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Michigan Probate Benchbook

March 2023 Update

PREPARED FOR

The State Court Administrative Office
A Division of the Michigan
Supreme Court

BY

The Institute of Continuing Legal
Education

The Institute of Continuing Legal Education

Ann Arbor, MI

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This book represents a major collaboration between the Institute of Continuing Legal Education and the State Court Administrative Office (SCAO), Michigan Judicial Institute, to provide probate resource materials to the bench and bar. The book updates and replaces the popular *Probate Benchbook* published by the Michigan Judicial Institute in 1990. It is designed to provide answers to the typical questions facing probate judges and registers.

This book not only summarizes applicable probate law but also provides checklists for estate and gfuardianship proceedings, sample scripts for guardianship and mental commitment proceedings, sample orders for a variety of probate proceedings, plus exhibits to assist the court in determining heirs, calculating degrees of kinship, and other tricky procedures.

The Institute and SCAO agreed that ICLE would produce a probate law benchbook covering all matters that routinely arise in probate court. We are confident that this book will help not only judges and registers but also lawyers and others dealing with probate law. We plan to keep this benchbook up-to-date with annual supplements.

The Institute staff developed this book under the guidance of the Michigan Probate Law Benchbook Advisory Committee, a group of judges, probate registers, and private practitioners appointed by the SCAO. The Advisory Committee helped us understand what judges and registers need in a benchbook, reviewed chapters, and provided practice tips for judges and registers on problematic issues. In addition, many members of the Advisory Committee contributed forms or exhibits, which are reproduced in the book. We are very grateful to them for the time they spent and the insight they gave us into issues facing those who deal with probate law matters.

We are also very grateful to those who helped us put this book together. Elaine M. Cohen, ICLE Assistant Publications Director, drafted almost all of *Michigan Probate Benchbook*. Her writing skills, prior experience as a probate and estate planning practitioner, and retained expertise from her ongoing responsibilities as editor of many ICLE probate and estate planning publications were invaluable. We are also very grateful to the Hon. Phillip E. Harter for answering questions on the guardianship chapters. We very much appreciate their help.

We also wish to thank our own staff for their significant contributions to this book. Juli C. Bergman, ICLE executive legal editor, provided superb legal editing. We appreciate the diligence and fine editing of Mary Ellen LeBlanc, editor, and other ICLE staff members who worked hard to make this a high-quality publication: Jennifer Brewster and Kathy Dennert were the media production specialists; Amy A. Wright was the production coordinator; and Yvette Harms, production manager, provided technical assistance. We also appreciate the careful work of assistant editor Carolyn Barber and our citecheckers and editorial assistants Geoff Brown, RuthAnn Ducmanis, Marianne McCreight, Jane Peterson, Allison B. Tannenbaum, and Alayna L. Tolbert.

Finally, we wish to thank the members of the staff of the Michigan Judicial Institute—in particular, Tobin L. Miller, Publications Administrator—who provided support and friendly assistance throughout the project.

May 1, 2003
Lynn P. Chard
Director

The March 2023 Update replaces the March 2022 Update. Please discard the March 2022 Update.

The March 2023 Update to *Michigan Probate Benchbook* covers legislation and statutory amendments through 2023 PA 3 and Pub L No 117-362 and covers caselaw, court rule changes, regulations, and form revisions through March 1, 2023. Other federal materials are current through March 1, 2023.

The March 2023 Update includes

- the latest appellate cases, including *In re Estate of Von Greiff* (Mich June 10, 2022) (effect of filing a petition for divorce on spouse's status as willfully absent), *Kilian v TCF Nat'l Bank* (Mich Ct App Oct 20, 2022) (notice of one-year limitation period for breach of trust actions), and *In re Eddins* (Mich Ct App Aug 11, 2022) (legal standard for petition to terminate guardianship of legally incapacitated individual);
- the latest statutory changes, including trauma-informed training for lawyer-guardians ad litem;
- the latest court rule changes concerning videoconferencing; and
- new practice tips regarding suitability findings and interested persons in guardianship proceedings

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State Court Administrative Office
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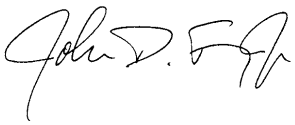
John D. Ferry, Jr., State Court Administrator

May 1, 2003

The *Michigan Probate Benchbook* is a result of a collaborative effort of the Institute of Continuing Legal Education and the State Court Administrative Office, Michigan Judicial Institute. The goals of this partnership were to build upon ICLE's substantial work in probate law, found in numerous ICLE publications, and to provide and keep current a resource for probate judges, Family Division of Circuit Court judges assigned to handle probate matters, and probate registers.

The *Michigan Probate Benchbook* is part of a series of trial court benchbooks developed to keep judges and court employees informed of the latest developments in Michigan law and procedure, and the second benchbook produced in collaboration with the Institute of Continuing Legal Education. We anticipate that this partnership will efficiently provide the judiciary with useful current resources to assist in providing the best possible service to the public in Michigan.



John D. Ferry Jr.

The *Benchbook* was drafted by Elaine M. Cohen, ICLE Assistant Publications Director.

The members of the Michigan Probate Benchbook Advisory Committee were extremely helpful in reviewing, commenting on, and contributing forms to the *Benchbook*.

Significant contributions to the *Benchbook* were also made by Juli C. Bergman, ICLE Executive Legal Editor, and Hon. Phillip E. Harter, Calhoun County Probate Court.

We would also like to thank the authors of ICLE books on related topics, some of whose research was used in the preparation of this book, particularly contributors to the following:

- George A. Cooney, Michael G. Cumming, and Elaine M. Cohen, *Estate Administration in Michigan* (ICLE 2000 & Supps)
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- Hon. Phillip E. Harter and Thomas V. Trainer, eds., *Michigan Guardianship and Conservatorship Handbook* (ICLE Rev ed 2000 & Supp)
- Hon. Gerald J. Supina and Elaine M. Cohen, eds., *Michigan Probate Litigation: A Guide to Contested Matters* (ICLE 2d ed 2001 & Supp)

Finally, we would like to thank the panel of judges, registers, and attorneys who answered and reviewed answers to the questions featured on the Probate & Estate Planning Section/ICLE website, http://www.icle.org/modules/section/probate/. Many of the practice tips in the *Benchbook* were adapted from the answers on that site.

May 1, 2003

1
Decedent Estate Proceedings: Unsupervised Administration

Summary of Decedent Estate Proceedings: Unsupervised Administration

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Estates and Protected Individuals Code. §§1.1–1.2.

Effective April 1, 2000, the Estates and Protected Individuals Code (EPIC) revised and replaced the Revised Probate Code. EPIC does not impair a right accrued or an action taken before April 1, 2000, but it does apply to determine whether an instrument signed by a decedent who died before April 1, 2000, is a testamentary instrument.

Jurisdiction and venue. §1.3.

The probate court has exclusive jurisdiction of matters regarding the settlement of the estate of a deceased person who was at the time of death domiciled either in the county or out of state, leaving an estate within the county to be administered. Venue for the first testacy or appointment proceeding after a decedent's death is in the county where the decedent was domiciled at the time of death. If the decedent was not domiciled in Michigan, venue is in the county where the decedent's property was located at the time of death.

Small estates. §1.4.

A small estate proceeding is commenced by filing a petition and order for assignment and a receipt showing the status of the funeral bill. Most courts also require a death certificate. If the balance of the decedent's gross estate after payment of funeral and burial expenses is not more than the statutorily determined amount, the court may order that the remaining property be assigned to the surviving spouse or, if none, to the decedent's heirs.

Interested persons. §1.5.

The following are persons interested in an application or a petition to probate a will:

- devisees
- nominated trustee and qualified trust beneficiaries of a trust under the will
- heirs
- nominated personal representative
- trustee of a revocable trust

In an intestate estate, the interested persons are heirs, the nominated personal representative, and the trustee of a revocable trust. "Interested person" also includes "any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual." MCL 700.1105(c). Additional persons are entitled to notice.

Priority for appointment of personal representative. §§1.6–1.9.

A personal representative must be at least age 18, not a protected or legally incapacitated individual, and not found unsuitable by the court in a formal proceeding. An appointment as a general personal representative has the following order of priority:

1. the personal representative appointed by the court of the decedent's domicile or that person's nominee
2. the person nominated in the decedent's probated will
3. the surviving spouse of the decedent, if the spouse is a devisee, or the spouse's nominee
4. other devisees of the decedent or their nominee
5. the surviving spouse of the decedent or the spouse's nominee
6. other heirs of the decedent or their nominee
7. a creditor's nominee, 42 days after decedent's death, if the court finds the nominee suitable
8. 63 days after the decedent's death, or if the court determines exigent circumstances exist, the state or county public administrator (if (a) no interested person applied or petitioned for appointment of a personal representative within 63 days (or the number of days determined by the court) of the decedent's death, (b) there are no known heirs, or (c) there is no United States resident entitled to a distributive share in the estate)

A person who does not have top priority for appointment may either send a notice of intent to request informal appointment of personal representative or obtain a signed renunciation of right to appointment from each person with equal or higher priority.

Informal testacy and appointment proceedings. §§1.10–1.15.

Application for probate and/or appointment of personal representative.

An interested person may file an application for informal probate and/or appointment of personal representative immediately after the decedent's death. If an application is not filed within 28 days after the decedent's death, another person who has a right or cause of action that cannot be enforced without administration may file an application. The application must be filed with the court along with the will, a sworn testimony form sufficient to establish the identity of interested persons, and a copy of the death certificate.

Appointment of a special personal representative.

If necessary to protect the decedent's estate, the probate register may appoint a special personal representative. The nominated personal representative in a valid will has priority unless the appointment would not be in the best interest of the estate or beneficiaries. The special personal representative's appointment terminates on the appointment of a general personal representative.

Formal probate proceedings. §§1.16–1.32.

Petition for probate and/or appointment of personal representative.

An interested person may commence a formal testacy proceeding by filing

- a petition requesting that the court enter an order probating a will,
- a petition to set aside a will's informal probate or to prevent a will's informal probate, or
- a petition for an order that the decedent died intestate.

The petition usually will also include a request for the appointment of a personal representative. It must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include additional allegations, as required; and
- include a current list of interested persons, indicating the existence and form of incapacity of any of them, their mailing addresses, the nature of their representation, if any, and the need for special representation.

The petition must be accompanied by a will, if any; a sworn testimony form sufficient to establish the identity of interested persons; and a copy of the death certificate.

Notice of hearing, service of process, and waivers.

The petitioner is responsible for serving notice of hearing and a copy of the petition on all interested persons. Personal service must be made at least 7 days before the hearing date; service by mail must be made at least 14 days before the hearing date. Notice may be served on an interested person whose address or whereabouts is unknown by publication in a newspaper in the county where the court is located at least 14 days before the hearing date. If service cannot otherwise reasonably be made, the court may direct the manner of service.

The service requirements may be avoided if waiver/consent forms are signed by all interested persons and filed with the court. A waiver and consent may also be stated on the record at the hearing, although a written waiver is usually required. If all interested persons have executed waivers and consents, the order may be entered without a hearing.

Appointment of a special personal representative.

The court may appoint a special personal representative if, after notice and a hearing, the court finds the appointment necessary to preserve the estate or secure its proper administration. The court on its own motion or on petition may appoint a special personal representative to supervise the disposition of the body of an intestate decedent who dies without heirs and without sufficient assets to pay for a funeral or burial. In an emergency, the court may appoint a special personal representative without notice. The nominated personal representative in a valid will has priority to be appointed

special personal representative unless the appointment is not in the best interest of the estate or the estate's beneficiaries. The special personal representative has the powers of a general personal representative, except as limited in the appointment, and duties as prescribed in the order.

Hearing.

In a hearing, the burdens of proof are the following:

- A petitioner seeking to establish intestacy must establish prima facie proof of death, venue, and heirship.
- A proponent of a will must establish prima facie proof of due execution. If the proponent is also the petitioner, the proponent must also establish prima facie proof of death and venue.
- A contestant of a will must prove lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.
- A party has the ultimate burden of persuasion as to a matter if that party has the initial burden of proof.

In uncontested cases, the court may order probate or intestacy on the strength of the pleadings if it is satisfied that

- the alleged decedent is dead,
- venue is proper, and,
- if applicable, the will is valid and unrevoked.

In the alternative, the court may conduct a hearing and require proof of these matters.

Will contests.

Any interested person may contest the probate of a will. There is no statute of limitations for contesting a will admitted in an informal proceeding, and the informal probate of a will is conclusive only until superseded by an order in a formal testacy proceeding. Objection to the formal admission of a will must be made before or at the time of the hearing in probate. It is too late to file an objection in probate court after the will is admitted formally, and the contestant's only means of challenging the will are appealing the order or petitioning the probate court to modify or vacate the order. Once the personal representative has notice that there is a contested matter, the person must notify the other interested persons that a contested matter has been commenced and must keep them reasonably informed of the personal representative's actions concerning the matter.

Will construction proceedings.

A will construction proceeding determines the rights of interested persons under the will based on the court's determination of the testator's intent. EPIC's rules of construction apply unless the will indicates a contrary intention.

Objections to proposed personal representative.

An objection to the appointment of a personal representative may be made only in a formal proceeding. If there is an objection, these are the priorities for appointment:

1. the personal representative appointed by the court of the decedent's domicile or that person's nominee
2. the person nominated in the decedent's probated will
3. the surviving spouse of the decedent, if the spouse is a devisee, or the spouse's nominee
4. other devisees of the decedent or their nominee
5. the surviving spouse of the decedent or the spouse's nominee
6. other heirs of the decedent or their nominee
7. a creditor's nominee, after 42 days, if the court finds the nominee suitable
8. 63 days after the decedent's death, or if the court determines exigent circumstances exist, the state or county public administrator (if (a) no interested person applied or petitioned for appointment of a personal representative within 63 days (or the number of days determined by the court) of the decedent's death, (b) there are no known heirs, or (c) there is no United States resident entitled to a distributive share in the estate)

These priorities apply unless either

- the estate is more than adequate to meet exemptions and administration costs but inadequate to discharge anticipated unsecured claims, or
- a devisee or heir with a substantial interest in the estate objects to the appointment.

Alternative dispute resolution.

The court may submit requests for relief in a contested proceeding to alternative dispute resolution (ADR). At any time, after consultation with the parties, the court may order that a case be subjected to the ADR process. Unless a rule governing the specific process provides otherwise, the order must

- specify, or provide for selecting, the ADR provider;
- provide time limits for initiating and completing the ADR process; and
- provide for paying the ADR provider.

Administration of the estate. §§1.34–1.45.

Acceptance of appointment by personal representative.

The personal representative must file an acceptance of appointment to accept the duties of the office. When the acceptance of appointment is filed, the court issues letters of authority that certify the personal representative's authority to act on behalf of the estate.

A bond is not required of a personal representative appointed in an informal proceeding, except when

- a special personal representative is appointed,
- the will requires a bond, or

- a person with an interest in the estate of over $2,500 or a creditor with a claim against the estate of over $2,500 makes a written demand that the personal representative give bond.

In a formal proceeding, the court may order bond unless the will relieves the personal representative of bond, in which case the court may order bond if an interested person requests bond and the court is satisfied that bond is desirable. If the will requires bond, bond may be dispensed with if the court determines it unnecessary. Note that many courts require nominal bonds, and that bond policies may vary by court.

Notices and other documents.

The personal representative may pay attorney fees and costs on a periodic basis without prior court approval as long as the attorney and the personal representative entered into a written fee agreement before the time of payment, copies of the fee agreement and a notice regarding the attorney fees were sent to all who were affected by the payment, statements for services and costs were sent to the personal representative and any interested person who requested copies, and no written objection to the fees has been served on the attorney or the personal representative. In any other case, the court must approve attorney fees before payment.

The personal representative must prepare an inventory of the estate's assets listing each asset's fair market value as of the date of the decedent's death and any encumbrances for each real property item and send it to all presumptive distributees and all other interested persons requesting it within 91 days after appointment. Most courts require the use of SCAO form PC 577, Inventory (Decedent Estate). Although the inventory need not be filed with the court, within 91 days of appointment, the personal representative must submit to the court the information necessary to compute the probate inventory fee.

If administration of the estate lasts more than one year, the personal representative has 28 days from the anniversary date of appointment to file with the court and serve on all interested persons a notice of continued administration.

Elections and allowances.

Within 28 days after appointment, the personal representative must notify the surviving spouse of the spouse's right to election and the election time period. In a testate estate, the surviving spouse may elect to do one of the following:

1. abide by the terms of the will
2. take half of the spouse's intestate share reduced by half the value of property derived by the spouse from the decedent by any means other than testate or intestate succession
3. if the surviving spouse is a widow, take her dower right but only if the husband died before April 6, 2017, the effective date of 2016 PA 489, which abolished dower.

In an intestate estate, a surviving widow may elect to take either her intestate share or her dower right but only if the husband died before April 6, 2017, the effective date of 2016 PA 489, which abolished dower.

If the decedent was domiciled in Michigan, the surviving spouse is entitled to a homestead allowance of $15,000 and household furniture, automobiles, furnishings, appliances, and personal effects with a date-of-death value of up to $10,000. In addition, a reasonable family allowance may be paid to a surviving spouse, minor children the decedent was obligated to support, and children of the decedent or another who were in fact being supported by the decedent. The amounts of these allowances are indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual amount as adjusted for inflation.

Court hearings—requests for relief.

A personal representative may commence a formal proceeding at any time during the probate process to obtain a single court determination without affecting other matters.

Closing procedures. §§1.46–1.51.

Summary administration.

If the inventory value of the estate, less liens and encumbrances, does not exceed the administration costs and expenses, reasonable funeral and burial expenses, homestead allowance, family allowance, exempt property, and reasonable and necessary medical and hospital expenses of the decedent's last illness, the estate may be closed using summary proceedings. In summary administration, there is no notice given to creditors, and the property is not subject to creditors' claims.

Complete estate settlement.

If the estate was formally opened, the personal representative may petition for complete estate settlement after the time for presenting claims expires. Other interested persons may petition beginning one year after the original personal representative's appointment if the time for presenting claims has expired.

If the estate was opened using informal proceedings and heirs were never formally determined, the petition for complete estate settlement must request a determination of testacy and must comply with the requirements for a formal testacy proceeding.

Discharge of the personal representative is usually sought with a formal closing procedure.

Settlement orders.

When a will has been admitted informally and formal admission of the will and determination of testacy status is not desired at closing, a settlement order may be used. Because notice to the heirs is not required, a settlement order does not bind them and leaves open the possibility of a will contest.

Reopening an estate. §1.52.

If estate property is discovered after the estate is settled and either the personal representative is discharged or one year has expired after the sworn statement was filed, or upon other good cause, the court may appoint the same or a successor personal representative to administer the subsequently discovered estate upon petition of an inter-

ested person. If there is good cause to reopen a previously administered estate, other than an estate that was terminated in supervised administration, any interested person may apply to the register to reopen the estate and appoint the former personal representative or another person who has priority.

I. Estates and Protected Individuals Code

A. Introduction

§1.1 The Estates and Protected Individuals Code (EPIC), effective April 1, 2000, completely revised and replaced the Revised Probate Code (RPC). It integrated most of the Uniform Probate Code into Michigan law while retaining some of the unique features of Michigan law in prior codes. Among other changes, EPIC

- eliminated ambiguities and inconsistencies in former Michigan law;
- simplified probate procedure;
- revised and updated the intestacy laws;
- updated the dollar amounts for allowances and exemptions and provided that they be indexed annually for inflation;
- updated the investment standards for fiduciaries by introducing the Michigan prudent investor rule;
- added provisions for self-proved wills, where an affidavit or oath under penalty for perjury constitutes admissible evidence of proper execution;
- added provisions for execution procedures for international wills;
- added provisions regarding the responsibilities and obligations of fiduciaries who encounter problems with estate assets;
- added a method to allow parents to name a guardian for a minor child without the need to prepare an entire will for that purpose;
- eliminated distinctions between procedures for testamentary and living trusts after the settlor's death, plus added a notice-to-creditors procedure for trusts that parallels that in the decedent estates area; and
- added a non-probate method for distributing small estate assets.

B. Substantive Rights Under the Revised Probate Code in Estates of Decedents Who Died Before April 1, 2000

§1.2 EPIC applies to the following:

- a governing instrument executed by a decedent who dies after April 1, 2000
- any proceeding in court pending on or commenced after April 1, 2000, regardless of the time of the decedent's death, except to the extent that in the court's opinion, the former procedure should be made applicable in a particular case in the interest of justice or feasibility
- the definition of the powers and duties after April 1, 2000, of a fiduciary who was appointed before April 1, 2000
- the construction of a governing instrument executed before April 1, 2000, unless there is a clear indication of a contrary intent (with the exception of the construction of the phrase *by representation*—see MCL 700.2718(1))

EPIC does not impair a right accrued or an action taken before April 1, 2000. MCL 700.8101(2)(d). For example, the beneficial shares of heirs of a decedent who died intestate before April 1, 2000, are determined under the RPC.

EPIC does apply to determine whether an instrument signed by a decedent who died before April 1, 2000, is a testamentary instrument. *Korean New Hope Assembly of God v Haight (In re Estate of Smith)*, 252 Mich App 120, 651 NW2d 153 (2002). In that case, the day after the execution of her will, the deceased executed a dated, handwritten document that expressed her intent to donate $150,000 to God in order to build a church. The petitioner-church offered the handwritten document as a holographic will to be probated as a codicil to the deceased's existing will. The trial court granted the respondent summary disposition because the handwritten document failed to reflect testamentary intent. The court of appeals reversed and remanded because, under EPIC, MCL 700.2502(3), the testamentary intent of a document may be established by extrinsic evidence. The EPIC provision applied even though the decedent died before its effective date, because a devise under a will is not an accrued right.

II. Jurisdiction and Venue

§1.3 The probate court has exclusive jurisdiction of matters relating to the settlement of an estate of a deceased person who was at the time of death domiciled either in the county or out of state, leaving an estate within the county to be administered. This includes, but is not limited to, the following types of proceedings:

- the internal affairs of the estate
- estate administration, settlement, and distribution
- declaration of rights that involve an estate, devisee, heir, or fiduciary
- construction of a will
- determination of heirs

MCL 700.1302(a).

Probate disputes, including the question of testamentary capacity, may also be settled by binding common-law arbitration. *Petorovski v Nestorovski (In re Nestorovski)*, 283 Mich App 177, 769 NW2d 720 (2009).

Even if a decedent's state of residence is in dispute, EPIC gives the court jurisdiction over the decedent's property located in Michigan. *Leete v Sherman (In re Estate of Leete)*, 290 Mich App 647, 803 NW2d 889 (2010). In addition, EPIC controls when there is an out-of-state decedent whose Michigan property passes intestate (with the possible exception of rules regarding spousal election). *In re Estate of Huntington*, 339 Mich App 8, 981 NW2d 72 (2021) (when there was no evidence that out-of-state estate had been opened, probate court erred in failing to determine heirs under EPIC's rules of intestate succession regarding Michigan property and share of each such heir). As spousal election was not sought in the case, the court looks to MCL 700.2203 for the default rules regarding intestate succession.

Venue for the first informal or formal testacy or appointment proceeding after a decedent's death is in the county where the decedent was domiciled at the time of death or, if the decedent was not domiciled in Michigan, in a county where the decedent's property was located at the time of death. Venue for subsequent proceedings is in the place where the initial proceeding occurred, unless the court transfers the proceeding. MCL 700.3201(1), (2).

Venue may be transferred to another county

- if the first proceeding was informal, on application of an interested person, and after notice to the applicant in the first proceeding, if the court finds that venue should be elsewhere; or
- on motion by an interested person or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be had in the county where the action is pending.

MCL 600.856, 700.3201(3), (4); MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

If there are conflicting claims as to the decedent's domicile in formal proceedings commenced in Michigan and in another state, the determination of domicile in the proceeding that was commenced first is determinative. MCL 700.3202.

III. Small Estates

§1.4 A small estate proceeding is commenced by filing a Petition for Assignment, SCAO form PC 556m, and Order for Assignment, SCAO form PC 556o, along with a receipt showing the status of the funeral bill. Most courts also require a death certificate. On a showing of satisfactory evidence that the balance of a decedent's gross estate after payment of funeral and burial expenses is valued at or less than $15,000 (as adjusted for inflation), the court may order that the remaining property be assigned to the surviving spouse or, if there is no surviving spouse, to the decedent's heirs. MCL 700.3982(1). See exhibit 1.1 for the annual inflation-adjusted amount. Note that it has become common for the funeral bill to be prepaid by the decedent. In those cases, the court can still assign small estate property to the heirs. Another situation that is fairly common is where the heirs have agreed that the assets should be assigned other than equally.

If the funeral and burial expenses are unpaid or were paid by a third party, the court must order that the property be used first to pay funeral and burial expenses or to reimburse the person who paid those expenses and that the balance be assigned to the surviving spouse or heirs. MCL 700.3982(2).

The order must specify that an heir, other than the surviving spouse or the decedent's minor children, is responsible, for 63 days after the date of the order, for any unsatisfied debt of the decedent up to the value of the property received through the order. Issuance of the order completes the small estate proceeding. MCL 700.3982(3).

The fees for a small estate proceeding are an initial filing fee of $25 plus the inventory fee. MCL 600.871(1), .880(2). See exhibit 1.2 for an inventory fee schedule.

Practice Tip

- *The small estate statute does not identify who has standing to file this petition. All probate courts permit heirs and the individual who paid the funeral bill to file a small estate. Some courts may allow others (e.g., a guardian or conservator who holds assets of the deceased ward) to submit a small estate petition.*

IV. Interested Persons

§1.5 The persons interested in an application or a petition to probate a will are the following:

- devisees whose devise remains unsatisfied
- nominated trustee and qualified trust beneficiaries described in MCL 700.7103(g)(i), of a trust created under the will
- heirs
- nominated personal representative
- trustee of a revocable trust described in MCL 700.7605(1).
- incumbent fiduciary, if any

MCL 700.1105(c); MCR 5.125(B)(2), (C)(1). In an intestate estate, the interested persons are

- heirs
- nominated personal representative
- trustee of a revocable trust described in MCL 700.7605(1).

MCR 5.125(C)(2). See also MCL 700.1105(c), which provides, in part, that "interested person" includes "any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual." MCL 700.1105(c) and MCR 5.125 when read in concert "demonstrate that the interested-person inquiry is decidedly flexible and fact-specific," and "[t]he identity of the interested persons can change not only over time but also depends on the nature of the proceedings and the relief requested." *In re Rhea Brody Living Tr, dated January 17, 1978 (On Remand)*, 325 Mich App 476, 486, 925 NW2d 921 (2018), *vacated in part, leave to appeal denied in part,* 504 Mich 882, 928 NW2d 222 (2019).

Additional special persons who are entitled to notice include the following:

- the Attorney General, if the decedent is not survived by any known heirs
- the appropriate foreign consul, if an interested person is a resident in and a citizen of a foreign country, *see* MCL 700.401(4)
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance

- any special fiduciary
- any person who has filed a demand for notice

MCR 5.125(A).

A person who has a financial or property interest in a decedent's estate may file a demand for notice with the court at any time after the decedent's death. If a proceeding is not pending when the demand is filed, the demandant must pay the $175 fee required to commence a proceeding, and the court must notify the person commencing an estate proceeding of any demands for notice that have been filed. If a proceeding is pending, the demandant must mail a copy of the demand to the decedent's attorney, if known; to the personal representative, if one has been appointed; to the personal representative's attorney; and to all other interested persons. MCL 700.3205; MCR 5.126.

After filing the demand, the demandant is an interested person entitled to receive copies of all orders and filings subsequent to the filing of the demand. If the demandant is an authorized user of the electronic filing system under MCR 1.109(G)(6)(a), copies of all orders and filings must be served on the demandant through the electronic filing system. MCR 5.126(B)(2)(b). If the demandant is not an authorized user, copies may be mailed to the address specified in the demand. If copies are not deliverable, no further copies of documents need to be provided to the demandant. The demandant's right to notice may also be terminated in a formal proceeding initiated by an interested person once the demandant no longer has a financial or property interest in the estate or by the demandant's written notice of withdrawal to the personal representative and the court. On its own motion, the court may require the demandant to show cause why the demand should not be stricken. The demand expires if no proceeding is filed within three years from the date the demand is filed. MCR 5.126(B), (C). A new demand may be filed if the first demand expires.

V. Priority for Appointment of Personal Representative

A. In General

§1.6 A person is qualified to serve as personal representative only if the person is age 18 or older, is not a protected or legally incapacitated individual, and is not found unsuitable by the court in a formal proceeding. MCL 700.3204(1), (3).

Practice Tip

- *EPIC does not prohibit the appointment of a nonresident as personal representative, and there is no statutory preference for appointment of a United States citizen. However, check with your local court, as some courts will not appoint a nonresident as personal representative. Note that the personal representative submits personally to the court's jurisdiction in any proceeding relating to the estate. MCL 700.3602. As a result, the Revised Probate Code requirement of designating a "resident agent" has not been carried over into EPIC.*

Qualified persons are entitled to appointment as a general personal representative in an informal or formal proceeding in the following order:

1. the personal representative appointed by the court of the decedent's domicile (unless the decedent's will nominates different persons to act in Michigan and the state of domicile) or that person's nominee
2. the person nominated in the decedent's probated will
3. the surviving spouse of the decedent, if the spouse is a devisee
4. other devisees of the decedent or their nominee
5. the surviving spouse of the decedent or the spouse's nominee
6. other heirs of the decedent or their nominee
7. a creditor's nominee, 42 days after decedent's death, if the court finds the nominee suitable
8. 63 days after the decedent's death, or if the court determines exigent circumstances exist, the state or county public administrator (if (a) no interested person applied or petitioned for appointment of a personal representative within 63 days (or the number of days determined by the court) of the decedent's death, (b) there are no known heirs, or (c) there is no United States resident entitled to a distributive share in the estate)

MCL 700.3203, .3204(4). Note that the person nominated in the decedent's will does not have the power to nominate another person to serve in that person's place.

Practice Tip

- *While EPIC contains no absolute prohibition against a creditor serving as personal representative, there is an inherent conflict of interest in having a creditor serve, since the personal representative decides which claims are valid. This conflict may cause the court to find a creditor unsuitable if a neutral person is available to serve.*

If a person with priority to serve as personal representative is a protected individual or (if not a protected individual) a legally incapacitated individual or minor ward, the person's conservator or guardian may exercise the same right to nominate, to object to another person's appointment, or to participate in determining the preference of a majority in interest of the devisees and heirs that the person with priority would have had if qualified for appointment. MCL 700.3204(1).

Practice Tip

- *A minor heir is not qualified to serve as personal representative and therefore has no power to nominate another person to serve in the heir's place. If a minor has a conservator or guardian appointed on the minor's behalf, the fiduciary may nominate a personal representative. A minor who has a substantial interest in the estate may, through a conservator, object to another person's appointment and request the appointment of an acceptable person. MCL 700.3203(2)(b).*

A qualified person who does not have top priority for appointment prescribed in MCL 700.3203(1)(a)–(f) as a general personal representative may request appointment if

- in an informal proceeding, the person who has priority, other than the person named in the decedent's will, nominates that person, *see* SCAO form PC 567 (Renunciation of Right to Appointment, Nomination of Personal Representative and Waiver of Notice);
- in a formal proceeding, after notice to interested persons, the court determines that the persons with priority have been notified of the proceedings and have failed to request appointment or to nominate another person for appointment and that administration is necessary; or
- one of the methods in §§1.7–1.9 is used.

MCL 700.3204(2).

B. Notice of Intent to Request Appointment as Personal Representative

§1.7 A person who does not have top priority for appointment may send SCAO form PC 557, Notice of Intent to Request Informal Appointment of Personal Representative, before filing the application (14 days' mail notice or 7 days' personal notice under MCL 700.1401) to those persons having equal or higher priority. Proof of Service, SCAO form PC 564, of the notice must be presented to the court when the application is filed. MCL 700.3310; MCR 5.309(C). If the address of a person with equal or greater priority is unknown and could not be found, the notice (but not a copy of the application) must have been published at least 14 days before the appointment. MCR 5.309(C)(2). See §1.18. As long as proper notice has been given and nobody else seeks appointment or objects, the applicant may be appointed personal representative immediately, despite the lack of priority.

C. Renunciation of Priority and Nomination

§1.8 A person who does not have top priority for appointment may obtain a signed renunciation of right to appointment from every person having equal or higher priority. MCL 700.3203(3); *see* SCAO form PC 567 (Renunciation of Right to Appointment, Nomination of Personal Representative and Waiver of Notice). If all persons who have equal or higher priority indicate that they are giving up their priority, the register may appoint the applicant as personal representative in an informal proceeding. Under these circumstances, no notice of intent to request informal appointment, SCAO form PC 557, Notice of Intent to Request Informal Appointment of Personal Representative, is necessary.

D. Waivers and Consents

§1.9 As noted in §1.8, a person with priority for appointment may renounce the right to appointment as personal representative by filing SCAO form PC 567, Renunciation of Right to Appointment, Nomination of Personal Representative and Waiver of Notice, with the court. MCL 700.3203(3). An alternative to using PC 567 is to have the person sign a writing that says the person waives the right to appointment and consents to the appointment of the applicant. In either case, if all persons who have equal or higher priority indicate that they are giving up their priority, the register may appoint the applicant as per-

sonal representative in an informal proceeding. Under these circumstances, no notice of intent to request informal appointment, SCAO form PC 557, Notice of Intent to Request Informal Appointment of Personal Representative, is necessary.

VI. Informal Testacy and Appointment Proceedings

A. In General

§1.10 Administration of an estate in a traditional probate proceedings may be court supervised or unsupervised. Proceedings to commence an unsupervised administration may be formal or informal. Informal proceedings are proceedings for the probate of a will or the appointment of a personal representative without notice to interested persons and are conducted by the probate register, not the judge. MCL 700.1105(b). Informal proceedings have the advantage of being faster, simpler, and cheaper than formal proceedings. The disadvantage of informal proceedings is that they provide little protection for the personal representative as there is no statute of limitations on contesting a will admitted in informal proceedings and as there are no orders signed by a judge. If you commence informal proceedings, you may always file a petition for supervised administration, and any interested party may make requests to the court on matters that relate to the estate. MCL 700.3415, .3502. Informal probate and appointment proceedings are governed by MCL 700.3301–.3311. For formal proceedings in an unsupervised administration, see §§1.16–1.34. For supervised administration, see chapter 2.

B. Application for Probate and/or Appointment of Personal Representative

§1.11 An interested person may file an Application for Informal Probate and/or Appointment of Personal Representative (Testate/Intestate), SCAO form PC 558, immediately after the decedent's death. If an application is not filed within 28 days after the decedent's death, another person who has a right or cause of action that cannot be enforced without administration (e.g., an individual who is entitled to damages under the wrongful death statute) may file an application. MCL 700.3301(1); *see* PC 558.

Practice Tip

- *Note that if an interested person in an estate is a minor, the estate may be opened by the minor's conservator or, if no conservator, by the minor's guardian because MCL 700.1105(c) provides that an interested person includes "a fiduciary representing an interested person." If no conservator or guardian is appointed or needed, in the interests of justice, the court may allow the minor's custodial parent, if the person files an appearance, to commence a formal estate proceeding on the minor's behalf. MCR 5.302(D).*

An application must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. An application must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR

1.109(D)(1), 5.113(A). PC 558 must be used when preparing the application for filing. MCR 5.113(A). The application must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

At least one SCAO-approved testimony form identifying heirs and devisees must be filed along with the application for informal probate and appointment. MCR 5.302(B); *see* SCAO form PC 565 (Testimony to Identify Heirs). This form must be verified in accordance with MCR 1.109(D)(3). In a testate estate, a supplemental testimony form is also required if there are devisees who are not also heirs. *See* SCAO form PC 566 (Supplemental Testimony to Identify Nonheir Devisees, Testate Estate). The supplemental form is executed in lieu of court testimony concerning the names of all devisees under the decedent's purported will.

If electronic filing is in place, the application indicates there is a will, and it is available and not already filed with the court, an exact copy of the will and codicils must be attached to the application. Originals of the will and codicils must be filed within 14 days of the filing of the application or the case will be dismissed. MCR 5.302(A)(2).

A copy of the death certificate must also be filed with the application. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Courts are prohibited from requiring any further documentation, such as information about the proposed or appointed personal representative. MCR 5.302(A).

If there is a will, it is filed with the court along with the application and testimony forms. The $175 filing fee must also be submitted with the application. This total fee includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a).

Practice Tips

- *If there are no assets requiring probate, an application may request probate of a will without appointment of a personal representative in order to document the exercise or nonexercise of a testamentary power of appointment or to provide the basis for transfer of real estate in another jurisdiction. In such cases, a register's statement granting or denying informal probate is a final disposition of the application, and no further court action or closing documents are required.*
- *If a will is admitted to probate by the probate register in an informal proceeding, the will is always subject to being contested because there is no statute of limitations. See MCL 700.3302 (informal probate is conclusive until superseded by an order in a formal testacy proceeding). If a will contest is anticipated, admission of the will in a formal proceeding is recommended. Objection to the formal admission of a will must be made before or at the time of the hearing in probate. MCL 700.3404. It is too late to file an objection in probate court after the will is admitted formally, and the contestant's only means of challenging the will are appealing the order or petitioning the probate court to modify or vacate the order. See MCL 700.3412.*

C. Register's Review of Application

1. Reasons for Denial

§1.12 The register must determine that there are no grounds for denial present, such as the following:

- A personal representative has been appointed in another county.
- The will offered for probate or another will of the decedent has been the subject of a previous probate order (except that informal probate of a will previously probated in another state may be granted if an authenticated copy of the will and of the statement probating it are attached to the application).
- The probate relates to multiple wills, the latest of which does not expressly revoke the earlier.
- The application indicates the existence of a possible unrevoked will that is not offered for probate.
- The register finds another reason, which must be clearly stated, to warrant denial.

MCL 700.3303–.3305, .3309, .3311.

2. Requirements for Approval

§1.13 The application and accompanying documents are filed with the probate register, who must determine, on the basis of the information in the application, whether the following statutory requirements have been met:

- The application is complete.
- The applicant has affirmed or made an oath that the statements in the application are true to the best of the applicant's knowledge and belief.
- The applicant appears to be an interested person.
- Venue is proper.
- An original (or authenticated copy), properly executed, and apparently unrevoked will is in the register's possession (if applicable).
- Any will to which the requested appointment relates has been or is being offered for probate.
- Notice requirements regarding informal appointment have been met, if applicable.

MCL 700.3303, .3308.

D. Appointment of a Special Personal Representative

§1.14 If necessary to protect the decedent's estate, a special personal representative may be appointed informally by the probate register before the appointment of a general personal representative. MCL 700.3614(a). The nominated personal representative in a valid will, if available and qualified, will be appointed special personal representative unless the appointment would not be in

the best interests of the estate or beneficiaries; otherwise, any proper person may be appointed. MCL 700.3615. No prior notice to others who may have priority is required. See MCL 700.3307, which specifically excludes special personal representatives from the requirements for appointment of a general personal representative.

An informally appointed special personal representative's powers are limited to collecting, managing, and preserving assets; accounting for them; and delivering them to the general personal representative. MCL 700.3616. MCR 5.202(A)–(B) specifically provide the court with the authority to impose restrictions and an expiration date on the special personal representative's letters of authority, but MCR 5.202 is silent with regard to the probate register's authority. Note, however, that the comment to MCR 5.202 specifies that "[t]he [probate] register may not impose restrictions in the letters of authority." The special personal representative's appointment terminates on the appointment of a general personal representative or as the order of appointment otherwise provides. MCL 700.3618.

On its own motion, or on the petition of an interested party, the court may appoint a special personal representative under MCL 700.3614(c) or a special fiduciary under MCL 700.1309 to supervise the disposition of the body of an intestate decedent who dies without heirs and without sufficient assets to pay for a funeral or burial. MCL 700.3206(8). Such a personal representative or special fiduciary may be appointed only if the next of kin in the order established under MCL 700.2103 for intestate succession cannot be located or is unwilling to take responsibility for funeral arrangements and there is no funeral representative or guardian. MCL 700.3206(8). This special personal representative may be permitted to make arrangements with a funeral home, secure a burial plot, obtain veteran's or pauper's funding, and determine the disposition of the body by burial or cremation. The bond requirements may be waived for such a personal representative. A county's public administrator may be appointed as the special personal representative only if the person is willing to serve.

E. Register's Statement

§1.15 On receipt of an application for informal probate and/or informal appointment of a personal representative, after making the required findings, the register must issue a written statement of informal probate and/or appoint the person whose appointment is sought subject to qualification and acceptance. MCL 700.3302, .3307;*see* SCAO form PC 568 (Register's Statement). Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. MCL 700.3302.

At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. MCR 5.307(C); *see* SCAO form PC 572 (Letters of Authority for Personal Representative).

VII. Formal Probate Proceedings

A. In General

§1.16 As stated in §1.10, administration of an estate in a traditional probate proceedings may be court supervised or unsupervised. Proceedings to commence an unsupervised administration may be formal or informal. Formal proceedings are proceedings with notice to interested persons and are conducted before a judge and not a register as is the case in informal proceedings. MCL 700.1104(h). Formal testacy proceedings determine whether a decedent left a valid will. MCL 700.3401(1). If an administration is commenced with informal proceedings, it is possible to have a formal proceeding to determine a matter at any time. Formal proceedings offer final adjudication on the issues involved and are governed by MCL 700.3401–.3415. For informal proceedings, see §§1.10–1.15; for supervised administration, see chapter 2.

B. Petition for Probate and/or Appointment of Personal Representative

§1.17 An interested person may commence a formal testacy proceeding by filing one of the following:

- a petition requesting that the court enter an order probating a will
- a petition to set aside a will's informal probate or to prevent a will's informal probate
- a petition for an order that the decedent died intestate

MCL 700.3401(1). The petition usually will also (but need not) include a request for the appointment of a personal representative. *See* SCAO form PC 559 (Petition for Probate and/or Appointment of Personal Representative (Testate/Intestate)).

Practice Tip

- *Note that if the only interested person in an estate is a minor, the estate may be opened by the minor's conservator or, if no conservator, by the minor's guardian because MCL 700.1105(c) provides that an interested person includes "a fiduciary representing an interested person." If no conservator or guardian is appointed or needed, in the interests of justice, the court may allow the minor's custodial parent, if the person files an appearance, to commence a formal estate proceeding on the minor's behalf. MCR 5.302(D).*

A petition must be legibly typewritten or printed in ink and, except for attachments, with font size of 12 or 13 point for body text and no less than 10 point for footnotes. An application must include the name of the court and the title of the proceeding, the case number, the identification of the document, and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). PC 559 must be used when preparing the petition for filing. MCR 5.113(A). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

A petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

Any formal testacy petition must also include

- information about the decedent;
- if the decedent was not domiciled in Michigan, a statement showing venue;
- a statement identifying the name and address of any personal representative for the decedent whose appointment has not been terminated; and
- a request for an order determining heirs.

If a will is offered for probate, the petition must also include the following:

- a statement that to the best of the petitioner's knowledge, the will was validly executed
- a statement that the petitioner is unaware of an instrument revoking the will and believes that the instrument offered for probate is the decedent's last will
- a statement as to whether the original of the will is in the court's possession or accompanies the petition; if not, a description of the will's contents and an indication that the will is lost, destroyed, or otherwise unavailable
- a request for an order as to the testacy of the decedent

MCL 700.3402; *see* PC 559.

At least one SCAO-approved testimony form identifying heirs and devisees must be filed along with the petition. MCR 5.302(B); *see* SCAO form PC 565 (Testimony to Identify Heirs). This form must be verified under MCR 1.109(D)(3). In a testate estate, a supplemental testimony form is also required if there are devisees who are not also heirs. *See* SCAO form PC 566 (Supplemental Testimony to Identify Nonheir Devisees, Testate Estate). The supplemental form is executed in lieu of court testimony concerning the names of all devisees under the decedent's purported will.

If electronic filing is in place, the petition indicates there is a will, and it is available and not already filed with the court, an exact copy of the will and codicils

must be attached to the petition. Originals of the will and codicils must be filed within 14 days of the filing of the application or the case will be dismissed. MCR 5.302(A)(2).

A copy of the death certificate must also be filed with the petition. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Courts are prohibited from requiring any further documentation, such as information about the proposed or appointed personal representative. MCR 5.302(A).

If there is a will, it is filed with the court along with the petition and testimony forms. The $175 filing fee must also be submitted with the petition. This total fee includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a).

See exhibit 1.3 for a checklist of filings for a formally opened estate.

C. Notice of Hearing, Service of Process, and Waivers

§1.18 The petitioner is responsible for serving notice of hearing and a copy of the petition on all interested persons. MCR 5.102, .107(A); *see* SCAO form PC 562 (Notice of Hearing). Service on the petitioner is not required. MCR 5.105(C).

Effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

Service may be made by any adult or emancipated minor. MCR 5.103(A). Personal and electronic service under MCR 1.109(G)(6)(a) must be made at least 7 days before the hearing date; service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Service on a person who is legally disabled or otherwise legally represented may be made on

- the person's guardian, conservator, or guardian ad litem;
- the trustee of a trust with respect to a beneficiary of the trust;
- a parent of a minor with whom the minor resides if the parent has filed an appearance and the parent and child do not have conflicting interests with respect to the outcome of the hearing;
- the attorney for an interested person who has filed a written appearance in the proceeding; or
- the agent of an interested person under an unrevoked power of attorney filed with the court.

MCR 5.105(D).

A party seeking permission to serve an interested person whose address or whereabouts are unknown by publication must follow the procedure of MCR

5.105(A)(3). This requires the filing of an affidavit or a Declaration of Intent to Give Notice by Publication, SCAO form PC 617, which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry.

Notice of hearing by publication must be made in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The court may direct the manner of service if service cannot otherwise reasonably be made. MCR 5.105(A)(4).

A proof of service must be filed with the court before the hearing. MCR 5.104(A); *see* SCAO form PC 564 (Proof of Service). In formal testacy and appointment proceedings, the proof of service is usually filed along with the petition.

After receiving notice of the formal testacy and/or appointment proceeding, a previously informally appointed personal representative cannot distribute the estate until the court makes its determination and, if appointment of a different personal representative is sought, may be ordered to refrain from exercising any powers. MCL 700.3401(4).

Waivers and consents. Service of process is unnecessary if all interested persons have signed and filed with the court Waiver/Consent forms (SCAO form PC 561). MCR 5.104(B). A waiver and consent may be made

- by a legally competent interested person,
- by a person designated as eligible in the court rules to be served on behalf of an interested person who is legally disabled (except that a fiduciary may not waive or consent with regard to petitions made by that person as fiduciary), or
- on behalf of an interested person by an attorney who has filed a written appearance.

A waiver and consent may also be stated on the record at the hearing.

If all interested persons waive notice and consent in writing to the relief requested in the petition, the court may enter an appropriate order without a hearing. MCL 700.1402; MCR 5.104(B). In addition, if a petition in a testacy proceeding is unopposed at the time set for hearing, the court may issue an ex parte order of probate or intestacy on the strength of the pleadings without conducting a hearing. MCL 700.3405. However, there will usually be a hearing unless a

Waiver/Consent, PC 561, is signed by each interested person is filed with the court before the hearing. These are usually filed with the petition.

Practice Tip

- *When some, but not all, of the interested persons return signed waivers and consents, a hearing is necessary, but the waivers obtained and submitted to the court help to provide an indication of the interested persons' opinions.*

D. Appointment of a Special Personal Representative

§1.19 The court may appoint a special personal representative if, after notice and a hearing, the court finds the appointment necessary to preserve the estate or secure its proper administration, and in cases of emergency, the court may order the appointment without notice. MCL 700.3614(b).

Under certain circumstances, the court, on its own motion or on a petition, may appoint a special personal representative under MCL 700.3614(c) or a special fiduciary under MCL 700.1309 to supervise the disposition of the body of an intestate decedent who dies without heirs and without sufficient assets to pay for a funeral or burial. MCL 700.3206(8). The court can also appoint a special fiduciary to perform a specific task under MCL 700.1309. MCL 700.3614(c). Such a personal representative or special fiduciary may be appointed only if the next of kin in the order established under MCL 700.2103 for intestate succession cannot be located or is unwilling to take responsibility for funeral arrangements and there is no funeral representative or guardian. MCL 700.3206(8). This special personal representative may be permitted to make arrangements with a funeral home, secure a burial plot, obtain veteran's or pauper's funding, and determine the disposition of the body by burial or cremation. The court may waive the bond requirements when appointing such a special personal representative and may appoint the county public administrator, if that official is willing to serve.

The nominated personal representative in a valid will, if available and qualified, has priority to be appointed special personal representative in either case unless the court finds the appointment is not in the best interest of the estate or the estate's beneficiaries; otherwise, the court may appoint any proper person. MCL 700.3615. A special personal representative appointed by the court in a formal proceeding has the powers of a general personal representative, except as limited in the appointment, and duties as prescribed in the order. MCL 700.3617. This authority usually extends to collecting and preserving estate assets until the general personal representative is appointed. A special personal representative's appointment terminates in accordance with the order of appointment or on the appointment of a general personal representative. MCL 700.3618.

E. Hearing

§1.20 MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1).

For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

If there is a hearing, the burdens of proof are as follows:

- A petitioner seeking to establish intestacy has the burden of establishing prima facie proof of death, venue, and heirship.
- A proponent of a will has the burden of establishing prima facie proof of due execution in all cases. If the proponent is also the petitioner, the proponent also has the burden of establishing prima facie proof of death and venue.
- A contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.
- A party has the ultimate burden of persuasion as to a matter if that party has the initial burden of proof.

MCL 700.3407(1). If a will is opposed by a petition for probate of a later will revoking the prior alleged will, the court first determines whether the later will is entitled to probate. If a will is opposed by a petition for a declaration of intestacy, the court first determines whether the will is entitled to probate. MCL 700.3407(2). See §§1.22–1.25 for a discussion of will contests.

In uncontested cases, the court may order probate or intestacy on the strength of the pleadings if satisfied that

- the alleged decedent is dead,
- venue is proper, and,
- if applicable, the will is valid and unrevoked.

In the alternative, the court may conduct a hearing and require proof of these matters. MCL 700.3405(1).

Due execution of an uncontested will may be proved by the sworn statement or testimony of an attesting witness or, if not available, by any other evidence or sworn statement. MCL 700.3405(2). See also MCL 700.2504 regarding self-proved wills. If the witnesses to a will cannot be found after diligent search, the testator's signature is identified, and the will appears on its face to meet the requirements for a valid will, a presumption arises that it was executed as required by law. For proof of execution in contested cases, see §1.23.

F. Lost, Destroyed, or Otherwise Unavailable Wills

§1.21 If the original will is not in the court's possession and neither the original will nor an authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition must state the will's contents and indicate that the will is lost, destroyed, or otherwise unavailable. MCL 700.3402(1)(c). Unlike under former law, EPIC does not require proof of the will's contents by two reputable witnesses, but if the contents are challenged, the petitioner bears the burden of proof.

Practice Tip

- *If a copy of a lost will exists, or knowledge of its contents can be ascertained, secure as full and complete a statement of its contents as possible. Determine the names of the subscribing witnesses and, if they are living, their addresses. Obtain the names and addresses of all people who have personal knowledge of the execution of the alleged will and its contents.*

Note that a missing will last known to have been in the decedent's possession is presumed to have been destroyed and revoked by the decedent. *In re Estate of Smith*, 145 Mich App 634, 378 NW2d 555 (1985). *But see In re Christoff Estate*, 193 Mich App 468, 484 NW2d 743 (1992).

G. Contested Proceedings

1. Will Contests

a. Procedure

§1.22 Persons entitled to contest a will. Any interested person is entitled to contest the probate of a will. MCL 700.3401. In addition, a beneficiary under a will may contest a subsequent will or codicil, as long as the gift under the prior will is not otherwise void. *In re Parker's Estate*, 268 Mich 79, 83, 255 NW 318 (1934); *In re Karabatian's Estate*, 17 Mich App 541, 547, 170 NW2d 166 (1969).

Statute of limitations. There is no statute of limitations for contesting a will admitted in an informal proceeding, and the informal probate of a will is conclusive only until superseded by an order in a formal testacy proceeding. MCL 700.3302.

The statute of limitations for a will admitted via a formal proceeding is 21 days from the date the order admitting the will was issued.

Once the appeal period (21 days) has passed, a formal testacy order is final as to all persons with respect to all issues concerning whether the decedent left a valid will and the determination of heirs except that

- the court must consider another will if the proponent of the later-offered will shows that the person was unaware of the later-offered will's existence at the time of the earlier proceeding or that the proponent was unaware of and given no notice of the earlier proceeding except by publication and
- the court may reconsider the determination of heirs if intestacy of all or part of the estate has been ordered, an individual was omitted from the determination, and the individual was unaware of the individual's relationship to the decedent or the decedent's death or was not given notice except by publication.

The petition to modify or vacate the previous order must be filed before the earliest of (1) the entry of an order approving the final distribution (if a personal representative is appointed for the estate), (2) six months after the filing of the closing statement (if the estate is closed by statement), or (3) one year after the entry of the order sought to be vacated. MCL 700.3412.

Practice Tip

- *It is a good practice to have a will admitted via a formal proceeding at the beginning of the estate administration when interested persons are most cooperative. It can be unsettling to all concerned if a will challenge is filed at the end of estate administration after all the assets have been distributed. Also, the 21-day statute of limitations begins to run far earlier in the proceeding if the will is admitted in the initial administration stage.*

Will contest petitions. If the estate is commenced with an informal proceeding, an objection to the admission of the will to probate may be made by filing a petition to prevent the will's probate or to set aside the will's informal probate. MCL 700.3401(1)(b). If the estate is commenced with a formal testacy proceeding, an objection to the will's probate must be stated in the contestant's pleadings, which may take the form of a pleading collateral to the petition to admit a will, a petition to admit a later will, or a petition for an order that the decedent died intestate. MCL 700.3404.

Practice Tip

- *The court rules permit objections to be made orally at the hearing. MCR 5.119(B). However, the better practice is to file a written objection because the court and the other interested persons may then anticipate and plan for a contested hearing. If no written objection is filed, the court may respond to an oral objection by adjourning the hearing until after a proper written objection can be filed and served. MCR 5.119(B).*

The form and content of the petition in a will contest must comply with the general petition requirements of MCR 1.109(D)(1). MCR 5.113(A). See §1.17. In complying with MCR 5.113(B), it is particularly important that the contestant must plead the interest giving the person the right to contest the will and must state objections or grounds of contest in the pleading. MCL 700.3404.

Common grounds for challenging the validity of a will include improper execution, the testator's lack of testamentary capacity, fraud, duress, mistake, revocation, and undue influence. Disputes about how a will's terms should be interpreted are also common. See §§1.26–1.28.

Notice and service of process. The notice and service requirements for all petitions, discussed in §1.18, also apply to will contest petitions. But note that service of a written objection to a petition for probate of a will may be served at any time before the hearing or at a time set by the court. MCR 5.108(F).

Once the personal representative has notice that there is a contested matter, the person must give notice to the other interested persons whose addresses are known or who are authorized users of the electronic filing system under MCR 1.109(G)(6)(a) that a contested matter has been commenced and must keep them reasonably informed of the personal representative's actions concerning the matter. The personal representative must inform them that they may file a petition to intervene in the matter and that failure to intervene will result in their being bound by the personal representative's actions. MCR 5.120.

Reimbursement of expenses and fees. The personal representative or person nominated as a personal representative is entitled to receive from the estate expenses and disbursements including reasonable attorney fees incurred if the person defends or prosecutes a proceeding in good faith. MCL 700.3720.

b. Improper Execution

§1.23 MCL 700.2502(1) requires that a will be

- in writing;
- signed by the testator or by someone else at the testator's request, on the testator's behalf, and in the testator's conscious presence; and
- signed by two witnesses to the signing of the will, the acknowledgment of the will, or the acknowledgment of the signature.

Any individual generally competent to be a witness may act as a witness to a will, and the signing of a will by an interested witness does not invalidate the will. MCL 700.2505.

A will may also be valid as a holographic will, whether or not witnessed, if it is dated, and if the testator's signature and the material portions of the will are in the testator's handwriting. MCL 700.2502(2).

Even if a document was not executed in compliance with these requirements, it will be treated as if it had been properly executed if the proponent establishes by clear and convincing evidence the decedent's intent that the document be the person's will. MCL 700.2503; *In re Estate of Horton*, 325 Mich App 325, 925 NW2d 207 (2018) (decedent intended electronic note left on his cell phone to be valid will); *Attia v Hassan (In re Estate of Attia)*, 317 Mich App 705, 895 NW2d 564 (2016). Intent that a document constitutes the testator's will can be established by extrinsic evidence. MCL 700.2502(3); *see also Korean New Hope Assembly of God v Haight (In re Estate of Smith)*, 252 Mich App 120, 651 NW2d 153 (2002).

In contested cases, the testimony of at least one of the attesting witnesses, if in the state and competent to testify, is required to prove due execution of an attested will that is not self-proved. If none of the attesting witnesses are in the state and competent to testify, the will may be proved by other evidence. MCL 700.3406(1). The subsequent incompetency of a witness, from whatever cause, who was competent when the person signed the will, does not prevent admission of the will to probate if it is otherwise satisfactorily proved. MCL 700.3406(3).

For self-proved wills, the self-proving affidavit or sworn statement provides a conclusive presumption as to the proper signature by the testator and witnesses without the necessity of testimony by the witnesses, subject only to proof of fraud or forgery affecting the acknowledgment or sworn statement contained in the self-proving affidavit. MCL 700.3406(2). Therefore, the burden of proof is on the contestant to prove fraud or forgery.

c. Lack of Testamentary Capacity

§1.24 An individual must be 18 years old or older and have "sufficient mental capacity" to make a will. MCL 700.2501(1). An individual has *sufficient mental capacity* if all of the following requirements are met:

> (a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
>
> (b) The individual has the ability to know the nature and extent of his or her property.
>
> (c) The individual knows the natural objects of his or her bounty.
>
> (d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

MCL 700.2501(2)(a)–(d); *see also* M Civ JI 170.41. For a discussion of the previous "sound mind" requirement, *see In re Sprenger's Estate*, 337 Mich 514, 60 NW2d 436 (1953).

MCL 700.2501(2)(d) is a new provision and has also been added to M Civ JI 170.41. 2009 PA 46. This new language increases the capacity standard for wills to the legal capacity to make a contract or deed. The same standard will also be applied to revocable trusts, durable powers of attorney, and beneficiary designations. The standard is echoed in *Persinger v Holst*, 248 Mich App 499, 503, 639 NW2d 594 (2001):

> Persons entering into business contracts and settlement agreements, opening bank accounts and changing insurance policy beneficiaries must, generally, possess "sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged." *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW 181 (1993); see, also, *Bannasch v Bartholomew*, 350 Mich 546, 554; 87 NW 2d 78 (1957); *Howard v Howard*, 134 Mich App 391, 396; 352 NW 2d 280 (1984).

Before adoption of 2009 PA 46, testamentary capacity required less ability than the legal competence to make a contract or deed. *See In re Vallender's Estate*, 310 Mich 359, 17 NW2d 213 (1945).

While *In re Paquien's Estate*, 328 Mich 293, 43 NW2d 858 (1950) (see also M Civ JI 170.42) stands for the proposition that the appointment of a guardian or conservator for an individual may be evidence of lack of testamentary capacity but is not determinative, adoption of the new standard may mean that this evidence will be given greater weight.

d. Undue Influence

§1.25 The validity of a will may be challenged on the basis that it was obtained through *undue influence*. Undue influence is influence that is so great that it overpowers the decedent's free will and prevents the decedent from doing as the person pleases with the person's property. M Civ JI 170.44. To be "undue," the influence exerted on the decedent must have been of such a degree that it overpowered the decedent's free choice and caused the decedent to act against the per-

son's own free will and to act in accordance with the will of the person using the undue influence. *Id.*

To establish *undue influence,* it must be shown "that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will." *Karmey-Kupka v Karmey (In re Estate of Karmey)*, 468 Mich 68, 75, 658 NW2d 796 (2003) (quoting *Kar v Hogan*, 399 Mich 529, 537, 251 NW2d 77 (1976)). A presumption of undue influence arises when

- the grantee had a fiduciary relationship with the decedent;
- the grantee or an interest represented by the grantee benefitted from the will (*see Pollack v Barron (In re Gerald L Pollack Tr)*, 309 Mich App 125, 867 NW2d 884 (2015) (fact that person served as cotrustee of trust did not on its own constitute sufficient benefit to give rise to presumption of undue influence)); and
- because of the fiduciary relationship, the grantee had the opportunity to influence the decedent in giving that benefit.

See *In re Mardigian Estate*, 502 Mich 154, 917 NW2d 325 (2018), in which the supreme court, in an evenly divided opinion, affirmed the court of appeals opinion holding that the preparation of an instrument by an attorney that results in a gift to the attorney or the attorney's family creates the rebuttable presumption of undue influence but does not automatically render the instrument void.

Karmey-Kupka defines *fiduciary relationship* as a "relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship." 468 Mich at 74 n2 (quoting *Black's Law Dictionary* (7th ed)). A fiduciary relationship can also exist when one person places faith, confidence, and trust in another person on whose judgment and advice the first person relies. *In re Monier Khalil Living Tr*, 328 Mich App 151, 168, 936 NW2d 694 (2019). Note that a spouse, by reason of marriage alone, is not in a confidential or fiduciary relationship for the purpose of establishing a presumption of undue influence. *Karmey-Kupka; see also Monier Khalil Living Tr* (evidence that son was managing mother's trust and its assets when not the trustee could create a fiduciary relationship).

When the presumption is established, there is a mandatory inference of undue influence that shifts the burden of going forward with contrary evidence onto the person contesting the claim of undue influence, but the burden of persuasion remains with the party asserting undue influence. *In re Mardigian Estate*, 502 Mich 154, 917 NW2d 325 (2018); *In re Mikeska Estate*, 140 Mich App 116, 121, 362 NW2d 906 (1985); *see* M Civ JI 170.44; *see also Widmayer v Leonard*, 422 Mich 280, 373 NW2d 538 (1985).

2. Will Construction Proceedings

a. In General

§1.26 The purpose of a will construction proceeding is to determine the rights of interested persons under the will based on the court's determination of the testator's intent. *Flynn v Brownell*, 371 Mich 19, 123 NW2d 153 (1963). EPIC's rules of construction for wills (MCL 700.2601–.2608) and for wills and other governing instruments (MCL 700.2701–.2722) apply unless the will indicates a contrary intention. MCL 700.2602(1), .2701.

b. Identifying Devised Property

§1.27 A will may provide for the passage of all the property owned by the testator at death and all property acquired by the testator's estate after death. MCL 700.2602.

Reference to another writing or events of independent significance. A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. MCL 700.2510.

A will may also refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. The writing must be either in the testator's handwriting or signed by the testator at the end, and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the will dispositions. MCL 700.2513.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is an example of such an event. MCL 700.2512.

Property subject to a security interest. A specific devise passes subject to any mortgage or other security interest existing at the date of death, even if the will contains a general directive to pay debts. MCL 700.2607.

EPIC makes it clear that secured creditors are treated differently from other potential claimants against the estate in that a secured creditor need not bring a claim against the estate to exhaust the security, even if there are insufficient funds to pay all claims and allowances. *Lundy v First Fed Bank of the Midwest (In re Estate of Lundy)*, 291 Mich App 347, 804 NW2d 773 (2011).

Securities. A devise of securities that the testator owns at the time the will is executed also includes additional securities owned by the testator at death as a result of the testator's ownership of the described securities, including securities of the same organization acquired by reason of the organization's action (except securities acquired by the exercise of purchase options) or by reason of a reinvestment plan and securities of another organization acquired, for example, because of

merger, consolidation, or reorganization. Distributions of cash before death are not part of the devise. MCL 700.2605.

Specifically devised property no longer owned by the decedent at death. If specifically devised property was disposed of during the testator's lifetime, the devisee is entitled to

- the balance of any purchase price owing at death for the sale of the property and any related security agreement;
- any portion of a condemnation award owing at death for the taking of the property;
- any insurance proceeds unpaid at death for injury to the property;
- any property owned by the testator at death that was acquired as a result of foreclosure (or in lieu of foreclosure) of a security interest in a specifically devised obligation;
- real or tangible personal property owned by the testator at death that was acquired as a replacement for the specifically devised property; and
- if the property is not in the estate at death and its value or replacement is not covered by the above provisions, the value of the specifically devised property unless the testator intended ademption as indicated by the facts and circumstances or the manifested plan of distribution.

MCL 700.2606(1).

If a conservator or attorney-in-fact acting for an incapacitated testator disposed of specifically devised property, the specific devisee is entitled to a general pecuniary devise in the amount of the net sale price, the unpaid loan, the condemnation award, the insurance proceeds, or the insurance recovery unless (with respect to a conservatorship only) the testator regained capacity and survived the termination of the conservatorship by one year. MCL 700.2606(2)–(5).

Effect of inter vivos gifts to devisee. Property given by the testator during life to a devisee is treated as satisfaction of the devise only if

- the will provides for deduction of the gift,
- the testator declared in a contemporaneous writing that the gift is in satisfaction (or partial satisfaction) of the devise, or
- the devisee acknowledges in writing that the gift is in satisfaction (or partial satisfaction) of the devise.

The gift is valued as of the earlier of the time the devisee came into possession or enjoyment of it or the testator's death. If the devisee fails to survive the testator, the gift may be treated as a full or partial satisfaction of the devise, as appropriate in applying the antilapse provision, unless the testator's contemporaneous writing provides otherwise. MCL 700.2608.

c. Identifying Devisees and Others Entitled to Share in the Estate

§1.28 Definitions. A *devise* is a testamentary disposition of real or personal property. MCL 700.1103(l). A *devisee* is a person designated in a will to receive a devise. MCL 700.1103(m).

Age of majority is the legal age of majority in effect when the will was executed. MCL 700.2721.

Survival requirement. A devisee who fails to survive the testator by 120 hours is treated as if the devisee predeceased the testator unless the will provides otherwise. MCL 700.2702; *see Leete v Sherman (In re Estate of Leete)*, 290 Mich App 647, 803 NW2d 889 (2010).

Surviving spouse. Unless the will, court order, or marital estate division contract provides otherwise, divorce or annulment of a marriage revokes a disposition or appointment of property in the will to the former spouse or to a relative of the former spouse. *In re Grablick Tr*, 339 Mich App 534, 984 NW2d 517 (2021). MCL 700.2806(e) defines "[r]elative of the divorced individual's former spouse" as "an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity." Therefore, in the absence of express terms to the contrary in a governing document, after a divorce, a decedent's stepchildren (individuals related by blood to the decedent's former spouse) are not related to the decedent for purposes of the disposition or appointment of property. This does not mean that a person, a step-child in this case, may continue to be related to the divorced individual by affinity after a divorce. Divorce or annulment also revokes a grant of a power of appointment in the will to the former spouse or to a relative of the former spouse, and a nomination of the former spouse or a relative of the former spouse to serve in fiduciary capacity, such as personal representative, trustee, conservator, agent, guardian, or funeral representative. Each provision in the will is given effect as if the former spouse and the spouse's relatives disclaimed the provisions. MCL 700.2807. Divorce or annulment also severs property interests held as joint tenants with the right of survivorship and transforms them into tenancies in common. MCL 700.2807(1)(b).

Class gifts. Adopted individuals, individuals who were born out of wedlock, and the descendants of either, if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. See §1.32. Terms of relationship that do not differentiate relationships by blood from those by affinity (e.g., nieces and nephews) are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood (e.g., brothers and sisters) are construed to include both types of relationships. MCL 700.2707(1). However, in construing a dispositive provision of a transferor who is not a natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the natural parent's household or of the household of the natural parent's parent, brother, sister, spouse, or surviving spouse. MCL 700.2707(2). In addition, in construing a dis-

positive provision of a transferor who is not an adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the adopting parent's household. MCL 700.2707(3).

If a class gift in favor of a multiple-generation class (e.g., descendants) does not specify the manner in which the property is to be distributed, the property is to be distributed among the class members who are living when the interest is to take effect, and each class member is to receive the share the person would have received under the applicable law of intestate succession if the designated ancestor had died intestate at the time of distribution owning the subject matter of the class gift. MCL 700.2717. In other words, applying the Michigan law of intestate succession, the class members would take by *representation.* MCL 700.2106.

Representation and per stirpes. Under EPIC, the phrase *by right of representation* or *per capita at each generation* means that shares are divided in equal shares among the decedent's living children and deceased children with living descendants, with each living child getting one share. The deceased children's shares are combined and divided in equal shares among the deceased children's living children and deceased children with living descendants, again with each living child getting one share. This process continues until all shares are distributed. MCL 700.2718.

For example, assume that the testator has three children, A, B, and C, who each have two children of their own. A dies before the testator. The testator now has eight living descendants: children B and C and the six grandchildren. A gift to "my descendants, by right of representation" would be distributed as follows:

Testator			
A (predeceased)		B	C
Grandchild	Grandchild	$^1/_3$	$^1/_3$
$^1/_6$	$^1/_6$		

However, consider the situation in which there are three children, A, B, and C. A has one child, B has two children, and C has three children. A, B, and C all predecease the testator. If the grandchildren take by right of representation, they will each get an equal share—$^1/_6$ of the estate. If the will provides for a gift to "my descendants, per stirpes," the property would be distributed as follows:

Testator					
A (predeceased)	B (predeceased)		C (predeceased)		
Grandchild	Grandchild	Grandchild	Grandchild	Grandchild	Grandchild
$^1/_3$	$^1/_6$	$^1/_6$	$^1/_9$	$^1/_9$	$^1/_9$

See MCL 700.2718(2).

The phrase *by right of representation* in wills and other governing instruments executed before April 1, 2000, is construed under the RPC, MCL 700.108, which read:

> [T]he estate shall be divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survived decedent, each surviving heir in the nearest degree receiving 1 share and the share of each deceased person in the same degree being divided among his issue in the same manner.

This yields the same result as EPIC's definition of *by right of representation* in the prior two examples, with the grandchildren in the last example receiving equal shares, because that was the first generation to contain a living member. However, if A survived the testator in that example, the distribution would have been as follows:

Testator					
A	B (predeceased)		C (predeceased)		
1/3	Grandchild	Grandchild	Grandchild	Grandchild	Grandchild
	1/6	1/6	1/9	1/9	1/9

The RPC version of representation requires that division into equal shares begins at the first generation of descendants that contains a living member and that it follow a per stirpes distribution for later generation beneficiaries. If a will signed before April 1, 2000, is amended and either the phrase "by right of representation" or "per capita at each generation" is used in the codicil, the EPIC rule of construction applies to the entire will. MCL 700.2718(1).

Antilapse provision. MCL 700.2603 states that, unless the will provides otherwise, if a devisee predeceases the testator, the gift passes to the beneficiary's surviving descendants by right of representation if the deceased beneficiary is

- the testator's grandparent,
- a descendant of the testator's grandparent, or
- the stepchild of the testator or of the donor of a power of appointment exercised by the testator's will.

For a definition of *devisee* and other terms relating to this antilapse statute, see MCL 700.2601. If the devise was in the form of a class gift to a single generation of individuals (e.g., "to my children" as opposed to "to my descendants"), a substitute gift is created in the surviving descendants of each deceased beneficiary, who take by representation. MCL 700.2603(1)(b). Words of survivorship attached to a devise (e.g., "to my son, if he survives me"), in the absence of additional evidence, are not a sufficient indication that the testator intended that the antilapse statute not apply. MCL 700.2603(1)(c).

Failed devises. A failed devise becomes part of the residue (unless the antilapse provision applies). A failed residuary devise passes to the other residuary

beneficiaries in proportion to the interest of each in the rest of the residue. MCL 700.2604.

Omitted spouse or children. A surviving spouse who married the testator after the execution of the will is entitled to receive the spouse's intestate share of that portion of the estate that is not devised to the testator's child or descendant of a child who was born before the marriage and is not a child of the spouse. *Comerica Bank v Bennett (In re Estate of Bennett)*, 255 Mich App 545, 662 NW2d 772 (2003). However, the omitted spouse is not entitled to this share if

- it appears from the will or other evidence that the will was made in contemplation of the marriage;
- the will expresses the intention that it is to be effective notwithstanding a subsequent marriage; or
- the testator provided for the spouse outside the will and the testator's intent that the transfer be a substitute for a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

MCL 700.2301.

A surviving spouse who satisfies the conditions of MCL 700.2301, governing premarital wills, may take an elective share under MCL 700.2202. MCL 700.2301(4); *Hill v Flint (In re Estate of Sprenkle-Hill)*, 265 Mich App 254, 703 NW2d 191 (2005). However, the intestate share received by the spouse under MCL 700.2301 reduces the sum available to the spouse under MCL 700.2202(2)(b).

A child born to or adopted by the testator after execution of the will is entitled to the same share that the testator's other children are given or, if there are no other children, to an intestate share. However, there is no intestate share for an omitted child if

- substantially all of the estate is given to the surviving spouse who is the parent of the omitted child;
- it is apparent from the will that the testator intended not to make a provision for the child; or
- the testator provided for the child outside the will and the transfer outside the will was intended to be a substitute for a gift under the will.

MCL 700.2302. A child omitted from the will solely because the testator mistakenly believed that the child was dead is also entitled to an omitted child's share.

Effect of penalty provision. A provision in a will that penalizes an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if there is probable cause for instituting proceedings. MCL 700.2518; *see In re Estate of Stan*, 301 Mich App 435, 839 NW2d 498 (2013) (while objection to appointment of personal representative invoked penalty clause in will, court found probable cause exception applied, citing MCL 700.3905).

Effect of homicide, abuse, neglect, or exploitation by devisee. The felonious and intentional killing of the decedent revokes a disposition or appointment of property in the will to the killer, a grant of a power of appointment in the will to the killer, and a nomination of the killer to serve in a fiduciary capacity, such as personal representative, trustee, funeral representative, conservator, agent, or guardian. Each provision in the will is given effect as if the killer had disclaimed the provisions. MCL 700.2803(2)(a), (c), (4). Killing the decedent also severs property interests held as joint tenants with the right of survivorship and transforms them into tenancies in common. MCL 700.2803(2)(b).

A conviction establishing criminal accountability for the felonious and intentional killing of the decedent (including a conviction of voluntary manslaughter, *Cook v Nale (In re Estate of Nale)*, 290 Mich App 704, 803 NW2d 907 (2010)), conclusively establishes the convicted individual as the decedent's killer for inheritance purposes. In the absence of a conviction, the court, on the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If so, the determination conclusively establishes that individual as the decedent's killer for inheritance purposes. MCL 700.2803(6).

An individual who is convicted of committing abuse, neglect, or exploitation of the decedent also forfeits rights to a decedent's estate and severs property interests held as joint tenants with rights of survivorship. MCL 700.2803(1), (2)(b). The individual can become a devisee if after the abuse, neglect, or exploitation conviction the decedent executed a new will or other governing instrument specifically expressing the intent that the felon is to inherit or otherwise receive assets from the decedent's estate or other property. MCL 700.2803(7).

3. Objections to Proposed Personal Representative

§1.29 An objection to the appointment of a personal representative may be made only in a formal proceeding. If an objection is made, the priorities for appointment discussed in §1.6 apply unless one of the following applies:

1. The estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims. In that case, on petition of creditors, the court may appoint any qualified person.
2. A devisee or heir who appears to have a substantial interest in the estate objects to the appointment. Unless the person whose appointment was objected to was nominated as personal representative in the will, the court may appoint a person who is acceptable to the devisees and heirs whose interests in the estate appear to be worth in total more than one-half of the probate distributable value. If there is no such person, the court may appoint any suitable person.

MCL 700.3203(2).

If a formal proceeding involving a dispute about who is to be appointed personal representative precedes the appointment of a personal representative, the formal proceeding stays an informal appointment proceeding that is pending or that is commenced after the formal proceeding's commencement. If the formal proceeding is commenced after the appointment of a personal representative, after receiving notice of the proceeding, the personal representative may not exercise a power of administration except as necessary to preserve the estate or unless the court orders otherwise. MCL 700.3414(3).

4. Alternative Dispute Resolution

§1.30 The court may order mediation, case evaluation, or other processes for ADR or other requests for relief in a contested proceeding. MCR 5.143. The rules in chapter 2 of the Michigan Court Rules apply to the extent feasible.

ADR is governed generally by MCR 2.410. At any time, after consultation with the parties, the court may order that a case be submitted to an ADR process, including a settlement conference, case evaluation, mediation, or other procedures provided by local court rule or ordered on stipulation of the parties. Unless a rule governing the specific process provides otherwise, the order must

- specify, or provide for selecting, the ADR provider;
- provide time limits for initiation and completion of the ADR process; and
- provide for the payment of the ADR provider.

The order may require attendance at ADR proceedings by attorneys, parties, and others with authority to settle the case. If ordered to attend, failure of a party or the party's attorney to do so constitutes a default or grounds for dismissal unless the court finds that entry of an order of default or dismissal would cause manifest injustice or the failure to attend was not due to the culpable negligence of the party or the attorney. The court may condition an order other than default or dismissal on the payment by the offending party or attorney of reasonable expenses. Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order, and a timely motion must be decided before the case is submitted to the ADR process.

Actions in which monetary relief or the division of property is sought may be submitted by the court to case evaluation. *See* MCR 2.403. Cases are evaluated by a panel of three lawyers at what the case evaluation rule refers to as a "hearing" but which is typically informal. Before the hearing, the parties submit written mediation summaries. At the conclusion of the hearing, the panel renders a case evaluation award. The award is generally thought of as the evaluators' collective opinion of the settlement value of the case. The parties must then either accept or reject the case evaluation award. If both parties accept it, judgment is entered in accordance with the evaluation unless the award is paid within 28 days after notification of the acceptances, in which case the court dismisses the case with prejudice. If one or both parties reject the award, the case proceeds to trial. A party who rejects the award is subject to liability for case evaluation sanctions unless the ver-

dict is more favorable (by more than 10 percent) than the award. Sanctions include actual costs plus attorney fees and, therefore, can be substantial.

H. Order of Formal Proceedings

1. In General

§1.31 After the time expires for notice, on proof of notice and after a hearing (if necessary), if the court finds that the alleged decedent is dead and venue is proper, the court must determine the decedent's

- domicile at death,
- heirs, and
- state of testacy.

MCL 700.3409(1). A will found to be valid and unrevoked must be formally probated. *See* SCAO form PC 569 (Order of Formal Proceedings). More than one will may be probated if neither revokes the other either expressly or by implication. MCL 700.3410.

Termination of the appointment of an informally appointed personal representative may also be appropriate if there has been a change of testacy status and another person is entitled to appointment under the court's determination of the state of testacy. MCL 700.3409(2), .3612. After notice to all interested persons (including a previously appointed personal representative), the court must determine who is entitled to appointment, make a proper appointment, and, if appropriate, terminate a prior improper appointment. MCL 700.3414(4).

At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. MCR 5.307(C); *see* SCAO form PC 572 (Letters of Authority for Personal Representative).

After the formal proceeding to determine testacy, admit the will (if any), and appoint the personal representative, administration continues as unsupervised administration unless a formal proceeding is commenced (see §1.48) or supervised administration is ordered (see chapter 2).

2. Determination of Heirs

§1.32 As noted in §1.31, the court must determine the decedent's heirs in all formal testacy proceedings. MCL 700.3409(1); MCR 5.308(B)(1).

Heir is defined as a person that is entitled under the laws of intestate succession to a decedent's property. MCL 700.1104(p). Intestate succession is governed by MCL 700.2101–.2114. An heir must survive the decedent by 120 hours; otherwise, the heir is considered to have predeceased the decedent. MCL 700.2104. See exhibit 1.4 for a list of heirs under the RPC and EPIC.

Note that a decedent by will may expressly exclude or limit the right of an individual or class to succeed to the decedent's property that passes by intestate succession. MCL 700.2101(2).

Surviving spouse. The surviving spouse is an heir who is entitled to the intestate share (by year of death, as adjusted for inflation) listed in exhibit 1.1. *See* MCL 700.2102.

A surviving spouse does not include

- an individual who was divorced from the decedent or whose marriage to the decedent was annulled unless the individual and the decedent are remarried to each other at the time of death (a decree of separation that does not terminate the marriage does not have the same effect);
- an individual who, following an invalid divorce or annulment, participated in a marriage ceremony with someone else;
- an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights;
- an individual who was living in a bigamous relationship with another individual at the time of the decedent's death; and
- an individual who for one or more years before the decedent's death
  - was willfully absent from the decedent,
  - deserted the decedent, or
  - willfully neglected or refused to provide support for the decedent if required to do so by law.

MCL 700.2801.

Willfully absent. "Willfully absent" is the intentional complete emotional and physical absence from the marriage in the year or more before the decedent's passing. *In re Estate of Erwin*, 503 Mich 1, 921 NW2d 308 (2018) (overruling *Lovett v Peterson (In re Estate of Peterson)*, 315 Mich App 423, 889 NW2d 753 (2016), to the extent it defined *willfully absent* as physical absence only). The burden of proving that a spouse is willfully absent is on the person challenging the individual's status as a surviving spouse. *Erwin* (party challenging surviving spouse status under MCL 700.2801(2)(e)(i) need not show that spouse intended to dissolve the marriage, only that surviving spouse intended to be absent from decedent spouse). Under MCL 700.2801(2)(e)(i), to establish that a decedent's spouse is not entitled to the benefits of a "surviving spouse," a challenging party must show, under the totality of the circumstances, (1) that the surviving spouse was completely absent from the decedent spouse, (2) that this absence was for a continuous period of one year or longer before the decedent's death, and (3) that the surviving spouse acted with a specific intent to be absent from the decedent spouse. *In re Estate of Von Greiff*, 509 Mich 292, 984 NW2d 34 (2022).

The court in *Von Greiff* further held that a wife's filing of a petition for divorce one year or more before her husband's death did not categorically mean she was not "willfully absent" from her husband for a period of one year or more before his death. Instead, filing for divorce, and the direct or indirect communications that may arise during the divorce proceedings, created a rebuttable presumption that

the wife was not willfully absent from her husband for a period of one year or more before his death. *Id.*

Desertion. "[A]n individual deserts his or her spouse within the meaning of MCL 700.2801(2)(e)(ii) if he or she physically leaves the marital home with the intent never to return and the spouse dies more than a year later." *Erwin.*

Willfully neglected. An individual willfully neglects a spouse for the purpose of MCL 700.2801(2)(e)(iii) if that individual intentionally fails or refuses to pay legally required separate maintenance for the year or more before the spouse's death. *Erwin.*

Other heirs. The part of the intestate estate not passing to the surviving spouse (all of it, if there is no surviving spouse) passes

- to the decedent's descendants by representation or, if none,
- to the decedent's parents equally if both survive or to the survivor or, if none,
- to the descendants of the decedent's parents, or of either of them, by representation or, if none,
- ½ to the paternal grandparents or their descendants by representation and ½ to the maternal grandparents or their descendants by representation. If there is no survivor on either the paternal or maternal side, the entire estate passes to the relatives on the other side.

MCL 700.2103. Note that heirs must survive the decedent by 120 hours in order to take. MCL 700.2104. An individual in gestation at the decedent's death is treated as living at the time if the individual lives for at least 120 hours after birth. MCL 700.2108. Children conceived via in vitro fertilization after the death of the father are not heirs. *Mattison v Social Sec Comm'r (In re Certified Question)*, 493 Mich 70, 825 NW2d 566 (2012). If there are no surviving heirs, the intestate estate passes to the State of Michigan. MCL 700.2105.

An individual's *descendants* include all descendants of all generations, with the relationship of parent and child at each generation being determined according to MCL 700.2114. MCL 700.1103(k). MCL 700.2114 provides that an individual is the child of the individual's natural parents regardless of their marital status. The parent-child relationship may be established as follows:

- A child born or conceived during a marriage (including an attempted marriage that is void) is presumed to be the child of both the husband and wife (including a child conceived by assisted reproductive technology unless the husband's lack of consent is shown by clear and convincing evidence). Only the presumed father may disprove this presumption, and this right ends at the presumed father's death. MCL 700.2114(1)(a), (5); *see Estate of Casey v Keene*, 306 Mich App 252, 856 NW2d 556 (2014) (death of presumed father prevented establishment of paternity by any of the alternative methods in MCL 700.2114(1)(b)(i)–(vi)).
- A child who is not conceived or born during a marriage will be considered "born in wedlock" if the parents marry after the child's conception or birth. MCL 700.2114(1)(c).

- A child born out of wedlock, or born during a marriage but not the issue of that marriage, is considered the natural child of a man if
  - the man joins with the child's mother to complete an acknowledgment of parentage pursuant to the Acknowledgment of Parentage Act;
  - the man joins the child's mother in a written request for a correction of the child's birth certificate that results in issuance of a substituted birth certificate;
  - the man and child have established a mutually acknowledged relationship of parent and child that begins before the child attains age 18 and continues until the death of either;
  - the man is determined to be the child's father and an order of filiation is entered pursuant to the Paternity Act (the Paternity Act does not authorize a court to order any person other than a mother, child, and alleged father to provide DNA samples to establish paternity to determine intestate succession, *see In re Estate of Seybert*, No 355647, ___ Mich App ___, ___ NW2d ___ (Jan 20, 2022));
  - the court with jurisdiction over probate proceedings determines that the man is the child's father, using the standards and procedures established under the Paternity Act, MCL 722.711–.730, *see Bierkle v Umble (In re Estate of Koehler)*, 314 Mich App 667, 888 NW2d 432 (2016); or
  - the man is determined to be the father in an action under the Revocation of Paternity Act, MCL 722.1431 et seq.

MCL 700.2114(1)(b). MCL 700.2114(1) uses the terms "husband," "woman," and "mother"; however, the U.S. Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015), guaranteeing the right to marry to same-sex couples, will likely result in statutory changes. The Michigan Law Revision Commission will be reviewing the statutes affected by the Supreme Court's decision and making recommendations to the legislature.

There is no requirement that a child be a biological child of a father for the child to be considered the natural child of a father under MCL 700.2114(1)(b). *Asbury v Custer (In re Estate of Daniels)*, 301 Mich App 450, 837 NW2d 1 (2013).

An adopted child is the child of the person's adoptive parent or parents and not of the person's natural parents, except that the adoption of a stepchild has no effect on either the relationship between the child and the stepparent's spouse or on the right of the child to inherit from or through the other natural parent. Under this circumstance, a child is an heir of both the natural parent and the adoptive parent. In all other scenarios, once a parent's rights have been permanently terminated, a child is not an heir of that natural parent. MCL 700.2114(2), (3). A natural parent and relatives of the natural parent may not inherit from or through a child unless the parent has openly treated the child as the person's child and has not refused to support the child. MCL 700.2114(4); *Turpening v Howard (In re Estate of Turpening)*, 258 Mich App 464, 671 NW2d 567 (2003); *see Bierkle* (MCL 700.2114(4) does not apply to posthumous child).

A relative by the half blood inherits the same share the person would have inherited if related by the whole blood. MCL 700.2107. However, an individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that entitles the individual to the larger share. MCL 700.2113.

If a deceased individual's descendants are entitled to take an intestate share by *representation,* the share is divided into as many equal shares as the total of the surviving descendants in the generation nearest to the individual that contains one or more surviving descendants and the deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the individual. MCL 700.2106.

Effect of lifetime gifts and loans. Property that a decedent gave during life to an heir is treated as an advancement against the heir's intestate share only if the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or the writing or acknowledgment otherwise indicates that the gift is to be taken into account in computing the heir's intestate share.

A debt owed to a decedent is not charged against the intestate share of any heir except the debtor. MCL 700.2110.

Effect of homicide, abuse, neglect, or exploitation by heir. An heir who feloniously and intentionally kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the person's intestate share. MCL 700.2803(1).

A conviction establishing criminal accountability for the felonious and intentional killing of the decedent (including a conviction of voluntary manslaughter, *Cook v Nale (In re Estate of Nale)*, 290 Mich App 704, 803 NW2d 907 (2010)), conclusively establishes the convicted individual as the decedent's killer for inheritance purposes. In the absence of a conviction, if the court determines that the individual would be found criminally accountable for the felonious and intentional killing of the decedent, that determination conclusively establishes that individual as the decedent's killer for inheritance purposes. MCL 700.2803(6).

An individual who is convicted of committing abuse, neglect, or exploitation of the decedent also forfeits rights to a decedent's estate. MCL 700.2803(1). *Abuse, neglect, or exploitation* is defined in MCL 700.2802(a). But, note MCL 700.2803(7), which allows such a person to retain those rights if the decedent indicated a specific intention to allow the individual to receive the estate or property after the date of the conviction by executing a governing instrument to that effect.

