnesses, but that is not required. Deliver your signed document to your agent and to anyone with whom your agent is dealing (for example, your bank).

“Whom Should I Name as My Agent?”

You may name any adult or a bank as your agent. You should have trust and confidence in whomever you select. Your agent should be willing to do this job for you.

“Can I Name More Than One Agent?”

You can name more than one agent to act at the same time. Include in your durable power of attorney whether the agents will act separately or as one. You should also name successor agents who will act if your agent becomes unavailable or unwilling to act on your behalf.

“What Are the Agent's Duties?”

Your agent must follow your instructions and act in your best interest.⁵ The agent must keep receipts and accurate records about your assets. The agent must keep a record of the actions done on your behalf.⁶ If you ask your agent to keep you informed of his or her actions, then he or she must do so. If you ask your agent for an accounting, then your agent must provide you with one.

“What if My Agent Abuses the Authority?”

Anyone interested in your welfare can ask the probate court to get involved, cancel the durable power of attorney and either appoint a conservator to handle your affairs or enter some other protective order on your behalf.⁷

¹ Under common law, the agent's authority ends when you (the principal) become incapacitated or die.

² MCL §700.5502.

³ MCL §700.5501 gives you (the principal) two options. You may sign the document in front of two witnesses or a notary public, or both. The witnesses cannot be an agent (attorney-in-fact) named within the document. The notary public will sign a certificate acknowledging that you signed the document and the date you signed it.

⁴ MCL 700.5501(4).

⁵ MCL §700.5501(3).

⁶ MCL §700.5501(3)(f).

⁷ MCL §700.5404(1).

Acting for Adults Who Become Disabled

Frequently Asked Questions

State Bar of Michigan Probate and Estate Planning Section

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This brochure explains Michigan guardianship and conservatorship for a formerly competent adult who loses the ability to take care of him or her self or property.¹ A person who loses this ability is called “incapacitated.” When an incapacitated person lacks the understanding or ability to make or communicate informed decisions,² the individual may need the help of a guardian or conservator. If the incapacitated person has a Durable Power of Attorney or a Designation of Patient Advocate, then a guardian and/or conservator may not be necessary. A guardian takes care of an incapacitated adult’s personal needs.³ A conservator takes care of an incapacitated adult’s property.⁴ One person can be both the guardian and the conservator for an incapacitated adult. A guardianship or conservatorship will limit an incapacitated adult’s legal right to handle his or her own matters and can cost the incapacitated adult time and money.⁵

If an individual has a disabling condition that began before the age of 22 and the condition is likely to continue indefinitely, then a guardian is appointed under a different set of laws.⁶ This brochure does not address that type of guardianship.

How a Guardian is Appointed

A guardian is appointed by the probate court at the request of a concerned person (petitioner) and after a hearing is held to consider the request. To make a request to the court, a concerned person must file a request on a legal document called a petition.

Where is the Petition Filed? The petition must be filed in the probate court in the county where the individual lives or is located.⁷

Who Can File a Petition for Guardianship? The incapacitated individual,⁸ or a person interested in the welfare of the incapacitated individual, may file the petition.⁹ The petition states details about why a guardian is needed.¹⁰

What Happens Next? The probate court clerk schedules a hearing date for a judge to consider the petition. The petitioner must deliver copies of the petition to certain people before the hearing date. Michigan Court Rules require that this be done in a certain way.

The court will appoint a guardian ad litem to represent the incapacitated individual unless the individual has his or her own attorney. Before the hearing date, the court may also order the individual to be examined by a physician or mental health professional and to submit a report to the court about the individual’s condition.

Who Gets Copies of the Hearing Notice and Petition? The petitioner will make sure the incapacitated individual is personally given a copy of the petition and a notice of the hearing.¹¹¹² The petitioner will also mail copies of the petition and notice of the hearing to certain people (called interested persons). These people are 1) the individual's spouse, 2) a person named as the individual's agent in a durable power of attorney, 3) the individual's children (or, if the individual has no children, the individual's parents), and 4) if there is one, the individual's guardian or conservator appointed by a court in another state. The incapacitated individual and these interested persons are entitled to object to the appointment of a guardian.¹³

What Does a Guardian Ad Litem Do?

