

Guardianships



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I. GUARDIANSHIPS

A. Legally Incapacitated Individual

Practice in the area of incapacity and agent decision-making is becoming more complex *and* more litigious. The attorney should review the statutes and the court rules carefully when advising a client involved in guardianship proceedings, especially where there may be disagreement from the prospective ward or from other interested persons.

First, we start with the location of the prospective ward, and the court's jurisdiction. Probate court jurisdiction over the appointment of a guardian derives from MCL 700.5301(b).

MCL 700.5301(b) provides for the probate court's jurisdiction, based upon the person's presence in the state, with a "significant connection" where:

(1) The court has jurisdiction over the appointment of a guardian under this part if any of the following apply:

- (a) The individual for whom a guardian is sought resides in this state.
- (b) The individual for whom a guardian is sought is present in this state and has a significant connection to this state.

(2) In determining if the individual for whom a guardian is sought has a significant connection to this state under subsection (1)(b), the court shall consider all of the following factors:

- (a) The wishes of the individual.
- (b) The location of the individual's family and other interested persons.
- (c) The length and time the individual was present in this state and the duration of any absence.
- (d) The location of the individual's property.
- (e) The extent to which the individual has ties to this state, such as voting registration, state tax return filing, vehicle registration, driver license, social relationship, and receipt of services.
- (f) Any other factor the court considers relevant.

PRACTICE NOTES

"Venue" is in the subdivision (county) of the state probate court where the incapacitated individual resides or is present. If the individual is admitted to an institution by order of a court of competent jurisdiction, venue is *also* in the county where that institution is located. See MCL 700.5302.

"Interested persons" for a Petition to Guardianship of a Legally Incapacitated Individual are identified in MCR 5.125(C)(22).

Also, MCR 5.405 governs how to admit into the record a physician's report on the individual alleged to be incapacitated.

MCL 700.5303 provides the statutory authority for the filing of a petition to have a guardian appointed for a legally incapacitated individual. Procedurally, there must be a judicial finding of legal incapacity, based upon admitted or evidenced facts:

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

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

(3) Upon the filing of a petition under subsection (1), the court shall set a date for hearing on the issue of incapacity. Unless the alleged incapacitated individual has legal counsel of his or her own choice, the court shall appoint a guardian ad litem (under **MCL 700.5303**) to represent the person in the proceeding.

PRACTICE NOTES

Michigan SCAO Form PC625 is the prescribed form of pleading for a Petition for Appointment of Guardian of Incapacitated Individual.

Typically, a guardian ad litem (GAL) is automatically appointed when the court receives a petition, as it is highly unlikely that an alleged incapacitated individual already has legal counsel in the proceeding. The GAL is generally an attorney who is tasked with investigating the circumstances, meeting alone with the alleged incapacitated individual, and reporting facts and a recommendation to the court before the hearing. **MCL 700.5305**. The GAL's fee is to be paid by the ward's estate or by the court if the estate is insufficient to pay it.

Also, a physician's orders for scope of treatment ("POST") form was added in 2018 to the list of information a probate court **must** provide to the person who intends to file a petition for guardianship. The POST form has been weaved into the Michigan statutes for guardianship of a legally incapacitated individual.

MCL 700.5313 provides for the selection of a Guardian who is competent, suitable, qualified, and willing to serve:

(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.

PRACTICE NOTE

Continued jurisdiction over a legal guardian is promulgated in **MCL 700.5307**. This is the authority that allows the court to require a guardian to maintain their responsibilities to the ward and interested persons.

MCL 700.5301 allows for the appointment of a guardian of a legally incapacitated individual by nomination *in the guardian's will*.

(1) If serving as guardian, the parent of an unmarried legally incapacitated individual may appoint by will, or other writing signed by the parent and attested by at least 2 witnesses, a guardian for the legally incapacitated individual.

(2) If serving as guardian, the spouse of a married legally incapacitated individual may appoint by will, or other writing signed by the spouse and attested by at least 2 witnesses, a guardian of the legally incapacitated individual.

PRACTICE NOTES

An Annual Report of Guardian on Condition of Legally Incapacitated Individual (Form PC 634) is *required* of all duly appointed Guardians, who may be suspended for failure to report. This form needs to be filed on an annual basis, starting within the first year of being appointed as Guardian.

Review MCR 5.125(C)(22) to determine if you have identified all interested persons. Remember that the MCR 5.405 allows the court to receive into evidence without testimony a written report of a physician. Docket the due date for the Annual Report and send a reminder letter to the client before the probate court sends a deficiency notice.

Go to:

https://www.oakgov.com/courts/probate/Pages/program_service/guard-conserv.aspx

MCL 700.5313(d) and the Do-Not-Resuscitate-Order.

The guardian has the authority and power under MCL 700.5313(d) to execute, reaffirm, and revoke a do-not-resuscitate order on behalf of a ward. However, a guardian shall not execute a do-not-resuscitate order unless the guardian does the following:

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

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

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

- Consult directly with the ward's attending physician as to specific medical indications that may warrant reaffirming the do-not-resuscitate order.
 - Consults directly with the ward's attending physician as to the specific medical indications that warrant the do-not-resuscitate order.
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MCL 330.1600(b) et seq. Developmentally Disabled Individual.

While it is outside the scope of this presentation, please note that the probate court also has jurisdiction over guardianships of individuals with developmental disabilities. If an adult individual has a developmental disability, a guardian may be appointed *only* pursuant to the Mental Health Code, even if the prospective ward is also an incapacitated individual. MCL 330.1604.

PRACTICE NOTE

Make sure the specific nature and extent of the disability is stated thoroughly and completely. PC 658 – Petition for Appointment of Guardian, Individual with Alleged Developmental Disability; PC 659 – Report to Accompany Petition; and PC 663 – Report of Guardian on Condition of Individual with Developmental Disability.

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