3. Modification or Vacation of Order

§1.33 For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal (21 days). MCL 700.3413.

Testacy orders and orders determining heirs. Subject to appeal and vacation, a formal testacy order, including an order that the decedent did not leave a valid will and that determines heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered except as follows:

- If the proponents of a later-offered will were unaware of that will's existence at the time of the earlier proceeding, or were unaware of the earlier proceeding and given no notice of it except by publication, the court must entertain a petition for modification or vacation of its order and probate the later-offered will.
- If intestacy has been ordered, the determination of the decedent's heirs may be reconsidered if an individual was omitted from the determination and was
  - unaware of the person's relationship to the decedent,
  - unaware of the decedent's death, or
  - not given notice of any proceeding concerning the decedent's estate, except by publication.

The petition for vacation must be filed before the earlier of the following:

- if a personal representative is appointed for the estate, the entry of an order approving final distribution of the estate or, if the estate is closed by statement, six months after the filing of the closing statement
- one year after the entry of the order sought to be vacated

The original order may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs. MCL 700.3412(1)–(3).

Fact of death. The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at the person's last known address and the court finds that a reasonably diligent search was made as required by MCL 700.3403. If the alleged decedent is not dead, even if notice was sent and the search was made, the alleged decedent may recover estate assets held by the personal representative. In addition, the alleged decedent may recover estate assets or their proceeds from distributees to the extent that recovery is equitable in view of all of the circumstances. MCL 700.3412(4)–(5).

VIII. Administration of the Estate

A. Acceptance of Appointment by Personal Representative

§1.34 The personal representative must file SCAO form PC 571, Acceptance of Appointment, to accept the duties of the office. By accepting appointment, the personal representative submits personally to the court's jurisdiction in any proceeding relating to the estate initiated by an interested person. MCL 700.3602.

Exclusion of environmentally contaminated property. If the estate contains environmentally contaminated real estate or an ownership interest in a business entity that owns environmentally contaminated property, the personal representative may exclude that property from the scope of the personal representative's authority for a period of up to 91 days by checking item 3 on the Acceptance of Appointment form (PC 571), indicating the number of days of the exclusion and providing a description of the environmentally contaminated real property or business interest. To make the exclusion permanent, the personal representative must file a petition to appoint a special personal representative with respect to the excluded property or to have the court exercise administrative authority over the excluded property by direct judicial order. This petition would be considered an independent request to the court and would not otherwise subject the estate administration to court supervision. See §1.45. In the absence of such a request, the personal representative's responsibilities extend to the excluded property at the end of the exclusion period. MCL 700.3601.

Bonds. A bond is not required of a personal representative appointed in an informal proceeding, except when

- a special personal representative is appointed;
- the personal representative is appointed to administer an estate under a will containing an express requirement of bond; or
- a person apparently having an interest in the estate worth in excess of $2,500 or a creditor having a claim against the estate in excess of $2,500 makes a written demand that the personal representative give bond pursuant to MCL 700.3605.

MCL 700.3603(1). Note that bond policies may vary by court.

In a formal proceeding, the court may order bond at the time of the personal representative's appointment unless the will relieves the personal representative of bond. Even if the will relieves the personal representative of bond, the court may order bond if an interested person requests bond and the court is satisfied that bond is desirable. If the will requires bond, bond may be dispensed with if the court determines it is unnecessary. MCL 700.3603(2). Although nominal bonds were technically eliminated under EPIC, many courts still require them.

Bond is not required of a personal representative who deposits, as determined by the court, cash or collateral with the county treasurer to secure performance of the fiduciary duties. MCL 700.3603(3).

If bond is required and the will or order does not specify the amount, unless stated in the person's application or petition, a person qualifying must file a statement under oath with the register indicating the person's best estimate of the value of the decedent's personal estate and of the income expected from the personal and real estate during the next year, and must execute and file a bond with the register, or give other suitable security, in an amount not less than the estimate. The register must determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The register may permit the amount of the bond to be reduced by the value of estate property deposited in this state with a financial institution in a manner that prevents the property's unauthorized disposition. On petition of the personal representative or another interested person or on the court's own motion, the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties. MCL 700.3604.

Letters of authority. When the acceptance of appointment is filed, the personal representative agrees to submit to the court's exercise of personal jurisdiction in proceedings initiated by an interested person involving the estate. MCL 700.3602. A bond is filed if ordered, and the court issues letters of authority for the personal representative that certify the personal representative's authority to act officially on behalf of the decedent's estate. Letters of authority are issued on the date they are signed by the probate court. *Estate of Jesse by Gray v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 144, 936 NW2d 705 (2019); *see* SCAO form PC 572 (Letters of Authority for Personal Representative). The issuance of letters of authority commences an estate's administration. MCL 700.3103. Letters of authority do not have an expiration date unless specified by the court. MCR 5.202(A).

B. Required Notices and Other Documents

1. Notice of Appointment

§1.35 Once the personal representative has been appointed, a Notice of Appointment and Duties of Personal Representative, SCAO form PC 573, must be served by personal service or by first-class mail on the decedent's heirs and devisees (unless written waivers were filed), the trustee of the decedent's revocable trust, and individuals who filed a demand for notice. MCL 700.3705; MCR 5.304(A). The notice must be filed no later than 14 days after the appointment. No notice is required to a person who was adjudicated in a prior formal testacy proceeding to have no interest in the estate.

2. Notice Regarding Attorney Fees

§1.36 MCR 5.313 requires that at the commencement of the representation, the attorney and the personal representative (or the proposed personal representative) enter into a written fee agreement signed by each. A copy of this agreement must be provided to the personal representative. MCR 5.313(B). Also, every attorney who represents a personal representative must maintain time

records for services that reflect the following information: (1) the identity of the person performing the services, (2) the date the services were performed, (3) the time expended in performing the services, and (4) a brief description of the services. MCR 5.313(C).

Within 14 days after the personal representative's appointment or the personal representative's retention of an attorney, whichever is later, the personal representative must serve notice by personal service or first-class mail to the interested persons whose interests will be affected by the payment of attorney fees a notice on a SCAO-approved form stating (1) the anticipated frequency of attorney fee payments; (2) that the party is entitled, on request, to a copy of each statement for services or costs; (3) that the party may object to the fees at any time before the allowance of fees by the court; and (4) that an objection may be made in writing or at a hearing and that a written objection must be filed with the court and a copy served on the personal representative or attorney. MCR 5.304(A), .313(D); *see* SCAO form PC 576 (Notice Regarding Attorney Fees). A copy of the written fee agreement should be attached to this form and it should be sent to each of the interested persons who is affected by the payment of attorney fees. This notice is often served at the same time as the Notice of Appointment, SCAO form PC 573, and a single proof of service may be prepared for both. The proof of service does not need to be filed with the court at this time. MCR 5.104(A)(3).

The personal representative may pay attorney fees and costs on a periodic basis without prior probate court approval as long as the attorney and the personal representative entered into the written fee agreement before the time of payment, copies of the fee agreement and the notice were sent to all who were affected by the payment, statements for services and costs containing the information described above were sent to the personal representative and any interested person who requested copies of the statements, and no written objections to the fees have been served on the attorney or the personal representative. MCR 5.313(E); *see also* MCL 700.3715(1)(w). In any other case, the probate court must approve attorney fees before payment.

Other costs and fees may be paid without prior probate court approval. However, any attorney fees and costs paid without prior probate court approval remain subject to later review by the probate court. The court may, on its own motion or on petition of an interested person, review the employment of a person by the personal representative and the related compensation. MCL 700.3721.

3. Notice to the Friend of the Court

§1.37 The personal representative is required to provide a notice to the Friend of the Court for the county where the estate is being administered that identifies the surviving spouse and the devisees or heirs of the estate. MCL 700.3705(6). The personal representative is not required to notify the Friend of the Court of a devise to a trustee of an existing trust or to a trustee under the will. *Id.* The notice must be given no later than 28 days after the appointment of the personal representative. MCL 700.3705(1), (6); *see* SCAO form PC 618 (Personal Representative Notice to the Friend of the Court).

4. Information Necessary to Determine the Inventory Fee

§1.38 The personal representative must prepare an inventory, *see* SCAO form PC 577 (Inventory (Decedent Estate)), and send it to all presumptive distributees and all other interested persons requesting it within 91 days following appointment. MCL 700.3706. Most courts require the use of form PC 577.

The inventory lists all assets of the estate, each asset's fair market value as of the date of the decedent's death, and any encumbrances for each real property item. If the value of an asset is not readily available, the personal representative should arrange for an appraisal by an independent party. MCL 700.3707. The court does not appoint appraisers. Each appraiser's name and address must be indicated on the inventory for the corresponding appraised item. *Id.* The inventory need not be filed with the court, but must be presented to the court, as discussed below.

Within 91 days of appointment, the personal representative must submit to the court the information necessary for computing the probate inventory fee. MCL 700.3706(2); MCR 5.307(A); *see also* MCL 600.871. This usually involves submitting a copy of the inventory for review (but not for filing). The court of appeals has held that the inventory fee is to be calculated based on the full value of all assets in an estate. *Estate of Wolfe-Haddad v Oakland Cty*, 272 Mich App 323, 725 NW2d 80 (2006). The outstanding debt used as security for an indebtedness is subtracted in calculating the value of real property for probate inventory fee purposes. MCL 600.871(2). Inventory fees are to be rounded to the nearest dollar. MCL 600.871(3). If the amount is 49 cents or below, it is rounded down. If the amount is 50 cents or above, it is rounded up. The inventory fee must be paid no later than one year after appointment or on the date a closing statement or petition for complete estate settlement is filed, whichever is earlier. MCR 5.307(A). When an estate has sufficient assets to pay the inventory fee, a probate court is not required to waive or suspend the inventory fee when the personal representative is indigent or receives public assistance because the inventory fee is an expense of the estate and not the personal representative. *In re Estate of DeCoste*, 317 Mich App 339, 894 NW2d 685 (2016). See exhibit 1.2 for an inventory fee chart.

If an inventory item is missing or not accurately valued, the personal representative must prepare and serve a supplementary inventory. MCL 700.3708.

5. Notice of Continued Administration

§1.39 If administration of the estate continues more than one year after the original personal representative's appointment, the personal representative has 28 days from the anniversary date of the original appointment (and 28 days from all subsequent anniversaries while the administration remains uncompleted) to file with the court and serve on all interested persons a Notice of Continued Administration, SCAO form PC 587, that specifies why continued administration is necessary. MCL 700.3951(1); MCR 5.307(B). If the estate is open more than two years, the notice must be prepared annually and one of the boxes in item 1 of the form should be checked.

If the personal representative fails to file this notice, an interested person may petition the court for a hearing on the necessity for continued administration or for a settlement order closing the estate. MCL 700.3951(2). If an interested person does not file a petition, the court may administratively close the estate after notifying the personal representative and all interested persons if a notice of continued administration, sworn closing statement, or a petition by the personal representative or an interested person is not filed within 63 days of the court's notice. MCL 700.3951(3); MCR 5.144.

C. Elections and Allowances

1. Elective Share of the Surviving Spouse

§1.40 Within 28 days after appointment, the personal representative must notify the surviving spouse of the spouse's right to election and the election time period. MCL 700.3705(5); MCR 5.305(A); *see* SCAO form PC 581 (Notice to Spouse of Rights of Election and Allowances, Proof of Service, and Election). MCL 700.2202(4) requires that either the proof of service of this notice or the spouse's election (both of which are included on the form) must be filed with the court. MCR 5.305(B), however, does not require the personal representative to file a proof of service of the notice of the rights of election. (Note that the comment to MCR 5.305 specifically states that "[s]ubrule (B) overrides MCL 700.2202(4)." MCR 5.305(B).

In a testate estate, the surviving spouse may elect to do one of the following:

1. abide by the terms of the will
2. take half of the spouse's intestate share reduced by half the value of property derived by the spouse from the decedent by any means other than testate or intestate succession (such as by joint ownership or being an insurance beneficiary)
3. if the surviving spouse is a widow, take her dower right under MCL 558.1–.29, but only if the decedent died before April 6, 2017 (the effective date of 2016 PA 489, which abolished dower)

MCL 700.2202(2).

A surviving spouse who satisfies the conditions of MCL 700.2301, governing premarital wills, may take an elective share under MCL 700.2202. MCL 700.2301(4); *Hill v Flint (In re Estate of Sprenkle-Hill)*, 265 Mich App 254, 703 NW2d 191 (2005). However, the intestate share received by the spouse under MCL 700.2301 reduces the sum available to the spouse under MCL 700.2202(2)(b).

In an intestate estate, a surviving widow may elect to take either her intestate share or her dower right, MCL 700.2202(1), but in the latter case only if the decedent died before April 6, 2017 (the effective date of 2016 PA 489, which abolished dower. In either case, the election must be made within 63 days after the date for presentment of claims or within 63 days after service of the inventory on the spouse. MCL 700.2202(3). If the surviving spouse fails to make an election, it is conclusively presumed in a testate estate that the surviving spouse elects to abide

by the terms of the will and in an intestate estate that the widow elects to take her intestate share, unless there are later discovered estate assets or the court allows an election after a petition by the spouse and notice to all interested persons. MCL 700.2203.

When the surviving spouse is a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding about that person's property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's life expectancy. MCL 700.2202(5). This statute has survived constitutional challenge for the reason that it is reasonably related to the legitimate government purpose of ensuring that the needs of the incapacitated person govern the exercise of the election. *Taverniti v Gorski (In re Estate of Eggleston)*, 266 Mich App 105, 698 NW2d 892 (2005).

2. The Homestead Allowance

§1.41 The surviving spouse is entitled to a homestead allowance of $15,000. MCL 700.2402. As with all allowances, the homestead allowance under EPIC is available only if the decedent was domiciled in Michigan. MCL 700.2401. This does not require the decedent to have owned a homestead or any other real estate. The term *homestead* is simply a term of art. If there is no spouse, the $15,000 may be paid pro rata to the decedent's minor and dependent children. This allowance has priority over all claims except administration expenses and reasonable funeral and burial expenses and does not reduce the spouse's or eligible child's intestate or testate share of the estate or the spouse's elective share. Note that there is no duty on the part of the personal representative to give notice to the spouse regarding the homestead allowance as the allowance is not elective but mandatory by statute.

The surviving spouse or eligible children (or their representatives) may choose estate property to satisfy the homestead allowance, except that if the estate is otherwise sufficient, specifically devised property may not be used for this purpose. MCL 700.2405(1). The personal representative may select the property if the surviving spouse, adult children, or those acting for minor children are unable or fail to do so in a reasonable time. *See* SCAO form PC 582 (Selection of Homestead Allowance and Exempt Property).

The $15,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted homestead allowance.

3. Exempt Tangible Property

§1.42 In addition to the homestead allowance, the surviving spouse is entitled to household furniture, automobiles, furnishings, appliances, and personal effects with a date-of-death value of up to $10,000. MCL 700.2404. This entitlement to exempt tangible property is available only if the decedent was domiciled in Michigan. MCL 700.2401. If there is no spouse, the $10,000 of exempt tangible property goes jointly to the decedent's children who are not excluded under MCL 700.2404(4). MCL 700.2404(1). If the value of the eligible assets (house-

hold furnishings and personal effects) in excess of any security interest does not exceed $10,000, any other assets (including cash) may be used to make up the difference. Entitlement to exempt property has priority over all claims, but the right to assets to make up a deficiency of exempt property is subject to prior satisfaction of administration expenses, reasonable funeral and burial expenses, and the homestead and family allowances. MCL 700.2404(2). Exempt property is not charged against the intestate or testate share of the surviving spouse or children or an elective share. MCL 700.2404(3). A child's right to the exempt property allowance may be eliminated by disinheriting language in a decedent parent's will. MCL 700.2404(4). Note that there is no duty on the part of the personal representative to give notice to the spouse or children regarding the exempt property as the right to the property is not elective but mandatory by statute.

As with the homestead allowance, the surviving spouse or children (or their representatives) may choose estate property to satisfy the exempt property right, except that if the estate is otherwise sufficient, specifically devised property may not be used for this purpose. MCL 700.2405(1). The personal representative may select the property if the surviving spouse, adult children, or those acting for minor children are unable or fail to do so in a reasonable time. Use SCAO form PC 582, Selection of Homestead Allowance and Exempt Property, to select exempt tangible property.

The $10,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted amount for exempt tangible property.

4. The Family Allowance

§1.43 A *reasonable* family allowance may be paid to a surviving spouse, minor children the decedent was obligated to support, and children of the decedent or another who were in fact being supported by the decedent. MCL 700.2403; *Seymour v Sallan (In re Estate of Seymour)*, 258 Mich App 249, 671 NW2d 109 (2003). No fixed dollar amount is required; the amount lies in the discretion of the personal representative. Without court approval, the personal representative may fix the family allowance in a lump sum not exceeding $18,000 or disburse up to that amount in equal monthly installments over one year. MCL 700.2405(2).

The $18,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted family allowance.

The family allowance is limited to one year if the estate is inadequate to discharge allowed claims. MCL 700.2403(1). The allowance is paid to the surviving spouse, if living, or to the minor and dependent children or persons having their care and custody. The family allowance has priority over all claims except administration expenses and reasonable funeral and burial expenses but is subject to prior satisfaction of the homestead allowance. It is not charged against the testate share (unless otherwise provided in the will) or intestate share of the surviving spouse or children; it is also not charged against the spouse's elective share. MCL 700.2403(2).

If a family allowance exceeding the amount that the personal representative may distribute without court order is desired or if the personal representative and family members disagree about the appropriate amount, an interested person may petition the court to deny or restrict the allowance. However, SCAO form PC 582, Selection of Homestead Allowance and Exempt Property, may no longer be used for this purpose as it has been changed from a petition and order to an election form. The new form is titled Selection of Homestead Allowance and Exempt Property. *See* MCL 700.2405(3).

D. Claims Against the Estate

§1.44 Claims against a decedent's estate are covered generally by MCL 700.3801–.3815, and the usual procedure does not involve court involvement, unless there is a dispute. However, a claim by a personal representative against the estate for an obligation that arose before the death of the decedent may only be allowed in a formal proceeding by order of the court. MCR 5.307(D). Requirements for notice to creditors are detailed in MCL 700.3801 and MCR 5.208. No notice to creditors is required if

1. The decedent or settlor has been dead for more than 3 years;
2. Notice need not be given to a creditor whose claim has been presented or paid;
3. For a personal representative:
   - the estate has no assets;
   - the estate qualifies and is administered under MCL 700.3982, .3983, or .3987;
   - notice has previously been given under MCL 700.7608, in the county where the decedent was domiciled in Michigan.
4. For a trustee, the costs of administration equal or exceed the value of the trust estate.

MCR 5.208(D).

If a personal representative has a claim against the estate that arose before the decedent's death, the personal representative must present that claim within four months after notification is published to the general creditors. *Mead v Barton (In re Schwein)*, 314 Mich App 51, 885 NW2d 316 (2016) (declining to include personal representative within definition of "known creditors" under MCL 700.3801(1)).

E. Court Hearings—Requests for Relief

§1.45 Regardless of whether the personal representative was appointed in a formal or informal proceeding, the person may commence a formal proceeding at any time during the probate process to obtain a single court determination without affecting other matters. MCL 700.3415. For instance, if the beneficiaries are unhappy about estate expenses or other matters disclosed on an accounting, the personal representative may file a petition to allow the account

and get the protection of a court order. *See* SCAO form PC 585a (Petition to Allow Account(s)). Other matters can also be brought before the court by an interested person, including the status of an estate as testate or intestate, a matter relating to one or more claims, a disputed title, and distribution. The Petition and Order, SCAO form PC 586, may be used to customize a petition and ask for any type of order desired, including a petition to appoint a special personal representative with respect to environmentally contaminated estate property. See §1.34. The filing fee for such requests is $20. MCL 600.880b(1).

IX. Closing Procedures

A. Summary Administration

§1.46 If the inventory value of the estate, less liens and encumbrances, does not exceed the administration costs and expenses, reasonable funeral and burial expenses, homestead allowance, family allowance, exempt property, and reasonable and necessary medical and hospital expenses of the decedent's last illness, the estate may be closed using summary proceedings. The liens, encumbrances, costs, and expenses will vary from estate to estate, but at a minimum, if there is a surviving spouse or minor children, an estate that does not exceed the sum of the allowances (assuming the maximum lump sum family allowance available without court order) and exempt property definitely qualifies for this procedure. See exhibit 1.1 for the annual inflation-adjusted amount for summary administration.

To determine whether an estate that exceeds this amount qualifies, verify that the maximum lump sum family allowance was given (or adjust the number accordingly) and add the value of the liens, encumbrances, costs, and expenses described above.

The estate proceeding is started in the same way as any traditional estate, with an application or petition for probate and the appointment of a personal representative. Summary administration is available only for unsupervised estates. After the personal representative sends out the usual notices and prepares the inventory, if it is determined that the estate qualifies for summary administration, the personal representative may immediately disburse and distribute the estate to the persons entitled to the estate. MCL 700.3987. There is no notice given to creditors, and the property is not subject to creditors' claims. *Id.* If there is not sufficient property to satisfy all allowances, exempt property, administration expenses, funeral expenses, and medical expenses of the decedent's last illness, distribution should be made in the following order:

1. costs and expenses of administration
2. funeral and burial expenses
3. the homestead allowance
4. the family allowance
5. exempt tangible property
6. debts and taxes with priority under federal law

7. medical and hospital expenses of the decedent's last illness, including compensation of persons attending the decedent

See MCL 700.2402–.2404, .3805.

The personal representative then files a Sworn Closing Statement, Summary Proceeding, Small Estates, SCAO form PC 590, with the probate court register, as required by MCL 700.3988, stating that the value of the total estate did not exceed the above allowances and expenses, the estate has been distributed, a full account has been furnished to the distributees, and a copy of the closing statement has been furnished to the distributees and creditors.

B. Sworn Closing Statement and Certificate of Completion

§1.47 An unsupervised administration (regardless of whether it was commenced with a formal or an informal proceeding) may be closed beginning five months after the personal representative's appointment. After the taxes, claims, and expenses are paid and distribution of the estate assets is complete, a closing statement, Sworn Statement to Close Unsupervised Administration, SCAO form PC 591, is prepared, served on all interested persons, and filed with the court. MCL 700.3954(1).

The closing statement is a sworn statement that all the following have been accomplished:

- The creditors' notice was published and claims periods have passed.
- Claims, taxes, and distributions were paid or arrangements were made for them.
- The closing statement was sent to all distributees and unpaid creditors.
- Full written accounts were furnished to those distributees affected, and the accounts clearly state amounts paid for fiduciary, attorney, and other professional fees.

Id. The personal representative's signature on this form must be notarized.

Once the personal representative has filed a closing statement, any interested person may file an objection to any item referred to in the statement. If no interested person files an objection within 28 days, the personal representative is entitled to a certificate of completion. MCL 700.3958; *see* SCAO form PC 592 (Certificate of Completion). If an interested person files an objection, most courts schedule a hearing to address the objection.

If a proceeding involving the personal representative is not pending in the court one year after the closing statement is filed, the personal representative's appointment terminates. MCL 700.3954(2).

C. Complete Estate Settlement

1. Formally Opened Estate

§1.48 After the time for presenting claims expires, the personal representative may petition for an order of complete estate settlement. Any other

interested person may petition beginning one year after the original personal representative's appointment if the time for presenting claims has expired. MCL 700.3952(1). As with any other petition, the petitioner may obtain waivers and consents from all interested persons or obtain a hearing date from the court and serve the notice of hearing on the interested persons, as discussed in §1.18. The interested persons include the devisees of a testate estate whose devise remains unsatisfied, heirs (unless there was a previous adjudication that the decedent died testate), claimants with a proper claim that remains unpaid, and any other persons whose interests are affected by the relief requested. MCR 5.125(B)(1)–(2), (C)(8).

A petition for complete estate settlement may include the following requests:

- a formal determination of testacy (if not previously determined)
- consideration of the final account
- compulsion or approval of an accounting and distribution
- construction of a will
- determination of heirs
- adjudication of the final settlement and distribution
- discharge of the personal representative from further claim or demand of an interested person
- confirmation or alteration of a previously issued testacy order if any interested persons did not receive proper notice of the initial hearing

If testacy was previously determined in a formal proceeding, a Petition for Complete Estate Settlement, SCAO form PC 593 (marked testacy previously adjudicated), should be used. If approval of distributions or payment of claims is sought (other than through approval of the final account), the personal representative may also prepare and file a schedule of distributions and payment of claims. *See* SCAO form PC 596 (Schedule of Distributions and Payment of Claims). Use of this schedule is not mandated by statute or court rule, but it assists the court in its determination that the personal representative properly fulfilled all duties relating to distributions and claims.

2. Informally Opened Estate

§1.49 If the estate was opened using informal proceedings and heirs were never formally determined, the petition for complete estate settlement must request a determination of testacy and must comply with the requirements for a formal testacy proceeding. MCR 5.311(B)(1); *see* SCAO form PC 593 (Petition for Complete Estate Settlement).

3. Discharge of the Personal Representative

§1.50 If the petition requests discharge of the personal representative, the following documents must also be filed with the court, along with any proofs of service:

- the inventory

- annual and final accountings
- the notice of appointment
- the attorney fee notice
- the notice to the spouse of elective rights and allowances
- affidavits of any required publication
- a statement that all Michigan estate taxes have been paid or that no federal estate tax return was required to be filed for the decedent

MCR 5.311(B)(3). Discharge of the personal representative will almost always be sought when a formal closing procedure is used.

If the estate is not completely distributed when the Order for Complete Estate Settlement is entered, the personal representative will have to submit evidence of final distributions and obtain a separate order of discharge. *See* SCAO form PC 597 (Order of Discharge).

D. Settlement Orders

§1.51 A settlement order is a formal closing procedure used only when a will has been admitted informally and formal admission of the will and determination of testacy status is not desired at closing. As with the petition for complete estate settlement, the personal representative may petition any time after the time for presenting claims expires, and any other interested person may petition beginning one year after the original personal representative's appointment if the time for presenting claims has expired. MCL 700.3953(1). Unlike the petition for complete estate settlement, a petition for a settlement order does not require notice to heirs; instead, notice is required only to the personal representative, devisees whose claim remains unsatisfied, and claimants with a proper claim that remains unpaid. MCL 700.3953; MCR 5.125(B)(1)–(2), (C)(9). Since notice is not given to the heirs, a settlement order does not bind them, but leaves open the possibility of a will contest.

X. Reopening an Estate

§1.52 **Reopening by petition.** If estate property is discovered after an estate is settled, and either the personal representative is discharged or one year has expired after a sworn statement is filed, or if there is other good cause to reopen a previously administered estate, including an estate administratively closed, upon petition of an interested person and notice as the court directs, the court may appoint the same or a successor personal representative to administer the subsequently discovered estate. A claim that was previously barred may not be asserted in the subsequent administration. MCL 700.3959. If reopening an administratively closed file, the court may appoint a special personal representative. The court may also order supervised administration if it is necessary under the circumstances. MCR 5.144.

Reopening by application. If there is good cause to reopen a previously administered estate, other than an estate that was terminated in supervised

administration, any interested person may apply to the register to reopen the estate and appoint the former personal representative or another person who has priority. For good cause and without notice, the register may reopen the estate, appoint the former personal representative or a person who has priority, and issue letters of authority with a specified termination date. MCR 5.312(A).

Due dates. For purposes of determining when the inventory fee calculation, the inventory filing, the inventory fee payment, and the notice of continued administration are due, a reopened decedent estate is to be treated as a new case. MCR 5.312(C).

Exhibit 1.1
State Inflation Adjustment Table

By February 1 each year since the passage of EPIC, MCL 700.1210 charges the Treasury Department with publishing the cost-of-living factor to be applied to certain amounts specified in EPIC. This information can be found at the Michigan Department of Treasury website. Click on Reports and Legal Resources, then Reports; under Economic Reports, click on 2023 Estates and Protected Individuals Code Cost-of-Living Adjustments to Specific Dollar Amounts.

Description	Year—2023	**Authority**
Homestead allowance	$27,000	MCL 700.2402
Exempt property	$18,000 for a single person	MCL 700.2404
Family allowance (maximum sum without court order)	$33,000	MCL 700.2405
Small estate qualification amount (maximum) and sworn affidavit procedure	$27,000	MCL 700.3982, .3983
Decedent has surviving spouse but no descendants	$273,000 + ¾ intestate estate	MCL 700.2102
All of decedent's descendants are surviving spouse's descendants	$273,000 + ½ intestate estate	MCL 700.2102
Some of decedent's descendants are not the surviving spouse's descendants	$273,000 + ½ intestate estate	MCL 700.2102
None of decedent's descendants are the spouse's descendants	$182,000 + ½ intestate estate	MCL 700.2102
Termination of uneconomic trust	$91,000	MCL 700.7414(1)

Annual Inflation Adjustment Amounts in Prior Years

Intestate Share of Spouse

Year	Decedent has surviving spouse but no descendants	All of decedent's descendants are surviving spouse's descendants	Some of decedent's descendants are not the surviving spouse's descendants	None of the decedent's descendants are the spouse's descendants
2022	$253,000 + ¾ intestate estate	$253,000 + ½ intestate estate	$253,000 + ½ intestate estate	$169,000 + ½ intestate estate
2021	$242,000 + ¾ intestate estate	$242,000 + ½ intestate estate	$242,000 + ½ intestate estate	$161,000 + ½ intestate estate
2020	$239,000 + ¾ intestate estate	$239,000 + ½ intestate estate	$239,000 + ½ intestate estate	$159,000 + ½ intestate estate
2019	$235,000 + ¾ intestate estate	$235,000 + ½ intestate estate	$235,000 + ½ intestate estate	$157,000 + ½ intestate estate
2018	$229,000 + ¾ intestate estate	$229,000 + ½ intestate estate	$229,000 + ½ intestate estate	$153,000 + ½ intestate estate
2017	$224,000 + ¾ intestate estate	$224,000 + ½ intestate estate	$224,000 + ½ intestate estate	$150,000 + ½ intestate estate
2016	$222,000 + ¾ intestate estate	$222,000 + ½ intestate estate	$222,000 + ½ intestate estate	$148,000 + ½ intestate estate
2015	$221,000 + ¾ intestate estate	$221,000 + ½ intestate estate	$221,000 + ½ intestate estate	$148,000 + ½ intestate estate
2014	$218,000 + ¾ intestate estate	$218,000 + ½ intestate estate	$218,000 + ½ intestate estate	$145,000 + ½ intestate estate
2013	$215,000 + ¾ intestate estate	$215,000 + ½ intestate estate	$215,000 + ½ intestate estate	$143,000 + ½ intestate estate
2012	$210,000 + ¾ intestate estate	$210,000 + ½ intestate estate	$210,000 + ½ intestate estate	$140,000 + ½ intestate estate
2011	$204,000 + ¾ intestate estate	$204,000 + ½ intestate estate	$204,000 + ½ intestate estate	$136,000 + ½ intestate estate
2010	$201,000 + ¾ intestate estate	$201,000 + ½ intestate estate	$201,000 + ½ intestate estate	$134,000 + ½ intestate estate
2009	$201,000 + ¾ intestate estate	$201,000 + ½ intestate estate	$201,000 + ½ intestate estate	$134,000 + ½ intestate estate
2008	$194,000 + ¾ intestate estate	$194,000 + ½ intestate estate	$194,000 + ½ intestate estate	$129,000 + ½ intestate estate
2007	$188,000 + ¾ intestate estate	$188,000 + ½ intestate estate	$188,000 + ½ intestate estate	$126,000 + ½ intestate estate
2006	$183,000 + ¾ intestate estate	$183,000 + ½ intestate estate	$183,000 + ½ intestate estate	$122,000 + ½ intestate estate

Year	Decedent has surviving spouse but no descendants	All of decedent's descendants are surviving spouse's descendants	Some of decedent's descendants are not the surviving spouse's descendants	None of the decedent's descendants are the spouse's descendants
2005	$177,000 + ¾ intestate estate	$177,000 + ½ intestate estate	$177,000 + ½ intestate estate	$118,000 + ½ intestate estate
2004	$172,000 + ¾ intestate estate	$172,000 + ½ intestate estate	$172,000 + ½ intestate estate	$115,000 + ½ intestate estate
2003	$168,000 + ¾ intestate estate	$168,000 + ½ intestate estate	$168,000 + ½ intestate estate	$112,000 + ½ intestate estate
2002	$165,000 + ¾ intestate estate	$165,000 + ½ intestate estate	$165,000 + ½ intestate estate	$110,000 + ½ intestate estate
2001	$161,000 + ¾ intestate estate	$161,000 + ½ intestate estate	$161,000 + ½ intestate estate	$107,000 + ½ intestate estate
2000	$150,000 + ¾ intestate estate	$150,000 + ½ intestate estate	$150,000 + ½ intestate estate	$100,000 + ½ intestate estate
Under RPC	$60,000 + ½ intestate estate	$60,000 + ½ intestate estate	½ intestate estate	½ intestate estate

Allowances and Small Estate Qualification

Year	Homestead allowance	Exempt property	Family allowance (maximum sum without court order)	Small estate qualification amount (maximum)
2022	$25,000	$17,000	$30,000	$25,000
2021	$24,000	$16,000	$29,000	$24,000
2020	$24,000	$16,000	$29,000	$24,000
2019	$23,000	$16,000	$28,000	$23,000
2018	$23,000	$15,000	$27,000	$23,000
2017	$22,000	$15,000	$27,000	$22,000
2016	$22,000	$15,000	$27,000	$22,000
2015	$22,000	$15,000	$27,000	$22,000
2014	$22,000	$15,000	$26,000	$22,000
2013	$21,000	$14,000	$26,000	$21,000
2012	$21,000	$14,000	$25,000	$21,000
2011	$20,000	$14,000	$24,000	$20,000
2010	$20,000	$13,000	$24,000	$20,000
2009	$20,000	$13,000	$24,000	$20,000

Year	Homestead allowance	Exempt property	Family allowance (maximum sum without court order)	Small estate qualification amount (maximum)
2008	$19,000	$13,000	$23,000	$19,000
2007	$19,000	$13,000	$23,000	$19,000
2006	$18,000	$12,000	$22,000	$18,000
2005	$18,000	$12,000	$21,000	$18,000
2004	$17,000	$11,000	$21,000	$17,000
2003	$17,000	$11,000	$20,000	$17,000
2002	$17,000	$11,000	$20,000	$17,000
2001	$16,000	$11,000	$19,000	$16,000
Under RPC	$10,000	$3,500	not applicable	$15,000

Termination of Uneconomic Trust

Year	Termination of uneconomic trust
2022	$84,000
2021	$81,000
2020	$80,000
2019	$78,000
2018	$76,000
2017	$75,000
2016	$74,000
2015	$74,000
2014	$73,000
2013	$72,000
2012	$70,000
2011	$68,000

Exhibit 1.2
Estate Inventory Fee Schedule

MCL 600.871(1). Amounts should be rounded to the whole dollar. MCL 600.871(3). In calculating a fee, if real property that is included in the estate is encumbered by or used as security for indebtedness, the amount of the indebtedness must be deducted from the value of the real property per 2012 PA 596 and 2018 PA 33.

For Estates Valued at $3,000–$9,999.99 ($25.00 plus $^5/_8$ of 1% of amount over $3,000) Part 1 ($1,000)	
Amount ($)	*Fee ($)*
3,000	25.00
4,000	31.25
5,000	37.50
6,000	43.75
7,000	50.00
8,000	56.25
9,000	62.50
10,000	68.75

For Estates Valued at $3,000–$9,999.99 ($25.00 plus $^5/_8$ of 1% of amount over $3,000) Part 2 ($100)	
Amount ($)	*Fee ($)*
100	.62
200	1.25
300	1.87
400	2.50
500	3.12
600	3.75
700	4.37
800	5.00
900	5.62

For Estates Valued at $3,000–$9,999.99 ($25.00 plus $^{5}/_{8}$ of 1% of amount over $3,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
1	.01
2	.01
3	.02
4	.02
5	.03
6	.04
7	.04
8	.05
9	.06
10	.06
11	.07
12	.07
13	.08
14	.09
15	.09
16	.10
17	.11
18	.11
19	.12
20	.12
21	.13
22	.14
23	.14
24	.15
25	.16
26	.16
27	.17
28	.17
29	.18
30	.19
31	.20
32	.20
33	.21
34	.21
35	.22

For Estates Valued at $3,000–$9,999.99 ($25.00 plus $^{5}/_{8}$ of 1% of amount over $3,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
36	.22
37	.23
38	.24
39	.24
40	.25
41	.26
42	.26
43	.27
44	.27
45	.28
46	.29
47	.29
48	.30
49	.31
50	.31
51	.32
52	.32
53	.33
54	.34
55	.34
56	.35
57	.36
58	.36
59	.37
60	.37
61	.38
62	.39
63	.39
64	.40
65	.41
66	.41
67	.42
68	.42
69	.43
70	.44
71	.44

For Estates Valued at $3,000–$9,999.99 ($25.00 plus $^{5}/_{8}$ of 1% of amount over $3,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
72	.45
73	.46
74	.46
75	.47
76	.47
77	.48
78	.49
79	.49
80	.50
81	.51
82	.51
83	.52
84	.52
85	.53
86	.54
87	.54
88	.55
89	.56
90	.56
91	.57
92	.57
93	.58
94	.59
95	.59
96	.60
97	.60
98	.61
99	.62

For Estates Valued at $10,000–$24,999.99 ($68.75 plus $^{1}/_{2}$ of 1% of amount over $10,000) Part 1 ($1,000)	
Amount ($)	*Fee ($)*
10,000	68.75
11,000	73.75

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 1 ($1,000)	
Amount ($)	*Fee ($)*
12,000	78.75
13,000	83.75
14,000	88.75
15,000	93.75
16,000	98.75
17,000	103.75
18,000	108.75
19,000	113.75
20,000	118.75
21,000	123.75
22,000	128.75
23,000	133.75
24,000	138.75
25,000	143.75

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 2 ($100)	
Amount ($)	*Fee ($)*
100	.50
200	1.00
300	1.50
400	2.00
500	2.50
600	3.00
700	3.50
800	4.00
900	4.50

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
1	.01

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
2	.01
3	.01
4	.02
5	.02
6	.03
7	.03
8	.04
9	.04
10	.05
11	.05
12	.06
13	.06
14	.07
15	.07
16	.08
17	.08
18	.09
19	.09
20	.10
21	.10
22	.11
23	.11
24	.12
25	.12
26	.13
27	.13
28	.14
29	.14
30	.15
31	.15
32	.16
33	.16
34	.17
35	.17
36	.18
37	.18

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
38	.19
39	.19
40	.20
41	.20
42	.21
43	.21
44	.22
45	.22
46	.23
47	.23
48	.24
49	.24
50	.25
51	.25
52	.26
53	.26
54	.27
55	.27
56	.28
57	.28
58	.29
59	.29
60	.30
61	.30
62	.31
63	.31
64	.32
65	.32
66	.33
67	.33
68	.34
69	.34
70	.35
71	.35
72	.36
73	.36

For Estates Valued at $10,000–$24,999.99 ($68.75 plus 1/2 of 1% of amount over $10,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
74	.37
75	.37
76	.38
77	.38
78	.39
79	.39
80	.40
81	.40
82	.41
83	.41
84	.42
85	.42
86	.43
87	.43
88	.44
89	.44
90	.45
91	.45
92	.46
93	.46
94	.47
95	.47
96	.48
97	.48
98	.49
99	.49

For Estates Valued at $25,000–$49,999.99 ($143.75 plus 3/8 of 1% over $25,000) Part 1 ($1,000)	
Amount ($)	*Fee ($)*
25,000	143.75
26,000	147.50
27,000	151.25
28,000	155.00

For Estates Valued at $25,000–$49,999.99 ($143.75 plus 3/8 of 1% over $25,000) Part 1 ($1,000)	
Amount ($)	*Fee ($)*
29,000	158.75
30,000	162.50
31,000	166.25
32,000	170.00
33,000	173.75
34,000	177.50
35,000	181.25
36,000	185.00
37,000	188.75
38,000	192.50
39,000	196.25
40,000	200.00
41,000	203.75
42,000	207.50
43,000	211.25
44,000	215.00
45,000	218.75
46,000	222.50
47,000	226.25
48,000	230.00
49,000	233.75
50,000	237.50

For Estates Valued at $25,000–$49,999.99 ($143.75 plus 3/8 of 1% over $25,000) Part 2 ($100)	
Amount ($)	*Fee ($)*
100	.37
200	.75
300	1.12
400	1.50
500	1.87
600	2.25
700	2.62
800	3.00

For Estates Valued at $25,000–$49,999.99 ($143.75 plus $^{3}/_{8}$ of 1% over $25,000) Part 2 ($100)	
Amount ($)	*Fee ($)*
900	3.37

For Estates Valued at $25,000–$49,999.99 ($143.75 plus $^{3}/_{8}$ of 1% over $25,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
1	.00
2	.00
3	.01
4	.01
5	.02
6	.02
7	.03
8	.03
9	.03
10	.04
11	.04
12	.04
13	.05
14	.05
15	.06
16	.06
17	.06
18	.07
19	.07
20	.07
21	.08
22	.08
23	.09
24	.09
25	.09
26	.10
27	.10
28	.10
29	.11

For Estates Valued at $25,000–$49,999.99 ($143.75 plus $^{3}/_{8}$ of 1% over $25,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
30	.11
31	.12
32	.12
33	.12
34	.13
35	.13
36	.13
37	.14
38	.14
39	.15
40	.15
41	.15
42	.16
43	.16
44	.16
45	.17
46	.17
47	.18
48	.18
49	.18
50	.19
51	.19
52	.19
53	.20
54	.20
55	.21
56	.21
57	.21
58	.22
59	.22
60	.22
61	.23
62	.23
63	.24
64	.24
65	.24

For Estates Valued at $25,000–$49,999.99 ($143.75 plus $^{3}/_{8}$ of 1% over $25,000) Part 3 ($1.00–$99)	
Amount ($)	*Fee ($)*
66	.25
67	.25
68	.25
69	.26
70	.26
71	.26
72	.27
73	.27
74	.28
75	.28
76	.28
77	.29
78	.29
79	.30
80	.30
81	.30
82	.31
83	.31
84	.31
85	.32
86	.32
87	.32
88	.33
89	.33
90	.34
91	.34
92	.34
93	.35
94	.35
95	.36
96	.36
97	.36
98	.37
99	.37

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 1 ($10,000)	
Amount ($)	*Fee ($)*
50,000	237.50
60,000	262.50
70,000	287.50
80,000	312.50
90,000	337.50
100,000	362.50

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 2 ($1,000)	
Amount ($)	*Fee ($)*
1,000	2.50
2,000	5.00
3,000	7.50
4,000	10.00
5,000	12.50
6,000	15.00
7,000	17.50
8,000	20.00
9,000	22.50
10,000	25.00

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 3 ($100)	
Amount ($)	*Fee ($)*
100	.25
200	.50
300	.75
400	1.00
500	1.25
600	1.50
700	1.75

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 3 ($100)	
Amount ($)	*Fee ($)*
800	2.00
900	2.25
1,000	2.50

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 4 ($1.00–$99)	
Amount ($)	*Fee ($)*
1	.00
2	.00
3	.00
4	.01
5	.01
6	.01
7	.02
8	.02
9	.02
10	.02
11	.03
12	.03
13	.03
14	.03
15	.04
16	.04
17	.04
18	.04
19	.05
20	.05
21	.05
22	.05
23	.06
24	.06
25	.06
26	.06
27	.07

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 4 ($1.00–$99)	
Amount ($)	*Fee ($)*
28	.07
29	.07
30	.07
31	.08
32	.08
33	.08
34	.08
35	.09
36	.09
37	.09
38	.09
39	.10
40	.10
41	.10
42	.10
43	.11
44	.11
45	.11
46	.11
47	.12
48	.12
49	.12
50	.12
51	.13
52	.13
53	.13
54	.13
55	.14
56	.14
57	.14
58	.14
59	.15
60	.15
61	.15
62	.15
63	.16

For Estates Valued at $50,000–$99,999.99 ($237.50 plus 1/4 of 1% over $50,000) Part 4 ($1.00–$99)	
Amount ($)	*Fee ($)*
64	.16
65	.16
66	.16
67	.17
68	.17
69	.17
70	.17
71	.18
72	.18
73	.18
74	.18
75	.19
76	.19
77	.19
78	.19
79	.20
80	.20
81	.20
82	.20
83	.21
84	.21
85	.21
86	.21
87	.22
88	.22
89	.22
90	.22
91	.23
92	.23
93	.23
94	.23
95	.24
96	.24
97	.24
98	.24
99	.25

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 1 ($100,000)	
Amount ($)	*Fee ($)*
100,000	362.50
200,000	487.50
300,000	612.50
400,000	737.50
500,000	862.50

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 2 ($10,000)	
Amount ($)	*Fee ($)*
10,000	12.50
20,000	25.00
30,000	37.50
40,000	50.00
50,000	62.50
60,000	75.00
70,000	87.50
80,000	100.00
90,000	112.50
100,000	125.00

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 3 ($1,000)	
Amount ($)	*Fee ($)*
1,000	1.25
2,000	2.50
3,000	3.75
4,000	5.00
5,000	6.25
6,000	7.50
7,000	8.75
8,000	10.00

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 3 ($1,000)	
Amount ($)	*Fee ($)*
9,000	11.25
10,000	12.50

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 4 ($100)	
Amount ($)	*Fee ($)*
100	.12
200	.25
300	.37
400	.50
500	.62
600	.75
700	.87
800	1.00
900	1.12
1,000	1.25

For Estates Valued at $100,000–$499,999.99 ($362.50 plus 1/8 of 1% over $100,000) Part 5 (Less than $100)	
Amount ($)	*Fee ($)*
Up to 4.99	.01
5–14.99	.02
15–24.99	.03
25–34.99	.04
35–44.99	.06
45–54.99	.07
55–64.99	.08
65–74.99	.09
75–84.99	.11
85–94.99	.12
95–99.99	.12

For Estates Valued at $500,000–$1,049,999.99	
Amount ($)	*Fee ($)*
500,000–549,999.99	862.50
550,000–649,999.99	925.00
650,000–749,999.99	987.50
750,000–849,999.99	1,050.00
850,000–949,999.99	1,112.50
950,000–1,049,999.99	1,175.00
Over $1,000,000, for each additional $100,000 value, or larger fraction thereof: $31.25	

Exhibit 1.3
Checklist of Filings for Formally Opened Estate

Checklist of Filings for
Formally Opened Estate

I. Initially

- Petition for Probate and/or Appointment of Personal Representative (Testate/Intestate) (PC 559)
- Testimony (PC 565) and (if applicable) Supplemental Testimony (PC 566)
- Will presented (if testate)
- Consents of all interested persons or set for hearing
- Appointment of special personal representative, if requested
- Acceptance of Appointment (PC 571) and any required Bond (PC 570)
- Order of Formal Proceedings (PC 569)
- Filing fee paid
- Copy of death certificate

II. During Administration

A. All Estates

- Claims published, if applicable, MCR 5.208
- Material presented for gross inventory fee computation within 91 days, MCR 5.307(A)
- Notice of Continued Administration annually (if estate open over one year) (PC 587), MCL 700.3951(1)

B. If Supervised Administration Granted

- Inventory filed (PC 577), MCR 5.310(C)(1)
- Annual Accounts (if estate open over one year) (PC 583 or PC 584), MCR 5.310(C)(2)(a)
- Notice of Appointment and Duties (PC 573), MCR 5.310(C)(3)
- Notice Regarding Attorney Fees, (PC 576), MCR 5.310(C)(4)
- Notice to Spouse (if applicable) (PC 581), MCR 5.310(C)(5)
- Notice of Continued Administration (if estate open over one year) (PC 587), MCR 5.307(B)
- Affidavit of any required publication, MCR 5.310(C)(6)
- Proof of payment of inheritance/estate tax or statement that no tax due, MCR 5.310(D)

- Final Account if personal representative removed (PC 583 or PC 584), MCR 5.310(C)(2)(a)

III. Closing Estate

A. All Estates

- Verify gross inventory fee paid. MCR 5.307(A).
- Check whether will establishes testamentary trust; if yes, verify testamentary trustee appointed by court order or accepted duties.

B. Unsupervised Administration—DE Case Type

- Sworn Statement with proof of service of statement and accounting (PC 590), MCL 700.3954; MCR 5.311(A)

OR

- Petition for Complete Estate Settlement (PC 593), MCL 700.3952; MCR 5.311(B)(1)
- Final Accounting* (PC 583 or PC 584)
- Schedule of Distributions and Payment of Claims* (PC 596)
- Receipts for any distributions as required by the court
- Order of Complete Estate Settlement (PC 595)
- Consents of all interested persons or set for hearing

Note: If the personal representative seeks a discharge, he or she must file all documents listed in II.B. and Proof of Service for all items except the publication affidavit and proof of payment of inheritance/estate tax. MCR 5.311(B)(3).

*Not necessarily required.

C. Supervised Administration—DA Case Type

- Verify all documents listed in II.B. are filed
- Petition for Complete Estate Settlement (PC 593), MCL 700.3952; MCR 5.311(B)(1)
- Final Account (PC 583 or PC 584)
- Schedule of Distributions and Payment of Claims (PC 596), MCL 700.3952(2)
- Receipts for any distributions as required by the court
- Order of Complete Estate Settlement (PC 595)
- Consents of all interested persons or set for hearing

Note: If the personal representative seeks a discharge, he or she must file all documents listed in II.B. and Proof of Service for all items except the publication affidavit and proof of payment of inheritance/estate tax. MCR 5.311(B)(3).

Exhibit 1.4
Determination of Heirs

Who Are Heirs?
Date of Death **Before** April 1, 2000 (RPC)

A. Spouse and children and issue (descendants) of predeceased children are heirs.

B. If **no** children—spouse and parents are heirs.

C. If **no** children or parents—spouse is sole heir.

D. If **no** spouse—children, including issue (descendants) of predeceased children by right of representation are heirs.

E. If **no** spouse and children—parent(s) are heirs.

F. If **no** spouse, children, or parents—brothers and sisters and children of predeceased brothers and sisters are heirs.

G. If none of the above—grandparents (maternal and paternal) or issue (descendants) of predeceased grandparents, stopping at first degree where heir is found.

Who Are Heirs?
Date of Death **on** or **After** April 1, 2000 (EPIC)

A. Spouse and children and issue (descendants) of predeceased children are heirs.

B. If **no** children—spouse and parents are heirs.

C. If **no** children or parents—spouse is sole heir.

D. If **no** spouse—children, including issue (descendants) of predeceased children by right of representation are heirs.

E. If **no** spouse and children—parent(s) are heirs.

F. If **no** spouse, children, or parents—brothers and sisters and issue (descendants) of predeceased brothers and sisters by right of representation are heirs.

G. If none of the above—grandparents (maternal and paternal) and/or issue (descendants) of predeceased grandparents by right of representation are heirs.

2
Decedent Estate Proceedings: Supervised Administration

D. Interim Orders §2.25
E. Elections and Allowances
   1. Elective Share of the Surviving Spouse §2.26
   2. The Homestead Allowance §2.27
   3. Exempt Tangible Property §2.28
   4. The Family Allowance §2.29

VIII. Closing the Estate
   A. Final Accounting §2.30
   B. Complete Estate Settlement §2.31

Summary of Decedent Estate Proceedings: Supervised Administration

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Estate and Protected Individuals Code. §§2.1–2.2.

Effective April 1, 2000, the Estates and Protected Individuals Code (EPIC) revised and replaced the Revised Probate Code. EPIC does not impair a right accrued or an action taken before April 1, 2000, but it does apply to determine whether an instrument signed by a decedent who died before April 1, 2000, is a testamentary instrument.

Supervised administration, a single in rem proceeding to secure the complete administration and settlement of a decedent's estate under the court's continuing authority that extends until entry of an order approving estate distribution and discharging the personal representative or any other order terminating the proceeding, is covered in EPIC at MCL 700.3501–.3505.

Jurisdiction and venue. §2.3.

The probate court has exclusive jurisdiction of matters regarding the settlement of the estate of a deceased person who was at the time of death domiciled either in the county or out of state leaving an estate within the county to be administered. Venue for the first testacy or appointment proceeding after a decedent's death is in the county where the decedent was domiciled at the time of death. If the decedent was not domiciled in Michigan, venue is in the county where the decedent's property was located at the time of death.

Priority for appointment of personal representative. §2.4.

A personal representative must be at least age 18, not a protected or legally incapacitated individual, and not found unsuitable by the court in a formal proceeding. An appointment as a general personal representative has the following order of priority:

1. the personal representative appointed by the court of the decedent's domicile or that person's nominee
2. the person nominated in the decedent's probated will

3. the surviving spouse of the decedent if a devisee or the spouse's nominee
4. other devisees of the decedent or their nominee
5. the surviving spouse of the decedent or the spouse's nominee
6. other heirs of the decedent or their nominee
7. a creditor's nominee, after 42 days of decedent's death, if the court finds the nominee suitable
8. 63 days after the decedent's death, or if the court determines exigent circumstances exist, the state or county public administrator (if (a) no interested person applied or petitioned for appointment of a personal representative within 63 days (or the number of days determined by the court) of the decedent's death, (b) there are no known heirs, or (c) there is no United States resident entitled to a distributive share in the estate).

Circumstances in which supervised administration may be granted. §2.5.

Any interested person or personal representative may file a petition for supervised administration at any time. MCL 700.3502(1).

- If the decedent's will directs supervised administration, the court must order supervised administration unless the court finds that circumstances bearing on the need for supervision have changed since the execution of the will so that supervised administration is not necessary.
- If the decedent's will directs unsupervised administration, the court may order supervised administration only if it finds that it is necessary for the protection of interested persons.
- If the decedent's will is silent regarding the form of administration or in an intestate estate, the court may order supervised administration if it finds that supervised administration is necessary under the circumstances.

Supervised administration proceedings. §§2.6–2.13.

Petition for probate and/or appointment of personal representative.

An interested person or personal representative may file a petition for supervised administration at any time. If supervision is sought at the beginning of the estate administration, the petition is joined with a formal testacy and appointment proceeding, and the interested persons must receive notice before the will is admitted and before the personal representative is appointed.

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;

- include additional allegations, as required; and
- include a current list of interested persons, indicating the existence and form of incapacity of any of them, their mailing addresses, the nature of their representation, if any, and the need for special representation.

The petition must also include a will, if any, and a sworn testimony form sufficient to establish the identity of interested persons.

Notice of hearing, service of process, and waivers.

The petitioner is responsible for serving notice of hearing and a copy of the petition, will, and testimony forms on all interested persons. Personal service must be made at least 7 days before the hearing date; service by mail must be made at least 14 days before the hearing date. Notice may be served on an interested person whose address or whereabouts is unknown by publication in a newspaper in the county where the court is located at least 14 days before the hearing date. If service cannot otherwise reasonably be made, the court may direct the manner of service.

The service requirements may be avoided if waiver/consent forms are signed by all interested persons and filed with the court. A waiver and consent may also be stated on the record at the hearing. If all interested persons have made waivers and consents, the order may be entered without a hearing.

Hearing.

The procedure and burdens of proof at a hearing in connection with a supervised administration are the same as for any formal testacy and appointment proceeding:

- A petitioner seeking to establish intestacy must establish prima facie proof of death, venue, and heirship.
- A proponent of a will must establish prima facie proof of due execution. If the proponent is also the petitioner, the proponent must also establish prima facie proof of death and venue.
- A contestant of a will must prove lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation.
- A party has the ultimate burden of persuasion as to a matter if that party has the initial burden of proof.

In addition, testimony about the need for court supervision is elicited in a supervised administration.

Changing between supervised administration and unsupervised administration. §§2.14–2.15.

Supervised administration may start at any time, including in the midst of an unsupervised administration, after an estate was opened by an informal proceeding or by a formal proceeding without an order for supervision. At any time during supervised administration, the personal representative or any interested person may petition the court to terminate court supervision. The court may terminate supervision unless it finds that supervised administration is necessary under the circumstances.

Administration of the estate. §§2.16–2.29.

Acceptance of appointment by personal representative.

The personal representative must file an acceptance of appointment to accept the duties of the office. When the acceptance of appointment is filed, the court issues letters of authority that certify the personal representative's authority to act on behalf of the estate.

Notices and other documents.

The personal representative may pay attorney fees and costs on a periodic basis without prior court approval as long as the attorney and the personal representative entered into a written fee agreement before the time of payment, copies of the fee agreement and a notice regarding the attorney fees were sent to all who were affected by the payment, statements for services and costs were sent to the personal representative and any interested person who requested copies, and no written objection to the fees has been served on the attorney or the personal representative. In any other case, the court must approve attorney fees before payment. The notice regarding attorney fees must be filed with the court.

A supervised personal representative must prepare an inventory and send it to all presumptive distributees and all other interested persons requesting it within 91 days following appointment. The inventory must be filed with the court within 91 days of the letters of authority. Most courts require the use of SCAO form PC 577, Inventory (Decedent Estate).

Until a beneficiary's share of the estate is fully distributed, a supervised personal representative must annually, and on completion of the estate settlement, account to each beneficiary by supplying a statement of the estate's and the personal representative's activities, specifying all receipts and disbursements and identifying property belonging to the estate. Accountings must be filed with the court within 56 days after the end of the accounting period.

If administration of the estate lasts more than one year, the personal representative has 28 days from the anniversary date of appointment to file with the court and serve on all interested persons a notice of continued administration.

A supervised personal representative must also file other documents with the court, including notice of appointment, notice to spouse of rights of election, and affidavit of any required publication.

Distribution of estate assets and interim orders.

A supervised personal representative has all the powers available to a personal representative in an unsupervised proceeding, except that a supervised personal representative cannot distribute estate property without a prior court order. However, the personal representative can pay claims, taxes, and administrative expenses without prior court approval. The personal representative, or any interested person, may seek interim orders for partial distribution at any time during the pendency of the supervised administration.

Elections and allowances.

Within 28 days after appointment, the personal representative must notify the surviving spouse of the spouse's right to election and the election time period. In a testate estate, the surviving spouse may elect to do one of the following:

1. abide by the terms of the will
2. take half of the spouse's intestate share reduced by half the value of property derived by the spouse from the decedent by any means other than testate or intestate succession
3. if the surviving spouse is a widow, take her dower right but only if the husband died before April 6, 2017, the effective date of 2016 PA 289, which abolished dower.

In an intestate estate, a surviving widow may elect to take either her intestate share or her dower right but only if the husband died before April 6, 2017, the effective date of 2016 PA 289 which abolished dower.

If the decedent was domiciled in Michigan, the surviving spouse is entitled to a homestead allowance of $15,000 and household furniture, automobiles, furnishings, appliances, and personal effects with a date-of-death value of up to $10,000. In addition, a reasonable family allowance may be paid to a surviving spouse, minor children the decedent was obligated to support, and children of the decedent or another who were in fact being supported by the decedent. The amounts of these allowances are indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual amount.

Closing the estate. §§2.30–2.31.

Final accounting.

A supervised personal representative must prepare a final account and serve it on all interested persons, except those who previously received their full share of the estate, and file it with the court when the estate is ready for closing or upon the removal of the personal representative. The personal representative must also file a proof of service with the court.

Complete estate settlement.

In a supervised administration, the estate must be closed with a petition and order for complete estate settlement. The petition should request court approval of all proposed distributions. Supervised administration is terminated in accordance with the order issued by the court directing estate distribution and discharging the personal representative. Final distributions will generally be made after the order is entered. After final distribution, the personal representative should submit receipts or other evidence of the final distributions to the court along with an order of discharge.

I. Estates and Protected Individuals Code

A. Introduction

§2.1 The Estates and Protected Individuals Code (EPIC), effective April 1, 2000, completely revised and replaced the Revised Probate Code (RPC). It integrated most of the Uniform Probate Code into Michigan law while retaining some of the unique features of Michigan law in prior codes.

Supervised administration under EPIC is a single in rem proceeding to secure the complete administration and settlement of a decedent's estate under the court's continuing authority that extends until entry of an order approving estate distribution and discharging the personal representative or any other order terminating the proceeding. MCL 700.3501(1). Supervised administration is covered in EPIC at MCL 700.3501–.3505.

B. Substantive Rights Under the Revised Probate Code in Estates of Decedents Who Died Before April 1, 2000

§2.2 EPIC applies to the following:

- a governing instrument executed by a decedent who dies after April 1, 2000
- any proceeding in court pending on or commenced after April 1, 2000, regardless of the time of the decedent's death, except to the extent that in the court's opinion, the former procedure should be made applicable in a particular case in the interest of justice or feasibility
- the definition of the powers and duties after April 1, 2000, of a fiduciary who was appointed before April 1, 2000
- the construction of a governing instrument executed before April 1, 2000, unless there is a clear indication of a contrary intent (with the exception of the construction of the phrase *by representation*—see MCL 700.2718(1)).

EPIC does not impair a right accrued or an action taken before April 1, 2000. MCL 700.8101(2). For example, the beneficial shares of heirs of a decedent who died intestate before April 1, 2000, are determined under the RPC.

EPIC does apply to determine whether an instrument signed by a decedent who died before April 1, 2000, is a testamentary instrument. *Korean New Hope Assembly of God v Haight (In re Estate of Smith)*, 252 Mich App 120, 651 NW2d 153 (2002). In that case, the day after the execution of her will, the deceased executed a dated, handwritten document that expressed her intent to donate $150,000 to God in order to build a church. The petitioner-church offered the handwritten document as a holographic will to be probated as a codicil to the deceased's existing will. The trial court granted the respondent summary disposition because the handwritten document failed to reflect testamentary intent. The court of appeals reversed and remanded because, under EPIC, MCL 700.2502(3), the testamentary intent of a document may be established by extrinsic evidence. The EPIC provision applied even though the decedent died before its effective date, because a devise under a will is not an accrued right.

A will created before EPIC's effective date for a decedent who died on or after April 1, 2000, is governed by the provisions of EPIC unless there is a clear indication of contrary intent. *Leete v Sherman (In re Estate of Leete)*, 290 Mich App 647, 803 NW2d 889 (2010).

II. Jurisdiction and Venue

§2.3 The probate court has exclusive jurisdiction of matters relating to the settlement of an estate of a deceased person who was at the time of death domiciled either in the county or out of state leaving an estate within the county to be administered. This includes, but is not limited to, the following types of proceedings:

- the internal affairs of the estate
- estate administration, settlement, and distribution
- declaration of rights that involve an estate, devisee, heir, or fiduciary
- construction of a will
- determination of heirs

MCL 700.1302(a).

EPIC controls when there is an out-of-state decedent whose Michigan property passes intestate (with the possible exception of rules regarding spousal election). *In re Estate of Huntington*, 339 Mich App 8, 981 NW2d 72 (2021) (when there was no evidence that out-of-state estate had been opened, probate court erred in failing to determine heirs under EPIC's rules of intestate succession regarding Michigan property and share of each such heir). As spousal election was not sought in the case, the court looks to MCL 700.2203 for the default rules regarding intestate succession.

Probate disputes, including the question of testamentary capacity, may be settled by binding common-law arbitration. *Petorovski v Nestorovski (In re Nestorovski)*, 283 Mich App 177, 769 NW2d 720 (2009).

Venue for the first formal testacy or appointment proceeding after a decedent's death is in the county where the decedent was domiciled at the time of death or, if the decedent was not domiciled in Michigan, in a county where the decedent's property was located at the time of death. Venue for subsequent proceedings is in the place where the initial proceeding occurred, unless the court transfers the proceeding. MCL 700.3201(1), (2).

Venue may be transferred to another county on motion by an interested person or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be had in the county where the action is pending. MCL 600.856, 700.3201(4); MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

If there are conflicting claims as to the decedent's domicile in formal proceedings commenced in Michigan and in another state, the determination of domicile in the proceeding that was commenced first is determinative. MCL 700.3202.

III. Priority for Appointment of Personal Representative

§2.4 A person is qualified to serve as personal representative only if the person is age 18, is not a protected or legally incapacitated individual, and is not found unsuitable by the court in a formal proceeding. MCL 700.3204(1), (3).

Practice Tip

- *EPIC does not prohibit the appointment of a nonresident as personal representative, and there is no statutory preference for appointment of a United States citizen. However, check with your local court, as some courts will not appoint a nonresident as personal representative. Note that the personal representative submits personally to the court's jurisdiction in any proceeding relating to the estate. MCL 700.3602. As a result, the Revised Probate Code requirement of designating a resident agent was not carried over into EPIC.*

Qualified persons are entitled to appointment as a general personal representative in the following order:

1. the personal representative appointed by the court of the decedent's domicile (unless the decedent's will nominates different persons to act in Michigan and the state of domicile) or that person's nominee
2. the person nominated in the decedent's probated will
3. the surviving spouse of the decedent, if the spouse is a devisee, or the spouse's nominee
4. other devisees of the decedent or their nominee
5. the surviving spouse of the decedent or the spouse's nominee
6. other heirs of the decedent or their nominee
7. a creditor's nominee, after 42 days of the decedent's death, if the court finds the nominee suitable
8. 63 days after the decedent's death or if the court determines exigent circumstances exist, the state or county public administrator (if (a) no interested person applied or petitioned for appointment of a personal representative within 63 days (or the number of days determined by the court) of the decedent's death, (b) there are no known heirs, or (c) there is no United States resident entitled to a distributive share in the estate)

MCL 700.3203, .3204(4). Note that the person nominated in the decedent's will does not have the power to nominate another person to serve in that person's place.

Practice Tip

- *While EPIC contains no absolute prohibition against a creditor serving as personal representative, there is an inherent conflict of interest in having a creditor*

serve, since the personal representative decides which claims are valid. This conflict may cause the court to find a creditor unsuitable if a neutral person is available to serve.

If a person with priority to serve as personal representative is a protected individual or (if not a protected individual) a legally incapacitated individual or minor ward, the person's conservator or guardian may exercise the same right to nominate, to object to another person's appointment, or to participate in determining the preference of a majority in interest of the devisees and heirs that the person with priority would have had if qualified for appointment. MCL 700.3204(1).

Practice Tip

- *A minor heir is not qualified to serve as personal representative and therefore has no power to nominate another person to serve in the minor's place. If a minor has a conservator or guardian appointed on the minor's behalf, the fiduciary may nominate a personal representative. A minor who has a substantial interest in the estate may, through a conservator, object to another person's appointment and request the appointment of an acceptable person. MCL 700.3203(2)(b).*

A qualified person who does not have top priority for appointment prescribed in MCL 700.3203(1)(a)–(g) as a general personal representative may request appointment if

- the person who has priority, other than the person named in the decedent's will, nominates that person, *see* SCAO form PC 567 (Renunciation of Right to Appointment, Nomination of Personal Representative and Waiver of Notice);
- in a formal proceeding, after notice to interested persons, if the court determines that the persons with priority have been notified of the proceedings and have failed to request appointment or to nominate another person for appointment and that administration is necessary; or
- one of the methods of prior notice or waiver by persons with priority discussed in §§1.7–1.9, applicable in formal appointment proceedings, is used.

MCL 700.3204(2).

IV. Circumstances in Which Supervised Administration May Be Granted

§2.5 Any interested person or personal representative may file a petition for supervised administration at any time. MCL 700.3502(1). The probate court will order supervised administration in any of the following circumstances:

- If the decedent's will directs supervised administration, the court must order supervised administration unless the court finds that circumstances bearing on the need for supervision have changed since the execution of the will so that supervised administration is not necessary.

- If the decedent's will directs unsupervised administration, the court may order supervised administration only if it finds that it is necessary for the protection of interested persons.
- If the decedent's will is silent regarding the form of administration or in an intestate estate, the court may order supervised administration if it finds that supervised administration is necessary under the circumstances.

MCL 700.3502(3).

V. Supervised Administration Proceedings

A. Petition for Probate and/or Appointment of Personal Representative

§2.6 Any interested person or personal representative may file a petition for supervised administration at any time. See the discussion in §2.14 about changing from an unsupervised administration to a supervised administration. If supervision is sought at the beginning of the estate administration, however, the petition for supervision is joined with a formal testacy and appointment proceeding, and the interested persons must receive notice before the will is admitted and before the supervised personal representative is appointed. MCL 700.3403, .3502(1); MCR 5.310(B); *see* SCAO form PC 559 (Petition for Probate and/or Appointment of Personal Representative (Testate/Intestate)). The same petition is used to go from unsupervised administration to supervised administration if testacy and appointment were done in an informal proceeding.

Practice Tip

- *Note that if an interested person in an estate is a minor, the estate may be opened by the minor's conservator, or if no conservator, by the minor's guardian because MCL 700.1105(c) provides that an interested person includes "a fiduciary representing an interested person." If no conservator or guardian is appointed or needed, in the interests of justice, the court may allow the minor's custodial parent, if the parent files an appearance, to commence a formal estate proceeding on the minor's behalf. MCR 5.302(D).*

A petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. A petition must include the name of the court and the title of the proceeding; the case number; the character of the paper; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1), 5.113(A). MCR 5.113(A) requires the petition to be verified in accordance with MCR 1.109(D)(3). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

A petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;

- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

Any formal testacy petition must also include

- information about the decedent;
- if the decedent was not domiciled in Michigan, a statement showing venue;
- a statement identifying the name and address of any personal representative for the decedent whose appointment has not been terminated; and
- a request for an order determining heirs.

If a will is offered for probate, the petition must also include the following:

- a statement that to the best of the petitioner's knowledge, the will was validly executed
- a statement that the petitioner is unaware of an instrument revoking the will and believes that the instrument offered for probate is the decedent's last will
- a statement as to whether the original of the will is in the court's possession or accompanies the petition; if not, a description of the will's contents and an indication that the will is lost, destroyed, or otherwise unavailable
- a request for an order as to the testacy of the decedent

MCL 700.3402; *see* PC 559.

At least one SCAO testimony form identifying heirs and devisees must be filed along with the petition. MCR 5.302(B); *see* SCAO form PC 565 (Testimony to Identify Heirs). This form must be verified under MCR 1.109(D)(3). In a testate estate, a supplemental testimony form is also required if there are devisees who are not also heirs. *See* SCAO form PC 566 (Supplemental Testimony to Identify Nonheir Devisees, Testate Estate). The supplemental form is executed in lieu of court testimony concerning the names of all devisees under the decedent's purported will.

If electronic filing is in place, the petition indicates there is a will, and it is available and not already filed with the court, an exact copy of the will and codicils must be attached to the petition. Originals of the will and codicils must be filed within 14 days of the filing of the application or the case will be dismissed. MCR 5.302(A)(2).

A copy of the death certificate must also be filed with the petition. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death. Courts are prohibited from requiring any further

documentation, such as information about the proposed or appointed personal representative. MCR 5.302(A).

If there is a will, it is filed with the court along with the petition and testimony forms. The $175 filing fee must also be submitted with the petition. This total fee includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a).

See exhibit 1.3 for a checklist of filings for a formally opened estate.

B. Notice of Hearing, Service of Process, and Waivers

§2.7 The petitioner is responsible for serving on interested persons notice of hearing and copies of the petition, sworn testimony forms, and will, if any. MCR 5.102, .107(A); *see* SCAO form PC 562 (Notice of Hearing). Service on the petitioner is not required. MCR 5.105(C).

Effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

The persons interested in a petition to probate a will are the following:

- devisees whose devise remains unsatisfied
- nominated trustee and current trust beneficiaries of a trust under the will
- heirs
- nominated personal representative
- trustee of a revocable trust

MCR 5.125(B)(2), (C)(1). The incumbent fiduciary will also be included as an interested person to be served notice by the petitioner. MCL 700.1105(c). MCL 700.1105(c) and MCR 5.125 when read in concert "demonstrate that the interested-person inquiry is decidedly flexible and fact-specific," and "[t]he identity of the interested persons can change not only over time but also depends on the nature of the proceedings and the relief requested." *In re Rhea Brody Living Tr, dated January 17, 1978 (On Remand)*, 325 Mich App 476, 486, 925 NW2d 921 (2018), *vacated in part, leave to appeal denied in part,* 504 Mich 882, 928 NW2d 222 (2019).

Additional special persons who are entitled to notice include the following:

- the Attorney General, if the decedent is not survived by any known heirs
- the appropriate foreign consul, if an interested person is a resident in and a citizen of a foreign country (see MCL 700.1401(4))
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary

- any person who has filed a demand for notice

MCR 5.125(A).

Service may be made by any adult or emancipated minor. MCR 5.103(A). Personal and electronic service must be made at least 7 days before the hearing date; service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Service on a person who is legally disabled or otherwise legally represented may be made on

- the person's guardian, conservator, or guardian ad litem;
- the trustee of a trust with respect to a beneficiary of the trust;
- a parent of a minor with whom the minor resides if the parent has filed an appearance and the parent and child do not have conflicting interests with respect to the outcome of the hearing;
- the attorney for an interested person who has filed a written appearance in the proceeding; and
- the agent of an interested person under an unrevoked power of attorney filed with the court.

MCR 5.105(D).

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The court may direct the manner of service if service cannot otherwise reasonably be made. MCR 5.105(A)(4).

A proof of service must be filed with the court before the hearing. MCR 5.104(A); *see* SCAO form PC 564 (Proof of Service). In formal testacy and appointment proceedings, the proof of service is usually filed along with the petition.

After receiving notice of the formal testacy or appointment proceeding, a previously informally appointed personal representative cannot distribute the estate until the court makes its determination and, if appointment of a different personal representative is sought, may be ordered to refrain from exercising any powers. MCL 700.3401(4). See §2.14 regarding changing from unsupervised administration to supervised administration.

Waivers and consents. Interested persons may waive notice and consent to the relief being sought by signing and filing Waiver/Consent forms (SCAO form PC 561) with the court. MCR 5.104(B). A waiver and consent may be made

- by a legally competent interested person,
- by a person designated as eligible in the court rules to be served on behalf of an interested person who is legally disabled (except a fiduciary may not waive or consent with regard to petitions made by that person as fiduciary), or
- on behalf of an interested person by an attorney who has filed a written appearance.

A waiver and consent may also be stated on the record at the hearing. If all interested persons have made waivers and consents, the order may be entered without a hearing.

If all interested persons waive notice and consent in writing to the relief requested in the petition, the court may enter an appropriate order without a hearing. MCL 700.1402; MCR 5.104(B). In addition, if a petition in a testacy proceeding is unopposed at the time set for hearing, the court may issue an ex parte order of probate or intestacy on the strength of the pleadings without conducting a hearing. MCL 700.3405. However, there will usually be a hearing unless Waiver/Consent forms (PC 561) signed by each interested person are filed with the court before the hearing. These are usually filed with the petition.

Practice Tip

- *When some, but not all, of the interested persons return signed waivers and consents, a hearing is necessary, but the waivers obtained and submitted to the court help to provide an indication of the interested persons' opinions.*

C. Hearing

§2.8 MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

The procedure and burdens of proof at a hearing in connection with a supervised administration are the same as for any formal testacy and appointment proceeding:

- A petitioner seeking to establish intestacy has the burden of establishing prima facie proof of death, venue, and heirship.
- A proponent of a will has the burden of establishing prima facie proof of due execution in all cases. If the proponent is also the petitioner, the proponent also has the burden of establishing prima facie proof of death and venue.

- A contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence (see §1.25), fraud, duress, mistake, or revocation.
- A party has the ultimate burden of persuasion as to a matter if that party has the initial burden of proof.

MCL 700.3407(1). In addition, testimony about the need for court supervision is elicited in a supervised administration. The court must adjudicate the decedent's testacy and the personal representative's priority and qualifications even if it denies the request for court supervision. MCL 700.3502(2).

If a will is opposed by a petition for probate of a later will revoking the prior alleged will, the court first determines whether the later will is entitled to probate. If a will is opposed by a petition for a declaration of intestacy, the court first determines whether the will is entitled to probate. MCL 700.3407(2). See §§1.22–1.25 regarding will contests.

In uncontested cases, the court may order probate or intestacy on the strength of the pleadings if satisfied that

- the alleged decedent is dead,
- venue is proper, and
- if applicable, the will is valid and unrevoked.

In the alternative, the court may conduct a hearing and require proof of these matters. MCL 700.3405(1).

Due execution of an uncontested will may be proved by the sworn statement or testimony of an attesting witness or, if not available, by any other evidence or sworn statement. MCL 700.3405(2). If the witnesses to a will cannot be found after a diligent search, the testator's signature is identified, and the will appears on its face to meet the requirements for a valid will, a presumption arises that it was executed as required by law. For proof of execution in contested cases, see §1.23.

D. Lost, Destroyed, or Otherwise Unavailable Wills

§2.9 If the original will is not in the court's possession and neither the original will nor an authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition must state the will's contents and indicate that the will is lost, destroyed, or otherwise unavailable. MCL 700.3402(1)(c). Unlike under former law, EPIC does not require proof of the will's contents by two reputable witnesses, but if the contents are challenged, the petitioner bears the burden of proof.

Practice Tip

- *If a copy of a lost will exists, or knowledge of its contents can be ascertained, secure as full and complete a statement of its contents as possible. Determine the names of the subscribing witnesses and, if they are living, their addresses. Obtain the names and addresses of all people who have personal knowledge of the execution of the alleged will and its contents.*

Note that a missing will last known to have been in the decedent's possession is presumed to have been destroyed and revoked by the decedent. *In re Estate of Smith*, 145 Mich App 634, 378 NW2d 555 (1985). *But see In re Christoff Estate*, 193 Mich App 468, 484 NW2d 743 (1992).

E. Contested Proceedings

§2.10 See §§1.22–1.30 for a discussion of contested proceedings.

F. Order

1. In General

§2.11 After the time expires for notice, on proof of notice and after a hearing (if necessary), if the court finds that the alleged decedent is dead and venue is proper, the court must determine the decedent's

- domicile at death,
- heirs, and
- state of testacy.

MCL 700.3409(1). A will found to be valid and unrevoked must be formally probated. *See* SCAO form PC 569 (Order of Formal Proceedings). More than one will may be probated if neither revokes the other either expressly or by implication. MCL 700.3410.

Termination of the appointment of an informally appointed personal representative may also be appropriate if there has been a change of testacy status and another person is entitled to appointment under the court's determination of the state of testacy. MCL 700.3409(2), .3612. After notice to all interested persons (including a previously appointed personal representative), the court must determine who is entitled to appointment, make a proper appointment, and, if appropriate, terminate a prior improper appointment. MCL 700.3414(4).

At the time of appointment, the court must provide the personal representative with written notice of information to be provided to the court. MCR 5.307(C); *see* SCAO form PC 572 (Letters of Authority for Personal Representative).

2. Determination of Heirs

§2.12 As noted in §2.11, the court must determine the decedent's heirs in all formal testacy proceedings. MCL 700.3409(1); MCR 5.308(B)(1).

Heir is defined as a person that is entitled under the laws of intestate succession to a decedent's property. MCL 700.1104(p). Intestate succession is governed by MCL 700.2101–.2114. An heir must survive the decedent by 120 hours; otherwise, the heir is considered to have predeceased the decedent. MCL 700.2104; *Leete v Sherman (In re Estate of Leete)*, 290 Mich App 647, 803 NW2d 889 (2010). See exhibit 1.4 for a list of heirs under the RPC and EPIC.

Note that a decedent may, by will, expressly exclude or limit the right of an individual or class to succeed to the decedent's property that passes by intestate succession. MCL 700.2101(2).

Surviving spouse. The surviving spouse is an heir who is entitled to the intestate share (by year of death, as adjusted for inflation) listed in exhibit 1.1, the inflation adjustment table. *See* MCL 700.2102.

A surviving spouse does not include

- an individual who was divorced from the decedent or whose marriage to the decedent was annulled unless the individual and the decedent are remarried to each other at the time of death (a decree of separation that does not terminate the marriage does not have the same effect);
- an individual who, following an invalid divorce or annulment, participated in a marriage ceremony with someone else;
- an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights;
- an individual who was living in a bigamous relationship with another individual at the time of the decedent's death; and
- an individual who for one or more years before the decedent's death
  - was willfully absent from the decedent,
  - deserted the decedent, or
  - willfully neglected or refused to provide support for the decedent if required to do so by law.

MCL 700.2801.

Willfully absent. "Willfully absent" is the intentional complete emotional and physical absence from the marriage in the year or more before the decedent's passing. *In re Estate of Erwin*, 503 Mich 1, 921 NW2d 308 (2018) (overruling *Lovett v Peterson (In re Estate of Peterson)*, 315 Mich App 423, 889 NW2d 753 (2016), to the extent it defined *willfully absent* as physical absence only). The burden of proving that a spouse is willfully absent is on the person challenging the individual's status as a surviving spouse. *Erwin,* 503 Mich at 17, 24–25 (party challenging surviving spouse status under MCL 700.2801(2)(e)(i) need not show that spouse intended to dissolve marriage, only that surviving spouse intended to be absent from decedent spouse). Under MCL 700.2801(2)(e)(i), to establish that a decedent's spouse is not entitled to the benefits of a "surviving spouse," a challenging party must show, under the totality of the circumstances, (1) that the surviving spouse was completely absent from the decedent spouse, (2) that this absence was for a continuous period of one year or longer before the decedent's death, and (3) that the surviving spouse acted with a specific intent to be absent from the decedent spouse. *In re Estate of Von Greiff*, 509 Mich 292, 984 NW2d 34 (2022).

The court in *Von Greiff* further held that a wife's filing of a petition for divorce one year or more before her husband's death did not categorically mean she was not "willfully absent" from her husband for a period of one year or more before his

death. Instead, filing for divorce, and the direct or indirect communications that may arise during the divorce proceedings, created a rebuttable presumption that the wife was not willfully absent from her husband for a period of one year or more before his death. *Id.*

Desertion. "[A]n individual deserts his or her spouse within the meaning of MCL 700.2801(2)(e)(ii) if he or she physically leaves the marital home with the intent never to return and the spouse dies more than a year later." *Erwin,* 503 Mich at 13.

Willfully neglected. An individual willfully neglects a spouse for the purpose of MCL 700.2801(2)(e)(iii) if that individual intentionally fails or refuses to pay legally required separate maintenance for the year or more before the spouse's death. *Erwin,* 503 Mich at 14.

Other heirs. The part of the intestate estate not passing to the surviving spouse (all of it, if there is no surviving spouse) passes

- to the decedent's descendants by representation, or, if none,
- to the decedent's parents equally if both survive or to the survivor, or, if none,
- to the descendants of the decedent's parents, or of either of them, by representation, or, if none,
- ½ to the paternal grandparents or their descendants by representation and ½ to the maternal grandparents or their descendants by representation. If there is no survivor on either the paternal or the maternal side, the entire estate passes to the relatives on the other side.

MCL 700.2103. Note that heirs must survive the decedent by 120 hours in order to take. MCL 700.2104. An individual in gestation at the decedent's death is treated as living at the time if the individual lives for at least 120 hours after birth. MCL 700.2108. Children conceived via in vitro fertilization after the death of the father are not heirs. *Mattison v Social Sec Comm'r (In re Certified Question)*, 493 Mich 70, 825 NW2d 566 (2012). If there are no surviving heirs, the intestate estate passes to the State of Michigan. MCL 700.2105.

An individual's *descendants* include all descendants of all generations, with the relationship of parent and child at each generation being determined according to MCL 700.2114. MCL 700.1103(k). MCL 700.2114 provides that an individual is the child of the individual's natural parents regardless of their marital status. The parent-child relationship may be established as follows:

- A child born or conceived during a marriage (including an attempted marriage that is void) is presumed to be the child of both the husband and wife (including a child conceived by assisted reproductive technology unless the husband's lack of consent is shown by clear and convincing evidence). Only the presumed father may disprove this presumption, and this right ends at the presumed father's death. MCL 700.2114(1)(a), (5); *see Estate of Casey v Keene*, 306 Mich App 252, 856 NW2d 556 (2014) (death of presumed father prevented establishment of paternity by any of the alternative methods in MCL 700.2114(1)(b)(i)–(vi)).

- A child who is not conceived or born during a marriage will be considered "born in wedlock" if the parents marry after the child's conception or birth. MCL 700.2114(1)(c).
- A child born out of wedlock, or born during a marriage but not the issue of that marriage, is considered the natural child of a man if
  - the man joins with the child's mother to complete an acknowledgment of parentage pursuant to the Acknowledgment of Parentage Act;
  - the man joins the child's mother in a written request for a correction of the child's birth certificate that results in issuance of a substituted birth certificate;
  - the man and child have established a mutually acknowledged relationship of parent and child that begins before the child attains age 18 and continues until the death of either;
  - the man is determined to be the child's father and an order of filiation is entered pursuant to the Paternity Act (the Paternity Act does not authorize a court to order any person other than a mother, child, and alleged father to provide DNA samples to establish paternity to determine intestate succession, *see In re Estate of Seybert*, No 355647, ___ Mich App ___, ___ NW2d ___ (Jan 20, 2022));
  - the court with jurisdiction over probate proceedings determines that the man is the child's father, using the standards and procedures established under the Paternity Act, MCL 722.711–.730, *see Bierkle v Umble (In re Estate of Koehler)*, 314 Mich App 667, 888 NW2d 432 (2016); or
  - the man is determined to be the father in an action under the Revocation of Paternity Act, MCL 722.1431 et seq.

MCL 700.2114(1)(b). MCL 700.2114(1) uses the terms "husband," "woman," and "mother"; however, the U.S. Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015), guaranteeing the right to marry to same-sex couples, will likely result in statutory changes. The Michigan Law Revision Commission will be reviewing the statutes affected by the Supreme Court's decision and making recommendations to the legislature.

An adopted child is the child of the person's adoptive parent or parents and not of the person's natural parents, except that adoption of a stepchild has no effect on either the relationship between the child and the stepparent's spouse or on the right of the child to inherit from or through the other natural parent. Under this circumstance, a child is an heir of both the person's natural parent and adoptive parent. There is no requirement that a child be a biological child of a father for the child to be considered the natural child of a father under MCL 700.2114(1)(b). *Asbury v Custer (In re Estate of Daniels)*, 301 Mich App 450, 837 NW2d 1 (2013).

In all other scenarios, once a parent's rights have been permanently terminated, a child is not an heir of the person's natural parent. MCL 700.2114(2), (3). A natural parent and relatives of the natural parent may not inherit from or

through a child unless the parent has openly treated the child as the person's child and has not refused to support the child. MCL 700.2114(4); *Turpening v Howard (In re Estate of Turpening)*, 258 Mich App 464, 671 NW2d 567 (2003); *see also Bierkle* (MCL 700.2114(4) does not apply to posthumous child).

A relative by the half blood inherits the same share the person would have inherited if related by the whole blood. MCL 700.2107. However, an individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that entitles the individual to the larger share. MCL 700.2113.

Unless the will, court order, or marital estate division contract provides otherwise, divorce or annulment of a marriage revokes a disposition or appointment of property in a decedent's will to a blood relative of the decedent's former spouse. MCL 700.2807(1)(a)(i); *In re Grablick Tr*, 339 Mich App 534, 984 NW2d 517 (2021). MCL 700.2806(e) defines "relative of the divorced individual's former spouse" as "an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity." This does not mean that a person, a step-child in this case, may continue to be related to the divorced individual by affinity after a divorce. Therefore, in the absence of express terms to the contrary in a governing document, after a divorce, a decedent's step-children (individuals related by blood to the decedent's former spouse) are not related to the decedent for purposes of the disposition or appointment of property.

If a deceased individual's descendants are entitled to take an intestate share by *representation,* the share is divided into as many equal shares as the total of the surviving descendants in the generation nearest to the individual that contains one or more surviving descendants and the deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the individual. MCL 700.2106.

Effect of lifetime gifts and loans. Property that a decedent gave during life to an heir is treated as an advancement against the heir's intestate share only if the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or the writing or acknowledgment otherwise indicates that the gift is to be taken into account in computing the heir's intestate share.

A debt owed to a decedent is not charged against the intestate share of any heir except the debtor. MCL 700.2110.

Effect of homicide, abuse, neglect, or exploitation by heir. An heir who feloniously and intentionally kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. This proscription against inheritance applies to an heir convicted of voluntary manslaughter. *Cook v Nale (In re Estate of Nale)*, 290 Mich App 704, 803

NW2d 907 (2010). If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the person's intestate share. MCL 700.2803(1).

An individual who is convicted of committing abuse, neglect, or exploitation of the decedent also forfeits rights to a decedent's estate. MCL 700.2803(1). *Abuse, neglect, or exploitation* is defined in MCL 700.2802(a). But note MCL 700.2803(7), which allows such a person to retain those rights if the decedent indicated a specific intention to allow the individual to receive the estate or property after the date of the conviction by executing a governing instrument to that effect.