The guardian ad litem will personally visit the incapacitated individual and explain certain things, including what has been requested in the petition, the incapacitated individual's rights, and what can happen at the hearing. The guardian ad litem will also ask the individual what he or she wants the court to do about the petition.¹⁴ The guardian ad litem will tell the individual the name of the person who requested the guardianship and who might be appointed as a guardian.¹⁵

Does the Court Investigate the Facts Stated in the Petition? The court may appoint someone to investigate the facts in the petition before the hearing date.¹⁶ This person can be the guardian ad litem, or it can be a physician or mental health professional. This person will submit a full report to the court, including what he or she recommends for the individual.¹⁷

What Happens at the Hearing? At the hearing on the petition, the judge will determine whether a guardianship is needed. The judge must find by clear and convincing evidence two things: (1) the individual lacks the understanding or capacity to make or communicate informed decisions, and (2) the appointment of a guardian is necessary to provide for the individual's continuing care and supervision.¹⁸

If the incapacitated individual needs a guardian, the judge will select (appoint) a suitable guardian who is willing to serve. If the individual needs a guardian but has some ability to take care of certain tasks, the judge may appoint a limited guardian to take care of only those things that the individual cannot.¹⁹

Who May Serve as a Guardian? Any competent person may be appointed as a guardian.²⁰ The person must be over age 18, suitable, and willing to serve. The law provides who has priority for appointment as guardian which includes the guardian appointed in another state for this individual, a person nominated by this individual, the person nominated in this individual's

durable power of attorney, a person nominated by this individual as a patient advocate in a Designation of Patient Advocate.²¹ A judge may reject anyone to serve as guardian if the judge finds the nominated person unsuitable. The judge will appoint a professional guardian only if there is no one suitable from the above list of people.²²

What Happens if the Incapacitated Individual Does Not Want the Guardianship? If the incapacitated individual does not agree to a guardianship,²³ the court must appoint an attorney to represent the incapacitated individual and a contested hearing is set.²⁴ The court must pay for the attorney if the individual cannot afford to pay for the attorney.²⁵

When Does the Guardian Have Authority?

The appointed guardian's responsibilities and authority start when he or she files with the court a signed document called an "Acceptance of Appointment."

The Powers and Duties of a Guardian

A full guardian is responsible for the individual's care, custody, and supervision.²⁶ This means that the guardian will make sure that: 1) the individual has proper food and clothing, 2) the individual lives in a place that is appropriate for him or her, 3) the individual's medical needs are met, and 4) the individual's property is safe. A limited guardian is responsible for only those duties stated in the court order.²⁷

Does the Guardian Make Medical Decisions for the Incapacitated Individual? If the incapacitated individual has a valid patient advocate designation and the patient advocate is properly acting in the best interests of the patient, the patient advocate will continue to make medical decisions for the individual.²⁸ Otherwise, the guardian will make the medical decisions.²⁹

Is the Guardian Liable for Any Wrong Done by the Incapacitated Individual? The guardian is not liable to other people for any action of the incapacitated individual.³⁰

What Kind of Reports Does the Guardian File With the Court? The guardian must visit the individual at least quarterly. At least once a year, the guardian must prepare a report on the condition of the incapacitated individual and file the report with the probate court. The guardian must give copies of the report to the incapacitated individual and all interested persons as defined by Michigan Court Rule.³¹

How Does a Guardian Provide for the Disabled Individual's Needs? If a conservator is not appointed, the guardian may take control of and manage the incapacitated person's funds and property for the benefit of the individual.³² The funds or property are used for the individual's support, care, and education. Any amount not used is saved for the individual's needs.

Can a hospital or nursing home ask a guardian to sign a do-not-resuscitate order for the incapacitated individual? Generally, yes, as long as the incapacitated individual does not object. There is a specific procedure limiting when and how a guardian may do this.³³

Guardian Compensation

A guardian may be paid for their services from the incapacitated individual's assets.³⁴ The payment amount depends upon the time spent by the guardian, the nature of services provided, the amount of available funds, and the individual's specialized needs. The court will only approve just and reasonable payment.³⁵

How a Conservator is Appointed

A conservator is appointed in three steps.³⁶ First, an appropriate person called "the petitioner" properly files a petition at the probate court.³⁷ "Petition" is the legal name for the document that must be filed to start a probate court proceeding. The person for whom a conservatorship is sought is called the "respondent." If a conservatorship is granted, then the person under conservatorship is called a "protected individual." The probate court clerk sets a hearing date. The petitioner timely delivers copies of the petition to certain "interested persons," according to the court rules. Second, the court investigates facts and determines whether the individual requires a court-appointed attorney. Third, at a hearing, the judge determines whether a conservatorship is necessary. If it is necessary, the judge selects a suitable conservator who is willing to serve. The conservator's responsibilities and authority begin once the person who is appointed files a bond as directed by the court.

When is a conservatorship necessary? A conservatorship may be necessary if an individual is unable to manage his or her property or business affairs.³⁸ If the court can provide protection and management of the individual's money, property and business affairs without a full conservatorship, then it will do so.^{39,40}

Who can petition for conservatorship? Certain mentally competent persons may petition the court for a conservator for themselves.⁴¹ In addition, anyone interested in an individual's estate, affairs, or welfare may petition for conservatorship.⁴² Also, anyone who would be negatively affected by ineffective management of the individual's property or business affairs may petition for conservatorship.⁴³

Where is the petition filed? The petition must be filed in the probate court in the county where the individual resides, or in the county where the individual's property is located in Michigan if the individual does not reside in Michigan.⁴⁴

Who gets copies of the hearing notice and petition? The petitioner must arrange for the individual who is the subject of the petition to be personally served a copy of the petition and hearing notice.⁴⁵ Copies must be given to his or her presumptive heirs; an individual's agent (an attorney in fact) under a durable power of attorney; the nominated conservator; a government agency paying benefits like Medicaid or Social Security Disability Income to the individual or to that government agency if the individual filed an application for benefits and is waiting for a response; and the U.S. Administrator of Veterans' Affairs if the individual is receiving or entitled to VA benefits.⁴⁶

How does the court investigate the relevant facts? If a mentally competent person who needs a conservator files a petition for conservatorship, then the court need not appoint a guardian ad litem.⁴⁷ If a petitioner alleges that the subject of the petition is not competent, the court shall appoint a guardian ad litem to investigate.⁴⁸ A "guardian ad litem" is not the same as the guardian. The guardian ad litem must investigate the claims made in the petition.⁴⁹ The guardian ad litem will make recommendations and submit a full report to the court.⁵⁰

What happens at the hearing? If a mentally competent person who needs a conservator and all interested persons consent,⁵¹ then the court may grant the petition without a hearing or the court may conduct a hearing.⁵² Ordinarily, the purpose of the hearing is to determine on the court's record that two things have occurred: (1) the individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and (2) the individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain

or provide proper support from the individual's resources.⁵³ This can be done on the basis of the allegations in the petition, if the petition is unopposed at the time of the hearing.⁵⁴

Who may serve as conservator? The judge may appoint any competent person over age 18 or a professional conservator to serve.⁵⁵ If the individual resides elsewhere and has a conservator appointed in another state, the court may appoint the conservator in the other state to act in Michigan.⁵⁶ In all other cases, any of the following people may be appointed as conservator in the following priority: the person or entity nominated by the individual (including a person or entity nominated in a durable power of attorney), the individual's spouse, adult child, parent, relative with whom the individual has lived for more than six months, or a person nominated by the person who is caring for or paying benefits to the protected individual. The judge follows this order of priority when selecting a conservator; however, the judge may only appoint a person who is suitable and willing to serve.⁵⁷ A conservator, spouse, adult child, parent or relative with whom the individual has lived for more than six months may designate in writing a substitute person to serve instead. That written designation transfers the priority to the substitute person.⁵⁸ If some people have equal priority (adult children, for example), then the judge chooses whomever he or she considers the best qualified to serve.⁵⁹ The judge may pass over a person with priority and choose a person with lower priority or no priority at all to protect the individual who is the subject of the petition, if it is in the individual's best interest to do so.⁶⁰

What happens if the disabled individual disagrees with the petition for conservatorship? If the individual does not agree to the proposed conservatorship, then the judge must appoint an attorney to represent the individual to contest the proposed conservatorship unless the individual retains counsel of their own choosing.⁶¹ If counsel is appointed the court will direct payment for appointed counsel from the assets of the protected person.