3. Modification or Vacation of Order

§2.13 For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal (21 days). MCL 700.3413.

Testacy orders and orders determining heirs. Subject to appeal and vacation, a formal testacy order, including an order that the decedent did not leave a valid will and that determines heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered except as follows:

- If the proponents of a later-offered will were unaware of that will's existence at the time of the earlier proceeding, or were unaware of the earlier proceeding and given no notice of it except
- by publication, the court must entertain a petition for modification or vacation of its order and probate the later-offered will.
- If intestacy has been ordered, the determination of the decedent's heirs may be reconsidered if an individual was omitted from the determination and was
  - unaware of the individual's relationship to the decedent,
  - unaware of the decedent's death, or
  - not given notice of any proceeding concerning the decedent's estate, except by publication.

The petition for vacation must be filed before the earlier of:

- if a personal representative is appointed for the estate, the entry of an order approving final distribution of the estate or, if the estate is closed by statement, six months after the filing of the closing statement; or
- one year after the entry of the order sought to be vacated.

The original order may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs. MCL 700.3412(1)–(3).

Fact of death. The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at the person's last known address and the court finds that a reasonably diligent

search was made as required by MCL 700.3403. If the alleged decedent is not dead, even if notice was sent and the search was made, the alleged decedent may recover estate assets held by the personal representative. In addition, the alleged decedent may recover estate assets or their proceeds from distributees to the extent that recovery is equitable in view of all of the circumstances. MCL 700.3412(4)–(5).

VI. Changing Between Supervised Administration and Unsupervised Administration

A. Unsupervised to Supervised

§2.14 Any interested person or a personal representative may file a petition for supervised administration at any time. MCL 700.3502(1). Thus, supervised administration may start in the midst of an unsupervised administration, after an estate was opened by an informal proceeding or by a formal proceeding without an order for supervision, if the requirements for supervision are met. The filing of a petition for supervised administration stays action on any pending informal application and prevents action on any informal application filed afterward. After receipt of notice of the supervised administration petition, a previously appointed personal representative may not exercise the power to distribute the estate, but the filing of the petition does not affect the personal representative's other powers and duties unless the court orders otherwise. MCL 700.3503.

As with any other petition, the petitioner may obtain waivers and consents from all interested persons or obtain a hearing date from the court and serve the notice of hearing on the interested persons, as discussed in §2.7. See MCR 5.125(C)(11) for a list of interested persons. The notice of hearing is not required to be published more than once with respect to the same interested person. MCR 5.105(A)(3). Therefore, if there were any previous formal petitions, publication of the notice will likely not be required unless the whereabouts of an interested person became unknown after the most recent petition.

If the estate was opened with informal testacy and appointment proceedings, the petition for supervised administration must include the matters required of a petition in a formal testacy proceeding. In addition, all the related notice and other procedural requirements apply. MCL 700.3502(2). In fact, the same Petition for Probate and/or Appointment of Personal Representative (SCAO form PC 559) is used for this purpose. MCR 5.310(B). The boxes must be checked and the appropriate information filled in items 6 and 7, which specifically relate to a petition for supervised administration after a previous informal appointment.

If the estate was opened in a formal testacy and appointment proceeding, the priority and qualification of the personal representative and the decedent's testacy status will have already been determined, and SCAO form PC 560, Petition for Supervised Administration After Previous Adjudication, may be used as the petition for supervised administration. MCR 5.310(B).

If supervised administration is granted, the requirements for any supervised administration apply to the extent they have not already been completed. The deadline for the personal representative to file the estate inventory with the court

is prescribed by MCR 5.307(A) (within 91 days of the date of the letters of authority). MCR 5.310(C)(1).

B. Supervised to Unsupervised

§2.15 At any time during supervised administration, the personal representative or any interested person may petition the court to terminate court supervision. The Petition and Order form (SCAO form PC 586) may be used and must indicate how circumstances have changed to make court supervision unnecessary. As with any other petition, the petitioner may either obtain waivers and consents from all interested persons or obtain a hearing date from the court and serve the notice of hearing on the interested persons, as discussed in §2.7. The notice of hearing will likely not have to be published unless the whereabouts of an interested person became unknown since the last petition was filed. *See* MCR 5.105(A)(3).

The court may terminate supervision unless it finds that supervised administration is necessary under the circumstances. Termination of supervision does not discharge the personal representative. MCR 5.310(F). Upon termination of court supervision, the estate administration continues as an unsupervised administration.

VII. Administration of the Estate

A. Acceptance of Appointment by Personal Representative

§2.16 The personal representative must file an Acceptance of Appointment and bond if required to accept the duties of the office. *See* SCAO form PC 571 (Acceptance of Appointment). By accepting appointment, the personal representative submits personally to the court's jurisdiction in any proceeding relating to the estate initiated by an interested person. MCL 700.3602.

Exclusion of environmentally contaminated property. If the estate contains environmentally contaminated real estate or an ownership interest in a business entity that owns environmentally contaminated property, the personal representative may exclude that property from the scope of the person's authority for a period of up to 91 days by checking item 3 on the Acceptance of Appointment form (PC 571), indicating the number of days of the exclusion, and providing a description of the environmentally contaminated real property or business interest. To make the exclusion permanent, the personal representative must file a petition to appoint a special personal representative with respect to the excluded property or to have the court exercise administrative authority over the excluded property by direct judicial order. In the absence of such a request, the personal representative's responsibilities extend to the excluded property at the end of the exclusion period. MCL 700.3601.

Bonds. The court may order bond at the time of the personal representative's appointment unless the will relieves the personal representative of bond. Even if the will relieves the personal representative of bond, the court may order bond if an interested person requests bond and the court is satisfied that bond is desirable.

If the will requires bond, bond may be dispensed with if the court determines it is unnecessary. MCL 700.3603(2).

Bond is not required of a personal representative who deposits, as determined by the court, cash or collateral with the county treasurer to secure performance of the fiduciary duties. MCL 700.3603(3).

If bond is required and the will or order does not specify the amount, unless stated in the person's petition, a person qualifying must file a statement under oath with the register indicating the person's best estimate of the value of the decedent's personal estate and of the income expected from the personal and real estate during the next year, and must execute and file a bond with the register, or give other suitable security, in an amount not less than the estimate. There is no SCAO-approved form for the statement under oath that should be filed with the register. The register must determine that the bond is duly executed by a corporate surety or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The register may permit the amount of the bond to be reduced by the value of estate property deposited in this state with a financial institution in a manner that prevents the property's unauthorized disposition. On petition of the personal representative or another interested person or on the court's own motion, the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties. MCL 700.3604.

Letters of authority. When the acceptance of appointment is filed, the personal representative agrees to submit to the court's exercise of personal jurisdiction in proceedings initiated by an interested person involving the estate. MCL 700.3602. A bond is filed if ordered, and the court issues letters of authority for the personal representative that certify the personal representative's authority to act officially on behalf of the decedent's estate. Letters of authority are issued on the date they are signed by the probate court. *Estate of Jesse by Gray v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 144, 936 NW2d 705 (2019); *see* SCAO form PC 572 (Letters of Authority for Personal Representative). The issuance of letters commences an estate's administration. MCL 700.3103. Letters of authority do not have an expiration date unless specified by the court. MCR 5.202(A).

B. Notices and Other Documents That Must Be Filed with the Court

1. Notice of Appointment

§2.17 Once the personal representative has been appointed, a Notice of Appointment and Duties of Personal Representative (SCAO form PC 573) must be served by personal service or first-class mail on the decedent's heirs and devisees (unless written waivers were filed), the trustee of the decedent's revocable trust, and individuals who filed a demand for notice. MCL 700.3705; MCR 5.304(A). The notice must be filed no later than 14 days after the appointment. *Id.* No notice is required to a person who was adjudicated in a prior formal testacy proceeding to have no interest in the estate.

2. Notice Regarding Attorney Fees

§2.18 MCR 5.313 requires that at the commencement of the representation, the attorney and the personal representative (or the proposed personal representative) enter into a written fee agreement signed by each. A copy of this agreement must be provided to the personal representative. MCR 5.313(B). Also, every attorney who represents a personal representative must maintain time records for services that reflect the following information: (1) the identity of the person performing the services, (2) the date the services were performed, (3) the time expended in performing the services, and (4) a brief description of the services. MCR 5.313(C).

Within 14 days after the personal representative's appointment or the personal representative's retention of an attorney, whichever is later, the personal representative must serve by personal service or first-class mail on the interested persons whose interests will be affected by the payment of attorney fees an SCAO-approved notice stating (1) the anticipated frequency of attorney fee payments; (2) that the party is entitled, on request, to a copy of each statement for services or costs; (3) that the party may object to the fees at any time before the allowance of fees by the court; and (4) that an objection may be made in writing or at a hearing and that a written objection must be filed with the court and a copy served on the personal representative or attorney. MCR 5.304(A), .313(D); *see* SCAO form PC 576 (Notice Regarding Attorney Fees). A copy of the written fee agreement should be attached to this form and it should be sent to each of the interested persons who is affected by the payment of attorney fees. This notice is often served at the same time as the Notice of Appointment and Duties of Personal Representative (SCAO form PC 573), and a single proof of service may be prepared for both. The notice regarding attorney fees must be filed with the court. MCR 5.310(C)(4).

The personal representative may pay attorney fees and costs on a periodic basis without prior probate court approval as long as the attorney and the personal representative entered into the written fee agreement before the time of payment, copies of the fee agreement and the notice were sent to all who were affected by the payment, statements for services and costs containing the information described above were sent to the personal representative and any interested person who requested copies of the statements, and no written objections to the fees have been served on the attorney or the personal representative. MCR 5.313(E); *see also* MCL 700.3715(1)(w). In any other case, the probate court must approve attorney fees before payment.

Other costs and fees may be paid without prior probate court approval. However, any attorney fees and costs paid without prior probate court approval remain subject to later review by the probate court. The court may, on its own motion or on petition of an interested person, review the employment of a person by the personal representative and the related compensation. MCL 700.3721.

3. Notice to the Friend of the Court

§2.19 The personal representative is required to provide a notice to the Friend of the Court for the county where the estate is being administered that identifies the surviving spouse and the devisees or heirs of the estate. MCL 700.3705(6). The personal representative is not required to notify the Friend of the Court of a devise to a trustee of an existing trust or to a trustee under the will. *Id.* The notice must be given no later than 28 days after the appointment of the personal representative. MCL 700.3705(1), (6); *see* SCAO form PC 618 (Personal Representative Notice to the Friend of the Court).

4. Inventory

§2.20 The supervised personal representative must prepare an Inventory (Decedent Estate) (SCAO form PC 577) and send it to all presumptive distributees and all other interested persons requesting it within 91 days following appointment. MCL 700.3706. Most courts require the use of PC 577.

The inventory lists all assets of the estate, each asset's fair market value as of the date of the decedent's death, and any encumbrances for each item. If the value of an asset is not readily available, the personal representative should arrange for an appraisal by an independent party. MCL 700.3707. The court does not appoint appraisers. Each appraiser's name and address must be indicated on the inventory for the corresponding appraised item. *Id.* Outstanding debt used as security for an indebtedness is subtracted in calculating the value of real property for probate inventory fee purposes. MCL 600.871(2). The inventory fee is calculated on the full value of the assets of the estate.

The inventory must be filed with the court within 91 days of the date of the letters of authority. MCR 5.307(A), .310(C)(1). Filing the inventory with the court also fulfills the personal representative's duty to submit to the court the information necessary for computing the probate inventory fee. MCL 700.3706(2); MCR 5.307(A). Inventory fees are to be rounded to the nearest dollar. MCL 600.871(3). If the amount is 49 cents or below, it is rounded down. If the amount is 50 cents or above, it is rounded up. The inventory fee must be paid no later than one year after appointment or on the date a petition for complete estate settlement is filed, whichever is earlier. MCR 5.307(A). When an estate has sufficient assets to pay the inventory fee, a probate court is not required to waive or suspend the inventory fee when the personal representative is indigent or receives public assistance because the inventory fee is an expense of the estate and not the personal representative. *In re Estate of DeCoste*, 317 Mich App 339, 894 NW2d 685 (2016).

If an inventory item is missing or not accurately valued, the personal representative must prepare and serve a supplementary inventory. MCL 700.3708.

5. Accountings

§2.21 The supervised personal representative must settle and distribute the estate in accordance with the terms of a probated will and EPIC as expeditiously and efficiently as is consistent with the best interests of the estate. MCL

700.3703(1). The personal representative must keep each presumptive distributee informed of the estate settlement. Until a beneficiary's share is fully distributed, the personal representative must annually, and on completion of the estate settlement, account to each beneficiary by supplying a statement of the estate's and the personal representative's activities, specifying all receipts and disbursements, and identifying property belonging to the estate. MCL 700.3703(4). All accounts to the beneficiaries should also contain information on the personal representative and attorney fees paid during the accounting period. MCL 700.3705(1)(d)(iv).

Either SCAO form PC 583, Account of Fiduciary, Short Form, or PC 584, Account of Fiduciary, Long Form, may be used for this purpose. The supervised personal representative must serve the form on the beneficiaries and file a proof of service with the court.

In a supervised administration, accountings must be filed with the court within 56 days after the end of the accounting period. The accounting period ends on the anniversary date of the issuance of the letters of authority or, if applicable, on the anniversary date of the close of the last period covered by an accounting. The personal representative may change the accounting period so that it ends on a different date by filing a notice of the change with the court, but the first accounting period after the change may not be more than a year. MCR 5.310(C)(2)(a), (b).

All accountings filed with the court must

- be itemized, showing in detail receipts and disbursements during the accounting period, unless this requirement is waived by all interested persons;
- include (usually as an attachment) a written description of the services performed by the personal representative and the attorney for the estate relating to any compensation sought; and
- include notice that
  - objections concerning the accounting must be brought to the court's attention by an interested person, because the court does not normally review the accounting without an objection;
  - interested persons have a right to review proofs of income and disbursements at a time reasonably convenient to the personal representative and the interested person;
  - interested persons may object to all or part of an accounting by filing an objection with the court before allowance of the accounting by the court; and
  - if an objection is filed and not otherwise resolved, the court will hear and determine the objection.

MCR 5.310(C)(2)(c). The court may defer hearings on each accounting and may, at any time, require a hearing on an accounting, whether or not an interested person requests it. MCR 5.310(C)(2)(e).

6. Notice of Continued Administration

§2.22 If administration of the estate lasts more than one year after the personal representative's appointment, the personal representative has 28 days from the anniversary date of the original appointment (and 28 days from all subsequent anniversaries while the administration remains uncompleted) to file with the court and serve on all interested persons a notice of continued administration that specifies why continued administration is necessary. MCL 700.3951(1); MCR 5.310(E); *see* SCAO form PC 587 (Notice of Continued Administration). If the estate is open more than two years, the notice must be prepared annually and the boxes in item 1 of the form should be checked.

If the personal representative fails to file this notice, an interested person may petition the court for a hearing on the necessity for continued administration or for a settlement order closing the estate. MCL 700.3951(2). If an interested person does not file a petition, the court may administratively close the estate after notifying the personal representative and all interested persons if a notice of continued administration, sworn closing statement, or a petition by the personal representative or an interested person is not filed within 63 days of the court's notice. MCL 700.3951(3); MCR 5.144.

7. Other Documents

§2.23 In addition to the notice regarding attorney fees, the inventory, the accountings, and the notice of continued administration, the following documents must be filed with the court in a supervised administration:

- Notice of Appointment and Duties of Personal Representative, SCAO form PC 573
- Notice to Spouse of Rights of Election and Allowances, Proof of Service, and Election, SCAO form PC 581 (see §2.26)
- affidavit of any required publication (i.e., Notice to Creditors, Decedent's Estate, SCAO form PC 574, and Publication of Notice of Hearing, SCAO form PC 563)
- other documents as ordered by the court

MCR 5.310(C). The personal representative must also file with the court proof from the Michigan Department of Treasury that all Michigan estate taxes have been paid or a statement that no federal estate tax return was required to be filed for the decedent. MCR 5.310(D). This is usually done on the accounting form (SCAO form PC 584, Account of Fiduciary, Long Form, item 5). For a decedent dying after 2004, there is no Michigan inheritance or estate tax.

C. Distribution of Estate Assets

§2.24 A supervised personal representative cannot distribute estate property to heirs or devisees without a prior court order. MCL 700.3504. Interim orders for distributions or partial distributions can be obtained on the petition of the personal representative or any interested person under MCL 700.3505. See §2.25 for a discussion of interim orders. Other than this one restriction on making

distributions to heirs and devisees, a supervised personal representative has all the powers available to an unsupervised personal representative, unless the court order for supervision imposes further restrictions that are endorsed on the letters of authority. The personal representative may make distributions paying claims, taxes, and expenses of administration without a prior court order. MCL 700.3504.

D. Interim Orders

§2.25 Although independent requests to the court under MCL 700.3415 technically are not available in supervised administration, the personal representative or any interested person may seek interim orders for partial distribution or any other relief at any time during the pendency of a supervised administration. MCL 700.3505. As with any other petition, the petitioner may obtain waivers and consents from all interested persons or obtain a hearing date from the court and serve the notice of hearing on the interested persons, as discussed in §2.7. See MCR 5.125(C)(7) for a list of interested persons. The notice of hearing is not required to be published more than once with respect to the same interested person. MCR 5.105(A)(3). Therefore, if there were any previous formal petitions, publication of the notice will likely not be required unless the whereabouts of an interested person became unknown after the most recent petition.

E. Elections and Allowances

1. Elective Share of the Surviving Spouse

§2.26 Within 28 days after appointment, the personal representative must notify the surviving spouse of the spouse's right to election and the election time period. MCL 700.3705(5); MCR 5.305(A); *see* SCAO form PC 581 (Notice to Spouse of Rights of Election and Allowances, Proof of Service, and Election). The notice to spouse must be filed with the court in a supervised administration. MCR 5.310(C).

In a testate estate, the surviving spouse may elect to do one of the following:

1. abide by the terms of the will
2. take half of the spouse's intestate share reduced by half the value of property derived by the spouse from the decedent by any means other than testate or intestate succession (such as by joint ownership or being an insurance beneficiary)
3. if the surviving spouse is a widow, take her dower right under MCL 558.1–.29, but only if the decedent died before April 6, 2017 (the effective date of 2016 PA 489, which abolished dower).

MCL 700.2202(2). In an intestate estate, a surviving widow may elect to take either her intestate share or her dower right, MCL 700.2202(1), but in the latter case only if the decedent died before April 6, 2017 (the effective date of 2016 PA 489, which abolished dower). In either case, the election must be made within 63 days after the date for presentment of claims or within 63 days after service of the inventory on the spouse. MCL 700.2202(3). If the surviving spouse fails to make an election, it is conclusively presumed in a testate estate that the surviving spouse

elects to abide by the terms of the will and in an intestate estate that the widow elects to take her intestate share, unless there are later discovered estate assets or the court allows an election after a petition by the spouse and notice to all interested persons. MCL 700.2203.

When the surviving spouse is a legally incapacitated person, the right of election may be exercised only by order of the court in which a proceeding about that person's property is pending, after finding that exercise is necessary to provide adequate support for the legally incapacitated person during that person's life expectancy. MCL 700.2202(5). This statute has survived constitutional challenge for the reason that it is reasonably related to the legitimate government purpose of ensuring that the needs of the incapacitated person govern the exercise of the election. *Taverniti v Gorski (In re Estate of Eggleston)*, 266 Mich App 105, 698 NW2d 892 (2005).

2. The Homestead Allowance

§2.27 The surviving spouse is entitled to a homestead allowance of $15,000. MCL 700.2402. As with all allowances, the homestead allowance under EPIC is available only if the decedent was domiciled in Michigan. MCL 700.2401. This does not require the decedent to have owned a homestead or any other real estate. The term *homestead* is simply a term of art. If there is no spouse, the $15,000 may be paid pro rata to the decedent's minor and dependent children. This allowance has priority over all claims except administration expenses and reasonable funeral and burial expenses and does not reduce the spouse's or eligible child's intestate or testate share of the estate or the spouse's elective share.

The surviving spouse or eligible children (or their representatives) may choose estate property to satisfy the homestead allowance, except that if the estate is otherwise sufficient, specifically devised property may not be used for this purpose. MCL 700.2405(1). The personal representative may select the property if the surviving spouse, adult children, or those acting for minor children are unable or fail to do so in a reasonable time. *See* SCAO form PC 582 (Selection of Homestead Allowance and Exempt Property).

The $15,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted homestead allowance.

3. Exempt Tangible Property

§2.28 In addition to the homestead allowance, the surviving spouse is entitled to household furniture, automobiles, furnishings, appliances, and personal effects with a date-of-death value of up to $10,000. MCL 700.2404. This entitlement to exempt tangible property is available only if the decedent was domiciled in Michigan. MCL 700.2401. If there is no spouse, the $10,000 of exempt tangible property goes jointly to the decedent's children who are not excluded under MCL 700.2404(4). MCL 700.2404(1). If the value of the eligible assets (household furnishings and personal effects) in excess of any security interest does not exceed $10,000, any other assets (including cash) may be used to make up the difference. Entitlement to exempt property has priority over all claims, but the right

to assets to make up a deficiency of exempt property is subject to prior satisfaction of administration expenses, reasonable funeral and burial expenses, and the homestead and family allowances. MCL 700.2404(2). Exempt property is not charged against the intestate or testate share of the surviving spouse or children or an elective share. MCL 700.2404(3). A child's right to the exempt property allowance may be eliminated by disinheriting language in a decedent parent's will. MCL 700.2404(4).

As with the homestead allowance, the surviving spouse or children (or their representatives) may choose estate property to satisfy the exempt property right, except that if the estate is otherwise sufficient, specifically devised property may not be used for this purpose. MCL 700.2405(1). The personal representative may select the property if the surviving spouse, adult children, or those acting for minor children are unable or fail to do so in a reasonable time. Use SCAO form PC 582, Selection of Homestead Allowance and Exempt Property, to select exempt tangible property.

The $10,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted amount for exempt tangible property.

4. The Family Allowance

§2.29 A *reasonable* family allowance may be paid to a surviving spouse, minor children the decedent was obligated to support, and children of the decedent or another who were in fact being supported by the decedent. MCL 700.2403; *Seymour v Sallan (In re Estate of Seymour)*, 258 Mich App 249, 671 NW2d 109 (2003). No fixed dollar amount is required; the amount lies in the discretion of the personal representative. Without court approval, the personal representative may fix the family allowance in a lump sum not exceeding $18,000 or disburse up to that amount in equal monthly installments over one year. MCL 700.2405(2).

The $18,000 amount is indexed for inflation under MCL 700.1210. See exhibit 1.1 for the annual inflation-adjusted amount for exempt tangible property.

The family allowance is limited to one year if the estate is inadequate to discharge allowed claims. MCL 700.2403(1). The allowance is paid to the surviving spouse, if living, or to the minor and dependent children or persons having their care and custody. The family allowance has priority over all claims except administration expenses and reasonable funeral and burial expenses, but is subject to prior satisfaction of the homestead allowance. It is not charged against the testate share (unless otherwise provided in the will) or intestate share of the surviving spouse or children; it is also not charged against the spouse's elective share. MCL 700.2403(2).

If a family allowance exceeding the amount that the personal representative may distribute without court order is desired or if the personal representative and family members disagree about the appropriate amount, an interested person may petition the court to deny or restrict the allowance. However, SCAO form PC 582, Selection of Homestead Allowance and Exempt Property, may no longer be used for this purpose as it has been changed from a petition and order to an elec-

tion form. The form is titled Selection of Homestead Allowance and Exempt Property. *See* MCL 700.2405(3).

VIII. Closing the Estate

A. Final Accounting

§2.30 The personal representative must prepare a final account and serve it on all interested persons, except those who previously received their full share of the estate. MCL 700.3703(4). In a supervised administration, the final account must be filed with the court when the estate is ready for closing or upon the removal of a personal representative. MCR 5.310(C)(2)(a). SCAO form PC 583 (Account of Fiduciary, Short Form) or PC 584 (Account of Fiduciary, Long Form) must be used for this purpose. The box at the top of the form next to "Final" should be checked to indicate that it is the final account. As with any annual account, a proof of service should be prepared and filed with the court.

B. Complete Estate Settlement

§2.31 In a supervised administration, the estate must be closed with SCAO form PC 593, Petition for Complete Estate Settlement, and SCAO form PC 595, Order for Complete Estate Settlement. MCL 700.3505; MCR 5.310(H), .311(B)(1). The petition should request court approval of all proposed distributions. The proposed distributions should be indicated either on the final account, SCAO form PC 584, Account of Fiduciary, Long Form, or on a schedule of distributions, SCAO form PC 596, Schedule of Distributions and Payment of Claims. As with any other petition, the petitioner may obtain waivers and consents from all interested persons or obtain a hearing date from the court and serve the notice of hearing on the interested persons, as discussed in §2.7. The interested persons include the devisees of a testate estate whose devise remains unsatisfied, heirs (unless there was a previous adjudication that the decedent died testate), claimants with a proper claim that remains unpaid, and any other persons whose interests are affected by the relief requested. MCR 5.125(B)(1)–(2), (C)(8).

Supervised administration is terminated in accordance with the order issued by the court directing estate distribution and discharging the personal representative. MCL 700.3505, .3952. In a supervised administration, final distributions will generally be made after the order is entered. Therefore, after final distribution, the personal representative should submit receipts or other evidence of the final distributions to the court along with a proposed order of discharge, SCAO form PC 597, Order of Discharge.

3
Miscellaneous Decedent Estate Proceedings

Summary of Miscellaneous Decedent Estate Proceedings

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Ancillary proceedings for nonresident decedents. §§3.1–3.3.

Jurisdiction and venue.

The probate court has exclusive jurisdiction of matters relating to the settlement of an estate of a deceased person who was at the time of death domiciled out of state leaving an estate within the county to be administered. Venue for the first proceeding is in the county where the decedent's property was located at the time of death.

Foreign personal representative's filing of documents.

If the nonresident decedent held property in Michigan, the personal representative appointed in the estate of the decedent's domicile (the *foreign personal representative*) may take care of matters without being appointed in Michigan, as long as no local administration is pending. If the decedent owned property in Michigan, the foreign personal representative may file with the probate court, in the county where the property is located, authenticated copies of the personal representative's appointment and of any bond and the filing fee. The foreign personal representative may then exercise the powers of a local personal representative with regard to the property.

Local administration.

A local administration for a nonresident decedent may be commenced in the same way as for a decedent who was domiciled in Michigan. The form of administration in the nonresident decedent's place of domicile has no bearing on the form of local administration in Michigan. The personal representative appointed by the court of the decedent's domicile has top priority for appointment as local personal representative unless the decedent's will nominates different persons to act in Michigan and the state of domicile.

Determination of heirs as a separate proceeding. §§3.4–3.5.

Any person may commence a formal proceeding to determine intestacy and heirs without appointment of a personal representative by filing a petition and a sworn testimony form sufficient to establish the decedent's domicile at the time of death and the identity of the interested persons. The petitioner must serve notice of hearing on the heirs. If notice and proofs are sufficient, the court must enter an order determining

- the decedent's date of death,
- the decedent's domicile at the time of death,
- whether the decedent died intestate, and
- the names of the heirs.

An heir is a person who is entitled under the laws of intestate succession to a decedent's property. An heir must survive the decedent by 120 hours; otherwise, the heir is considered to have predeceased the decedent.

Surviving spouse.

A surviving spouse does not include an individual who

- was divorced from the decedent or whose marriage to the decedent was annulled, unless the individual and the decedent were remarried to each other at the time of death;
- participated in a marriage ceremony with someone else following an invalid divorce or annulment;
- was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights;
- was living in a bigamous relationship with another individual at the time of the decedent's death; or
- for one year or more before the decedent's death
  - was willfully absent from the decedent,
  - deserted the decedent, or
  - willfully neglected or refused to provide support for the decedent if required to do so by law.

Other heirs.

The part of the intestate estate not passing to the surviving spouse passes

- to the decedent's descendants by representation, or, if none,
- to the decedent's parents equally if both survive or to the survivor, or, if none,
- to the descendants of the decedent's parents, or of either of them, by representation, or, if none,
- ½ to the paternal grandparents or their descendants by representation and ½ to the maternal grandparents or their descendants by representation. If there are no survivors on either side, the entire estate passes to the relatives on the other side.

If there are no surviving heirs, the intestate estate passes to the State of Michigan.

Examination of decedent's safe deposit box. §3.6.

Before a personal representative is appointed, any interested person may petition the probate court to open a safe deposit box in the county where the box is located (i.e., the probate court that has jurisdiction to look for a will or burial plot deed). The box must be opened in the presence of an officer or authorized employee of the bank. Items in the safe deposit box other than the will or burial plot deed may not be removed from the box.

Wrongful death settlements. §§3.7–3.11.

No action pending in circuit court.

To settle a claim for which a wrongful death action is not pending in another court, the probate court may hold a hearing and approve or reject the settlement. MCL 700.3924(1). If there is no personal representative, one must be appointed.

Notice of hearing on the petition to approve the settlement must be given to the decedent's heirs, claimants whose interests are affected, and all other persons who may be

entitled to wrongful death damages. A person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the petition for distribution of the proceeds. Failure to present a claim for damages within the statutory time period bars the person from making a claim to any of the proceeds but not from receiving a distribution of proceeds under the settlement agreement.

Action pending in circuit court.

If a wrongful death action is filed, it must be brought in the circuit court by the personal representative of the decedent's estate. If the action is settled, the approval of the settlement and the determination of who will share in the proceeds is made in circuit court. If there is a wrongful death claim pending in another court, distribution of the proceeds of a settlement or judgment is governed by the procedures in MCL 600.2922. MCL 700.3924(2)(g).

Establishing a decedent's death in unusual circumstances. §§3.12–3.14.

A certified copy of a death certificate or other similar record or report of a governmental agency is prima facie evidence of a decedent's identity and the fact, place, date, and time of a decedent's death.

In cases of death by accident or disaster where the decedent's remains are unrecoverable or unidentifiable, a petition to establish the death of a victim may be filed beginning 63 days after the accident or disaster either by

- the medical examiner, sheriff, or prosecutor of the county where the accident or disaster occurred or, if not in Michigan, the county of the presumed decedent's domicile; or
- the presumed decedent's spouse, next of kin, heir, devisee, nominated personal representative, creditor, or debtor.

After an unexplained absence of five years, a presumption of death arises. During the five-year absence, a conservatorship may be established to manage the missing person's assets. At the end of the five-year absence, a formal testacy or appointment proceeding may be commenced.

Funeral and burial arrangements. §§3.15–3.16.

Priority for making decisions.

Priority for making funeral and burial arrangements is determined by making reference to the order established for intestate succession. If no next of kin can be found or if the next of kin chooses not to exercise these rights, the authority falls to either the decedent's guardian (if applicable), the personal representative, a special personal representative, the county public administrator, or the medical examiner, in that order.

Petition to determine priority.

If a conflict arises among the next of kin or if the next of kin cannot be located, a hearing may be held to determine who has the authority to make funeral and burial arrangements.

Venue is in the county in which the decedent was domiciled at the time of death. The probate court must set a date for hearing no later than 7 business days after the date petition is filed. Unless the court orders that service on these individuals is not required, notice of the petition must be served on the next of kin who have the highest priority according the rules of intestate succession.

Disappeared heirs. §§3.17–3.19.

If an interested person's address and whereabouts are unknown, notice is given by publication. Estate administration can proceed without the missing interested person and, if at the time of distribution, the interested person still cannot be located, the funds may be deposited with the county treasurer. Alternatively, the court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines

- the individual is unable to manage property and business affairs effectively because the person has disappeared, and
- the individual has property that will be wasted or dissipated unless proper management is provided.

I. Ancillary Proceedings for Nonresident Decedents

A. Jurisdiction and Venue

§3.1 The probate court has exclusive jurisdiction of matters relating to the settlement of an estate of a deceased person who was at the time of death domiciled out of state leaving an estate within the county to be administered. MCL 700.1302(a).

Venue for the first proceeding is in the county where the nonresident decedent's property was located at the time of death. MCL 700.3201(1)(b). Venue for subsequent proceedings is in the same place unless the first proceeding was informal and the court, on application of an interested person, after notice to the proponent in the first proceeding, finds that venue is elsewhere and transfers the proceeding and file to the other court. MCL 700.3201. Venue also may be changed to another county on an interested person's motion or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be held in the county where the proceeding is pending. MCL 700.3201(4); MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

In cases involving nondomiciliaries, a debt, other than a debt evidenced by investment or commercial paper or another instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is not an individual, at the place where the debtor has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued. MCL 700.3201(5).

B. Foreign Personal Representative's Filing of Documents

§3.2 If the decedent was not a Michigan resident but held property in Michigan, the personal representative appointed in the estate of the decedent's domicile (the *foreign personal representative*) may take care of matters without being appointed in Michigan, as long as no local administration is pending.

Beginning 63 days after the decedent's death, a person holding money or personal property belonging to a nonresident decedent may deliver it to the foreign personal representative upon being presented with proof of the foreign personal representative's appointment and a sworn statement stating the date of the decedent's death, that local administration is not pending in Michigan, and that the foreign personal representative is entitled to payment or delivery. MCL 700.4201. Delivery to the foreign personal representative releases the deliverer from liability to the same extent as if payment were made to a local personal representative. MCL 700.4202.

If the decedent owned property in Michigan, the foreign personal representative may file with the probate court, in a county where property belonging to the nonresident decedent is located, authenticated copies of the personal representative's appointment and of any bond, along with a $20 filing fee. MCL 600.880b(1). Upon the filing of these documents, the foreign personal representative may exercise the powers of a local personal representative, including the power

to execute and deliver deeds, discharge mortgages and other security interests, and maintain actions or proceedings on behalf of the estate. MCL 700.4203. The probate court may issue the foreign personal representative a Notice of Ancillary Administration Filing (SCAO form PC 619).

Note that the foreign personal representative's filing of documents merely confers the powers of a local personal representative on that person. It does not result in local appointment or begin a local administration. However, by filing an authenticated copy of appointment or by receiving money or other property, the foreign personal representative submits personally to the jurisdiction of Michigan courts in proceedings relating to the estate. MCL 700.4301. A foreign personal representative is also subject to the jurisdiction of Michigan courts to the same extent that the decedent was subject to it immediately before death. MCL 700.4302. Service may be made on the foreign personal representative as provided in MCL 700.4303.

An application or petition for local administration of the estate terminates the powers of the foreign personal representative except to the extent that the court permits the foreign personal representative limited powers to preserve the estate. MCL 700.4204.

C. Local Administration

§3.3 A local administration may be commenced for a nonresident decedent in the same way as administration is commenced for a decedent who was domiciled in Michigan, with an informal or formal proceeding. *See* MCL 700.3301(1)(a)(ii)–(iii), .3402(1)(b), .4205. See also chapter 1. *Local administration* is defined as administration by a personal representative appointed in Michigan under an informal or formal testacy proceeding. A *local personal representative* is the personal representative appointed in such a proceeding (as distinguished from a foreign personal representative). MCL 700.4101.

The form of administration in the nonresident decedent's place of domicile has no bearing on the form of local administration in Michigan. MCR 5.309. Thus, even if there is an ongoing supervised administration in the state of domicile, local administration in Michigan may be unsupervised and may be commenced with an informal application.

The personal representative appointed by the court of the decedent's domicile has top priority for appointment as local personal representative unless the decedent's will nominates different people to act in Michigan and the state of domicile, and the domiciliary personal representative may transfer that person's priority by nominating another person to serve. MCL 700.3204(4).

If the decedent's will was probated in the state of domicile, informal probate in Michigan may be granted at any time upon written application by an interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where the will was first probated. MCL 700.3303(4). If the decedent's state of domicile does not provide for probate of a will, the will may be proved for probate in Michigan by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the

will is effective under the law of the other place. MCL 700.3409(2). Note that there is no requirement in EPIC that the decedent's will first be admitted in the state of domicile. Therefore, in the absence of prior proceedings in the state of domicile, probate of a will should proceed in the same manner as for a resident's will.

In an informal proceeding for a nonresident decedent, the register must delay the order of appointment until 28 days after the death unless the personal representative appointed at the decedent's domicile is the applicant or unless the decedent's will directs that the estate be subject to the laws of Michigan. MCL 700.3307(1).

An application or petition for local administration terminates the local powers of a foreign personal representative, except to the extent that the local court allows the foreign personal representative to exercise limited powers to preserve the estate. MCL 700.4204. If a local personal representative is appointed, a judgment in any jurisdiction in favor of or against a personal representative of the estate is binding on the local personal representative. MCL 700.4401.

The local personal representative must distribute the estate to the domiciliary personal representative, if there is one and that person is willing to receive it, unless

- by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified under Michigan law without reference to the law of the decedent's domicile;
- after reasonable inquiry, the local personal representative is unaware of the existence or identity of a domiciliary personal representative; or
- the court orders otherwise in a proceeding for a closing order or incident to the closing of a supervised administration.

Otherwise, the decedent's estate is to be distributed in accordance with the rules for a local decedent. MCL 700.3919.

II. Determination of Heirs as a Separate Proceeding

A. Procedure

§3.4 Any person may commence a formal proceeding to determine intestacy and heirs without appointment of a personal representative by filing a petition and an SCAO-approved testimony form sufficient to establish the decedent's domicile at the time of death and the identity of the interested persons. MCR 5.308(B)(2)(a); *see* SCAO forms PC 553 (Petition to Determine Heirs, Separate Proceedings), PC 565 (Testimony to Identify Heirs). The total filing fee for the petition is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a).

The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs, and the petitioner must serve notice of hearing on them. MCR 5.125(C)(3), .308(B)(2)(b). Personal and electronic service under MCR

1.109(G)(6)(a) must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

If an interested person's address or whereabouts is not known, the petitioner must serve notice on that person by publication. MCR 5.308(B)(2)(b). This requires that the petitioner file an affidavit or a Declaration of Inquiry (SCAO form PC 617), which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. As provided by MCR 5.106(A), publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3). However, in determination of heirs proceedings, the court may require other publication if it deems necessary. MCR 5.308(B)(2)(b).

If the existence of interested parties is unknown, the publication process of service noted above is available. In such an instance, the attorney general must also be served. MCR 5.125(A) The attorney general must be served whenever the decedent in an action is not survived by any known heirs. *See* Alan A. May & Barbara Andruccioli, *Determination of Heirs*, Michigan Prob & Est Plan J, Winter 2004, at 9.

If notice and proofs are sufficient, the court must enter an order determining

- the decedent's date of death,
- the decedent's domicile at the time of death,
- whether the decedent died intestate, and
- the names of the heirs.

See SCAO form PC 554 (Order Determining Heirs, Separate Proceedings). If there are no further requests for relief and no appeal, the court may close its file. MCR 5.308(B)(2)(c), (d).

B. Identity of Heirs

§3.5 *Heir* is defined as a person that is entitled under the laws of intestate succession to a decedent's property. MCL 700.1104(n). Intestate succession is governed by MCL 700.2101–.2114. An heir must survive the decedent by 120 hours; otherwise, the heir is considered to have predeceased the decedent. *Leete v Sherman (In re Estate of Leete)*, 290 Mich App 647, 803 NW2d 889 (2010); MCL 700.2104. See exhibit 1.4 for a list of heirs under the RPC and EPIC.

Note that a decedent by will may expressly exclude or limit the right of an individual or class to succeed to the decedent's property that passes by intestate succession. MCL 700.2101(2).

Surviving spouse. The surviving spouse is an heir who is entitled to the intestate share (by year of death, as adjusted for inflation) listed in exhibit 1.1, the inflation adjustment table.

A surviving spouse does not include

- an individual who was divorced from the decedent or whose marriage to the decedent was annulled unless the individual and the decedent were remarried to each other at the time of death (a decree of separation that does not terminate the marriage does not have the same effect);
- an individual who, following an invalid divorce or annulment, participated in a marriage ceremony with someone else;
- an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights;
- an individual who was living in a bigamous relationship with another individual at the time of the decedent's death; or
- an individual who for one year or more before the decedent's death
  - was willfully absent from the decedent,
  - deserted the decedent, or
  - willfully neglected or refused to provide support for the decedent if required to do so by law.

MCL 700.2801.

Willfully absent. "Willfully absent" is the intentional complete and continuing emotional and physical absence from the deceased spouse in the year or more before the decedent's passing. *In re Estate of Erwin*, 503 Mich 1, 21, 921 NW2d 308 (2018) (overruling *Lovett v Peterson (In re Estate of Peterson)*, 315 Mich App 423, 889 NW2d 753 (2016), to the extent it defined *willfully absent* as physical absence only). The burden of proving that a spouse is willfully absent is on the person challenging the individual's status as a surviving spouse. *Erwin,* 503 Mich at 17, 24–25 (party challenging surviving spouse status under MCL 700.2801(2)(e)(i) need not show that spouse intended to dissolve marriage, only that surviving spouse intended to be absent from decedent spouse). Under MCL 700.2801(2)(e)(i), to establish that a decedent's spouse is not entitled to the benefits of a "surviving spouse," a challenging party must show, under the totality of the circumstances, (1) that the surviving spouse was completely absent from the decedent spouse, (2) that this absence was for a continuous period of one year or longer before the decedent's death, and (3) that the surviving spouse acted with a specific intent to be absent from the decedent spouse. *In re Estate of Von Greiff*, 509 Mich 292, 984 NW2d 34 (2022).

The court in *Von Greiff* further held that a wife's filing of a petition for divorce one year or more before her husband's death did not categorically mean she was

not "willfully absent" from her husband for a period of one year or more before his death. Instead, filing for divorce, and the direct or indirect communications that may arise during the divorce proceedings, created a rebuttable presumption that the wife was not willfully absent from her husband for a period of one year or more before his death. *Id.*

Desertion. "[A]n individual deserts his or her spouse within the meaning of MCL 700.2801(2)(e)(ii) if he or she physically leaves the marital home with the intent never to return and the spouse dies more than a year later." *Erwin,* 503 Mich at 13.

Willfully neglected. An individual willfully neglects a spouse for the purpose of MCL 700.2801(2)(e)(iii) if that individual intentionally fails or refuses to pay legally required separate maintenance for the year or more before the spouse's death. *Erwin,* 503 Mich at 14.

Other heirs. The part of the intestate estate not passing to the surviving spouse (all of it, if there is no surviving spouse) passes

- to the decedent's descendants by representation, or, if none,
- to the decedent's parents equally if both survive or to the survivor, or, if none,
- to the descendants of the decedent's parents, or of either of them, by representation, or, if none,
- ½ to the paternal grandparents or their descendants by representation and ½ to the maternal grandparents or their descendants by representation. If there is no survivor on either the paternal or the maternal side, the entire estate passes to the relatives on the other side.

MCL 700.2103. Note that heirs must survive the decedent by 120 hours in order to take. MCL 700.2104. An individual in gestation at the decedent's death is treated as living at the time if the individual lives for at least 120 hours after birth. MCL 700.2108. Children conceived via in vitro fertilization after the death of the father are not heirs. *Mattison v Social Sec Comm'r (In re Certified Question)*, 493 Mich 70, 825 NW2d 566 (2012). If there are no surviving heirs, the intestate estate passes to the State of Michigan. MCL 700.2105.

An individual's *descendants* include all descendants of all generations, with the relationship of parent and child at each generation being determined according to MCL 700.2114. MCL 700.1103(k). MCL 700.2114 provides that an individual is the child of the individual's natural parents regardless of their marital status. The parent-child relationship may be established as follows:

- A child born or conceived during a marriage (including an attempted marriage that is void) is presumed to be the child of both the husband and wife (including a child conceived by assisted reproductive technology unless the husband's lack of consent is shown by clear and convincing evidence). Only the presumed father may disprove this presumption, and this right ends at the presumed father's death. MCL 700.2114(1)(a), (5); *see Estate of Casey v Keene*, 306 Mich App 252, 856 NW2d 556 (2014) (death of presumed

father prevented establishment of paternity by any of the alternative methods in MCL 700.2114(1)(b)(i)–(vi)).

- A child who is not conceived or born during a marriage will be considered "born in wedlock" if the parents marry after the child's conception or birth. MCL 700.2114(1)(c).
- A child born out of wedlock, or born during a marriage but not the issue of that marriage, is considered the natural child of a man if
  - the man joins with the child's mother to complete an acknowledgment of parentage pursuant to the Acknowledgment of Parentage Act;
  - the man joins the child's mother in a written request for a correction of the child's birth certificate that results in issuance of a substituted birth certificate;
  - the man and child have established a mutually acknowledged relationship of parent and child that begins before the child attains age 18 and continues until the death of either;
  - the man is determined to be the child's father and an order of filiation is entered pursuant to the Paternity Act (the Paternity Act does not authorize a court to order any person other than a mother, child, and alleged father to provide DNA samples to establish paternity to determine intestate succession, *see In re Estate of Seybert*, No 355647, ___ Mich App ___, ___ NW2d ___ (Jan 20, 2022));
  - the court with jurisdiction over probate proceedings determines that the man is the child's father, using the standards and procedures established under the Paternity Act, MCL 722.711–.730, *see Bierkle v Umble (In re Estate of Koehler)*, 314 Mich App 667, 888 NW2d 432 (2016); or
  - the man is determined to be the father in an action under the Revocation of Paternity Act, MCL 722.1431 et seq.

MCL 700.2114(1)(b). MCL 700.2114(1) uses the terms "husband," "woman," and "mother"; however, the U.S. Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015), guaranteeing the right to marry to same-sex couples, will likely result in statutory changes. The Michigan Law Revision Commission will be reviewing the statutes affected by the Supreme Court's decision and making recommendations to the legislature.

There is no requirement that a child be a biological child of a father for the child to be considered the natural child of a father under MCL 700.2114(1)(b). *Asbury v Custer (In re Estate of Daniels)*, 301 Mich App 450, 837 NW2d 1 (2013).

An adopted child is the child of the person's adoptive parent or parents and not of the person's natural parents, except that adoption of a stepchild has no effect on either the relationship between the child and the stepparent's spouse or on the right of the child to inherit from or through the other natural parent. Under this circumstance, a child is an heir of both the person's natural parent and adoptive parent. In all other scenarios, once a parent's rights have been permanently terminated, a child is not an heir of the person's natural parent. MCL 700.2114(2), (3).

A natural parent and relatives of the natural parent may not inherit from or through a child unless the parent has openly treated the child as the person's child and has not refused to support the child. MCL 700.2114(4); *Turpening v Howard (In re Estate of Turpening)*, 258 Mich App 464, 671 NW2d 567 (2003); *see Bierkle* (MCL 700.2114(4) does not apply to posthumous child).

A relative by the half blood inherits the same share the person would have inherited if related by the whole blood. MCL 700.2107. However, an individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that entitles the individual to the larger share. MCL 700.2113.

If a deceased individual's descendants are entitled to take an intestate share by *representation,* the share is divided into as many equal shares as the total of the surviving descendants in the generation nearest to the individual that contains one or more surviving descendants and the deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the individual. MCL 700.2106.

Effect of lifetime gifts and loans. Property that a decedent gave during life to an heir is treated as an advancement against the heir's intestate share only if the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement, or the writing or acknowledgment otherwise indicates that the gift is to be taken into account in computing the heir's intestate share.

A debt owed to a decedent is not charged against the intestate share of any heir except the debtor. MCL 700.2110.

Effect of homicide, abuse, neglect, or exploitation by heir. An heir who feloniously and intentionally kills the decedent forfeits all benefits with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, a family allowance, and exempt property. This proscription from inheritance includes an heir convicted of voluntary manslaughter. *Cook v Nale (In re Estate of Nale)*, 290 Mich App 704, 803 NW2d 907 (2010). If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the person's intestate share. MCL 700.2803(1).

An individual who is convicted of committing abuse, neglect, or exploitation of the decedent also forfeits rights to a decedent's estate. MCL 700.2803(1). *Abuse, neglect, or exploitation* is defined in MCL 700.2802(a). But note MCL 700.2803(7), which allows such a person to retain those rights if the decedent indicated a specific intention to allow the individual to receive the estate or property after the date of the conviction by executing a governing instrument to that effect.

III. Examination of Decedent's Safe Deposit Box

§3.6 Before a personal representative is appointed, any interested person may petition the probate court to open a safe deposit box in the county where the box is located (i.e., where the probate court has jurisdiction to look for a will or burial plot deed). MCL 700.2517(2)(a); *see* SCAO form PC 551 (Petition and Order to Open Safe-Deposit Box to Locate Will or Burial Deed). The filing fee is $10. *Id. Interested person* is defined to include an heir, a devisee, a child, a spouse, a creditor, a beneficiary, an incumbent fiduciary, and any other person that has a property right in or claim against the estate of a decedent; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. MCL 700.1105(c).

If it appears that a safe deposit box in the court's jurisdiction may contain a will or burial plot deed, the probate judge may issue the order at once without notice. Once the order has been issued, the box may be opened in the presence of an officer or authorized employee of the bank. MCL 700.2517(2)(a). All those in attendance must sign a certificate stating whether a will or burial deed was found in the box and that no other items were removed. The approved certificate is the upper portion of the Safe Deposit Box Certificate and Receipt. *See* SCAO form PC 552. Items contained in the safe deposit box other than the will or burial plot deed may not be removed from the box.

The certificate and any will or burial plot deed found in the box are to be delivered to the probate register within seven days by the person named in item 3 of the petition, PC 551. The register issues a receipt for these materials to the bank where the box was found. The approved form of the receipt is the lower portion of SCAO form PC 552, Safe-Deposit Box Certificate and Receipt.

Note that a personal representative, once appointed, has full access to the box and does not need to use this procedure. MCL 700.2517(2)(b). A surviving joint lessee also has full access to the box. MCL 700.2517(2)(c).

IV. Wrongful Death Settlements

A. No Action Pending in Circuit Court

1. Petition to Settle Claim and to Distribute Proceeds

§3.7 If a wrongful death action is not pending and the parties have reached an agreement to settle the matter, the probate court may approve the settlement. MCL 600.2922(9), 700.3924. The personal representative must petition the court in writing for approval of the settlement and authority to distribute the proceeds and obtain a hearing date. MCL 700.3924(2)(a). If there is no personal representative, one must be appointed.

2. Notice Requirements and Service of Process

§3.8 Notice of hearing on the petition to approve the settlement must be given to the decedent's heirs, claimants with a proper claim that remains unpaid whose interests are affected, and all other persons who may be entitled to wrongful death damages. MCL 700.3924(2)(b); MCR 5.125(B)(1), (C)(13). Persons who may be entitled to wrongful death damages include the following:

- the decedent's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the decedent, those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the decedent's date of death (see §3.5)
- the children of the decedent's spouse
- devisees under the decedent's will, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a testamentary trust, those who are designated in the will as persons who may be entitled to wrongful death damages, and the beneficiaries of the decedent's living trust if there is a devise to that trust in the will

MCL 600.2922(3).

The notice of hearing must include the following:

- the name and address of the personal representative and of the personal representative's attorney
- a statement that the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing and that failure to present a claim for damages within the time provided bars the person from making a claim to any of the proceeds

MCL 700.3924(2)(b).

A person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the petition for distribution of the proceeds. Failure to present a timely claim for damages bars the person from making a claim to any of the proceeds. MCL 700.3924(2)(f). Note that being barred from making a claim for proceeds does not bar a person from receiving a distribution of proceeds under the settlement agreement. *See In re Estate of Kubiskey*, 236 Mich App 443, 600 NW2d 439 (1999).

Practice Tip

- *Note that the interested persons for estate and wrongful death proceedings are not always the same. The list of persons who have to be given notice and are entitled to make a claim for wrongful death damages is more expansive than the individuals under EPIC (e.g., heirs, devisees) who have to be notified in decedent estate cases.*

3. Guardians ad Litem

§3.9 If an interested person is a minor, is an incapacitated individual for whom a fiduciary is not appointed, or has disappeared, the court must appoint a fiduciary or guardian ad litem, and the notice discussed in §3.8 must be given to the fiduciary or guardian ad litem. MCL 700.3924(2)(c). Check with the court regarding its particular policies and practices.

Before the date set for hearing, the guardian ad litem must conduct an investigation. The guardian ad litem must then file a written report of the investigation and recommendation with the court at least 24 hours before the hearing or at such other time specified by the court, or the guardian ad litem may make a report in

open court. The guardian ad litem need not appear personally at the hearing unless the court directs otherwise. MCR 5.121(C).

The report may be received by the court and relied on to the extent of its probative value even if it is not admissible under the Michigan Rules of Evidence. The report may be examined and controverted by any interested person. The subject of the report may cross-examine the guardian ad litem on request, and other interested persons may cross-examine the guardian ad litem if the guardian ad litem is reasonably available. MCR 5.121(D).

Appointment of an attorney as guardian ad litem does not create an attorney-client relationship, and communications between the guardian ad litem and the interested person are not privileged. The guardian ad litem is charged with informing the person that the guardian ad litem represents of this lack of privilege. Note that if the guardian ad litem is later appointed as the person's attorney, there will be an attorney-client privilege, and that privilege relates back to the date of the appointment of the guardian ad litem. MCR 5.121(E).

4. Order Distributing Proceeds

§3.10 After a hearing on the personal representative's petition, the court must order payment from the wrongful death proceeds of the decedent's reasonable medical, hospital, funeral, and burial expenses for which the estate is liable. The proceeds may not be applied to the payment of any other charges against the decedent's estate. The court must then enter an order distributing the remaining proceeds to those persons designated in MCL 600.2922(3) (see §3.8) who suffered damages and to the decedent's estate for compensation for conscious pain and suffering, if any, in the amount the court considers fair and equitable considering the relative damages sustained by each of the persons and the decedent's estate. MCL 700.3924(2)(d).

If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated individual, and all of the persons entitled to the proceeds execute a sworn stipulation or agreement in writing in which each person's portion of the proceeds is specified, the court order must be entered in accordance with the stipulation or agreement. MCL 700.3924(2)(e).

B. Action Pending in Circuit Court

§3.11 If a wrongful death action is filed, it must be brought in the circuit court by the personal representative of the decedent's estate. MCL 600.2922(2). If a personal representative has not already been appointed, it is necessary to get one appointed by the probate court before the circuit court action may be brought. Probate court involvement is also required if a guardian or conservator is needed for a minor or incapacitated individual who is a claimant for wrongful death proceeds in the circuit court action. If the action is settled, the approval of the settlement, as well as the determination of who is to share in the proceeds, is made in circuit court. MCL 600.2922(5). However, if the settlement provides for the creation of a trust for a minor or a legally incapacitated individual, the circuit court determines the amount to be paid to the trust, but the probate

court must approve the terms of the trust. MCR 2.420(B)(5). Note that if an interested person is a minor or legally incapacitated and has a guardian or conservator, no judgment or dismissal may be entered by the circuit court until it receives written verification from the probate court that it has passed on the sufficiency of the bond and any required bond has been filed with the probate court. MCR 2.420(B)(3); MC 95, Request for Approval of Bond and Notice.

A personal representative bringing a wrongful death action represents the interests of the estate; therefore, the personal representative must be represented by an attorney. A personal representative filing a wrongful death action without an attorney violates the unauthorized practice of law statute, MCL 600.916. *Shenkman v Bragman*, 261 Mich App 412, 682 NW2d 516 (2004).

V. Establishing a Decedent's Death in Unusual Circumstances

A. Evidence Necessary to Establish Death

§3.12 A certified copy of a death certificate or other similar record or report of a governmental agency is prima facie evidence of a decedent's identity and the fact, place, date, and time of a decedent's death. MCL 700.1207. If a certified copy of a death certificate or other similar report of a governmental agency is absent or lacking, the fact of death may be established by clear and convincing evidence, including circumstantial evidence. Under this section, death may also be established pursuant to the Determination of Death Act, MCL 333.1031–.1034, or by any clear and convincing evidence, including circumstantial evidence.

B. Petition to Establish Death by Accident or Disaster

§3.13 In cases of death by accident or disaster where the decedent's remains are unrecoverable or unidentifiable, a petition to establish the death of an accident or disaster victim may be filed beginning 63 days after the accident or disaster either by

- the medical examiner, sheriff, or prosecutor of the county where the accident or disaster occurred or, if not in Michigan, the county of the presumed decedent's domicile; or
- the presumed decedent's spouse, next of kin, heir, devisee, nominated personal representative, creditor, or debtor.

The petition must set forth the facts and circumstances concerning the accident or disaster, the reasons for the belief that the presumed decedent died, that the presumed decedent is missing or unidentifiable, and the names and addresses of the presumed decedent's heirs. *See* SCAO form PC 549 (Petition to Establish Death of Accident or Disaster Victim).

Venue is in the county where the accident or disaster occurred, if in Michigan. If the incident took place on the Great Lakes or connecting waters, venue is in the county adjacent to the scene of the accident or disaster. If the incident did not take place in Michigan or adjoining waters, venue is in the county of the presumed decedent's domicile. MCL 700.1208(1). After notice and a hearing, the court

issues an order establishing the date and time of the decedent's death. *See* SCAO form PC 550 (Order Establishing Death of Accident or Disaster Victim).

C. Presumption of Death After Unexplained Five-Year Absence

§3.14 If death is not established by any of the means provided by MCL 700.1207 or by the procedure to establish the death of an accident or disaster victim in MCL 700.1208(1), a presumption of death arises at the end of an unexplained absence of five years. MCL 700.1208(2). During the five-year absence, a conservatorship may be established to manage the missing person's assets. MCL 700.5401(3)(a). At the end of the five-year absence, a formal testacy or appointment proceeding may be commenced. Note that in such a proceeding, a notice—that a determination of presumed death based on absence is sought—must be published once a month for four consecutive months before the hearing on the petition. MCR 5.106(A).

VI. Funeral and Burial Arrangements

A. Priority for Making Decisions

§3.15 EPIC gives priority for making funeral and burial arrangements to a funeral representative designated under MCL 700.3206(2). MCL 700.3206(3). If there is no funeral representative designated, the priority of authority to make funeral and burial arrangements for a decedent is given to the surviving spouse (see MCL 700.2801(3)), followed by children, grandchildren, parents, grandparents, siblings, a descendant of the decedent's parents, or a descendant of the decedent's grandparents. *Id.* If there is no funeral representative or the funeral representative cannot be found or chooses not to exercise these rights, and no next of kin can be found or the next of kin chooses not to exercise these rights, the authority falls to the decedent's guardian (if applicable), the personal representative or nominated personal representative, a special personal representative, or the medical examiner, in that order. MCL 700.3206(4), (6)–(10). Note that special rules of priority apply when the decedent was a service member and certain other requirements are met under MCL 700.3206(3).

If the next of kin in the order established under MCL 700.2103 for intestate succession cannot be located or is unwilling to take responsibility for funeral arrangements and there is no funeral representative or guardian, the court may appoint a special personal representative under MCL 700.3614(c) or a special fiduciary under MCL 700.1309 to supervise the disposition of the body of an intestate decedent who dies without heirs and without sufficient assets to pay for a funeral or burial. MCL 700.3206(8). This special personal representative may be permitted to make arrangements with a funeral home, secure a burial plot, obtain veteran's or pauper's funding, and determine the disposition of the body by burial or cremation. The bond requirements may be waived for such a personal representative. A county's public administrator may be appointed as the special personal representative only if the person is willing to serve.

B. Petition to Determine Priority

§3.16 To resolve a disagreement between two or more individuals who share the power and right to make funeral and burial decisions under MCL 700.3206(1) or to rebut the presumption given to certain individuals to make such decisions, a court hearing may be held. MCL 700.3206(5), .3207. A petition may be filed by

- an individual who has the right and power to make funeral and burial arrangements under MCL 700.3206(1);
- a funeral establishment that has custody of the decedent's body; or
- an individual other than a person with priority under MCL 700.3206(3)–(5) (a funeral representative, a surviving spouse, children, grandchildren, parents, grandparents, siblings, a descendant of decedent's parents, a descendant of decedent's grandparents) or acting under MCL 700.3206(6), (7), (8), or (9) (the personal representative or nominated personal representative, decedent's guardian, a special personal representative or special fiduciary, or medical examiner).

MCL 700.3207(1). Venue is in the county where the decedent was domiciled at the time of death. The probate court must set a date for hearing no later than seven business days after the date a petition is filed. Unless the court orders that service on these individuals is not required, notice of the petition must be served on the next of kin who have the highest priority under MCL 700.3206(2). MCL 700.3207(2)–(3). The court may waive or modify the notice and hearing requirements under certain circumstances. MCL 700.3207(3).

The court will consider the following in deciding a petition to determine priority for making funeral and burial arrangements:

- the reasonableness and practicality of the funeral and burial arrangements proposed by the petitioner in comparison with the arrangements proposed by the individuals with the rights and powers described under MCL 700.3206(1)
- the nature of the relationship to the decedent of the petitioner compared with the relationship to the decedent of individuals with the rights and powers under MCL 700.3206(1)
- whether the petitioner is ready, willing, and able to pay the costs of the arrangements
- whether the decedent executed a funeral representative designation
- if married at the time of death, whether decedent's spouse was physically or emotionally separated from the decedent for a period of time that clearly demonstrates an absence of affection, trust and regard

MCL 700.3207(5).

VII. Disappeared Heirs

A. Notice by Publication

§3.17 If an interested person's address and whereabouts are unknown, notice is given by publication. MCL 700.1401(1)(c). A party seeking permission to serve by publication must follow the procedure of MCR 5.105(A)(3). This requires the filing of an affidavit or Declaration of Intent to Give Notice by Publication (SCAO form PC 617), which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. In formal proceedings, the publication must take place before the hearing. MCL 700.3403(2). The notice to creditors required under MCL 700.3801 can be combined with the notice of hearing to those interested persons whose whereabouts and addresses are unknown. After an informal appointment, the publication of notice coincides with the notice of appointment. MCR 5.304(B). However, once a missing interested person has been served by publication, it is not necessary to serve the person by publication again. *See* MCR 5.105(A)(3).

B. Distribution of Inheritance or Bequest

1. Deposit with County Treasurer or Distribution with Residue

§3.18 Estate administration can proceed without the missing interested person and, if at the time of distribution, the interested person still cannot be located, the funds may be deposited with the county treasurer. MCL 700.3916(1)

As an alternative, in the case of funds in the amount of $250 or less, the funds may be distributed as part of the residue of the estate. MCL 700.3916(2).

The persons interested in a proceeding for assignment and distribution of the share of an absent apparent heir or devisee are

- the devisees of the decedent's will whose devise remains unsatisfied,
- the decedent's heirs, if the decedent did not leave a will,
- the devisees of the absent person's will whose devise remains unsatisfied, and
- the presumptive heirs of the absent person.

MCR 5.125(B)(2), (C)(10).

2. Distribution to Conservator

§3.19 As an alternative to the procedure discussed in §3.18, the court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

- the individual is unable to manage property and business affairs effectively because the individual has disappeared
- the individual has property that will be wasted or dissipated unless proper management is provided

MCL 700.5401(3). See chapter 9.

4
Civil Actions

Summary of Civil Actions

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Civil actions in probate court. §4.1.

Civil actions in probate court include the following:

- an action against another filed by a fiduciary
- an action filed by a claimant after notice that the claim has been disallowed

All other probate court actions are proceedings.

A proceeding is commenced by filing a petition in the probate court, and the probate court rules (Chapter 5 of the Michigan Court Rules) apply. A civil action is commenced by filing a summons and complaint, and the general rules of court, Chapter 2 of the Michigan Court Rules, apply.

Jurisdiction and venue. §4.2.

The probate court has exclusive jurisdiction over actions that involve the settlement of a deceased individual's estate; the settlement of a trust; guardianship, conservatorship, or protective proceedings; and settlement of the accounts of a fiduciary. The probate court has concurrent jurisdiction over

- actions against a distributee of a fiduciary of an estate to enforce liability that arises because the estate was liable upon a claim or demand before distribution of the estate;
- claims by or against a fiduciary for the return of property; and
- contract actions by or against an estate, trust, or ward.

Unless there is a specific venue rule for the type of action, venue is in the county where a defendant resides, has a place of business, or conducts business, or where the registered office of a defendant corporation is located, or if none of the defendants meets one of these criteria, the county where a plaintiff resides or has a place of business, or where the registered office of a plaintiff corporation is located.

Initial pleadings. §§4.3–4.7.

Complaint and summons.

A complaint must be legibly typewritten or printed in ink and must contain a full caption. The allegations must be made in numbered paragraphs. Each paragraph must be limited to a single set of circumstances, and each claim for relief that is founded on a separate transaction or occurrence must be stated in a separately numbered count. If a claim is based on a written instrument, a copy of the instrument must be attached to the complaint as an exhibit unless it is unavailable.

The statement of claim must state the facts on which the pleader relies in stating the cause of action and include the specific allegations that are reasonably necessary to inform the adverse party of the nature of the action. It must also contain a demand for

judgment for the relief sought. Allegations regarding jurisdiction and venue should always be included.

The civil complaint summons must be filed with the complaint and issued by the court clerk.

Service of process.

Service of the summons and a copy of the complaint must be made on the defendant within 91 days after the complaint is filed; otherwise, the action is deemed automatically dismissed without prejudice. Service generally may be made by any legally competent adult who is not a party or an officer of a corporate party.

Personal service is made by delivering a summons and copy of the complaint to the defendant personally or by sending them to the defendant by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Substituted service may be made without a court order on nonresident individual defendants, minors, legally incapacitated or protected individuals, and defendants doing business under an assumed name.

Service by publication may be made only with court authorization and the court's determination of whether service must also be made by registered mail. The court may direct an alternative method of service if normal methods have not been effective.

The party requesting that the summons be issued is responsible for filing proof of service.

Answer.

The defendant has 21 days after being served to file an answer or a responsive motion. If the defendant was served outside of Michigan or process was sent by registered mail, the defendant has 28 days to respond.

In answering the complaint, the defendant must, with respect to each of the allegations,

- state an explicit admission or denial,
- plead no contest, or
- state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of the allegation (which acts as a denial).

All allegations that are not denied are considered admitted except for allegations regarding the amount of damages or the nature of the relief demanded. The answer must also assert the party's defenses against the claim.

A counterclaim, cross-claim, and third-party complaint must be filed along with the answer. An answer to such a claim must be filed within 21 days after service.

Pretrial procedures. §§4.8–4.14.

Status conferences and scheduling orders.

Most courts hold a status conference early in the litigation to enter a scheduling order setting time limitations for the processing of the case and establishing dates for the

beginning or completion of future events, such as the completion of discovery. A scheduling order may be entered ex parte.

Discovery.

Subject to the considerations listed in the applicable court rule, parties may obtain discovery of any matter, nonprivileged, relevant to a party's claims or defenses, and proportional to the needs of the case.

A party must provide initial disclosures to the other parties in the matter.

Absent a particular rule, disclosures and discovery materials may not be filed with the court unless

- they are to be used in connection with a motion, in which case they must either be filed separately or be attached to the motion or an accompanying affidavit;
- they are to be used at trial, in which case they must either be filed or be made into an exhibit; or
- the court orders them to be filed.

Attorneys who receive discovery requests that seek privileged information or that in some way result in unfair annoyance, embarrassment, oppression, or undue burden or expense, may seek a protective order from the court within the time for responding to the discovery requests.

Attorneys who do not receive disclosures or responses to discovery requests, or who are not satisfied with the responses they receive, may file a motion to compel responses. Under appropriate circumstances, if a party fails to provide initial disclosures, permit or submit to discovery, or obey a court order compelling discovery, the court may order sanctions. The sanction most commonly imposed is the assessment of costs and fees.

Alternative dispute resolution.

At any time, after consultation with the parties, the court may order that a case be submitted to an alternative dispute resolution (ADR) process, including a settlement conference, case evaluation, or mediation.

In case evaluation, cases are evaluated by a panel of three lawyers at an informal hearing. Before the hearing, the parties submit written mediation summaries. At the conclusion of the hearing, the panel renders a case evaluation award, representing the evaluators' collective opinion of the settlement value of the case. The parties must then either accept or reject the case evaluation award. If both parties accept it, judgment is entered in accordance with the evaluation unless the award is paid within 28 days after notification of the acceptances, in which case the court dismisses the case with prejudice. If one or both parties reject the award, the case proceeds to trial.

A similar settlement facilitation technique, initiated by a party, is an offer of judgment. If a party accepts an offer of judgment, the court enters judgment accordingly. A party who does not accept an offer of judgment is liable for sanctions if the verdict is more favorable to the other party than the average offer. With offer of judgment sanctions, the court has discretion "in the interest of justice" to refuse to award attor-

ney fees as an offer of judgment sanction. Offer of judgment sanctions may not be awarded in a case that has been submitted to case evaluation unless the case evaluation award was not unanimous.

In mediation, a neutral third party facilitates communication between the parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. Mediators have no authoritative decision-making power. Mediators may be selected by the parties, or if the parties fail to select a mediator, by the court from its approved list. The order referring the case for mediation must specify the time in which mediation is to be completed. Within 7 days after the mediation is completed, the mediator must advise the court of the date it was completed, who participated, whether settlement was reached, and whether further ADR proceedings are contemplated. If the case was settled through mediation, within 21 days after mediation is completed, the attorneys must prepare and submit to the court the appropriate documents to conclude the case. Statements made during mediation and communications between the parties or counsel and the mediator relating to the mediation are confidential.

Parties may also submit a case to arbitration under the Uniform Arbitration Act (UAA), MCL 691.1681–.1713, or pursuant to MCR 3.602, which pertains to "all other forms of arbitration."

Pretrial motions.

A motion must be signed by the party or the attorney, which certifies that the motion conforms to the court rules and is not brought for reasons of delay or any other improper purpose. Motions need not be accompanied by affidavits unless otherwise specifically required by court rule or statute, but any motion that presents an issue of law must be accompanied by a brief. A motion, notice of hearing, and any supporting brief or affidavits must be served at least 9 days before the time set for hearing if served by mail or at least 7 days before the hearing if served by delivery or by electronic service on the attorney or party.

An opposing party may respond to a motion in writing. Any response, including a brief or affidavits, must be served at least 5 days before the hearing if served by mail or at least 3 days before the hearing if served by delivery on the attorney or party.

Common pretrial motions include

- motions for temporary restraining orders or preliminary injunctions,
- motions for summary disposition, and
- motions to compel discovery.

Trial. §§4.15–4.19.

If a jury is demanded, after the jury is sworn and before evidence is taken, the judge orally instructs the jury with preliminary instructions that are intended to enable the jury to understand the proceedings and the evidence and that explain procedure and give specific admonitions. The judge may also instruct the jury on a point of law or give a cautionary instruction at any time during the trial.

Following the judge's preliminary instructions to the jury, the attorney for the plaintiff (if the plaintiff bears the burden of proof) may make an opening statement. Immediately after that or immediately before the defendant introduces evidence, the attorney for the defendant makes an opening statement. The court may limit the time allowed for opening statements and closing arguments. Judges frequently dispense with opening statements and closing arguments in bench trials.

Motions made during trial can be, and often are, oral. Common motions during trial include the following:

- motions to amend pleadings to conform to the evidence admitted at trial
- motions for adjournment
- motions regarding the admissibility of specific evidence
- motions for rehearing or reconsideration of a motion
- motions for directed verdict

After the close of all the evidence, the parties may rest their cases with or without final arguments. The plaintiff is entitled to open the argument and, if the defendant makes an argument, to make a rebuttal argument. Although the court has broad power and discretion concerning the conduct of the argument before the jury, it is an abuse of discretion and reversible error to completely deny a closing argument to a party who requests it.

The judge's charging instructions to the jury may be given before or after closing arguments, or at both times, in the court's discretion. The Model Civil Jury Instructions (formerly the Standard Jury Instructions) must be given when they apply, provide an accurate statement of the law, and are requested by a party. The court may give other instructions on applicable law not covered by a Model Civil Jury Instruction as long as those instructions are modeled after the style of the standard instructions. In some cases, *supplemental* instructions may be given to the jury after deliberations commence, most often in response to a request or inquiry by the jury.

Jury reform, implemented with amendments to the Michigan Court Rules effective September 1, 2011, expand the opportunity for judges to advance jurors' understanding of the cases and controversies before them.

The jury may be asked to complete a special verdict form rather than to render a general verdict. Special verdicts require the jury to answer questions of fact that are essential to the cause of action at issue.

Judgments. §§4.20–4.21.

A written judgment grants relief in favor of the party that is entitled to the relief. The date that the judgment is signed by the court is the date of entry. The court may sign the judgment when it grants the relief requested, when the parties approve as to form a judgment that comports with the court's ruling, when a proposed judgment is presented to the court clerk for the judge's signature if no party objects within 7 days of the notice of presentation, or when a special hearing for settlement of the judgment is held. Statutory interest must be added to a money judgment.

Posttrial motions. §4.22.

All posttrial motions must be made in writing and follow the requirements for written motions described above with respect to pretrial motions. Common posttrial motions include the following:

- motions for a new trial
- motions for judgment notwithstanding the verdict (JNOV)
- motions for relief from judgments or orders

Most posttrial motions must be made within 21 days from the date of the judgment, although motions for relief from judgment on certain grounds may be made within one year from the date of the judgment.

Recovery of costs and fees. §4.23.

The prevailing party in an action is entitled to recover costs unless prohibited by statute or court rule or directed otherwise by the court for reasons stated in writing and filed in the action.

Recoverable costs include the following:

- fees for officers and witnesses
- matters made taxable by statute or court rule
- fees for any newspaper publication required by law
- reasonable expenses for printing required briefs and appendixes in the supreme court, including briefs and motions for leave to appeal
- reasonable costs of any bond required by law, including a stay of proceeding or appeal bond
- any attorney fees authorized by statute or court rule

Attorney fees are recoverable as sanctions against the other party if the party's action or defense is frivolous or if an attorney or party signed a pleading in violation of the certification requirement.

I. Civil Actions in Probate Court (Actions Versus Proceedings)

§4.1 Two forms of action take place in probate court: proceedings and civil actions. MCR 5.101(A). The following actions must be titled civil actions:

- an action against another filed by a fiduciary and
- an action filed by a claimant after notice that the claim has been disallowed.

MCR 5.101(C). All other probate court actions are proceedings. Note that a surcharge action filed by conservator against a fiduciary is properly considered a proceeding. *In re Seklar*, No 330829 (Mich Ct App Aug 8, 2017) (unpublished).

Practice Tip

- *Note that an action on a creditor's claim must be a civil action if the claim has been disallowed, but it is a proceeding if it is filed either before the claim is disallowed or if the claim is allowed. For instance, a creditor might petition for payment of a properly presented claim that has been allowed but there has been some delay in payment.*

A proceeding is commenced by filing a petition in the probate court, and the probate court rules (Chapter 5 of the Michigan Court Rules) apply. MCR 5.101(B). The rules applicable to other civil proceedings (Chapters 1 and 2 of the Michigan Court Rules) apply except as modified by the probate court rules. MCR 5.001(A).

A civil action is commenced by filing a summons and complaint, and the general rules of court, Chapter 2 of the Michigan Court Rules (not those of Chapter 5), apply.

Civil actions are litigated with court supervision even if the underlying estate remains unsupervised.

Please note that this chapter provides only a general overview of the rules of civil procedure for civil actions in probate court. For a more detailed analysis of the topics covered in this chapter, see *Michigan Civil Procedure* (Kathleen A. Lang et al eds, ICLE 2d ed).

II. Jurisdiction and Venue

§4.2 The probate court has exclusive jurisdiction over actions that involve the settlement of a deceased individual's estate; the settlement of a trust; guardianship, conservatorship, or protective proceedings; and settlements of the accounts of a fiduciary. MCL 700.1302(b).

The probate court has concurrent jurisdiction with the circuit court over

- actions against a distributee of a fiduciary of an estate to enforce liability that arises because the estate was liable upon a claim or demand before distribution of the estate;
- claims by or against a fiduciary for the return of property; and
- contract actions by or against an estate, trust, or ward.

MCL 700.1303(1)(f), (h), (i).

If the probate court has concurrent jurisdiction over an action that is pending in another court, on the motion of a party and after a finding and order on the jurisdictional issue, the other court may order removal of the action to the probate court and forward to the probate court all the original papers in the action. The purpose is to simplify the disposition of an action involving a decedent's, protected individual's, ward's, or trust estate by consolidating the probate and other related actions in the probate court. MCL 700.1303(2), (3). But note that a case may not be transferred to probate court unless there is a related probate matter pending in probate court.

Venue is determined as follows:

- for actions involving the determination of rights in real or tangible personal property, in the county where the property is located
- for actions involving a probate bond, the county where the bond is filed
- for actions against a governmental unit, the county where the governmental unit exercises or may exercise its authority
- for tort actions, the county where the injury occurred and the defendant resides or conducts business, the injury occurred and the plaintiff resides or conducts business, or the plaintiff and defendant reside or conduct business
- for actions against a court-appointed fiduciary, in the county where the fiduciary was appointed
- for other actions (and for tort actions where none of the above criteria apply), the county where a defendant resides, has a place of business, or conducts business, or where the registered office of a defendant corporation is located, or if none of the defendants meets one of these criteria, the county where a plaintiff resides or has a place of business, or where the registered office of a plaintiff corporation is located

MCL 600.1605, .1611, .1615, .1621, .1629.

Venue, if proper, may be changed on the motion of a party for the convenience of the parties and witnesses or when an impartial trial cannot be held where the action is pending. MCR 2.222. If venue is improper, the court must order change of venue on the timely motion of a defendant or may order a change of venue on its own initiative with notice to the parties and an opportunity to be heard. MCR 2.223. The right to change venue is waived if a timely motion is not made under MCR 2.221.

III. Initial Pleadings

A. Complaint and Summons

§4.3 A complaint must be legibly typewritten or printed in ink, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. MCR 1.109(D)(1)(a), 2.113(A).

The caption of a complaint and any other pleading must include

- the name of the court;
- the names of the parties or title of the action;
- the case number;
- the identification of the pleading;
- the name, address, telephone number, and state bar number of the pleading attorney and each other attorney who has appeared in the action; and
- the name, address and telephone number of a pleading party appearing without an attorney.

MCR 1.109(D)(1)(b). The caption must also contain one of the following statements, from MCR 1.109(D)(2)(a):

> There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.
>
> A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in [this court] / [_____ Court], where it was given case number _____ and was assigned to Judge _____ . The action [remains] / [is no longer] pending.

Practice Tip

- *Most probate clerks want statements in the complaint to support jurisdiction, venue, and MCR 5.101(C) applicability, stating that the plaintiff is a fiduciary, trustee, or claimant whose claim has been disallowed.*

The allegations in a complaint must be made in numbered paragraphs. Each paragraph must be limited to a single set of circumstances, to the extent practicable, and each claim for relief that is founded on a separate transaction or occurrence must be stated in a separately numbered count. MCR 2.113(B). If a claim is based on a written instrument, a copy of the instrument must be attached to the complaint and labeled according to standards established by the SCAO unless the complaint states that the instrument is of public record and reveals its location, the adverse party has it, it is inaccessible to the pleader for a stated reason, or it is unnecessary or impractical for a stated reason. MCR 2.113(C).

The statement of claim must state the facts on which the pleader relies in stating the cause of action and include the specific allegations that are reasonably necessary to inform the adverse party of the nature of the action. It must also contain a demand for judgment for the relief sought. MCR 2.111(B). Allegations regarding jurisdiction and venue should always be included.

Practice Tip

- *While it is not necessary to anticipate a defendant's answer or affirmative defenses, it may be prudent for the plaintiff to address foreseeable defenses in the complaint to forestall the success of a defendant's motion for summary disposition.*

The attorney or the party, if the party is not represented, must sign the complaint. MCR 1.109(E)(2). The signature operates as a certification that the signer

has read the pleading and that, to the best of the person's knowledge and belief formed after reasonable inquiry, the pleading is warranted by law and fact and is not being interposed for an improper purpose. MCR 1.109(E)(5). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). An attorney or party who violates this rule is subject to sanctions. MCR 1.109(E)(6)–(7).

The Summons and Complaint, MC 01, must be filed with the complaint and issued by the probate register.

Filing fee. The total filing fee for commencing a civil action in probate court is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a). The court may waive the fee if the plaintiff is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. There is no fee for filing an answer, brief, or response. The fee for filing a motion is $20. MCL 600.880b(1).

B. Electronic Filing

§4.4 Pursuant to 2015 PA 230, 231, 232, 233, 234, and 235, Michigan is to develop, implement, and fund a statewide e-filing system. The Michigan Court Rules require all courts to implement e-filing and e-service capabilities in compliance with MCR 1.109(G) and State Court Administrative Office standards. Different courts are at different stages with the e-filing requirements, so be sure to research local procedures. Attorneys must electronically file documents in courts where electronic filing has been implemented unless an attorney is exempted because of a disability. MCR 1.109(G)(3)(f).

C. Service of Process

§4.5 Service of the summons and a copy of the complaint must be made on the defendant within 91 days after the summons is issued. MCR 2.102(D). The summons includes essential information about the action, including how long the defendant has to answer the complaint or take other action. *See* MCR 2.102(B). An action is deemed automatically dismissed without prejudice as to any defendant who is not served within the 91 days. MCR 2.102(D). Within that 91 days and on a showing of due diligence, the court may extend the time for service for a period not exceeding one year from the date the summons is issued. MCR 2.102(D).

Effective July 26, 2021, "all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible." Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

Service may be made by any legally competent adult who is not a party or an officer of a corporate party except that

- a sheriff or certain other officers must serve process requiring seizure or attachment of property;

- a sheriff, deputy, police officer, or specially appointed court officer must serve process in civil proceedings requiring the arrest of a person; and
- the person in charge of an institution or someone designated by that person must serve defendants in governmental institutions, hospitals, or group homes.

MCR 2.103.

Personal service may be made by delivering a summons and copy of the complaint to the defendant personally or sending a summons and copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. MCR 2.105(A). Substituted service may be made without a court order as follows:

- on a nonresident individual defendant—by service in Michigan on the defendant's agent, employee, representative, sales representative, or servant or by registered mail addressed to the defendant at the person's last known address
- on a minor—by serving a person having care and control of the minor and with whom the minor resides
- on a legally incapacitated or protected individual—by serving the individual's guardian or conservator
- on a defendant doing business under an assumed name—by serving the person in charge of the defendant's office or business establishment or by registered mail addressed to the defendant at the person's usual residence or last known address

MCR 2.105(B). MCR 2.105 also contains special rules for service on partnerships, associations, private corporations, insurers, governmental bodies, and resident agents.

Service by publication may be made only with court authorization and with the court's determination of whether service must also be made by registered mail. MCR 2.106(B). Publication must be made once a week for three consecutive weeks in a newspaper in the county where the defendant resides, if known, and if not known, in the county where the action is pending.

The court may direct an alternative method of service that is reasonably calculated to give the defendant actual notice of the action and an opportunity to be heard if normal methods have not been effective. MCR 2.105(J).

The party requesting that the summons be issued is responsible for filing proof of service. MCR 2.104(C). If service is made by registered mail, a copy of the return receipt signed by the defendant must be attached to the proof of service. MCR 2.105(A). Service by publication must be proved by filing the publisher's affidavit of publication with the court. MCR 2.106(G).

D. Answer

§4.6 The defendant has 21 days after being served with process to file an answer or a motion responsive to the complaint unless the defendant was served outside Michigan or process was required to be sent by registered mail, in which case the defendant has 28 days to respond. MCR 2.108(A). Unless a motion is filed to extend the time to file a responsive pleading or unless the court rules that no responsive pleading is required, an answer or a motion responsive to the complaint must be timely filed to avoid a default judgment. MCR 2.603(A).

The answer must follow the general rules of pleading set forth in §4.3. In addition, as to each allegation in the complaint, the answer must

- state an explicit admission or denial,
- plead no contest, or
- state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of the allegation (which acts as a denial).

MCR 2.111(C). Each denial must state the substance of the matters on which the pleader relies to support the denial. All allegations that are not denied are considered admitted except for allegations regarding the amount of damages or the nature of the relief demanded. The answer must also assert the defenses the party has against the claim, because any defense that is not asserted in the answer is waived. MCR 2.111(D)–(F).

A counterclaim, cross-claim, and third-party complaint must be filed along with the answer. MCR 2.203(E). The defendant also has the option of filing an answer demanding a reply. MCR 2.110(B)(5). Absent a counterclaim or an answer demanding a reply, the plaintiff has no obligation to file further pleadings.

An answer to a counterclaim, cross-claim, third-party claim, or answer demanding a reply must be filed within 21 days after service. MCR 2.108(A)(4), (5).

Any party seeking a default judgment after entry of a default must identify whether the defaulted party is in the military. This requirement is mandated by the Servicemembers Civil Relief Act (SCRA), 50 USC 3901 et seq., which bars a court from entering a default judgment against a service member on active duty unless the court appoints an attorney to represent the service member. 50 USC 3931. Therefore, to properly enter a default against a nonappearing party, the court must receive an affidavit attesting that the defaulted party is not in the military service. If the court cannot determine whether the defaulted party is in military service, the court may require the defaulting party to post a bond as a condition of a default judgment. 50 USC 3931(b)(3). The SCRA affords a number of other procedural protections to service members, including stays of proceeding. The SCRA completely replaces the former Soldiers and Sailors Civil Relief Act, which had similar requirements.

E. Demand for Jury Trial

§4.7 Any party may demand a jury trial on any issue on which there is a right to a jury trial by filing a written demand for jury trial within 28 days after the filing of an answer or a timely reply. The jury demand must be filed as a separate document. The fee for a jury trial must be paid when the demand is filed. MCR 2.508(B)(1). The fee for a jury trial in probate court cannot exceed $30. MCL 600.857(3).

Unless the party specifies the issues to be tried by a jury, the party is deemed to have demanded a trial by jury of all issues triable. MCR 2.508(C). If a party fails to demand a jury trial and pay the jury fee, the party is deemed to have waived trial by jury. Once a demand for jury trial is made, it may not be withdrawn without the consent of the parties or their attorneys. MCR 2.508(D).

Practice Tip

- *If there is a companion probate proceeding pending in the same court as the civil action, attorneys should make sure that each action is appropriately captioned with the correct file number to avoid having pleadings filed in the incorrect file.*

IV. Pretrial Procedures

A. Status Conferences and Scheduling Orders

§4.8 The court may schedule one or more conferences with the parties. MCR 2.401(A). Courts may hold an early scheduling conference during which the court should consider matters that would facilitate the fair and expeditious disposition of the action. Such matters include determining the propriety of jurisdiction and venue, whether a case is frivolous, the timing of disclosures, the procedures involving expert witnesses, and whether mediation, case evaluation, or another form of ADR is appropriate. For a complete list of matters the court should consider, see MCR 2.401(B)(1). After a conference or at another time a court decides that an order would facilitate the case's progress, the court must enter a scheduling order setting time limitations for future events, such as

- initiating or completing ADR,
- amending pleadings,
- adding parties or filing motions,
- completing discovery,
- exchanging witness lists, and
- scheduling a pretrial conference, settlement conference, or trial.

MCR 2.401(B). More than one scheduling order can be entered. *Id.* For a complete list of matters the court may consider, see MCR 2.401(B)(1). The court must also adopt other provisions regarding which, if any, changes should be made in the timing, form, or requirement for disclosures under MCR 2.302(A) or to the limitations on discovery imposed under this rule. See form 4.1 and form 4.2 for sample pretrial orders that function as scheduling orders. Courts often enter a scheduling order ex parte to set the dates for witness list exchange, discovery cut-

off, mediation, and the settlement conference. When an order is entered ex parte, a party may file and serve a written request for amendment of the order, detailing the reasons for the requested amendments, within 14 days after the order is entered. *See* MCR 2.401(B)(2)(d).

Motions to extend the dates in the original scheduling order, as contemplated by MCR 2.401(B)(2)(d)(iii), are fairly common. Most courts permit the parties to extend dates for witness list exchange and discovery cutoff by stipulation if the new dates will not affect the timing of a scheduled mediation, settlement conference, or trial. Most courts do not adjourn mediation, the settlement conference, or the trial date by stipulation but do require a formal motion. See §4.14 for a discussion of motion practice procedure. The court rules provide that a final pretrial conference to facilitate preparation for trial may be combined with a settlement conference and may result in a final pretrial order providing for the detailed list of items in MCR 2.401(H). This list includes items such as a statement of stipulated facts, objections or stipulations to the admission of exhibits, the estimated length of trial, and jury instructions.

B. Discovery

§4.9 Parties may obtain discovery of any nonprivileged matters relevant to any party's claims or defenses. MCR 2.302(B)(1). Information within the scope of discovery does not need to be admissible into evidence to be discoverable. *Id.* Discovery must be proportional to the needs of the case and must take into account pertinent factors, including

- whether the burden or expense of the proposed discovery outweighs its likely benefit,
- the complexity of the case,
- the importance of the issues at stake,
- the amount in controversy, and
- the parties' resources and access to relevant information.

Id.

After a reasonable time has elapsed from the filing of the complaint, discovery may be obtained by any means provided in subchapter 2.300 of the Michigan Court Rules, in any sequence. There are five formally recognized methods for obtaining discovery:

1. depositions (both oral and upon written questions)
2. interrogatories
3. requests for admission
4. requests for production or inspection of documents and other tangible things
5. physical and mental examinations

MCR 2.306–.312. These methods of discovery are generally available without court order.

A party must provide initial disclosures to the other parties in the matter unless exempted by court rule, *see* MCR 2.302(A)(4), 5.131; stipulation; or court order. MCR2.302(A). The disclosures must include

> (a) the factual basis of the party's claims and defenses;
>
> (b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;
>
> (c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (d) a copy—or a description by category and location—of all documents, [electronically stored information (ESI)], and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;
>
> (f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR 2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;
>
> (g) a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, security equivalent, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment, including self-insured retention and limitations on coverage, indemnity, or reimbursement for amounts available to satisfy a judgment; and
>
> (h) the anticipated subject areas of expert testimony.

MCR 2.302(A)(1). See MCR 2.302(A)(5) for the timing of the disclosures. A party that has made a disclosure must supplement or correct its disclosure in certain situations. MCR 2.302(E)(1)(a), (b).

An attorney of record must sign all disclosures, discovery requests, and responses to discovery. MCR 2.302(G). Unless a particular rule requires the filing of disclosures and discovery materials, they may not be filed with the court unless

- they are to be used in connection with a motion, in which case they must be attached to the motion, the response, or an accompanying affidavit;
- they are to be used at trial, in which case they must be filed with the judge, and not the court, and made an exhibit; or
- the court orders them to be filed.

MCR 2.302(H). Requests for admissions and answers in response must be filed with the court. MCR 2.312(F).

Attorneys who receive discovery requests that seek privileged information or that in some way result in unfair annoyance, embarrassment, oppression, or undue burden or expense, may seek a protective order from the court pursuant to MCR 2.302(C) within the time for responding to the discovery requests.

Attorneys who do not receive disclosures and responses to discovery requests, or who receive evasive or incomplete disclosures or responses, may file a motion to compel disclosure or discovery responses. MCR 2.313(A). Under appropriate circumstances, if a party fails to provide disclosures or permit or submit to discovery or fails to obey a court order compelling disclosures or discovery, the court may order "such sanctions as are just," including, but not limited to, an order

- stating that certain matters are established in accordance with the moving party's claim,
- striking claims or defenses of the disobedient party,
- striking pleadings or parts of pleadings,
- staying proceedings until the party complies with the discovery request,
- dismissing the action or rendering a default judgment against the disobedient party, and
- holding the party in contempt (unless the order involves submission to a physical or mental exam).

MCR 2.313(B)(2). The payment of reasonable expenses, including attorney fees, may be required by the court, unless the failure was substantially justified or circumstances make the award unjust. *Id.*

In determining a just sanction, the court should consider

- whether the violation was willful or accidental,
- the party's history of refusing to comply with discovery requests,
- the prejudice to the other party caused by the failure to comply,
- whether there exists a pattern of the party engaging in deliberate delays,
- the party's degree of compliance with other provisions of the order in question,
- whether the party attempted to timely cure the defect, and
- whether a lesser sanction would better serve the interests of justice.

Dean v Tucker, 182 Mich App 27, 451 NW2d 571 (1990). The court's evaluation of the appropriate sanctions must be made on the record. The sanction most commonly imposed is the assessment of costs and fees.

If a court orders or a party requests in writing, the parties to a civil action are jointly responsible for preparing a proposed discovery plan. MCR 2.401(C). The discovery plan must address "all disclosure and discovery matters … and propose deadlines for completion of disclosure and discovery." *Id.*

Parties may agree on, the court may order, or a party may request an ESI (electronically stored information) conference if the case is reasonably likely to include the discovery of ESI. MCR 2.401(J). Parties must consider the items listed in MCR 2.401(J)(1), which include, but are not limited to, the preservation of discoverable information, what metadata will be produced, and whether the expense of producing the material should be allocated among the parties. Unless otherwise agreed, the plaintiff's attorney must file with the court an ESI discovery plan within 14 days of the ESI conference. MCR 2.401(J)(2). Any attorney who participates in an ESI conference or who appears at a conference addressing ESI issues must possess sufficient knowledge of the client's technological systems to competently address the issues discussed. A client representative or outside expert may assist an attorney in such discussions. MCR 4.201(J)(3). The court may issue an order regarding ESI discovery on a party's motion, by the parties' stipulation, or by the court's own initiative. MCR 4.201(J)(4).

The time for completing discovery is set by the court in its scheduling order under MCR 2.401(B)(2)(a). MCR 2.301(B). The date for the completion of discovery means the serving party will initiate the discovery by a time that provides for a response or appearance before the completion date. MCR 2.301(B)(4).

The court may order or the parties may stipulate to the mediation of discovery disputes under certain circumstances. MCR 2.411(H).

Consequences for failing to comply with a discovery order; providing evasive or incomplete disclosures, answers, or responses; failing to disclose, supplement, or admit; and failing to preserve ESI are found in MCR 2.313.

Practice Tip

- *The mere fact that there is a proceeding pending in probate court does not authorize discovery on a prospective civil action, as discovery in probate proceedings is limited to matters raised in petitions and objections pending before the court. MCR 5.131(B). This court rule was in response to the ruling in Brown v Townsend (In re Brown), 229 Mich App 496, 582 NW2d 530 (1998).*

C. Alternative Dispute Resolution

1. In General

§4.10 Alternative dispute resolution (ADR) is governed by MCR 2.410. At any time, after consultation with the parties, the court may order that a case be submitted to an ADR process, including a settlement conference, case evaluation, mediation, or other procedures provided by local court rule or ordered on stipulation of the parties. Unless a rule governing the specific process provides otherwise, the order must

- specify, or provide for selecting, the ADR provider;
- provide time limits for initiating and completing the ADR process; and
- provide for the payment of the ADR provider.

The order may require attendance at ADR proceedings by attorneys, parties, and others with authority to settle the case. If a party or the party's attorney is ordered

to attend, failure to do so constitutes a default or grounds for dismissal unless the court finds that entry of an order of default or dismissal would cause manifest injustice or the failure to attend was not due to the culpable negligence of the party or the attorney. The court may condition an order other than default or dismissal on the payment by the offending party or attorney of reasonable expenses. Within 14 days after entry of an order referring a case to an ADR process, a party may move to set aside or modify the order, and a timely motion must be decided before the case is submitted to the ADR process.

2. Case Evaluation and Offers of Judgment

§4.11 Most actions in which monetary relief is sought are submitted by the court to case evaluation. *See* MCR 2.403. Cases are evaluated by a panel of three lawyers at what the case evaluation rule refers to as a "hearing" but which is typically informal. Before the hearing, the parties submit written mediation summaries. At the conclusion of the hearing, the panel renders a case evaluation award. The award is generally thought of as the evaluators' collective opinion of the settlement value of the case. The parties must then either accept or reject the case evaluation award. If both parties accept it, judgment is entered in accordance with the evaluation unless the award is paid within 28 days after notification of the acceptances, in which case the court dismisses the case with prejudice. If one or both parties reject the award, the case proceeds to trial.

Effective January 1, 2022, if the parties stipulate to an ADR process outlined in MCR 2.403(A)(2)–(3) and approved by the court, they may not later be ordered to participate in case evaluation without their written consent. MCR 2.403(A)(1).

A similar settlement facilitation technique, initiated by a party, is an offer of judgment. *See* MCR 2.405. Until 28 days before trial, a party may serve on the adverse party an offer of judgment for all or part of the claim, including interest and costs accrued. A party who receives an offer of judgment may accept the offer, reject the offer, make a counteroffer, or make a new offer. To accept an offer, within 21 days after service of the offer, the party must

- serve on the other parties a written notice of agreement to stipulate to entry of the judgment offered and
- file the notice and proof of service with the court.

The court then enters judgment according to the terms of the stipulation. An offer is rejected if the party expressly rejects the offer in writing or fails to accept the offer. A counteroffer is a written reply to an offer, served within 21 days after service of the offer, in which the party rejects an offer and makes one of the party's own. A counteroffer made more than 21 days after service of the offer is a new offer. An offeree is liable for sanctions if the verdict is more favorable to the offeror than the average offer. An offeror is liable if either a counteroffer was made or the original offer was made less than 42 days before trial and the verdict is more favorable to the offeree than the average offer. The court has discretion "in the interest of justice" to refuse to award attorney fees as an offer of judgment sanction. *See* MCR 2.405(D)(3).

3. Mediation

§4.12 The court may submit cases to mediation pursuant to MCR 2.410. See the discussion in §4.10. Mediation, other than mediation in domestic relations matters, is governed by MCR 2.411. In mediation, a neutral third party facilitates communication between the parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. Mediators have no authoritative decision-making power. MCR 2.411(A).

If the parties stipulate to the selection of a mediator, the court must appoint that mediator, provided that the person qualifies under MCR 2.411(F) and is willing to serve within a time period that does not interfere with the court's scheduling of the case for trial. If the order referring the case to mediation does not specify a mediator, the order must set the date by which the parties must select a mediator. If the parties do not select a mediator by that date, the court appoints one from the approved list of mediators according to its local ADR plan. MCR 2.411(B). The court may recommend or advise the parties on the selection of a mediator only on the request of all parties by stipulation in writing or orally on the record.

The order referring the case for mediation must specify the time in which mediation is to be completed. Within 7 days after the mediation is completed, the mediator must advise the court of the date it was completed, who participated, whether settlement was reached, and whether further ADR proceedings are contemplated. If the case was settled through mediation, within 21 days after mediation is completed, the attorneys must prepare and submit to the court the appropriate documents to conclude the case. Note that statements made during mediation, including statements made in written submissions, may not be used in any other proceedings, including trial. Except for limited circumstances set forth in MCR 2.412(D), communications between the parties or counsel and the mediator relating to the mediation are also confidential and may not be disclosed without the written consent of all parties. MCR 2.412.

Practice Tip

- *A court may consider ordering facilitative mediation at relatively early stages of a case, even before discovery has been ordered or has been completed, as a means of exploring whether a satisfactory settlement can be reached or if outstanding issues can be narrowed by agreement. Early mediation potentially reduces litigation costs to the parties and can also assist a court in better using its available docket time on issues that remain contested.*

4. Arbitration

§4.13 In addition to mediation, the parties may submit cases to arbitration. The Michigan Arbitration Act (MAA), MCL 600.5001–.5035, was repealed effective July 1, 2013, and replaced by the Uniform Arbitration Act (UAA), MCL 691.1681–.1713. The MAA was designed to make private arbitration in Michigan more efficient, cost effective, predictable, and formalized. The UAA provides for rights that can and cannot be waived before arbitration, MCL 691.1684, and contains provisions for discovery, MCL 691.1697, summary dispo-

sition motions, MCL 691.1695, and punitive damages and attorney fees, MCL 691.1701.

The court rule covering arbitration, MCR 3.602, explicitly pertains to "all other forms of arbitration" not described in the UAA. MCR 3.602(A). The rule covers issues such as the time and place of arbitration, the placing of a witness under oath, the taking of depositions, representation by counsel, the award itself, and confirmation that the award may be entered with the court. In a situation where arbitration is binding, it is important that the arbitration award is filed with the clerk of the court and entered as a judgment. Note that under MCR 3.602(B)(3), a court may stop an arbitration that has already started on a showing that there is no agreement to arbitrate.

D. Pretrial Motions

§4.14 Motion practice is governed by MCR 2.119, which sets forth detailed requirements for motions and supporting briefs. A motion must be signed by the party or the attorney, which certifies that the motion conforms to the court rules and is not brought for reasons of delay or any other improper purpose. Motions need not be accompanied by affidavits unless otherwise specifically required by court rule or statute, but any motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based. A motion, notice of hearing, and any supporting brief or affidavits must be served at least 9 days before the time set for hearing, if served by mail, or at least 7 days before the hearing, if served by delivery on the attorney or party or by electronic service under MCR 1.109(G)(6)(a); *see* MCR 2.119(C)(1).

An opposing party may, but is not required to, respond to a motion in writing. Most attorneys who are concerned about the result of a pending motion file a written response. Any response, including a brief or affidavits, must be served at least 5 days before the hearing, if served by mail, or at least 3 days before the hearing, if served by delivery on the attorney or party or by electronic service under MCR 1.109(G)(6)(a). MCR 2.119(C)(2). Attorneys should be prepared to raise the same grounds in support or opposition to the motion at oral argument that were raised in the motion or response. Counsel should also be prepared to present a written order that memorializes the court's ruling on the motion promptly, under one of the methods provided in the court rules.

Common pretrial motions include

- motions for temporary restraining orders or preliminary injunctions, MCR 3.310;
- motions for summary disposition, MCR 2.116; and
- motions to compel discovery or disclosures, MCR 2.313.

Motions for summary disposition. A motion for summary disposition may be brought on the following grounds:

- to challenge the court's jurisdiction over the person or property or to assert insufficient process issued in the action or insufficient service of process, but

note that the defects in process or service must be so substantial that they affect the court's authority to exercise personal jurisdiction

- to challenge the court's subject matter jurisdiction
- to challenge the plaintiff's legal capacity to sue (e.g., due to infancy or mental incompetency)
- to assert that another action involving the same claim has been initiated between the same parties
- to assert that the entry of judgment, dismissal of the action, or other relief is appropriate due to release, payment, prior judgment, immunity, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, the moving party's infancy or other disability, or assignment or other disposition of the claim before commencement of the action
- to assert that the opposing party has failed to state a claim on which relief may be granted (accepting all factual allegations in the complaint as true) or has failed to state a valid defense to the claim asserted against the party (e.g., the defenses raised are so clearly untenable that no factual development could deny the plaintiff's right to recover) (Note that a motion for one of these reasons is based on the pleadings alone, without consideration of any other evidence.)
- to assert that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law

MCR 2.116(C), (D). For all of the grounds listed above, except challenging subject matter jurisdiction, failure to state a claim, and asserting that there is no genuine issue of material fact, the ground is waived if not raised in the party's responsive pleading or in a motion before the party's first responsive pleading. Except for the more stringent time limitations noted above, a motion for summary disposition must be filed and served at least 21 days before the time set for hearing. Any response to the motion must be filed and served at least 7 days before the hearing. MCR 2.116(G)(1)(a).

The most common basis for a motion for summary disposition is that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary disposition on this basis must specifically identify those issues about which the party believes there are no disputed material facts and must submit affidavits, depositions, admissions, or other documentary evidence in support of the motion. The court must grant the nonmoving party the benefit of any reasonable doubt about material facts and must then determine whether a factual dispute exists to warrant a trial, but may not make factual findings or weigh credibility.

V. Trial

A. Opening Statements and Closing Arguments

§4.15 MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's mean-

ingful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For additional information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

Judges frequently dispense with opening statements and closing arguments in bench trials. If a jury is demanded, after the jury is sworn and before evidence is taken, the court gives preliminary instructions orally to the jury regarding their duties, trial procedure, and the law applicable to the case. MCR 2.513(A); *see* M Civ JI 1.01–2.13. See also the discussion of jury instructions in §4.18.

Then, also before evidence is taken, the attorney for the plaintiff (if the plaintiff bears the burden of proof, as discussed in §4.16) makes a full and fair statement of the plaintiff's case and the facts the plaintiff intends to prove. Immediately after that or immediately before the defendant introduces evidence, the attorney for the defendant makes a similar statement. Opening statements may be waived with the consent of the court and the opposing attorney. MCR 2.507(A).

The court has wide discretion regarding the presentation and content of opening statements, and attorneys are typically given considerable freedom in presenting their opening. *Cleavenger v Castle*, 255 Mich 66, 237 NW 542 (1931); *Haynes v Monroe Plumbing & Heating Co*, 48 Mich App 707, 211 NW2d 88 (1973). Arguments that are prohibited in the opening statement include appeals to prejudice or passion, improper appeals to the jury's sympathy, and references to insurance coverage. *See* MCL 500.3030; *Board of Cty Rd Comm'rs v GLS LeasCo, Inc*, 394 Mich 126, 131, 229 NW2d 797 (1975); *Smith v Musgrove*, 372 Mich 329, 125 NW2d 869 (1964).

After the close of all the evidence, the parties may rest their cases with or without final arguments. The plaintiff is entitled to open the argument and, if the defendant makes an argument, to make a rebuttal argument. MCR 2.507(E). Although the court has broad power and discretion concerning the conduct of the argument before the jury, *Bugar v Staiger*, 66 Mich App 32, 238 NW2d 404 (1975), it is an abuse of discretion and reversible error to completely deny a closing argument to a party who requests it. *United Coin Meter Co v Lasala*, 98 Mich App 238, 296 NW2d 221 (1980).

The court may limit the time allowed for opening statements and closing arguments. MCR 2.507(F).

B. Proofs

§4.16 The term *burden of proof* encompasses two separate meanings. First, the general term *burden of proof* refers to the burden of going forward or the risk of nonproduction, often called the *burden of production.* The burden of production carries with it the risk of an adverse ruling (generally a finding or directed verdict) if the party with this burden fails to produce evidence on an issue. This burden generally starts with the party pleading a fact but may shift to the adver-

sary during trial. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 178–179, 405 NW2d 88 (1987).

Second, and more commonly, the term *burden of proof* denotes the *burden of persuasion* or the risk of nonpersuasion. The burden of persuasion becomes a crucial factor only if the parties sustain their burdens of producing evidence and only after introduction of all of the evidence. This burden does *not* shift between parties during trial. The court must instruct the jury that, if a party fails to satisfy its burden of persuasion on an issue, the jury must decide that issue against the party. *Id.*

The burden of persuasion that applies in most civil actions is that "the evidence must persuade you that it is more likely than not that the proposition is true." M Civ JI 8.01. This is also called the *preponderance of the evidence* standard.

In some instances, depending on the type of claim pleaded, the burden of persuasion is more stringent. For example, a plaintiff must prove fraud elements by clear and convincing evidence, rather than by a mere preponderance. M Civ JI 128.01, .02.

In an action on a claim against a decedent's estate or trust, the claimant has the burden of proof on each element of the claim by clear and satisfactory evidence. *Lafrinere v Campbell's Estate*, 343 Mich 639, 73 NW2d 295 (1955); *In re Jorgenson's Estate*, 321 Mich 594, 32 NW2d 902 (1948). If the claim involves goods, services, or compensation, the claimant further bears the burden of proving the fair value of each item. *Dolgy's Estate v Polate*, 338 Mich 567, 61 NW2d 649 (1953).

The burden of proof is crucial in the trial context because it drives the sequence of events. Because they generally have the burden of proof, plaintiffs typically make the first opening statement and present their evidence first. When a defendant has the burden of proof, however, the defendant makes the first opening statement and presents its evidence first. *See* MCR 2.507(B). The party who commences the evidence also makes the first closing argument and may then rebut its opponent's closing argument. *See* MCR 2.507(E).

Mechanisms that are used to satisfy a party's burdens of proof during trial include the following:

- presumptions and inferences
- stipulations
- fact witnesses
- expert witnesses
- exhibits and demonstrative aids

The Michigan Rules of Evidence and the cases interpreting the rules are the primary authority for the methods of proof.

C. Motions During Trial

§4.17 Written motions made during trial must follow the requirements of MCR 2.119, discussed in §4.14. However, trial motions can be, and often are, oral. *See* MCR 2.119(A)(1). Common motions during trial include the following:

- motions to amend pleadings to conform to the evidence admitted at trial, MCR 2.118(C)
- motions for adjournment (often due to the unexpected unavailability of a material witness; note that the moving party must show that there has been a diligent effort made to produce the witness), MCR 2.503
- motions regarding the admissibility of specific evidence, MRE 103
- motions for directed verdict, which must be made at the close of the opponent's evidence, MCR 2.516

D. Jury Instructions and Special Verdicts

§4.18 The judge must instruct the jury orally at the commencement of the trial with such "preliminary instructions … as are reasonably necessary to enable the jury to understand the proceedings and the evidence." MCR 2.513(A). Preliminary instructions also explain procedure and give specific admonitions, such as to avoid news accounts of the trial, M Civ JI 2.06, or to ignore inadmissible testimony, M Civ JI 3.03. The court must also provide a written copy of the preliminary instructions. MCR 2.513(A). At any time during the trial, the judge may, with or without a request, instruct the jury on a point of law if the instruction will materially help the jury understand the proceedings and render a just verdict. MCR 2.512(B)(1).

At other times during trial, the judge might give a cautionary instruction as when, for example, evidence is admitted that is admissible for one purpose or one party but not for another. MRE 105; *see also* M Civ JI 3.07.

The instructions that the judge gives orally in the final charge to the jury are known as *charging* instructions. These instruct the jury "on the applicable law, the issues presented by the case, and, if a party requests … that party's theory of the case." MCR 2.512(B)(2), .513(N)(1). The judge can give the charge before or after closing arguments, or at both times, in the court's discretion. In some cases, *supplemental* instructions may be given to the jury after deliberations commence, most often in response to a request or inquiry by the jury. MCR 2.513(N)(1).

The Model Civil Jury Instructions must be given when they apply, provide an accurate statement of the law, and are requested by a party. MCR 2.512(D)(2). The court may give other instructions on applicable law not covered by a Model Civil Jury Instruction as long as those instructions are modeled after the style of the standard instructions. MCR 2.512(D)(4).

The jury may be asked, particularly in cases involving personal injury, to complete a special verdict form rather than to render a general verdict. Special verdicts require the jury to answer questions of fact that are essential to the cause of action

at issue. Special verdicts are authorized by MCR 2.515, and the Michigan Supreme Court Committee on Model Civil Jury Instructions has adopted special verdict forms for a number of causes of action.

Claims of error in jury instructions are a frequent issue on appeal. An appellate court will not interfere with a jury verdict because of instructional error unless the failure to do so would be inconsistent with substantial justice. *Winiemko v Valenti*, 203 Mich App 411, 513 NW2d 181 (1994); *see also* MCR 2.613(A).

As it relates to the number of jurors empaneled to decide a civil action, six jurors are used unless parties have stipulated in writing or on the record that (1) the jury will consist of any number less than six; (2) a verdict or a finding of a stated majority of the jurors will be taken as the verdict or finding of the jury; or (3) if more than six jurors were impaneled, all the jurors may deliberate. Except as provided in MCR 5.740(C), in the absence of such a stipulation, a verdict in a civil action tried by six jurors will be received when five jurors agree. MCR 2.514(A).

E. Jury Reform

§4.19 Since September 1, 2011, the court rules have reflected a number of jury reform principles. ADM File No 2005-19. These reforms expand the opportunity for judges to advance jurors' understanding of the cases and controversies before them. The rules

- permit note-taking by jurors during the trial and require the judge to allow the use of such notes during deliberations, MCR 2.513(H);
- permit reference documents or notebooks, MCR 2.513(E);
- permit interim summarizing statements by attorneys, MCR 2.513(D);
- permit juror discussion of evidence before deliberations in civil cases, MCR 2.513(K);
- require the court to invite jurors to ask questions about final jury instructions before they begin deliberations, MCR 2.513(N)(2);
- require the court to advise jurors of their ability to submit in a sealed envelope written questions about the jury instructions that arise during deliberations, MCR 2.513(N)(2);
- require courts to provide jurors with written copies of jury instructions, MCR 2.513(N)(3);
- permit courts to sum up the evidence, MCR 2.513(M);
- permit courts to clarify or amplify the final jury instructions during deliberations, MCR 2.513(N)(4);
- permit courts to allow jurors to take into the jury room reference documents and notebooks, if these have been prepared, as well as exhibits and writings admitted into evidence, MCR 2.513(O);

- permit courts to make a video or audio recording of witness testimony or prepare a transcript of such testimony to provide to jurors during deliberations, MCR 2.513(P);
- permit courts to require the preparation of concise, written summaries of depositions to be read at trial in lieu of the full deposition, MCR 2.513(F); and
- permit courts to craft a variety of approaches to the scheduling of expert witnesses in civil cases, MCR 2.513(G).

VI. Judgments

A. In General

§4.20 A written judgment grants relief in favor of the party that is entitled to the relief. MCR 2.601. The date that the judgment is signed by the court is the date of entry. MCR 2.602. The court may sign the judgment when it grants the relief requested, when the parties approve as to form a judgment that comports with the court's ruling, when a proposed judgment is presented to the court clerk for the judge's signature if no party objects within 7 days of the notice of presentation, or when a special hearing for settlement of the judgment is held.

Special rules apply to different types of judgments. When multiple claims or multiple parties are involved, the judgment must clearly specify which claim or which parties are affected by the judgment and whether that judgment is a final judgment that adjudicates all claims, rights, and liabilities of the parties. MCR 2.604.

There are also a number of statutory requirements for judgments in cases involving personal injury, death, or property damage where more than one person is at fault. There must be separate findings of fact indicating the total amount of each plaintiff's damages and the percentage of total fault of all persons that contributed to the injury or death, regardless of whether those persons are or could have been named as defendants. MCL 600.2957(1), .6304(1). Damages must be broken down into economic, noneconomic, and future damages components, and future damages must be reduced to present cash value. Calculation of the judgment may be affected by matters such as a plaintiff's fault, statutory caps on noneconomic damages, or collateral source payments.

Special rules regarding consent judgments for minors and legally incapacitated individuals are discussed in §4.21.

Statutory interest under MCL 600.6013 must be added to a money judgment. (Any interest that is an element of damages is awarded by the trier of fact as part of the general verdict.) The statutory interest calculation may be affected by whether, in a tort case, one of the parties made a bona fide offer of settlement or, in a medical malpractice case, failed to allow access to medical records as required by statute.

When a final money judgment is entered, if the losing party does not pay the judgment, the prevailing party must take steps to collect, including garnishment or execution on the judgment debtor's property. Collection efforts may not begin

until the time for filing postjudgment motions or an appeal has passed. A party may move for a new trial, for rehearing or reconsideration, or for other relief from judgment within 21 days of the entry of the judgment, which will stay attempts at collection until the court rules on the motion. MCR 2.614(A). If an appeal is taken from the original judgment or from the court's ruling on a postjudgment motion, entry of a stay or an appeal bond will halt collection until the appeal is resolved.

B. Settlements and Judgments for Minors and Legally Incapacitated Individuals

§4.21 In an action brought for a minor or a legally incapacitated individual by a next friend, guardian, or conservator or where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim, the procedure for entry of a consent judgment, settlement, or dismissal pursuant to settlement is governed by MCR 2.420. Any proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge of the civil action to pass on the fairness of the proposal. Before an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is brought before the probate court and governed by the Estates and Protected Individuals Code, MCL 700.1101 et seq., pursuant to MCR 2.420(A).

If the action is for damages because of personal injury to the minor or legally incapacitated individual, the person must appear in court personally to allow the judge to observe the nature of the injury unless, for good cause, the judge excuses the person's presence. The judge may require medical testimony, by deposition or in court, if not satisfied of the extent of the injury. MCR 2.420(B)(1).

When a suit is filed and there is a settlement or judgment for more than $5,000 in a single year to a legally incapacitated individual, a developmentally disabled individual, or a minor, MC 95, Request for Approval of Bond and Notice (Settlement/Judgement/Wrongful Death Settlement), must be sent by the circuit court to the probate court, completed, and returned. MC 95 provides notice that an individual may need protection and requires the court to determine whether to set a bond or order a restricted account.

If the guardian, next friend, or conservator has made a claim in the same action and will share in the settlement or judgment, the judge must appoint a guardian ad litem for the minor or legally incapacitated individual to approve the settlement or judgment. MCR 2.420(B)(2).

If the next friend, guardian, or conservator was appointed by a probate court, the terms of the proposed settlement or judgment is approved by the court in which the action is pending on a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court that appointed the fiduciary that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court. MCR 2.420(B)(3). In a civil action in the probate court that appointed the fiduciary, the judge may sim-

ply find on the record that the bond is sufficient and has been filed in the probate file.

The following provisions apply to settlements for minors:

- If the settlement or judgment requires payment of more than $5,000 to the minor either immediately or in installments that exceed $5,000 in any single year during minority, the probate court must appoint a conservator before the entry of the judgment or dismissal. The judgment or dismissal must provide that payment be made payable to the minor's conservator on behalf of the minor.
- If the settlement or judgment does not require payment of more than $5,000 to the minor in any single year, the money may be paid to
  - the minor, if married;
  - an individual having care and custody of the minor with whom the minor resides;
  - the minor's guardian; or
  - a savings account in the sole name of the minor, with notice of the deposit to the minor.

MCR 2.420(B)(4); *see* MCL 700.5102.

If a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the court hearing the civil action determines the amount to be paid to the trust, but the trust may not be funded without prior approval of the trust by the probate court after notice to all interested persons and a hearing. MCR 2.420(B)(5).

VII. Posttrial Motions

§4.22 All posttrial motions must be made in writing and follow the requirements for motions set forth in MCR 2.119, discussed in §4.14. Common posttrial motions include the following:

- motions for a new trial, MCR 2.611
- motions for judgment notwithstanding the verdict (JNOV), MCR 2.610
- motions for relief from judgments or orders, MCR 2.612

Most posttrial motions must be made within 21 days from the date of the judgment, although motions for relief from judgment on certain grounds may be made within one year from the date of the judgment.

Note that the court may grant a new trial within 21 days after the entry of judgment even if no party makes a motion for it. MCR 2.611(C), .612(C)(2).

VIII. Recovery of Costs and Fees

§4.23 The prevailing party in an action is entitled to recover costs unless prohibited by statute or court rule or directed otherwise by the court for reasons stated in writing and filed in the action. MCR 2.625(A)(1).

Recoverable costs include the following:

- fees for officers, witnesses, and other persons mentioned in MCL 600.2401 et seq., .2501 et seq.
- matters made taxable by statute or court rule
- fees for any newspaper publication required by law
- reasonable expenses for printing required briefs and appendixes in the supreme court, including briefs and motions for leave to appeal
- reasonable costs of any bond required by law, including a stay of proceeding or appeal bond
- any attorney fees authorized by statute or court rule

MCL 600.2405. Note that a party's attorney fees are not recoverable unless expressly authorized by statute or court rule. *See also Bonner v Chicago Title Ins Co*, 194 Mich App 462, 487 NW2d 807 (1992). Attorney fees are recoverable as sanctions against another party if the attorney or party signed a pleading in violation of the requirements of MCR 1.109(E)(5)(a)–(c). MCR 1.109(E)(6). Additionally, attorney fees are also recoverable as sanctions if a party's action or defense is frivolous. MCR 1.109(E)(7). Further, in ordering a sanction under MCR 1.109(E)(6), the court may not assess punitive damages.

Frivolous actions. When the court finds that a civil action or defense to a civil action is frivolous, the court must award the prevailing party the costs and fees incurred by the party by assessing the costs and fees against the opposing party and the opposing party's legal counsel. MCL 600.2591(1). The amount allowed includes all reasonable costs actually incurred, plus costs allowed by law or by court rule, including court costs and reasonable attorney fees. MCL 600.2591(2). For the court to determine that a civil action or defense is frivolous, the court must find that at least one of the following conditions exists:

- The party's primary purpose in asserting the action or defense was to harass, embarrass, or injure the prevailing party.
- The party had no reasonable basis to believe the facts underlying the party's legal position were true.
- The party's legal position was devoid of arguable legal merit.

MCL 600.2591(3). This statute requires a party and a party's attorney to conduct reasonable inquiry into the viability of a pleading before signing it. If a party's primary purpose for bringing the action or raising the defense is "to harass, embarrass, or injure the prevailing party," if there is no reasonable basis for a party to believe that the facts supporting that party's legal position are true, or if a party's legal position is devoid of legal merit, the pleading is frivolous and sanctions are mandated. MCL 600.2591(1).

Violations of MCR 1.109(E) signature certification requirements. An attorney or party who signs a document certifies that the person has read the document; that to the best of the person's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and warranted by

existing law or good-faith argument for the extension, modification, or reversal of existing law; and that the document is not interposed for any improper purpose, including harassment, unnecessary delay, or needless increase in the cost of litigation. MCR 1.109(E)(5). If the court finds that a document was signed in violation of this rule, sanctions, which may include reasonable attorney fees, are mandatory and are imposed on the person who signed it, the represented party, or both. MCR 1.109(E)(6).

A determination of what constitutes reasonable inquiry under MCR 1.109(E) (formerly MCR 2.114) is dependent on the facts and circumstances of each case. *Lloyd v Avadenka*, 158 Mich App 623, 405 NW2d 141 (1987). The reasonableness mandated is not akin to the party's honest belief or personal feelings. Rather, MCR 1.109(E)(5) sets forth an objective standard. *Reasonable inquiry* is an empirically verifiable fact or event in which the court can examine the efforts undertaken to investigate a claim or defense before the party stated the claim or defense in a pleading. *Lloyd,* 158 Mich App at 630.

Form 4.1
Pretrial Order, Short Form

Submitted by the Hon. Allen J. Nelson, Genesee County Probate Court

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

In re *[estate / trust]*, *[Deceased / Trust]*

File No. *[number]-[case-type code]*
Judge *[name]*

_____/

[Attorney's name] (P*[number]*)
Attorney for Petitioner
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Respondent
[Address, telephone, email]

At a session of court held in the courthouse in
[city, county], Michigan, on *[date]*.
Present: Honorable *[name of judge]*
[name of court] Court Judge

A pretrial conference was held on this date. In attendance were *[names]*.

IT IS ORDERED:

Counsel shall exchange witness lists and file same with the Court no later than *[date]*.

Discovery shall be completed no later than *[date]*.

All motions are to be **heard** no later than *[date]*.

All exhibits are to be agreed upon as to authentication and admissibility no later than *[date]*. Counsel shall provide the Court with a list of exhibits that have been authenticated and stipulated to. Counsel shall also provide the Court with a list of exhibits that cannot be stipulated to and the legal reasons for the objection. Finally, Counsel shall provide an index of all exhibits.

The theories of the case are to be filed no later than *[date]*.

A **final pretrial** is scheduled for *[date]*. Counsel and interested parties are to attend.

Settlement negotiations are to continue and the status of said negotiations will be discussed at the conclusion of the final pretrial.

The parties have agreed to case evaluation in an attempt to reach a resolution or settlement of the dispute as an alternative to litigation. The Judicial Neutral Panel clerk shall schedule a panel date and notify the interested parties.

Trial briefs are to be filed no later than *[date]*.

A *[jury / bench]* **trial** is scheduled for*[date]*.

Dated: *[date]*

[Signature line]
Probate Court Judge

Form 4.2
Pretrial Order, Long Form

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

In re *[estate / trust]*, *[Deceased / Trust]*

File No. *[number]-[case-type code]*
Judge *[name]*

_____/

[Attorney's name] (P*[number]*)
Attorney for Petitioner
[Address, telephone, email]

[Attorney's name] (P*[number]*)
Attorney for Respondent
[Address, telephone, email]

At a session of court held in the courthouse in
[city, county], Michigan, on *[date]*.
Present: Honorable *[name of judge]*
[name of court] Court Judge

A pretrial conference was held on this date. In attendance were *[names]*.

IT IS ORDERED:

1. Any hearing date, settlement conference or trial date appearing in this Scheduling Order shall serve as proper notice to all parties. Additional notice of any hearing, settlement conference, or trial will not be sent.

Discovery

2. Plaintiff shall disclose all expert witnesses by *[date]*. Defendant shall disclose all expert witnesses by *[date]*. The disclosures must contain all the information specified in MCR 2.302(B)(4)(a)(i), Absent a showing of good cause, expert witnesses not identified as required hereby will not be allowed to testify at trial.
3. All other proposed trial witnesses must be disclosed by *[date]*. The disclosure must name each proposed witness; provide an address, residence or business; and state briefly what the witness is expected to say. This disclosure requirement shall not prevent a party from obtaining an earlier disclosure of nonexpert witness information by appropriate discovery means. It does require that by *[date]*, a list of all witnesses who will be called at trial

must be provided to all opposing parties, even if the witnesses have previously been identified during discovery. Absent a showing of good cause, witnesses not identified as required hereby will not be allowed to testify at trial.

4. Discovery must be completed by *[date]*. The Court will consider compelling discovery and imposing sanctions for failing to engage in discovery only if the discovery request at issue was timely. A request will be considered timely only if it was served sufficiently in advance of the deadline specified in this paragraph that the applicable time for responding expires before that date or within such other time as the Court has agreed to. No discovery of any kind may occur, even by stipulation of the parties, after case evaluation.

Pleadings

5. After *[date]*, the pleadings may be amended only by leave of Court.

Motions

6. Motions for summary disposition based on the pleadings alone must be filed by *[date]*. All other motions for summary disposition must be filed no later than *[date]*. Absent an extension or a showing of good cause for the delay, an untimely motion will not be heard by the Court. No reply briefs are authorized unless there has been an intervening change in the law since the original motion for summary judgment was filed.
7. Motions for summary disposition are to be noticed for hearing by the moving party as soon as is practicable after filing, The motion and all supporting material must be filed and served no less than 21 days before the scheduled hearing date. Service on opposing counsel will be deemed completed on mailing. All opposing materials must be filed and served no fewer than 7 days before the scheduled hearing.
8. Supporting documents for a motion for summary disposition or brief in opposition to such a motion—e.g., excerpts from depositions, answers to interrogatories, disclosed documents—shall be appended to the motion or to the opposing brief. The parties are to append only the pertinent portions of lengthy materials. Specific reference to the supporting materials, preferably verbatim quotations, is to appear in the parties' briefs. Merely attaching materials is not useful.
9. The parties are encouraged to bring to the Court's attention by way of pretrial motions any matter that may, given the status of the record, be resolved before trial. Where appropriate, the Court will, before trial, exclude evidence, admit contested evidence, inform the parties what instructions will be given, and the like. The Court believes that the possibility of reasonable settlement is diminished, not enhanced, by unnecessary uncertainty.

10. All motions, except those for summary disposition, must be filed and answered within the time limits set by MCR 2.119(C). The parties are encouraged to use the procedures found in MCR 2.119(D), especially for discovery motions. Motions in limine must be filed and heard at least two weeks before trial. Whenever a motion is adjourned by agreement of the parties, Judge *[name]*'s judicial clerk must be notified of the adjournment. The telephone number of the judge's clerk is *[phone number]*
11. Whenever any motion or brief cites to any Michigan or foreign authority or to any treatise or secondary source, copies of all such authority are to be either attached to the judge's copy of the motion and brief or produced as a separate appendix of authorities and served with the judge's copy of the motion and brief. The judge's copy of the brief/appendix shall be served directly on Judge *[name]*'s judicial staff at the judge's chambers located at *[location]*. The originals of all motions and supporting materials are to be filed directly with the Clerk of the Probate Court, not with the judicial staff.
12. With the exception of the appendices of authority discussed above, the originals of all motions and supporting materials are to be filed directly with the Clerk of this Court, not with the judicial staff. A copy of all such materials, designated JUDGE'S COPY, is to be served directly upon the judicial staff.

Alternative Dispute Resolution

13. Because the parties have agreed that this case should not be submitted to any form of alternative dispute resolution (ADR) other than case evaluation, ADR is reserved. The issue will be discussed at the settlement conference held in this case, and, at that time, the Court may order this case submitted to some form of ADR.
14. The parties have agreed that this case is to be submitted to

    a. mediation or

    b. arbitration

    immediately or in the month of *[month]*.

    The parties have selected *[name]* as *[mediator / arbitrator]*, and it is the responsibility of the parties to notify the *[mediator / arbitrator]* of any relevant dates and to serve the *[mediator / arbitrator]* with a copy of this scheduling order.

    Within 7 days of the conclusion of *[mediation / arbitration]*, the *[mediator / arbitrator]* should notify the court in writing of the results of *[mediation / arbitration]*. If the case has settled through *[mediation / arbitration]*, counsel shall file an order of dismissal and any other settlement document with the court or schedule a hearing to place the dismissal/settlement on the record within 21 days of mediation.

Case Evaluation

15. *[This case will be submitted for case evaluation during [month]. Notice of the specific date and time will be sent by the ADR Clerk. Case evaluation can be adjourned only by order of the Court. / This case will not be submitted for case evaluation.]*

Further Conferences

16. A settlement conference will be held on *[date]*, at *[time]*, in the chambers of Judge *[name]*. The parties themselves, or agents of corporate parties, and their counsel must be personally present and must be fully prepared and authorized to meaningfully discuss settlement. This includes *representatives of lien holders* and *representatives of insurance carriers.* Availability by telephone is not adequate. Failure to attend will result in the sanctions authorized by MCR 2.401 as will failing to have authority to meaningfully discuss settlement and/or failing to discuss settlement in good faith. Authority to have "meaningful discussion of settlement" means having the ability to respond on the merits to settlement offers without the need to confer with someone not present at the settlement conference.
17. If the parties need a conference with the Court to discuss any matter in the case, e.g., scheduling or a discovery dispute, a call to the judge's clerk will suffice to schedule the conference. The telephone number of the judge's clerk is *[phone number]*. One day's notice is sufficient. The conferences may be by telephone. Of course, personal appearances by counsel are also welcome.

Trial

18. If this case is not resolved before or at the settlement conference, a firm trial date will be set at that conference. Trials may not be adjourned by stipulation. A motion must be filed to obtain any adjournment, and all such motions must strictly comply with MCR 2.503(B) and (C)(1). Motions to adjourn will rarely be granted.
19. Trial will be by *[bench / jury]*.
20. Trial briefs and proposed findings of fact and conclusions of law are to be filed with the Probate Clerk of the Court (with copies provided to the judge) and actually served on opposing counsel no fewer than 14 days before trial. Absent good cause, the Court will not entertain during trial legal issues, including evidentiary objections, that could have been anticipated before trial and were not addressed in the trial briefs or were not earlier the subject of a motion in limine.
21. Jury instructions must be provided to the Court by *[date]*. The parties will submit proposed joint jury instructions with all jury instructions that both parties request. These proposed joint jury instructions will include the jury instruction number and also the entire proposed language in printed version of the jury instruction. Any instructions that the parties are not able to

agree on jointly shall be submitted as a proposed plaintiff's or proposed defendant's jury instruction. These instructions will also include the reference to the Model Civil Jury Instruction number that they use as well as have the full printed jury instruction.

22. Proposed exhibits must be provided to opposing counsel 14 days before trial. Absent good cause, exhibits not timely disclosed and provided may not be presented at trial. Exhibits shall be marked with exhibit stickers before trial. Plaintiffs shall mark their exhibits using numbers. Defendants shall mark their exhibits with letters. Counsel shall provide a complete set of premarked exhibits to opposing counsel and the Court in chambers at least 3 business days before the commencement of trial.
23. If this case settles, the parties will be responsible in equal shares for the fees of all jurors summoned for possible selection to try the case, unless the Assignment Clerk was notified of the settlement no later than noon of the last business day preceding the trial date.

Dated: *[date]*

[Signature line]
Probate Court Judge

5
Trust Proceedings

Summary of Trust Proceedings

This is a summary of major principles only, with cross-references to more detailed discussion in other sections of the *Benchbook*.

Michigan Trust Code. §5.1.

The Michigan Trust Code (MTC) codified current Michigan law concerning trusts and filled in the gaps in current law. The MTC is a series of default rules that the set-

tlor of a trust may choose to include, delete, or modify, but it cannot be overemphasized that contained in section 7105 of the MTC, MCL 700.7105, are 18 mandatory rules of construction that cannot be modified or altered by drafting.

Jurisdiction, venue, and registration of trusts. §5.2.

The probate court has exclusive jurisdiction over the validity, internal affairs, and settlement of trusts; over the administration, distribution, modification, reformation, and termination of trusts; and to declare rights involving trusts, trustees, and beneficiaries. MCL 700.1302. The probate court has concurrent jurisdiction with the circuit court over other actions that may involve trusts, including determining property rights and interests in trusts, imposing a constructive trust, and deciding any contract, proceeding, or action by or against a trust. MCL 700.1303.

The probate court has personal jurisdiction over a trustee of a registered trust and, on commencement of a proceeding by a beneficiary, over a trustee of a trust that could have been registered in the county. The court also has personal jurisdiction over the beneficiaries of a trust that has its principal place of administration or has been properly registered in this state.

Venue for trust proceedings is in the county where the trust is registered or could have been registered. A trust may be registered in the principal place of administration of the trust, which includes the trustee's usual place of business or place of residence if the trustee has no usual place of business. MCL 700.7204, .7209. For a corporate trustee, the usual place of business is the business location of the primary trust officer for the trust.

Supervised trusts. §5.3.

Under the Michigan Trust Code (MTC), all trusts are unsupervised by default, but the court may order supervision of a trust on a petition by an interested trust beneficiary or during any trust proceeding. Supervision of a supervised trust that predates the Estates and Protected Individuals Code (EPIC) may be terminated on the trustee's request or on the court's own initiative.

Procedure for trust proceedings. §§5.4–5.9.

Petition and notice.

A trust proceeding is commenced by filing a petition and giving notice to interested persons.

Generally, the interested persons in a trust proceeding affecting a trust include the following:

- the trustee
- all qualified trust beneficiaries
- the holder of a power of appointment
- in a proceeding to appoint a trustee, the proposed trustee
- the trust director, if any

- the settlor of a revocable trust
- persons entitled to be reasonably informed of trust proceedings if the petitioner reasonably believes that the settlor is an incapacitated individual
- in certain types of proceedings, creditors and other persons asserting a claim or right against the trust.

MCR 5.125(C)(33).

A *qualified trust beneficiary* is a distributee or permissible distributee of trust income or principal.

If waiver and consent forms signed by all the interested persons are filed with the court, the requirements of service may be avoided, and an order may be entered without a court hearing.

Guardians ad litem.

The court may appoint a guardian ad litem in a proceeding to represent the interests of a minor, a legally incapacitated individual, an unborn or unascertained person, or a person whose identity or address is unknown. MCL 700.7305; MCR 5.121. A guardian ad litem is generally appointed when there is no other person who can adequately represent the beneficiary's interest.

The guardian ad litem must conduct an investigation, file a written report of the investigation or report in open court, and give the guardian ad litem's recommendations.

Right to jury trial.

Issues of fact may be tried to a jury, and issues involving trustee discretion are tried exclusively to the trial court. Thus, issues of breach of fiduciary duty, propriety of investments, trustee prudence, and determination of best interests are left to the determination of the trial court. *Old Kent Bank v Remainder Beneficiaries (In re Messer Tr)*, 457 Mich 371, 579 NW2d 73 (1998). Note that jury and nonjury issues may be present in the same case.

Specific proceedings and remedies. §§5.10–5.21.

Specific trust proceedings include the following:

- Challenge the validity of the trust

  A trust can be challenged as void because its creation was induced by fraud, duress, or undue influence, or because its purpose was unlawful and contrary to public policy. The challenge may take place two years after the settlor's death or six months after the trustee sent notice informing the interested person of the trust's existence, the trust's date and the date of any amendments, the settlor's name, the trustee's name and address, a copy of the relevant terms of the trust, and the time allowed for beginning proceedings.

- Appoint and remove trustees.

  If a trustee is not designated in the trust or the designated trustee declines to accept or resigns and no successor trustee is named, the probate court may

appoint a successor. The court may also remove a trustee for breach of fiduciary duty or any other circumstance that renders the trustee unfit. Any interested person may petition the court for appointment or removal of a trustee.

- Review fees and compensation.

  On petition of an interested person, or when reviewing an account that has been filed with the court, the court may review the reasonableness of the trustee's compensation for services to determine whether they are just and reasonable. The court may also review the propriety of a trustee's employment of an agent, including an attorney, and the reasonableness of that person's compensation. The court may order a person who receives excessive compensation from a trust to make an appropriate refund.

- Settlement of trustees' accounts.

  A trustee may be required by the trust instrument or by court order to file annual accounts with the probate court for allowance. If so, any interested person may object to any item on the account. If the trustee is not required to file annual accounts, the court may, on its own motion or in response to an interested person's petition, order a trustee to file an account. Trustees may also voluntarily seek court approval of an account.

  An account may not be challenged after it is allowed by the court (and the appeal period has passed); after the deadline in the trust instrument, if any; or within one year after the account is provided to the beneficiary if the requirements of MCL 700.7905 are met or within five years if not. A claim of fraud may toll these periods.

- Instruction of trustees.

  On the petition of a trustee seeking court approval of a proposed action, or of a beneficiary seeking to compel the trustee to perform an action, the court may give appropriate instructions. The court also, for good cause, may relieve the trustee from restrictions on the trustee's powers imposed by law or the trust instrument.

- Approval of nonjudicial settlement agreements.

  Proper nonjudicial settlement agreements no longer require court approval. Nonjudicial settlements cannot be used to terminate or modify a trust.

  An interested person may request the court to approve or disapprove a nonjudicial settlement agreement. If the court determines that representation is proper, the agreement does not violate a material purpose of the trust, and the agreement contains provisions the court could have properly approved, the court shall enter an order approving the agreement.

- Reformation of trusts.

  A trust instrument may be reformed on the same grounds as any other transfer of property, including fraud, duress, undue influence, mistake, and incapacity. The most common ground for reforming a trust is mistake, which, in the case of a gratuitous trust, may be a unilateral mistake by the settlor. The court may reform a trust, even if unambiguous, to conform to the settlor's intention if both the settlor's intent and the terms of the trust were affected by a mistake of fact or law

and it is proved by clear and convincing evidence. The court may modify the administrative terms of a trust if the continuation of the trust on its terms would be impracticable or wasteful or impair the trust's administration. The court may modify the dispositive terms of a trust if, because of unanticipated circumstances, modification will further the settlor's stated purpose or probable purpose.

- Construction of trusts.

  Under certain circumstances, the court may construe or interpret the terms of a trust instrument without changing the language of the trust document to carry out the settlor's intent. The court must first look to the expression of intent in the trust instrument, applying the rules of construction that apply to other written instruments and that are found in EPIC. If an ambiguity can be established, parol evidence is admissible to aid in the construction. A construction decree determines the meaning of the trust instrument using the original language of the trust from the date of its execution. The court may look beyond the language of the trust agreement in interpreting trusts if the trust agreement language is ambiguous or contradictory.

- Claims proceedings.

  A proceeding on a claim may be filed before the claim is disallowed. A suit on a claim after disallowance is a civil action. In claims proceedings, the claimant has the burden of proving the right to recover by meeting the burden of proof for the claim. The court may allow the claim in whole or in part and must reduce the amount allowed by any valid counterclaim that the trustee has against the claimant.

- Termination of trusts.

  The court may terminate a trust on a petition by the trustee or another interested person in the following situations:

  - The value of the trust property is insufficient to justify the cost of administration.
  - Owing to circumstances not known to or anticipated by the settlor, the termination of the trust will further the settlor's stated purpose.
  - All of the qualified trust beneficiaries and the trustee consent, and termination of the trust is consistent with the material purposes of the trust or the continuance of the trust is not necessary to achieve any material purpose of the trust.

I. Michigan Trust Code

§5.1 The Michigan Trust Code (MTC), effective April 1, 2010, replaced Article VII of EPIC, codified current Michigan law concerning trusts, and filled in the gaps in current law by adding several provisions not previously found in common law. The MTC is a series of default rules that the settlor of a trust may choose to include, delete, or modify, *but* there are certain mandatory rules of construction in MCL 700.7105 that cannot be drafted around. To the extent that common law has not been codified or modified by the MTC, such common law will govern the interpretation and application of the trust instrument. MCL 700.7105. The MTC, as a part of EPIC, should be read and interpreted with the context of EPIC as a whole.

II. Jurisdiction, Venue, and Registration of Trusts

§5.2 The probate court has exclusive legal and equitable jurisdiction

- over the validity, internal affairs, and settlement of trusts;
- over the administration, distribution, modification, reformation, and termination of trusts; and
- over the declaration of rights involving trusts, trustees, and beneficiaries of trusts, including jurisdiction to
  - appoint or remove a trustee;
  - review trustee fees;
  - require, hear, and settle interim or final accounts;
  - ascertain beneficiaries;
  - determine any questions arising in the administration or distribution of trusts, including questions of construction;
  - instruct trustees and determine their immunity, powers, privileges, duties, and rights;
  - release registration of a trust; and
  - determine an action or proceeding that involves settlement of an irrevocable trust.

MCL 700.1302, .7201(3), .7203. "[T]o the extent the probate court's grant of exclusive jurisdiction over trust matters in MCL 700.1302 and MCL 700.1303 conflicts with the broad inclusion of trust-related matters within the exclusive jurisdiction of the business court under MCL 600.8035(3)," the specific grant of exclusive jurisdiction to the probate court controls. *Brody v Deutchman (In re Rhea Brody Living Tr)*, 321 Mich App 304, 313–314, 910 NW2d 348 (2017), *vacated in part on other grounds,* 501 Mich 1094, 912 NW2d 175 (2018). The probate court has concurrent jurisdiction with other courts to

- determine property rights and interests in trusts;
- authorize partition of property;
- authorize specific performance;

- ascertain survivorship of persons;
- determine *cy pres,* gifts, grants, bequests, and devises;
- impose a constructive trust; and
- hear and decide any contract, proceeding, or action by or against a trust.

MCL 700.1303, .7203(2).

If a matter involving a trust is pending in another court, it may be removed to the probate court on motion by a party. MCL 700.1303(2).

The probate court in the county where a trust is registered has concurrent jurisdiction with other Michigan courts over an action or a proceeding

- to determine the existence or nonexistence of the trust if created other than by will,
- against a creditor or debtor of the trust, and
- involving a trustee and a third party.

MCL 700.7206.

Personal jurisdiction. By registering a trust or accepting trusteeship of a registered trust or a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the probate court's jurisdiction in any proceeding involving the trust. MCL 700.7202(1). If a trust beneficiary commences a proceeding involving an unregistered trust, the trustee is subject to the personal jurisdiction of a court in which the trust could have been registered. MCL 700.7202(2). The beneficiaries of a trust that has its principal place of administration or has been properly registered in this state are also subject to the court's jurisdiction to the extent of all beneficial interests in the trust. MCL 700.7202(3). A recipient who accepts a distribution from such a trust submits personally to the jurisdiction of the courts of this state for any matter involving the trust. *Id.*

Venue. Venue for trust proceedings is in the county where the trust is registered or could be registered. If the unregistered trust is created by will and the estate is not closed, venue is in the county where the decedent's estate is being administered. MCL 700.7204(1).

If a party objects, a Michigan probate court may not entertain trust proceedings involving a trust that is registered or has its place of administration in another state unless all appropriate parties cannot be bound by litigation in the place where the trust is registered or has its principal place of administration or unless the interests of justice would otherwise be seriously impaired. MCL 700.7205.

If a trust has no trustee and has not been registered, venue for the appointment of a trustee is

- in a county in which a trust beneficiary resides
- in a county in which trust property is located

- if the trust is created by will, in the county in which the decedent's estate was or is being administered
- as otherwise provided by court rule.

MCL 700.7204(2).

Trust registration. The trustee of a trust that has its principal place of administration in this state may register a trust at the place designated in the terms of the trust or, if none, at the principal place of administration. MCL 700.7209(1). The principal place of administration is

- the trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee does not have a place of business;
- for a corporate trustee, the business location of the primary trust officer for the trust;
- for cotrustees, when there is only one corporate trustee, the corporate trustee's usual place of business;
- for cotrustees, when there is only one professional fiduciary who is an individual and no corporate trustee, the professional fiduciary's usual place of business or residence; and
- for cotrustees, when there is no corporate trustee or professional fiduciary, the usual place of business or residence of any of the cotrustees as agreed by them.

MCL 700.7209.

A trustee registers a trust by filing a statement that

- states the trustee's name and address;
- acknowledges the trusteeship;
- indicates if the trust has been registered elsewhere (if so, registration in Michigan is ineffective until the earlier registration is released by order of the court where that registration occurred or by an instrument signed by the trustee and all beneficiaries, and the order or instrument is filed with the court); and
- identifies the trust as follows:
  - for a trust created by will, by the name of the testator and the date and place of domiciliary probate;
  - for a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument and all amendments existing on the date of registration; and
  - for an oral trust, by information identifying the settlor or other source of property and describing the trust's time and manner of creation and the trust's terms, including the subject matter, beneficiaries, and time of performance.

The trust instrument and amendments do not need to be filed with the court. MCL 700.7210; *see* SCAO form PC 610 (Registration of Trust).

Venue may be changed to another county on an interested person's motion or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be held in the county where the proceeding is pending. MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

Practice Tip

- *Registration of trusts under the MTC is wholly permissive and is not required to file a petition. MCR 5.501(C). The purpose of registration is to establish venue for any future proceedings or actions. In addition, for oral trusts, registration provides a writing establishing the existence of the trust. The disadvantage of registration is the $25 fee and the fact that the registration information is a public record.*

III. Supervised Trusts

§5.3 Under the MTC, all trusts are unsupervised by default. MCL 700.7201(2); MCR 5.501(B). However, before EPIC's effective date of April 1, 2000, trusts created by will were supervised, and supervision of such trusts continues unless supervision is terminated. The court may also order supervision of a trust on a petition by an interested trust beneficiary or during any trust proceeding; if so, the court must specify the terms of the supervision. MCR 5.501(F), .502.

For trusts created before April 1, 2000, trust supervision may be terminated on the trustee's request for an order closing court supervision or on the court's own initiative. If supervision is terminated, the trustee must give notice of the order of termination to all current trust beneficiaries. MCR 5.501(F). Form 5.1 is a sample order terminating court supervision. Terminating court supervision of a trust, after the advent of EPIC, does not preclude any interested trust beneficiary from later petitioning the court for trust supervision. *Id.*

Practice Tip

- *A court should order supervision of a trust if an interested person requests it and the request is justified because, for example, the trustee has been uncooperative or nonresponsive, has not provided accounts, has had problems with accountings, or has not complied with the terms of the trust. Supervision may also be appropriate when the interested persons are at odds with each other. If a trust is established for a minor, there may be good reason for the court to supervise the trust, especially if the trustee is a parent.*

IV. Procedure for Trust Proceedings

A. Petition

§5.4 This chapter covers trust proceedings in probate court, which are commenced by filing a petition. The procedure for civil actions involving trusts

is covered in chapter 4. A trust proceeding is commenced by filing a petition and giving notice to interested persons. MCL 700.7208.

Other than the two types of actions listed in MCR 5.101(C), which must be civil actions ((1) an action against another filed by a fiduciary or trustee and (2) an action filed by a claimant after notice that the claim has been disallowed), all other actions may be filed as proceedings. *In re Seklar*, No 330829 (Mich Ct App Aug 8, 2017) (unpublished) (action filed by successor fiduciary against prior fiduciary is properly proceeding).

A petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. A petition must include the name of the court and the title of the proceeding; the case number; the character of the paper; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

At least one attorney of record must sign every document of a party who is represented by an attorney. MCR 1.109(E)(2). MCR 1.109(E)(2)(b) expressly applies to probate proceedings and indicates that an inventory, an account, an acceptance of appointment, and a sworn closing statement must be signed by the fiduciary or trustee. A receipt for the assets must be signed by the person entitled to the asset. MCR 1.109(E)(2). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge and belief." MCR 1.109(D)(3)(a)–(b).

In addition to these general requirements, a petition in a trust proceeding should contain

1. all relevant facts concerning the trust (for example, the fact that the trust is irrevocable and the reason why it is irrevocable);
2. the reason why reformation, construction, termination, or other court action is required;
3. a statement that the petitioner has no adequate remedy at law;
4. a request for relief, stating exactly what the order should say or attaching a copy of the proposed order; and
5. relevant attachments, such as a copy of the trust instrument, a draft of any proposed construction or reformation language, and the settlor's death certificate.

Filing fees. The filing fee for registering a trust is $25. MCL 600.880c(2). The total fee for commencing a trust proceeding in probate court is $175, except for proceedings involving testamentary trusts that are processed as part of a decedent's estate, for which the filing fee is $20. MCL 600.880(1), .880b(1). The total fee includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.1986(1)(a). The fee for filing a motion, a petition, an account, an objection, or a claim after the commencement of a trust proceeding in the probate court is $20. The court shall waive a filing fee if the petitioner or other moving party is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d.

B. Interested Persons

§5.5 Generally, interested persons in a proceeding affecting a trust are

- the qualified trust beneficiaries affected by the relief requested;
- the holder of a power of appointment affected by the relief requested;
- the current trustee;
- in a proceeding to appoint a trustee, the proposed trustee;
- the trust director, if any, as referred to in MCL 700.7103(m);
- the settlor of a revocable trust; and
- persons entitled to be reasonably informed as referred to in MCL 700.7603(2) if the petitioner has a reasonable basis to believe the settlor is incapacitated.

MCR 5.125(C)(33).

Interested persons in the modification or termination of a noncharitable irrevocable trust are

- the qualified trust beneficiaries affected by the relief requested;
- the settlor;

- settlor's representative as referred to in MCL 700.7411(6), if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual;
- the trust director, if any, as referred to in MCL 700.7103(m);
- the current trustee; and
- any other person named in the terms of the trust to receive notice of such a proceeding.

MCR 5.125(C)(32). For proceedings concerning the examination of trustee accounts, the interested persons are set forth in MCR 5.125(C)(6); and for a petition for approval of a trust, the interested persons are set forth in MCR 5.125(C)(29). MCL 700.1105(c) and MCR 5.125 when read in concert "demonstrate that the interested-person inquiry is decidedly flexible and fact-specific," and "[t]he identity of the interested persons can change not only over time but also depends on the nature of the proceedings and the relief requested." *In re Rhea Brody Living Tr, dated January 17, 1978 (On Remand)*, 325 Mich App 476, 486, 925 NW2d 921 (2018), *vacated in part, leave to appeal denied in part,* 504 Mich 882, 928 NW2d 222 (2019).

Qualified trust beneficiary is defined under the MTC as a trust beneficiary to whom one or more of the following apply on the date the trust beneficiary's qualification is determined:

> (i) The trust beneficiary is a distributee or permissible distributee of trust income or principal.
>
> (ii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees under the trust described in subparagraph (i) terminated on that date without causing the trust to terminate.
>
> (iii) The trust beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

MCL 700.7103(g). *Distributee* is defined in MCL 700.1103(o), in part, as "a person that receives a decedent's property from the decedent's personal representative or trust property from the trustee other than as a creditor or purchaser." A *permissible distributee* is a person who is permitted, not entitled, to receive trust property from the trustee (other than as a creditor or purchaser). *Rhea Brody Living Tr.*

Depending on the type of proceeding, creditors and other persons asserting a claim or right against the trust would be interested persons. The court may order notification of additional persons in the interest of justice. MCR 5.125(E). Note that a judgment or an order binds each person who is given notice of the proceeding, even if not all interested persons are notified. MCL 700.7208.

C. Notice of Hearing, Service of Process, and Waivers

§5.6 The petitioner is responsible for giving notice of the time, date, place of hearing, and nature of the hearing to all interested persons. Hearings must be noticed for and held at times previously approved by the court. MCR 5.102. See PC 562. Service on the petitioner is not required. MCR 5.105(C).

Effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

Service may be made by any adult or emancipated minor, including an interested person. MCR 5.103(A). Personal and electronic service must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown if a declaration of intent to give notice of publication, verified under MCR 1.109(D)(3), is filed with the court. The declaration must set forth facts asserting that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. MCR 5.105(A)(3). Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. See PC 563. The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is not required unless the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The court may direct the manner of service if service cannot otherwise reasonably be made. MCR 5.105(A)(4).

A proof of service must be filed with the court before the hearing. If a hearing is not involved, proof of service must be filed with the document. MCR 5.104(A). See PC 564.

Waiver and consent. Service of process is unnecessary if all interested persons have signed and filed with the court Waiver/Consent forms (SCAO form PC 561). MCR 5.104(B).

The right to notice of hearing may be waived by either stating the waiver on the record or executing a writing that is dated and signed by the interested person or someone authorized to consent on the interested person's behalf and specifies the hearing to which it applies. MCR 5.104(B)(1)(a)–(b).

Relief requested in a petition may be granted by consent. An interested person who consents does not have to be served with or waive notice of hearing. The consent must be stated on the record or be in a writing that is dated and signed by the interested person or someone authorized to consent on behalf of the interested person and must contain a statement that the person signing has received a copy of the petition. MCR 5.104(B)(2)(a)–(b).

A waiver and consent may be made

- by a legally competent interested person;

- by a person designated as eligible in the court rules to be served on behalf of an interested person who is legally disabled (except that a fiduciary may not waive or consent with regard to petitions made by that person as fiduciary); or
- on behalf of an interested person by an attorney who has filed a written appearance.

The court rules designate the following as eligible to be served on behalf of an interested person who is legally disabled:

- the legally disabled person's guardian, conservator, or guardian ad litem
- the trustee of a trust with respect to a beneficiary of the trust except that the trustee may not be served on behalf of the beneficiary on petitions, accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate
- a parent of a minor with whom the minor resides if the parent has filed an appearance and the parent and child do not have conflicting interests with respect to the outcome of the hearing
- the attorney for an interested person, if the attorney has filed a written appearance in the proceeding
- the agent of an interested person under an unrevoked power of attorney filed with the court

MCR 5.105(D).

If all interested persons have consented, or if every person affected by the proceeding waives notice and consents in writing to the granting of the petition, the order may be entered immediately. MCL 700.1402; MCR 5.104(B).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For additional information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

D. Guardian ad Litem

§5.7 A court may appoint a guardian ad litem in a trust proceeding to represent the interests of a minor, a legally incapacitated individual, an unborn or unascertained person, or a person whose identity or address is unknown. MCL 700.7305(1). The court usually appoints a guardian ad litem when there is no one else who can adequately represent the interests of the interested person. Further, under MCR 5.121, 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.

Before the date set for hearing, the guardian ad litem must conduct an investigation. The guardian ad litem must then file a written report of the investigation and recommendation with the court at least 24 hours before the hearing or at such other time specified by the court, or the guardian ad litem may make a report in open court. The guardian ad litem need not appear personally at the hearing unless the court directs otherwise. MCR 5.121(C).

The report may be received by the court and relied on to the extent of its probative value even if it is not admissible under the Michigan Rules of Evidence. The report may be examined and controverted by any interested person. The subject of the report may cross-examine the guardian ad litem on request, and other interested persons may cross-examine the guardian ad litem if the person is reasonably available. The court may limit cross-examination for good cause. MCR 5.121(D).

Practice Tip

- *The petitioner in a trust proceeding in which one or more of the interested persons is not ascertained or is under a legal disability should follow up with the judge's secretary or clerk to ensure that a guardian ad litem is appointed in a timely manner. The sooner the guardian ad litem is provided with all the relevant facts, the sooner the guardian ad litem can investigate the situation and write the report. The guardian ad litem's failure to submit the report before the hearing could delay the proceedings.*

E. Representation

§5.8 The rules of representation in Part 3 of the MTC indicate when notice to one person can substitute for notice to another and when the consent of the person to whom notice was given can bind the other person (unless the person represented objects to the representation before consent would otherwise be affected):

- A holder of a power of revocation or amendment or of a presently exercisable or testamentary general or special power of appointment may represent and bind a person to the extent that the person's interest, as a permissible appointee, taker in default, or otherwise, is subject to the power. See the caveat about granting consent or approval to modification or termination of a trust described in MCL 700.7111; MCL 700.7302.
- To the extent there is no conflict of interest between the representative and the person represented,
  - a conservator, plenary guardian, or partial guardian who has the power to act with respect to the trust may represent and bind the estate that the conservator, plenary guardian, or partial guardian controls;
  - if there is no conservator, plenary guardian, or partial guardian, an agent under a durable power of attorney who has the power to act with respect to the trust may represent and bind the principal;

- if there is no conservator and no agent under a durable power of attorney, a guardian may represent and bind the ward;
- if there is no guardian or conservator and there is no conflict of interest, a parent (who files an appearance as required by MCR 5.105(D)(4)) may represent the minor child;
- a trustee may represent and bind the beneficiaries of the trust; and
- a personal representative may represent and bind persons interested in the estate. MCL 700.7303.

The represented person is bound by any order that binds the person who represents that person. MCL 700.7303(a)–(f). In addition, a minor, incapacitated, unborn, or unascertained person who is not otherwise represented is bound by an order to the extent that the person's interest is adequately represented by another party that has a substantially identical interest in the proceeding but only to the extent there is no conflict of interest between the representative and the person represented. MCL 700.7304. Note that a fiduciary's representation of interested persons in a contested matter applies only after the fiduciary notifies them of their right to intervene. MCR 5.120.

Practice Tip

- *A court may wish to highlight a fiduciary's obligation to provide notice to all interested persons that a contested matter has arisen by expressly including within the case scheduling order a deadline for the fiduciary to comply with obligations set forth in MCR 5.120.*

F. Right to Jury Trial

§5.9 Issues of fact may be tried to a jury, and issues involving trustee discretion are tried exclusively to the trial court. Thus, issues of breach of fiduciary duty, propriety of investments, trustee prudence, and determination of best interests are left to the determination of the trial court. *Old Kent Bank v Remainder Beneficiaries (In re Messer Tr)*, 457 Mich 371, 579 NW2d 73 (1998). Note that jury and nonjury issues may be present in the same case.

A demand for jury trial must be filed within 28 days after an issue is contested. If trial is conducted within 28 days of the issue being joined, the jury demand must be filed at least 4 days before trial. A party who was not served with notice of the hearing at least 7 days before the hearing or trial may demand a jury trial at any time before the time set for the hearing. The jury fee provided by law must be paid at the time the demand is filed. MCR 5.158(A).

V. Specific Proceedings and Remedies

A. Challenge of the Validity of a Trust

§5.10 The requirements for creating a trust are as follows:

- The settlor has the capacity to make a trust.
- The settlor indicates an intention to create a trust.

- The trust has a definite beneficiary or is
  - a charitable trust or
  - a trust for a noncharitable purpose or a pet trust, as provided in MCL 700.2722.
- The trustee has duties to perform.
- The same person is not the sole trustee and sole beneficiary.

MCL 700.7402(1)(a)–(e). A trust may be challenged as void because its creation was induced by fraud, duress, or undue influence (see §1.25) or because its purpose was unlawful and contrary to public policy. MCL 700.7404, .7406.

A person may begin a proceeding to contest the validity of a trust that was revocable at the settlor's death within the shorter of the following time periods:

- two years after the settlor's death
- six months after the trustee sent notice informing the person of all of the following:
  - the trust's existence
  - the date of the trust instrument
  - the date of any amendments known to the trustee
  - a copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust
  - the settlor's name
  - the trustee's name and address
  - the time allowed for beginning proceedings

MCL 700.7604. In *Pollack v Barron (In re Gerald L Pollack Tr)*, 309 Mich App 125, 867 NW2d 884 (2015), the court of appeals held that there was no improper retroactive application of the statute of limitations in MCL 700.7604(1) where the proceeding was commenced and the triggering notice sent out after the effective date of the MTC notwithstanding the fact that the trust documents were finalized and the settlor died before the effective date of the MTC. Note that MCL 700.8206(1) provides "that the MTC applies to trusts that were created before, on, or after the effective date of the MTC, thereby encompassing all trusts, and that the MTC applies to all judicial proceedings concerning trusts that are commenced on or after the MTC's effective date." *Pollack,* 309 Mich App at 138.

A penalty clause, an in terrorem clause, or a no-contest clause in a trust that penalizes an interested person for challenging the trust or instituting another proceeding related to the trust will not be given effect if probable cause exists for instituting the proceeding. MCL 700.7113. This probable cause exception to a penalty clause cannot be modified by the terms of a trust. MCL 700.7105(2)(q). In *Perry v Perry (In re Miller Osborne Perry Tr)*, 299 Mich App 525, 831 NW2d 251 (2013), a trust beneficiary brought a suit for declaratory relief to determine whether he had probable cause to challenge a trust amendment under MCL 700.7113. The court held that the suit did not constitute a contest or challenge to

the trust where the trust beneficiary did not challenge the trust in any of the ways specified under the trust's penalty clause.

B. Appointment and Removal of Trustees

§5.11 The trustee of a trust is generally designated in the trust instrument. The trustee accepts the trusteeship by substantially complying with a method of acceptance set forth in the terms of the trust. MCL 700.7701(1)(a). If the trust does not provide a method, the trustee accepts the office by accepting delivery of the trust property, exercising powers, performing duties, or otherwise indicating acceptance. MCL 700.7701(1)(b). A trustee who has not accepted the trusteeship may reject the office, and a trustee who does not accept the office within a reasonable time is deemed to have rejected the trusteeship. MCL 700.7701(2). If, for whatever reason, a trustee is not designated in the trust instrument or the designated trustee declines to accept or resigns as trustee and no successor is named in the trust instrument, the probate court has jurisdiction to appoint a successor trustee. *See* MCL 700.7203(1), .7704. In addition, a nonjudicial settlement agreement may be used to appoint a trustee, without court involvement, as long as the agreement does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court. MCL 700.7111(3)(d). Any interested person may petition the court to appoint the successor when there is a vacancy in a trusteeship. MCL 555.27; MCR 5.501(D); *see also* MCL 700.1302(b)(i), .3915(4).

A trustee who is appointed by court order qualifies by signing and filing an acceptance of trust and must serve the acceptance and order on the qualified trust beneficiaries. The court does not issue letters of trusteeship. MCR 5.501(E).

The trustee is also a fiduciary and, as such, stands in a position of confidence and trust to the beneficiary. MCL 700.1104(e), .1212. The fiduciary must discharge all duties, including impartiality, care and prudence in actions, and segregation of assets held in the fiduciary capacity. MCL 700.1212(1). The fiduciary shall conform to the Michigan prudent investor rule with respect to making investments. *Id.*

The probate court has authority to remove a trustee, including on the court's own initiative. MCL 700.7201, .7706. A trustee may be removed for breach of fiduciary duty, a substantial change in circumstances, or for any other circumstance that renders the trustee unfit to continue as trustee. MCL 700.7201, .7706(2). MCL 700.7706(2), which provides a detailed list of grounds for the removal of a trustee, has superseded and replaced the common-law basis for removal. *Pollack v Barron (In re Gerald L Pollack Tr)*, 309 Mich App 125, 867 NW2d 884 (2015). A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust. MCL 700.7901. Breaches can result from nonfeasance, misfeasance, or malfeasance. Examples of breach of duty include the following:

- failing to perform the trustee's duties
- failing to report

- failing to follow the trust instrument's instructions
- failing to make required distributions
- failing to properly invest

See MCL 700.7108, .7801–.7821. In *Brody v Deutchman (In re Rhea Brody Living Tr)*, 321 Mich App 304, 910 NW2d 348 (2017), *vacated in part on other grounds,* 501 Mich 1094, 912 NW2d 175 (2018), the trustee breached his fiduciary duty by failing to appoint an independent cotrustee, as required by the language of the trust instrument, before shifting beneficial interests under the trust.

Lack of fitness to continue as trustee can be established in a number of circumstances; however, absent an accompanying breach of fiduciary duty, courts are reluctant to remove the trustee designated in the trust instrument unless it can be shown that failure to remove the trustee will result in serious detriment to the administration of the trust.

The MTC specifies that a trustee who does not register the trust as required by the trust instrument after a settlor or beneficiary has demanded registration in writing is subject to removal by the court. MCL 700.7202(2).

In a default rule, at least annually and at the termination of the trust, the trustee must provide a report of the trust property to the distributees or permissible distributees of trust income or principal and to other qualified or nonqualified trust beneficiaries who request it. Except if otherwise ordered, this report is not filed with the court. However, a trustee's failure to prepare a statement of account or the inadequacy of that statement of account may be the basis of a motion to remove the trustee. At a minimum, a report must list the trust's property, liabilities, receipts, and disbursements and the source and amount of the trustee's compensation. MCL 700.7814(3). This is a default provision that may be modified by drafting.

Any interested person may initiate removal by filing a petition with the court requesting that the court remove the trustee. Notice must be given to all interested persons. MCL 700.7208. The petition should include specific details of the trustee's duties and a description of how the trustee has breached those duties. A petitioner must prove a breach of fiduciary duty by a preponderance of the evidence. *In re Conservatorship of Murray*, 336 Mich App 234, 970 NW2d 372 (2021). A probate court's decision to remove a trustee will not be reversed absent a showing of an abuse of discretion. *Comerica Bank v Adrian*, 179 Mich App 712, 446 NW2d 553 (1989).

A trustee may not be removed simply because of hostility or conflicts of interest between the trustee and a beneficiary unless the administration of the trust was affected. *Pollack,* 309 Mich App at 166–167 (noting that "MCL 700.7706(2) d[id] not list "conflict of interest" by itself as a ground for removal," nor did it provide for "[t]he mere existence of litigation between a trustee and a beneficiary [as being] a sufficient reason for removal"); *In re Gerber Tr*, 117 Mich App 1, 323 NW2d 567 (1982). *But see Mills v Patterson (In re Mlynarczyk Tr)*, No 302877 (Mich Ct App Sept 15, 2011) (unpublished).

In addition to removal of a trustee, the court may remedy a breach of trust that has occurred or that may occur by compelling the trustee to perform the trustee's duties, enjoin the trustee, compel the trustee to pay money or restore property, order the trustee to account, appoint a special fiduciary to administer the trust or take possession of trust property, suspend the trustee, reduce or deny the trustee compensation, void a transaction or impose a lien or constructive trust, or order any other appropriate relief. MCL 700.7901. Beyond these equitable remedies, the court may impose monetary damages against the trustee in an amount required to restore the value of the trust property and trust distributions to the amount had the breach not occurred or order repayment of any profit the trustee made by reason of the breach. MCL 700.7902. In *Brody,* the probate court's reformation of a contract to correct a trustee's breach of duty was improper where the original contract expressed the intent of the parties. The probate court was, however, within its discretion to set aside an option agreement that favored one beneficiary over another.

A breach of trust proceeding against a trustee must be filed within one year from the date the beneficiary or the representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding. *See Kilian v TCF Nat'l Bank*, No 358761, ___ Mich App ___, ___ NW2d ___ (Oct 20, 2022) (probate court properly held that plaintiffs were barred from bringing action in November 2019 related to defendant's actions that took place from April 2010 to November 2013 because plaintiffs received notice of one-year limitation period in November 2013 account statement report and should have looked into potential claims for breach of trust at that time). If the required notice was not sent, a judicial proceeding by a trust beneficiary against a trustee for breach of trust must be commenced within five years after the first of the following to occur: the removal, resignation, or death of the trustee; the termination of the trust beneficiary's interest in the trust; or the termination of the trust. MCL 700.7905.

A trust beneficiary who has waived the right to receive reports under MCL 700.7814(5) shall not commence a breach of trust proceeding more than one year after the end of the calendar year in which the alleged breach occurred.

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent the term relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries, or the term of a trust was inserted as the result of an abuse by the trustee of a fiduciary confidential relationship to the settler. MCL 700.7908. This statutory provision, a 2010 amendment to EPIC, establishes a minimum standard of conduct for trustees that cannot be modified by drafting. MCL 700.7105.

C. Review of Fees and Compensation

1. Trustee Fees

§5.12 Most trusts are administered without probate court supervision. MCL 700.7201(2). Therefore, the probate court does not review a trustee's fees unless an interested person files a petition requesting that the court do so or the trustee files annual accounts with the court. On the petition of an interested person, after notice to all interested persons, the court may review the reasonableness of the trustee's compensation for the trustee's services. MCL 700.7207.

The trustee's fee must be *just and reasonable*. The factors the court should consider when determining whether a fee is just and reasonable include the following:

- the size of the trust
- the trustee's responsibility
- the character of the trustee's work
- the results achieved
- the knowledge, skill, and judgment required and used
- the time and services required
- the trustee's manner and promptness in performing trustee duties and responsibilities
- any unusual skill or experience of the trustee
- the trustee's fidelity or disloyalty
- the amount of risk
- the customary charge for similar services in the community
- the trustee's estimate of the value of the trustee's services

The weight to be given to any factor and the determination of reasonable compensation is within the probate court's discretion. The burden of proof is on the trustee to satisfy the court that the services rendered were necessary and that the charges for them are reasonable. The trustee's failure to present records concerning the trustee's services usually weighs against the person, but is not in itself sufficient justification to disallow fees. *Comerica Bank v Adrian*, 179 Mich App 712, 446 NW2d 553 (1989).

If a trustee participates in a civil action or proceeding in good faith, whether successful or not, the trustee is entitled to receive from trust property all expenses and disbursements, including reasonable attorney fees, the trustee incurs in connection with the trustee's participation. However, a court may reduce or deny a trustee's claim for compensation, expenses, or disbursements for any breach of trust. MCL 700.7904.

Practice Tip

- *When a claim of breach of trust or removal and surcharge action is levied against a trustee, the court may be wise or prudent in ordering the restriction or prohibition of the payment of attorney fees from trust assets by the trustee for the defense of the*

breach of trust action. This type of order can inhibit a malfeasant trustee from using trust assets to fund the trustee's defense. There is ample support for this type of judicial action. In re Baldwin's Estate, 311 Mich 288, 18 NW2d 827 (1945); In re Hammond Estate, 215 Mich App 379, 547 NW2d 36 (1996); In re Gerber Tr, 117 Mich App 1, 323 NW 2d 567 (1982); In re Estate of Geiger, No 212692 (Mich Ct App Mar 14, 2000) (unpublished). On the exoneration of the trustee, the trustee may seek reimbursement of costs and expenses related to the breach of trust or surcharge action.

If a bank is serving as trustee, it is entitled to be paid all "proper, legal, *usual, and customary* charges, costs, and expenses … for the care and management of [the] estate." MCL 487.14401(3)(c) (emphasis added). Therefore, the fee practices of other corporate fiduciaries must be considered when determining what constitutes a bank's just and reasonable fee. There is a rebuttable presumption that a bank's fees for conducting trust services are reasonable

- if the fee or its method of computation were specified in a fee schedule or fee agreement of the bank and
- if the person entitled to be kept reasonably informed of the fiduciary account under EPIC received reasonable notice of the fee schedule or agreement before the fee was charged.

MCL 487.14401(3)(e).

The court may order a person who receives excessive compensation from a trust to make an appropriate refund. MCL 700.7207.

2. Employment and Compensation of Agents

§5.13 Unless the trust instrument provides otherwise, a trustee may employ, and pay reasonable compensation for services performed by, an auditor, investment advisor, accountant, appraiser, broker, custodian, rental agent, realtor, or other agent, to advise or assist the trustee in the performance of an administrative duty; and instead of acting personally, the trustee may employ one or more agents to perform an act of administration. A trustee may also employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and pay reasonable compensation for that employment. MCL 700.7817(v), (w).

On the petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of a person by a trustee and the reasonableness of the person's compensation. The court may order a person who receives excessive compensation from a trust to make an appropriate refund. MCL 700.7207.

3. Attorney Fees

§5.14 Under Michigan law, "attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract." *Marilyn Froling Revocable Living Tr v Bloomfield*

Hills Country Club, 283 Mich App 264, 297, 769 NW2d 234 (2009). The leading case on attorney fees disputes is *Smith v Khouri*, 481 Mich 519, 751 NW2d 472 (2008), as refined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274, 884 NW2d 257 (2016). The *Pirgu* case reiterated that the multifactor approach articulated in *Smith* is the standard for determining a fee's reasonableness through a multifactor approach. *Powers v Brown*, 328 Mich App 617, 939 NW2d 733 (2019). The *Pirgu* court analyzed the issue of reasonableness of attorney fees in the context of a no-fault case under MCL 500.3148 and determined that the *Smith* factors "must be considered by a trial court when awarding attorney fees under [MCL 500.3148(1)]." 499 Mich at 280. The burden of proving the reasonableness of the requested attorney fees rests with the party requesting them. The court "should begin the process of calculating a reasonable attorney fee by determining … the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence." *Smith,* 481 Mich at 522. Next, this hourly rate "should be multiplied by the reasonable number of hours expended. … After this, the court may consider making adjustments up or down in light of the other factors listed in [*Wood v DAIIE*, 413 Mich 573, 321 NW2d 653 (1982)] and MRPC 1.5(a)." *Smith,* 481 Mich at 522. It is an abuse of discretion for a trial court to address only a few factors and fail to comprehensively review and state its findings regarding all the factors in the combined *Smith-Pirgu* framework. *Powers,* 328 Mich App at 624.

It should be noted that Michigan law merely allows for "a *reasonable* fee, i.e., a fee similar to that customarily charged in the locality for similar legal services, which, of course, may differ from the *actual* fee charged or the highest rate the attorney might otherwise command." *Smith,* 481 Mich at 528 (emphasis in original; footnote omitted). In sum, reasonable fees "are different from the prices charged to well-to-do clients by the most noted lawyers and renowned firms in a region." *Id.,* quoting *Coulter v Tennessee*, 805 F2d 146, 148 (6th Cir 1986).

In determining the fee customarily charged in the locality for similar legal services, trial courts have routinely relied on data contained in surveys such as the Economics of Law Practice Surveys published by the State Bar of Michigan in addition to the attorney's own affidavits. *Smith,* 481 Mich at 530.

Reasonable attorney fee awards should already include the work of paralegals. MCR 2.626 (attorney fee awards "may include an award for the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney, provided the legal assistant meets the criteria set forth in Article 1, § 6 of the Bylaws of the State Bar of Michigan"). However, independent paralegal billings may not be included in attorney fee awards. *Allard v State Farm Ins Co*, 271 Mich App 394, 404–405, 722 NW2d 268 (2006).

Michigan law does not contemplate an award of reasonable attorney fees for the simultaneous work of two firms. *Van Elslander v Thomas Sebold & Assocs*, 297 Mich App 204, 823 NW2d 843 (2012).

In determining the reasonable number of hours expended, detailed billing records must be submitted, which the court must examine. Excessive, redundant,

or otherwise unnecessary hours regardless of the attorney's skill, reputation, or experience should be excluded. *Van Elslander,* 297 Mich App at 231.

After a baseline figure of reasonable attorney fees is established, the trial court should consider the other factors set forth in MRPC 1.5(a) and *Wood,* to "determine whether they support an increase or decrease in the base number." *Smith,* 481 Mich at 533. Under MRPC 1.5(a), the court should consider the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

MRPC 1.5(a); *see also* M Civ JI 180.03. The overlap of factors between the MRPC and *Wood* should be noted. It should also be recognized that any number of the several factors may have already been contemplated by the court in determining either the reasonable hourly rate or the reasonable number of hours expended.

D. Trustee's Duty to Report and Settlement of Trustees' Accounts

§5.15 A trustee shall do all of the following: (1) on the reasonable request of a trust beneficiary, promptly furnish to the beneficiary a copy of the terms of the trust that describe or affect the beneficiary's interest and relevant information about the trust property; (2) within 63 days of accepting a trusteeship, notify the qualified trust beneficiaries of the acceptance, the court in which the trust is registered if it is registered, and the trustee's name, address, and telephone number; and (3) subject to certain exceptions, within 63 days after the trustee learns of the creation of an irrevocable trust or the date the trustee learns that a formerly revocable trust has become irrevocable, notify the qualified trust beneficiaries of the trust's existence, the identity of the settlor(s), the court in which the trust is registered if it is registered, and the right to request a copy of the terms of the trust that describe or affect the trust beneficiary's interest. These duties of a trustee contained in MCL 700.7814(2)(a)–(c) cannot be modified through drafting. MCL 700.7105(2)(i).

If the trust document is silent regarding the duty to inform and report to beneficiaries, the default rule of the MTC requires the trustee to send to distributees, to permissible distributees, and to other qualified or nonqualified trust beneficiaries who request it, at least annually and at the termination of the trust, a report of

the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation; a listing of the trust property and the market values, if feasible; and any disclosure required under MCL 700.7802(5). *See* MCL 700.7814(3). The probate court may order a trustee to account or provide other information at any time at the request of an interested person or on its own initiative. MCL 700.1308(d), .7105(2)(j), .7814(4).

Trustees may be required by default statute, if applicable, the trust instrument or, again, by court order to file reports or accountings with the court. If annual reports are required to be filed, the trustee files the account along with a petition to allow it, and an interested person may object to any item reflected on the report by filing a written objection with the probate court or by appearing at the hearing on the account to object. If oral objections are made, the court may adjourn the hearing and require that proper written objections be filed and served. MCR 5.119(B).

The hearing process is generally straightforward. The trustee makes a brief presentation to the judge outlining the income and expenses of the trust, summarizing distributions from the trust, and drawing attention to any unusual events. The trustee may also request approval of certain trustee actions. If a beneficiary challenges an item on the account or an action of the trustee, the judge may decide that the beneficiary's complaints are without merit, may order the trustee to refrain from engaging in similar actions in the future, or may order that the trustee take remedial action. If the judge approves the account, the judge usually signs the order (PC 585b) immediately.