The Powers and Duties of a Conservator

A conservator is responsible for the collection, preservation, and investment of the individual's property and must use the property for the support, care, and benefit of the individual and his or her dependents.⁶² A conservator has a duty of loyalty and may not use any of the individual's assets for his or her own personal benefit.⁶³ The court typically requires the filing of a fiduciary bond.⁶⁴

Is the conservator required to review the individual's records? Yes, the conservator must promptly file an inventory of the individual's property with the court and deliver copies to the individual and other parties as required by court rule. Doing so requires a detailed review of how the individual's assets are held.⁶⁵

Is the conservator allowed to make gifts from the individual's estate? Some courts restrict gifting. If the estate is more than sufficient to provide for the individual's financial needs, then gifts less than twenty percent (20%) of annual income may be made to charities or other individuals in a manner that the individual might have been expected to make.⁶⁶ The court and the conservator must consider the individual's estate plan in making investments and gifts.⁶⁷

Is the conservator required to report to the court on an ongoing basis? Within 56 days of appointment the conservator must file with the court a verified inventory detailing all of the assets of the individual's estate. Copies of the inventory must be given to the individual and the interested persons.⁶⁸ The conservator must also file annual, verified accounts with the court and provide copies to the individual and other parties as required by the court rules.⁶⁹ Accounts shall be set for hearing for approval or allowance at least once every three years. A hearing before a judge must be held if the individual or an interested party objects to or challenges the accuracy of the conservator's account.⁷⁰ The conservator must maintain careful records, and all payments from the individual's funds or other property should be supported by proof of payment or a receipt⁷¹ with a note describing the purpose of the payment.

Conservator Compensation

A conservator is entitled to just and reasonable compensation for services.⁷² In approving a conservator's fee, the court will usually consider time spent by the conservator, professional expertise and required skill, nature, number, and complexity of assets, makeup of parties interested in the conservatorship, extent of the responsibilities and risks assumed, and the results obtained in administering the property.

Guardianships and Conservatorships Can Be Modified or Terminated

The individual or any interested person may petition the court to modify or end a guardianship or conservatorship.⁷³ The court may also change a guardian or conservator's powers.⁷⁴

Obtaining Legal Assistance

Serving as a guardian or conservator requires technical expertise. Often, it is necessary to retain the services of an attorney, accountant, bank trust department, investment counselor, family counselor, or other professional. Since the professional's proposed fee is paid from the assets of the individual, the probate court must approve any amount paid to professionals. Guardians and conservators must monitor the work of those they hire to provide services to or for the incapacitated or protected individual. The probate court clerks cannot provide legal advice, but there are helpful packets of information available for purchase at the probate court counter.

¹ MCL §§500.5301-.5319 and MCL §§700.5401-.5433.

² The disability must render the person incapable of comprehending, making or communicating the relevant, important personal decision that triggered the need for the pending guardianship.

³ MCL §700.5314.

⁴ MCL §700.5419(1) provides that a conservatorship vests in the conservator title as trustee to all of the protected individual's property, or to the part of the property specified in the order, held at the time of or acquired after the order, including title to property held for the protected individual by a custodian or attorney-in-fact. Also, MCL §700.5416. Sections 700.5423-.5427 lay out the conservator's duties.

⁵ The power and authority to make decisions for self is lost once the court appoints a substitute decision-maker. Per MCL §700.5107 a guardianship order must be entered into the Law Enforcement Information Network. A person in the LEIN database cannot obtain a license to buy a handgun in Michigan. MCL §28.422.

⁶ Guardianship for individuals with developmental disability are utilized to promote and protect the well-being of the individual, including protection from neglect, exploitation, and abuse, and are designed to encourage the development of maximum self-reliance and independence in the individual. MCL §330.1602(1). To successfully commence a DD guardianship proceeding, the petitioner must establish that the individual for whom guardianship is sought is developmentally disabled. For children up to age five, a developmental disability is defined as a substantial developmental delay or specific congenital or acquired condition with a high probability of resulting in developmental disability if services are not provided. MCL §330.1100a(25). "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL §330.1100a. MCL §722.853(b). Section 100a of the mental health code provides that "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.
 - (b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided.

⁷ MCL §700.5302. However, if the individual is in an institution by order of the court, then venue is also in the county in which that court is located.

⁸ The adult guardianship procedure in the Estates and Protected Individuals Code (EPIC) will determine whether the subject person of the petition is an incapacitated individual. An incapacitated individual is defined as an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions. MCL §700.1105(a). Minority is not included in this definition. Also, the guardianship procedure in EPIC applies only to persons who are not also developmentally disabled. If an individual is developmentally disabled, a guardian may be appointed only pursuant to the Mental Health Code, even though the person might also qualify as an incapacitated individual. *Neal v Neal (In re Neal)*, 230 Mich App 723, 584 NW2d 654 (1998).

⁹ MCL §700.5303(1).

¹⁰ See SCAO Form PC 625 available at the Supreme Court Administrative Office court forms website. The petition must be legible and in English. It can either be typed or printed in ink the size of a 12-point type. See MCR §5.113 for the minimum requirements for content and form of probate filings. MCL §700.5303(1) requires the petitioner to allege specific facts about the disabled person's recent conduct to demonstrate why the guardianship is needed.

¹¹ MCR §5.402(C), MCL §700.5311. Personal service must be made at least seven days before the hearing date. MCR §5.108. Proof of service must be filed with the court per MCR §5.104(A)(1); however, the court may have additional local rules, also.

¹² MCL §700.5311(2).

¹³ MCR §5.125(C)(22). Additional parties may be entitled to notice. See MCR §5.125(A) and MCL §700.5104. Service by mail is permitted, but it must be made at least 14 days before the hearing date. MCR 5.108. Additional petitions and objections may be filed as provided in MCR §5.119.

¹⁴ MCL §§700.5305(1) and 700.5306a(2).

¹⁵ MCL §700.5305(1)

¹⁶ MCL §700.5303(3).

¹⁷ MCL §700.5305(1)(g).

¹⁸ MCL §700.5306(1). Note that the evidentiary standard is clear and convincing evidence on both prongs. According to MCR §5.104(C), testimony must be taken for unopposed guardianship petitions. SCAO Form PC 625 does not specifically ask why the guardianship is necessary. Regardless, the petitioner should prepare testimony about recent occurrences that endangered the subject's health or safety. This kind of information supports the second evidentiary prong concerning why a guardianship is necessary.

¹⁹ MCL §700.5306(2).

²⁰ MCL §700.5313(1).

²¹ MCL §700.5313(2),(3).

²² MCL §700.5313(4).

²³ Any interested party may object to (1) the chosen guardian, (2) the scope of the guardian's powers, (3) the necessity of a guardianship, and/or (4) whether the individual's disability meets EPIC's criteria for an "incapacitated individual." MCR §5.119(B). Ordinarily, once an objection is made, the court adjourns the hearing and sets the matter for a contested hearing date instead.

²⁴ MCL §700.5305(3).

²⁵ *Id.*

²⁶ MCL §700.5314.

²⁷ *Id.*

²⁸ A patient advocate designation remains valid after incapacity. MCL §700.5306(5) prohibits giving a guardian the authority of a patient advocate if a valid patient advocate designation exists. If the patient advocate designation is valid and the patient advocate is acting properly, then the guardian's powers and duties will not include those given to the patient advocate in the patient advocate designation.

²⁹ MCL §700.5314(c).

³⁰ Second sentence of MCL §700.5314.