The court approval process is greatly simplified if a court hearing can be avoided. Court approval of the accounting without a hearing is possible if waivers or consents are signed by all of the interested persons and are filed with the court, as discussed in §5.6.

A beneficiary must request court review of an account within the time provided in the trust instrument, if any, or within one year after receiving a report that adequately discloses the existence of a potential claim for breach of trust that also informs the beneficiary of the time allowed for commencing a proceeding. MCL 700.7905(1); *see Kilian v TCF Nat'l Bank*, No 358761, ___ Mich App ___, ___ NW2d ___ (Oct 20, 2022) (probate court properly held that plaintiffs were barred from bringing an action because plaintiffs received notice of the one-year limitation period in account statement report six years before filing their complaint). A report meets this adequate disclosure standard if it informs the beneficiary of the potential claim or provides enough information so the beneficiary knows of the potential claim or should have inquired into such a claim. MCL 700.7905(2). However, if the beneficiary does not receive such a report or if the report inadequately disclosed the existence of the potential claim, the breach of trust action must be brought within five years of the trustee's removal, resignation, or death; the termination of the beneficiary's interest in the trust; or the trust's termination, whichever is sooner. MCL 700.7905(3).

MCL 700.7905(1)(a) requires neither that the trust be terminated or that a final report issue for the one-year statute of limitation to begin running. Instead,

MCL 700.7905(1)(a) requires that the trust beneficiary be sent a report disclosing a potential claim and informing the trust beneficiary of the time frame for filing the claim. *Ducharme v Ducharme*, 305 Mich App 1, 850 NW2d 607 (2014) ("trial court properly granted summary disposition pursuant to MCR 2.116(C)(7) on the ground that the claims were time-barred under MCL 700.7905(1)(a)" where "the reports adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding").

The trustee may also voluntarily seek court approval of a trust account. MCL 700.1302(b)(iii), .7201(3)(c). Many trustees file a petition for the allowance of the final account to bind the beneficiaries who are parties to the proceeding and anyone who would be bound under the representation rules in Part 3 of the MTC.

If the terms of the trust direct that reports be sent to less than all of the qualified trust beneficiaries, at the court's direction, the trustee must provide reports to persons excluded under the terms of the trust. MCL 700.7814(4). Unless the governing instrument alters the prudent investor rule of MCL 700.1502, a fiduciary is required to follow it. MCL 700.7803.

E. Instruction of Trustees

§5.16 The probate court has the authority to instruct a trustee and to determine, relative to a trustee, the existence or nonexistence of an immunity, a power, a privilege, a duty, or a right. MCL 700.1302, .7201(3)(e)–(f). A petition may be filed either by the trustee, hoping to secure court approval of a proposed action, or by a beneficiary, hoping to compel the trustee to perform an action (e.g., make a distribution). The court also has the authority, for good cause shown, to relieve the trustee from any restrictions on the trustee's power that are otherwise placed on the trustee by the trust or by EPIC. *See* MCL 700.1302(b)(vi), .7201(3)(f), .7412(1)–(2).

A trustee may request instructions from the probate court on any issue on which the trustee is unsure how to proceed properly. For instance, if disputes arise among the beneficiaries over the division of trust property, the trustee may want to bring the matter before the court for instruction on how to proceed. A trustee may also want to request instructions from the court if the terms of the trust are inconsistent with the law or require the trustee to take actions that are impossible for the trustee to accomplish. In addition, a trustee must petition for instructions and authorization to exercise a power if the trustee's duty conflicts with the trustee's individual interest or the trustee's interest as a trustee of another trust and the transaction is not expressly authorized in the trust agreement or otherwise permitted by statute. *See* MCL 700.7802.

F. Approval of Nonjudicial Settlement Agreements

§5.17 The probate court has exclusive legal and equitable jurisdiction in a proceeding that concerns the validity, internal affairs, administration, distribution, modification, reformation, settlement, or termination of a trust. MCL 700.1302, .7203. Under the MTC, interested persons now may enter into a bind-

ing nonjudicial settlement agreement without court involvement to resolve such issues as the construction or interpretation of a term of a trust. The statute provides a nonexhaustive list of matters that may be resolved by nonjudicial settlement agreement. This type of agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court. A nonjudicial settlement agreement cannot be used to terminate or modify a trust. MCL 700.7111.

In *Draves v Draves (In re Draves)*, 298 Mich App 745, 828 NW2d 83 (2012), the court of appeals clarified that a global settlement agreement entered into by parties to a lawsuit that settled numerous pending actions, was entered into the record, and involved the retention of jurisdiction by the probate court to administer disputes regarding the performance or compliance of a party under the settlement agreement, was not the resolution of routine trust administration but was in fact a modification of the trust creating a contractual agreement between the parties and, as such, was not a nonjudicial settlement agreement as defined by MCL 700.7111(2).

Any interested person may petition for approval of a nonjudicial settlement agreement under MCL 700.7111(1). Note, however, even with the consent of the trustee, the settlor, and all living beneficiaries, if there are unborn or unascertained beneficiaries who are not adequately represented, the court should appoint a guardian ad litem to represent their interests, and the guardian ad litem must also consent to the settlement. MCL 700.7305. See §5.7 regarding the appointment of a guardian ad litem for unborn and unascertained beneficiaries.

If all the interested persons are adequately represented in the settlement, the agreement does not violate a material purpose of the trust, and the agreement contains terms and conditions the court could have properly approved, the court must approve the settlement agreement. MCL 700.7111(4).

G. Reformation or Construction of Trusts

§5.18 Reformation is a proceeding to obtain judicial authorization to reform the terms of an existing trust instrument as necessary to give effect to the settlor's original intent. Reformation may involve the addition of language not contained in the original instrument or the deletion of language originally included by mistake. Under MCL 700.7415, reformation encompasses mistakes in expression and inducement. A construction proceeding determines the settlor's intent from the language contained in the trust document when the language of the trust instrument is ambiguous. The court's authority to interpret ambiguity is found in MCL 700.1302. A construction decree determines the meaning of the trust instrument from the date of its execution. The court may consider extrinsic evidence to demonstrate the existence of a latent ambiguity or resolve an ambiguity in the instrument.

Reformation proceedings. A trust instrument may be reformed or rescinded on the same grounds as any other transfer of property can be reformed or rescinded. *Restatement (Second) of Trusts* §333. Thus, fraud, duress, undue influ-

ence, mistake, and incapacity at the time of the creation of the trust document are grounds for reforming the terms of a trust instrument.

The most common ground for reforming a trust is mistake. *See Kobylinski v Szeliga*, 307 Mich 306, 11 NW2d 899 (1943). If the petitioner alleges fraud or mistake, the allegations must be stated with particularity in the petition. MCR 2.112(B)(1). Allegations regarding intent, knowledge, and condition of mind may be general.

A court may reform a trust, even if unambiguous, to conform the terms to the settlor's intention if both the settlor's intent and the terms of the trust were affected by a mistake of fact or law and it is proved by clear and convincing evidence. MCL 700.7415. Parol evidence may be admitted to prove that the trust instrument does not express the settlor's intent. *Burns v Caskey*, 100 Mich 94, 100, 58 NW 642 (1894).

Note that a proceeding to modify a trust involves a change to the original terms of the trust to address unanticipated circumstances arising after the execution of the trust. The modification must be consistent with the material purposes of the trust. MCL 700.7411. A court may modify the terms of a trust to achieve the settlor's tax objectives, if the modification is not contrary to the settlor's probable intention. MCL 700.7416.

Practice Tip

- *Judicial reformation is not the only course to address a tax problem. In some cases, it may be possible to seek a judicial construction rather than a reformation to achieve the desired tax result. In the area of the generation-skipping transfer tax (GSTT), a court's construction of ambiguous trust provisions will not affect the trust's GSTT-exempt status because it does not change, but only clarifies, the original terms of the trust instrument. Priv Ltr Rul 9522032 (Mar 3, 1995) (clarifying Priv Ltr Rul 9448024 (Aug 31, 1994)), 9528012 (Apr 13, 1995)).*

If the continuation of a trust on its existing terms would be impracticable or wasteful or impair the trust's administration, the court may modify the administrative terms of a trust. MCL 700.7412(1). The court may also modify the administrative and dispositive terms of a trust or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose or, if there is not stated intention, probable purpose. MCL 700.7412(2). A court may also modify or terminate a trust (or remove the trustee and appoint a different one) if it determines that the value of the trust property is insufficient to justify the cost of administration.

Construction proceedings. A court may construe the terms of a trust instrument to carry out the settlor's intent. *Union Guardian Tr Co v Nichols*, 311 Mich 107, 18 NW2d 383 (1945); *In re Nowels Estate*, 128 Mich App 174, 339 NW2d 861 (1983). However, an appropriately executed trust instrument is to be given effect according to its terms, and, in determining the settlor's intent, the court must first look to the expression of intent in the trust instrument and construe the instrument so that each word has meaning, to the extent possible. *Detroit Bank & Tr Co v Grout*, 95 Mich App 253, 289 NW2d 898 (1980); *see also Karam v Law*

Office of Kliber, 253 Mich App 410, 655 NW2d 614 (2002) (extrinsic evidence may be introduced to determine intent only when estate-planning documents are internally inconsistent or ambiguous). The intent of the settlor as gathered from the entire trust instrument controls an apparently inconsistent term when the inconsistency cannot be reconciled. *Foster v Ypsilanti Sav Bank*, 299 Mich 258, 300 NW 78 (1941); *Donovan v National Bank of Detroit*, 20 Mich App 485, 174 NW2d 146 (1969), *aff'd*, 384 Mich 595, 185 NW2d 354 (1971).

Generally, the rules of construction that apply to deeds, contracts, and other written instruments apply to trusts. EPIC also contains specific rules of construction that are applicable to trusts, including the following:

- An individual who does not survive an event by 120 hours is considered to have predeceased the event. MCL 700.2702.
- The donor's intent in requiring that a power of appointment be exercised by specific reference is presumed to be to prevent an inadvertent exercise of the power. MCL 700.2706.
- Adopted and illegitimate individuals and their descendants are included in class gifts in accordance with the rules for intestate succession. MCL 700.2707.
- Terms of relationship that do not differentiate between blood relationships and affinity relationships (e.g., nieces and nephews) are construed to exclude affinity relationships. MCL 700.2707.
- Terms of relationship that do not differentiate between relationships by the half blood and by the whole blood (e.g., brothers and sisters) are construed to include both types of relationships. MCL 700.2707.
- Antilapse provisions may apply to preserve the interest of a deceased beneficiary for the person's surviving descendants. MCL 700.2713–.2716.
- Multigenerational class gifts that do not specify the manner in which the property is to be distributed among class members are to be distributed according to the laws of intestate succession. MCL 700.2717, .2720.
- Property that is to be distributed *by representation* is to be distributed on a per capita at each generation basis. MCL 700.2718.
- *Age of majority* means the legal age of majority in effect when the trust instrument was executed. MCL 700.2721.

EPIC's express rules for the interpretation of and disposition of property by will, MCL 700.2605–.2608, which previously did not apply to trusts, are now extended to trusts under the MTC. MCL 700.7112.

If the settlor's intent cannot be determined from the trust instrument, parol evidence is admissible to aid in the construction. *Flynn v Brownell*, 371 Mich 19, 23, 123 NW2d 153 (1963) (permitting proof of testator's intent in use of term *entire net income*).

Be aware that matters involving the construction of terms of the trust can also be resolved by a proper nonjudicial settlement agreement under MCL 700.7111.

H. Claims Proceedings Involving Revocable Trusts

§5.19 If the assets of a decedent's estate are insufficient, the assets of the decedent's revocable trust are subject to claims against the decedent's estate, including the statutory allowances for the surviving spouse and minor and dependent children, administrative expenses, and other valid claims that are timely presented to the personal representative. MCL 700.7605; *see also* MCL 556.128. The personal representative is responsible for certifying in writing to the trustee that the trust assets are necessary to satisfy the estate's claims. Only claims that have been timely presented and allowed against the probate estate may be certified for payment from the trust assets. The trust estate includes income from trust assets. *Williams v Herbert (In re Herbert Tr)*, 303 Mich App 456, 844 NW2d 163 (2013).

If no personal representative has been appointed, the trustee must publish a claims notice as required by MCL 700.3801 and MCR 5.208, unless MCL 700.3803 applies and publication is not required. MCL 700.7608. The procedures for presentment of claims, allowance, and disallowance are virtually the same as those for a probate estate. MCL 700.7606. When there is no personal representative appointed for the settlor's estate within four months of the date of publication of notice to creditors, a trust described in MCL 700.7605(1), is not liable for payment of homestead, family, or exempt property allowance. MCL 700.7606(1).

In disputes involving creditors' claims, an action on a claim against an estate, other than an action filed by a claimant after notice that the claim has been disallowed, can be a proceeding, commenced by filing a petition in the probate court. A suit on a claim following disallowance of the claim is a civil action, commenced by filing a complaint and subject to the general court rules applicable to civil actions. MCR 5.101. For procedural rules governing civil actions, see chapter 4.

The claimant has the burden of proving the right to recover as to each element of a claim by clear and satisfactory evidence. *Lafrinere v Campbell's Estate*, 343 Mich 639, 73 NW2d 295 (1955); *In re Jorgenson's Estate*, 321 Mich 594, 32 NW2d 902 (1948). If the claim involves goods, services, or compensation, the claimant further bears the burden of proving the fair value of each item. *Dolgy's Estate v Polate*, 338 Mich 567, 61 NW2d 649 (1953). The real-party-in-interest doctrine requires that the claim be prosecuted by the party who owns the claim asserted. In *Rottenberg v Lipsitz (In re Beatrice Rottenberg Living Tr)*, 300 Mich App 339, 833 NW2d 384 (2013), because the trust beneficiary was not the real party in interest, the beneficiary's claims should have been dismissed.

A claimant seeking to recover in a proceeding based on a contract bears the burden of proof to establish the existence of the contract. *Dolgy; Jorgenson*. If the claimant seeks to recover under a theory of contract for services, the claimant must also prove

- that the claimant performed services that were beneficial to the decedent or at the request of the decedent,
- that the claimant performed the services expecting to be paid,
- the value of the services, and
- that the decedent accepted the services expecting to pay the claimant.

See In re Pierson's Estate, 282 Mich 411, 276 NW 498 (1937); *In re Estate of Donley*, 3 Mich App 458, 142 NW2d 898 (1966). Further, the claimant must prove that the decedent intended that the claimant be paid from the estate after the decedent's death; otherwise, the claimant is limited to recovering only for the six years of service immediately preceding the decedent's death. *Pupaza v Laity*, 268 Mich 250, 256 NW 328 (1934); *see also* M Civ JI 176.02.

Claims may be allowed by court order as follows:

- On the trustee's or a claimant's commencement of a claim proceeding, the court may allow in whole or in part a claim that was properly and timely presented and has not been disallowed under MCL 700.7611(a).
- A judgment in a proceeding in another court against a trustee to enforce a claim against a decedent's estate is an allowance of the claim.

MCL 700.7611(c), (d). A trustee may inform a claimant that a particular claim has been disallowed in whole or in part. A claim that is disallowed is barred to the extent not allowed unless the claimant begins a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance. MCL 700.7611(a). In *Independent Bank v Hammel Assocs, LLC*, 301 Mich App 502, 836 NW2d 737 (2013), a claim was presented by the creditor against both the decedent's estate and the decedent's revocable trust. Because the notice of disallowance filed by the trustee referred only to the decedent's estate (which had yet to be filed) and not to the revocable trust, the claim was not disallowed for the trust.

In determining liability for a claim against a trust, the court must reduce the amount allowed by the amount of any valid counterclaim that the trustee has against the claimant and, if the total counterclaims exceed the claim, render a judgment against the claimant for the excess. The counterclaim may arise from a transaction other than that on which the claim is based and may give rise to relief different in kind from that sought in the claim. MCL 700.7615.

I. Termination of Trusts

§5.20 A trust terminates without court intervention, as provided in the trust instrument, when no purpose of the trust remains to be achieved or the purposes of the trust have become impossible to achieve or are found by a court to be unlawful or contrary to public policy. MCL 700.7410(1). A trustee or beneficiary may commence a proceeding to confirm the termination of the trust. MCL 700.7410(2).A trust may be terminated by the court on a petition for termination by the trustee or another interested person for various reasons, including the following:

- Owing to circumstances not anticipated by the settlor, termination of the trust will further the settlor's stated purpose or, if there is no stated purpose, the settlor's probable intention. MCL 700.7412(2).
- The value of the trust property is insufficient to justify the cost of administration. MCL 700.7414(2).

- All of the qualified trust beneficiaries and the trustee consent, and termination is consistent with the material purposes of the trust or continuance of the trust is not necessary to achieve any material purpose of the trust. MCL 700.7411(1)(a). However, if a trustee fails and refuses to consent or fewer than all the qualified trust beneficiaries consent, the court may terminate the trust if the following apply: (i) if the trustee and all of the qualified trust beneficiaries had consented, the trust could have been modified under MCL 700.7411(5), and (ii) the interests of a qualified trust beneficiary who does not consent will be adequately protected. (This does not apply to irrevocable trusts created before or revocable trusts that become irrevocable before April 1, 2010.)

Except for irrevocable trusts created before or revocable trusts that become irrevocable before April 1, 2010, a trust may be terminated without court approval by the following:

- by the consent of the qualified trust beneficiaries and a person or committee that has been given the power to grant, veto, or withhold approval of termination or modification of the trust, MCL 700.7411(1)(b)
- by a trustee or other person or committee that has been given the power by the terms of the trust to direct the termination by the terms of the trust, MCL 700.7411(1)(c)

Practice Tip

- *A trustee can terminate a trust without court approval if it is valued under $50,000 63 days after giving notice to qualified trust beneficiaries (and the attorney general, if it is a charitable trust). MCL 700.7414(1). This amount is adjusted annually for inflation. See exhibit 1.1 for the annual amount.*

J. Repayment of Improper Distributions

§5.21 Unless a distribution or payment may no longer be questioned because of adjudication, estoppel, or other limitation, a distributee or claimant who received improper payments or distributions from a trust may be ordered to return the property or pay its value. MCL 700.7813(3). Specifically, the court may order the distributee or claimant to either disgorge the property or repay the trust both the value of the asset and any income or gain from the distribution.

Practice Tip

- *The EPIC questions and answers website notes that MCL 700.7813 is based on a similar Uniform Probate Code (UPC) section governing wrongful distributions from wills. The UPC comment to that section indicates that a trustee seeking to avoid a wrongful distribution claim should either have a beneficiary sign an approval of the distribution or obtain court confirmation of the distribution.*

Form 5.1
Order Terminating Court Supervision of Trust

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

Estate of *[deceased's name]*, Deceased,
Trust Under Will
_____/

File No. *[number]-[case-type code]*
Judge *[name]*

[Attorney's name] (P*[number]*)
Attorney for Petitioner
[Address, telephone, email]

ORDER TERMINATING COURT SUPERVISION

At a session of court held in the courthouse in
[city, county], Michigan, on *[date]*.
Present: Honorable *[name of judge]*
[name of court] Court Judge

Upon the filing by *[petitioner's name]* of its Petition to Terminate Court Supervision, and all interested parties having been given due Notice of Hearing upon said Petition; and

The Court finding that, pursuant to applicable statutory provisions, supervision of the subject Testamentary Trust should be terminated; accordingly,

IT IS ORDERED that Court supervision of the administration of the Trust established under the Last Will and Testament of *[deceased's name]*, Deceased, is hereby terminated, subject to the right of any interested party to invoke Court jurisdiction and supervision upon a Petition duly made, all pursuant to the provisions of MCL 700.7201, .7203, and any other applicable statutory provision.

Dated: *[date]*

[Signature line]
Probate Court Judge

6
Minor Guardianship Proceedings

Contributions to the sections on the Indian Child Welfare Act and the Michigan Indian Family Preservation Act were made by Annette Nickel.

Summary of Minor Guardianship Proceedings

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Jurisdiction and venue. §§6.1–6.10.

The probate court has jurisdiction over minor guardianships except for juvenile guardianships under the juvenile code. For cases commenced on or after January 1, 1998, the family division of circuit court has ancillary jurisdiction. Venue is in the county where the minor resides or is present.

The Indian Child Welfare Act and the Michigan Indian Family Preservation Act govern any action removing an Indian child from a parent or an Indian custodian for placement in the home of a guardian.

Temporary guardians. §6.11.

Temporary guardians may be appointed during proceedings for the appointment of a guardian or if a guardian is not properly performing the guardian's duties. In the latter case, the appointment may not exceed six months.

Initial appointment of the full guardian of a minor. §§6.12–6.19.

Parental appointment.

The parent of an unmarried minor may appoint a guardian for the minor by will or by another writing signed by the parent and attested by at least two witnesses. If both parents are dead or legally incapacitated, or if the surviving parent has no parental rights, the appointment becomes effective, absent objection by the minor if age 14 or older, on the guardian's filing an acceptance of appointment.

Court appointment.

Who may petition for a full guardianship?—"any person interested in the welfare of a minor," or a minor if age 14 or older. The term *full guardianship* is not used in the statute. The term is used to distinguish this type of minor guardianship from a *limited* guardianship, which is identified as such.

Notice of the hearing must be given to the following:

- the minor, if 14 or older
- if known by the petitioner, each person who had the principal care and custody of the minor during the 63 days before filing
- the parents of the minor; if neither is living, any grandparents and the minor's adult presumptive heirs
- the nominated guardian
- if known by the petitioner, a guardian or conservator appointed in another state to make decisions regarding the person of the minor

Additional special persons who may need to be notified are the following:

- if the minor is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a request for notice

A guardian may be appointed only if

1. the parental rights of both parents or the surviving parent are terminated or suspended by prior court order, divorce, separate maintenance, death, judicial determination of mental incompetency, disappearance, or confinement in a place of detention; or
2. the parent or parents permit the minor to reside with another person and have not given that person legal authority over the minor; or
3. the minor's biological parents never married each other; the parent with custody dies or is missing and the other parent does not have legal custody; and the proposed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

Who may be appointed—a person whose appointment would serve the minor's welfare; the court must appoint a person nominated by the minor 14 or older unless the appointment is contrary to the minor's welfare. The appointment of professional guardians is subject to restrictions. A guardian who is appointed, qualified, and serving in good standing in another state may be appointed temporary guardian in Michigan and then full guardian on the filing of proof of service of notice of the temporary appointment.

Lawyers–guardian ad litem, guardians ad litem, and investigation.

The court may appoint a lawyer–guardian ad litem to represent the minor if the minor's interests are or may be inadequately represented (the court must consider the minor's preference if the minor is 14 or older).

The court may appoint a guardian ad litem.

The court may order an investigation and report by the Department of Health and Human Services (DHHS) or court staff.

Evidence.

- The court may receive and rely on all material and relevant evidence, even though it might not be admissible under the Michigan Rules of Evidence.
- Interested persons can examine and controvert reports; in the court's discretion, they may cross-examine individuals making the reports.
- Except for the attorney-client privilege, privilege does not prevent receipt and use of materials prepared for a court-ordered examination, etc.

Standard for appointment.

The court must make the appointment on a finding that

- a qualified person seeks appointment,
- venue is proper,
- required notices have been given,
- requirements of MCL 700.5204 have been met (defining situations in which a full guardian may be appointed), and
- the minor's welfare will be served by the appointment.

If there are no such findings, the court may dismiss the petition or make any other disposition that will serve the welfare of the minor.

Limited guardians. §§6.20–6.22.

The provisions for full guardians outlined above apply, with the following exceptions:

- Only the custodial parent or parents may petition the court.
- The court may make an appointment if
  - the parent or parents with custody consent,
  - the parent or parents voluntarily consent to the suspension of their parental rights, and

- the court approves a limited guardianship placement plan that has the consent of the parent or parents and the proposed guardian.

The limited guardianship placement plan must state

- why the parents are requesting the appointment of a limited guardian,
- parenting time sufficient for the parents to maintain a parent-child relationship,
- the length of the limited guardianship,
- who will provide financial support for the child, and
- any other agreements between the parties.

Review of guardianships. §§6.23–6.27.

The court reviews as necessary, and at least annually for a ward under six.

Factors in the review include the following:

- the parents' compliance with the limited guardianship placement plan
- whether the guardian has provided for the minor's welfare
- the necessity of continuing the guardianship
- the guardian's willingness and ability to continue to provide for the minor's welfare
- effect on the minor if the guardianship continued
- other factors relevant to the minor's welfare

The court may order an investigation by DHHS or court staff.

After the investigation, the court may do the following:

- Continue the guardianship.
- Conduct a hearing. After the hearing, the court may continue the guardianship or order modification of the limited guardianship placement plan or, for a full guardianship, order a court-structured plan.
- Take actions permitted following petitions for termination (see below).

Powers of full and limited guardians. §§6.28–6.33.

Full guardians have all the powers and responsibilities of custodial parents, except that they are not legally obligated to support the ward out of their own funds and are not liable to third parties for the ward's acts.

Limited guardians have the same powers, except that they may not consent to the ward's marriage, adoption, or release for adoption.

Termination of guardianships. §§6.34–6.37.

The authority of a guardian terminates without court order on the minor's death, adoption, marriage, or attaining majority. It terminates by court order on the guardian's death, resignation, or removal.

Petition for removal or resignation.

Any person interested in the minor's welfare or the minor, if the minor is 14 or older, may petition for removal of the guardian; the guardian may petition to resign.

The court may appoint a lawyer–guardian ad litem if the minor's interests are or may be inadequately represented.

After the hearing, the court may terminate the guardianship or make other appropriate orders.

Petition for termination of full guardianships.

The parent or parents may petition for termination.

If a petition for termination is filed, the court may order an investigation, use "the community resources in behavioral sciences and other professions" and consider their recommendation, appoint a guardian ad litem or attorney for the child, or take other necessary action.

After a hearing, the court may

- terminate the guardianship if termination is in the best interests of the minor and enter orders to facilitate the reintegration of the minor into the parental home;
- continue the guardianship for not more than one year and order compliance with the applicable plan;
- if the child has resided with the guardian for not less than one year and the parents' actions have resulted in substantial disruption of the parent-child relationship, continue the guardianship if the court finds by *clear and convincing evidence* that continuation is in the best interests of the minor; or
- appoint an attorney to represent the minor or refer the matter to DHHS, either of whom may file a child protection complaint.

See §6.36 for the best interests standard to be applied.

A full guardianship may also be terminated on an interested person's petition for removal or resignation.

Petition for termination of limited guardianships.

The parent or parents with a right to custody of the minor may petition for termination.

After notice and a hearing, the court must terminate the limited guardianship if it finds that the parents have substantially complied with the limited guardianship placement plan. The court may order DHHS to supervise the transition period when the minor is reintegrated into the parent's home. MCL 700.5209(2)(a)(ii).

After a hearing, the court may

- continue the guardianship for not more than one year and order compliance with the applicable plan;
- if the child has resided with the guardian for not less than one year and the parents' actions have resulted in substantial disruption of the parent-child relation-

ship, continue the guardianship if the court finds by *clear and convincing evidence* that continuation is in the best interests of the minor; or

- appoint an attorney to represent the minor or refer the matter to DHHS, either of whom may file a child protection complaint.

If there is no such finding, the court has the options described above under "Petition for termination of full guardianships."

A limited guardianship may also be terminated on a petition for resignation by the limited guardian.

I. Jurisdiction and Venue

A. Concurrent Jurisdiction with Family Division of Circuit Court

§6.1 The probate court has exclusive legal and equitable jurisdiction over guardianships, conservatorships, and protective proceedings, except to the extent the Revised Judicature Act confers jurisdiction on the family division of circuit court. MCL 600.841, 700.1302(c). The family division of circuit court has ancillary jurisdiction over cases involving guardians and conservators that are commenced on or after January 1, 1998. MCL 600.1021(2)(a). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011. The family division of circuit court also has jurisdiction over juvenile guardianships emanating from child protective proceedings. If the court determines at a posttermination review hearing or a permanency planning hearing that it is in the child's best interests to appoint a juvenile guardian, the court may do so. MCL 712A.19a, .19c; MCR 3.979.

Since one of the purposes of the 1996 family court legislation was to create a court before which all family matters can be heard, it is presumed that ancillary jurisdiction will be invoked when an earlier case involving the same parties is pending before the family division of the circuit court. Examples may include juvenile matters in which a guardianship is sought as a disposition technique and domestic relations cases with third-party custodial issues.

The invocation of concurrent or ancillary jurisdiction in a particular case has significant consequences for the interested persons, particularly with respect to appellate rights. A final order in a guardianship proceeding in probate court is appealable by right to the court of appeals. MCL 600.308.

The probate court's jurisdiction over a valid guardianship is not affected by the execution of a six-month power of attorney delegating parental rights to a third party. *In re Martin*, 237 Mich App 253, 602 NW2d 630 (1999).

Subsequent proceedings. The court in the county where the ward resides has concurrent jurisdiction with the court that appointed the guardian over such matters as resignation, removal, accounting, and other proceedings relating to the guardianship. MCL 700.5218.

B. Indian Child Welfare Act and the Michigan Indian Family Preservation Act

1. Applicability

§6.2 The Indian Child Welfare Act (ICWA), 25 USC 1901 et seq., the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1–.41, and 25 CFR 23.2 apply to any action deemed a *child custody proceeding*, as defined in 25 USC 1903 and MCL 712B.3(b). A child custody proceeding includes a *foster care placement,* in which an *Indian child* is removed from a parent or Indian custodian and the parent or Indian custodian cannot have the child returned on demand. *On*

demand means that the parent or Indian custodian can regain custody on verbal request, without any formalities or contingencies. 25 CFR 23.2. ICWA and MIFPA protections govern termination of parental rights proceedings for a non-Indian parent of an Indian child as well as an Indian parent. *See In re Beers*, 325 Mich App 653, 926 NW2d 832 (2018). This holding may have implications for custodial rights for a non-Indian parent of an Indian child as well as an Indian parent.

The congressional intent behind ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 USC 1902; *see also* NAA 230.

ICWA was enacted in 1978 to reverse the practice of public and private welfare agencies of removing Indian children from their Indian families and placing them in non-Indian foster and adoptive homes and institutions. The act recognizes that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 USC 1901(3).

Most cases that require application of ICWA are child protection proceedings. However, according to the plain language of 25 USC 1903(1), ICWA defines *foster care placement* to include guardianship proceedings in which the child is placed with a person other than the parents or Indian custodian and a parent or Indian custodian may not have the child returned on demand. By definition, *guardianships,* whether limited or full, are included in this definition of *foster care placement.* The Michigan Court of Appeals held that ICWA applies to guardianship proceedings in *Empson-Laviolette v Crago*, 280 Mich App 620, 760 NW2d 793 (2008).

MIFPA was enacted on January 2, 2013, and codifies in state law many of the federal ICWA requirements. The enactment of MIFPA applies the concepts of ICWA to specific Michigan procedure and statutory provisions and clarifies the ICWA provisions in the context of Michigan statutes and court rules.

Although the state law is generally consistent with ICWA, the Michigan statute is more specific in some areas. For instance, MIFPA expands the definition of *Indian child* to eliminate the requirement that a child who is eligible for enrollment need not be the biological child of a parent who is an enrolled member of an Indian tribe. 25 USC 1903(4); MCL 712B.3(k); 25 CFR 23.2. See exhibit 6.1 for a chart prepared by the State Court Administrative Office (SCAO) Child Welfare Services that summarizes the differences between ICWA and MIFPA.

In 2016, the Department of the Interior created ICWA regulations to implement the federal statute. *See* 25 CFR Part 23. The federal regulations include a definition of *active efforts,* 25 CFR 23.2, and made significant changes to the notice requirements, 25 CFR 23.11(a), .111. The guidelines from the Bureau of Indian Affairs (BIA) were also updated in 2016. While not binding, these guide-

lines are meant to assist state courts in interpreting and applying ICWA and the federal regulations.

A court should apply the more specific provisions of the state law instead of ICWA when the state law provides them. 25 USC 1921. Also, the state law should be applied over BIA regulations when that law provides more protection to the parents, Indian custodian, or tribe. 25 CFR 23.106.

For a fuller discussion of MIFPA as well as ICWA in the context of adoptions and termination of parental rights, see *Michigan Family Law Benchbook* ch 13 (ICLE 2d ed).

2. Identification of an Indian Child

§6.3 The court must determine whether the child is an *Indian child,* which is defined as any unmarried person who is under the age of 18 and is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe as determined by that Indian tribe. MCL 712B.3(k); MCR 3.002(12). ICWA limited the definition of *Indian child* to the biological children of a member of an Indian tribe. 25 CFR 23.2. MIFPA gets rid of that requirement, opening the door to adoptive children if by adoption they become eligible for membership or enrolled as tribe members regardless of heritage by birth. *See* 25 USC 1903(4); MCR 3.002(12); *In re KMN*, 309 Mich App 274, 870 NW2d 75 (2015).

Membership (also referred to as citizenship or enrollment) is determined by each tribe as identified in the tribe's constitution or other tribal legislation. In Michigan, DHHS has applied the act to expand recognition of an *Indian Tribe* and *Indian Child* beyond the specific requirements of ICWA and MCR 3.002(17) to include state historic and Canadian tribes. *See* NAA 200; DHHS Native American Affairs Glossary. However, MIFPA did not codify this expansion of the definition. MCL 712B.3(o).

The court must apply ICWA and its procedures as well as MIFPA requirements if the court "knows or has reason to know that an Indian child is involved." 25 USC 1912. The federal regulations set out the following circumstances under which a court has reason to believe that a child is an Indian child:

1. The court is informed by any participant in the proceeding, an officer of the court involved in the proceeding, an Indian tribe, an Indian organization, or an agency that the child is an Indian child.
2. The court is informed by any participant in the proceeding, an officer of the court involved in the proceeding, an Indian tribe, an Indian organization, or an agency that information exists indicating the child is an Indian child.
3. The child gives the court reason to know that the child is an Indian child.
4. The court is informed that the residence or domicile of the child, the parent, or the Indian custodian is on a reservation or in an Alaska native village.
5. The court is informed that the child is or has been a ward of a tribal court.
6. The court is informed that either parent or the child possesses an identification card indicating membership in an Indian tribe.

25 CFR 23.107(c); *see also*MCL 712B.9(4). The petitioner must document all efforts made to determine a child's membership or eligibility for membership in an Indian tribe. MCR 5.404(A)(1).

If DHHS is involved, MIFPA imposes on DHHS a duty to determine, at initial contact with a child, whether the child is an Indian child, and then must contact the Indian tribe or tribes in writing to seek to verify membership or eligibility for membership. If DHHS cannot make an initial determination about which tribe or tribes the child may be a member of, DHHS must contact in writing the tribe or tribes located in the county in which the child is located and the Secretary of the Interior. MCL 712B.9(3).

The Michigan Supreme Court clarified when ICWA notice requirements of 25 USC 1912(a) are triggered, stating that notice must be provided when there is "sufficiently reliable information of virtually any criteria on which tribal membership might be based." *In re Morris* and *In re Gordon*, 491 Mich 81, 108, 815 NW2d 62 (2012). The decision is based on two cases that were consolidated on appeal and illustrate two different notice issues. In *In re Morris,* the child's parents informed the probate court that they each had Cherokee Indian heritage, but no notice was given to any potential tribe. In *In re Gordon,* the child's mother informed the court at a preliminary hearing that her family was part of the Saginaw Chippewa Indian Tribe. The supreme court found in both cases that the trial court properly found that the notice requirements of ICWA were triggered. The court provided explicit steps to evaluate when notice to a tribe is required and how the efforts to provide notice must be documented. The court also reiterated that a parent cannot waive a child's status as an Indian child. 25 USC 1912(a); *In re Morris,* 491 Mich at 95–97, 110–111; *see also In re Johnson*, 305 Mich App 328, 852 NW2d 224 (2014) (court must investigate whether ICWA applies if there is any indication that child may be an Indian child, and record should indicate that an investigation was conducted). It is the petitioner who must provide the notice to the tribe. MCL 712B.9(1). However, in many guardianships, the petitioner is a lay person who may not be aware of the notice requirements. This does not waive the requirement that the child's tribe must be notified. A best practice is to have the court ensure that proper notice is provided.

Once it is determined that a child is an Indian child, additional provisions apply. If both parents consent under MCL 712B.13 and MCR 5.404, the guardianship is voluntary and the court must follow the procedures outlined in MCR 5.404(B). If both parents do not consent as required by MCL 712B.13 and MCR 5.404, the guardianship is involuntary, and the court must follow the procedures outlined in MCL 712B.15 and .25 and MCR 5.404(C). In an involuntary guardianship, the court cannot place the child in foster care without a finding by clear and convincing evidence that active efforts (defined in 25 CFR 23.2) have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that those efforts were unsuccessful, and that continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 CFR 23.120(a). See 25 CFR 23.2 for a definition of *continued custody.* The evidence must include the testimony of at least one qualified expert witness, as described in MCL 712B.17, who has knowl-

edge of child-rearing practices of the Indian child's tribe and who testifies that the continued custody is likely to result in serious emotional or physical damage to the Indian child. MCL 712B.15(2); MCR 5.404(F)(1); 25 CFR 23.121(a). Active efforts must take into account the prevailing social and cultural conditions of the child's tribe. MCL 712B.15(2); MCR 5.404(F). Active efforts are described in MCL 712B.3(a) and MCR 3.002(1). *See also* MCR 5.404(A)(3), (F). Active efforts must be documented in detail in the record. 25 CFR 23.120(b); *see* BIA Guidelines §E.6. A petitioner may not be aware of these requirements, and consultation with the child's tribe as soon as possible can be instrumental in meeting the requirements of MIFPA.

If the court or petitioner discovers before the conclusion of the proceedings that the child may be an Indian child, all proceedings are suspended until the tribe or the Secretary of the Interior receive notice of the proceedings as set forth in MCL 712B.9(2). If the child is determined to be an Indian child, all provisions of ICWA and MIFPA apply whether or not the child's tribe intervenes.

If, after a hearing, the court decides that the parent or tribe was prejudiced by the lack of notice, the court's prior decisions will be vacated and the case will start again with the first hearing. The petitioner has the burden of proving lack of prejudice. *Id.; see also Family Independence Agency v Conselyea (In re TM) (After Remand)*, 245 Mich App 181, 188, 628 NW2d 570 (2001).

The proper remedy for violating ICWA notice provisions is conditional reversal of the trial court and remand for resolution of ICWA notice issue. *In re Morris,* at 121–122, *overruling In re IEM; see also In re Budd*, 491 Mich 934, 815 NW2d 125 (2012); *In re Johnson.*

3. Procedure for Notifying Tribe or Secretary of the Interior

§6.4 The party seeking guardianship over an Indian child must notify the parent or Indian custodian and the Indian child's tribe of the proceedings and of the right to intervene by personal service or registered mail, return receipt requested and delivery restricted to the addressee. 25 CFR 23.111(a)–(b). Federal regulations require that notice be sent to each tribe in which the child may be a member or eligible for membership if a biological parent is a member. 25 CFR 23.111(b)(1). For information on how to contact a tribe, see 25 CFR 23.105. The notice must include the following:

- the child's name, birth date, and birthplace
- all known names of the parents, the parents' birth dates and birthplaces, and tribal enrollment numbers, if known
- the names, birth dates, birthplaces, and tribal enrollment information of other direct lineal ancestors of the child, such as grandparents, if known
- the name of each Indian tribe in which the child is a member (or may be eligible for membership if a biological parent is a member)
- a copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing

- statements setting out the name of the petitioner and the name and address of the petitioner's attorney; the various rights of the Indian child, any parent or Indian custodian of the child, and the Indian tribe; and the potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian (see 25 CFR 23.111(d)(6) for a list of all requirements)

25 CFR 23.111(d); *see also* MCL 712B.13(1)(b), .25(2). Copies of the sent notices must be sent to the BIA regional director, which for Michigan is the Minneapolis Regional Director. 25 CFR 23.11(a), (b)(2).

If the identity or location of the parent or Indian custodian and the Indian child's tribe cannot be determined, the notice must be given to the Secretary of the Interior by registered mail, return receipt requested. 25 USC 1912(a); MCL 712B.9(1); MCR 5.109; 25 CFR 23.111(a); *see also* 25 CFR 23.111(e). No foster care placement proceeding can be held until at least 10 days after receipt of the notice by the parent or Indian custodian and the tribe or Secretary of the Interior. 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a). BIA Guidelines §D.10 recommends that where the tribe does not respond to the notice or responds that it is not interested in participating, the court or agency should continue to send the tribe notice of subsequent proceedings (when notice is required). On request, a parent, Indian custodian, or the tribe will be granted up to an additional 20 days to prepare for the proceeding. 25 USC 1912(a); MCL 712B.9(2); 25 CFR 23.112(a).

If the court discovers that a child may be an Indian child after a guardianship is in place, the court must

- schedule a hearing to be conducted in accordance with MCR 5.404(C) and (F);
- enter an order for an investigation in accordance with MCR 5.404(A)(2) that requires the guardian to cooperate in the investigation; and
- provide notice of the guardianship and the hearing and the potential applicability of ICWA and MIFPA to the parties named in MCR 5.125(A)(8), (C)(20), and (C)(26) in accordance with MCR 5.109(1).

MCR 5.402(E)(5). A copy of the notice must be served on the guardian. *Id.*

Addresses of federally recognized Michigan tribes, state historic tribes, and the Secretary of the Interior are included in NAA 610. See exhibit 6.2.

Practice Tip

- *The SCAO has developed a form, PC 678, Notice of Guardianship Proceedings Concerning an Indian Child, for use in conjunction with the notice requirements of MCR 5.109.*

4. Record-Keeping Requirements

§6.5 While ICWA is silent regarding the particularities of record keeping around the issue of notice to Indian tribes, the Michigan Supreme Court,

in *In re Morris*, 491 Mich 81, 815 NW2d 62 (2012), imposed on the trial courts a duty to ensure that the lower court record includes

- the original or a copy of each actual notice personally served or sent via registered mail under 25 USC 1912(a) and
- the original or a legible copy of the return receipt or other proof of service showing personal service.

In re Morris, at 113–114. If these items are made part of the record, an appellate court could then determine whether notice was actually sent and to whom it was sent and whether notices were received by the correct recipients. The Michigan Supreme Court also suggested that trial courts retain in the record any additional correspondence among the petitioner, the court, and the Indian tribe (or other person or entity entitled to notice under 25 USC 1912(a)).

MCR 5.404(A)(1) requires the petitioner for minor guardianship to document all efforts made to determine the child's membership or eligibility for membership in an Indian tribe and to provide them to the court, the Indian tribe, the Indian child, and the Indian child's lawyer–guardian ad litem (LGAL), parent, or Indian custodian, on request.

On the filing of a guardianship petition, the court may order DHHS or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation in accordance with MCL 700.5204(1). MCR 5.404(A). If the petition involves an Indian child, the report must be filed with the court and include the information required in MCL 712B.25(1). MCR 5.404(A)(2). See §6.8 for the requirements in MCL 712B.25(1). If the petition states that it is unknown whether the minor is an Indian child, the investigation must inquire into Indian tribal membership. MCR 5.404(A)(2).

5. Transfer of Guardianship Proceedings

§6.6 Generally, if a party seeks guardianship over an Indian child and an Indian tribe has exclusive jurisdiction, the matter will be dismissed. If the Indian tribe does *not* have exclusive jurisdiction, as defined in MCL 712B.7(1) and MCR 3.002(6), the court must transfer the proceeding to the tribal court on the request of either parent, the Indian custodian, or the Indian child's tribe, provided that the transfer is subject to declination by the tribal court of the Indian tribe. 25 USC 1911(b); MCL 712B.7(3); MCR 5.402(E)(3)(c); 25 CFR 23.117. Exceptions to this rule are the following: (1) either parent objects to the transfer, or (2) the court finds good cause not to transfer the case. 25 USC 1911(b); MCL 712B.7(3); MCR 5.402(E)(3)(a); 25 CFR 23.117. The "adequacy of the tribe, tribal court, or tribal social services" should not be considered in determining whether there is good cause to refuse to transfer. MCL 712B.7(4); MCR 5.402(E)(3)(a); 25 CFR 23.118(c)(5). A court may determine that good cause exists and refrain from transferring a case only if the person opposing the transfer shows by clear and convincing evidence that either the Indian tribe does not have a tribal court or the requirements of the parties or witnesses to present evidence in tribal court would cause them undue hardship that the Indian tribe is unable to

mitigate. MCL 712B.7(5); MCR 5.402(E)(3)(a). The timeliness of the request or the effect the transfer would have on the child's best interests does not constitute an undue hardship that would justify the denial of a request to transfer. *In re Spears*, 309 Mich App 658, 872 NW2d 852 (2015). A petition to transfer can be made at any time. MCL 712B.7(3); MCR 5.402(E)(3)(d); 25 CFR 23.115(a).

The probate court must not dismiss the proceeding until the transfer has been accepted by the tribal court. MCR 5.402(E)(3)(b). If the tribal court declines a transfer, the probate court must apply MIFPA and applicable court rule provisions. MCR 5.402(E)(3)(c). If the court does not have exclusive jurisdiction over the guardianship proceeding, the court must ensure that the petitioner gave notice to the interested parties as defined by MCR 5.125(A)(8) and (C)(20) and in accordance with MCR 5.109(1). MCR 5.402(E)(3).

6. Voluntary Guardianship Proceedings

§6.7 Under MIFPA, a guardianship is voluntary if both parents or Indian custodian voluntarily consent to a petition for guardianship under MCL 700.5204 or .5205. MCL 712B.13(1); MCR 5.404. For voluntary proceedings, such as limited or full guardianships, the parent or Indian custodian's consent to the arrangement is not valid unless it is in writing, recorded before a judge of competent jurisdiction, and accompanied by the judge's certificate that the terms and consequences of the consent were fully explained in detail and that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that was understood. 25 USC 1913(a); MCL 712B.13(1)(a); MCR 5.404(B)(1); 25 CFR 23.125(a), (b)(1), (c). The court must explain, before accepting consent, that the parent or Indian custodian may withdraw consent "for any reason, at any time, and have the child returned."25 CFR 23.125(b)(2)(i). If confidentiality is requested, consent does not need to be made in open court but still must be made before a court of competent jurisdiction. 25 CFR 23.125(d). MIFPA requires that the consent be on a form approved by the SCAO. MCL 712B.13(1)(a); MCR 5.404(B)(1); *see* SCAO form PC 686 (Consent by Parent/Indian Custodian to Guardianship of Indian Child). The consent is not valid if given before or within 10 days after the child's birth. 25 USC 1913(a); MCL 712B.13(1)(a); MCR 5.404(B)(1); 25 CFR 23.125(e). The court may use videoconferencing technology for the guardianship consent hearing required to be held under MIFPA. MCL 712B.13(1); MCR 5.404(B)(1).

The child's tribe is allowed to intervene even in a voluntary guardianship, MCL 712B.7(6). All of the notice requirements of ICWA, the CFRs, MIFPA, and the Michigan Court Rules must be followed.

The consent must contain the following:

- the name and date of birth of the Indian child
- the name of the child's tribe and any identifying number or other indication of the child's membership in the tribe, if any
- the name and address of the consenting parent or Indian custodian

- a sworn statement from the translator, if any, attesting to the accuracy of the translation
- signature of the consenting parent(s) or Indian custodian recorded before the judge, verifying an oath of understanding of the significance of the guardianship and the parent's right to file a written demand to terminate the guardianship at any time

MCL 712B.13(2); *see also* 25 CFR 23.126(b). The written consent must include any conditions to the consent. 25 CFR 23.126(a).

A parent or Indian custodian may withdraw consent at any time by sending written notice to the court "substantially in compliance on a form approved by the SCAO that the parent or Indian custodian revokes consent and wants his or her Indian child returned." MCL 712B.13(4); *see also* MCL 712B.25(4); MCR 5.404(B)(3); 25 CFR 23.127(a)–(b); SCAO form PC 687 (Withdrawal of Consent to Guardianship of Indian Child). Once the court receives a demand for withdrawal of consent, the court must immediately enter an ex parte order terminating the guardianship and returning the Indian child to the parent or Indian custodian; however, if both parents executed a consent, both parents must withdraw their consent or the court must conduct a hearing within 21 days to determine whether to terminate the guardianship. MCL 712B.25(5); MCR 5.404(B)(3); 25 CFR 23.127(c).

For a case finding that ICWA applies to a petition for guardianship by a grandparent, see *In re Guardianship of QGM*, 808 P2d 684 (Okla 1991). See also Thomas R. Myers and Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application,* Mich BJ, July 2004, at 19, for a discussion of the applicability of the act. MIFPA specifically addresses guardianships, both voluntary and involuntary, MCL 712B.13, .25.

In a voluntary guardianship proceeding, the court must hold a hearing to determine if the tribe has exclusive jurisdiction that will result in dismissal of the petition, whether valid consent has been obtained from both parents or the Indian custodian as required by MCL 712B.13, if it is in the child's best interest to appoint a guardian, and if an LGAL should be appointed to represent the Indian child. MCL 712B.25(2); MCR 5.404(B)(2). See also §6.6. The court must also determine whether the current placement with a guardian complies with MCL 712B.23, which requires a certain order of preference (unless good cause is shown to deviate from this order or the tribe establishes a different order). MCL 712B.13(1)(c)(i), .23, .25(2). In *In re KMN*, 309 Mich App 274, 291 n5, 870 NW2d 75 (2015), the court found that good cause for deviating from the order of preference should be interpreted in accordance with MIFPA, not with the Bureau of Indian Affairs guidelines, which provide additional circumstances for modifying the statutory order of preference. Since *In re KMN* was decided, the federal regulations added further conditions the court should consider in determining whether good cause to deviate exists. 25 CFR 23.132(c). The court must consider the Indian child or the child's parent's placement preference. 25 CFR 23.130(c), .131(d); *see also* 25 CFR 23.132(c); BIA Guidelines §H.4. An Indian child's bio-

logical mother's preference of adoptive parents is not good cause for disregarding the preferences under MCL 712B.23(2). *In re KMN.*

7. Involuntary Guardianship Proceedings

§6.8 If an Indian child is the subject of a guardianship proceeding under MCL 700.5204 and .5205 and a parent has not provided a consent, the procedural requirements of MCL 712B.25, and MCR 5.404(C) apply. MCL 712B.15(1), .25(3); MCR 5.404(A). A parent may subsequently consent to the guardianship; both parents consenting to the guardianship turns the involuntary guardianship into a voluntary guardianship. *See* MCR 5.404(C)(1)(e). See §6.7. When a guardianship is involuntary because only one parent consented, MCR 5.404(H)(6) permits the consenting parent to withdraw consent and terminate the guardianship in accordance with MCR 5.404(B)(3).

An involuntary guardianship petition must state what active efforts were made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family. MCR 5.404(A)(3).

If the court has reason to know that the child is an Indian child, the court may appoint a LGAL to represent the child's interests and may order DHHS or a court employee to conduct an investigation of the proposed guardianship and file a written report. The report must include

- whether the child is an Indian child;
- the identity and location of the child's parents, if known; and,
- if the child is an Indian child,
  - the tribe or tribes of which the child is a member or eligible for membership,
  - whether the child and family need culturally appropriate and other services to preserve the family, and
  - the identity and location of extended family members (as defined in MCL 712B.3(f)) and, if no extended family members are found, the efforts made to locate them.

MCL 712B.25(1); MCR 5.404(A)(2). The investigation must also include an inquiry into Indian tribal membership. MCR 5.404(A)(2). If the petition does not indicate that the minor is an Indian child, the court must so inquire. MCR 5.404(D). The court must hold a hearing to determine whether the tribe has exclusive jurisdiction that will result in dismissal of the petition. MCR 5.404(C)(1). See §6.6. While courts are allowed to use videoconferencing technology under MCR 5.140, in a proceeding concerning a minor guardianship, the subject of the petition must be allowed to be physically present if the person wishes, but only if the person is 14 years of age or older. MCR 5.140(C), .404(B)(1) (eff. May 1, 2021).

The court must determine whether active efforts have been made to prevent the breakup of the Indian family. MCL 712B.15(2); MCR 5.404(F)(1). The court must also determine whether the current placement with a guardian was made

within a certain order of preference (unless good cause is shown to deviate from this order or unless the tribe establishes a different order), is in the least restrictive setting that most approximates a family (taking into account sibling attachment) and in which any special needs may be met, and is within reasonable proximity to the child's home, extended family, or siblings. 25 USC 1915(b); MCL 712B.25(2), .23; MCR 5.404(C)(1)–(3); 25 CFR 23.131(a); *see also* 25 CFR 23.131(b), .129(c). The court, where appropriate, must consider the preference of the Indian child or the Indian child's parent. 25 USC 1915(c); 25 CFR 23.131(d). For more details on when the parent's preference applies, see 25 CFR 23.132(c)(1). The court must also determine whether it is in the Indian child's best interests to appoint a guardian and whether an LGAL should be appointed. MCL 712B.25(2); MCR 5.404(C)(1)(c)–(d). The court must also determine whether each parent wants to consent to the guardianship. MCR 5.404(C)(1)(e).

No placement can be made without testimony of at least one qualified expert witness (as defined by MCL 712B.17) with knowledge of the tribe's child rearing practices and testimony that active efforts to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family have been unsuccessful and that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." MCL 712B.15(2); MCR 5.404(F)(1); 25 CFR 23.120(a), .121(a). See 25 CFR 23.2 for the definition of *continued custody.* The evidence must show a causal relationship between the conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage to the child. 25 CFR 23.121(c). Without a causal relationship, evidence of poverty, isolation, and other negative factors does not by itself constitute clear and convincing evidence that continued custody will likely result in serious emotional or physical damage to the child. 25 CFR 23.121(d).

Active efforts must take into account social and cultural conditions of the Indian child's tribe. MCL 712B.15(2); MCR 5.404(F). Active efforts must be documented in detail on the record. 25 CFR 23.120(b); *see also* BIA Guidelines §E.6. If the petitioner is unable to show that active efforts have been made, the court must dismiss the petition and may refer the petitioner to DHHS or the tribe for services. MCR 5.404(F).

8. Right to Intervene or Participate in Proceeding

§6.9 An Indian child, the child's tribe, and the Indian custodian have a right to intervene at any point in a guardianship proceeding. 25 USC 1911(c); MCL 712B.7(6); *see also* MCR 5.402(E)(4). The tribe may or may not file a written motion, because the tribe intervenes by right, not by leave. The tribe might be unable to hire local counsel (especially tribes located outside the state of Michigan). For that reason, MIFPA includes a provision that enables an official tribal representative, an individual designated by the Indian child's tribe to represent the tribe in a court overseeing a child custody proceeding, to participate in any guardianship proceeding subject to ICWA and MIFPA. MCL 712B.7(7), .3(r). ICWA and MIFPA apply whether the child's tribe intervenes in the proceeding. If the tribe intervenes, it does so as the governmental entity, and the

tribal representative does not represent either the parent or the Indian child. See the National Indian Law Library's ICWA Guide Online forms index for a motion to intervene.

C. Venue

§6.10 Venue for guardianship proceedings for a minor is the county where the minor resides or is present when the proceeding is commenced. MCL 700.5211.

Venue may be changed by the court or by the motion of a party for the convenience of the parties, the witnesses, or the attorneys. MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128; *see* SCAO forms PC 608p (Petition for Change of Venue), PC 608o (Order to Change Venue).

II. Temporary Guardians

§6.11 The court may appoint a temporary guardian in the course of a proceeding for permanent guardianship or pursuant to an application to appoint a guardian serving in another state to serve as guardian in this state (see §6.13). MCR 5.403(A). In the course of a proceeding for permanent guardianship, a temporary guardian for a minor may be appointed in two situations:

1. If necessary, the court may appoint a temporary guardian during proceedings for the appointment of a guardian. MCR 5.403(D)(1).
2. A temporary guardian may also be appointed if it comes to the court's attention that a guardian is not properly performing the guardian's duties. MCR 5.403(D)(2). Besides assuming the powers of the suspended guardian, the temporary guardian determines whether a petition to remove the guardian should be filed. If a removal petition is not filed, the temporary guardian makes recommendations to the court for the protection of the minor after the temporary guardian's term expires. MCR 5.403(D)(2).

In either situation, the temporary guardian's appointment may not exceed six months. MCL 700.5213(3). Note that a temporary guardian has the same powers as a full guardian, including standing to bring an action for custody. *See Kater v Brausen*, 241 Mich App 606, 617 NW2d 40 (2000). For further discussion of a guardian's standing to seek custody, see §6.30. The court must inquire whether the child is an Indian child; if so, all provisions related to an Indian child apply. See §§6.2–6.9.

Notice. For good cause, the court may shorten the period for notice of a hearing, or dispense with it altogether, except that the minor must always receive notice if the minor is 14 years of age or older. MCR 5.403(B). If the notice period is shortened or eliminated and a temporary guardian is appointed, the court must send notice of appointment to all interested persons as well as information regarding the right to object and the date of the new hearing using SCAO form PC 672, Notice of Appointment of Temporary Guardian for Minor and of Right to Object. MCR 5.403(B). If an interested person objects to the temporary ex parte

appointment of a guardian where the notice period has been shortened or eliminated, a hearing must be held within 14 days of the objection's filing. MCR 5.403(B).

Practice Tip

- *A temporary guardianship typically is used to address an immediate need of the child, such as enrolling in school, obtaining insurance, or seeing a doctor.*

III. Full Guardians

A. Appointment in a Will or Other Writing

§6.12 The parent of an unmarried minor may appoint a guardian for the minor by will or by another writing signed by the parent and attested by at least two witnesses. MCL 700.5202. If both parents are dead or legally incapacitated or if the surviving parent has no parental rights, the appointment becomes effective on the guardian's filing Acceptance of Appointment (SCAO form PC 571), in the court in which the will is probated. If the nomination is contained in a nontestamentary instrument or the testator who made the nomination is still alive, the appointment is effective when the acceptance is filed in the court where the minor resides or is present. *Id.* The minor, if 14 or older, may object either before the appointment is accepted or within 28 days after acceptance. MCL 700.5203.

The procedure for a testamentary appointment is to file the guardian's acceptance "in the court in which a nominating instrument is probated." MCL 700.5202(2). In a nontestamentary appointment, the acceptance must be filed in the court at the place the minor resides or is present. MCL 700.5202(2).

The guardian is a full guardian once an acceptance of appointment is filed and not objected to. *Ramon v Pena (In re Ramon)*, 208 Mich App 610, 528 NW2d 831 (1995). Note that the term *full guardianship* is not used in the Estates and Protected Individuals Code (EPIC). The term is used to distinguish this type of minor guardianship from a *limited* guardianship, which is identified as such.

If the guardian named in the will does not file an acceptance of appointment within 28 days after receiving notice of a pending guardianship petition, the court may proceed with the appointment of a guardian. MCL 700.5204(4). The guardian named in the will may consent to the appointment of the petitioner and waive the 28-day notice requirement by signing a Waiver/Consent form (SCAO form PC 561), which the petitioner should file with the court. MCR 5.104(B).

Practice Tips

- *Because the will must first be admitted to probate, a testamentary appointment may become effective only after the parent's death. Appointment in a nontestamentary document, on the other hand, may be effective on either incapacity or death. If the surviving parent becomes legally incapacitated and has made only a testamentary appointment, the appointee should commence a guardianship proceeding and offer the will as evidence of the parent's intent that the appointee serve as guardian.*

- *A custodial parent may not bar a claim from the noncustodial parent at the custodial parent's death by naming a third party as testamentary guardian. The court is free to consider the rights of the noncustodial parent. This is true even if the custodial parent nominates a third party with whom the child is living at the time of the custodial parent's death. MCL 700.5202; Porter v Overton, 214 Mich App 95, 542 NW2d 288 (1995).*

B. Court Appointment

1. Conditions for Appointment

§6.13 MCL 700.5204(2) provides that the court may appoint a guardian for an unmarried minor in the following situations:

- The parental rights of both parents or of the surviving parent are terminated or suspended by prior court order, a judgment of divorce or separate maintenance, death, judicial determination of mental incompetency, disappearance, or confinement in a place of detention. If a divorce judgment provides for sole (i.e., both legal and physical) custody with one party, the other party's parental rights are considered suspended, and the noncustodial parent's consent is unnecessary to proceed with a guardianship.
- The parent or parents permit the minor to reside with another person and have not provided that person with legal authority for the care and maintenance of the minor. These circumstances must exist at the time the petition is filed. *See In re Guardianship of Versalle*, 334 Mich App 173, 963 NW2d 701 (2020) (MCL 700.5204(2)(b) constitutional because guardianship may be obtained only if petitioner rebuts presumption that parent is fit parent—parent no longer adequately caring for children (as defined by statute)); *see also Deschaine v St Germain*, 256 Mich App 665, 671 NW2d 79 (2003).
- All of the following are true:
  - The minor's biological parents have never been married to one another.
  - The custodial parent dies or is missing and the other parent has not been granted legal custody under court order.
  - The person whom the petition asks to be appointed guardian is related to the minor within the fifth degree by marriage, blood, or adoption.

  To calculate the degree of kinship, go back to the common ancestor and count each generation (in each direction), including the one of the person applying to be guardian. For example, to calculate the degree of kinship between you and your sister's daughter, count the daughter, your sister, your mother, and yourself, resulting in kinship of the fourth degree. See exhibit 6.3.

Foreign guardian. A guardian who is appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in Michigan if (1) a guardian has not been appointed in Michigan, and (2) a petition for the appointment of a guardian is not pending in Michigan. MCL 700.5202a(1); MCR 5.108(B)(2)(a). The appointment takes place on the

filing of an application for appointment, an authenticated copy of letters of appointment in the other state, and an acceptance of appointment. *See* SCAO forms PC 684m (Application for Appointment of Out-of-State Guardian of Minor), PC 684o (Order for Appointment of Out-of-State Guardian of Minor). The letters of guardianship for this temporary guardian expire 28 days after the date of appointment. MCL 700.5202a(1). Within 14 days of appointment, the guardian must give notice to the interested persons of the appointment and the right to object. MCR 5.108(B)(2)(b), .125(C)(20). The notice to interested persons is included in SCAO form PC 684o. The temporary guardian will be made full guardian after the filing of a proof of service of notice of the appointment, with the right to object, on all interested parties. MCL 700.5202a(2). If an objection is filed, the guardianship continues unless a court in this state enters an order removing the guardian. MCL 700.5202a(3).

Practice Tip

- *Some courts may make the temporary appointment on filing appropriate documentation; others may want ex parte or fully noticed hearings.*

2. Who May File the Petition

§6.14 Any person interested in the welfare of the minor, or a minor 14 years of age or older, may petition for the appointment of a guardian of the minor. MCL 700.5204(1); MCR 5.402(B).

A limited guardian may petition to be appointed full guardian, except that the "petition shall not be based upon suspension of parental rights by the order that appointed that person the limited guardian for that minor." MCL 700.5204(3). This provision does not have much effect unless circumstances have changed (e.g., both parents are now deceased). Typically a limited guardian wants full guardian status so that the guardian may file for custody in circuit court without the parent being able to use compliance with the limited guardianship placement plan as a defense.

3. Form and Contents of the Petition

§6.15 The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;

- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e). Because there is an SCAO form (PC 651, Petition for Appointment of Guardian of Minor), the form must be used. MCR 5.113(A).

Practice Tip

- *If SCAO has approved a form for a specific purpose, the applicable court rule requires that form to be used for filing with the court. Most courts allow attachments if needed.*

A petition for temporary guardian, filed during proceedings for the appointment of a guardian, must specify in detail the conditions requiring a temporary guardianship. MCR 5.403(D)(1).

A social history must be filed before hearing the petition for guardianship. SCAO form PC 670, Minor Guardianship Social History, must be used. MCR 5.404(A)(4). Note that "[t]he social history for minor guardianship is confidential, and it is not to be released, except on order of the court, to the parties or the attorneys for the parties." *Id.*

A petition concerning a minor who is subject to prior continuing jurisdiction of another court must contain allegations concerning the prior proceedings. MCR 5.112. The SCAO form MC 28, Notice to Prior Court of Proceedings Affecting Minor(s), is used to notify the prior court of the present proceeding. Many courts complete and mail this form on receipt of a petition reporting a prior proceeding. Others require that the petitioner do so.

MCR 2.004 provides that in an action involving the custody or guardianship of a minor child, if a party to the action is incarcerated under the jurisdiction of the Michigan Department of Corrections, the party seeking an order regarding the child must

- contact the Department of Corrections to confirm the incarceration and the incarcerated party's prison number and location;
- serve the incarcerated person with the petition or motion seeking an order regarding the child and file proof of service with the court;
- file the petition or motion with the court, stating that a party is incarcerated and providing the party's prison number and location; and
- state in the caption of the petition or motion that a telephonic hearing or video conference is required by MCR 2.004.

MCR 2.004(B). The court will then issue an order requesting the facility holding the incarcerated party to allow that party to participate with the court by unmoni-

tored and noncollect phone or videoconferencing technology. The order must contain the date and time for the hearing or conference and the prisoner's name and identification number. The order must be served at least seven days before the hearing or conference on the parties and the warden or supervisor of the facility where the incarcerated person is being held. MCR 2.004(C). The obligations of MCR 2.004 apply only when the parent is incarcerated by the Michigan Department of Corrections. *Family Independence Agency v Davis (In re BAD)*, 264 Mich App 66, 690 NW2d 287 (2004). A parent incarcerated in a county jail, a federal prison, or in another state is not protected by the court rule.

If there is an attorney for the petitioner, the attorney must sign the petition as attorney according to MCR 1.109(E)(2)(a) because the SCAO form (PC 651) includes a place for an attorney's signature. The attorney may also sign the petition for the petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain the following statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b); *see* PC 651 (Petition for Appointment of Guardian of Minor).

Filing fee. The total filing fee is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.1986(1)(a). If a temporary guardianship is requested at the same time as the full, there is no additional fee. If it is filed at a different time, the fee is $20. MCR 2.119(G)(2); MCL 600.880a(1), .880b(1). The court may waive the fee if the petitioner is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. See MCR 2.002 for required court procedures on waiving fees for indigent petitioners. There is no filing fee if the petition is filed by DHHS, the attorney general, an agency of county government, the Department of Treasury, or the administrator of Veterans Affairs of the U.S. Veterans Administration. MCL 600.880a(2).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

4. Notice of Hearing

§6.16 The petitioner must give notice of the time and place of the hearing on the petition to the following:

- the minor, if the person is 14 years old or older

- if known by the petitioner, each person who had the principal care and custody of the minor during the 63 days before the petition was filed
- the parents of the minor or, if neither parent is living, any grandparents and the adult presumptive heirs of the minor (Note that the biological father of a child born out of wedlock need not be served notice of the proceedings unless paternity has been determined. *See* MCR 5.125(B)(4).)
- the nominated guardian
- if known by the petitioner, a guardian or conservator appointed by a court in another state to make decisions regarding the person of the minor.

MCR 5.125(C)(20).

Additional special persons who may need to be notified are the following:

- if the minor is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a request for notice under MCL 700.5104
- the Indian child's tribe, Indian custodian (if any), and, if the Indian child's parent or custodian or tribe is unknown, the Secretary of the Interior, MCL 712B.9

MCR 5.125(A). MCL 700.5104 permits an interested person who desires to be notified before an order is made in a guardianship or conservatorship proceeding to file a request for notice. If a guardianship or protective proceeding is not pending when the request for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding ($175, *see* SCAO form PC 624 (Request for Notice)).

Service. The petitioner is responsible for serving notice of hearing and a copy of the petition on all interested persons. MCR 5.102; *see* SCAO form PC 562 (Notice of Hearing). Service on the petitioner is not required. MCR 5.105(C). An interested person may be served by mail, personal service, or publication when necessary. If the minor is 14 years or older, notice on the minor must be served personally unless another method is justified under the circumstances. MCR 5.402(C).

Effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

Personal and electronic service under MCR 1.109(G)(6)(a) must be made at least seven days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The court may direct the manner of service if service cannot otherwise reasonably be made. MCR 5.105(A)(4).

A proof of service must be filed with the court before the hearing. *See* SCAO form PC 564 (Proof of Service). If no hearing is involved, proof of service must be filed with the document. MCR 5.104(A).

Waiver and consent. Service of process is unnecessary if all interested persons have signed and filed with the court Waiver/Consent forms (SCAO form PC 561). MCR 5.104(B). However, a hearing is required in all minor guardianship cases to determine whether the proposed guardianship "serves the minor's welfare." MCL 700.5212. Waivers show that the family members are in agreement and provide evidence that the proposed guardianship serves the minor's welfare, since the interested persons, who presumably know the minor best, consent to it.

5. Lawyer–Guardian ad Litem

§6.17 If the court determines that the minor's interests are or may be inadequately represented, the court may appoint a LGAL to represent the minor. MCL 700.5213(4). For the duties and powers of the LGAL, EPIC refers to MCL 712A.17d, which governs child protection proceedings and provides that the LGAL's duty is to the child, not to the court, and that the attorney-client privilege applies. MCL 712A.17d(1)(a). However, the LGAL also has the duty to determine and advocate for the child's best interests. MCL 712A.17d(1)(i). MCL 712A.17d applies to LGALs appointed in minor guardianship cases, as well as termination of parental rights proceedings. MCL 712A.13a(1)(g). The child's wishes are relevant to the determination of best interests and should be weighed according to the child's competence and maturity. MCL 712A.17d(1)(i). The LGAL may file a written recommendation and report, which the court may read but not admit into evidence unless all parties stipulate to the admission. The report may also be used for a settlement conference. MCL 700.5213(5)(a).

MCL 712A.17d(1)(c) requires that an LGAL review the agency file before disposition and before any hearing for termination of parental rights. The LGAL must also review updated materials that are provided by the court and parties. Further, the LGAL must meet and observe the child, assessing the child's needs and

wishes regarding the issues in the case. MCL 712A.17d(1)(d). These meetings, observations, and assessments must occur in the following instances:

- before the pretrial hearing
- before the initial disposition, if held more than 91 days after the petition has been authorized
- before a dispositional review hearing
- before a permanency planning hearing
- before a post-termination review hearing
- at least once during the pendency of a supplemental petition
- at other times as ordered by the court

MCL 712A.17d(1)(d).

The court may allow the LGAL to use alternative means of contact with the child if good cause is shown on the record. MCL 712A.17d(1)(e).

Pursuant to MCR 3.915(B)(2)(a), at each hearing the court must ask whether the LGAL has met or had contact with the child as required by MCL 712A.17d(1)(d). If the LGAL has not met or had contact with the child, the court must require the LGAL to state the reasons for failing to do so on the record. MCR 3.915(B)(2)(a).

An LGAL must identify common interests among the parties and, if possible, promote a cooperative resolution of the matter through consultation with the child's parent, foster care provider, guardian, and case worker. MCL 712A.17d(1)(k). LGALs must participate in early childhood, child, and adolescent development training. MCL 712A.17d(1)(m). LGALs must participate in trauma-informed training if it is provided by the SCAO. MCL 712A.17d(1)(n). The statute does not address the frequency or nature of the training.

A fee to the LGAL must be approved by the court. To receive payment, LGALs must file SCAO form JC 82, an Affidavit of Service Performed by Lawyer–Guardian Ad Litem, along with SCAO form MC 221, Statement of Service and Order for Payment of Court Appointed Representative. After determining the ability to pay, the court may charge costs and reasonable fees of the LGAL against one or more of the parties or against fees allocated for family counseling services. MCL 700.5213(5)(b); *see* SCAO forms PC 641 (Petition for Appointment of Guardian Ad Litem/Attorney/Lawyer Guardian Ad Litem), PC 642 (Order Appointing Guardian Ad Litem/Attorney/Lawyer–Guardian Ad Litem).

Appointment of guardian ad litem. At any point in a proceeding, the court may appoint a LGAL. MCL 700.1403(d), .5213(6); *see also* MCR 5.121(A). For more information on the duties of the LGAL, see chapter 7 of the Michigan Judicial Institute's *Child Protective Proceedings Benchbook—Fourth Edition*.

Investigation. In addition, the court may order an investigation of the proposed guardianship and a written report of the investigation by DHHS or court staff. MCL 700.5204(1).

Practice Tip

- *The role of the LGAL is to represent the minor and advocate for the minor's wishes, which is not a neutral role and is not to advocate for what the LGAL thinks is in the minor's best interests. However, MCL 712A.17d(2) states that if the LGAL determines that the child's interests as identified by the child are inconsistent with the LGAL's determination of the child's best interests, the LGAL shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the LGAL's identification of the child's interests, the court may appoint an attorney for the child.*

6. Qualification to Serve as Guardian

§6.18 The person appointed must serve "the minor's welfare." MCL 700.5212. Courts have varying ways of determining if this standard has been met. The court often requires the proposed guardian to attend the hearing. The court may then ask any questions it believes may bear on the qualifications of the guardian to serve. Topics covered may include the following:

- prior cases in juvenile court and record of incarcerations
- family home layout and the number of people residing there
- understanding of the guardianship duties
- expectations regarding support and visits by the parents
- expectations regarding compensation
- educational plans
- need for public assistance
- interest in additional services such as counseling and tutoring

A social history form must be filed before a hearing is held on a petition for guardianship. SCAO form PC 670, Minor Guardianship Social History, must be used. It is confidential and is not to be released, except on order of the court, to the parties or the attorneys for the parties. MCR 5.404(A)(4).

Some courts require proposed guardians to complete a guardianship home study. See form 6.1. Other courts require letters from people who will vouch for the proposed guardian. If the proposed guardian does not attend the hearing, the court may adjourn the matter or dismiss the petition.

Practice Tip

- *Some courts require more detailed information of the person, including the age, education, health, and employment of the individual; the existence of any convictions involving dishonesty or felonies; if there has been a history of mental health treatment or substance abuse; whether there are any Child Protective Services referrals; and prior appointments as guardian.*

Note that if the minor is 14 years of age or older, the court must appoint the person nominated by the minor unless the court finds that the minor's nominee would not serve the minor's welfare. MCL 700.5212.

Practice Tip

- *EPIC allows the appointment of a nonresident as guardian if the nonresident is otherwise suitable. Note that the guardian submits personally to the court's jurisdiction in any proceeding relating to the guardianship. MCL 700.5214.*

7. Hearings and Orders

§6.19 The court sets a hearing date after the petition for the appointment of a guardian is filed. In most courts, the date is 30 to 60 days after the filing of the petition. A jury trial is not available in minor guardianship proceedings.

When a case is called, the parties present are generally sworn. Some courts require both the petitioner and the proposed guardian to be present. While the court may allow the use of videoconferencing technology on request of any participant or sua sponte, if the subject of the guardianship petition is 14 years of age or older and wants to be physically present, the court must allow the individual to be present. MCR 5.140(A)–(C).

The petitioner is asked if the statements in the petition are true. The court satisfies itself that

- a qualified person seeks the appointment (see §6.18);
- venue is proper (the petition is brought in the county where the minor resides or is present);
- the required notices have been given;
- the statutory requirements of MCL 700.5204 have been met (see §6.13);
- the appointment will serve the welfare of the minor, MCL 700.5212; and
- the child is not an enrolled member or eligible for enrollment in a federally recognized Indian tribe, MCL 712B.9.

In a full guardianship proceeding, the court generally inquires about the circumstances that led to the petition being filed. The court may also question the proposed guardian about many of the matters listed in §6.18.

The court may receive and rely on all relevant and material evidence, including written reports, to the extent of its probative value, even though such evidence may not be admissible under the Michigan Rules of Evidence. MCR 5.404(F)(2). Interested persons must be given an opportunity to examine and controvert written reports; cross-examination of the reports' authors is allowed at the court's discretion if the authors are reasonably available. MCR 5.404(F)(3). Only the assertion of an attorney-client privilege may prevent the receipt and use of materials prepared pursuant to a court-ordered interview, examination, or course of treatment. MCR 5.404(F)(4). The report of the LGAL is not admissible unless all parties stipulate to its admission. MCL 700.5213(5)(a).

Orders. If the court finds the proof sufficient, the judge signs SCAO form PC 653, Order Regarding Appointment of Guardian/Limited Guardian of a Minor; the appointed guardian signs PC 571, Acceptance of Appointment; and the judge signs SCAO form PC 633, Letters of Guardianship, which authorizes the guardian to act. The letters also contain a notice of the guardian's duties to the court, as required by MCR 5.409(E). Many courts prepare the orders for the judge to sign. Others require the petitioner to do so.

If the petitioner is unable to present proof by a preponderance of the evidence that a statutory basis for the guardianship exists, the petition for the appointment of a guardian is dismissed.

As part of the order appointing a guardian, the court may order parenting time with reasonable support from the minor's parents. MCL 700.5204(5). (Note that the statutory provision expressly overrules the outcome in *D'Allessandro v Ely*, 173 Mich App 788, 434 NW2d 662 (1988), which held that the probate court did not have jurisdiction to enter orders concerning visitation in guardianship matters.) The court may request the assistance of the Friend of the Court in resolving parenting time and support issues.

The file is usually given to counsel or the court officer to take to the court office. The court staff then prepares and presents copies of needed orders and letters for counsel and clients. The guardian may purchase enough certified copies of the letters at that time to have copies for physicians, schools, and others who may need to rely on the guardian's authority.

IV. Limited Guardians

A. Petition by Custodial Parent or Parents

§6.20 While any interested person may petition for a full guardianship, MCL 700.5204(1), only the custodial parent or parents may petition for a limited guardianship, MCL 700.5205(1).

The court may appoint a limited guardian if

1. the parent or parents with custody of the child consent to the appointment of a limited guardian,
2. the parent or parents voluntarily consent to the suspension of their parental rights, and
3. the court approves a limited guardianship placement plan that has the consent of the parent or parents and the proposed limited guardian.

Id.; see also MCL 700.5205(2), .5206.

In a limited guardianship petition involving a child whose parent is an unemancipated minor, the court must appoint a guardian ad litem to represent the minor. MCR 5.404(A)(5).

Practice Tip

- *Courts may differ on the interpretation of custody, which is not defined in EPIC.*

Proceedings at the hearing proceed much like those for a full guardianship. See §6.19. The court satisfies itself that

- a qualified person seeks the appointment (see §6.18);
- venue is proper (the petition is brought in the county where the minor resides or is present);
- the required notices have been given;
- the statutory requirements of MCL 700.5205 and .5206 have been met;
- the appointment will serve the welfare of the minor, MCL 700.5212; and
- the child is not an Indian child.

There is no automatic limit on a limited guardian's term. MCL 700.5206(3); *see* SCAO form PC 650 (Petition for Appointment of Limited Guardian of Minor).

B. Limited Guardianship Placement Plans

§6.21 A limited guardianship placement plan is an agreement setting forth the terms of the limited guardianship. The plan must state

1. the reason the parents are requesting the appointment of a limited guardian,
2. parenting time sufficient for the parents to maintain a parent-child relationship,
3. the length of the limited guardianship,
4. who will provide financial support for the child, and
5. any other agreements between the parties.

MCL 700.5205(2); MCR 5.404(E)(1).

The plan may also include a schedule of services to be followed by the parent, the child, and the guardian and any other provisions the court deems necessary for the child's welfare. MCR 5.404(E)(2). The plan must accompany the Petition for Appointment of Limited Guardian of Minor (SCAO form PC 650). MCL 700.5205(2). SCAO form PC 652, Limited Guardianship Placement Plan, was developed by the SCAO for this purpose. The plan also notifies the parents that a substantial failure to comply with the plan without good cause may result in the termination of parental rights, and it includes an acceptance of appointment; therefore, no separate Acceptance of Appointment (SCAO form PC 571) is required in limited guardianships. The court must also consider and apply the placement preferences of MCL 712B.23 if the proposed ward is an Indian child.

As noted in §6.20, the court must appoint a guardian ad litem to represent an unemancipated minor where the petition involves a child whose parent is an unemancipated minor. MCR 5.404(A)(5). In such cases, the limited guardianship placement plan is not binding on a minor parent until the appointed guardian ad litem consents. *Id.*

Practice Tip

- *Careful drafting of the limited guardianship placement plan will provide the specifics needed to alert the court and all parties on what is required for compliance. Note that the court must terminate the guardianship on petition if there is substantial compliance with the plan. See §6.37.*

C. Review and Modification of the Plan

§6.22 The court reviews the proposed limited guardianship placement plan and does one of the following: approves the plan; disapproves it; or on its own motion, modifies the plan and approves it if the parties agree to the modification. MCL 700.5206(1).

The parties may also modify a plan after the court has approved it if the parties agree on the modification and obtain court approval. MCL 700.5206(2). The modification procedure is as follows:

- A proposed modification may be filed without filing a petition.
- The court must examine the proposed plan and act within 14 days to approve or disapprove it.
- If the modification plan is approved, the court endorses it and notifies the interested persons.
- If the court does not approve the modification, the court must either (1) set the proposed plan for a hearing or (2) notify the parties of its objections and that they may schedule a hearing or submit another plan.

MCR 5.404(E)(3).

V. Court Review of Guardianships

A. Timing of the Review

§6.23 The court may review a minor guardianship, including a limited guardianship, as it considers necessary and must annually review a guardianship, if the minor is under six years of age, on the anniversary of the guardian's qualification. MCL 700.5207. The review must commence within 63 days after the guardian's anniversary date. MCR 5.404(G)(1).

B. What Constitutes Review?

§6.24 The review may consist of an informal review of the investigative report or, on review of the report, the court may set the matter for hearing within 28 days. MCR 5.404(G)(3). A short review hearing (often less than five minutes) with the guardian and with notice to the parents can be scheduled with other short probate hearings. The court inquires as to the parenting time with parents, asks in general how things are going, and asks if the guardian is willing and able to continue to serve as guardian.

Practice Tip

- *Many courts set future review hearings on the initial order appointing guardian so that no further notice is required. However, because the subsequent review hearing is sometimes 12 months later, it is a good practice for the court to send a reminder.*

For a limited guardianship, the court should inquire into the progress of the parents under the limited guardianship plan and make findings on whether the parents are in substantial compliance with the terms of the plan. MCL 700.5207(1)(a)(i).

Practice Tip

- *Courts should consider regular inquiry into the progress of the parents under the plan. A regular review may prevent a petition to terminate parental rights by providing a parent with multiple warnings about failing to comply with the plan.*

C. Factors for Review

§6.25 The court must consider the following factors when conducting the review:

1. the parent's or guardian's compliance with a limited guardianship placement plan or any other court-structured plan
2. whether the guardian has adequately provided for the minor's welfare
3. the necessity of continuing the guardianship
4. the willingness and ability of the guardian to continue to provide for the minor's welfare
5. the effect on the minor's welfare if the guardianship is continued
6. any other factor the court considers relevant to the minor's welfare

MCL 700.5207(1).

D. Investigation

§6.26 The court shall order an investigation by a court employee or agent, DHHS, or any other person based on the review factors listed in §6.25. MCL 700.5207(2); MCR 5.404(G)(2); *see* SCAO form PC 655 (Report for Court Review of Minor Guardianship).

If the court appoints DHHS to do investigations, DHHS assigns protective services staff or foster care staff (if a foster care worker is already familiar with the situation) to do the investigations along with their other duties.

Some courts have contractors or other individuals do these investigations according to set terms for compensation and mileage. Another option is for courts to use trained volunteers to complete the investigations.

The investigator must file a written report within 28 days after the appointment, including a recommendation regarding continuing or modifying the guard-

ianship and whether a hearing should be scheduled. A report recommending modification must state the nature of the modification. MCR 5.404(G)(2).

E. Judicial Action on Investigator's Report

§6.27 After reviewing the report, the court may (1) enter an order continuing the guardianship or (2) conduct a hearing and continue the guardianship, order a modification of the plan, or take any of the actions described in MCL 700.5209(2). MCL 700.5207(3); MCR 5.404(G)(3). A limited guardianship placement plan may be modified as a condition to continuing the limited guardianship. MCL 700.5207(3)(b)(i)(B). For a full guardianship, the court may order a court-structured plan designed to resolve conditions identified at the review hearing. MCL 700.5207(3)(b)(ii)(B). For many courts, the investigation of the guardianship and review of the resulting report under MCR 5.404(G)(3) constitutes the periodic review mandated by MCR 5.404(G)(1) and MCL 700.5207.

VI. Guardians' Powers and Duties

A. In General

§6.28 A full guardian has the same powers and responsibilities toward a child as does a custodial parent, except that a guardian is not obligated to support the ward with personal funds and is not liable to third parties for the ward's acts. MCL 700.5215.

A limited guardian has all the powers and duties of a full guardian enumerated in MCL 700.5215 except that a limited guardian may not consent to the ward's adoption, the ward's release for adoption, or the marriage of a minor ward. MCL 700.5206(4).

Note: A guardian has authority to examine and obtain a ward's medical records under the Medical Records Access Act, MCL 333.26261 et seq.

Specific powers and responsibilities. The guardian must do the following:

- Take reasonable care of the ward's personal effects and start protective proceedings if necessary to protect the ward's property. The guardian may not sell the ward's interest in real property without court authorization.
- Receive money for the ward's support; spend it on the ward's current needs for support, care, and education; and exercise due care to conserve the excess. The money is not to be used to compensate the guardian for services rendered unless approved by court order or as determined by a duly appointed conservator other than the guardian.
- Facilitate the ward's education and social activities and authorize medical or other professional care. A full guardian may consent to the minor ward's marriage and to the ward's adoption or release for adoption.
- File a report with the court each year, within 56 days of the anniversary of the guardian's appointment, and at other times as the court may order. This report must be in the form approved by the SCAO and must detail the ward's condition, including any medical treatment given to the ward; the assets in the guardian's control; and reasons for continuing the guardianship.

The guardian must serve the report on the interested persons listed in MCR 5.125(C)(24). *See* MCR 5.409(A).

- Within 14 days after a change in the ward's place of residence, give notice to the court of the ward's new address.

MCL 700.5215. The guardian must also notify the court of any change in the guardian's address within 7 days. MCR 5.205.

A guardian of a minor may execute a do-not resuscitate order on behalf of the ward as provided in MCL 333.1053a. MCL 700.5215(h).

By a properly executed power of attorney, a guardian may delegate the guardian's powers to another person for up to 180 days; on doing so, the guardian must notify the court of the name, address, and telephone number of the attorney in fact within 7 days. MCL 700.5103. A guardian in the armed forces who is sent to a foreign country may delegate the guardian's powers regarding care, custody, or property of the ward. However, a guardian serving in the U.S. armed forces who is deployed to a foreign nation is not limited to only a 180-day delegation of guardian powers. MCL 700.5103. This delegation is effective until the 31st day after the end of the guardian's deployment.

If a minor dies while under guardianship and without a conservator being appointed, the guardian may petition the court to pay burial expenses from the deceased minor's account. MCL 700.5216(2).

B. Parenting Time

§6.29 The court, for the minor ward's welfare, may at any time order reasonable parenting time and contact of the minor ward with the parents. MCL 700.5204(5). However, no one else can seek parenting time under this provision. Unless ordered at the initial hearing, a nonparent who desires parenting time must file a postappointment proceeding petition under MCL 700.5219(1). This provision permits a person interested in the ward's welfare to request an order that would serve the welfare of the ward. *Id.* Under this section, a nonparent could request parenting time with the minor ward. The court could properly entertain a petition of this type and make a determination as to whether the requested nonparental visitation would serve the minor ward's welfare.

C. Standing to Seek Custody of Minor

§6.30 A guardian or limited guardian of a child has standing to bring an action for custody of the child. However, a limited guardian does not have standing if there is substantial compliance with the limited guardianship placement plan. MCL 722.26b.

If a court has suspended parental rights over a child, the full guardian of that child has standing to bring an action for custody, even if a reintegration plan has been instituted and the parents have substantially complied with the plan. *Newsome v Labby*, 206 Mich App 434, 522 NW2d 872 (1994). Given the same circumstances, a limited guardian would not have standing.

A temporary guardian has standing to bring a custody action. *Kater v Brausen*, 241 Mich App 606, 617 NW2d 40 (2000). *Kater* involved a custody dispute between the children's stepfather (plaintiff) and their biological father (defendant) following the death of their mother. After the mother's death, plaintiff was appointed temporary guardian for the minors and filed a petition seeking custody of them in circuit court. Defendant moved for summary disposition on the ground that a temporary guardian did not have standing to bring a custody action. The trial court denied the motion and defendant appealed. The court of appeals concluded that temporary guardians have standing to petition for custody, because temporary guardians are a subcategory of ordinary guardians with the same duties and authority except that the temporary guardianship terminates at a time certain within a six-month period. As a subcategory of ordinary guardianships, there is no need for them to be mentioned in the statute.