³¹ MCL §700.5314(g). The court will review the annual reports as provided in MCL §700.5309.

³² MCL §700.5314(f).

³³ MCL §§333.1053(a) and 700.5314(d)-(f).

³⁴ A guardian is entitled to compensation for room and board provided to the incapacitated individual. If no conservator has been appointed, then the guardian must obtain court approval for the room and board charges. MCL §700.5314(f)(ii). If a conservator has been appointed, then the guardian may obtain reasonable compensation for room and board as the conservator agrees. MCL §700.5314(2). A professional guardian may be paid for its guardianship services as provided in MCL §700.5106(4).

³⁵ Willfully appropriating the funds of the incapacitated individual might lead to a charge of embezzlement. MCL §750.176.

³⁶ A conservatorship is a protective proceeding. MCL §700.1106(w). This brochure focuses on protective proceedings under MCL §700.5401(3), (4). Under MCL §700.5401(3), the court determines the subject's incompetency to make certain decisions then considers whether the situation warrants a protective order. Under MCL §700.5401(4), the court determines whether the subject voluntarily signed the petition for conservatorship then determines the subject's competency and limitations regarding certain decisions. According to MCL §700.5407(1), the

court must make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure. The term "protective individual" includes persons for whom orders were issued pursuant to MCL §700.5401(4). MCL §700.1106(v).

³⁷ See SCAO Form PC 625 available at the Supreme Court Administrative Office court forms website. The petition must be legible and in English. It can either be typed or printed in ink the size of a 12-point type. See MCR §5.113 for the minimum requirements for content and form of probate filings. MCL §700.5303(1) requires the petitioner to allege specific facts about the individual's recent conduct to demonstrate why the guardianship is needed.

³⁸ MCL §700.5401(3), (4). Under MCL §700.5401(3), the court may issue a protective order if the court determines that the individual is unable to effectively manage their property and business affairs due to mental illness or deficiency, physical illness or disability, chronic abuse of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance and that the individual has property that will be wasted or dissipated unless proper management is provided or the person or those entitled to support by the person is in need of support and proper management is necessary to obtain that support. *Id.*

³⁹ MCL §700.5407(1).

⁴⁰ MCL §700.5407 lists permissible court orders. Under MCL §700.5407(2)(a), while a petition is pending, the court has the limited power to make orders to preserve and apply property for the benefit of the individual or his or her dependents. Under MCL §700.5407(2)(c), after a hearing and determination that the basis for a conservatorship or a protective order exists, the court has the full power to exercise the individual's rights to his property with one exception: The court cannot make a will for the individual.

⁴¹ MCL §700.5401(4).

⁴² MCL §700.5404(1).

⁴³ *Id.*

⁴⁴ MCL §700.5403.

⁴⁵ MCR §5.402(C).

⁴⁶ MCR §5.125(C)(24).

⁴⁷ The court shall set a hearing whenever a petition for a conservator's appointment or another protective order is filed. If the person to be protected is mentally competent and requesting a conservator the court does not appoint a guardian ad litem. The court may, however, send a visitor to interview the individual to be protected. MCL §700.5406(2).

⁴⁸ Unless the individual to be protected has chosen counsel, the court shall appoint a guardian ad litem. Even if the individual has chosen counsel, the court may send a visitor to interview the individual to be protected. MCL §700.5406(2).

⁴⁹ Unlike guardianships, there is no specific, statutory requirement that the guardian ad litem personally visit the subject of a conservatorship petition. Compare MCL §700.5305(1) to MCL §700.5406(4). See also, MCR §5.121.

⁵⁰ MCR §5.121.

⁵¹ *See*, SCAO Form PC 561.

⁵² MCR §5.104(B).

⁵³ MCL §700.5401(3).

⁵⁴ MCL §700.5401(3). The burden of proof is clear and convincing evidence. MCL §700.5406(6). If the individual has a developmental disability, then the proceeding should be

under the Mental Health Code and not under EPIC. Unlike guardianships, it is possible to obtain a conservatorship for a mentally incompetent person without taking testimony at the hearing. “If a petition is unopposed, at the time set for the hearing, the court may either grant the petition on the basis of the recitations in the petition or conduct a hearing.” MCR §5.104(C). See also, MCL §700.5406(7).