Venue and stay. The custody action must be brought in the family division of the circuit court for the county in which the guardianship was established. Filing the custody action stays the guardianship action until the disposal of the custody action. MCL 722.26b.

Statutory presumptions. In *Hunter v Hunter*, 484 Mich 247, 771 NW 2d 694 (2009), the Michigan Supreme Court declared that a natural parent is entitled to the strong presumption that the award of custody to the parent is in the child's best interests; no threshold determination of parental fitness is required for the presumption to apply. MCL 722.25(1). The parental presumption controls over the established custodial environment presumption. MCL 722.27(1)(c). A third party seeking custody (including a guardian) must show by clear and convincing evidence that it is not in the child's best interests to award custody to the natural parent.

Practice Tip

- *Hunter is a significant decision that has had a dramatic impact on the adjudication of child custody proceedings concerning natural parents and third parties (i.e., guardians), since the parental presumption now applies regardless of whether the person is a fit parent. Close calls, or even where the evidence is persuasive (but not clear and convincing) in the guardian or third party's favor, will not be sufficient to overcome the parental presumption.*

D. Consent to Adoption

§6.31 MCL 700.5215(e) empowers a full guardian to consent to the adoption of a minor ward or to the release of a minor ward for adoption. This authority is subject to the conditions and restrictions of the Michigan Adoption Code, MCL 710.21 et seq. Note that a limited guardian does not have this power. MCL 700.5206(4).

The guardian is required to file a petition with the probate court for authority to release the child for adoption or consent to the child's adoption and obtain court authorization to execute the release or consent. MCL 710.28(3), .43(5); *see* SCAO form PCA 308a (Consent to Adoption by Guardian).

However, before the court may grant authority to a guardian to release a child for adoption or consent to a child's adoption, either the parents must consent to the adoption or their parental rights must be terminated. According to *Eby v Labo (In re Handorf)*, 285 Mich App 384, 387, 776 NW2d 374 (2009), a properly authorized guardian with whom a child has been placed does not have the power to consent to the child's adoption without first obtaining consent from the parents or taking steps to terminate the parents' parental rights. In *In re Handorf,* the petitioners, as guardians of a child they wanted to adopt, petitioned the court for authorization to consent to the child's adoption. The child's father consented to the adoption, but the child's mother refused to consent. The trial court concluded it was not able to grant the petition without terminating the parents' parental rights.

In addition, the Michigan Supreme Court clarified in *Eby v Labo (In re Handorf)*, 485 Mich 1052, 777 NW2d 130 (2010), that a guardian may consent to a child's adoption once the guardian obtains authority from the court to execute the consent, MCL 710.43(5), and

1. the parents' rights have already been terminated, MCL 710.41(1);
2. the parents consent to an adoption, MCL 710.26(1)(a); or
3. the parents have released their rights to the child and do not intend to exercise any parental rights over that child, MCL 710.44.

In an unpublished decision cited in *In re Handorf, In re Partello*, No 202757 (Mich Ct App Sept 15, 1998) (unpublished), the court further explained the proper procedure for the probate court to follow. The court must determine whether grounds for termination exist under MCL 712A.19b(3). See §6.33. If so, the court must determine whether it would be appropriate to consent to the minor's adoption considering the best interests factors in the Adoption Code, MCL 710.22(g). The best interests factors in the Adoption Code are similar to those in EPIC. See §6.36.

Note: the Adoption Code prohibits the court from appointing a guardian for the minor or a parent solely to defeat the parent's status as an interested party in the adoption proceeding. MCL 710.24a(7).

E. Termination of Life Support

§6.32 A guardian has the power to authorize medical or other professional care, treatment, or advice. MCL 700.5215(c). The guardian is not liable by reason of such consent for injury to the ward resulting from negligence or acts of third persons unless it would have been illegal for a parent to have consented to the care.

There are no reported decisions regarding the withholding of life-sustaining medical treatment for a minor by a guardian, but since a guardian assumes the role of a custodial parent, cases involving parental decisions to terminate life support provide some guidance. Parents have the right to decide to withhold life-sustaining treatment from their child. *In re Rosebush*, 195 Mich App 675, 683, 491 NW2d 633 (1992). In making such a decision, parents should employ a "best

interests" standard for immature minors and a "substituted judgment" standard for a child of mature judgment. *Id.* at 688.

The "best interests" standard for deciding whether to terminate life support for immature minors was reiterated in *Family Independence Agency v AMB (In re AMB)*, 248 Mich App 144, 640 NW2d 262 (2001). In addition, the appellate panel held that before a court may make a decision to withdraw life support based on the allegation that a parent or other surrogate decision maker is incapable of making the decision due to incompetency, clear and convincing evidence must be presented that the incompetency exists. *Id.* at 204–206.

F. Termination of Parental Rights

§6.33 Under MCL 712A.19b, the guardian may file a petition to have the parental rights to a child who is in a guardian's custody terminated. Note that the guardian may petition to have a case heard in the jurisdiction of the family division. MCL 600.1021(1)(e). A request for termination should accompany the petition.

The grounds for termination include the following:

> (a) The child has been deserted under either of the following circumstances:
>
> (i) The child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period. For the purposes of this section, a parent is unidentifiable if the parent's identity cannot be ascertained after reasonable efforts have been made to locate and identify the parent.
>
> (ii) The child's parent has deserted the child for 91 or more days and has not sought custody of the child during that period.
>
> (b) The child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.
>
> (ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.
>
> (iii) A nonparent adult's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse by the nonparent adult in the foreseeable future if placed in the parent's home.
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(d) The child's parent has placed the child in a limited guardianship under section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, and has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(e) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and the parent has substantially failed, without good cause, to comply with a court-structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship.

(f) The child has a guardian under the estates and protected individuals code, 1998 PA 386, MCL 700.1101 to 700.8206, and both of the following have occurred:

(i) The parent, having the ability to support or assist in supporting the minor, has failed or neglected, without good cause, to provide regular and substantial support for the minor for a period of 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for a period of 2 years or more before the filing of the petition.

(ii) The parent, having the ability to visit, contact, or communicate with the minor, has regularly and substantially failed or neglected, without good cause, to do so for a period of 2 years or more before the filing of the petition.

(g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(h) The parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

(i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and the parent has failed to rectify the conditions that led to the prior termination of parental rights.

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

(k) The parent abused the child or a sibling of the child, the abuse included 1 or more of the following, and there is a reasonable likelihood that the child will be harmed if returned to the care of the parent:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life-threatening injury.

(vi) Murder or attempted murder.

(vii) Voluntary manslaughter.

(viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(ix) Sexual abuse as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622.

(*l*) The parent's rights to another child were voluntarily terminated following the initiation of proceedings under section 2(b) of this chapter or a similar law of another state and the proceeding involved abuse that included 1 or more of the following, and the parent has failed to rectify the conditions that led to the prior termination of parental rights:

(i) Abandonment of a young child.

(ii) Criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.

(iii) Battering, torture, or other severe physical abuse.

(iv) Loss or serious impairment of an organ or limb.

(v) Life-threatening injury.

(vi) Murder or attempted murder.

(vii) Voluntary manslaughter.

(viii) Aiding and abetting, attempting to commit, conspiring to commit, or soliciting murder or voluntary manslaughter.

(ix) Sexual abuse as that term is defined in section 2 of the child protection law, 1975 PA 238, MCL 722.622.

(m) The parent is convicted of 1 or more of the following, and the court determines that termination is in the child's best interests because continuing the parent-child relationship with the parent would be harmful to the child:

(i) A violation of section 136, 136a, 316, 317, 520b, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136, 750.136a, 750.316, 750.317, 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g.

(ii) A violation of a criminal statute that includes as an element the use of force or the threat of force and that subjects the parent to sentencing under section 10, 11, or 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.

(iii) A federal law or law of another state with provisions substantially similar to a crime or procedure listed or described in subparagraph (i) or (ii).

MCL 712A.19b(3).

The Americans with Disabilities Act (ADA), 42 USC 12101 et seq., is not available as a defense in parental rights termination proceedings because the proceedings are not "services, programs, or activities" covered by the act. 42 USC 12131(2); *Family Independence Agency v Terry (In re Terry)*, 240 Mich App 14, 610 NW2d 563 (2000).

If the child is an Indian child, all provisions and standards of proof of MCL 712B.15(4) apply to the termination of parental rights.

Practice Tip

- *Compliance with the terms of the limited guardianship placement plan is a complete defense by a parent when the limited guardian petitions for custody. That defense is not available if it is a full guardianship.*

VII. Termination of Guardianships

A. Guardians' Responsibilities and Liabilities

§6.34 **Termination of responsibilities.** The authority of the guardian terminates on the minor's death, adoption, marriage, or attainment of the age of majority. MCL 700.5217; MCR 5.404(H). In these cases, no court order is necessary. MCR 5.404(H)(1). A guardian's responsibilities also terminate on the guardian's death, resignation, or removal on petition or on a withdrawal of consent. MCL 700.5217; MCR 5.404(H). An order of the court is required. MCR 5.404(H)(1).

A parental appointment under an unprobated or informally probated will terminates if the will is denied probate in a formal proceeding. MCL 700.5217.

Liabilities. Termination does not affect the guardian's liability for prior acts or the guardian's obligation to account for the ward's funds and assets. The court must approve the resignation of a guardian before it becomes effective. MCL 700.5217.

B. Removal of Guardian by Petition or Resignation

§6.35 Any "person interested in a ward's welfare or the ward, if the ward is 14 years of age or older, may petition for the removal of a guardian on the ground that removal would serve the ward's welfare." MCL 700.5219(1); *see also* MCR 5.404(H)(5). Alternatively, a guardian may file a petition to resign. *Id.* Either petition may include a request for the appointment of a successor guardian. *Id.*

If the court determines during the proceedings that the minor's interests are inadequately represented, it may appoint an LGAL to represent the minor, giving consideration to the preference of the minor if the person is 14 or more years old. MCL 700.5219(4).

After notice and a hearing on the petition, the court may terminate the guardianship or make other appropriate orders. MCL 700.5219(3); MCR 5.404(H)(4), (5).

Practice Tip

- *The same form is used to request termination, modification, or acceptance of the guardian's resignation. See SCAO form PC 675 (Petition to Terminate/Modify Guardianship).*

C. Full Guardianships

§6.36 Although interested persons, or the minor if 14 or older, may petition for removal of the guardian, only the parent or parents of the minor may petition for termination. MCL 700.5208(1). However, the court may terminate the guardianship after a petition for removal or resignation. MCR 5.404(H)(4), (5). When the parents petition for the termination of a guardianship of a minor, the court may do any of the following:

- Order DHHS or a court employee or agent to conduct an investigation and file a written report regarding the best interests of the minor or give testimony regarding the investigation.
- Use the community resources in behavioral sciences and other professions in the investigation and study of the best interests of the child and consider their recommendations for the disposition of the petition.
- Appoint a guardian ad litem or attorney to represent the child.
- Take any other necessary action.

MCL 700.5208(2).

Disposition of the parents' petition. After notice and a hearing, the court may take any of the following options described in MCL 700.5209(2):

- terminate the guardianship and enter orders to facilitate the reintegration of the minor into the parents' home, establishing a transition period of up to six months
- continue the guardianship for not more than one year and order the parents to follow a court-structured plan that enables the minor to return to the parental home (See forms 6.2 and 6.3 for a sample court-structured reintegration plan and agreement.)
- if the child has resided with the guardian for at least one year and the parents' actions have resulted in a substantial disruption of the parent-child relationship, continue the guardianship if the court finds by clear and convincing evidence that the continuation would serve the best interests of the minor
- appoint an attorney to represent the minor or refer the matter to DHHS, either of which may file a complaint on behalf of the minor requesting that the family division of the circuit court take jurisdiction under the child protective provisions of the Juvenile Code

Best interests of the minor. The first three options described in MCL 700.5208(2) are conditioned on the action being in the best interests of the minor. *Best interests of the minor* means the sum total of the following 12 factors:

> (i) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (ii) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.
>
> (iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (v) The permanence, as a family unit, of the existing or proposed custodial home.
>
> (vi) The moral fitness of the parties involved.
>
> (vii) The mental and physical health of the parties involved.
>
> (viii) The child's home, school, and community record.
>
> (ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.
>
> (x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.
>
> (xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.
>
> (xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time.

MCL 700.5101(a).

D. Limited Guardianships

§6.37 A limited guardian may petition the court to resign under MCR 5.404(H). The parents may then petition for a new limited guardian. MCR 5.404(H)(4). If the court does not approve the parents' petition for a new limited guardian, or the parents do not petition, the court may proceed to terminate the guardianship.

Termination. The parent or parents with the right to custody of the minor may petition to terminate the limited guardianship at any time. MCL 700.5208(1)(a).

The court must terminate a limited guardianship after notice and a hearing on a petition to terminate if the court determines that the parents have substantially complied with the limited guardianship placement plan. MCL 700.5209(1). The court may enter orders to facilitate the reintegration of the minor into the parental

home for a period of up to six months before the termination. *Id.* The court may order DHHS to supervise the transition period when the minor is reintegrated into the parent's home. MCL 700.5209(2)(a)(ii).

If the parents have not substantially complied with the placement plan, the court may take any of the actions described in MCL 700.5209(2) that it determines is in the best interests of the child. If the court chooses to continue the guardianship for not more than one year, it must order the parent or parents to comply with the limited guardianship placement plan or a court-modified limited guardianship placement plan.

Best interests of the child. MCL 700.5101(a) sets forth 12 factors that are considered in establishing the best interests of the child. See §6.36.

Form 6.1
Guardianship Home Study

STATE OF MICHIGAN
38th JUDICIAL CIRCUIT COURT
FAMILY DIVISION

File No. _____
Date/Interview: _____
Visitor: _____

Name of Minor: _____
DOB: _____
POB: _____

HOME EVALUATION

	Proposed Guardian	**Spouse**
Name:		
Address		
Telephone		
Age/DOB		
Social Security Number		
Race/Ethnicity		
Educational Level		
Marriage Date		
Number of Children		
Employer		
Occupation		
Employer's Address		
Employer's TX		
Income		
Length of Service		
Medical Benefits		
Relation to Minor		

OTHERS WHO RESIDE IN THE HOUSEHOLD:

NAME: **DATE OF BIRTH:** **RELATIONSHIP:**

COMMUNITY: (Type of neighborhood, city, suburb, rural other)

HOME/APARTMENT: (# of bedrooms, bathrooms; layout; approximate square footage; describe outside area)

How long have you lived at this address?

Are you renting or buying your home?

SCHOOL: (Where will the child(ren) attend school? How will he/she get to and from school? Will special educational/medical needs be met?

FINANCIAL INFORMATION:

Are you financially able to support the child placed with you with your current resources: If not, what other resources will you use?

Assets: (include cars; other property)

Do you have a valid driver's license?

What company insures your vehicle(s)?

AGENCY OR INSTITUTIONAL INVOLVEMENT: (A police record check must be obtained on all adults living in the household 18 years of age or older.)

Do you have a law enforcement history? (Arrests, convictions, incarceration)

Results of record check:

Please describe any history of involvement with Child Protective Services:

Results of P.S. check:

Do you have any history of mental health problems requiring hospitalization or medication? Have you sought counseling and if so for what reasons?

Do you currently have any health condition which might interfere with your ability to care for the child(ren)?

Do you smoke? Will the child(ren) be exposed to second-hand smoke in your home or vehicles?

Do you have a history of drug use/alcoholism? If so, are you currently attending AA or NA meetings?

What are your hobbies, leisure activities, community affiliation?

Do you have a religious affiliation? If the child(ren) has a different religious affiliation, will he/she be allowed to participate in the religious affiliation of his/her choice?

Do you have pets in the home? Are the pets friendly with children?

Do you own firearms or other weapons? If so, describe where they are stored in inoperable condition. Is ammunition stored in a separate locked place? Where?

PLACEMENT INFORMATION:

What is your relationship with the child(ren) placed in your home? How frequently have you seen and been involved with this child(ren).

How long has the child(ren) been placed with you?

What do you believe is the reason the child(ren) is not residing with a parent?

Can you prepare the child(ren) for reunification or if needed alternate placement?

How will this child(ren) fit into you family? Are you willing to provide care for the child(ren) on a long-term basis? How do other members of your family feel about this placement? How do the parents feel about this placement?

PERSONAL INFORMATION:

For adults in the home, where were you born and who raised you?

Marital Status: Cite any significant marital problems.

Do you anticipate any significant changes in your home within the next six months, such as moving or a change in household composition?

PERSONAL REFERENCE:

Please provide the names, addresses, and telephone numbers of 2 to 3 people as personal references.

IMPRESSIONS/CONCERNS:

RECOMMENDATIONS:

Form 6.2
Court-Structured Reintegration Plan

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

In the Matter of *[name]*, File No. *[number]-[case-type code]*
Judge *[name]*

Court-Structured Reintegration Plan

IT IS ORDERED between the parties that for the next 12 months commencing from the date of this order, *[parent]* shall have visitation with the minor child as prescribed below:

SUPERVISED: *[specify]*
UNSUPERVISED: *[specify]*

Parental rights remain suspended during the term of guardianship. If in the sole judgement of the guardian it is determined that visits would not be in the best interest of the minor, the guardian may cancel visitation. However, the guardian shall not unreasonably cancel visitation.

THE FOLLOWING CONDITIONS EXIST:

1. *[Parent]* shall notify the guardian if unable to attend the visit. The guardian will be relieved of the obligation to have the minor ready for visitation if the parent is more than 30 minutes late for the scheduled visitation time.
2. *[Parent]* shall transport the minor in a legally licensed, registered, and insured vehicle, or public transportation if necessary. The parent must provide transportation for all scheduled visits unless otherwise agreed upon between the parent and the guardian. The parent and the guardian may decide upon an acceptable alternative driver.
3. If overnight visits are approved, sleeping accommodations for the minor must be appropriate and suitable. On the invitation of the parent, the guardian may visit the home to review the sleeping accommodations for the minor.
4. The minor is not to be taken to *[place]*.
5. The minor is not to have contact with *[name]*.
6. The minor is not to be taken out of *[county]* without the approval of the guardian.

7. The minor will not be exposed to, or have contact with, alcohol, drugs, or any illegal substance during visits. Violation of this condition will result in immediate suspension of visitation privileges.
8. *[Parent]* shall submit to the Probate Court
    a. source of income,
    b. amount of income, and
    c. frequency of payment (e.g., pay stubs, vouchers, Supplemental Security Income, Social Security).
9. If *[Parent]* is employed, *[he / she]* must submit the name, address, and phone number of the responsible adult who will supervise the minor in *[his / her]* absence.
10. *[Parent]* shall pay to the guardian *[amount]* per week, or 10 percent of net income, commencing from the date of this order. The payment must be submitted in such a way that it can be verified. If the parent contributes to the personal needs of the minor, a receipt must be submitted to the court.
11. *[Parent]* shall reside in and maintain an appropriate and suitable residence for a minimum of six months. The residence must be maintained in a safe and sanitary manner. A representative of Probate Court or its designee may verify the residency requirements by a random and unannounced visit.
12. *[Parent]* shall submit the name of a doctor or clinic where the minor will be treated, if necessary, during visitations.
13. *[Parent]* shall submit to the court a means of providing medical insurance for the minor.
14. *[Parent]* shall attend all medical evaluations and conferences regarding the minor. The guardian will in advance notify the parent of all dates and times of medical appointments.
15. *[Parent]* shall attend all school parent-teacher conferences and activities regarding the minor. The guardian will in advance notify the parent of all dates and times of school events.
16. If required by the court, *[Parent]* shall submit to psychological testing and comply with follow-up recommendations. Recommendations and verifications must be submitted to the Probate Court.
17. If required by the court, *[Parent]* shall on a monthly basis, submit to, and pay for, full screen drug testing by a reputable laboratory. The results of these tests must be submitted to the Probate Court.
18. If required by the court, *[Parent]* shall attend and participate in an accredited substance abuse program. Verification must be submitted to the Probate Court.
19. *[Parent]* must not commit any law violation, which involves criminal intent and/or criminal charges. Violation of this condition will result in immediate suspension of the Reintegration Plan.

20. Parent shall attend and complete Parenting Classes. Verification of completion must be submitted to the Probate Court.
21. If required by the court, *[Parent]* shall attend education classes to fulfill GED or high school equivalency requirements. Verification must be submitted to the Probate Court.
22. *[Parent]* must sign a release of information form so the court can inquire and receive confidential information that may assist the court in determining what is in the best interest of the minor.
23. *[Parent]* must submit to the court three letters of recommendation from reliable sources that explain why the parent should have their parental rights restored and be awarded custody of the minor.
24. ADDITIONAL CONDITIONS:

A CAUTION. Any actions by the interested parties (or any third party) that are considered negative or detrimental to the progress of the Reintegration Plan will result in court action. The child shall not be influenced by negative persuasion or seduction by the interested parties (or any third party).

On the completion of successful compliance with the conditions of the Court-Structured Reintegration Plan, the parent may petition the court for a termination of guardianship hearing. At that time, the parent will present proofs of compliance to the judge.

If either interested party is noncompliant, the grieved party may file a petition for court intervention.

NOTE: This reintegration plan may be referred to the Department of Health and Human Services for monitoring. *[Parent]* must maintain regular and frequent contact with the DHHS.

The interested parties will revisit the plan on *[date]*.

FAILURE TO COMPLY with this Court-Structured Reintegration Plan may result in the termination of parental rights.

Dated: *[date]*

[Signature line]
[Name of court] Court Judge

Form 6.3
Court-Structured Reintegration Plan Agreement

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

In the Matter of *[name]*,	File No. *[number]-[case-type code]* Judge *[name]*

The interested parties agree upon the Court-Structured Reintegration Plan.

The interested parties agree to cooperate with one another and to act in the best interest of the minor.

Dated: *[date]*

[Signature line]
[Typed name of guardian]

Dated: *[date]*

[Signature line]
[Typed name of guardian]

Dated: *[date]*

[Signature line]
[Typed name of biological mother]

Dated: *[date]*

[Signature line]
[Typed name of biological father]

Dated: *[date]*

[Signature line]
[Typed name]
Witness

Dated: *[date]*

[Signature line]
[Name of court] Court Judge

Exhibit 6.1
Indian Child Welfare Act and Michigan Indian Family Preservation Act Comparison Chart

Indian Child Welfare Act – Michigan Indian Family Preservation Act Reference Comparison Chart

2012 Public Act 565, the Michigan Indian Family Preservation Act (MIFPA),[1] strengthens and clarifies provisions of the federal Indian Child Welfare Act (ICWA) into Michigan law, MCL 712B.1 to 712B.41. The MIFPA is not intended to replace ICWA; therefore, child welfare professionals should be knowledgeable about both laws. The chart below provides a comparison between key provisions of ICWA and MIFPA.[2]

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Definition of Indian Child	An unmarried person who is under the age of 18 years and is either: 1. A member of an Indian tribe, or 2. Both eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe. 25 USC 1903(4)	**Removes the requirement of being a biological child of a tribal member.** An unmarried person who is under the age of 18 years and is either of the following: 1. A member of an Indian tribe. 2. Eligible for membership in an Indian tribe as determined by that Indian tribe. 712B.3(k)
Exclusive Jurisdiction	An Indian tribe shall have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of the tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 USC 1911(a)	The same as ICWA with additional language clarifying the tribe retains jurisdiction over wards of the tribal court with any subsequent change in residence or domicile. A tribal ward can be non-Indian. 712B.7(1)
Limited Emergency Jurisdiction – child temporarily off reservation	Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent of Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law in order to prevent imminent physical damage or harm to the child. 25 USC 1922	The same as ICWA with the reference to Michigan Court Rules and sections MCL 712A.13a, 712A.14, and 712A.14a. 712B.7(2)

[1] http://www.legislature.mi.gov/documents/2011-2012/publicact/pdf/2012-PA-0565.pdf

[2] This chart is intended as a reference tool and contains paraphrasing of statutory language. Do not rely on this chart as a legal citation go directly to the relevant statute. Citations are provided within the document to assist the user.

SCAO Child Welfare Services
Tribal Court Relations 7/19/13

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Transfer to Tribal Court & Good Cause Not to Transfer	When there is concurrent jurisdiction and the parent, Indian custodian, or tribe requests transfer to tribal court, the case shall be transferred unless: 1. There is good cause to the contrary; 2. Either parent objects; or 3. The tribal court declines the transfer. 25 USC 1911(b)	The same as ICWA. Additionally, MIFPA defines good cause. 712B.7(3)
Good Cause Not to Transfer Case to Tribal Court	ICWA is silent regarding what constitutes "good cause."	In determining whether good cause exists to deny the transfer, the court shall not consider the adequacy of the tribe, tribal court or tribal social services. 712B.7(4) The court may determine good cause not to transfer a case to tribal court only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies: (a) The Indian tribe does not have a tribal court. (b) The requirement of the parties or witness to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate. 712B.7(5)
Child Custody Proceedings Governed by these Acts	1. Foster care placement • Any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand. • It does not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. 2. Termination of parental rights proceeding 3. Pre-adoptive placement	MIFPA language mirrors ICWA but also includes guardianships under the Juvenile Code and the Estates and Protected Individuals Code. 712B.3(b)(i)(B)&(C)

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Child Custody Proceedings (contd.)	4. Adoptive placement 25 USC 1903(1) The language of ICWA and case law from other states hold that ICWA applies to guardianship cases.	
Intervention and Participation in State Court Proceedings	The Indian custodian and tribe have the right to intervene at any point in a state court proceeding involving the foster care placement of or TPR to an Indian child. 25 USC 1911(c)	The same as ICWA. 712B.7(6) MIFPA clarifies that an official tribal representative has the right to participate in any state court proceedings subject to ICWA and MIFPA. 712B.7(7) This person does NOT have to be an attorney. 712B.3(r)
Full Faith and Credit	The United States, every State, every territory or possession of the United States shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity. 25 USC 1911(d)	The state shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent given to the public acts, records, and judicial proceedings of any other entity. 712B.7(8)
Definition of Parent (for the purpose of ICWA and MIFPA)	A biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established. 25 USC 1903(9)	The same as ICWA except the definition uses putative father language rather than unwed father. 712B.3(s)
Initial Notice & Reason to Believe a Child is an Indian Child	The petitioning party is required to provide initial notice of an involuntary proceeding in State court to the parents, Indian custodian, and the tribe by registered mail with return receipt requested at least 10 days prior to the first hearing. If the tribe is not known, notice shall be given to the Secretary (Bureau of Indian Affairs) in like manner. No foster care placement or termination of parental rights proceeding shall be held until at least 10 days after receipt of notice by the parent or Indian custodian and the tribe or Secretary. The parent, Indian	The same as ICWA with additional requirements noted below and guidelines on determining if a child may be an Indian. 712B.9 At initial contact, the department is required to actively seek to determine whether a child is an Indian child. If the department is unable to determine which tribe a child belongs to, at a minimum, the department shall contact in writing any tribes located in the county where the child is located and the Secretary. 712B.9(3)

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Initial Notice & Reason to Believe a Child is an Indian Child (contd.)	Custodian or tribe may request an additional 20 days to prepare. 25 USC 1912	Circumstances under which the court, department, or other party has reason to believe a child may be an Indian, includes but is not limited to any of the following: (a) Any party to the case, Indian tribe, Indian organization, or public or private agency informs the court that child is an Indian child. (b) Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests the child is an Indian child. (c) The child who is the subject of the proceeding gives the court reason to believe s/he is an Indian child. (d) The residence or domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community. (e) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.
Active Efforts	The party seeking foster care placement or TPR shall satisfy the court active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 USC 1912(d) ICWA does not define active efforts.	Party seeking placement must satisfy the court active efforts have been made but with a clear and convincing evidence standard and requirement for expert witness testimony. MIFPA defines active efforts. Active efforts means action to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and to reunify the child with the Indian family. Active efforts require more than a referral to a service without actively engaging the Indian child and family. Active efforts include reasonable efforts as required by title IV-E of the social security act, 42 USC 670 to 679c, and also include doing or addressing all of the following: (*i*) Engaging the Indian child, child's parents, tribe, extended family members, and individual Indian caregivers through the utilization of culturally appropriate services and in collaboration with the parent or child's Indian tribes and Indian social services agencies.

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Active Efforts (contd.)		(*ii*) Identifying appropriate services and helping the parents to overcome barriers to compliance with those services. (*iii*) Conducting or causing to be conducted a diligent search for extended family members for placement. (*iv*) Requesting representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards and child rearing practices within the tribal community to evaluate the circumstance of the Indian child's family and to assist in developing a case plan that uses the resources of the Indian tribe and Indian community, including traditional and customary support, actions, and services, to address those circumstances. (*v*) Completing a comprehensive assessment of the situation of the Indian child's family, including a determination of the likelihood of protecting the Indian child's health, safety, and welfare effectively in the Indian child's home. (*vi*) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in all aspects of the Indian child custody proceeding at the earliest possible point in the proceeding and actively soliciting the tribe's advice throughout the proceeding (*vii*) Notifying and consulting with extended family members of the Indian child, including extended family members who were identified by the Indian child's tribe or parents, to identify and to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child. (*viii*) Making arrangements to provide natural and family interaction in the most natural setting that can ensure the Indian child's safety, as appropriate to the goals of the Indian child's permanency plan,, including, when requested by the tribe, arrangements for transportation and other assistance to enable family members to participate in that interaction. (*ix*) Offering and employing all available family preservation

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Active Efforts (contd.)		strategies and requesting the involvement of the Indian child's tribe to identify those strategies and to ensure that those strategies are culturally appropriate to the Indian child's tribe. (*x*) Identifying community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child's family with special needs, and providing information about those resources to the Indian child's family, and actively assisting the Indian child's family or offering active assistance in accessing those resources. (*xi*) Monitoring client progress and client participation in services. (*xii*) Providing a consideration of alternative ways of addressing the needs of the Indian child's family, if services do not exist or if existing services are not available to the family. Because the statutory definition of active efforts incorporates the federal definition of reasonable efforts, it is no longer necessary for courts to make both reasonable and active efforts findings for title IV-E eligibility. 712B.3(a)
Burden of Proof for Active Efforts	ICWA is silent regarding a burden of proof.	The burden of proof for active efforts is clear and convincing evidence, including the testimony of at least one expert witness who has knowledge of child rearing practices of the Indian child's tribe, in out-of-home placement and TPR cases. The active efforts must take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. 712B.15(2)
"Serious Damage" & Qualified Expert Witness	No foster care placement may be ordered without a determination, supported by clear and convincing evidence, including the testimony of qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in	The same requirements as ICWA, and also provides two categories of persons, in an order of preference, for qualified expert witnesses: 1. A member of the Indian child's tribe, or witness approved by the Indian child's tribe, who is recognized by the tribal

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
	serious emotional or physical damage to the child. 25 USC 1912(e) No termination of parental rights may be ordered without a determination, supported by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC 1912(f) ICWA does not define qualified expert witness.	community as knowledgeable in tribal customs and how the tribal customs pertain to family organization and child rearing practices. 2. A person with knowledge, skill, experience, training, or education and who can speak to the Indian child's tribe and its customs and how the tribal customs pertain to family organization and child rearing practices. 712B.17(1)
Burden of Proof for "Serious Damage"	The burden of proof for foster care placement is clear and convincing evidence. 25 USC 1912(e) The burden of proof for TPR is beyond a reasonable doubt. 25 USC 1912(f)	The same as ICWA. 712B.15(2)&(4)
Placement Preferences	In a foster care, pre-adoptive or adoptive placement, placement shall be made in the order of preference set forth in ICWA unless there is good cause not to follow the placement preferences. There is an order of preference for foster care and pre-adoptive placements and another order of preference for adoptive placements. ICWA provides for an Indian child's tribe to establish a different order of preference by tribal resolution. 25 USC 1915	The same orders of preference as ICWA. For foster care or pre-adoptive placement of an Indian child, placement is in the following order of preference: (a) A member of the Indian child's extended family. (b) A foster home licensed, approved, or specified by the Indian child's tribe. (c) An Indian foster home licensed or approved by the department. (d) An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.712B.23(1) For an adoptive placement of an Indian, placement is in the following order of preference: (a) A member of the Indian child's extended family. (b) A member of the Indian child's tribe. (c) An Indian family. 712B.23(2) MIFPA does not require a formal tribal resolution for changing

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Placement Preferences (contd.)	ICWA is silent on who has the burden of establishing good cause not to follow the placement preferences.	the order of placement preference. 712B.23(6) MIFPA places the burden of establishing good cause not to follow the order of preference on the party requesting the deviation. 712B.23(3) **The court shall address efforts to place an Indian child in accordance with the placement preferences *at each hearing* until the placement meets the requirements.** 712B.23(4)
Good Cause Not to Follow Placement Preferences	ICWA does not define "good cause," other than that the preference of the child or parent shall be considered where appropriate, including the parent's desire for anonymity. 25 USC 1915(c) Because ICWA provides greater rights to the parent by allowing his or her preference to be considered, this aspect should be followed over MIFPA. MIFPA does not afford the parent the same opportunity as it is currently written.	Good cause not to follow the order of preference shall be based on one or more of the following conditions: (a) A request was made by a child of sufficient age. (b) A child has an extraordinary physical or emotional need as established by testimony of an expert witness. 712B.23(5) The department or court must maintain records evidencing efforts made to comply with placement preferences and be made available upon request to the BIA or Indian child's tribe. 712B.23(7)
Voluntary Placement and TPR	Voluntary consent by an Indian custodian or parent to a foster care placement or termination of parental rights shall be in writing, recorded before a judge, and accompanied by the judge's written certification that the terms and consequences were explained and understood. Voluntary consent may not be given within 10 days of the child's birth. 25 USC 1913	The same basic requirements as ICWA, except MIFPA requires the consent of BOTH parents and also addresses guardianships. The requirements for consent, notice, and each of the types of the proceedings are listed in the statute. 712B.13
Withdrawal of Consent (Placement & Guardianship)	A voluntary consent to foster care placement may be withdrawn by a parent or Indian custodian at any time. 25 USC 1913	The same as ICWA. 712B.13(2) MIFPA includes withdrawal of consent to a guardianship. 712B.13(4)
Withdrawal	In any voluntary proceeding for termination of parental	A parent may withdraw the consent to TPR for any reason at any

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
of Consent (TPR)	rights, consent may be withdrawn by a parent for any reason at any time prior to the final decree of termination or adoption. 25 USC 1913(c)	time prior to the entry of a final order of adoption. 712B.13(3)
Guardianships	ICWA includes a guardianship in its definition of a child custody proceeding. 25 USC 1903(1) ICWA does not provide further information regarding guardianships.	For EPIC or juvenile guardianships determined to be involuntary and the court knows or has reason to know the child is an Indian child, MIFPA permits the court to order the department or a court employee to conduct an investigation and file a written report. In addition to information required in EPIC at 700.5204, MIFPA requires the report to include, but does not limit it to: (a) Whether or not the child is an Indian child. (b) The identity and location of the child's parents, if known. (c) If the child is an Indian child, the report must also address all of the following: (*i*) The tribe or tribes of which the child is a member or eligible for membership. (*ii*) If the child and family need culturally appropriate and other services to preserve the Indian family. (*iii*) The identity and location of extended family members and if no extended family members can be found, what efforts were made to locate them. 712B.24(1) MIFPA sets forth requirements for the guardianship hearing. 712B.25
Invalidation of Action	An Indian child, parent, Indian custodian, or tribe may petition the court to invalidate a foster care placement or termination of parental rights action upon a showing that any provision of ss. 1911, 1912, and 1913 of ICWA.	An Indian child, parent, Indian custodian or tribe who is the subject of an action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody an Indian child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate the action upon a showing that the action violated any provision of sections 7, 9, 11, 13, 15, 21, 23, 25, 27 and 29 of MIFPA. 712B.41
State Court Final Adoption	ICWA requires any state court entering a final decree or order in any Indian child adoptive placement to provide	MIFPA adds the requirement that the listed information also be sent to the tribal enrollment officer of the appropriate tribe.

Topic	ICWA 25 USC 1901-1963	Michigan Indian Family Preservation Act MCL 712B.1-41
Information to Bureau of Indian Affairs (BIA)	the Secretary (BIA) with a copy of the decree or order together with such other information as may be necessary to show: (1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and address of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement. *Where the court records contain an affidavit from the biological parent(s) requesting their identity remain confidential, the court shall include the affidavit with the other information. It is up to the BIA to ensure the confidentiality of this information is maintained. 25 USC 1951	712B.35

Exhibit 6.2
Federally Recognized Michigan Tribes

NAA 610	1 of 3	FEDERALLY RECOGNIZED TRIBES LOCATED IN MICHIGAN	NAB 2014-002 5-1-2014

LIST OF TRIBES

Bay Mills Indian Community

12140 W. Lakeshore Drive
Brimley, MI 49715
Web site: www.baymills.org

Phone: (906) 248-3241
Fax: (906) 248-5492

Grand Traverse Band of Ottawa and Chippewa Indians

2605 N.W. Bayshore Drive
Peshawbestown, MI 49682
Web site: www.gtbindians.org

Toll free: (866) 534-7750

Hannahville Indian Community

N14911 Hannahville B-1 Road
Wilson, MI 49896
Web site: www.hannahville.net

Phone: (906) 466-0306
Fax: (906) 466-0307

Keweenaw Bay Indian Community

16429 Beartown Road
Baraga, MI 49908
Web site: www.ojibwa.com

Phone: (906) 353-6623
Fax: (906) 353-7540

Lac Vieux Desert Band of Lake Superior Chippewa Indians

PO Box 249
Watersmeet, MI 49969
Web site: www.lvdtribal.com

Phone: (906) 358-4577*
Fax: (906) 358-4785
* Ask for the Social Services department.

Little River Band of Ottawa Indians

375 River Street
Manistee, MI 39660-0314

Phone: (231) 723-8288
Fax: (231) 723-8020
Toll free: (888) 723-8288

Web site: www.lrboi.com

Little Traverse Bay Bands of Odawa Indians

7500 Odawa Circle
Harbor Springs, MI 49740

Phone: (231) 242-1400
Fax: (231) 242-1414
Toll free: (866) 652-5822

Web site: www.ltbbodawa-nsn.gov

Match-E-Be-Nash-She-Wish Band of Pottawatomi Gun Lake Tribe

1743 142nd Ave.
PO Box 218
Dorr, MI 49323

Phone: (616) 681-8830
Fax: (616) 681-8836
Toll free: (866) 564-7429

Web site: www.mbpi.org

Nottawaseppi Huron Band of Potawatomi

2221 1/2 Mile Rd.
Fulton, MI 49502

Phone: (269) 729-5151
Fax: (269) 729-5920
Toll free: (866) 499-5151

Web site: www.nhbpi.com

Pokagon Band of Potawatomi Indians

58620 Sink Rd.
PO Box 180
Dowagiac, MI 49047

Phone: (269) 782-8998
Fax: (269) 782-9625
Toll free: (800) 517-0777

Web site: www.pokagon.com

NAA 610	3 of 3	FEDERALLY RECOGNIZED TRIBES LOCATED IN MICHIGAN	NAB 2014-002 5-1-2014

Saginaw Chippewa Indian Tribe

7070 E. Broadway
Mt. Pleasant, MI 48858

Phone: (989) 775-4000
Fax: (989) 772-3508
Toll free: (800) 225-8172*

Web site: www.sagchip.org

* Michigan only.

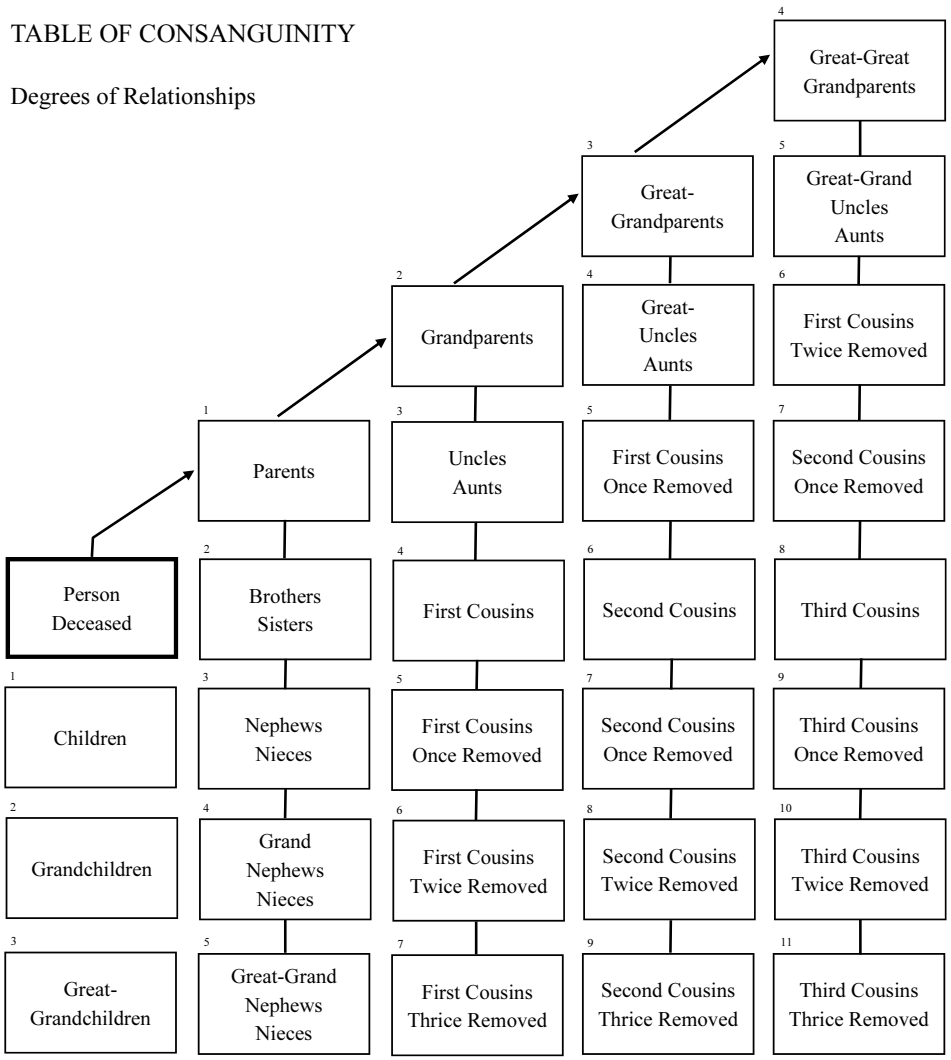
Sault Tribe of Chippewa Indians

523 Ashmun Street
Sault Ste. Marie, MI 49783

Phone: (906) 635-6050
Fax: (906) 635-4969
Toll free: (800)793-0660

Web site: www.saulttribe.com

Exhibit 6.3
Calculating Degrees of Kinship



7
Guardianships of Incapacitated Individuals

Summary of Guardianships of Incapacitated Individuals

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Jurisdiction and venue. §7.1.

The probate court has jurisdiction over guardianships of incapacitated individuals. For cases commenced on or after January 1, 1998, the family division of circuit court has ancillary jurisdiction. Venue is in the county where the individual resides or is present.

An *incapacitated individual* is someone 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 that the person lacks sufficient understanding or capacity to make or communicate informed decisions. Guardianships for individuals with developmental disabilities must be brought under the Mental Health Code.

Parental and spousal appointment. §7.2.

If serving as a guardian, the parent or spouse of an incapacitated individual can appoint a successor guardian by will or other writing signed by the parent or spouse and attested by at least two witnesses. The appointment becomes effective, after the death or incapacity of the parent or spouse and notice of intent to accept appointment, upon the guardian's filing an acceptance of appointment.

Court appointment. §§7.3–7.15.

An individual on the individual's own behalf or any person interested in the individual's welfare may petition for the 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."

Notice of the hearing must be given to the following:

- the alleged incapacitated individual
- if known, a person named as attorney in fact under a durable power of attorney
- the alleged incapacitated individual's spouse
- the alleged incapacitated individual's children or, if no adult child is living, the individual's parents
- if no spouse, child, or parent is living, the individual's presumptive heirs
- the person who has the care and custody of the alleged incapacitated individual
- the nominated guardian
- if known by the petitioner, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual

Additional special persons who may need to be notified include the following:

- if the incapacitated individual is receiving Veterans Affairs benefits, the Administrator of Veterans Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a request for notice

Before a guardianship petition is filed, the court must provide the person intending to file the petition with a list of alternatives to the appointment of a full guardian, including a limited guardian, a conservator, a protective order, a living will, a patient advocate designation, a durable power of attorney, or a do-not-resuscitate order, and an explanation of each alternative.

Priorities for appointment.

Unless there is a guardian previously appointed, qualified, and serving in good standing in another state, the court must appoint the person designated by the proposed ward if the person is suitable and willing to serve. Absent designation of a suitable and willing person, the court may appoint a person named as attorney in fact or patient advocate through a durable power of attorney. Absent designation of a suitable and willing person and a suitable and willing attorney in fact, the statute sets forth the following priorities for appointment:

1. the spouse, including a person nominated by the deceased spouse in a will or other writing
2. an adult child
3. a parent, including a person nominated by a deceased parent in a will or other writing
4. a relative of the legally incapacitated individual with whom the subject of the petition has resided for more than six months before the filing of the petition
5. a person nominated by a person who is caring for or paying benefits to the subject of the petition

If none of these persons is suitable or willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian. The court may not appoint as guardian an agency that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual.

Temporary guardians.

If there is an emergency, the individual does not have a guardian, and no one else appears to have authority to act, following a hearing with notice by personal service to the individual concerned and appointment of a guardian ad litem, the court may appoint a temporary guardian. A temporary guardian may be appointed only in the course of a proceeding for the appointment of a permanent guardian, and if tempo-

rary relief is granted, the hearing on the appointment of a permanent guardian must be held within 28 days.

Guardians ad litem and attorneys.

Unless the allegedly incapacitated individual has counsel of the individual's own choice, the court shall appoint a guardian ad litem to represent the person in the proceeding. The guardian ad litem must make determinations and inform the court on

- whether there are one or more appropriate alternatives to the appointment of a full guardian or whether one or more actions should be taken in addition to the appointment of a guardian, including a limited guardian, a conservator or other protective order, a patient advocate designation, a durable power of attorney, and a do-not-resuscitate order;
- whether a disagreement related to the petition might be resolved through court-ordered mediation; and
- whether the individual wishes to be present at the hearing, contest the petition, have limits placed on the guardian's powers, or object to a particular person being appointed guardian.

The court appoints legal counsel if the individual wishes to contest the petition or have limits placed on the guardian's powers, objects to a particular person being appointed guardian, or requests counsel or if the guardian ad litem determines it is in the individual's best interest to have legal counsel. Upon appointment of counsel, the guardian ad litem's appointment terminates. The court may appoint a visitor.

Examination by a physician or mental health professional.

The court, if necessary, may order that the individual alleged to be incapacitated be examined by a physician or mental health professional appointed by the court. The individual alleged to be incapacitated also has the right to secure an independent evaluation, at the individual's own expense, unless the individual is indigent. The professionals' reports are not part of the public record.

Alternative dispute resolution.

Any contested issue may be referred to mediation, case evaluation, or other alternative dispute resolution.

Hearing and order.

The individual alleged to be incapacitated is entitled to be present at the hearing and to see or hear all the evidence regarding the individual's condition. The individual is entitled to be represented by legal counsel; to present evidence; to cross-examine witnesses, including any court-appointed physician, mental health professional, or visitor; and to have a jury trial. The individual may ask for a closed hearing on the issue of incapacity (without a jury).

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the individual is incapacitated and that the appointment is necessary to provide continuing care and supervision of the incapacitated individual, with each finding supported separately on the record. The court grants a guardian only such powers as are necessary to provide for the demonstrated needs of that individual, and the guard-

ianship must be designed to encourage the incapacitated individual's maximum self-reliance and independence. The court may not grant a guardian powers held by an existing patient advocate. If the ward's property needs protection, the court must include restrictions in the letters of guardianship or order the guardian to furnish a bond.

Powers and duties of a guardian. §§7.16–7.19.

A full guardian of a legally incapacitated individual is responsible for the care, custody, and control of the ward and must also annually report to the court. Any sale of real property must receive prior court approval.

Guardianship reviews. §7.20.

The court must appoint an investigator and review a guardianship not later than one year after the appointment of the guardian and not later than every three years after that.

Modification and termination of a guardianship. §§7.21–7.22.

The ward or any person interested in the ward's welfare may bring a petition to remove the guardian, appoint a successor guardian, or modify the terms of or terminate the guardianship. The request may be made by an informal letter to the court. If the action or inaction of the guardian threatens the immediate well-being of the legally incapacitated individual, counsel may petition for the removal of the fiduciary and the appointment of a temporary guardian.

The authority of the guardian of an incapacitated individual terminates if either the guardian or the ward dies or if the guardian becomes incapacitated, resigns, or is removed.

I. Jurisdiction and Venue

§7.1 The probate court has exclusive legal and equitable jurisdiction over guardianships, conservatorships, and protective proceedings, except to the extent the Revised Judicature Act confers jurisdiction on the family division of circuit court. MCL 600.841, 700.1302(c). The family division of circuit court has ancillary jurisdiction over cases involving guardians and conservators that are commenced on or after January 1, 1998. MCL 600.1021(2)(a). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011.

The probate court has jurisdiction over the appointment of a guardian under MCL 700.5301–.5319 if the individual for whom a guardian is sought

- resides in this state or
- is present in this state and has a significant connection to this state.

MCL 700.5301b(1). In determining whether there is a significant connection to the state, the court will consider

- the wishes of the individual,
- where the individual's family and other interested persons are located,
- the length of time the individual was present in the state and the length of any absence,
- the location of the individual's property,
- the extent of the ties of the individual to this state, such as voting registration, state tax return filing, vehicle registration, driver's license, social relationships, and receipt of services, and
- any other factor the court deems relevant.

MCL 700.5301b(2).

A final order in a guardianship proceeding in probate court is appealable by right to the court of appeals. MCL 600.308; MCR 5.801(A)(3). The court of appeals also has jurisdiction over appeals from the family division of circuit court. MCR 7.203.

Venue is in the place 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 court is located. MCL 700.5302.

Incapacitated individuals. The adult guardianship procedure in the Estates and Protected Individuals Code (EPIC) applies to *incapacitated individuals,* 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).

Practice Tip

- *If an individual is developmentally disabled, a guardian may be appointed only pursuant to the Mental Health Code, even if the prospective ward is also an incapacitated individual. Neal v Neal (In re Neal), 230 Mich App 723, 584 NW2d 654 (1998). See chapter 10.*

II. Appointment in a Will or Other Writing

§7.2 If serving as guardian, the parent or spouse of an incapacitated individual can appoint a successor guardian by will or by another writing signed by the guardian and attested by at least two witnesses. MCL 700.5301(1), (2); MCR 5.405(C). Note that only a parent or spouse can appoint a successor guardian.

For a parental appointment to become effective, both parents must be dead or legally incapacitated. A spousal appointment may become effective on the spouse's death or incapacity. In either case, the appointment becomes effective if, after the guardian gives 7 days' prior written notice of the intent to accept appointment to the legally incapacitated individual and to the person having the care of the ward or nearest adult relative, the guardian files an Acceptance of Appointment, SCAO form PC 571, with the court that has jurisdiction over the guardianship. MCR 5.405(C)(1). Unless the court finds the person unsuitable, the court must issue letters of guardianship equivalent to those that had been issued to the deceased guardian. If the legally incapacitated individual files a written objection to the guardian's appointment, the appointment is terminated, and appointment must be made pursuant to the petition for guardianship procedure outlined in §§7.4–7.16. MCL 700.5301(4).

In a testamentary appointment, the guardian notifies the court in which the will is probated of the appointment. If the will is denied probate, the probating court notifies the court having jurisdiction over the guardianship, and that court revokes the letters of guardianship. MCR 5.405(C)(2).

III. Petition for Guardianship

A. Who May File?

§7.3 An individual on the individual's own behalf or any person interested in the individual's welfare may petition for the appointment of a guardian. MCL 700.5303(1).

Another person interested in the individual's welfare might file a separate petition seeking other relief, such as the appointment of another person as guardian. If the second petition is filed in a timely manner, the court usually consolidates the petitions for hearing at the same time.

An interested person or the subject of the petition may file an answer to the petition, seeking different relief such as the appointment of another person as guardian or the dismissal of the initial petition; however, it is rare to see answers to petitions for the appointment of a guardian, because MCR 5.119(B) allows an interested person to make oral objections on pending petitions at the time of the hearing.

Practice Tip

- *Filing an objection or answer to a guardianship petition is good practice, because the court and the other interested persons may then anticipate and plan for a contested hearing. If no objection or answer is filed, the court may respond to an oral objection by adjourning the hearing until after a proper written objection or answer can be filed and served. If it is appropriate, the court may convert the initial hearing to a pretrial and issue a scheduling order to govern further proceedings on the petition.*

B. Form and Contents

§7.4 The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

A petition for temporary guardian must specify in detail the emergency situation requiring the temporary guardianship. MCR 5.403(C).

If there is an attorney for the petitioner, the attorney must sign the petition as attorney according to MCR 1.109(E)(2)(a) because the form, SCAO form PC 625, Petition for Appointment of Guardian of Incapacitated Individual, includes a place for an attorney's signature. The attorney may also sign the petition for the

petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b).

The petition may contain multiple requests for relief. MCR 5.402(A). Other relief might include, for example, a request to enjoin a person from removing the individual who is alleged to be incapacitated from a home, hospital, or nursing home or a request that, pending the hearing, the court set certain hours of visitation.

PC 625 is the petition for a guardianship of an incapacitated individual. If the state court administrator has an approved form for a particular use, that form must be used when drafting the document for filing with the court. MCR 5.113(A).

It is especially important that the petitioner comply with the statutory requirement that "[t]he 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." MCL 700.5303(1). Absent sufficient facts and specific examples, the court may dismiss the petition or require the petitioner to amend it.

Practice Tips

- *In providing specific facts about the individual's condition and examples of recent conduct, the observations of a licensed professional, particularly one who specializes in the area of the individual's disability, are particularly helpful.*
- *If the incapacitated individual has a durable power of attorney or a patient advocate that the petitioner wants to replace with a guardian, the request to terminate the other person's authority should be included in the initial petition to appoint a guardian so that the court can decide on both matters at the same time.*

Filing fee. The total filing fee is $175 when an initial petition is filed that also requests a temporary guardianship or when a petition for guardianship or limited guardianship is filed. The total fee includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .880a(1), .1986. Additional motions, petitions, accounts, objections, or claims require an additional $20 fee. MCL 600.880b(1). The court may waive the fee if the petitioner is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. See MCR 2.002 for the required court procedures on waiving fees for indigent practitioners. If the petition is filed by a government agency, such as the Department of Health and Human Services, there is no filing fee.

C. Notice to Interested Persons

§7.5 The petitioner must give notice of the time and place of the hearing on the petition (and a copy of the petition) to all interested persons, including

1. the alleged incapacitated individual;
2. if known, a person named as attorney in fact under a durable power of attorney;
3. the alleged incapacitated individual's spouse;
4. the alleged incapacitated individual's adult children and the individual's parents;
5. if no spouse, adult child, or parent is living, the presumptive heirs of the individual;
6. the person who has the care and custody of the alleged incapacitated individual;
7. the nominated guardian; and,
8. if known by the petitioner, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual.

MCR 5.125(C)(23).

Additional special persons who may need to be notified include the following:

1. if the incapacitated individual is receiving Veterans Affairs benefits, the Administrator of Veterans Affairs
2. any guardian, conservator, or guardian ad litem of an interested person
3. any attorney who has filed an appearance
4. any special fiduciary
5. any person who has filed a request for notice under MCL 700.5104

MCR 5.125(A). MCL 700.5104 permits an interested person who desires to be notified before an order is made in a guardianship or conservatorship proceeding to file a request for notice. If a guardianship or protective proceeding is not pending when the request for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding.

The notice to the individual alleged to be incapacitated must state (1) the nature, purpose, and legal effects of the appointment of a guardian and (2) the rights of the alleged incapacitated individual in the proceeding, including the right to appointed legal counsel. MCL 700.5311(3); *see* SCAO form PC 626 (Notice of Rights to Alleged Incapacitated Individual).

The importance of giving proper notice is illustrated in *In re Estate of Williams*, 133 Mich App 1, 349 NW2d 247 (1984). In *Williams,* the petitioner failed to give notice to the ward's daughter (who had turned 18 after the appointment of the last successor guardian and conservator) when the court appointed a successor

guardian and conservator. The daughter petitioned the court for the removal of the successor and appointment of herself and her attorney as successor guardian and conservator, respectively. The court held that "the failure to give petitioner notice was jurisdictional and cannot be considered harmless." *Id.* at 8. As a result, the court's appointment of a successor guardian and conservator was void and the case was remanded for entry of an order making the appointments the daughter requested.

Practice Tip

- *Sometimes, the court may determine that the interested persons as defined by statute or court rule are insufficient to address the issues raised in a case. MCR 5.125(E) provides the court with the option of requiring additional individuals to be served in the "interest of justice."*

Service. An interested person may be served by mail, by personal service, or by publication when necessary. For the initial hearing, however, notice to the individual alleged to be incapacitated, if the person is 14 years of age or older, must be by personal service unless another method of service is specifically permitted in the circumstances. MCR 5.402(C); *see also* MCL 700.5311. The only other method of service on the individual alleged to be incapacitated that might be permitted would be service pursuant to MCR 5.105(A)(4)(b), under which the court may direct the manner of service if service cannot otherwise reasonably be made.

However, effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

If the individual alleged to be incapacitated is in a government institution, hospital, or home, the required personal service must be made by the person in charge of the institution or a person designated by that person. MCR 5.103(B).

Personal and electronic service under MCR 1.109(G)(6)(a) must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). This requires the filing of an affidavit or a Declaration of Intent to Give Notice by Publication, SCAO form PC 617, which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further

notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The petitioner must file a Proof of Service, SCAO form PC 564, promptly and before a hearing to which the document relates. If no hearing is involved, proof of service must be filed with the document. MCR 5.104(A)(1).

Waiver and consent. An interested person other than the individual alleged to be incapacitated may waive the right to receive notice of hearing by a statement on the record at the hearing or in a writing, SCAO form PC 561, Waiver/Consent, that is dated and signed by the interested person or someone authorized to consent on the interested person's behalf, specifying the hearing to which it applies. MCR 5.104(B)(1). An individual alleged to be incapacitated may not waive notice of hearing unless the individual attends the hearing or the waiver is confirmed in an interview with a visitor. MCL 700.5311(2). A visitor is a person who has no personal interest in the proceedings; is trained in law, nursing, or social work; and is an officer, an employee, or a special appointee of the court. MCL 700.5101(d).

D. Alternatives to Guardianship

1. Notice by the Court

§7.6 Before a guardianship petition is filed, the court must provide the person intending to file it with written information that sets forth alternatives to appointment of a full guardian, including a limited guardian, conservator, patient advocate designation, do-not-resuscitate order, durable power of attorney, and a physician orders for scope of treatment form. MCL 700.5303(2); *see* SCAO form PC 666 (Options You Should Know Before Filing a Petition for a Full Adult Guardianship).

2. Subject of the Petition Has a Durable Power of Attorney or Patient Advocate Designation

§7.7 A durable power of attorney is not revoked by the disability or incompetence of the principal. MCL 700.5501. A durable power of attorney remains in force even after a guardian has been appointed, and a guardian who does not control the ward's property has no authority to revoke it. For a discussion of proceedings necessary to revoke a durable power of attorney, see §12.4.

A durable power of attorney over financial affairs should not affect the guardian's powers over the ward's person. The attorney in fact has no duty to report to the guardian unless the guardian also serves as conservator, because the guardian's powers relate to the ward's physical well-being. The attorney in fact has superior rights and powers with respect to the ward's financial affairs and retains control over the ward's assets.

The proper execution of a patient advocate designation (PAD) should eliminate the need for the appointment of a guardian if it is only claimed that an individual needs a guardian to make decisions concerning health care, custody, and medical or mental health treatment. EPIC now permits a patient advocate to be authorized to make mental health treatment decisions for a patient. MCL 700.5506. If the person designated as patient advocate is unsuitable, the statute

relating to PADs provides the procedure for removing the patient advocate. MCL 700.5511(5); MCR 5.784. For a discussion of this procedure, see §12.5. The petition for the removal of a patient advocate may be filed at the same time as the petition for the appointment of a guardian. If the patient advocate is not removed or if a petition to remove an existing patient advocate is not filed, the court must limit the authority of any guardian it appoints to exclude the powers to make decisions concerning care, custody, and medical treatment for the individual, because MCL 700.5306(5) explicitly prohibits the court from granting a guardian powers held by an existing patient advocate.

If it is claimed that the individual needs a guardian to make decisions other than those concerning health care, it would be appropriate to request the appointment of a limited guardian.

Note: A legally incapacitated individual with a guardian empowered to make medical or mental health treatment decisions may not designate another individual as the individual's patient advocate. MCL 700.5520.

Practice Tip

- *If the incapacitated individual has a durable power of attorney or a patient advocate that the petitioner wants to replace with a guardian, the request to terminate the other person's authority should be included in the initial petition to appoint a guardian so that the court can decide on both matters at the same time. The order of the court and the letters of authority should indicate whether the durable power of attorney has been terminated.*

IV. Priorities for Appointment

§7.8 Any competent person may be appointed the guardian of a legally incapacitated individual. MCL 700.5313(1), (4). A *person* is "an individual or an organization." MCL 700.1106(o). An *organization* is "a corporation, business trust, estate, trust, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity." MCL 700.1106(i).

MCL 700.5313(2) sets out the mandatory order of priority for appointment of a guardian as follows:

1. a person previously appointed, qualified, and serving in good standing in another state
2. a person chosen to serve as guardian by the individual subject to the petition
3. a person nominated as guardian in a durable power of attorney or other writing by the individual subject to the petition
4. a person named by the individual as a patient advocate or attorney in fact in a durable power of attorney

If no person is chosen, nominated, or named as described in MCL 700.5313(2) or if none of the persons so chosen, nominated, or named are suitable and willing to serve, the court may appoint a relative of the individual subject to the petition in the following priority:

1. the spouse, including a person nominated by the deceased spouse in a will or other writing
2. an adult child
3. a parent, including a person nominated by a deceased parent in a will or other writing
4. a relative of the legally incapacitated individual with whom the subject of the petition has resided for more than six months before the filing of the petition
5. a person nominated by a person who is caring for or paying benefits to the subject of the petition

MCL 700.5313(3). If none of these persons is suitable and willing to serve, the court may appoint any competent person who is suitable and willing to serve, including a professional guardian. MCL 700.5313(4). To depart from the statutory provisions and appoint a public guardian under MCL 700.5313(4), the court must find by a preponderance of the evidence that none of the persons listed in MCL 700.5313(2) or (3) are suitable and willing to serve. *In re Guardianship of Gerstler*, 324 Mich App 494, 922 NW2d 168 (2018) (probate court erred appointing professional guardian when ward's adult daughter had priority to serve and there was no evidence that daughter was not competent, suitable, and willing to serve).

Foreign guardians. A guardian who is appointed, qualified, and serving in good standing in another state may be appointed immediately as temporary guardian in Michigan if (1) a guardian has not been appointed in Michigan, and (2) a petition for the appointment of a guardian is not pending in Michigan. MCL 700.5301a(1), MCR 5.108(B)(2)(a). The appointment takes place on the filing of an application for appointment, an authenticated copy of letters of appointment in the other state, and an acceptance of appointment. *See* SCAO forms PC 685m (Application for Appointment of Out-of-State Guardian of Legally Incapacitated Individual), PC 685o (Order for Appointment of Out-of-State Guardian of Legally Incapacitated Individual). The letters of guardianship for this temporary guardian expire 28 days after the date of appointment. MCL 700.5301a(1). Within 14 days after the appointment as temporary guardian, the guardian is responsible to give notice to all interested persons of the appointment and the right to object. MCR 5.108(B)(2)(b), .125(C)(23). The temporary guardian will be made full guardian after the filing of a proof of service of notice of the appointment, with the right to object, on all interested parties. MCL 700.5301a(2). If an objection is filed to the appointment of the foreign guardian, then the appointment continues until a court in this state enters an order removing the guardian. MCL 700.5301a(3).

Professional guardians. A professional guardian may be appointed as a temporary, limited, or full guardian. MCL 700.5106(1). A professional guardian is "a person that provides guardianship services for a fee. Professional guardian does not include a person who is an individual who is related to all but 2 of the wards for whom he or she is appointed as guardian." MCL 700.1106(v). Before appointing a professional guardian, the court must first find on the record that (1) the

appointment is in the ward's best interests and (2) no other person is competent, suitable, and willing to serve as fiduciary. MCL 700.5106(2); *In re Guardianship of Gerstler*. In addition, the professional guardian must file a bond in an amount and with the conditions determined by the court. MCL 700.5106(3). The professional guardian, as a result of being appointed guardian, may not benefit beyond compensation specifically authorized for guardians. MCL 700.5106(4). A professional guardian is not prevented from receiving compensation from a third party (from other than the ward's estate), but the guardian must file notice of the compensation and the source with the court and serve a copy on the ward. MCL 700.5106. Furthermore, the court may not appoint as guardian "an agency, public or private, that financially benefits from directly providing housing, medical, mental health, or social services to the legally incapacitated individual." MCL 700.5313(1).

Determining suitability. The purpose of guardianship is to install as guardian a substitute decision maker for a person who can no longer make any decisions or certain decisions. Under MCL 700.5313, a relative of the proposed ward may have priority for appointment as guardian over others, but there may be instances in which the person holding priority due to a familial relation is factually as remote in the person's contact with the ward as a stranger. It is within the court's purview to examine the qualitative circumstances of the relationship between the ward and the individual having statutory priority for appointment. In *Redd v Carney (In re Guardianship of Redd)*, 321 Mich App 398, 909 NW2d 289 (2017), the court held that a suitable guardian is one who is qualified and who can provide for the ward's care, custody, and control. Suitability is established by a preponderance of the evidence. *Id.* See also the trial judge's analysis of suitability in *In re Estate of Williams*, 133 Mich App 1, 10, 349 NW2d 247 (1984). The court exercises its discretion to find the substitute decision maker that will be in the best interests of the person. If the court determines the needs of the person who will have a guardian, the court can then look at potential appointees in light of their ability to satisfy those needs. Their ability might be determined by looking at the proposed guardians'

- willingness to spend the time necessary to become acquainted with the incapacitated individual's needs and the services that would provide for those needs;
- ability to make decisions after considering the best interests of the ward;
- historical relationship with the incapacitated individual, or, if there has been no relationship, experience in other situations in which the proposed guardian has had an opportunity to help others in similar circumstances;
- empathy, willingness to serve and have continuous contact with the ward, and willingness to make difficult decisions; and
- potential for a conflict of interest.

Someone otherwise suitable might be disqualified due to the potential for a conflict of interest (e.g., the owner of the foster care home where the incapacitated individual resides would not be a suitable guardian).

Practice Tips

- *A nonresident who has priority is not disqualified because of residence. However, the court has discretion to pass over such a person if the court concludes the person cannot fulfill the fiduciary responsibilities because of distance or for some other reason. For example, in Kent County, the guardian ad litem explains the requirements of visitation and asks whether the nominated guardian can meet the requirement, and that information is then included in the guardian ad litem's report.*
- *It is important for the court to make a complete record regarding suitability findings, especially if an unsuitability finding leads the court to pass over a person who otherwise would have priority by statute for appointment as guardian.*

V. Temporary Guardians

§7.9 If there is an emergency, the individual does not have a guardian, and no one else appears to have authority to act, the court may hold a hearing after notice to the individual concerned. MCL 700.5312(1). The petitioner must notify, by personal service, the individual alleged to be incapacitated. A Proof of Service, SCAO form PC 564, should be filed with the court before the hearing.

The court must appoint a guardian ad litem for the individual who is alleged to be incapacitated unless the appointment would cause delay and the person would likely suffer serious harm if immediate action is not taken. MCR 5.403(C). The guardian ad litem must visit the individual, report to the court, and take whatever other action the court directs. Additional duties of the guardian ad litem are set forth in MCL 700.5305. See §7.10. It is recommended that a guardian ad litem be appointed if at all possible because of the nature of the emergency relief that is usually the primary reason for initiating a temporary guardianship proceeding.

If there is proof that the individual is incapacitated, the court may exercise the powers of a guardian or may appoint a temporary guardian. MCL 700.5312(1). This section does not define the burden of proof; however, to prove that a person needs a permanent guardian, the petitioner must prove by clear and convincing evidence that the individual is incapacitated and that the appointment is necessary to provide care and supervision of the individual. MCL 700.5306(1). The same burden of proof should apply at the hearing on the temporary guardianship petition.

The powers and duration of the temporary guardian are limited by the court's order, SCAO form PC 632, Order Regarding Appointment of Temporary Guardian of Incapacitated Individual, and Letters of Guardianship, SCAO form PC 633. The temporary guardian is entitled to determine the individual's care and custody; must make reports as required by the court; and, in other respects, is governed by the provisions concerning guardians. MCL 700.5312(3).

The appointment of a temporary guardian may occur in the course of a proceeding for the appointment of a permanent guardian and pursuant to an application to appoint a guardian serving in another state to serve as guardian in this

state. If temporary relief is granted, the hearing on the appointment of a permanent guardian must be held within 28 days, with notice to the interested persons. MCR 5.403(A), (C).

Practice Tip

- *A temporary guardianship typically is used to address an immediate threat to the well-being of the ward, not to address an emergency related to the interests of an agency, an institution, or a third party.*

VI. Guardians ad Litem and Attorneys

§7.10 On the petition for appointment of a permanent guardian, unless the individual alleged to be incapacitated has an attorney of the individual's own choice, the court must appoint a guardian ad litem. MCL 700.5303(3). The person who commences the guardianship proceeding (or in any other manner requests the appointment of a guardian ad litem) may not choose or indicate in any manner a preference as to a particular person for that appointment. MCL 700.5108.

The guardian ad litem has the following duties:

- personally visit the individual
- explain to the individual the nature, purpose, and legal effects of a guardian's appointment
- explain to the individual the hearing procedure and the individual's rights as set forth in MCL 700.5306a(1), including information on how to contact the court or other relevant personnel regarding those rights
- inform the individual of the name of each person seeking appointment as guardian
- ask the individual and the petitioner about the amount of cash and property readily convertible into cash in the individual's estate
- report to the court on whether there are appropriate alternatives to appointment of a full guardian, taking into consideration the following:
  - appointment of a limited guardian (with appropriate limitations specified by the guardian ad litem)
  - appointment of a conservator or another protective order
  - execution of a patient advocate designation, do-not-resuscitate declaration, durable power of attorney, or a physician orders for scope of treatment form
- report to the court on the following:
  - whether a dispute related to the petition could be resolved through court-ordered mediation
  - an estimate of the amount of cash and property readily convertible into cash in the individual's estate
  - whether the individual wishes to be present at the hearing

- whether the individual wants to contest the petition or have limits placed on the guardian's powers
- whether the individual objects to a particular person being appointed guardian.

MCL 700.5305(1), .5306a(2).

The guardian ad litem must inform the individual that if a guardian is appointed, the guardian may have the power to execute a do-not-resuscitate order or a physician orders for scope of treatment form on behalf of the individual. The guardian ad litem must also tell the individual that the individual has a right to request a limitation on that power and, if meaningful communication is possible, the guardian ad litem must discern whether the individual objects to having a do-not-resuscitate order or a physician orders for scope of treatment form executed and then report to the court if the individual objects. MCL 700.5305(1)(e), (h).

See also SCAO form PC 627, Acceptance of Appointment and Report of Guardian Ad Litem of Alleged Incapacitated Individual, and exhibit 7.1, Procedure for the Appointment of a Guardian for a Legally Incapacitated Individual. The guardian ad litem is not entitled to court-ordered compensation until the guardian ad litem states on the record or in the report that the person has complied with these duties. MCL 700.5305(2).

Attorneys. After the guardian ad litem has had an opportunity to visit the person, the court might find it necessary to appoint legal counsel. Legal counsel is appointed if the individual wishes to contest the petition or have limits placed on the guardian's powers, objects to a particular person being appointed guardian, or requests counsel. Counsel is also appointed if the guardian ad litem determines it is in the individual's best interest to have legal counsel. MCL 700.5305(3), (4); *see* SCAO form PC 628 (Order Appointing Attorney). On appointment of counsel, the appointment of the guardian ad litem terminates. MCL 700.5305(5).

VII. Examination of the Subject of the Petition

§7.11 The court, if necessary, may order that the individual alleged to be incapacitated be examined by a physician or mental health professional appointed by the court. *See* SCAO form PC 629 (Order Appointing Physician/Visitor/Mental Health Professional). *Mental health professional* means an individual who is trained and experienced in the area of mental illness or developmental disability and includes Michigan-licensed doctors, psychologists, registered nurses, physicians assistants, licensed professional counselors, and certified social workers. A social worker must be a licensed master's social worker to meet the mental health professional standard. MCL 700.1106(a)(iv).

The individual who is alleged to be incapacitated has the right to secure an independent evaluation. The examination is at the individual's expense unless the individual is indigent; in that event, the cost is at public expense. MCL 700.5304(2).

Any report prepared pursuant to a court order or as a result of an independent evaluation must contain all the information set forth in MCL 700.5304(3):

(a) A detailed description of the individual's physical or psychological infirmities.

(b) An explanation of how and to what extent each infirmity interferes with the individual's ability to receive or evaluate information in making decisions.

(c) A listing of all medications the individual is receiving, the dosage of each medication, and a description of the effects each medication has upon the individual's behavior.

(d) A prognosis for improvement in the individual's condition and a recommendation for the most appropriate rehabilitation plan.

(e) The signatures of all individuals who performed the evaluations upon which the report is based.

See SCAO form PC 630 (Report of Physician or Mental Health Professional).

If the report is to be admitted, it must be filed five days before the hearing and be in the form required by the state court administrator. In addition, the party offering the report must inform the parties that the report is filed and available. The court may issue, or any party may secure, a subpoena to compel the preparer of the report to testify. MCR 5.405(A)(1). MCR 5.405(A)(2) abrogates any privilege for a court-ordered report and also for a report made as part of an independent evaluation if the alleged incapacitated individual seeks to have the report considered in the proceedings. The report must not be part of the public record. It is available only to the court or the appellate court, the individual alleged to be incapacitated, the petitioner, their legal counsels, and other persons as the court directs. MCL 700.5304(1).

In order to receive payment, the physician or mental health professional must submit an itemized statement of services and expenses for court approval. The court must review the statement and consider the time required for the examination, evaluation, and preparation of reports and court appearances; the examiner's experience and training; and the local fee for similar services. MCR 5.405(A)(3).

VIII. Alternative Dispute Resolution

§7.12 Any contested issue may be referred to mediation, case evaluation, or other alternative dispute resolution (ADR). MCR 5.143.

Facilitative mediation has been used successfully in disputes among family members and between the alleged incapacitated individual and the petitioner as well as in disputes arising in petitions for the modification or termination of the guardianship. In facilitative mediation, the parties, and in some cases the attorneys, meet with a trained neutral third party who does not make an evaluation or recommendation, but helps the parties craft their own agreement. Facilitative mediation is often successful only if the contestants want it, but it does have significant advantages over litigation, including the following:

- Mediation usually costs less than litigation.
- Mediation maintains privacy and confidentiality by avoiding public discussion of the family's "dirty laundry" and by encouraging the contestants to speak freely in an attempt to reach a resolution. Except for limited circum-

stances set forth in MCR 2.412(D), statements made during the ADR process may not be used in other proceedings. MCR 2.412.

- Mediation can be therapeutic for the participants. The dispute in these types of cases may actually be about animosity between a second spouse and children of a first marriage or between siblings. Often the parties to a disputed guardianship simply want an opportunity to air grievances or get an apology, and a skilled mediator can facilitate healing.
- Standards for future behavior can be set in mediation. If a possible resolution is coguardianship (or the appointment of one person as guardian and another as conservator), the mediation process gives the parties an opportunity to set ground rules for communication and decision making and to assess whether continued communication is a realistic alternative.
- If a petitioner may have difficulty proving incapacity, mediation may provide an opportunity for family members to discuss how the alleged incapacitated individual's needs may be met without the imposition of a guardianship.

IX. Hearing

A. Rights of the Subject of the Petition and Required Proof

§7.13 The individual alleged to be incapacitated is entitled to be present at the hearing and to see or hear all the evidence regarding the individual's condition. If the individual wants to be at the hearing, all practical steps must be taken to ensure the individual's presence, including, if necessary, moving the site of the hearing. MCL 700.5304(4). If the hearing is not in a courtroom, MCR 5.405(B) sets forth the requirements for the setting. While the court may allow the use of videoconferencing technology on request of any participant or sua sponte, if the subject of the guardianship petition wants to be physically present, the court must allow the individual to be present. MCR 5.140(A)–(C). The individual is entitled to be represented by legal counsel; to present evidence; to cross-examine witnesses, including any court-appointed physician, mental health professional, or visitor; and to have a jury trial. MCL 700.5304(5). In addition, the individual alleged to be incapacitated or the individual's legal counsel may ask for a closed hearing on the issue of incapacity (without a jury). MCL 700.5304(6). Whether the issue of incapacity is decided with or without a jury, it is the judge who selects the guardian. MCL 700.5306. It is important to note that only the person who is the subject of the petition for guardianship, as opposed to any other interested person, has the right to request a jury trial.

While the rules of evidence apply generally, the court may receive the oral and written reports of a guardian ad litem or visitor and rely on them to the extent of their probative value even though this evidence may not be admissible under the Michigan Rules of Evidence. MCR 5.121(D)(1). For other evidentiary considerations, see MCR 5.121(E) and MCR 5.405(A)(1)–(2).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for

meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

Jury trials on petitions to appoint a guardian for an alleged incapacitated individual are not common. Jury instructions are in chapter 172 of the Michigan Civil Jury Instructions. Note that M Civ JI 172.02 instructs regarding two findings:

> A guardian may be appointed by the court for *[name of respondent]* if the petitioner proves by clear and convincing evidence that:
>
> a. *[name of respondent]* is an incapacitated person and
>
> b. a guardian is necessary as a means of providing continuing care and supervision of *[name of respondent]*.

Practice Tip

- *If representing a petitioner, you should consider whether to ask for a special instruction if the alleged incapacitated individual has a patient advocate designation. That designation arguably only applies to medical care, and the alleged incapacitated individual may need assistance with other decisions concerning residential placement, transportation, etc. You may want to request that the trial judge instruct the jury on the limitations of the patient advocate designation.*

When the case is called, the parties present are generally sworn and questions are asked of the subject of the petition. See exhibit 7.2, Questions to Ask an Individual Subject to a Guardianship Petition, and exhibit 7.3, Questions to Ask the Proposed Guardian at the Initial Hearing. See also exhibit 7.4, Issues That May Arise in a Hearing to Determine Capacity. See also the discussion of determining the proposed guardian's suitability in §7.8.

Unless there is clear and convincing evidence that the person is an incapacitated individual *and* that the appointment is necessary to provide continuing care and supervision of the individual, with each finding supported separately on the record, the court must dismiss the proceedings. MCL 700.5306(1). If the court finds in the affirmative on both points of proof, the court may grant the guardian only those powers, and only for the period of time, necessary to provide for the demonstrated need of the incapacitated individual. MCL 700.5306(2). Thus, the statute prefers the appointment of a limited guardian. *See also* MCL 700.5306(3) (if there is clear and convincing evidence that individual is incapacitated to do some but not all tasks necessary to care for the person's self, court *may* appoint limited guardian to provide those services but *shall not* appoint full guardian). Appointment of a limited guardian may also be appropriate under other circumstances. For example, if the court finds by clear and convincing evidence that (1) an individual is incapacitated, (2) the person with care and custody of the incapacitated individual has denied another person access to the incapacitated individual, and (3) the incapacitated individual wishes to have contact with the other person or contact is in the incapacitated individual's best interest, the court may appoint a limited guardian to supervise contact between the incapacitated individual and that other person. MCL 700.5306(6). Only when there is clear and convincing

evidence that the individual is incapacitated and is totally without capacity to care for the individual's self and therefore needs guardianship services may the court appoint a full guardian.

B. Entry of Order

§7.14 If there is clear and convincing evidence that the individual is incapacitated and is totally without capacity to care for the individual's self, the court must specify that finding of fact in the order. MCL 700.5306(4). The court must also specify in the order any limitations on the guardian's powers and any time limit on the guardianship.

At the time of appointment, the court must also determine whether there would be sufficient assets under the guardian's control to require an inventory. If so, the court must order the guardian to file an inventory within 56 days after appointment. MCR 5.409(B). The guardian must serve copies of the inventory on the interested persons defined in MCR 5.125(C)(28) (see §7.18) and file a proof of service with the court. If the ward's property needs protection, the court must include restrictions in the letters of guardianship or order the guardian to furnish a bond. MCL 700.5313(1).

The court may also authorize the ward to handle a portion of the ward's assets, "[t]o encourage self-reliance and independence." MCL 700.5316. Under this section, the court may authorize the individual to maintain a savings or checking account and, to that extent, other people may deal with the individual as though the individual were mentally competent.

The petitioner usually prepares the orders and other papers that might be issued pursuant to the hearing on the petition for the appointment of a guardian. Some courts require that a proposed order, SCAO form PC 631, Order Regarding Appointment of Guardian of Incapacitated Individual, and Letters of Guardianship, SCAO form PC 633, be prepared and submitted to the court before the hearing.

C. Entry and Removal from the Law Enforcement Information Network (LEIN)

§7.15 When an order is entered appointing a guardian for an incapacitated individual, the court must immediately order the Department of State Police to enter the order into the law enforcement information network (LEIN). MCL 700.5107(1). If the court enters an order finding that a person is no longer incapacitated, the court must immediately order the Department of State Police to remove the order from the LEIN. MCL 700.5107(2). The Department of State Police must comply immediately with both orders of the court. MCL 700.5107(3).

X. Guardian's Powers and Duties

A. In General

§7.16 The powers, rights, and duties of a guardian are set forth in MCL 700.5314. A full guardian of a legally incapacitated individual is responsible

for the care, custody, and control of the ward but is not liable to third persons for acts of the ward. To the extent granted by court order, a guardian has the following powers and duties:

- *Consultation.* The guardian must consult with the ward before making a major decision affecting the legally incapacitated individual.
- *Custody.* The guardian has custody of the ward and may establish the ward's place of residence, either inside or outside Michigan. The guardian must notify the court within 14 days of any change in the ward's or the guardian's place of residence. The guardian must visit the ward within three months of appointment and at least once within three months after each previous visit.
- *Maintenance, property.* If the guardian is entitled to custody, the guardian must provide for the care, comfort, and maintenance of the ward and, when appropriate, arrange for the ward's training and education. The guardian must obtain services to "restore the ward to the best possible state of mental and physical well-being so that the ward can return to self-management at the earliest possible time." Regardless of custody, the guardian must take reasonable care of the ward's personal effects (clothing, vehicles, furniture) and commence protective proceedings if other property of the ward needs protection or if it would be in the ward's best interest to sell the ward's real property.
- *Medical care.* A guardian may give any necessary consent or approval so that the ward can receive medical or other professional care, counsel, treatment, or services. A guardian has authority to examine and obtain a ward's medical records under the Medical Records Access Act. MCL 333.26261 et seq.
- *Mental health care.* A guardian has the power to consent to or approve mental health care for the ward.
- *Do-not-resuscitate order.* A guardian has the power to execute a do-not-resuscitate order on behalf of a ward provided certain conditions are met. MCL 333.1053a, 700.5314(d).
- *Nonopioid directive.* A guardian has the power to execute, reaffirm, and revoke a nonopioid directive form on behalf of the ward. MCL 333.9145(2). The form is developed under MCL 333.9145(1). MCL 700.1106(g), 333.9145(7)(d).
- *Physician orders for scope of treatment form.* A guardian has the power to execute a physician orders for scope of treatment form described in MCL 333.5676. *See* MCL 700.1106(r), 333.5674(7).
- *Support.* If no conservator has been appointed, a guardian may institute proceedings to compel a person with a duty to support or pay money to the ward to do so and may receive money and tangible property due to the ward and use it for the ward's support, care, and education. The guardian may not use funds from the ward's estate for room and board provided by the guardian or the guardian's spouse, parent, or child unless the charge is approved by the court with notice to at least one of the next of kin of the ward, if notice is possible. The guardian must conserve any excess for the ward's needs. If a

conservator is appointed, the guardian must pay to the conservator the amount of the ward's estate received by the guardian in excess of the amount the guardian spends for the ward's current support, care, and education, and must account to the conservator for the amount spent.

MCL 700.5314(a)–(d), (f), (g), (i).

If the guardian determines that there is more cash or property that is readily convertible to cash in the ward's estate than was estimated at the time the guardian was appointed and if no conservator has been appointed, the guardian must report the amount of the additional cash or property to the court. MCL 700.5319(2). If the court determines that financial protection is required for the ward, the court may order the guardian to petition for the appointment of a conservator or for a protective order. MCL 700.5319(1).

The probate court is required to deliver a notice of duties to a guardian on appointment or qualification. MCR 5.310(E), .409(E). This notice appears on the back of SCAO form PC 633, Letters of Guardianship.

B. Annual Report

§7.17 In addition to the duties listed in §7.16, a guardian of a legally incapacitated individual must report to the court at least annually on the condition of the ward and of the portion of the estate that is subject to the guardian's possession or control. MCL 700.5314(j). The report must be in writing and is due within 56 days after the anniversary of the appointment and at any other times the court orders. The report must be in the form approved by the state court administrator. MCR 5.409(A); *see* SCAO form PC 634 (Annual Report of Guardian on Condition of Legally Incapacitated Individual). The report contains information about the ward's current living arrangements, physical and mental health, and social activities as well as a list of the guardian's visits with and activities on behalf of the ward. The report must also indicate whether the guardian has executed, reaffirmed, or revoked a do-not-resuscitate order, a physician orders for scope of treatment form, or a nonopioid directive form on behalf of the ward during the past year. MCL 700.5314(j).

The guardian must serve this report on the ward and all interested persons. MCL 700.5314(e). The persons interested in receiving a copy of the report on the condition of the ward are

- the ward, if 14 years of age or older;
- the person who has principal care and custody of the ward, if other than the guardian;
- for an adult guardianship, the spouse and adult children or, if no adult children are living, the presumptive heirs of the individual; and
- for a minor guardianship, the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor.

MCR 5.125(C)(24).

Practice Tip

- *Failure to file an annual report on the ward's condition in a timely manner may result in the guardian's suspension as fiduciary or removal and replacement with a special fiduciary. MCR 5.203, .204. In some courts, a guardian who does not file the annual report within 56 days after its due date is automatically suspended and may be reinstated only on submitting the report.*

C. Annual Account

§7.18 If ordered by the court, a guardian must file an annual account within 56 days after the end of the accounting period. MCR 5.409(C)(1).

The guardian must serve a copy of the account on all interested persons, which include

- the protected individual, if 14 years old or older,
- the protected individual's presumptive heirs,
- claimants with a proper claim that remains unpaid,
- the guardian ad litem, and
- the personal representative, if any.

MCR 5.125(B)(1), (C)(28). The guardian must also file a proof of service with the court. MCR 5.409(C).

For further discussion of annual accounts, see §9.19.

D. Medical Treatment

§7.19 MCL 700.5314(c) declares that, unless limited by the court, a guardian may "give the consent or approval that is necessary to enable the ward to receive medical, mental health, or other professional care, counsel, treatment, or service." However, note that if the ward executed a patient advocate designation before the person was determined to be legally incapacitated, the guardian appointed does not have the power or duty to make medical or mental health treatment decisions that the patient advocate is designated to make. MCL 700.5306(5). The court may modify the guardianship to grant those powers to the guardian if, on the petition for guardianship or on a petition for modification of the guardianship, it is alleged and the court finds that the patient advocate designation was not validly executed, that the patient advocate is not complying with the terms of the designation or the statute, or that the patient advocate is not acting consistently with the ward's best interests. For a discussion of the procedure to remove a patient advocate, see §12.5.

Withholding medical treatment. Michigan's Do-Not-Resuscitate Procedure Act (DNR Act), MCL 333.1066(1), provides that "[t]he provisions of this act are cumulative and do not impair or supersede a legal right that an individual may have to consent to or refuse medical treatment for himself or herself or that a parent, guardian, or other individual may have to consent to or refuse medical treatment on behalf of another." The DNR Act creates a method for a guardian to be

given the authority to withhold life-sustaining medical treatment. MCL 333.1053a.

The Michigan Supreme Court addressed the question of a guardian's authority to withhold life-sustaining treatment in *Martin v Martin (In re Martin)*, 450 Mich 204, 538 NW2d 399 (1995), *cert denied,* 516 US 1113 (1996), in which the ward's mother objected to the guardian's petition to withdraw nutritive support. *Martin* adopted the purely-subjective-analysis standard in that particular case. 450 Mich at 223 n15. The purely-subjective-analysis test requires clear and convincing evidence that the ward, while competent, stated that the person would refuse life-sustaining treatment under the then present circumstances. The standard would be very difficult to satisfy in the absence of a written document executed by the ward before becoming incapacitated. The *Martin* court seemed impressed that certain witnesses testified that the ward said "no" when asked if he did not want to continue living. The decision in *Martin* is narrow in scope because it only addresses the issue of a conscious patient who is not terminally ill or in a persistent vegetative state.

The *Martin* court acknowledged that the objective or best-interests test might be appropriate when the ward is a never competent adult in a persistent vegetative state, experiencing great pain, or is terminally ill.

A guardian has the explicit power to execute a do-not-resuscitate order and a physician orders for scope of treatment form on behalf of a ward provided certain conditions are met. MCL 333.1053a, 700.5314.

Mental health treatment. A guardian has the power to consent to or approve mental health care on behalf of the ward. However, the guardian may not consent to inpatient hospitalization without express court approval and the assent of the ward. MCL 700.5314(c). If the ward objects to or actively refuses the treatment, the guardian must petition the court for an order to provide involuntary mental health treatment under the Mental Health Code. *Id.* See also MCL 330.1400(f) for a definition of *involuntary mental health treatment.* A patient advocate authorized to make mental health treatment decisions may also execute an application for formal voluntary hospitalization. MCL 330.1415.

XI. Guardianship Reviews

§7.20 The court must review a guardianship not later than one year after the appointment of the guardian and not later than every three years after that. MCL 700.5309.

The mechanics of conducting guardianship reviews are set forth in MCR 5.408(A). This subrule requires the court to appoint a person to investigate the guardianship and to report to the court by a date set by the court. *See* SCAO form PC 636 (Report on Review of Guardianship of Legally Incapacitated Individual). Some courts have a designated person that they appoint to perform these investigations for a set fee plus mileage, to be paid out of the ward's estate or, if the estate cannot or will not pay, to be paid by the court.

The appointed person must visit the legally incapacitated individual or explain in the report why a visit was not practical. The report must also include a recommendation on whether the guardianship should be modified. MCR 5.408(A)(2). After informally reviewing the report, the court must enter an order continuing the guardianship or appointing an attorney to represent the legally incapacitated individual for the purpose of filing a petition to modify the guardianship. In either case, the court must send a copy of the report and the order to the legally incapacitated individual and the guardian. MCR 5.408(A)(3). As an alternative to appointing an investigator to submit a report, some courts require the guardian to submit a questionnaire.

This review process may help the court to uncover instances in which a guardian has been remiss in discharging fiduciary obligations. Under such circumstances, the guardian may be removed, suspended, or found liable for the guardian's actions or omissions. The guardian may also be prosecuted for embezzlement if the guardian willfully appropriated money or property for the guardian's own use and failed to return the money or property after being ordered to do so by the probate court. MCL 750.176.

XII. Petitions to Modify or Terminate a Guardianship

§7.21 Once the court has entered an order appointing a guardian, the ward or any person interested in the ward's welfare may bring a petition to remove the guardian, appoint a successor guardian, or modify the terms of or terminate the guardianship. MCL 700.5310(2). *See* SCAO form PC 675 (Petition to Terminate/Modify Guardianship) (note that PC 675 requires petitioner to indicate reasons why court should take action). A request for such an order may be made by an informal letter to the court. *Id.* The same procedures to safeguard the ward's rights in a petition for a guardian's appointment apply to removing the guardian, appointing a successor guardian, and modifying the terms of or terminating the guardianship. MCL 700.5310(4); *In re Guardianship of Gordon*, 337 Mich App 316, 975 NW2d 114 (2021). The ward's rights include an attorney (if the ward does not have one), presence at the hearing, jury trial, cross-examination, presentation of evidence, and an independent medical examination. MCL 700.5304(2), (4), (5); MCR 5.408(B)(1). If the action or inaction of the guardian threatens the immediate well-being of the legally incapacitated individual, counsel may petition for the removal of the fiduciary and the appointment of a temporary guardian, pursuant to MCL 700.5312(2).

A petition to terminate or modify the guardianship may also be initiated after a periodic review of a guardianship. If the person appointed by the court to investigate the guardianship recommends that it be terminated or modified, the court must enter an order appointing an attorney to represent the legally incapacitated individual for the purpose of filing the petition. MCR 5.408(A)(2), (3). The court-appointed attorney must file the petition (PC 675) within 14 days of the date of appointment. MCR 5.408(A)(4); *see* SCAO form PC 637 (Order Following Review of Guardianship).

The interested persons to a modification or termination petition are the guardian and the same persons as those interested in a petition for the appointment of a guardian. MCR 5.125(C)(26). See §7.5.

To remove a guardian under MCL 700.5310, the probate court must find that the guardian is no longer suitable and willing to serve. *Redd v Carney (In re Guardianship of Redd)*, 321 Mich App 398, 909 NW2d 289 (2017). The court determines suitability by a preponderance of the evidence and must examine whether an existing guardian satisfactorily provided care, custody, and control of the ward.

Jurisdiction. The court in the county where the ward resides has concurrent jurisdiction with the court that appointed the guardian over these matters. If the court in the county where the ward resides is not the court of appointment, the court in which the petition is filed must notify the appointing court. After consultation with the appointing court, the court in which the petition is filed determines whether to retain jurisdiction or transfer the proceedings to the appointing court, whichever is in the best interests of the incapacitated individual. MCL 700.5317.

Procedure. If the legally incapacitated individual petitions for or requests termination or modification and that individual does not have an attorney, the court must immediately appoint an attorney. MCR 5.408(B)(1). If another person petitions for or requests termination or modification, the court must appoint a guardian ad litem. If the guardian ad litem determines that the legally incapacitated individual contests the requested relief, the court must appoint an attorney for the legally incapacitated individual and terminate the appointment of the guardian ad litem. MCR 5.408(B)(2). Before acting on a modification or termination petition, the court may send a visitor to the residences of the present guardian and the ward, to observe conditions and report in writing to the court. MCL 700.5310(4).

Unless otherwise provided in the court order finding incapacity, the court must hold a hearing within 28 days after the receipt of a modification petition. MCL 700.5310(3). An order finding incapacity may specify a minimum period not exceeding 182 days during which a petition for termination or modification may not be filed without special leave of the court. If the court entered a time restriction for filing a modification or termination at the time of the original order, the ward or another person wishing to file such a motion within the restricted time period must first file a motion or petition and order asking special leave of the court. If no such motion is filed, the court will not accept the petition or will hold it until the minimum time period has expired.

The trial of a contested petition for the removal of a guardian or for the modification or termination of a guardianship order is conducted in the same manner as a trial of a contested petition for the appointment of a guardian. If the incapacitated individual alleges a change in capacity, the burden of proof is on the respondent (guardian), who must show by clear and convincing evidence that the individual continues to be incapacitated and that a guardianship continues to be necessary to provide continuing care and supervision of that individual. M Civ JI 172.03. Similarly, if a limited guardian requests additional powers, the burden is

on the limited guardian to show that the additional powers are necessary. The burden of proof of breach of fiduciary duty is on the person asserting it. *Moyer v Fletcher*, 56 Mich 508, 23 NW 198 (1885).

XIII. Termination of Guardian's Authority

§7.22 Pursuant to MCL 700.5308, the responsibility and authority of a guardian for a legally incapacitated individual terminates if any of the following occurs:

- death of the guardian
- death of the ward
- determination of incapacity of the guardian
- removal of the guardian pursuant to MCL 700.5310
- resignation of the guardian pursuant to MCL 700.5310

In addition, a testamentary appointment of a successor guardian under an unprobated will or a will probated via informal probate terminates if the will is later denied probate in a formal testacy proceeding. MCL 700.5308; MCR 5.405(C)(2).

Exhibit 7.1
Procedure for the Appointment of a Guardian for a Legally Incapacitated Individual

(MCR 5.401 et seq., .125(C)(23); MCL 700.5302 et seq. passim)

To receive the form to start a guardianship, call the court and request a petition form to establish a guardianship for a legally incapacitated individual.

When you receive the form, it is necessary to complete it fully and in detail. Carefully follow the instructions provided with the form. You may then bring the form to the court. Before you pay the filing fee and receive a court date, you will be given materials you must read carefully. **There may be an alternative to the guardianship proceeding that will accomplish what you are trying to do.** Our probate counsel is available to discuss this with you if you like. Once you have read the materials, if you believe guardianship is the appropriate step to take, you may file your papers and pay the fee. A guardian ad litem (that is a person who investigates for the court) will be appointed to review the situation you describe, express the desires of the respondent, and recommend (1) whether a guardian should be appointed, (2) who should be appointed, and (3) whether there should be restrictions placed on the guardian's powers.

The estate of the individual is responsible for the costs of the guardian ad litem unless the estate has insufficient funds. This fee generally runs around $150. This is in addition to the filing fee, currently $175.

Once you file the papers, you will receive a hearing date in approximately three weeks. If there is an emergency, the court can act much quicker. There is a place on the petition form to request an emergency hearing.

Which county is the appropriate place to file your petition? The appropriate county in which to file the petition is the county the individual resides in or is present in. The individual must have a significant connection to this state. MCL 700.5301b.

Who may file the petition? The petition may be filed by anyone interested in the individual's welfare, including the individual.

Who must receive notice? There are certain people entitled to know the hearing is taking place. Those are the individual who is the subject of the petition, the attorney in fact, if known; the spouse of the individual; adult living children and the parents; if no spouse, adult children, or parents, the presumptive heirs of the individual; the person who is caring for or who has the custody of the individual; the person who is nominated as guardian; a guardian or conservator appointed by a court in a different state, if known by the petitioner. Notice must be given according to certain rules. The court can assist you in following these rules. Failure to follow them may result in your hearing being postponed or the petition being dismissed. If you have questions about the procedure, court staff is happy to help you. MCR 5.125.

What if the individual's capacity is uncertain? If there is a question concerning the individual's legal capacity, an evaluation may be ordered by the court. The individual may also request an independent evaluation.

What does the guardian ad litem do? The guardian ad litem represents the alleged incapacitated person. The guardian ad litem will visit the individual. The nature, purpose, and legal effects, of the guardianship and the rights of the alleged incapacitated individual under MCL 700.5306a will be explained. The hearing procedure will be explained: the individual has the right 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 counsel. The guardian ad litem will name each person seeking to become guardian. A report will be filed to the court responding to each of the above and explaining to the court whether there are alternatives to the proposed guardianship; what limits should be placed on the powers of the guardian; whether a conservator should be appointed or protective order entered; whether a patient advocate designation, do-not-resuscitate declaration, or durable power of attorney should be entered into; whether the issues presented could be mediated; whether the individual wishes to be present at the hearing; whether the individual wishes to contest the petition; whether the individual wishes limits placed on the guardian's powers; and whether the individual objects to the particular person requesting appointment. You will want to speak with the guardian ad litem before the hearing.

When will the court appoint counsel for the individual? If the individual requests it, if the guardian ad litem recommends it, if limits are requested on the guardian's powers, if the petition is contested, if the person requesting appointment is objected to by the individual, or if the court decides to appoint counsel, counsel will be appointed.

In order to appoint a guardian and to determine the guardian's powers, what must the court find? At the hearing, the court must determine, by clear and convincing evidence, two things: first, the individual is legally incapacitated, and second, the appointment of a guardian is necessary for the care and supervision of the individual. Each of these requirements is important. First and foremost, the court must determine incapacity. Incapacity means the inability of the individual to make informed decisions concerning himself or herself. However, even if the person is unable to make informed decisions, if all needs are being met, a guardianship may be unnecessary. And while a person is unable to make informed decisions about certain aspects of life, the person may be able to make decisions about others. For example, the person may be perfectly capable of deciding where to live but incapable of deciding what medical procedures should be engaged in. The court will tailor the guardianship to meet the individual's needs and encourage the individual's independence.

Are there rules the court must consider when deciding what person should be appointed guardian? The court will first consider someone the individual wishes to serve, or someone designated in a power of attorney of the individual. Then, the court will consider the following, in order: spouse, adult child, parent, relative,

someone nominated by a caregiver, or other competent person. There is a restriction on appointing a person or agency that may financially benefit from directly providing housing, medical, mental health, or social services to the individual. Even though a person has priority, someone else may be appointed if the court finds they are more suitable.

What will happen at the hearing? Hearings are set for Thursdays at 1:30 or 2:00 in the afternoon. The hearing may be short if everyone is in agreement and everything is in order. If proper persons have not been served or the file is not otherwise in order, the case may be postponed or the petition dismissed. It is petitioner's responsibility to see that the procedural requirements have been met. The hearing, if contested, will likely be set on another day. This is because the court desires to give all parties and witnesses the time they need. Thursday dockets are generally quite crowded and are reserved for short matters. Please explain this to any witnesses you have arranged to attend so they will not be disappointed.

Is there any other way to resolve disputes besides a full court hearing? An excellent mediation program permits families to meet with a trained third party. This can be a good way to resolve any contested issues.

What are the duties of a guardian? In general, a guardian should talk with the individual, if communication is possible, before making major decisions. The guardian is responsible for the individual's care, custody, and control but is not liable to third persons by reason of that responsibility. It is important to carefully read the court's order and a paper called "Letters of Authority" to see the full extent of the guardian's duties. A guardian must visit the individual at least once every three months. If the individual moves to a different address, the guardian must notify the court within 14 days of the move. Special provisions must be followed if the individual's property needs to be sold. Call the court if you have questions. The guardian must take reasonable care of the individual's belongings and take reasonable steps to restore the individual to the best possible state of mental and physical well-being. The guardian must report the condition of the individual and the individual's property at least annually on a report form supplied by the court. The guardian may wish to keep a diary to make this important task simpler and more meaningful. The following areas are important to keep track of: the ward's current condition, how the condition has changed in the past year, present living arrangements, whether there is a more appropriate living arrangement that could be made, medical treatment received during the year, services received by the individual, a list of the guardian's visits with the individual, and a statement concerning whether the guardianship should be continued. MCL 700.5314.

May a guardian be compensated? May a guardian resign? If there are questions concerning compensation of a guardian, the desire of the guardian to resign, or other issues confronting the guardian, please call the court.

How may I modify or terminate the guardianship? If an individual no longer needs a guardian or if the guardian seeks other powers, a petition needs to be filed with the court. You may call the court for information about this.

Exhibit 7.2
Questions to Ask an Individual Subject to a Guardianship Petition

[Often, the individual will not be present. If the individual is present, the court will first wish to attend to any special needs the individual may have, such as hearing, sight, or language deficits.]

1. Please state your name.
2. How do you feel about having someone assist you with decision making?
3. Have you talked with the guardian ad litem?
4. Do you agree with the recommendation?

[If there is agreement:]

5. Thank you for taking the time to come to court today. *[The court can at this point enter the requested order and letters of authority.]*

[If there is not agreement:]

6. What would you like to see the court do today?
7. What in the recommendation do you disagree with?
8. Would you like to have an attorney represent you? *[An attorney will be appointed in any case.]*
9. Do you have your own attorney or would you like the court to appoint one for you? *[This is another opportunity to see if mediation will resolve the impasse.]*
10. *[Determine from the guardian ad litem if there are emergent issues. If not, set the matter for hearing, giving sufficient time for the attorney to meet with the individual and prepare for the hearing. Sometimes, once the attorney is appointed, a further delay will be requested to receive an independent mental health evaluation. Note that this is the right of the respondent, not the petitioner. However, the court may order it on its own if it believes this will help resolve outstanding issues.]*
11. *[If there are emergent issues, it may be necessary to conduct a hearing with respect to the emergency matters at once and appoint a temporary guardian pending a full hearing. This is a last resort. But there are occasions when the court is left with little choice, as when life-threatening issues confront the individual about which the individual is oblivious or in denial, or, in the words of the court rule, the "alleged incapacitated individual would likely suffer serious harm if immediate action is not taken." If this tack is taken, the court must hold its full hearing on the guardianship within 28 days of the appointment of the temporary guardian.]*

Exhibit 7.3
Questions to Ask the Proposed Guardian at the Initial Hearing

Typically, a judge will not have many questions of a proposed guardian at the initial hearing if staff has done its work. In general, the suitability of the proposed guardian is dealt with in advance of the hearing by the guardian ad litem. If issues arise about the suitability or acceptability of a proposed guardian during the investigation, the case will be set for trial if mediation is not appropriate. At the trial, since counsel will likely represent the parties, the court will usually not be actively involved in the questioning.

A tool for courts is available that will permit additional screening by court staff. Conviction information is available from the state's website through the Internet Criminal History Access Tool (ICHAT). This can be a helpful tool in dealing with cases where financial integrity or other duties requiring scrupulous character are key. Courts may receive an agency code from the help desk, (517) 322-1953, prior to accessing the site. If your county court already has an agency code, probate judges should acquire it from the trial court administrator. The Michigan State Police issue one agency code for each county court system.

If there are no issues about the suitability of the proposed guardian, the court will simply ask the proposed guardian at the initial hearing if he or she is willing to serve. When a "yes" response is received, the court will thank the person for agreeing to serve the individual and the court.

The guardian will be notified that the court has an instructional videotape available. The tape explains the guardian's duties both to the individual and to the court. The guardian is invited to take the tape home and return it within a reasonable period of time.

Some courts provide a mandatory orientation session once the appointment is made. It is critical that guardians and conservators understand the nature and importance of their responsibilities to the individual and to the court.

Exhibit 7.4
Issues That May Arise in a Hearing to Determine Capacity

Determination of an individual's capacity. This is doubtless the toughest aspect of guardianship, one that is tricky for judges and gerontologists alike. The reason: people simply do not respond in the same way to stimuli at each hour of the day, or when they are taking certain medications. Nor is capacity an all or nothing concept. Some persons may have capacity at noon and not at night, some persons may react better before or after medication is administered, and some persons may be able to determine perfectly where they should live but not be able to make decisions about medical care. How does a court learn about this? A physician who testifies at trial may not have the full database from which to make an accurate assessment. That is, he or she may have an accurate snapshot of the individual at the time of the office visit, but not have a clue about the individual the rest of the day. It may be that a social worker or observant friend or neighbor may be a more accurate historian. What makes all this relevant for the conscientious judge is the legal requirement to tailor the guardianship order as narrowly as possible to include in the order only those areas of activity in which the individual is unable to make informed decisions. The doctor may only be concerned that a guardian be appointed so that issues of informed consent do not later arise. The family may wish to have a protective net in place to protect their loved one (or to preserve assets for the moment it is time to distribute the estate!). The court, too, wishes to protect the individual but also is required to preserve a person's autonomy to the fullest extent consistent with the evidence. The decision to appoint a guardian and thereby take from an individual the right to make those decisions involves a complex intertwining of legal and bioethical considerations. The court, however, must make its decisions based on the law.

How may a judge be faithful to the legislative mandate? The answer is training. The guardian ad litem is not expected to be a clinical psychologist, but the guardian ad litem should be trained to recognize when a person "is unable to make informed decisions" and in which area. The guardian ad litem may well recommend to the court that a mental health professional assess the individual in a problematic case. Guardians ad litem must be trained to assess the individual and to assess the assessors. Guardians ad litem need to be given basic investigatory tools but they also need to be able to determine whether the experts have the full range of data available to reach conclusions that will help the court fashion appropriate orders. In this way, their recommendations will have great benefit.

Many Michigan probate courts offer training programs. This enables guardians ad litem to create the reports that help the court tailor orders to meet the precise needs of the individual. What should be included in the training? There is no bright line test to determine capacity. There are, however, a number of questions a guardian ad litem may ask to assist him or her in reporting to the court regarding the capacity of the individual or the need for the individual to receive further evaluation. It is key for the guardian ad litem (and the court) to focus on functional capacity—what is it that the person is not now able to do that a guardian could do.

The guardian ad litem should be aware of the complexities of determining capacity. A good initial source for guardian ad litem review is the following four maxims from Phil Hrenchir, *Testing for Mental Capacity in the Elderly* (April 2002):

- Find out what the person cannot do that a guardian could do.
- Find out what the person can do.
- Perform a risk/benefit analysis. What are the potential negative consequences to the individual if a guardian is not appointed? (Remember the statutory requirement that a guardian must be necessary. If the behavior engaged in is not "informed" but nonetheless inconsequential, a guardian is not necessary.)
- Understand that capacity is not stagnant. That is, improvement may occur with treatment and time. Therefore, orders may be limited not only with respect to function but also with respect to time.

Note that Mental Status Reporting Software and the Mini Mental State Examination can be purchased from PAR, Inc.

Once the guardians ad litem have received the requisite training, the judge will feel far more comfortable relying on the recommendations received. The quality of decisions the court will be able to make will be improved.

Washtenaw, Oakland, and Wayne counties, among others, have training programs and would be happy to share their agendas. See the Wayne County Probate Court website for agendas and attorney training materials.

8
Protective Orders

Summary of Protective Orders

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook.*

Jurisdiction and venue. §8.1.

The probate court has jurisdiction over protective orders. Venue is in the county where the individual resides or is present.

Court's authority. §8.3.

A protective order may be obtained if a statutory basis exists for affecting the property and business affairs of an individual. Without appointing a conservator, the court may

- authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs and
- authorize, direct, or ratify a contract, trust, or other transaction relating to the protected individual's property and business affairs if the court determines that the transaction is in the protected individual's best interests.

The probate court may appoint a special conservator to assist in the accomplishment of any protective arrangement.

Procedure for obtaining a protective order. §§8.4–8.9.

A petition for a protective order may be filed by

- the individual to be protected (including a minor, if at least age 14);
- a person interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian; or
- a person who would be adversely affected by the lack of effective management of the individual's property and business affairs.

Preliminary protective order.

As a preliminary matter, before the hearing on a petition for a protective order and without notice to interested persons, the court may issue a preliminary order to preserve and apply the property of the individual to be protected as may be required for the support of the individual or the individual's dependents.

Interested persons.

Notice of the hearing must be given to the following:

- the individual to be protected (if age 14 or older)
- the presumptive heirs of the individual
- if known, a person named as attorney in fact under a durable power of attorney
- the nominated conservator (if applicable)
- a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending
- if known by the petitioner, a guardian or conservator appointed by a court in another state to manage the protected individual's finances

Additional special persons who may need to be notified include the following:

- if the individual to be protected is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a request for notice

Guardians ad litem, health professionals, visitors, and attorneys.

For an adult, unless the individual to be protected has private counsel, the court must appoint a guardian ad litem. The guardian ad litem does not have an attorney-client relationship with the protected person, and communications between the two of them are not privileged unless the guardian ad litem is subsequently appointed as attorney. If the individual's alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may appoint a physician or mental health professional to examine the individual. The individual also has the right to an independent medical evaluation. The court may also send a visitor to interview the individual. The guardian ad litem or visitor must, before the hearing

date, conduct an investigation, report in open court or file a written report of the investigation, and give recommendations.

For a minor, the court may appoint a guardian ad litem if necessary. The court must state the purpose of the appointment in the order, which may be entered with or without notice. The court also may appoint an attorney to represent the minor if at any time in the proceeding it determines the minor's interests are or may be inadequately represented. The court must consider the choice of a minor who is at least 14 years old. An attorney appointed by the court has the powers and duties of a guardian ad litem.

Hearing and order.

The individual to be protected is entitled to be present at the hearing. The individual is also entitled to counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and visitor, and to trial by jury. The individual or the individual's counsel may request a closed hearing.

The Michigan Rules of Evidence apply to protective proceedings. However, the court may receive and rely on oral and written reports of a guardian ad litem or visitor to the extent of their probative value, even if they are not admissible under the Michigan Rules of Evidence.

The court may issue a protective order if a basis for the order is established by clear and convincing evidence.

I. Jurisdiction and Venue

§8.1 The probate court has exclusive legal and equitable jurisdiction over guardianships, conservatorships, and protective proceedings, except to the extent the Revised Judicature Act confers jurisdiction on the family division of circuit court. MCL 600.841, 700.1302(c). The family division of circuit court has ancillary jurisdiction over cases involving guardians and conservators that are commenced on or after January 1, 1998. MCL 600.1021(2)(a). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011. For a discussion of when concurrent or ancillary jurisdiction may be invoked, see §6.1.

After notice is served in a proceeding seeking a protective order and until the proceeding terminates, the court in which the petition is filed has the following jurisdictional authority:

- exclusive jurisdiction to determine the need for a conservator or other protective order
- exclusive jurisdiction to determine how the estate of the protected individual that is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants
- concurrent jurisdiction with the circuit court to determine the validity of claims against the individual or the individual's estate and questions of title concerning estate property

MCL 700.5402. The probate court has jurisdiction over the appointment of a conservator or the issuance of a protective order in relation to an individual's estate and affairs under MCL 700.5401–.5433 if the individual for whom the conservatorship or protective order is sought

- resides in the state or
- is present in the state and has a significant connection to the state.

MCL 700.5402a(1). In determining whether there is a significant connection to the state, the court will consider

- the wishes of the individual,
- where the individual's family and other interested persons are located,
- the length of time the individual was present in the state and the length of any absence,
- the location of the individual's property,

- the extent of the ties of the individual to this state, such as voting registration, state tax return filing, vehicle registration, driver's license, social relationships, and receipt of services, and
- any other factor the court deems relevant.

MCL 700.5402a(2).

Venue is in the place where the individual to be protected resides, regardless of whether a guardian has been appointed in another place. If the protected individual resides out of state, venue is in the place where property of the individual is located. MCL 700.5403. Venue can be changed to another county on an interested person's motion or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be held in the county where the action is pending. MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

Practice Tip

- *Protective proceedings on a minor's behalf are not auxiliary to the probate proceedings of a deceased parent, even though venue may be the same. In re Estate of Valentino, 128 Mich App 87, 339 NW2d 698 (1983).*

II. Examples of Use

§8.2 Protective orders may be used for numerous purposes. The following are some examples of their use for minors:

- create or ratify a trust for the minor's benefit, provided that the enjoyment of assets presently vested is not postponed beyond age 18 (unless the minor has a disability other than minority or the court finds continuation is in the minor's best interest and does not unreasonably restrain the minor's access to these funds on reaching majority)
- approve an out-of-court settlement for a minor in which no lawsuit is pending and no conservatorship needs to be established (typically because a probate court-approved trust is being created to hold the proceeds, the settlement does not exceed $5,000, or the minor will not receive funds until age 18 under a structured settlement)
- authorize the purchase of an annuity pursuant to a lawsuit or structured settlement
- obtain a release of rights to property (e.g., oil lease, sale of land)

The following are some examples of the use of protective orders for adults:

- purchase an annuity
- authorize a contract for life care, training, or education
- approve a transfer of assets to a previously existing trust to complete funding
- distribute an inheritance to a prior created living trust (when the settlor's heirs and beneficiaries are identical)

- appoint a special conservator to obtain back wages owed to an alcoholic, which will then be distributed directly to the alcoholic's spouse for the spouse's and children's support
- authorize placement in a hospice when no guardianship has been established or is contemplated for the adult
- create a deed conveying title from a now incompetent, paid-in-full vendor of a land contract to the vendee

III. Court's Authority

§8.3 A protective order may be obtained if a basis exists under MCL 700.5401 for affecting the property and business affairs of an individual.

To obtain a protective order for an adult, the petitioner must show that the individual

- is unable to manage property or 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
- either
  - has property that will be wasted or dissipated unless proper management is provided or
  - needs money for the support, care, and welfare of the individual or those entitled to be supported by the individual and that protection is necessary to obtain or provide money.

MCL 700.5401(3). In *Lyneis v Brody (In re Conservatorship of Brody)*,321 Mich App 332, 909 NW2d 849 (2017), the court found that it was necessary to establish only that the property (held either individually or jointly) will be wasted or dissipated in the future unless proper management is provided and unnecessary to show that the property had been wasted or dissipated in the past.

To obtain a protective order for a minor, the petitioner must show that the minor

- owns money or property that requires management or protection that may not otherwise be provided,
- has or may have business affairs that may be jeopardized or prevented by minority, or
- needs money for support and education and protection is necessary or desirable to obtain or provide money.

MCL 700.5401(2).

The scope of probate court powers regarding protective arrangements and transaction authorizations is delineated in MCL 700.5408. Without appointing a conservator, the court may

- authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs (protective arrangements include, but are not limited to, "payment, delivery, deposit, or retention of money or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, contract for life care, deposit contract, or contract for training and education; or an addition to or establishment of a suitable trust") and
- authorize, direct, or ratify a contract, trust, or other transaction relating to the protected individual's property and business affairs if the court determines that the transaction is in the protected individual's best interests.

In deciding whether to enter a protective order, the court must consider the interests of creditors and dependents of the protected individual and must consider whether the individual needs the continued protection of a conservator. MCL 700.5408(3).

Probate courts have the authority to enter protective orders providing support for a community spouse whose institutionalized spouse is receiving Medicaid benefits. *In re Estate of Vansach*, 324 Mich App 371, 922 NW2d 136 (2018). However, the court cautioned that the authority to enter such protective orders must be exercised with consideration of the institutionalized spouse's needs and patient-pay obligations under Medicaid. *Id.* at 376–377. To assess the need for money for the protected spouse's support and care under Medicaid-related circumstances, the protected spouse's eligibility for Medicaid benefits and the applicable patient-pay costs must have actually been determined by Medicaid. *In re Estate of Schroeder*, 335 Mich App 107, 966 NW2d 209 (2020) . In *Estate of Schroeder*, a probate court improperly calculated the amount of money needed to support the protected spouse because the court's calculation was based on an estimation of the Medicaid benefits expected by a protected spouse whose eligibility for Medicaid had not yet even been confirmed.

A probate court may also appoint a special conservator to assist in the accomplishment of any protective arrangement. MCL 700.5408. A special conservator has the authority conferred by the court's order and serves until discharged by order after reporting to the court pursuant to its order. This arrangement may be used to ensure that the protective order is complied with, to assist in implementing the protective order, or to execute the action authorized by the protective order.

Practice Tip

- *Instead of appointing a conservator, the court may authorize, direct, or ratify a trust for a minor, but the trust may not postpone the enjoyment of assets presently vested in the minor beyond age 18 unless the court finds continuation is in the minor's best interest and does not unreasonably restrain the minor's access to these funds on reaching majority. A trust may be created for a minor that would postpone enjoyment beyond minority for assets not presently vested in the minor, as long as the assets are transferred directly to the trust. Examples include a bequest in*

a will to the trust or settlement proceeds paid to such a trust as a condition of settlement.

IV. Preliminary Protective Orders

§8.4 As an interim measure before the hearing on a petition for a protective order and without notice to interested persons, the court may issue a preliminary order to preserve and apply the property of the individual to be protected as may be required for the support of the individual or the individual's dependents. MCL 700.5407(2)(a). As discussed in §8.3, a special conservator may be appointed for this purpose.

V. Petition for Protective Order

A. Who May File?

§8.5 A petition for a protective order may be filed by

- the individual to be protected (including a minor, if at least age 14, MCR 5.402(B));
- a person interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian; or
- a person who would be adversely affected by the lack of effective management of the individual's property and business affairs.

MCL 700.5404(1). Note: the procedure for obtaining a protective order is the same as that for establishing a conservatorship and is governed by the same statutes, MCL 700.5401 et seq.

B. Form and Contents

§8.6 The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or

their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

A petition concerning a minor who is subject to prior continuing jurisdiction of another court must contain allegations concerning the prior proceedings. MCR 5.112. SCAO form MC 28, Notice to Prior Court of Proceedings Affecting Minor, is used to notify the prior court of the present proceeding. Many courts complete and mail this form on receipt of a petition reporting a prior proceeding. Others require that the petitioner do so.

If there is an attorney for the petitioner, the attorney must sign the petition as attorney, according to MCR 1.109(E)(2)(a), because the form, SCAO form PC 639, Petition for Appointment of Conservator and/or Protective Order, includes a place for an attorney's signature. The attorney may also sign the petition for the petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain the following statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b).

The form used to initiate a protective order is PC 639. Some attorneys complete the probate form to ensure that the statutory grounds are included but attach their own petition, which provides additional details on the protective order request.

The pleading must be well grounded in fact and based on existing law or a good-faith argument for the modification of an existing law, or the petitioner and the person's attorney will be subject to sanctions pursuant to MCR 1.109(E)(5)–(6). *In re Pitre*, 202 Mich App 241, 508 NW2d 140 (1993).

Filing fee. The total filing fee for a protective order is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .880b(1), .1986. The court may waive the fee if the petitioner is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. See MCR 2.002 for the required court procedures on waiving fees for indigent petitioners.

C. Notice to Interested Persons

§8.7 Notice of hearing must be given to all interested persons. MCR 5.102.

The interested persons to a petition for a protective order are the following:

1. the individual to be protected (if age 14 or older)
2. the presumptive heirs of the individual

3. if known, a person named as attorney in fact under a durable power of attorney
4. the nominated conservator (if applicable)
5. a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending
6. if known by the petitioner, a guardian or conservator appointed by a court in another state to manage the protected individual's finances

MCR 5.125(C)(25). Note: if the individual to be protected is a minor who was born out of wedlock, the individual's father is not an interested person in the proceedings unless paternity has been established in a manner provided by law. MCR 5.125(B)(4). Methods of establishing paternity include acknowledgment of parentage and an order of filiation from the circuit court pursuant to a paternity action. *See* MCL 722.711 et seq.

Additional special persons who may need to be notified are the following:

1. if the individual to be protected is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
2. any guardian, conservator, or guardian ad litem of an interested person
3. any attorney who has filed an appearance
4. any special fiduciary
5. any person who has filed a demand for notice under MCL 700.3205or a request for notice under MCL 700.5104

MCR 5.125(A). MCL 700.5104 permits an interested person who desires to be notified before an order is made in a guardianship or protective proceeding to file a request for notice. If a guardianship or protective proceeding is not pending when the request for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding.

In addition, the court may require that additional persons be served in the interest of justice. MCR 5.125(E). Examples might include persons with whom a minor is residing without any legal basis.

The importance of giving proper notice is illustrated in *In re Estate of Williams*, 133 Mich App 1, 349 NW2d 247 (1984). In *Williams,* the petitioner failed to give notice to the ward's daughter (who had turned 18 after the appointment of the last successor guardian and conservator) when the court appointed a successor guardian and conservator. The daughter petitioned the court for the removal of the successor and appointment of herself and her attorney as successor guardian and conservator, respectively. The court held that "the failure to give petitioner notice was jurisdictional and cannot be considered harmless." *Id.* at 8. As a result, the court's appointment of a successor guardian and conservator was void and the case was remanded for entry of an order making the appointments the daughter requested.

Service. An interested person may be served by mail, by personal service, or by publication when necessary. For the initial hearing, however, notice to the individual to be protected, if age 14 or older, must be by personal service unless another method of service is specifically permitted in the circumstances. MCR 5.402(C). For instance, if the individual to be protected has disappeared or is otherwise situated so that personal service is not possible, notice may be given by mail or by publication. MCL 700.5405(1)(a).

However, effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

If the individual to be protected is in a government institution, hospital, or home, the required personal service must be made by the person in charge of the institution or a person designated by that person. MCR 5.103(B).

Personal and electronic service under MCR 1.109(G)(6)(a) must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). This requires the filing of an affidavit or a Declaration of Intent to Give Notice by Publication, SCAO form PC 617, which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The petitioner must file a Proof of Service, SCAO form PC 564, promptly and before a hearing to which the document relates. If a hearing is not involved, proof of service must be filed with the document. MCR 5.104(A)(1).

Waiver and consent. An interested person other than the individual to be protected may waive the right to receive notice of hearing by a statement on the record at the hearing or in a writing, SCAO form PC 561, Waiver/Consent, that is dated and signed by the interested person or someone authorized to consent on the interested person's behalf, specifying the hearing to which it applies. MCR 5.104(B)(1). An individual alleged to need protection may not waive notice of hearing unless the individual attends the hearing or the waiver is confirmed in an interview with a visitor. MCL 700.5405(1) (incorporating the provisions of MCL 700.5311(2)). A visitor is a person who has no personal interest in the proceed-

ings; is trained in law, nursing, or social work; and is an officer, an employee, or a special appointee of the court. MCL 700.5101(d).

D. Guardians ad Litem, Health Professionals, Visitors, and Attorneys

§8.8 Adult individuals to be protected. Unless the individual to be protected has private counsel, the court must appoint a guardian ad litem. MCL 700.5406(2). The person commencing the protective proceeding (or making a motion for or in any other manner requesting the appointment of a guardian ad litem) may not choose or indicate in any manner the person's preference regarding who should be appointed guardian ad litem. MCL 700.5108. The guardian ad litem does not have an attorney-client relationship with the protected person, and communications between the two of them are not privileged. MCR 5.121(E)(1). If the guardian ad litem is subsequently appointed as attorney, the attorney-client privilege relates back to the date of the appointment as guardian ad litem. MCR 5.121(E)(2).

If the individual's alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may appoint a physician or mental health professional, preferably not connected with an institution in which the individual is a patient or is detained, to examine the individual. MCL 700.5406(2); *see* SCAO form PC 629 (Order Appointing Physician/Visitor/Mental Health Professional). The individual alleged to need protection has the right to an independent medical evaluation. A physician not otherwise compensated for services rendered is entitled to reasonable compensation from the protected individual's estate. MCL 700.5413.

The court may also send a visitor to interview the individual. The visitor may be a guardian ad litem or a court officer or employee. MCL 700.5406(2). The court may use, as an additional visitor, a public or charitable agency to evaluate the condition of the individual to be protected. MCL 700.5406(3).

The guardian ad litem or visitor must, before the hearing date, conduct an investigation, report in open court or file a written report of the investigation, and give recommendations. The guardian ad litem or visitor need not appear personally at the hearing unless required by law or directed by the court. The guardian ad litem or visitor must file any written report with the court at least 24 hours before the hearing unless another time is specified by the court. MCR 5.121(C). If it deems necessary, the court may revoke the appointment and appoint another guardian ad litem or visitor. MCR 5.121(B).

Guardians ad litem and visitors are entitled to reasonable compensation from the protected individual's estate if not otherwise compensated for services rendered. MCL 700.5413.

Minor individuals to be protected. When the court considers it necessary, it may appoint a guardian ad litem to appear for a minor and represent the minor in any matter pending before the court. On the application of the minor or at the discretion of the court, the appointment may be revoked and another guardian ad litem appointed. MCR 5.121. When not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

MCL 700.1403(d). For example, a single guardian ad litem might be appropriate in the case of several minor children whose parents have died and left them significant assets. The court must state the purpose of the appointment in the order, which may be entered with or without notice. MCR 5.121(A)(1). Note that the person commencing the protective proceeding cannot choose or indicate in any manner a preference as to who should be appointed guardian ad litem. MCL 700.5108.

The court may appoint an attorney to represent the minor if at any time in the proceeding it determines the minor's interests are or may be inadequately represented. The court must consider the choice of a minor who is at least 14 years old. An attorney appointed by the court has the powers and duties of a guardian ad litem. MCL 700.5406(1).

If not otherwise compensated for services, a guardian ad litem or attorney appointed in a protective proceeding is entitled to reasonable compensation from the estate. MCL 700.5413.

Practice Tip

- *The guardian ad litem is often a key player in proceedings to obtain a protective order. That person's recommendation is often crucial to the judge's ruling on the petition.*

VI. Hearing and Order

§8.9 Rights of the individual to be protected. The individual to be protected is entitled to be present at the hearing. If the individual wishes to exercise this right, all necessary steps must be taken to ensure the individual's presence, including moving the site of the hearing, if necessary. The individual is also entitled to counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and visitor, and to trial by jury. The individual or the individual's counsel may request a closed hearing. MCL 700.5406(5).

Any person may request permission to participate in the hearing. The court may grant this request with or without a hearing on the request, if it finds that the individual to be protected will be served by granting the request. The court may restrict the permission with "appropriate conditions." MCL 700.5406(6). While the court may allow the use of videoconferencing technology on request of any participant or sua sponte, if the subject of the petition regarding a protected individual wants to be physically present, the court must allow the individual to be present. MCR 5.140(A)–(C).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

Burden of proof. The court may issue a protective order if a basis for the order is established by clear and convincing evidence. MCL 700.5401, .5406(7); *see also Lyneis v Brody (In re Conservatorship of Brody)*,321 Mich App 332, 909 NW2d 849 (2017). Once the basis for the order has been established by clear and convincing evidence, the trial court must adhere to the standards in MCL 700.5407 and .5408 in creating the order and exercising authority over the individual's property. *In re Estate of Vansach*, 324 Mich App 371, 922 NW2d 136 (2018). The potential bases for a protective order are listed in §8.3.

Evidence. The Michigan Rules of Evidence apply to protective proceedings. MRE 1101. However, the court may receive and rely on oral and written reports of a guardian ad litem or visitor to the extent of their probative value, even if they are not admissible under the Michigan Rules of Evidence. MCR 5.121(D)(1). Any interested person may examine and controvert reports received into evidence. MCR 5.121(D)(2)(a). The subject of a report has the right, upon request, to cross-examine the individual who made the report. MCL 700.5406(5); MCR 5.121(D)(2)(b). Other interested persons may cross-examine the individual who made the report if the individual is "reasonably available." MCR 5.121(D)(2)(c).

Order. SCAO form PC 644 is the Order Regarding Petition for Protective Order.

Because a protective order is not an ongoing estate subject to supervision by the probate court, judges generally do not order a bond. Even if a bond is imposed, it remains in place only until the protective action is completed (e.g., monies placed in trust, an annuity purchased).

In many cases, no fiduciary is appointed; in others, a special conservator with limited powers over a defined transaction or protective arrangement is named. No accounting is filed, although a special conservator must report to the court on all matters done pursuant to the order. MCL 700.5408(3).

9
Conservatorships

Summary of Conservatorships

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Jurisdiction and venue. §9.1.

The probate court has jurisdiction over conservatorships. For cases commenced on or after January 1, 1998, the family division of circuit court has ancillary jurisdiction. Venue is in the county where the individual resides or is present.

Appointment of a conservator. §§9.2–9.15.

A petition for appointment of a conservator may be filed by the following:

- the individual to be protected (including a minor, if at least age 14)
- a person interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian
- a person who would be adversely affected by the lack of effective management of the individual's property and business affairs
- the Department of Health and Human Services (DHHS), on behalf of a vulnerable adult

Interested persons.

Notice of the hearing must be given to the following:

- the individual to be protected (if age 14 or older)
- the presumptive heirs of the individual
- if known, a person named as attorney in fact under a durable power of attorney
- the nominated conservator (if applicable)
- a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending
- if known by the petitioner, a guardian or conservator appointed by a court in another state to manage the protected individual's finances

Additional special persons who may need to be notified include the following:

- if the individual to be protected is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
- any guardian, conservator, or guardian ad litem of an interested person
- any attorney who has filed an appearance
- any special fiduciary
- any person who has filed a request for notice

Preliminary protective order.

As a preliminary matter, before the hearing on a petition for appointment of a conservator and without notice to interested persons, the court may issue a preliminary order

to preserve and apply the property of the individual to be protected as may be required for the support of the individual or the individual's dependents.

Priorities for appointment.

An individual, a corporation authorized to exercise fiduciary powers, or a professional conservator may be appointed in the following order of priority:

1. a conservator or similar fiduciary properly appointed by a court of another jurisdiction in which the protected individual resides or that person's nominee
2. an individual or corporation nominated by the protected individual if the individual is age 14 or older
3. the protected individual's spouse or the spouse's nominee
4. an adult child of the protected individual or the child's nominee
5. the protected individual's parent or the parent's nominee
6. a relative of the protected individual with whom the individual has resided for more than six months before the petition is filed or that person's nominee
7. a person nominated by the person who is caring for or paying benefits to the protected individual

If none of these persons is suitable and willing to serve, the court may appoint any person who is suitable and willing to serve.

Guardians ad litem, health professionals, visitors, and attorneys.

For an adult, unless the individual to be protected has private counsel, the court must appoint a guardian ad litem. The guardian ad litem does not have an attorney-client relationship with the protected person, and communications between the two of them are not privileged unless the guardian ad litem is subsequently appointed as attorney. If the individual's alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may appoint a physician or mental health professional to examine the individual. The individual also has the right to an independent medical evaluation. The court may also send a visitor to interview the individual. The guardian ad litem or visitor must, before the hearing date, conduct an investigation, report in open court or file a written report of the investigation, and give recommendations, including recommendations on whether there is an appropriate alternative to full conservatorship.

For a minor, the court may appoint a guardian ad litem if necessary. The court must state the purpose of the appointment in the order, which may be entered with or without notice. The court also may appoint an attorney to represent the minor if at any time in the proceeding it determines the minor's interests are or may be inadequately represented. The court must consider the choice of a minor who is at least 14 years old. An attorney appointed by the court has the powers and duties of a guardian ad litem.

Hearing and order.

The individual to be protected is entitled to be present at the hearing. The individual is also entitled to counsel, to present evidence, to cross-examine witnesses, including

the court-appointed physician and visitor, and to trial by jury. The individual or the individual's counsel may request a closed hearing.

The Michigan Rules of Evidence apply to protective proceedings. However, the court may receive and rely on oral and written reports of a guardian ad litem or visitor to the extent of their probative value, even if they are not admissible under the Michigan Rules of Evidence.

The court may issue a protective order if a basis for the order is established by clear and convincing evidence.

Powers and duties of a conservator. §§9.16–9.20.

A conservator has broad powers to handle all assets held on behalf of the protected individual and to make payments from the assets for the health, benefit, and welfare of the protected individual, including all the powers of a trustee. However, a conservator may not sell the ward's real property unless the conservator obtains court approval after a hearing with notice to interested persons.

A conservator must file an inventory of the protected individual's assets with the probate court within 56 days after appointment and must annually file an account of all receipts and disbursements from the estate within 56 days after the end of the accounting period. Copies of the inventory and annual accounts must be served on the protected individual and all other interested persons.

Resignation or removal of a conservator. §9.21.

Any person interested in the ward's welfare may bring a petition to remove the conservator and to request the appointment of a temporary or successor conservator. The petitioner must prove that the present conservator acted improperly or was otherwise unfit to continue to serve as conservator.

The probate court may remove a conservator on its own initiative for good cause. If the probate court removes the conservator, it may appoint a successor or terminate the conservatorship. Any successor conservator succeeds to the title and powers of the predecessor.

If the conservator makes withdrawals from the protected individual's account without court permission or otherwise exceeds the conservator's authority, the probate court may appoint a special fiduciary to investigate the situation. With this appointment, the conservator's powers are suspended unless the order of appointment provides otherwise. The special fiduciary must safeguard the remaining assets of the protected individual.

Termination of a conservatorship. §9.22.

Any person interested in the protected individual, including the protected individual, may petition the court to terminate the conservatorship. A protected individual seeking termination is entitled to the same rights and procedures as in the original proceeding.

A conservatorship otherwise terminates, in the case of a conservatorship of a minor, when the individual reaches the age of majority or, in the case of a conservatorship of an adult, when the protected individual regains capacity or dies.

I. Jurisdiction and Venue

§9.1 The probate court has exclusive legal and equitable jurisdiction over guardianships, conservatorships, and protective proceedings, except to the extent the Revised Judicature Act confers jurisdiction on the family division of circuit court. MCL 600.841, 700.1302(c). The family division of circuit court has ancillary jurisdiction over cases involving guardians and conservators that are commenced on or after January 1, 1998. MCL 600.1021(2)(a). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011. The probate court has jurisdiction over the appointment of a conservator or the issuance of a protective order in relation to an individual's estate and affairs under MCL 700.5401–.5433 if the individual for whom the conservatorship or protective order is sought

- resides in this state or
- is present in this state and has a significant connection to the state.

MCL 700.5402a(1). In determining whether there is a significant connection to the state, the court will consider

- the wishes of the individual,
- where the individual's family and other interested persons are located,
- the length of time the individual was present in the state and the length of any absence,
- the location of the individual's property,
- the extent of the ties of the individual to this state, such as voting registration, state tax return filing, vehicle registration, driver's license, social relationships, and receipt of services, and
- any other factor the court deems relevant.

MCL 700.5402a(2).

Alternatives to conservatorship. The court must carefully consider whether there are less-intrusive alternatives than a conservatorship that will protect an individual's property and autonomy. *Bittner-Korbus v Bittner (In re Bittner)*, 312 Mich App 227, 879 NW2d 269 (2015) (citing MCL 700.5407(3), .5408, .5419(1)). Note that the court is not required to give notice of alternatives to full conservatorship, but it is required to give notice of alternatives to full adult guardianship (see §7.6). However, many of the same alternatives to full guardianship described in SCAO form PC 666, Options You Should Know Before Filing a Petition for a Full Adult Guardianship, may also be appropriate alternatives to conservatorship that must be considered by the court, particularly durable powers of attorney, trusts, protective orders, representative payees, and delegations of parental powers. A limited conservatorship, in which only a part of the protected

individual's property vests in the conservator, is another option that the court should consider. *See* MCL 700.5419.

Subsequent proceedings. After notice is served in a proceeding seeking the appointment of a conservator and until the proceeding terminates, the court in which the petition is filed has the following jurisdictional authority:

- exclusive jurisdiction to determine the need for a conservator or other protective order
- exclusive jurisdiction to determine how the estate of the protected individual that is subject to the laws of this state must be managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants
- concurrent jurisdiction with the circuit court to determine the validity of claims against the individual or the individual's estate and questions of title concerning estate property

MCL 700.5402.

Venue. Venue is in the place where the individual to be protected resides, regardless of whether a guardian has been appointed in another place. If the protected individual resides out of state, venue is in the place where property of the individual is located. MCL 700.5403. Venue can be changed to another county on an interested person's motion or on the court's own initiative, for the convenience of the parties and witnesses, for the convenience of the attorneys, or if an impartial trial cannot be held in the county where the action is pending. MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

Practice Tip

- *Protective proceedings on a minor's behalf are not auxiliary to the probate proceedings of a deceased parent, even though venue may be the same. In re Estate of Valentino, 128 Mich App 87, 339 NW2d 698 (1983).*

II. Petition

A. Who May File?

§9.2 A petition for the appointment of a conservator may be filed by the following:

- the individual to be protected (including a minor, if at least age 14, MCR 5.402(B))
- a person interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian
- a person who would be adversely affected by the lack of effective management of the individual's property and business affairs

MCL 700.5404(1). In addition, the Social Welfare Act, MCL 400.1 et seq., provides that the county DHHS office may petition for the appointment of a conservator for a vulnerable adult. MCL 400.11b(6). An adult is *vulnerable* if the person

"is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age." MCL 400.11(f).

Before a conservatorship petition is filed, the court should provide the person intending to file it with written information that sets forth information about when a conservator is needed and the appointment process. *See* SCAO form PC 667 (What You Need to Know Before Filing a Petition to Appoint a Conservator).

B. Form and Contents

§9.3 The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6). If the SCAO has approved a form for a particular purpose, that form must be used for filing that particular document with the court. MCR 5.113(A).

The petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

A petition concerning a minor who is subject to prior continuing jurisdiction of another court must contain allegations concerning the prior proceedings. MCR 5.112. SCAO form MC 28, Notice to Prior Court of Proceedings Affecting Minor(s), is used to notify the prior court of the present proceeding. Many courts complete and mail this form on receipt of a petition reporting a prior proceeding. Others require that the petitioner do so.

If there is an attorney for the petitioner, the attorney must sign the petition as attorney, according to MCR 1.109(E)(2)(a), because the form, SCAO form PC 639, Petition for Appointment of Conservator and/or Protective Order, includes a place for an attorney's signature. The attorney may also sign the petition for petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature

is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b).

Use PC 639 to initiate conservatorship proceedings. The petition must contain, to the extent known,

- the petitioner's interest;
- the name, age, residence, and address of the individual to be protected;
- the name and address of the individual's guardian (if any);
- the name and address of the individual's nearest relative known to the petitioner;
- a general statement of the protected individual's property, with an estimate regarding its value, including any compensation, insurance, pension, or allowance to which the individual is entitled; and
- the reason it is necessary to appoint a conservator.

The petition must also include the name and address of the person seeking appointment as conservator and the basis for that person's priority for appointment. MCL 700.5404(2). Priority for appointment is discussed in §9.6.

Filing fee. The total filing fee is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .880b(1), .1986. The court may waive the fee if the petitioner is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. See MCR 2.002 for the required court procedures on waiving fees for indigent petitioners. If the petition is filed by a government agency, such as DHHS, there is no filing fee.

III. Notice of Hearing

§9.4 Notice of hearing must be given to all interested persons. MCR 5.102.

The interested persons to a petition for a conservatorship are the following:

1. the individual to be protected (if age 14 or older)
2. the presumptive heirs of the individual
3. if known, a person named as attorney in fact under a durable power of attorney
4. the nominated conservator
5. a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending
6. if known by the petitioner, a guardian or conservator appointed by a court in another state to manage the protected individual's finances

MCR 5.125(C)(25). Note: if the individual to be protected is a minor who was born out of wedlock, the individual's father is not an interested person in the proceedings unless paternity has been established in a manner provided by law. MCR 5.125(B)(4). Methods of establishing paternity include acknowledgment of parentage and an order of filiation from the circuit court pursuant to a paternity action. *See* MCL 722.711 et seq.

Additional special persons who may need to be notified are the following:

1. if the individual to be protected is receiving Veterans Affairs benefits, the Administrator of Veterans' Affairs
2. any guardian, conservator, or guardian ad litem of an interested person
3. any attorney who has filed an appearance
4. any special fiduciary
5. any person who has filed a request for notice under MCL 700.5104

MCR 5.125(A); *see also* MCL 700.5405. MCL 700.5104 permits an interested person who desires to be notified before an order is made in a guardianship or protective proceeding to file a request for notice. If a guardianship or protective proceeding is not pending when the request for notice is filed, the person must pay a filing fee equal to, but separate from, the fee required to commence a guardianship or protective proceeding. *See also* MCR 5.126.

In addition, the court may require that additional persons be served in the interest of justice. MCR 5.125(E). Examples might include persons with whom a minor is residing without any legal basis.

The importance of giving proper notice is illustrated in *In re Estate of Williams*, 133 Mich App 1, 349 NW2d 247 (1984). In *Williams,* the petitioner failed to give notice to the ward's daughter (who had turned 18 after the appointment of the last successor guardian and conservator) when the court appointed a successor guardian and conservator. The daughter petitioned the court for the removal of the successor and appointment of herself and her attorney as successor guardian and conservator, respectively. The court held that "the failure to give petitioner notice was jurisdictional and cannot be considered harmless." *Id.* at 8. As a result, the court's appointment of a successor guardian and conservator was void and the case was remanded for entry of an order making the appointments the daughter requested.

Service. An interested person may be served by mail, by personal service, or by publication when necessary. For the initial hearing, however, notice to the individual to be protected must be by personal service if the individual is 14 years of age or older unless another method of service is specifically permitted in the circumstances. MCR 5.402(C). For instance, if the individual to be protected has disappeared or is otherwise situated so that personal service is not possible, notice may be given by mail or by publication. MCL 700.5405(1)(a).

However, effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not

require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

If the individual to be protected is in a government institution, hospital, or home, the required personal service must be made by the person in charge of the institution or a person designated by that person. MCR 5.103(B).

Personal and electronic service under MCR 1.109(G)(6)(a) must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108.

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). This requires the filing of an affidavit or a Declaration of Intent to Give Notice by Publication, SCAO form PC 617, which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The petitioner must file a Proof of Service, SCAO form PC 564, promptly and before a hearing to which the document relates. If no hearing is involved, proof of service must be filed with the document. MCR 5.104(A)(1).

Waiver and consent. An interested person other than the individual to be protected may waive the right to receive notice of hearing by a statement on the record at the hearing or in a writing, SCAO form PC 561, Waiver/Consent, that is dated and signed by the interested person or someone authorized to consent on the interested person's behalf, specifying the hearing to which it applies. MCR 5.104(B)(1). An individual alleged to need protection may not waive notice of hearing unless the individual attends the hearing or the waiver is confirmed in an interview with a visitor. MCL 700.5405(1) (incorporating the provisions of MCL 700.5311(2)). A visitor is a person who has no personal interest in the proceedings; is trained in law, nursing, or social work; and is an officer, an employee, or a special appointee of the court. MCL 700.5101(d).

IV. Preliminary Protective Orders

§9.5 As an interim measure before the hearing on a petition for the appointment of a conservator, and without notice to others, the court may issue a preliminary order to preserve and apply the property of the individual to be protected as may be required for the support of the individual or the individual's dependents. MCL 700.5407(2)(a).

A preliminary protective order is desirable if needed to prevent the removal of assets or the spending of money pending a hearing. Examples include

- an order to prevent an agent under a power of attorney from removing assets or spending money for the agent's own use;
- an order appointing a special conservator to take over a bank account and release funds to support the spouse and minor children of a person who is incompetent and refuses to provide for them; and
- an order preserving funds when the respondent is about to give inappropriate large gifts.

V. Priority for Appointment

§9.6 An individual, a corporation authorized to exercise fiduciary powers, or a professional conservator described in MCL 700.5106, may be appointed conservator 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.

MCL 700.5409(1). The court of appeals, in *Lyneis v Brody (In re Conservatorship of Brody)*, 321 Mich App 332, 341, 909 NW2d 849 (2017), held that the appointment of a conservator is largely within the discretion of the court and that the statutory priorities are "merely a guide for the probate court's exercise of discretion." The court also held in *Brody* that the appointment of an independent fiduciary (a trustee in this case) for the protected individual in the same court gives priority to that fiduciary over all others under MCL 700.5409(1). However, to depart from the statutory provisions and appoint a public conservator under MCL 700.5409(1)(h), the court must find by a preponderance of the evidence that none of the persons listed in MCL 700.5409(1)(a)–(g) are suitable and willing to serve. *In re Guardianship of Gerstler*, 324 Mich App 494, 922 NW2d 168 (2018) (probate court erred appointing professional conservator when ward's adult daughter had

priority to serve and there was no evidence to suggest she was not competent, suitable, and willing to serve).

A person who holds a priority pursuant to (a) or (c) through (f) may, by writing, nominate a person to serve in the person's stead and transfer the person's priority to that person. When there is more than one person with equal priority, the court must select the one best qualified among those willing to serve. In addition, acting in the individual's best interest, the court may pass over a person with priority and appoint a person with less priority or no priority. MCL 700.5409(2); *In re Estate of Williams*, 133 Mich App 1, 349 NW2d 247 (1984).

Foreign conservators. A conservator who is qualified and serving in good standing in another state may be appointed immediately as temporary conservator in Michigan if (1) a conservator has not been appointed in Michigan, and (2) a petition in a protective proceeding is not pending in Michigan. MCL 700.5433(1), MCR 5.108(B)(2)(a). The appointment takes place on the filing of an application for appointment, an authenticated copy of letters of appointment in the other state, and an acceptance of appointment. *See* SCAO forms PC 683m (Application for Appointment of Out-of-State Conservator), PC 683o (Order for Appointment of Out-of-State Conservator). The letters of conservatorship for this temporary conservator expire 28 days after the date of appointment. MCL 700.5433(1). Within 14 days after appointment, the conservator is responsible to give notice to all interested persons of the appointment and the right to object. MCR 5.108(B)(2)(b), .125(C)(25). The temporary conservator will be made full conservator after the filing of a proof of service of notice of the appointment, with the right to object, on all interested parties. MCL 700.5433(2). If an objection is filed, the conservatorship continues unless a Michigan court enters an order removing the conservator. MCL 700.5433(3).

Professional conservators. A professional conservator may be appointed as a limited or full conservator. MCL 700.5106(1). A professional conservator is "a person that provides conservatorship services for a fee. Professional conservator does not include a person who is an individual who is related to all but 2 of the protected individuals for whom he or she is appointed as conservator." MCL 700.1106(u). Before appointing a professional conservator, the court must first find on the record that (1) the appointment is in the incapacitated individual's best interests and (2) there is no other person that is competent, suitable, and willing to serve as conservator. MCL 700.5106(2); *Gerstler*. In addition, the professional conservator must file a bond in an amount and with the conditions determined by the court, with sureties and liabilities as provided in MCL 700.5410, .5411 (see §9.14). MCL 700.5106(3). The professional conservator, as a result of being appointed conservator, may not benefit beyond compensation specifically authorized for conservators. MCL 700.5106(4). A professional conservator is not prevented from receiving compensation from a third party (from other than the ward's estate), but the conservator must file notice of the compensation and the source with the court and serve a copy on the ward. MCL 700.5106.

Practice Tip

- *A nonresident who has priority is not disqualified because of residence. However, the court has discretion to pass over such a person if the court concludes the person may not fulfill the fiduciary responsibilities because of distance or for some other reason.*

VI. Guardians ad Litem, Visitors, and Attorneys

A. Adult Conservatorships

§9.7 Unless the individual to be protected has private counsel or the petition is brought under MCL 700.5401(4) (a mentally competent but aged or infirm individual requesting the appointment of a conservator for the individual's self), the court must appoint a guardian ad litem to represent the individual. MCL 700.5406(2). The person commencing the conservatorship proceeding (or making a motion for or in any other manner requesting the appointment of a guardian ad litem) may not choose or indicate in any manner the person's preference regarding who should be appointed guardian ad litem. MCL 700.5108. The guardian ad litem does not have an attorney-client relationship with the protected person, and communications between the two of them are not privileged. MCR 5.121(E)(1). The guardian ad litem is charged with informing the person the guardian ad litem represents of this lack of privilege. If the guardian ad litem is subsequently appointed as attorney, the attorney-client privilege relates back to the date of the appointment as guardian ad litem. MCR 5.121(E)(2).

The court may also send a visitor to interview the individual. The visitor may be a guardian ad litem or a court officer or employee. MCL 700.5406(2). The court may also use, as an additional visitor, a public or charitable agency to evaluate the condition of the individual to be protected. MCL 700.5406(3).

The guardian ad litem or visitor must, before the hearing date, conduct an investigation, report in open court or file a written report of the investigation, and give recommendations. The guardian ad litem or visitor need not appear personally at the hearing unless required by law or directed by the court. The guardian ad litem or visitor must file any written report with the court at least 24 hours before the hearing unless another time is specified by the court. MCR 5.121(C). The court typically requires the guardian ad litem to attend the hearing on a petition to appoint a conservator, but does not necessarily require the guardian ad litem to appear at a subsequent hearing unless ordered by the judge of record. If it deems necessary, the court may revoke the appointment and appoint another guardian ad litem or visitor. MCR 5.121(B).

Physician's examination. If the individual's alleged disability is mental illness, mental deficiency, physical illness or disability, chronic use of drugs, or chronic intoxication, the court may appoint a physician or mental health professional, preferably someone who is not connected with an institution in which the individual is a patient or is detained, to examine the individual. MCL 700.5406(2); *see* SCAO form PC 629 (Order Appointing Physician/Visitor/Mental Health Professional). The individual alleged to need protection also has the right to an independent medical evaluation.

Alternatives to conservatorship. A guardian ad litem, physician, mental health professional, or visitor in a conservatorship appointment proceeding who meets with, examines, or evaluates the alleged protected individual must consider whether there is an appropriate alternative to conservatorship and, if a conservatorship is appropriate, the desirability of limiting the scope and duration of the conservator's authority and must report to the court on these considerations. MCL 700.5406(4). Many of the same alternatives to full guardianship described in SCAO form PC 666, Options You Should Know Before Filing a Petition for a Full Adult Guardianship, may also be appropriate alternatives to conservatorship that should be considered by the guardian ad litem or other visitor, particularly durable powers of attorney, trusts, protective orders, representative payees, and delegations of parental powers. A limited conservatorship, in which only a part of the protected individual's property vests in the conservator, is another option that the guardian ad litem or other visitor should consider. *See* MCL 700.5419.

Note that a durable power of attorney remains in force after a conservator has been appointed. However, if a conservator is appointed for an individual who has a valid durable power of attorney, the attorney in fact is accountable to the conservator. MCL 700.5503. In addition, the conservator has the same power to revoke or amend the power of attorney that the principal would have had if the principal were not incapacitated.

Compensation. Guardians ad litem, visitors, and physicians are entitled to reasonable compensation from the protected individual's estate if not otherwise compensated for services rendered. MCL 700.5413.

B. Minor Conservatorships

§9.8 When the court considers it necessary, it may appoint a guardian ad litem to appear for a minor and represent the minor in any matter pending before the court. On the application of the minor or at the discretion of the court, the appointment may be revoked and another guardian ad litem appointed. MCR 5.121(B). When not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests. MCL 700.1403(d). For example, a single guardian ad litem might be appropriate in the case of several minor children whose parents have died and left them significant assets. The court must state the purpose of the appointment in the order. The order may be entered with or without notice. MCR 5.121(A)(1). Note that the person commencing the protective proceeding cannot choose or indicate in any manner a preference as to who should be appointed guardian ad litem. MCL 700.5108.

The court may appoint an attorney to represent the minor if at any time in the proceeding it determines the minor's interests are or may be inadequately represented. The court must consider the choice of a minor who is at least 14 years old. An attorney appointed by the court has the powers and duties of a guardian ad litem. MCL 700.5406(1).

Practice Tip

- *Some courts require more detailed information of the conservator, including the existence of any convictions involving dishonesty or felonies, if there has been a*

history of substance abuse, whether there are any Child Protective Services referrals, and prior appointments as conservator.

If not otherwise compensated for services, a guardian ad litem or attorney appointed in a conservatorship or protective proceeding is entitled to reasonable compensation from the estate. MCL 700.5413. In minor conservatorship proceedings, an estate from which compensation can be paid exists in virtually all cases. The guardian ad litem submits a bill to the conservator for payment. If a dispute that the parties cannot resolve arises over the amount of the fee, the judge of record determines the guardian ad litem's compensation.

VII. Hearing

A. Rights of the Individual to Be Protected

§9.9 The individual to be protected is entitled to be present at the hearing. If the individual wishes to be present at the hearing, all necessary steps must be taken to ensure the individual's presence, including moving the site of the hearing, if necessary. The individual is also entitled to have counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and visitor, and to have a trial by jury. The individual or the individual's counsel may request a closed hearing. MCL 700.5406(5). While the court may allow the use of videoconferencing technology on request of any participant or sua sponte, if the subject of the conservatorship petition wants to be physically present, the court must allow the individual to be present. MCR 5.140(A)–(C). The use of videoconferencing is presumed in all uncontested petitions or motions for conservatorship. MCR 5.140(C). However, the presumption is negated when a court determines that a case is not suited for videoconferencing and orders that the hearing be held in person. MCR 2.407(B)(5).

Any person may request permission to participate in the hearing. The court may grant this request with or without a hearing on the request, if it finds that the individual to be protected will be served by granting the request. The court may restrict the permission with "appropriate conditions." MCL 700.5406(6).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

B. Burden of Proof

§9.10 The court may appoint a conservator if it determines that a basis for the appointment has been established by clear and convincing evidence. MCL 700.5401, .5406(7); *see also Lyneis v Brody (In re Conservatorship of Brody)*, 321 Mich App 332, 909 NW2d 849 (2017). Note that MCL 700.5401 provides repeatedly that the court "may appoint" a conservator or make other protective

order, while MCL 700.5406(7) states the court "*shall* make the appointment" or other protective order (emphasis added).

Adult conservatorships. For an adult conservatorship, the petitioner (unless the petitioner is a mentally competent but aged or infirm individual requesting the appointment of a conservator for the individual's self) must show that the individual

- is unable to manage property or 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
- either
  - has property that will be wasted or dissipated unless proper management is provided or
  - needs money for the support, care, and welfare of the individual or those entitled to be supported by the individual and that protection is necessary to obtain or provide money.

MCL 700.5401(3).

In *Bittner-Korbus v Bittner (In re Bittner)*, 312 Mich App 227, 879 NW2d 269 (2015), the court of appeals reversed the probate court's orders establishing a conservatorship and appointing a conservator. In *Bittner,* the alleged incapacitated person was found to have cognitive impairments giving rise to problems in regularly being able to initiate and complete tasks necessary to manage her financial affairs. However, the court of appeals determined that this did not evidence a need for conservatorship where the individual made informal arrangements with her daughter to make sure her bills were paid on time, she lived within her means, and her household was effectively managed.

In *Brody,* the court found that it was necessary to establish only that the property will be wasted or dissipated in the future unless proper management is provided and unnecessary to show that the property had been wasted or dissipated in the past. The court may consider both individually held and jointly held assets. *Id.*

The court may appoint a conservator for an individual who is mentally competent, but due to age or physical infirmity is unable to effectively manage property and affairs, on the individual's request. MCL 700.5401(4). The court may also appoint a conservator for a vulnerable adult as defined in the Social Welfare Act, MCL 400.1 et seq., even though this reason for appointing a conservator is not specifically listed in MCL 700.5401, as long as the condition that prohibits the individual from effectively managing property and business affairs is "of a similar nature and quality to the eight conditions listed in the statute." *Townsend v Townsend (In re Townsend)*, 293 Mich App 182, 809 NW2d 424 (2011). But note that an inability to deny requests for money from one's children is not necessarily an age-related condition that causes a person to be unable to manage property and business affairs and that justifies the appointment of a conservator. *Id.* To establish

vulnerability under the Social Welfare Act, the individual must have a "mental, physical, or advanced age-related impairment." *Id.*

Minor conservatorships. For a minor conservatorship, the petitioner must show that the minor

- owns money or property that requires management or protection that may not otherwise be provided,
- has or may have business affairs that may be jeopardized or prevented by minority, or
- needs money for support and education and protection is necessary or desirable to obtain or provide money.

MCL 700.5401(2).

C. Evidence

§9.11 The Michigan Rules of Evidence apply to adult and minor conservatorship proceedings. MRE 1101. However, the court may receive and rely on oral and written reports of a guardian ad litem or visitor to the extent of their probative value, even if they are not admissible under the Michigan Rules of Evidence. MCR 5.121(D)(1). Any interested person may examine and controvert reports received into evidence. MCR 5.121(D)(2)(a). The subject of a report has the right, upon request, to cross-examine the individual who made the report. MCL 700.5406(5); MCR 5.121(D)(2)(b). Other interested persons may cross-examine the individual who made the report if the individual is "reasonably available." MCR 5.121(D)(2)(c).

VIII. Contested Proceedings

A. Right to Jury Trial

§9.12 Although virtually never exercised, a right to jury trial exists for contested adult conservatorship proceedings. *See* MCL 700.5406(5); M Civ JI 172.11, 172.12. Jury trials in probate proceedings are governed by MCR 2.508–.516 unless the court rules provide otherwise. MCR 5.151. A written jury trial demand must be filed within 28 days after an issue is contested and at least 4 days before trial. MCR 5.158. An individual who did not receive notice of the hearing at least 7 days before the hearing or trial may demand a jury trial at any time before the time set for hearing or trial. Note that whether the issue of incapacity is decided with or without a jury, it is the judge who selects the conservator. MCL 700.5406.

Six persons constitute a jury in a civil trial. MCR 2.511(B). Each party may peremptorily challenge three jurors. MCR 2.511(E)(2).

In minor conservatorship proceedings, there is no right to jury trial.

B. Alternative Dispute Resolution

§9.13 The court may refer any contested issue to mediation, case evaluation, or other alternative dispute resolution (ADR) process. MCR 5.143.

Facilitative mediation may also be used in disputes among family members and those between the person to be protected and the petitioner as well as in disputes arising in petitions for modification or termination of the conservatorship. In facilitative mediation, the parties, and in some cases the attorneys, meet with a trained neutral third party who does not make an evaluation or recommendation but helps the parties craft their own agreement. Facilitative mediation is successful only if the contestants want it, but it does have significant benefits over litigation. For additional information on the facilitative mediation process, see MCR 2.410 and 2.411. For the provisions regarding confidentiality in mediation, see MCR 2.412. See also the discussion in §7.12.

IX. Bond

§9.14 The court may require that a conservator furnish a bond and may specify sureties:

> Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the estate property in the conservator's control plus 1 year's estimated income minus the value of securities deposited under arrangements requiring a court order for their removal and the value of land that the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. Instead of sureties on a bond, the court may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

MCL 700.5410(2).

A bond *is* required from a conservator if the court determines that the value of cash (and property readily convertible to cash) in the conservator's control exceeds the limit for administering a decedent's estate under MCL 700.3982, as adjusted for inflation for the year in which the conservator is appointed unless one or more of the following apply:

> (a) The estate contains no property readily convertible to cash and the cash is in a restricted account with a financial institution.
>
> (b) The conservator has been granted trust powers under section 4401 of the banking code of 1999, 1999 PA 276, MCL 487.14401.
>
> (c) The court determines that requiring a bond would impose a financial hardship on the estate.
>
> (d) The court states on the record the reasons why a bond is not necessary.

MCL 700.5410(1).

The requirements of a conservator's bond are as follows:

- Sureties are jointly and severally liable with the conservator and each other, unless the approved bond's terms provide otherwise.
- Execution of an approved bond by the surety constitutes the surety's consent to the jurisdiction of the court that issued letters to the conservator in a proceeding relating to the conservator's fiduciary duties and naming the surety as a party respondent.

- A proceeding may be initiated by the petition of a successor conservator or an interested person against a surety for breach of the obligation of the conservator's bond.
- The conservator's bond is not void after the first recovery but may be proceeded against until the whole penalty is exhausted.

MCL 700.5411(1).

No bond is required of trust companies organized under the laws of Michigan or of banks with trust powers unless the court orders that a bond be required. MCR 5.411.

All bonds must be filed with the court. A bond is not valid unless the court examines it and approves it in writing. If the proposed conservator does not furnish the bond within a reasonable time, the court may appoint another fiduciary or a special fiduciary, or both. MCL 700.1309(a); MCR 5.203, .204. The court also possesses the implicit authority to require the conservator to give a new or additional bond and to remove the conservator if the bond is not filed within a reasonable period.

Practice Tip

- *Requiring a conservator to post a bond or requiring that funds be kept in a restricted account are the primary safeguards for the ward against the malfeasance or negligence of the fiduciary. Ensuring that an adequate safeguard is in place is crucial to preserving the protected individual's rights.*

X. Acceptance of Appointment and Letters of Authority

§9.15 Before receiving letters, the conservator must file the required bond and a statement of acceptance of duties. MCL 700.5412(1); *see* SCAO form PC 571 (Acceptance of Appointment). In the statement of acceptance, the conservator may exclude from the scope of responsibility, for up to 91 days, real estate or ownership interest in a business if the conservator reasonably believes the property may be contaminated by a hazardous substance or used for an activity involving a hazardous substance. The statement must identify the property and the time period of the exclusion. MCL 700.5412(2).

If the conservator identifies excluded property, the conservator's responsibilities extend to the property at the end of the exclusion period (or sooner if the conservator files a notice of acceptance of that property) unless, during the exclusion period, the conservator requests that the court appoint a special conservator or exercise administrative authority through direct judicial order. MCL 700.5412(3). In response to this request, the court may either (1) appoint a special conservator to act with respect to excluded property to the extent necessary, as directed by the general conservator or the court, or (2) direct administration of the excluded property by judicial order without appointing a conservator for the excluded property. MCL 700.5412(4).

On qualification, the conservator is issued Letters of Conservatorship, SCAO form PC 645. Unless ordered by the court, the letters do not have an expiration

date. MCR 5.202(A). Note that the conservator is a fiduciary and is bound by fiduciary obligations. MCL 700.5416.

Any restrictions or limitations on the conservator's powers must be listed and conspicuously appear in the letters, including limits on any power conferred on a conservator under MCL 700.5423–.5426. MCL 700.5427; MCR 5.402(D). See form 9.1 for sample restrictions in a conservator's letters of authority. With or without a hearing, the court may modify or remove the restrictions. MCR 5.202(B).

The court may authorize the protected individual to handle a portion of the individual's assets, "[t]o encourage the development of maximum self-reliance and independence." MCL 700.5407(1). Under this section, the court may authorize the individual to maintain a savings or checking account. In addition, the order appointing the conservator may specify that only a part of the protected individual's property vests in the conservator. In this case, a limited conservatorship is created. MCL 700.5419(1).

The SCAO has issued a "Best Practice" guide for probate courts regarding conservatorship matters. The SCAO recommends that the letters of authority for a conservator of a minor require that all of the minor's assets be deposited in restricted accounts if the money is not needed for ongoing support. Thus a court order would be required before money was withdrawn. If funds are placed in a restricted account, proof of the restricted account must be filed with the court within 28 days of the conservator's qualification or as otherwise ordered by the court. The conservator must also file an annual verification of funds on deposit with a copy of the financial institution statement attached. MCR 5.409(C)(4); *see* PC 669 (Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor)).

It is good practice for judges approving expenditures out of a minor's restricted account to require that receipts be filed with the court documenting the expenditures within a specified period of time.

Practice Tip

- *Be specific in setting out the powers of a conservator. For example, if the conservator is not to distribute funds, the appointment order should specify that the funds are to be placed in a restricted account and that withdrawals are not to be made without a prior court order. See exhibit 9.1 for a sample court policy regarding the expenditure of funds. The letters of conservatorship should state that prior approval of the court is required before any expenditure. See form 9.2 for an agreement that the conservator's attorney files with the court regarding the proof of restricted account and verification of funds on deposit.*

XI. Conservator's Powers and Duties

A. In General

§9.16 A conservator has broad powers to handle all assets held on behalf of the protected individual and to make payments from the assets for the health, benefit, and welfare of the protected individual, including all the powers of

a trustee. MCL 700.5423(1). A list of specific powers that the conservator may exercise without court authorization or confirmation, unless the court otherwise provides, is set forth in MCL 700.5423(2). These powers include the following:

- to invest or reinvest funds in accordance with the Michigan Prudent Investor Rule
- to retain assets in which the conservator has a personal interest
- to exercise powers and duties relating to stock ownership
- to hold stock in the name of a nominee
- to continue and participate in the operation of the protected individual's business
- to open a bank account
- to acquire or lease real estate
- to repair, erect, or demolish real estate improvements
- to purchase insurance
- to borrow money to be repaid from estate property
- to pay or settle claims by or against the estate (But note: if the conservator is to share in a settlement, a guardian ad litem must be appointed to represent the protected individual's interests and must consent to the settlement in writing or on the record, or else the court must approve the settlement over any objections. MCR 5.407.)
- to employ professionals
- to respond to environmental concerns

MCL 700.5423(2). MCL 700.5423(2)(z) allows for the hiring of an attorney by the conservator. A lawyer hired by a conservator represents the conservator, not the ward's estate. *Estate of Maki v Coen*, 318 Mich App 532, 899 NW2d 111 (2017); *see also* MCR 5.117(A).

A conservator shall not sell or otherwise dispose of the protected individual's principal dwelling, real property, or interest in real property or mortgage, pledge, or cause a lien to be placed on the property without court approval after a hearing with notice to interested persons. MCL 700.5423(3). It is noted that the "principal dwelling," which is not defined, has been added along with prohibitions against mortgaging, pledging, or causing a lien to be placed.

A conservator is obligated to pay the protected individual's bills out of the conservatorship estate, to the extent possible. If the estate is insufficient to cover all expenses, the procedures and priorities set forth in MCL 700.5429 govern.

Practice Tip

- *A parent acting as conservator for a minor child may not use conservatorship funds to discharge the parent's obligation to support the minor. This is a common source of confusion. It may be helpful to give a parent acting as conservator additional guidance on these matters.*

B. Inventory

§9.17 A conservator must gather and secure all of the protected individual's assets and must file an inventory with the probate court within 56 days after appointment. The property that the protected person owns jointly or in common with others must be listed on the inventory along with the type of ownership. MCR 5.409(B). In addition, the conservator must provide the name and address of each financial institution listed on the inventory. The address may be that of the institution's main headquarters or the branch used most frequently by the conservator. *Id.; see* SCAO form PC 674 (Inventory (Conservatorship)).

The SCAO states that the best practice is for courts to require that conservators include the following information with the inventory:

- A tax assessor record showing the current state equalized value for any real estate in the inventory.
- Copies of bank statements, account statements, investment accounts, and stock and bonds showing the value of the assets at the time the inventory is filed.

The SCAO recommends that a court staff member confirm that the property listed on the inventory matches that shown on the assessor's record and that the account balances shown on the inventory match the supporting documentation.

The conservator must serve a copy of the inventory on all interested persons and file a proof of service with the court. The interested persons are the following:

- the protected individual, if age 14 or older
- the protected individual's presumptive heirs
- claimants with a proper claim that remains unpaid
- the guardian ad litem
- the personal representative, if any

MCR 5.125(B)(1), (C)(28).

C. Petitions for Instructions

§9.18 A conservator may petition the court for instructions concerning fiduciary responsibility and, after notice and a hearing, the court may give instructions or make an appropriate order. MCL 700.5415(2).

A conservator shall not sell or otherwise dispose of the protected individual's principal dwelling, real property, or interest in real property or mortgage, pledge, or cause a lien to be placed on the property without court approval after a hearing with notice to interested persons. MCL 700.5423(3). It is noted that the "principal dwelling," which is not defined, has been added along with prohibitions against mortgaging, pledging, or causing a lien to be placed. At the hearing, the court considers evidence of the property's value and otherwise determines whether sale or disposal is in the best interest of the protected individual. MCL 700.5423(3); *see* SCAO forms PC 673m (Petition to Use Funds (Conservatorship)), PC 673o (Order to Use Funds (Conservatorship)).

A petition for instructions may also request approval of a sale of the protected individual's assets to the conservator or to someone else involving a substantial conflict of interest between the conservator's personal interests and the protected individual's interests. Until the conservator gets court approval, such sales are voidable (unless the transaction involves a contract entered into or claim acquired by the conservator before the person became or contemplated becoming conservator, or the transaction is otherwise permitted by statute). MCL 700.5421(1).

The interested persons on a petition for instructions or approval of sale are the protected individual and the interested persons on the original petition for conservatorship who will be affected by the instructions or order. MCR 5.125(C)(27).

D. Annual Accountings

§9.19 Duty to file. Conservators are required to file an annual account of all receipts and disbursements from a conservatorship estate 56 days after the end of the accounting period. MCR 5.409(C). The use of either SCAO form PC 583, Account of Fiduciary, Short Form, or PC 584, Account of Fiduciary, Long Form, is acceptable. The only substantive difference between the forms is that PC 584 contains a schedule on which to indicate gains and losses on the disposition of assets. Both forms provide a section for fiduciary and attorney fees separate from the actual account.

Accounts should cover a fiscal year beginning with the date of the appointment of the conservator, located on the letters of conservatorship. If the account is not filed within 56 days after the close of the accounting period, the probate court sends a reminder notice giving an extension not to exceed 28 days within which to file the account. If the account cannot be filed timely, the probate court is authorized to furnish extensions not exceeding a total of 56 days (including the original extension) before suspending the powers of the conservator. MCR 5.203.

Interested persons. A copy of the account must be served on all interested persons and a proof of service filed with the court. *See* MCR 5.107(A), .409(C)(1), (D). The interested persons for this purpose are the following:

- the protected individual, if age 14 or older
- the protected individual's presumptive heirs
- claimants with a proper claim that remains unpaid
- the guardian ad litem
- the personal representative, if any

MCR 5.125(B)(1), (C)(28).

Court action on accounts. The conservator may annually request an order allowing the annual account by filing a Petition to Allow Account(s), SCAO form PC 585a. The matter must then be scheduled for a hearing before the probate judge, and a notice of hearing must be served on all interested persons. A hearing is necessary even if a Waiver/Consent, SCAO form PC 561, can be obtained from all interested persons, since the protected individual cannot provide a valid waiver and the conservator cannot waive and consent on the protected individual's behalf

due to the inherent conflict of interest. MCR 5.104(B)(3). If no one objects to the account at the hearing, the probate court may enter the Order Allowing Account(s), SCAO form PC 585b. The court must either review or allow accounts annually, unless no account is required under MCR 5.409(C)(1) or (4). The court must hold a hearing on the accounts at least once every three years. MCR 5.409(C)(6).

The SCAO best practices recommendation is that after the Petition to Allow Account is filed, court staff examine the list of interested parties to confirm that the petitioner served each interested party with a copy of the accounting. Under this best practice standard, the hearing is not scheduled until service of the account on all the interested parties is confirmed.

Practice Tip

- *Misuse of the protected individual's funds is a common problem, and the court should review the conservator's accounts with this in mind. First review the letters of authority and note what can be paid for without court order; then see if the account reveals that the conservator has exceeded this authority. Also, note the assets on hand listed in the account and check to make sure that there is corresponding income from those assets. If not, this may be a warning sign that the conservator is misusing funds.*

Receipts. Conservators used to be required to furnish receipts for all disbursements listed on an account. The current court rule, MCR 5.310(C)(2)(d), does not require that receipts be filed with the probate court. Instead, the account must provide a notice to all interested persons that they have a right to review all data to confirm the income and disbursements at a time and place convenient to them and the conservator and that they may object to all or part of the account. MCR 5.310(C)(2)(c).

Some probate courts still require the presentment of receipts when the account is filed. The preferred form of receipt is the canceled check from the conservatorship checking account. Probate courts generally do not accept tissue copies of checks as receipts, because the tissues do not verify that the intended recipient actually received the funds. If payments were made without using checks, the receipt from the person or business providing the goods or services to the protected individual should be provided. If no receipt is available, some courts accept an affidavit from the conservator verifying that the receipts as stated on the account are a true and accurate reflection of the funds expended on behalf of the protected individual.

MCR 5.409(C)(5) requires that a financial institution statement or a verification of funds on deposit must be filed, unless waived by the court. *See* SCAO form PC 669 (Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor)). Either of these documents must reflect the value of all liquid assets held by a financial institution and must be dated within 30 days after the end of the accounting period.

Reviewing accounts. According to the SCAO, a review of a conservator's account requires the following:

- confirmation that the accounting period is correct
- confirmation that the beginning balance of the current account matches the ending balance of the last account or inventory
- confirmation that the totals shown in all categories are correct, including confirming that the totals shown in Schedules A, B, C, and D match the totals shown in the "Summary" section
- that if fiduciary fees or attorney fees were paid during the reporting period, they are supported by a written description of the services performed, including
  - date of the service,
  - description of the service,
  - the amount of time spent on that service,
  - the amount charged for that service, and
  - the total billed.
- confirmation that the conservator completed all sections of the annual account form (Forms submitted with incomplete or missing information should not be accepted.)

Attorney fees. Attorney fees paid during the year, other than those appearing on the prior account, should be listed as a disbursement. A statement of attorney services rendered should be filed with the account, including details about the dates, tasks, and time spent for all activities on behalf of the estate of the ward. Even if the attorney fees have been paid throughout the year pursuant to an attorney-client fee agreement, copies of the prior statements should be attached to the statement of attorney services rendered. To the extent attorney fees are sought to be paid with the filing of the account, those services for which payment is requested must appear on the statement. Note that all attorney fees are subject to review and confirmation by the probate court, even when fees are paid without prior court approval.

Practice Tip

- *Attorney fees are chargeable to the estate only when the attorney's services were on behalf of and beneficial to the estate. Attorney fees in defense of the conservator's actions are not chargeable to the estate if the conservator does not completely prevail or was partially to blame for bringing about unnecessary litigation. In re Estate of Valentino, 128 Mich App 87, 95–96, 339 NW2d 698 (1983).*

E. Appropriate Compensation for a Conservator

§9.20 A conservator is entitled to reasonable compensation for services rendered to the protected individual in a fiduciary capacity. MCL 700.5413.

The conservator should submit a statement of the services rendered, indicating the amount of time spent in performing the duties on behalf of the protected individual. A common method of determining an appropriate fee is to multiply the hours worked by a reasonable hourly rate. Some courts limit the hourly rate

for conservatorship services to $10 per hour, while other courts allow a higher rate. The court may consider the relationship of the conservator to the protected individual, whether the conservator has an accounting degree that is being used in providing services, or whether the conservator is a professional fiduciary such as an attorney or a bank. Where a conservator performs duties under MCL 500.3107(1)(a), which are causally connected to an accidental bodily injury arising out of an automobile accident under MCL 500.3105(1), the compensation may be recovered from the auto insurance company and not the protected individual's account. For a detailed discussion of the types of services performed by a conservator for a motor vehicle accident victim that are allowable expenses and payable by the insurance carrier under the No-Fault Act and those considered replacement services and subject to a limitation of three years after the accident occurred in order to be compensated by the insurer, see *May v Auto Club Ins Ass'n (In re Estate of Carroll)*, 300 Mich App 152, 832 NW2d 276 (2013).