⁵⁵ MCL §700.5409(1).

⁵⁶ MCL §700.5433(1).

⁵⁷ MCL §700.5409(1).

⁵⁸ MCL §700.5409(2).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ MCL §700.5406(5).

⁶² MCL §700.5423(1).

⁶³ MCL §700.5416.

⁶⁴ MCL §700.5410,

⁶⁵ MCL §700.5417, MCR §5.409(B), SCAO Form PC 674. Often financial records are incomplete and assets may be missing. To locate and trace missing assets, a 1099 transcript going back several years may be ordered from the Internal Revenue Service.

⁶⁶ MCL §700.5426(1).

⁶⁷ MCL §700.5428.

⁶⁸ MCL §700.5417

⁶⁹ MCR §5.409(C)(5) requires either a statement from the financial institution indicating the ending balance for the account, or a verification of funds on deposit at the institution using SCAO Form PC 669. The interested persons are listed in MCR §5.125(C)(27). Proof of service must be filed with the court. MCR §5.107(A).

⁷⁰ Each year, the court must either review or allow the annual account. MCR §5.409(C) The review process does not require a hearing. The court simply accepts that the annual account is complete and has been filed. Allowance of an annual account, on the other hand, results in a hearing date and a court order allowing the account after objections, if any, have been heard and resolved. See SCAO Form PC 585b.

⁷¹ Regardless of whether the court asks for receipts filed with an annual account, a conservator must be able to present them for review by interested persons. A receipt may be a cancelled check or the actual paper receipt from the provider of the good or service. MCR §5.310(C)(2)(d).

⁷² MCL §700.5413.

⁷³ MCL §§700.5310(2) and 700.5415(1)(d).

⁷⁴ MCL §§700.5312 and 700.5427 If the conservator resigns or is removed, then an account is due. MCL 700.5418. As a fiduciary, the conservator continues to be liable for his or her activities. *Id.*

**What You Need to Know About Designating Someone
to Make Medical Treatment Decisions for You**

**Frequently Asked Questions about
Patient Advocate Designations**

DISCLAIMER: This brochure is for informational purposes only. The information provided in this brochure is not legal advice. You can get legal advice from a lawyer who is a member of the State Bar of Michigan. You can find legal help at <http://michbar.directory.zeekbeek.com/sbm>. You can find a lawyer who knows about designating someone to make medical decisions for you by searching for a lawyer in your area and using the practice area search terms “health care power of attorney” or “advance directive.” The information in this brochure may be modified or rendered incorrect by future legislative or judicial developments and may not be applicable to any individual reader’s facts and circumstances.

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“What Is a Patient Advocate Designation?”

You have the legal right to make your own medical treatment decisions. But, suppose something happens that makes you unable to make your own medical treatment decisions? Who will speak to the doctors for you? You can choose a person to make these decisions for you by signing a legal document called a “patient advocate designation.”¹ This legal document gives the person you choose (the patient advocate) authority to make decisions for your care, custody, and medical treatment when you cannot.

“What if I Don’t Have a Patient Advocate Designation?”

If you become unable to make your own decisions and you don’t have a patient advocate designation, the probate court may be asked to appoint a guardian to make decisions for your care, custody, and medical treatment.²

“What Can Be Included in a Patient Advocate Designation?”

You can decide what care and medical treatment you want included in your patient advocate designation.³ You can also give your patient advocate permission to donate your organs or other body parts for transplant or research after you die.⁴

“How Can I Make Sure My Patient Advocate Designation is Valid?”

You and two other people (witnesses) must sign the patient advocate designation. You must be of sound mind and age 18 or older. The witnesses are agreeing that you appear to be of sound mind, that you are signing the document of your free will, and that you are not being pressured by others to sign the document.

A witness cannot be your spouse, parent, child, grandchild, sibling, or possible heir. A witness also cannot be a known beneficiary when the document is signed. Others who cannot sign are a physician, a patient advocate, or an employee of one of the following: a health insurance provider, a health facility that is treating you, a home for the aged where

you live, or a community mental health services program or hospital that is providing you mental health services.

“When Can the Patient Advocate Act?”

After you complete the patient advocate designation, your patient advocate must accept and agree to the terms. Your patient advocate act can make decisions for you only 1) after signing an acceptance, 2) when you are unable to make your own medical treatment decisions,⁵ and 3) after your attending physician (or supervising physician if you have more than one physician) and another physician or a licensed psychologist determine that you are unable to make your own medical treatment decisions.⁶

“What Are the Patient Advocate’s Duties?”

Your patient advocate must act in your best interest.⁷ Your patient advocate must take reasonable steps to follow your expressed desires, preferences, and instructions.⁸ This includes preferences you put in your patient advocate designation or that are obvious from your own medical treatment decisions. It is best to put your desires in writing but you don’t have to.

Your patient advocate cannot condone, allow, permit, authorize, or approve your suicide or homicide.⁹ Your patient advocate cannot make a life-ending decision if you are pregnant.¹⁰

Your patient advocate may withhold or withdraw treatment, allowing you to die, only if you clearly and convincingly authorized the patient advocate to make such a decision.¹¹

The patient advocate’s powers cannot be delegated to another person without the patient’s prior authorization.¹²

A designation that names your spouse as your patient advocate is suspended during an action for separation or divorce and cancelled when the divorce is final.¹³

Finally, a patient advocate cannot receive compensation but can be reimbursed for expenses.¹⁴

“What Are the Responsibilities of Medical Professionals Regarding Patient Advocate Designations?”

Medical professionals are required to use sound medical practice.¹⁵ They also are required to follow your patient advocate’s instructions if they believe your patient advocate designation is valid and your patient advocate is following the law..¹⁶

¹ MCL §700.5506. This brochure discusses designating a patient advocate to make medical treatment decisions. The statute also authorizes designating a patient advocate to make mental health treatment decisions. This brochure does not discuss the latter.

² A guardianship may become necessary if the patient disagrees with the patient advocate’s decisions. “Subject to section 5515, even if the patient 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 the patient advocate designation. If there is a dispute as to the intent of the patient to revoke the patient advocate designation, the court may make a determination on the patient's intent to revoke the patient advocate designation. If the revocation is not in writing, an individual who witnesses a revocation of a patient advocate designation shall describe in writing the circumstances of the revocation, must sign the writing, and shall notify, if possible, the patient advocate of the revocation. If the patient's physician, mental health professional, or health facility has notice of the patient's revocation of a patient advocate designation, the physician, mental health professional, or health facility shall note the revocation in the patient's records and bedside chart and shall notify the patient advocate.” MCL §700.5510(1)(d). Once a guardian has been appointed for a patient, the patient cannot execute a patient advocate designation. MCL §700.5520.

³ MCL §700.5507(1). “A patient advocate designation may include a statement of the patient’s desires on care, custody, and medical treatment or mental health treatment, or both.” According to the last sentence of MCL §770.5507(1), a patient advocate designation might authorize the patient advocate to exercise one or more powers concerning care, custody and treatment. Therefore, a patient advocate designation could create a limited patient advocate with specified decision-making powers.

⁴ *Id.*

⁵ MCL §700.5508(1).

⁶ *Id.*

⁷ MCL §§700.5509 (1)(a) and MCL §700.5507(4)(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.” MCL 700.5507(6).

⁸ MCL §700.5509(1)(b).

⁹ MCL §700.5512(4).

¹⁰ MCL §§700.5509(1)(d) and MCL 700.5512(1).

¹¹ MCL §700.5509(1)(e).

¹² “A patient advocate under this section shall not delegate his or her powers to another individual without prior authorization by the patient.” MCL §700.5509(1)(g). “Delegate” means to send another to perform a task for you.

¹³ MCL §700.5510(1)(g).

¹⁴ MCL §700.5507(4)(5).

¹⁵ MCL §700.5511(3).

¹⁶ MCL §§700.5511(3) and MCL 700.5511(5). MCR §5.784.