Banks. Banks serving in the capacity of a conservator have an established fee schedule for their services, and the schedule does not vary from one client to another. Most courts approve the fiduciary fees requested by a bank in accordance with its usual schedule. Because banks must be competitive in the trust market, the fee schedules of most banks tend to be comparable with respect to the ultimate fee charged.

Attorneys. Attorneys serving as conservators should separate the services rendered into two bills, listing time spent on behalf of the protected individual on services requiring their specialized legal knowledge on one bill and time spent on the individual's affairs that could also have been performed by a layperson on another bill. The hourly rates for the two different bills reflect the difference in the types of services performed. The attorney rate should be no higher than what the average attorney in the probate field charges in that particular community. The standard attorney rates differ to some degree around the state, largely depending on the population of the community in which they serve. In addition, the court should consider the factors for determining whether an attorney fee is reasonable that are listed in MRPC 1.5, including the standing and experience of the attorney, the skill, time, and labor involved, the amount in question, the results achieved, the difficulty of the case, the expenses incurred, and the nature and length of the professional relationship.

Excessive fees. It is not unusual for the court to reduce conservator and attorney fees that are determined to be excessive, particularly compared to the total assets and income of the estate. *See Wies v Brandt*, 294 Mich 240, 248, 293 NW 773 (1940).

XII. Resignation or Removal of Conservator

§9.21 Once the court has entered an order appointing a conservator, the ward or any person interested in the ward's welfare may bring a petition to remove the conservator and to request the appointment of a temporary or successor conservator. MCL 700.5415(1)(d); *see* SCAO form PC 676 (Petition to Terminate/Modify Conservatorship). The petitioner must prove that the present

conservator acted improperly or was otherwise unfit to continue to serve as conservator.

The interested persons to a petition for the removal of a conservator are the same as those for the appointment of a conservator. MCR 5.125(C)(26).

The probate court may remove a conservator on its own initiative for good cause. MCL 700.5414. Notice must be given to all interested persons and the conservator, and a hearing must give the conservator and interested persons the opportunity to be heard. If the probate court removes the conservator, it may appoint a successor or terminate the conservatorship. It is usually imperative to appoint a successor as soon as possible. The order removing the conservator should order the conservator to promptly file an account. Any successor conservator succeeds to the title and powers of the predecessor. *Id.*

If the conservator makes withdrawals from the protected individual's account without court permission or otherwise exceeds the conservator's authority, the probate court may appoint a special fiduciary under MCL 700.1309 to investigate the situation. MCR 5.204(A). With this appointment, the conservator's powers are suspended unless the order of appointment provides otherwise. The special fiduciary must safeguard the remaining assets of the protected individual. *See* MCR 5.204(B).

An appointed conservator may request permission from the court to resign and may request the appointment of a successor conservator. MCL 700.5414. On being granted permission to resign, the conservator must turn assets over to the successor conservator.

The resignation or removal of a conservator does not end the conservator's liability for prior actions or the conservator's obligation to account under MCL 700.5418. The resignation or removal of the conservator triggers the duty to account. MCL 700.5418(1).

XIII. Termination of a Conservatorship

§9.22 Any person interested in the protected individual, including the protected individual, may petition the court to terminate the conservatorship. MCL 700.5431; *see* SCAO form PC 676 (Petition to Terminate/Modify Conservatorship) (note that PC 676 requires petitioner to indicate reasons why court should take action). A protected individual seeking termination is entitled to the same rights and procedures as in the original proceeding. MCL 700.5431. The conservator must reestablish, by clear and convincing evidence, that the person is still a protected individual. MCL 700.5401, .5406(7). The ward's rights include the right to an attorney (if the ward does not have one), to be present at the hearing, to have a jury trial, to conduct cross-examination, to present evidence, and to have an independent medical examination. MCL 700.5406(2), (5). If someone other than the legally incapacitated individual files a petition to modify or terminate the guardianship, a different standard is applied.

The interested persons to a modification or termination petition are the conservator and the same persons as those interested in a petition for the appointment of a conservator. MCR 5.125(C)(26). See §9.4.

Before the court can terminate a conservatorship, it must first determine after notice and a hearing that the disability of the protected individual has ceased. MCL 700.5431. A conservatorship otherwise terminates, in the case of a conservatorship of a minor, when the individual reaches the age of majority or, in the case of a conservatorship of an adult, when the protected individual regains capacity or dies.

When the protected individual turns 18 or regains capacity, the conservator must return all assets to the individual's control, after making final payments of claims and administration expenses. MCL 700.5426(3). The court may authorize a conservator to create a trust that continues beyond the age 18 if it finds continuation is in the minor's best interest and does not unreasonably restrain the minor's access to these funds on reaching majority. If the protected individual dies, the conservator must deliver any will of the protected individual in the conservator's possession to the court, inform the personal representative or a will beneficiary that the will has been so delivered, and retain the estate for delivery to the personal representative. *See* SCAO form PC 621 (Receipt of Property from Conservator). If no petition for administration is filed within 42 days of the death and no personal representative has been appointed, the conservator may petition the court for the powers of a personal representative. MCL 700.5426(4).

Form 9.1
Sample Restrictions for Letters of Authority

General

No debt, liability, contract, or expenditure may be incurred on behalf of the protected individual without an express order of the court. Real estate may not be sold without the court's confirmation.

No sale of real estate shall be made without confirmation of the court.

Ownership of the funds must be in the name of the conservator as fiduciary for the protected individual.

All assets received on behalf of the protected individual must be invested in an insured banking institution. The institution must file a Receipt and Agreement Regarding the Withdrawal of Funds with the court. Once funds are deposited, no withdrawals are permitted without a written order of the court. Acceptance of a deposit is deemed an assumption of liability on the part of the depository.

For nonresident conservators

ASSETS ARE NOT TO BE REMOVED FROM THE STATE OF MICHIGAN WITHOUT AN ORDER FROM THE PROBATE COURT.

The money to be received may not be used without prior written authority of this court. The money is to be deposited in an account, certificate of deposit, money market certificate, or a combination of these, in a bank, credit union, or savings and loan association that is insured by an instrumentality of the federal government and that accepts these conditions: The money may not be withdrawn from the depository until further order of this court. Ownership of the money must be in the name of the conservator as fiduciary for the protected individual. The depository must complete the forms titled Verification of Deposit in a Fiduciary Account and Agreement on the Withdrawal of Funds and mail them to this court within five days of the initial receipt of the money. The depository must then, at least annually and as requested, furnish this court with a Verification of Funds on Deposit form. The money may also be deposited in a brokerage house account protected by the Securities Investor Protection Corporation if an authorized officer of the firm accepts the restrictions and obligations in writing.

REAL ESTATE IS NOT TO BE SOLD, PURCHASED, MORTGAGED, OR OTHERWISE ALIENATED WITHOUT THE APPROVAL OF THE PROBATE COURT.

Limited duration

These letters of authority expire on *[date]*.

Form 9.2
Agreement Regarding Use of Restricted Account

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

Estate of *[name]*, Deceased

Case No. *[number]-[case-type code]*
Judge *[name]*

_____/

AGREEMENT REGARDING USE OF RESTRICTED ACCOUNT

I, the undersigned, being the attorney for the conservator of the above-captioned estate, agree that in consideration of the Court allowing the use of a nominal bond rather than a corporate surety bond, I, or someone from the firm on my behalf, will do the following:

1. Accompany the conservator to the bank or other financial institution to see that the funds are deposited in a conservatorship account.
2. See that the Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor) is properly filled out and executed by the bank and the conservator.
3. See that the properly executed Proof of Restricted Account and Annual Verification of Funds on Deposit (Conservatorship of Minor) is delivered or mailed to the Court by *[date]*.

AMOUNT: $*[amount]*

[Signature line]
[Typed name of attorney]
Attorney for Conservator

FAILURE TO TIMELY FILE THE AFFIDAVIT REGARDING PROOF OF RESTRICTED ACCOUNT WILL RESULT IN THE SUSPENSION OF THE FIDUCIARY.

Exhibit 9.1
Court Policy Regarding Expenditure of Funds in Conservatorships of Minors

The general principle that this Court will follow is that it is this Court's responsibility to preserve the child's money until the minor attains age 18 or to only spend money for basic items for the child that the child could not otherwise obtain through the parents. This policy will apply to petitions for authority for the use of monies in restricted bank accounts and the annual accounting of conservatorships where unrestricted monies are involved.

In the former case, the Court will grant authority to withdraw restricted funds only in conformance with this written policy; and in the latter case, it will be the conservator's responsibility to only spend money in accordance with this policy.

1. No expenditure will be allowed unless it directly benefits the child.
2. No expenditure will be allowed that benefits the child if the expenditure relieves a parental obligation that could otherwise be met. Exceptions to this rule may include such things as unusual medical expenses, educational expenses, and other unusual circumstances that may create an exceptional burden for the family. Before an expenditure is allowed, evidence must be presented that the parent cannot otherwise provide the benefit. Receipts for expenditures allowed will be required within 10 days of an order allowing withdrawal of money from a restricted account.
3. Expenditures regarding maintenance of the principal in a child's account will be allowed ex parte. An example of such a situation would be taxes payable on the interest income from such principal.
4. No money will be released to the Department of Health and Human Services or at its request to relieve a parental obligation, as such an obligation is the parent's and not the child's.

10
Guardianships of Individuals with Developmental Disabilities

Summary of Guardianships of Individuals with Developmental Disabilities

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Jurisdiction and venue. §10.1.

The probate court has jurisdiction over guardianships of individuals with developmental disabilities. For cases commenced on or after January 1, 1998, the family division of circuit court has ancillary jurisdiction. If a county of residence cannot be determined, venue is in the county where the individual resides or is present. A guardian may be appointed for an adult individual with a developmental disability only pursuant to the Mental Health Code.

For a person over five years of age, a *developmental disability* is a severe chronic condition that

- is attributable to a mental or physical impairment or a combination of them;
- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more areas of major life activity; and
- 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.

Testamentary Appointment by Parent. §10.2.

A parent of an individual with a disability may appoint a guardian in the parent's will if

- the individual is a minor for whom no guardian has been appointed or
- the parent was appointed guardian and no standby guardian was appointed.

The appointment becomes effective on the parent's death, and the guardian possesses the same powers that the parent, as parent or guardian, possessed, subject to the court's power to modify. If no guardian was previously appointed, the appointment terminates on the minor's 18th birthday.

Court appointment. §§10.3–10.11.

A parent, an individual on the individual's own behalf, or any other interested person or entity may petition for the appointment of a guardian.

The petition must include, among other things, the facts and reasons for the need for guardianship and a factual description of the nature and extent of the individual's developmental disability.

The petition must be accompanied by a report containing a description of the individual's developmental disability, current evaluations of various aspects of the individual's condition, an opinion regarding the need for guardianship, and a recommendation regarding the most appropriate rehabilitation plan and living arrangement. If no report accompanies the petition, the court must secure the evaluations.

Notice of the hearing must be given to the following:

- the petitioner
- the individual with the alleged developmental disability (the respondent)
- the respondent's presumptive heirs
- the preparer of the report or person who performed an evaluation or other evaluator
- the director of the facility where the respondent resides (if applicable)
- the respondent's guardian ad litem (if applicable)
- the respondent's legal counsel
- the Administrator of Veterans' Affairs (if the respondent is receiving VA benefits)

Who may be appointed?

The court may appoint any suitable individual or agency, other than the Department of Health and Human Services' Community Mental Health Services Program that is directly providing services to the individual, unless there is no other suitable candidate. The court must make a reasonable effort to find out if the proposed ward has a preference.

Temporary guardians.

The court may appoint a temporary guardian before the hearing on the appointment of a guardian "under emergency circumstances and if necessary for the welfare or protection" of the proposed ward. If a temporary guardian is appointed, the hearing on the petition for guardianship must be held within 14 days of the appointment.

Attorneys and guardians ad litem.

Within 48 hours after the petition is filed, the court must appoint an attorney for the respondent, unless private counsel has already filed an appearance. The respondent has the right to request the attorney of the respondent's choice, and the attorney must act as an advocate for the respondent's desires. The respondent may waive the right to an attorney.

The court may appoint a guardian ad litem if the respondent waives the right to an attorney and must appoint a guardian ad litem if the respondent requires someone to represent the respondent's best interests and to assist legal counsel.

Who must be present?

The respondent must be present unless there is a showing, supported by affidavit of a physician or psychologist, that such attendance would subject the individual to serious risk of physical or emotional harm.

The person who prepared the Report to Accompany Petition or at least one of the persons who performed an evaluation serving in part as a basis for the report must testify in person at the hearing.

Hearing and order.

The hearing must be held within 30 days after the filing of the petition. With a temporary guardian, the hearing must be held within 14 days of the temporary appointment. The respondent is entitled to

- demand a jury trial,
- present evidence and cross-examine witnesses,
- request a closed hearing,
- be present at all proceedings, and
- secure an independent evaluation.

The court may appoint a guardian if it is satisfied by clear and convincing evidence that the individual is developmentally disabled and lacks the capacity for self-care or care of the individual's estate. If the individual lacks the capacity in some but not all areas, the court may appoint a partial guardian for no more than a five-year period. There is a significant distinction between the appointment of a plenary guardian and a partial guardian. A partial guardian possesses fewer than all the legal rights and powers of a plenary guardian. These powers, rights, and duties are enumerated in the court's order of appointment. MCL 330.1600(e). The appointment of a partial guardian does not constitute a finding of legal incompetence or incapacity except in the areas specified by the court. If the individual is totally without capacity for self-care or care of the individual's estate, the court may appoint a plenary guardian.

The court may also appoint a standby guardian to assume the duties of the initial guardian in the event of the guardian's death, incapacity, or resignation.

Powers and duties of a guardian. §§10.12–10.19.

The guardian's powers and duties are specified in the letters of guardianship and vary depending on whether the person is a plenary or partial guardian and whether the person is guardian of the person, of the estate, or both. A guardian of the person has the power to make decisions regarding the ward's person and must annually report to the court. A guardian of the estate manages the ward's finances and assets and must file an annual accounting of transactions involving the ward's estate.

Modification and termination of a guardianship. §10.20.

The ward, the guardian, or any interested person may petition the court to modify or terminate the guardianship. The ward may make the request by a phone call or informal letter to the court. The petition triggers a hearing with all the rights of an original hearing for guardianship. At its conclusion the court may dismiss or deny the petition, remove the guardian and either dissolve the guardianship or appoint a successor, modify the original guardianship order, or make any other appropriate order.

The authority of the guardian automatically terminates on the expiration of the guardianship term. If a guardian is still needed, a new petition for guardianship may be filed.

I. Jurisdiction and Venue

§10.1 The probate court has jurisdiction over guardianship proceedings for individuals with developmental disabilities. MCL 330.1600(b), .1604; 600.841. For cases commenced on or after January 1, 1998, the family division of circuit court has ancillary jurisdiction over cases involving the guardianship of developmentally disabled persons under the Mental Health Code. MCL 600.1021(2)(b).

Developmental disability, for a person older than five years of age, is defined as a severe, chronic condition that

- is attributable to a mental or physical impairment or a combination of them;
- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and
- 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.

MCL 330.1100a(26)(a). For individuals from birth to five years of age, a *developmental disability* is a substantial developmental delay or specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined above if services are not provided. MCL 330.1100a(26)(b).

Practice Tip

- *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; Neal v Neal (In re Neal), 230 Mich App 723, 584 NW2d 654 (1998).*

Ancillary jurisdiction. The family division of circuit court is given ancillary jurisdiction over guardianships for developmentally disabled individuals for cases commenced on or after January 1, 1998. MCL 600.1021(2)(b). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011. The court of appeals has jurisdiction over appeals from the family division of circuit court and all appeals from probate court. MCL 600.308; MCR 7.203.

Venue. Venue is in the place where the individual with a developmental disability resides or is found. MCL 330.1600(b). However, if the individual is in a facility, if venue is questioned, and if it appears that proceeding in that county

would inconvenience the individual or guardian, venue is proper in the county where the individual most likely would reside if not disabled. In making this determination, the court must consider the location of the individual's property and the residence of relatives or others who have provided care. MCR 5.127(C).

If an individual with a developmental disability is not a Michigan resident, but needs a guardian for Michigan property, venue is in the probate court of the county where any of the property is located. MCR 5.127(B).

Venue may be changed by the court or by the motion of a party for the convenience of the parties, the witnesses, or the attorneys. MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128; *see* SCAO forms PC 608p (Petition for Change of Venue), PC 608o (Order to Change Venue).

II. Testamentary Appointment by Parent

§10.2 No guardian previously appointed. The surviving parent of a minor with a developmental disability but no guardian may appoint a guardian in the parent's will. The appointment becomes effective immediately on the parent's death. The letters of authority will not be issued until the will is probated. Whether a bond needs to be filed is based on court order; it is often not required. The guardian possesses the powers of a parent and serves subject to the court's power to reduce the scope of the guardian's authority or to dismiss the guardian. The appointment terminates on the minor's 18th birthday, unless the guardian is dismissed first. On assuming office, the guardian must notify the court in which the will is to be probated. MCL 330.1642(1).

Parent served as guardian. Unless a standby guardian has been designated, a parent who has been appointed guardian of the parent's child with a developmental disability may appoint a guardian in the parent's will. MCL 330.1642(2). The appointment becomes effective on the parent's death. The guardian is qualified on the guardian's filing an acceptance of appointment with the court that appointed the parent guardian. If the nominated person is to act as guardian of the estate, the person should also file a bond in the amount last required of the deceased guardian. Unless the court finds the person unsuitable or incompetent for the appointment, the court shall issue to the testamentary guardian letters of authority equivalent to those that had been issued to the deceased guardian. MCR 5.406(A). The guardian has the same powers that the parent, as guardian, possessed and may request a copy of the court order creating or modifying the initial guardianship. The guardian serves subject to the power of the court to reduce the scope of the guardian's authority or to dismiss the guardian. On assuming office, the testamentary guardian must notify both the probate court that appointed the initial guardian and the probate court in which the will is subject to probate. MCL 330.1642(2); MCR 5.406(B).

Will denied probate. If the will is denied probate, the probating court must notify the court having jurisdiction over the guardianship, and the court having the guardianship jurisdiction shall immediately revoke the testamentary guardian's letters of authority. MCR 5.406(B).

III. Petition for Guardianship

A. Form and Contents

§10.3 A parent, any other interested person or entity, or the individual may file a petition. MCL 330.1609. An *interested person or entity* is defined as "an adult relative or friend of the respondent, an official or representative of a public or private agency, corporation, or association concerned with the individual's welfare." MCL 330.1600(c).

The petition must include

- the respondent's name, date of birth, and place of residence;
- the petitioner's relationship and interest (e.g., parent, aunt, brother);
- the facts and reasons for the need for guardianship;
- the names and addresses of the respondent's current guardian and presumptive heirs (if any);
- the name and address of the person with whom, or the place in which, the respondent is residing;
- a description and approximate value of the respondent's estate (including estimated yearly income and source of income);
- the name, address, and age of the proposed guardian (which may or may not be the petitioner), along with an indication whether this person is a current provider of services to the respondent; and
- a factual description of the nature and extent of the respondent's developmental disability.

MCL 330.1609; *see* SCAO form PC 658 (Petition for Appointment of Guardian, Individual with Alleged Developmental Disability).

The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b). If the SCAO has approved a form for a particular purpose, that form must be used when preparing that particular document for filing. MCR 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6).

In addition to the specific requirements described above, the petition must include allegations and representations sufficient to justify the relief sought and must

- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or

their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1).

A petition concerning a minor who is subject to prior continuing jurisdiction of another court must contain allegations concerning the prior proceedings. MCR 5.112. SCAO form MC 28, Notice to Prior Court of Proceedings Affecting Minor(s), is used to notify the prior court of the present proceeding. Many courts complete and mail this form on receipt of a petition reporting a prior proceeding. Others require that the petitioner do so.

If there is an attorney for the petitioner, the attorney must sign the petition as attorney, according to MCR 1.109(E)(2)(a), because the form (PC 658) includes a place for an attorney's signature. The attorney may also sign the petition for the petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must be either authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b).

There is no filing fee for a petition for guardianship of an individual with a developmental disability. MCL 600.880(3).

See form 10.1 for a task list of requirements for guardianship of an individual with a developmental disability.

B. Report to Accompany Petition

§10.4 The petition must be accompanied by a report that contains the following:

- a description of the nature and type of the respondent's developmental disability
- current evaluations of the respondent's mental, physical, social, and educational condition, adaptive behavior, and social skills (The psychological tests on which an evaluation of the respondent's mental condition have been based may be performed up to one year before the filing of the petition.)
- an opinion regarding whether a guardianship is needed, the type and scope of guardianship needed, and the specific reasons for the guardianship
- a recommendation regarding the most appropriate rehabilitation plan and living arrangement for the respondent
- the signatures of all persons preparing the report, one of whom must be a physician or psychologist who, by training or experience, is competent to evaluate individuals with developmental disabilities

- a list of all psychotropic and other medications the respondent is receiving, the dosage of the medications, and a description of the effect on the respondent's mental, physical, and educational conditions, adaptive behavior, and social skills

MCL 330.1612(1), (2); *see* SCAO form PC 659 (Report to Accompany Petition to Appoint, Modify or Discharge Guardian of Individual with Developmental Disability). While MCL 330.1612(1) states that the petition must be accompanied by the report, MCL 330.1612(3) provides for when a report does not accompany the petition. Typically, the report will be filed after the petition is filed, but it must be filed before the hearing.

The report may be obtained privately or from various public agencies such as a school district or a county community mental health office.

If no report accompanies the petition, the court must order the appropriate evaluations. The court may order payment for evaluations by a public agency that treats or serves the developmentally disabled. State compensation for evaluations paid for by public mental health agencies is determined under MCL 330.1302–.1310 and .1800–.1842. Compensation must be reasonable and based upon time and expenses. The report must be prepared and filed with the court at least 10 days before the hearing. MCL 330.1612(3).

The report is not part of the public record of the proceedings, but is available to the court, the respondent, the petitioner, their attorneys, and other individuals the court directs. MCL 330.1612(4).

C. Notice of Hearing

§10.5 Under MCR 5.125(C)(19), the interested persons in a proceeding under the Mental Health Code for a petition to appoint a guardian for an individual with a developmental disability are

- the individual;
- the individual's attorney;
- the petitioner;
- the individual's presumptive heirs;
- the preparer of the report or another appropriate person who performed an evaluation;
- the director of any facility where the individual may be residing;
- the individual's guardian ad litem, if appointed; and
- other persons as the court determines.

See also MCL 330.1614(3); MCR 5.402(C). If the respondent is receiving VA benefits, the Administrator of Veterans' Affairs must also be served. MCR 5.125(A)(3). The court may also require that additional persons be served in the interest of justice. MCR 5.125(E); *see* SCAO form PC 562 (Notice of Hearing).

Service. An interested person may be served by mail, by personal service, or by publication when necessary. If the respondent is age 14 or older, notice to the respondent of the initial hearing must be by personal service unless another method of service is specifically permitted in the circumstances. MCR 5.402(C). The only other method of service on the respondent that might be permitted would be service pursuant to MCR 5.105(A)(4)(b), under which the court may direct the manner of service if service cannot otherwise reasonably be made.

However, effective July 26, 2021, all service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

If the respondent is in a government institution, hospital, or home, the required personal service must be made by the person in charge of the institution or a person designated by that person. MCR 5.103(B).

The petitioner must file a Proof of Service, SCAO form PC 564, promptly and before a hearing to which the document relates. If the document does not involve a hearing, proof of service must be filed with the document. MCR 5.104(A)(1).

Waiver and consent. An interested person may waive the right to receive notice of hearing and consent to the relief requested by a statement on the record at the hearing or in a writing, SCAO form PC 561, Waiver/Consent, that is dated and signed by the interested person or someone authorized to consent on the interested person's behalf, specifying the hearing to which it applies. MCR 5.104(B). A waiver and consent may be made by a legally competent interested person, by an interested person's attorney, or by a person designated as eligible to be served on behalf of a legally disabled person, except that a fiduciary may not waive or consent with regard to petitions, motions, accounts, or reports made by that person as fiduciary. MCR 5.104(B)(3).

IV. Who May Be Appointed Guardian?

§10.6 The court may appoint any suitable individual or agency, public or private, including a private association capable of conducting an active guardianship program as guardian. However, the court may not appoint the Department of Health and Human Services' Community Mental Health Services Programs or any other public or private agency that is directly providing services to the individual unless no other suitable individual or agency can be identified. In such instances, guardianship by the provider shall continue only until a more suitable individual or agency can be appointed. MCL 330.1628(1).

Before the appointment, the court must make a reasonable effort to find out if the individual has a preference as to who is appointed guardian and must give due consideration to any preference indicated. MCL 330.1628(2).

Practice Tip

- *A nonresident who has priority is not disqualified to serve as guardian because of residence. However, the court may find such a person unsuitable if the court concludes the person cannot fulfill the fiduciary responsibilities because of distance or for some other reason.*

V. Temporary Guardians

§10.7 The guardianship petition must be set for hearing within 30 days after it is filed. MCL 330.1614(1). However, when emergencies arise, waiting a month for the appointment of a guardian might not be feasible. A temporary appointment might be appropriate if, for example, the parent with whom a developmentally disabled adult lives suddenly dies. A sibling steps in to deal with the necessary agencies and have supports and services put in place for the individual's health and safety, but the agencies will not cooperate until a guardianship is in place. In another example, an individual with a developmental disability needs a medical procedure, but the doctor will not perform it without the authorization of a court-appointed guardian.

If the circumstances warrant it, the petitioner may request the appointment of a temporary guardian in the guardianship petition. *See* SCAO form PC 658. The court may appoint a temporary guardian before the appointment of a plenary or partial guardian of the person or the estate "under emergency circumstances and if necessary for the welfare or protection of an individual with a developmental disability." MCL 330.1607(1). A temporary guardian may be appointed almost immediately (typically within one week or less) if the court finds the request meritorious. *See* SCAO form PC 679 (Order Appointing Emergency Temporary Guardian for Individual with Alleged Developmental Disability).

If the court appoints a temporary guardian, a hearing on the petition for guardianship must be held within 14 days of the appointment. MCL 330.1607(2). The temporary guardian and the later-appointed guardian often are the same person.

Practice Tip

- *A temporary guardianship typically is used to address an immediate threat to the well-being of the ward, not the emergency of an agency, institution, or third party.*

VI. Attorneys and Guardians ad Litem

§10.8 Within 48 hours of the court's receipt of a complete petition package, an attorney must be appointed for the subject of the petition (the respondent) unless private counsel has already filed an appearance with the court. MCL 330.1615(2). Often an attorney is appointed before the court receives a complete petition package, since the completion of the report can take some time. *See* SCAO form PC 628 (Order Appointing Attorney). A respondent has the right to request the attorney the person wants. MCL 330.1615(3). The attorney for an indigent respondent (a person receiving Medicaid is automatically considered

indigent) is entitled to reasonable compensation from the court. MCL 330.1615(4).

Guardians ad litem. If the court determines that the respondent requires a person to represent the respondent's best interests and to assist legal counsel, it also must appoint a guardian ad litem for the respondent. MCL 330.1616. The guardian ad litem makes a recommendation to the court regarding what course of action, in the guardian ad litem's impartial opinion, would be in the best interests of the respondent. The guardian ad litem is not required to act as an advocate for the respondent and may make recommendations that conflict with the respondent's wishes. *See also* MCR 5.121.

VII. Hearing and Order

A. Hearing Procedure

§10.9 A hearing must be held within 30 days after the filing date of the petition. MCL 330.1614(1). The respondent has the following rights:

- to demand that a jury of six persons decide any issues of fact
- to present evidence and to confront and cross-examine all witnesses
- to request a closed hearing
- to request an independent evaluation (at public expense if the respondent is indigent) if the respondent does not agree with the evaluations that accompany the petition

MCL 330.1617(1)–(4), (6). The respondent's presence at the proceedings is required but "may be excused by the court only on a showing, supported by an affidavit signed by a physician or psychologist who has recently examined the respondent, that the respondent's attendance would subject him or her to serious risk of physical or emotional harm." MCL 330.1617(4).

While the court may allow the use of videoconferencing technology on request of any participant or sua sponte, if the subject of the guardianship petition wants to be physically present, the court must allow the individual to be present. MCR 5.140(A)–(C).

A guardian shall not be appointed unless the person who prepared the report or at least one of the persons who performed an evaluation serving in part as a basis for the report testifies in person in court. MCL 330.1617(5).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

B. Required Findings

§10.10 The court must make the findings of fact on the record regarding the following:

- the nature and extent of the respondent's general intellectual functioning
- the extent of the impairment in the respondent's adaptive behavior
- the respondent's capacity to care for the respondent's self by making and communicating responsible decisions concerning the respondent's person
- the capacity of the respondent to manage the respondent's estate and financial affairs (This applies if guardianship of the estate, as well as the person, is sought.)
- the appropriateness of the proposed living arrangements for the respondent and whether they are the least restrictive setting suited to the respondent's condition
- if the respondent is residing in a facility, the appropriateness of the living arrangement and whether it is the least restrictive arrangement suited to the respondent's condition

MCL 330.1618(1), (2). See form 10.2 for a sample judge's worksheet to record these findings of fact.

C. Disposition and Order

§10.11 Denial of petition. If the court determines that the respondent possesses the capacity to care for the respondent's self and estate, it must deny the petition. MCL 330.1618(3).

Appointment of partial guardian. If the court finds by clear and convincing evidence that the respondent is developmentally disabled and lacks the capacity to do some but not all tasks necessary for self-care and the care of the respondent's estate, the court may appoint a partial guardian to provide guardianship services to the respondent but may not appoint a plenary guardian. MCL 330.1618(4). Note that MCL 330.1602(2) provides, "If the court determines that some form of guardianship is necessary, partial guardianship is the preferred form of guardianship for an individual with a developmental disability."

The court order establishing partial guardianship must

- contain findings of fact,
- define the partial guardian's powers and duties so as to permit the individual with a developmental disability to care for the individual's self and property commensurate with the individual's ability to do so, and
- specify all legal disabilities to which the individual is subject.

MCL 330.1620(1).

Some powers and duties that the court may consider granting to a limited guardian include the following:

- executing an application for administrative admission
- consenting to any necessary medical treatment, minor or surgical treatment, and emergency major surgical treatment except extraordinary procedures including, but not limited to, sterilization, vasectomy, abortion, organ transplants from ward to another person, and experimental treatment
- for a guardian of the estate, making all legal, contractual, and financial decisions on the ward's behalf
- making program and placement decisions on the ward's behalf
- releasing information and consenting to photographs and fingerprints
- arranging for and consenting to the ward's living arrangements
- arranging the ward's travel and transportation (but retaining the ward's full right to make such decisions for a specified number of miles)
- for a guardian of the estate, transacting and supervising the ward's financial matters, including collecting and spending funds and entering into contractual agreements to administer amounts that exceed a specified amount

The order establishing partial guardianship may also reserve to the ward the right to make decisions on daily dress and daily programs and activities other than those within the guardian's scope of authority. See form 10.3.

An individual with a developmental disability for whom a partial guardian has been appointed retains all legal and civil rights except those that have been designated by court order as legal disabilities or that the court has specifically granted to the partial guardian. MCL 330.1620(2). Therefore, for example, if a dispute arises between a ward and a partial guardian regarding where the ward is to live, the decision is entirely up to the ward unless the power over the ward's living arrangements is included in the guardian's letters of authority as ordered by the court. The appointment of a partial guardian does not constitute a finding of legal incompetence or incapacity except in those areas specified by the court. MCL 330.1620(3). The duration of the guardianship must be indicated in the court order, and a partial guardianship may not continue for a term greater than five years. MCL 330.1626(1), (2).

Appointment of plenary guardian. If the court finds by clear and convincing evidence that the respondent is developmentally disabled and is totally without capacity for self-care or to care for the respondent's estate, the court must specify that finding of fact in any order and may appoint a plenary guardian of the person, the estate, or both. MCL 330.1618(5). The duration of the term of guardianship must be indicated in the court order. MCL 330.1626(1).

There is a significant distinction between the appointment of a plenary guardian and a partial guardian. A plenary guardian possesses all the legal rights and powers of a full guardian of the person, the estate, or both. MCL 330.1600(d). A partial guardian possesses fewer than all the legal rights and powers of a plenary guardian. These powers, rights, and duties are enumerated in the court's order of appointment. MCL 330.1600(e).

Appointment of standby guardian. A standby (i.e., potential successor) guardian agrees to assume the duties of the initial guardian in the event of that person's death, incapacity, or resignation. MCL 330.1640. The appointment of a standby guardian, if any, usually occurs simultaneously with the appointment of the guardian of the person or the estate. *Id.* The use of a standby guardian provides for a smooth transition if the initial guardian can no longer serve. In the event of the initial guardian's death, incapacity, or resignation, the standby guardian may immediately begin serving without additional court proceedings. *Id.* See §10.12 regarding obtaining letters of authority. Furthermore, if an emergency arises and the initial guardian for whatever reason is unavailable to serve, the standby guardian may temporarily assume the guardian's duties. *Id.*

Practice Tip

- *Unlike guardianships for legally incapacitated adults under the Estates and Protected Individuals Code, which currently does not allow for standby guardians, the appointment of a standby guardian is specifically authorized in guardianships for developmentally disabled persons. One reason for this difference is that courts most typically hear guardianship petitions for developmentally disabled individuals when the proposed ward has reached age 18 and, due to adult status, now requires someone to have decision-making authority for the ward's person or estate (or both). In this context, a parent is frequently appointed as the initial guardian; however, due to the generational difference between the parent-guardian and the child-ward, there is a greater likelihood that at some point during the course of the guardianship a successor guardian will be necessary. This scenario is often addressed through the court's appointment of a standby guardian at the same time the initial guardian is appointed.*

Order appointing guardian and notice to ward. See SCAO form PC 660 for the Order Appointing Guardian for Individual with Developmental Disability. If a guardian of the estate is appointed, the court may require that the guardian furnish a bond. While there are no statutory provisions or court rules regarding bonds for guardians of the estate, the provisions regarding conservators' bonds may be instructive. See §9.14.

At the time of appointment of a guardian, the court must make a reasonable effort to verbally inform the individual of the right to, at a later date, request dismissal of the guardian or modification of the guardianship and also must serve a written statement to that effect on the ward. MCL 330.1634; *see* SCAO form PC 661 (Notice of Right to Request Dismissal of Guardian or Modification of Guardianship Order).

VIII. Powers and Duties of Guardians

A. Letters of Guardianship

§10.12 The court specifies a guardian's powers and duties in its order and in the letters of guardianship. *See* SCAO form PC 662 (Letters of Guardianship of Individual with Developmental Disability). The guardian's powers and duties vary depending on whether the person is a plenary (full) or partial (limited) guardian and whether the person is a guardian of the person, of the estate, or of

both. Although there can be a significant distinction between a plenary and a partial guardian, sometimes the partial guardian has very broad powers that approach those of a plenary guardian.

Guardians of the person. A plenary guardian of the person has the power to make decisions regarding the ward's person such as housing, employment, and education. MCL 330.1631. More specifically, a full guardian of the person has

- custody of the ward;
- the duty to make provision from the ward's estate or other sources for the ward's care, comfort, and maintenance; and
- the duty to make a reasonable effort to secure for the ward training, education, medical and psychological services, and social and vocational opportunities as are appropriate and as will assist the ward in the development of maximum self-reliance and independence.

The extent of a limited guardian's power depends on the court order. Guardians of the person are required to file annual reports detailing the condition of their wards with the court. MCL 330.1631(2).

Guardians of the estate. Much like a conservator of a minor or a protected individual, a guardian of the estate is authorized to take possession of and manage the finances and assets of an individual with a developmental disability. A guardian of the estate is routinely ordered to file an inventory within 56 days after appointment and serve it on the interested persons. MCR 5.409(B). Guardians of the estate must also prepare and file with the court annual accounts that detail income and expenditures of the estate. MCL 330.1631(2)(h), (4).

B. Placement in a Mental Health Facility

§10.13 Whether the guardianship is partial or plenary, a guardian has the power to place the ward in a facility for the developmentally disabled only if it is specifically granted by court order, and the powers should be spelled out in the letters of authority. MCL 330.1623(1); MCR 5.746. A *facility* means the following that regularly admit individuals with developmental disabilities and provide residential and other services: (1) a *facility* as defined by MCL 330.1100b and (2) a child care institution, a boarding school, a convalescent home, a nursing home or home for the aged, or a community residential program. MCL 330.1600(a). A *facility* as defined by MCL 330.1100b is a residential facility, either a state facility or a licensed facility, for the "care or treatment of individuals with serious mental illness, serious emotional disturbance, or developmental disability." A *facility* includes a preadmission screening unit established under MCL 330.1409 that is operating a crisis stabilization unit.

Before authorizing a guardian to place a ward in a facility, the court must determine the appropriateness of the placement and must

> determine, in conjunction with the appropriate community mental health services program whether the placement offers appropriate treatment and residential programs to meet the needs of the respondent and whether there is a less restrictive treatment and residential program available. In ordering a placement,

> the court shall give preference to an available less restrictive treatment and residential program provided that it is adequate and appropriate to meet the respondent's needs. The court or counsel may request reports from public agencies on the suitability of a particular placement for a respondent.

MCL 330.1623(3).

If placement in a facility has not been authorized or if the guardian seeks permission to authorize placing the individual in a more restrictive setting than previously ordered, the guardian must petition the court for authority. MCR 5.746(A); *see* SCAO form PC 664 (Petition for Authority to Place Individual with Developmental Disability in a Facility). Notice of hearing must be given to those persons required to be served with notice of hearing for the appointment of a guardian. MCR 5.746(C).

If the court grants the petition for authorization, it may order that the guardian may

- execute an application for the individual's administrative admission to a specific center;
- request the individual's temporary admission to a center for a period not to exceed 30 days for each admission; or
- place the individual in a specific facility or class of facility.

MCR 5.746(B); *see* SCAO form PC 665 (Order for Placement of Individual with Developmental Disability).

Practice Tip

- *If a ward with a developmental disability needs to be admitted to a psychiatric facility because the person can reasonably be expected in the near future to intentionally or unintentionally seriously physically injure the individual's self or another person and has overtly acted in a manner substantially supportive of that expectation or the person has been arrested and charged with an offense that was the result of the disability, the guardian has two options: (1) petition for appropriate outpatient treatment or admission into an appropriate treatment facility, MCL 330.1515, unless the guardian has been given the authority to execute an application for administrative admission, MCL 330.1508, or (2) file a petition for an involuntary mental health treatment under MCL 330.1400 et seq. See chapter 11.*

The Mental Health Code imposes fairly significant restrictions regarding the transfer of a developmentally disabled individual from one facility to another. A resident in a facility can be transferred to another facility or to a hospital operated by the department of mental health only if the transfer would not be detrimental to the resident and the transfer is approved by the responsible community mental health services program. MCL 330.1536(1). In addition, the resident and the resident's nearest relative or guardian must be notified at least seven days before any transfer, although a transfer may be effected earlier if necessary due to an emergency. MCL 330.1536(2). The resident may also designate two other persons to receive this notice. If the resident or the resident's nearest relative or guardian

objects to the transfer, an opportunity to appeal the transfer must be provided. *Id.* If the resident is transferred because of an emergency, the notices must be given as soon as possible but no later than 24 hours after the transfer. MCL 330.1536(3). In *In re Brosamer*, 328 Mich App 267, 936 NW2d 870 (2019), the court of appeals affirmed the order of the Lenawee Probate Court enjoining the transfer of a developmentally disabled individual from one residential placement to another. The guardian of the ward sought and obtained an ex parte order prohibiting the transfer pursuant to MCL 330.1536 on the basis that it would be detrimental to the individual.

C. Medical Treatment Decisions

1. In General

§10.14 The powers of a plenary guardian, or a partial guardian who has been given power over routine medical procedures, do not extend to the authorization of any *extraordinary* medical procedure, which "includes, but is not limited to, sterilization, including vasectomy, abortion, organ transplants from the ward to another person, and experimental treatment." MCL 330.1629(3).

If it is not clear whether a medical procedure is extraordinary, particularly if family members or other interested persons disagree with the guardian's intended action, the guardian may bring a petition for instructions before the probate court to determine whether the contemplated procedure is in the ward's best interests.

2. Sterilization

§10.15 In a case in which the authority of a probate court to authorize sterilization was questioned, the Michigan Supreme Court decided, "the probate court has jurisdiction to hear an application by a guardian [of a person with a developmental disability] for authorization to consent to an extraordinary procedure under MCL 330.1629, including sterilization, and to order such authorization if it determines the procedure is in the ward's best interests." *In re Wirsing*, 456 Mich 467, 476, 573 NW2d 51 (1998). The court declined to adopt a clear and convincing evidence standard for such a decision and instead entrusted the probate court with exercising its sound discretion to determine whether an extraordinary procedure is in the ward's best interests.

3. Termination of Life Support

§10.16 There are no reported Michigan decisions on whether the court may authorize a guardian to approve the withholding of life-sustaining medical treatment on behalf of an individual with developmental disabilities. While not specifically listed in MCL 330.1629(3), removing life support would be an *extraordinary,* rather than a routine, medical decision. Therefore, the reasoning in *In re Wirsing*, 456 Mich 467, 476, 573 NW2d 51 (1998), the sterilization case cited in §10.15, is instructive. In *Wirsing,* the Michigan Supreme Court relied on reasoning from *Martin v Martin (In re Martin)*, 450 Mich 204, 538 NW2d 399 (1995), *cert denied,* 516 US 1113 (1996), a removal-of-life-support case involving a legally incapacitated adult, which recognized that a subjective substituted-judgment analysis is appropriate for formerly competent individuals,

and an objective best-interests standard is appropriate for immature minors and other individuals who were never competent to make this type of decision. The results of either analysis must be established by clear and convincing evidence. For further discussion of *Martin,* see §7.19.

With respect to individuals with developmental disabilities, the *Wirsing* court concluded:

> What the Legislature has instead provided is a mechanism designed to encourage a guardian, upon concluding it is in the ward's interests, to apply to the probate court for an order authorizing consent for an extraordinary procedure such as sterilization. The probate court shall then evaluate the case, and, if it is persuaded and finds that the procedure is in the ward's best interests, order the authorization of consent.

Id. at 475–476.

Some of the factors that should be considered in determining whether removal of life support is in an individual's best interests are

> Evidence about the patient's present level of physical, sensory, emotional, and cognitive functioning; the degree of physical pain resulting from the medical condition, treatment, and termination of the treatment, respectively; the degree of humiliation, dependence, and loss of dignity probably resulting from the condition and treatment; the life expectancy and prognosis for recovery with and without treatment; the various treatment options; and the risks, side effects, and benefits of each of those options.

In re Rosebush, 195 Mich App 675, 690, 491 NW2d 633 (1992). For further discussion of *Rosebush,* see §6.32.

4. Do-Not-Resuscitate Orders and Patient Advocate Designations

§10.17 A guardian of an individual with a developmental disability does not have the power to execute patient advocate designations or do-not-resuscitate (DNR) orders on behalf of a ward under the patient advocate or DNR Act. OAG No 7056 (June 20, 2000).

IX. Annual Reports

§10.18 The general duties of a partial or plenary guardian of the person include filing an annual report with the court regarding the ward's personal condition. MCL 330.1631. The annual report must include statements indicating

- the ward's mental, physical, and social condition;
- living arrangements at and a description and address (and length of stay) of each residence lived in during the reporting period;
- an assessment of the adequacy of the treatment and residential programs at the current residence and whether the ward will continue to live there or the guardian recommends an alternative;
- a summary of the services the ward is receiving;
- a summary of the guardian's activities;

- a recommendation of the need for continued guardianship;
- an accounting of the guardian's financial transactions involving the ward's estate;
- a statement from the standby guardian, if one has been appointed; and
- other information the court may request or the guardian believes is useful.

The reporting period is based on the anniversary of the date of the letters of authority unless the guardian has requested a different anniversary date. The guardian must serve the report on interested persons. MCR 5.409; *see* SCAO form PC 663 (Report of Guardian on Condition of Individual with Developmental Disability).

X. Annual Accounts

§10.19 Duty to file. Guardians of the estate must file an annual account of all receipts and disbursements from the ward's estate within 56 days after the end of each accounting period. MCL 330.1631(2)(h); MCR 5.409(C). The use of either SCAO form PC 583, Account of Fiduciary, Short Form or PC 584, Account of Fiduciary, Long Form, respectively, is acceptable. The only substantive difference between the forms is that PC 584 contains a schedule on which to indicate gains and losses on the disposition of assets. If there is a separately valued asset that has been disposed of during the applicable time period, the account should be submitted on the long form. Both forms provide a section for fiduciary and attorney fees separate from the actual account.

Accounts should cover a fiscal year beginning with the date of the qualification of the guardian, located on the letters of guardianship. If the account is not filed within 56 days after the close of the accounting period, the probate court sends a reminder notice giving a 28-day extension within which to file the account. If the account cannot be filed timely, the probate court is authorized to furnish extensions not exceeding a total of 56 days (including the original extension) before suspending the powers of the guardian. MCR 5.203(A), (C).

Interested persons. A copy of the account must be served on all interested persons and a proof of service filed with the court. *See* MCR 5.107(A), .409(C)(1), (D). The interested persons for this purpose are

- the ward, if age 14 or older,
- the ward's presumptive heirs,
- the claimants,
- the guardian ad litem, and
- the personal representative, if any.

MCR 5.125(C)(28).

Court action on accounts. The guardian may annually request an order allowing the annual account by filing a Petition to Allow Account(s), SCAO form PC 585a. The matter must then be scheduled for a hearing before the probate judge, and a notice of hearing must be served on all interested persons. A hearing is nec-

essary even if a Waiver/Consent, SCAO form PC 561, can be obtained from all interested persons, since the ward cannot provide a valid waiver and the guardian cannot waive and consent on the ward's behalf due to the inherent conflict of interest. MCR 5.104(B)(3). If no one objects to the account at the hearing, the probate court may enter the Order Allowing Account(s), SCAO form PC 585b. The court must either review or allow accounts annually. The court must hold a hearing on the accounts at least once every three years. MCR 5.409(C)(6).

Attorney fees. Attorney fees paid during the year (whether incurred in that year or not), other than those appearing on the prior account, should be listed as a disbursement. A statement of attorney services rendered should be filed with the account, including details about the dates, tasks, and time spent for all activities on behalf of the estate of the ward. Even if the attorney fees have been paid throughout the year pursuant to an attorney-client fee agreement, copies of the prior statements should be attached to the statement of attorney services rendered. To the extent attorney fees are sought to be paid with the filing of the account, those services for which payment is requested must appear on the statement. Note that all attorney fees are subject to review and confirmation by the probate court, even when fees are paid without prior court approval.

Practice Tip

- *Attorney fees are chargeable to the estate only when the attorney's services were on behalf of and beneficial to the estate. Attorney fees in defense of the guardian's actions are not chargeable to the estate if the guardian does not completely prevail or was partially to blame for bringing about unnecessary litigation. See In re Estate of Valentino, 128 Mich App 87, 95–96, 339 NW2d 698 (1983).*

XI. Modification and Termination of Guardianship

§10.20 The guardian's duties may be modified or the guardianship terminated before the expiration date in the letters of guardianship when a person's circumstances or abilities warrant it. MCL 330.1637. The individual with a disability, the individual's guardian, or any interested person may petition the court for the discharge or modification of a guardianship when the individual's capacity to perform tasks necessary for the care of the individual's self or estate have changed. MCL 330.1637(1). Specifically, an individual with a developmental disability may request discharge or modification via a phone call or other "oral communication" or an informal letter. MCL 330.1637(2). In response, the court will appoint someone to prepare the appropriate petition. *Id.* This petition triggers a hearing with the rights set forth in MCL 330.1615 and .1617, including the appointment of an attorney for the person with a disability. MCL 330.1637(3). See SCAO form PC 677, Petition to Terminate/Modify Guardian for Developmentally Disabled Individual, for the petition form.

At the conclusion of a hearing on a petition for discharge or modification, the court must enter an order setting forth the factual basis for its findings and may

- deny the petition,
- remove the guardian and dissolve the guardianship order,

- remove the guardian and appoint a successor,
- modify the original guardianship order, or
- make any other appropriate order in the interests of the individual with a developmental disability.

MCL 330.1637(4).

Expiration of guardianship term. Once the term of the guardianship expires, the individual with a developmental disability automatically regains all legal and civil rights that had been granted to the guardian. MCL 330.1644. If no guardian is needed at that time, no further court proceedings are required. If a guardian is still needed, a new petition for guardianship may be filed. MCL 330.1626(3).

Form 10.1
Task List for Guardianship of an Individual with Developmental Disability

Task List for Guardianship of an Individual with Developmental Disability

Make sure you are using current probate court forms.

Check the following:

Need	Supplied	
		Venue. MCL 330.1600(b).
		Petitioner has signed petition. MCR 1.109(D)(3), (E)(2), (E)(4), 5.113(A).
		If petitioner is represented by counsel, has petitioner's attorney signed petition? MCR 1.109(E)(2), (4).
		Petition is complete.

Necessary Forms, Statutes, and Court Rules

Need	Supplied	
		PC 658, Petition for Appointment of Guardian, Individual with Alleged Developmental Disability. MCL 330.1100a, .1609.
		PC 659, Report to Accompany Petition to Appoint, Modify or Discharge Guardian of Individual with Developmental Disability. MCL 330.1612. (Attach all required evaluations upon which this report is based.)
		PC 642, Order Appointing Guardian Ad Litem / Attorney / Lawyer-Guardian Ad Litem. MCL 330.1616; MCR 5.121.
		PC 643, Acceptance of Appointment and Report of Guardian Ad Litem. MCR 5.121.
		PC 661, Notice of Right to Request Dismissal of Guardian or Modification of Guardianship Order. MCL 330.1634, .1637.
		PC 628, Order Appointing Attorney. MCL 330.1454; MCR 5.404(G)(3).
		PC 562, Notice of Hearing. MCL 330.1614; MCR 5.102.
		PC 564, Proof of Service. MCR 5.104(A), .105, .107.
		PC 561, Waiver/Consent. Note: check who may waive. MCR 5.104(B).

Service on Interested Parties, per MCL 330.1614(3).

Need	Supplied	
		Petitioner.
		Respondent. (Must be served personally. MCR 5.734(A).)
		Respondent's presumptive heirs.
		Preparer of the report required by MCL 330.1612 or another appropriate person who performed an evaluation.
		Director of any facility in which the respondent may be residing.
		Respondent's guardian ad litem if one has been appointed.
		Respondent's legal counsel.
		Service by publication if necessary. MCR 5.106.

Necessary Forms, Statutes, and Court Rules

Need	Supplied	
		PC 563, Publication of Notice of Hearing. MCR 5.106.
		PC 660, Order Appointing Guardian for Individual with Developmental Disability. MCL 330.1620.
		PC 662, Letters of Guardianship of Individual with Developmental Disability. MCL 330.1631; MCR 5.202.
		PC 663, Report of Guardian on Condition of Individual with Developmental Disability. MCL 330.1631; MCR 5.409(A). Note: Fully explain to the Guardian the requirements of preparing and filing this form.

Adapted from *Probate Court Benchbook* (Michigan Judicial Institute May 1990).

Form 10.2
Hearing Worksheet for Guardianship of an Individual with Developmental Disability

Hearing Sheet

RE: *[Alleged Developmentally Disabled Individual]*	FILE NO.
TYPE OF HEARING:	DATE & TIME:

[Name], Petitioner	*[Name]*, Proposed Guardian
[Name], Attorney for Respondent	*[Name]*, Proposed Standby Guardian
[Name], Testifying Evaluator	

FINDINGS OF FACT

1. Is respondent an individual with a developmental disability? (Y/N)
    - Has the disability continued since its origination? (Y/N)
    - Can the disability be expected to continue indefinitely? (Y/N)
    - Does the disability constitute a substantial burden to respondent's ability to perform normally in society? (Y/N)
    - Is the disability attributable to one or more of the following:
        - impaired cognitive function, cerebral palsy, epilepsy, or autism? (Y/N)
        - any other condition closely related to impaired cognitive function? (Y/N)
        - dyslexia? (Y/N)

2. What is the nature and extent of respondent's general intellectual functioning?

3. What is the extent of impairment in respondent's adaptive behavior?

4. What is respondent's capacity to care for the respondent's self by making and communicating responsible decisions concerning the respondent's person?

5. What is respondent's capacity to manage the respondent's estate and financial affairs?

6. Is respondent's proposed living arrangement appropriate? (Y/N)

7. Is respondent's proposed or current living arrangement in the least restrictive setting and suited to respondent's condition?

8. Does respondent have a preference as to who should be appointed guardian?

9. If a partial guardian is to be appointed, in what areas is the respondent legally competent, and in what areas does the respondent possess adequate competency?

Dated: *[date]*

[Signature line]
Probate Court Judge

Form 10.3
Attachment to PC 660, Listing Powers of Partial Guardian for an Individual with a Developmental Disability

ATTACHMENT A TO ORDER APPOINTING PARTIAL GUARDIAN

RE: *[Developmentally Disabled Individual]* FILE NO.
DATE OF ORDER:

A PARTIAL GUARDIAN IS APPOINTED, with the following powers and duties:

_____ (A) Execute the necessary application for administrative admission.

_____ (B) Consent to any necessary medical treatment, minor or surgical treatment, and emergency major surgical treatment except extraordinary procedures including but not limited to sterilization, vasectomy, abortion, organ transplants from ward to another person, and experimental treatment.

_____ (C) Make all legal, contractual, and financial decisions on the ward's behalf.

_____ (D) Make program and placement decisions on the ward's behalf.

_____ (E) Release information and consent to photographs and fingerprints.

_____ (F) Arrange for and consent to the ward's living arrangements.

_____ (G) Arrange any travel and transportation for the ward (retaining the ward's full legal right to make such decisions for less than _____ miles).

_____ (H) Transact and supervise the ward's financial matters, including collection and expenditure of funds, entering into contractual agreements covering amounts which exceed _____ dollars.

_____ (I) Reserving to the ward the right to make decisions on daily dress and daily programs and activities except as set forth above.

Dated: *[date]*

[Signature line]
Probate Court Judge

11
Proceedings Under the Mental Health Code

Summary of Proceedings Under the Mental Health Code

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Jurisdiction and venue. §§11.1, 11.28.

The probate court has exclusive and original jurisdiction over civil commitment hearings. Venue is in the place where the individual resides or is found.

Mentally ill adults—initiating proceedings. §§11.2–11.13.

Petitions for mental health treatment.

Proceedings are initiated by petition. For a respondent to receive involuntary mental health treatment, it must be shown by clear and convincing evidence that the respondent has a mental illness and that the person meets one of the three criteria of MCL 330.1401, based on capacity or conduct. Under the criteria found in MCL 330.1401(1)(a), (b), or (c), hospitalization, assisted outpatient treatment (AOT), or a combination of hospitalization and AOT is requested as a potential initial form of relief. Whether the requested relief is sought under MCL 330.1401(1)(a)–(c), proceedings are initiated by using SCAO form PCM 201, Petition for Mental Health Treatment. There is no fee for filing the petition. MCL 600.880(3).

A petition may seek relief under any or all of the criteria found in MCL 330.1401. MCL 330.1401(1)(a), (b), and (c) are not mutually exclusive. Under subsections (a), (b), and (c), two clinical certificates are required when seeking hospitalization or a combination of hospitalization and AOT. One certificate must be signed by a physician or licensed psychologist. This certificate is obtained by the person initiating proceedings within 72 hours before hospitalization, before the filing of the petition, or after a court-ordered examination if the person initiating proceedings made a reasonable effort to secure an examination, but was unable to do so. The other certificate must be signed by a psychiatrist who examined the individual within 24 hours of hospitalization, within 72 hours before the filing of the petition, or after the petition is filed, by court order.

A petition that seeks only AOT does not require a clinical certificate.

On receipt of the petition and clinical certificates that request hospitalization, the court must order a report assessing the availability and appropriateness for the individual of alternatives to hospitalization.

Within four days of the court's receipt of the petition and certificates, the respondent must be given a copy of the petition and clinical certificates and notice of the right

- to have a full court hearing,
- to be present at the hearing,
- to be represented by legal counsel,
- to demand a jury trial, and
- to obtain an independent clinical evaluation

Counsel and guardians ad litem.

Counsel must be appointed within 24 hours after receipt of the petition if the respondent has been hospitalized, and within 48 hours if respondent has not been hospitalized. Counsel must consult with the respondent within 72 hours if the respondent is

hospitalized or at least 24 hours before the hearing if not, and must file a certificate with the court.

If counsel is waived, or if the court deems it necessary for any other reason, the court may appoint a guardian ad litem.

Independent clinical evaluations.

The respondent has the right to an independent evaluation at the respondent's own expense or, if indigent, at public expense. The independent examiner's report is for the sole use of the respondent, and the examiner may not testify without the respondent's consent.

Deferrals and adjournments.

The respondent, if hospitalized pending the court hearing, must meet with counsel, a hospital treatment team member, a person assigned by community mental health services, and, if possible, a person designated by the respondent within 72 hours after the petition and certificates are filed with the court. At that meeting the respondent must be informed of the proposed plan of treatment at the hospital, the nature and possible consequences of commitment procedures, the proposed plan of treatment in the community, consisting of an alternative to hospitalization or a combination of hospitalization and AOT with hospitalization for a maximum of 60 days, and the right to request a deferral of the hearing for 60 days (if the respondent chooses to remain hospitalized) or 180 days (if the respondent chooses outpatient treatment or a combination of hospitalization and outpatient treatment).

A deferred hearing is held during the deferral period at the respondent's request or if the respondent refuses treatment or, more commonly, is not complying with treatment during the deferral period. A hearing is held at the end of the deferral period if the director of the hospital or of the board responsible for alternative treatment believes it is necessary.

A hearing may be adjourned only for good cause.

Practice Tip

- *For petitions that only seek AOT, because the individual is not hospitalized, leave to adjourn may be more freely granted, particularly if the matter has been referred to mediation and progress is being made.*

Hearings on the commitment of mentally ill adults. §§11.14–11.19.

Notice of hearing.

Notice of the hearing must be given to the following:

- the respondent
- the respondent's attorney
- the petitioner
- the prosecuting attorney
- the hospital director

- the respondent's spouse
- the respondent's guardian
- other relatives or persons as the court may determine

A hearing on a petition seeking hospitalization under MCL 330.1401(1)(a), (b), or (c) must be held within 7 days after the court's receipt of the petition and the required clinical certificates. Service must be made at least 2 days before the hearing scheduled to be heard within 7 days or less. If the hearing is not to be held within 7 days, service must be made at least 5 days before the hearing.

A hearing on a petition seeking assisted outpatient treatment solely under MCL 330.1401(1)(a)–(c) must be held no more than 28 days after the filing of the petition. However, if the respondent is hospitalized, a hearing must be held no more than 7 days after the filing of a petition.

Conduct of hearing.

The respondent, and only the respondent, may demand a jury trial at any time before testimony is received.

If the respondent is hospitalized, the hearing should be held at the hospital whenever practicable. The respondent must be present at the hearing unless the person waives this right, a mental health professional testifies that the respondent's presence would expose the person to serious risk of harm, or the respondent's conduct makes it impossible to conduct the hearing.

The respondent must be found to be a *person requiring treatment* by clear and convincing evidence. The testimony of an examining physician or psychologist is required unless the respondent waives this requirement. The respondent may be called to testify against the respondent's wishes.

For a petition for AOT that does not seek hospitalization before the hearing, an individual may not be found to be a *person requiring treatment* unless a psychiatrist who personally examined the individual testifies at the hearing. However, a psychiatrist need not testify if a psychiatrist signs the petition. In that case, at least one physician or licensed psychologist, having personally examined the individual, must testify. An individual who is the subject of a petition may waive testimony at the hearing, which then requires that a clinical certificate completed by a physician, licensed psychologist, or psychiatrist be provided to the court at or before the initial hearing. MCL 330.1461(2).

Orders. §§11.20–11.25.

Initial orders for mental health treatment.

If the court finds that the respondent is not a *person requiring treatment,* the court must enter a finding to that effect and, if the respondent is hospitalized, must order that the person be discharged immediately.

If an individual is found to be a *person requiring treatment,* the court may order the following even if the petition only sought AOT:

- hospitalization for up to 60 days

- AOT for up to 180 days
- combined hospitalization and AOT for up to 180 days (the hospitalization portion not to last more than 60 days)

If an AOT program is adequate to meet the individual's treatment needs and an agency or mental health professional is available to supervise the program, the court must issue an order for AOT or combined hospitalization and AOT.

AOT may include a case management plan and case management services through the local office of community mental health services program. The AOT order may also include requirements for

- medication,
- blood or urine tests to determine compliance with or effectiveness of prescribed medications,
- individual or group therapy,
- day or partial day programs,
- educational and vocational training,
- supervised living,
- assertive community treatment team services,
- substance use disorder treatment,
- substance use disorder testing with history of alcohol/substance use (subject to hearing every 180 days), or
- any other services that will either assist the respondent to function in the community or help prevent relapse or deterioration.

A psychiatrist must supervise preparation and implementation of the AOT treatment plan, which must be completed within 30 days of entry of the order. The treatment plan must be filed with the probate court. A decision to release an individual from an AOT program must be made by a psychiatrist designated by the outpatient treatment provider. MCL 330.1474(1).

Noncompliance and modification of orders for treatment.

During the period of alternative treatment, the supervisor of the program must notify the court in writing if the individual is not complying with the court order or if the alternative treatment has not been or will not be sufficient to prevent the individual from harming self or others. The individual may notify the court in writing if the individual believes that the alternative treatment program is not appropriate. The court, without a hearing, may then consider other alternatives to hospitalization. The court may modify the order to direct that the individual undergo another program of alternative treatment for the duration of the order or modify the order to direct that the individual undergo hospitalization or combined hospitalization and alternative treatment.

Second and continuing orders.

At least 14 days before an order of involuntary mental health treatment expires, if the hospital director or the agency or mental health professional supervising an individual's alternative treatment believes that the individual continues to be a *person requiring treatment* and that the individual is likely to refuse voluntary treatment when the order expires, the hospital director or supervisor must file a petition for a second or continuing order of involuntary mental health treatment.

The court, on receiving a petition before the initial order expires and finding that the individual continues to be a *person requiring treatment,* must issue a second order for involuntary treatment for up to 90 days (inpatient, AOT, or combined).

On receiving a petition before the second order or a continuing order expires and finding that the individual continues to be a *person requiring treatment,* the court must issue a second or continuing order for involuntary treatment for up to one year. The court must continue to issue consecutive one-year continuing orders for involuntary treatment, prompted by a petition and a finding of *person requiring treatment* until a continuing order expires without a petition having been filed or the court finds that the individual is not a *person requiring treatment.*

If a petition for a second or continuing order of involuntary treatment is not brought by the hospital director or supervisor at least 14 days before the expiration of the prior order, any person who believes that an individual continues to be a *person requiring treatment* may file a petition for another initial order of involuntary mental health treatment.

Discharges and leaves of absence. §11.26.

The hospital director must discharge any patient who has been on an authorized leave from the hospital for a continuous period of one year and must notify the court of the discharge. Leaves otherwise are governed by the hospital's procedures. However, when an individual receiving involuntary treatment is returned to the hospital from an authorized leave lasting more than 10 days, the hospital director must notify the court of the return and notify the individual of the right to appeal the return. The court must notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the person wants a hearing. A hearing may be demanded within seven days after the individual receives notice of the right to appeal, and the court must schedule a hearing within seven days of the court's receipt of the demand. At the hearing, the hospital director must show that the individual requires treatment in a hospital.

If the court finds that the individual requires treatment at a hospital, it must dismiss the appeal and order the individual returned to the hospital. If not, the court may either order the individual returned to authorized leave status or order an alternative treatment to hospitalization.

For intellectual disability treatment, the facility must notify the court on discharge of an individual who was admitted by court order and the prosecuting attorney if the individual met the criteria for treatment under MCL 330.1515(b) (i.e., the individual was arrested or charged with an offense that was the result of an intellectual disabil-

ity). MCL 330.1525(3). A provider of alternative treatment must also notify the court when the alternative treatment is terminated. MCL 330.1526(2).

Review procedures. §11.27.

Each individual subject to a one-year order of involuntary mental health treatment has the right to have that individual's status as a *person requiring treatment* reviewed six months from the date of the order. The results of each periodic review are made part of the individual's record, and a written report is filed with the court that last ordered the individual's treatment. The director of the hospital or treatment program must give notice of the results of the review and information on the individual's right to petition for discharge to the individual, the individual's attorney, the individual's guardian, and the individual's nearest relative or a designee.

If the report concludes that the individual requires continuing involuntary treatment, the individual or the director of the hospital or treatment program may object to the conclusion and petition the court for discharge of the individual from the treatment program. If the court finds that the individual is no longer a *person requiring treatment,* the court must order that the individual be discharged. If the court finds that the individual continues to be a *person requiring treatment,* after consideration of complaints submitted, the court may either continue the order or issue a new continuing order for involuntary mental health treatment.

Individuals with developmental disabilities—objections to administrative admissions. §11.29.

A person found suitable by the court may file an objection to the administrative admission of an alleged individual with developmental disabilities within 30 days after admission. Additional objections may be made at any six-month interval following the date of the original objection or, if none, the date of admission.

On receiving notice of an objection, the court must schedule a hearing to be held within seven days and give notice of hearing to the following:

- the person who objected
- the resident
- the person who executed the application
- the executive director
- the director of the facility

The hearing is governed by those provisions governing judicial admissions of individuals with developmental disabilities, including the appointment of counsel and an independent medical or psychological evaluation, that the court deems necessary to ensure that all relevant information is brought to its attention.

Individuals with developmental disabilities—petitions for treatment. §§11.30–11.37.

Only an individual age 18 or older who has been diagnosed with intellectual disability and can be reasonably expected to cause serious injury to self or others in the near

future based on overt acts or who has been arrested and charged with an offense that was a result of the intellectual disability may be judicially admitted.

Any person found suitable by the court may file a petition for treatment.

If the petition appears sufficient on its face, the court must order that the respondent be examined and a report of examination prepared. If the respondent will not comply with an order of examination, the court may order that a peace officer or security transport officer transport the respondent to a facility for the examination. Following the examination, the court must order that the respondent be immediately admitted to a facility if it appears necessary to prevent physical harm to the respondent or others pending a hearing.

Within four days of the court's receipt of the report, the respondent must be given a copy of the petition and report and notice of the right

- to have a full court hearing,
- to be present at the hearing,
- to be represented by legal counsel,
- to demand a jury trial, and
- to obtain an independent clinical evaluation

Counsel and guardians ad litem.

Counsel must be appointed within 24 hours after receipt of the petition if the respondent has been admitted to a facility, and within 48 hours if respondent has not been admitted to a facility. Counsel must consult with the respondent within 72 hours if the respondent is admitted to a facility or, if not, at least 24 hours before the hearing, and must file a certificate with the court.

If counsel is waived or if the court deems it necessary for any other reason, the court may appoint a guardian ad litem.

Independent examinations.

The respondent has the right to an independent examination at the respondent's own expense or, if indigent, at public expense.

Hearings on petitions for intellectual disability treatment. §§11.38–11.41.

Notice of hearing.

Notice of the hearing must be given to the following:

- the respondent
- the respondent's attorney
- the petitioner
- the prosecuting attorney
- the community mental health services program
- the director of any facility to which the respondent is admitted
- the respondent's spouse

- the respondent's guardian
- other relatives or persons as the court may determine

The hearing date must be set within seven days after the court's receipt of the petition and report. Service must be made at least two days before the hearing. If the hearing is not to be held within seven days, service must be made at least five days before the hearing.

The respondent is entitled to obtain a continuance for a reasonable time for good cause.

Conduct of hearing.

The respondent, and only the respondent, may demand a jury trial at any time before testimony is received.

The respondent has the right to present documents and witnesses, cross-examine witnesses, and require testimony in court from one of the examining physicians or psychologists.

The grounds for commitment must be shown by clear and convincing evidence.

Orders. §§11.42–11.43.

If the court finds that the respondent does not meet the criteria for treatment, the court must enter a finding to that effect and, if the respondent is admitted to a facility, must order that the person be discharged immediately.

If a respondent meets the criteria for treatment, the court may order the following:

- admission to a facility or a licensed hospital
- participation in an outpatient program for one year of care and treatment recommended by the community mental health services program as an alternative to being admitted to a facility

If an alternative treatment program is appropriate and adequate to meet the respondent's treatment needs, and an agency or mental health professional is available to supervise the program, the court must issue an order for alternative treatment.

Modification of orders for alternative treatment.

During the period of an order for alternative treatment, the supervisor of the program must notify the court in writing if the individual is not complying with the court order or if the alternative treatment has not been or will not be sufficient to prevent the individual from harming self or others. The individual may notify the court in writing if the individual believes that the alternative treatment program is not appropriate. The court, without a hearing, may then consider other alternatives to admission and modify the order to direct that the individual undergo another program of alternative treatment for the duration of the order or modify the order to direct that the individual be admitted to a facility.

Discharges and leaves of absence. §11.44.

The facility or provider of alternative treatment must notify the court when the individual is discharged or the treatment is terminated. A resident has the right to petition the court for discharge once a year from the date of the original order of admission.

The facility must discharge any patient who has been on an authorized leave for a continuous period of one year and must notify the court of the discharge. Leaves otherwise are governed by the procedures of the Department of Health and Human Services (DHHS) or the private facility. However, when an individual receiving involuntary treatment is returned from an authorized leave lasting more than 10 days, the facility must notify the court of the return and notify the individual of the right to appeal the return. The court must notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the person wants a hearing. A hearing may be demanded within seven days after the individual receives notice of the right to appeal, and the court must schedule a hearing within seven days of the court's receipt of the demand. At the hearing, the facility must show that the individual requires treatment.

If the court finds that the individual requires treatment at the facility, it must dismiss the appeal and order the individual returned to the facility. If not, the court may either order the individual returned to authorized leave status or order an alternative treatment for up to one year.

Periodic reviews. §11.45.

Six months after the date of admission, and every six months after that, the resident's status as an individual meeting the criteria for judicial commitment must be reviewed. The results of each periodic review are made part of the individual's record, and a written report is filed with the court that last ordered the individual's admission. The facility must give notice of the results of the review to the individual, the individual's attorney, the individual's guardian, and the individual's nearest relative or a designee.

If the report concludes that the individual continues to meet the criteria for judicial admission, the individual or someone on the individual's behalf may petition the court for discharge.

Incompetence to stand trial for a criminal offense. §§11.46–11.50.

If a showing is made that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination either at the center for forensic psychiatry or at another facility certified by the state department of mental health to perform competency examinations. As part of the examination process, the facility must consult with defense counsel and may consult with the prosecutor or other persons. The report must be completed within 60 days of the order.

A hearing must be held within five days of the report's receipt by the court unless the prosecution or defense requests a reasonable delay for good cause that is granted by the court. If the court determines the defendant is incompetent to stand trial, it must

determine whether treatment would render the defendant competent within the time limit of MCL 330.2034.

When treatment is ordered to attempt to render the defendant competent, the medical supervisor must send a written report to the court, prosecuting attorney, defense counsel, and the center for forensic psychiatry (1) at least once every 90 days from the treatment order; (2) whenever it is believed that the defendant is no longer incompetent; and (3) whenever it is believed that there is no substantial probability that the defendant will regain competency within the time period of MCL 330.2034.

Persons found not guilty by reason of insanity. §§11.51–11.54.

If a person is acquitted of a crime by reason of insanity, the individual must be placed in the center for forensic psychiatry for a maximum period of 60 days. The center for forensic psychiatry is required to file a report with the court, the prosecuting attorney, and the defense counsel within the 60-day period. After the court receives the report, it may direct the prosecuting attorney to file a petition for judicial admission.

I. Mentally Ill Adults

A. Jurisdiction and Venue

§11.1 The probate court has exclusive and original jurisdiction over petitions for involuntary mental health treatment (i.e., civil commitment hearings and hearings for assisted outpatient treatment (AOT)). *See* MCL 330.1400(c); *Teasel v Department of Mental Health*, 419 Mich 390, 355 NW2d 75 (1984).

Ancillary jurisdiction. The family division of circuit court is given ancillary jurisdiction over petitions for treatment of persons with mental illness for cases commenced on or after January 1, 1998. MCL 600.1021(2)(b). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan law and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit court and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011.

A final order affecting the rights or interests of a person under the Mental Health Code (except for final orders affecting the rights or interests of a person in the estate of an individual with developmental disabilities) is appealable by right to the court of appeals. MCL 600.308.

Venue is in the place where the individual resides or is found. MCL 330.1400(c). The subject of a petition, any interested person, or the court on its own motion may request a change of venue because of residence, convenience to parties, witnesses, or the court, or the individual's mental or physical condition. MCL 330.1456(2); *see also* MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

On being informed that the individual is subject to a previous court order,

- if the same court issued the previous order, the court must either dismiss the new proceeding and determine the proper disposition under the previous order or vacate the previous order and proceed under the new petition, or,
- if another court issued the previous order, the court must continue the new proceeding and issue an appropriate order. The court must consult with the prior court to determine if the best interests of the individual will be served by changing venue of the prior proceeding to the county where the new proceeding was initiated. If not, the court must transfer the matter to the other court.

MCR 5.745(B). The court may treat a petition or certificate filed in connection with the more recent proceedings as notification under MCR 5.743 (appeal by individual returned to hospital after authorized leave, discussed in §11.26) and MCR 5.744 (proceedings regarding hospitalization without a hearing, discussed in §11.24) and proceed with disposition under those rules. MCR 5.745(C).

B. Initiating Proceedings

1. Petition Process for Mental Health Treatment

§11.2 *Mental illness* is defined as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g).

Two tracks are available when filing a petition for treatment under the Mental Health Code: (1) a petition for mental health treatment where any type of treatment may be ordered and the individual may be hospitalized pending a hearing and (2) a petition that only seeks AOT and hospitalization is not sought before the hearing. Regardless of which type of treatment is requested, a petition may seek relief under any or all of the criteria found in MCL 330.1401(1)(a), (b), or (c). The petitioner must establish that the subject of the petition is a *person requiring treatment* under any of the following criteria:

- The individual has mental illness and
  - as a result of that mental illness, can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure the individual's self or another individual and
  - has engaged in one or more acts or made significant threats that are substantially supportive of this expectation.
- The individual has mental illness and
  - as a result of that mental illness is unable to attend to the individual's basic physical needs such as food, clothing, or shelter that must be attended to if the individual is to avoid serious harm in the near future and
  - has demonstrated this inability by failing to attend to those basic physical needs.
- The individual has mental illness and
  - the individual's judgment is so impaired by that mental illness and the individual's lack of understanding of the need for treatment has caused the individual to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of the individual's condition and
  - the individual presents a substantial risk of significant physical or mental harm to the individual's self or others.

Practice Tip

- *The primary focus is on the risk of harm to the individual if left untreated. The immediacy of the risk of harm governs whether inpatient or outpatient treatment is appropriate.*

In *In re Tchakarova*, 328 Mich App 172, 936 NW2d 863 (2019), the court found the respondent was a person requiring treatment under MCL

330.1401(1)(a) when respondent's reckless driving and speeding tickets, her history of car accidents, her arrest for trespassing, and her delusions related to stalking professors on college campus constituted clear and convincing evidence of a reasonable expectation of serious physical harm to respondent or someone else in the near future. The court held that the act or threat described in MCL 330.1401(1)(a) did not need to be recent.

Petitions for mental health treatment are initiated using SCAO form PCM 201, Petition for Mental Health Treatment. There is no fee for filing the petition. MCL 600.880(3).

A petition may be made by any person age 18 or older. The petition must contain

- an assertion that the individual is a *person requiring treatment;*
- the alleged facts that are the basis for the assertion;
- the names and addresses, if known, of witnesses to alleged relevant facts; and
- if known, the name and address of the individual's nearest relative or guardian, or, if none, friend, if known.

MCL 330.1434(1), (2). The petition must be filed within 10 days of signing. MCL 700.1423.

Practice Tip

- *In deciding these cases, the finder of fact must determine that the person has a "mental illness" as defined by the statute. Most psychiatrists agree that while personality disorders may impair the person's ability to function, they are not mental illnesses. Likewise, dementia and chronic substance abuse fit the definition only if they have resulted in psychosis.*

2. Petition for Mental Health Treatment

a. Required Testimony and Clinical Certificates

§11.3 Petitions requesting hospitalization under MCL 330.1401(1)(a), (b), or (c) must be accompanied by a clinical certificate of a physician or a licensed psychologist that was executed within 72 hours before the filing of the petition after personal examination of the individual. *See* SCAO form PCM 208 (Clinical Certificate). If, after reasonable effort, the petitioner could not secure an examination, the petitioner must set forth in the petition the reasons an examination could not be secured. *See* SCAO forms PCM 209a (Order for Examination/Transport), PCM 245 (Notice of Inability to Secure Evaluation/Examination). A second clinical certificate may accompany the petition. If two clinical certificates are filed with the petition, at least one of them must have been executed by a psychiatrist. MCL 330.1434(3), (4).

If the petition is not accompanied by a clinical certificate, and the court is satisfied that a reasonable effort was made to secure an examination, the court must order that the individual be examined by a psychiatrist and either a physician or a licensed psychologist. If the petition was accompanied by only one clinical certificate, the court must order that the individual be examined by a psychiatrist. The

individual may be received and detained at the place of examination as long as necessary to complete the examination or examinations, but not longer than 24 hours. MCL 330.1435(1)–(3).

If it appears that the individual will not comply with an order of examination, the court may order that a peace officer take the individual into protective custody and that a peace officer or security transport officer transport the individual to a suitable place for examination. MCL 330.1436(1); *see* PCM 209a.

After an examination under MCL 330.1435(1) or (2), the examining psychiatrist must either transmit a clinical certificate to the court or report to the court that the execution of the clinical certificate is not warranted. On receipt of a report indicating that clinical certificate is not warranted, the court must either (1) dismiss the petition or (2) order another examination by a psychiatrist, or if a psychiatrist is unavailable, by a physician or licensed psychologist. If the third examination results in a report that a clinical certificate is not warranted, the court must dismiss the petition. MCL 330.1435(4), (5).

If it appears to the court that the individual requires immediate assessment because the individual presents a substantial risk of significant physical or mental harm to the individual's self or others in the near future, the court may order that the individual be hospitalized, that a peace officer take the individual into protective custody, and that a peace officer or security transport officer transport the individual to a preadmission screening unit designated by the community mental health services program. If the preadmission screening unit authorizes hospitalization, the peace officer or security transport officer must transport the individual to the designated hospital. If the examinations and clinical certificates of the psychiatrist and the physician or the licensed psychologist are not completed within 24 hours after hospitalization, the individual must be released. MCL 330.1438.

If the transport order is requested because the individual will not make themself available for an evaluation following the filing of a petition for assisted outpatient treatment only, the court may, after being satisfied that reasonable effort was made to secure an examination, order law enforcement to transport the individual for mental health evaluation and to take the individual to the designated preadmission screening unit/hospital. On the individual's arrival, the preadmission screening unit/hospital must complete an assessment that includes an examination. The individual must be released at the end of examination unless it is determined that immediate hospitalization is required. If immediate hospitalization is required, a petition with two clinical certifications must be filed with the probate court within 24 hours of the medical professional's finding. The petition must request involuntary hospitalization and may request combined treatment (hospitalization and AOT). MCL 330.1436(3). The hearing under this petition proceeds under MCL 330.1452(1). MCL 330.1436(3)

A transport order must be executed within 10 days of its issuance. If it is not, the responsible law enforcement agency must report to the issuing court the reason it was not executed. MCL 330.1436(2).

An individual who is not ordered hospitalized may stay in the current residence pending any ordered examination and may return there after examination.

The individual may be accompanied by one or more relatives or friends to the examination. MCL 330.1437.

Practice Tip

- *A person's previous history of mental health treatment is both relevant evidence for adjudication and necessary to ensure appropriate treatment. If the person has previously received treatment in another jurisdiction and refuses to sign a release of information, the court has the authority to order the information to be furnished to the treating physician, for example, after the clinical certificates are completed but before the hearing. See form 11.1 for an order.*

Once hospitalized, the patient must be examined by a psychiatrist within 24 hours (excluding legal holidays) after hospitalization. The examining psychiatrist cannot be the same physician on whose clinical certificate the patient was hospitalized. If the psychiatrist does not certify that the patient is a *person requiring treatment,* the patient must be released immediately. If the psychiatrist certifies that the patient is a *person requiring treatment,* the patient's hospitalization may continue pending the court hearing. MCL 330.1430. Within 24 hours after receipt of a clinical certificate by a psychiatrist, the hospital director must send a notice to the court that the patient has been hospitalized; the notice must be accompanied by a copy of the application and copies of the two clinical certificates. *See* SCAO form PCM 211 (Notice of Hospitalization and Certificate of Service). The hospital director must also give a copy of the petition, a copy of the two clinical certificates, and a statement of the right of the patient to court hearings to the patient and the patient's spouse (if applicable), nearest relative, guardian, and attorney. MCL 330.1431. The director must also ask the patient if they want the documents to be sent to anyone else and must send copies to at least two of those parties designated by the patient. *Id.*

b. Report on Alternative Treatment Program

§11.4 On receipt of the petition and the required clinical certificates or written testimony, the court must order that the community mental health services program, a public or private agency, or another individual found suitable by the court prepare a report assessing the current availability and appropriateness for the respondent of alternatives to hospitalization, including alternatives available following an initial period of court-ordered hospitalization. In deciding which individual or agency should be ordered to prepare the report, the court must give preference to an agency or individual familiar with the treatment resources in the respondent's home community. MCL 330.1453a; *see* SCAO form PCM 216 (Order and Report on Alternative Mental Health Treatment). A petition for AOT only under MCL 330.1434(7) does not require preparation of the report.

3. Petition for Assisted Outpatient Treatment Only

a. Required Testimony and Clinical Certificates

§11.5 If the petition requests assisted outpatient treatment only, a clinical certificate is not required to be attached to the initial petition. MCL 330.1434(7).

If it appears that the individual will not make themselves available for an examination, the court, after being satisfied that reasonable efforts were made to secure an examination, may order that a peace officer take the individual into protective custody for transport to the designated preadmission screening unit or hospital. MCL 330.1436; *see* SCAO form PCM 209a (Order for Examination/Transport). A transport order must be executed within 10 days of its issuance. If it is not, the responsible law enforcement agency must report to the issuing court the reason it was not executed. MCL 330.1436(2).

On the individual's arrival, the preadmission screening unit or hospital must complete an assessment that includes an examination. The individual must be released at the end of examination unless it is determined that immediate hospitalization is required. If immediate hospitalization is required, a petition with two clinical certifications must be filed within 24 hours of the medical professional's finding. The petition must request involuntary hospitalization and may request combined hospitalization and outpatient treatment. MCL 330.1436(3). The hearing under this petition proceeds under MCL 330.1452(1). MCL 330.1436(3).

If not ordered hospitalized, the individual may stay in the individual's current residence pending any ordered examination and may return there after examination. The individual may be accompanied by one or more relatives or friends to the examination. MCL 330.1437.

At the hearing, treatment may not be ordered unless a psychiatrist who has personally examined the individual testifies. In the alternative, a physician or licensed psychologist who has personally examined the individual may testify if a psychiatrist signs the petition. The individual may waive the requirement for testimony. In that case, a clinical certificate completed by a physician, licensed psychologist, or psychiatrist must be presented to the court. MCL 330.1461(2).

Practice Tip

- *A person's previous history of mental health treatment is both relevant evidence for adjudication and necessary to ensure appropriate treatment. If the person has previously received treatment in another jurisdiction and refuses to sign a release of information, the court has the authority to order the information to be furnished to the treating physician, for example, after the clinical certificates are completed but before the hearing. See form 11.1 for an order.*

b. Report on Alternative Treatment Program

§11.6 A petition for AOT only under MCL 330.1434(7) does not require preparation of a report on alternative treatment programs.

Note: The remainder of the mental health petition process is the same regardless of the relief sought.

4. Funding

§11.7 A community mental health services program must determine an individual's eligibility for private health insurance, Medicaid, or Medicare and

must bill the appropriate organization first before spending money from the state general fund when providing treatment services to an individual. MCL 330.1202(2).

5. Notice to Respondent of Rights

§11.8 Within four days of the court's receipt of the petition and clinical certificates, the court must make sure the respondent is given a copy of the petition and required clinical certificates or written testimony (unless previously given) and notice of the right

- to have a full court hearing,
- to be present at the hearing,
- to be represented by legal counsel,
- to demand a jury trial, and
- to obtain an independent clinical evaluation

MCL 330.1453(2); *see* SCAO form PCM 212 (Notice of Hearing and Advice of Rights).

6. Appointment of Counsel and Guardians ad Litem

§11.9 Counsel. Counsel must be appointed within 24 hours after receipt of the petition if the respondent has been hospitalized or admitted to a mental health services center, and within 48 hours if respondent has not been hospitalized or admitted to a mental health services center. MCL 330.1454(2). If the respondent is indigent, the court must compensate appointed counsel in a reasonable amount that is based on time and expenses. MCL 330.1454(5); *see* SCAO form PCM 212 (Notice of Hearing and Advice of Rights).

Counsel must consult with the respondent at least 24 hours before the hearing. If the respondent is hospitalized pending the hearing, counsel must consult with the respondent for the first time within 72 hours after the petition and accompanying clinical certificates have been filed with the court. After consultation, counsel promptly must file with the court a certificate stating that counsel personally has seen and has consulted with the respondent. MCL 330.1454(7)–(9); *see* SCAO form PCM 223 (Certificate of Legal Counsel/Waiver of Attendance).

Counsel must represent the respondent in all probate court proceedings under the Mental Health Code until counsel is discharged by court order or another attorney files an appearance on the respondent's behalf. Counsel must serve as an advocate for the respondent's preferred position or, if none is expressed, for the position that counsel believes is in the respondent's best interest. MCR 5.732. Note that a claim for ineffective assistance of counsel may be made against counsel representing a person in a mental health proceeding. *In re Londowski*, No 355635, ___ Mich App ___, ___ NW2d ___ (Feb 17, 2022).

On notice that the respondent prefers other counsel and the preferred counsel agrees to accept the appointment, the court must replace the initially appointed counsel. MCL 330.1454(4).

Practice Tip

- *Most courts will grant a request for other counsel once. Many courts encourage counsel to call at once when it is apparent that the attorney-client relationship has broken down. This gives the court an opportunity to appoint successor counsel in time to meet the 24-hour requirement without having to grant an adjournment.*

The respondent has the right to waive counsel. MCL 330.1454(3). Any waiver must be made voluntarily and understandably. A waiver will not be granted unless it is made in open court after the respondent has had an opportunity to confer with counsel. MCR 5.732(C). Note that while MCR 5.732(C) requires the waiver to take place in open court, MCL 330.1454(3) does not. The statute requires only that the waiver be in writing.

The issue of whether a trial court was thorough enough when it allowed a criminal defendant to waive counsel was analyzed in *People v Blunt*, 189 Mich App 643, 473 NW2d 792 (1991). While mental health proceedings are civil proceedings, this case may provide the probate court with helpful guidelines when a respondent insists on the right to self-representation. The court should explain to the person the following:

- Counsel must advocate for the expressed wishes of the respondent.
- The respondent may request particular counsel. The court will make the appointment when the requested attorney agrees to serve at a reasonable fee.
- Self-representation is almost always unwise, and the respondent may conduct a defense ultimately to the respondent's detriment.
- The respondent can receive no special indulgence from the court.
- The respondent must follow all the technical rules of substantive law, procedure, and evidence in making motions, objections, presentation of evidence, voir dire, and argument.
- The petitioner will be represented by an experienced professional counsel who will not proceed less vigorously because the respondent is not represented by counsel. From the standpoint of professional skill, training, education, experience, and ability, it will definitely not be an even fight.

Guardians ad litem. If counsel is waived, or if the court deems it necessary for any other reason, the court may appoint a guardian ad litem to represent the respondent's interests. MCR 5.121(A), .732(C); *see* SCAO form PC 642 (Order Appointing Guardian Ad Litem/Attorney/Lawyer-Guardian Ad Litem). The court must state the purpose of the appointment in the order of appointment, which may be entered without notice. MCR 5.121(A). The guardian ad litem does not have an attorney-client relationship with the respondent, and communications between the two of them are not privileged, MCR 5.121(E)(1), unless the

guardian ad litem is later appointed as the respondent's attorney, MCR 5.121(E)(2).

Practice Tip

- *If the respondent insists on self-representation, the court may wish to have appointed counsel present in the courtroom during the hearing and advise the respondent that the respondent may consult with appointed counsel at any time.*

7. Independent Clinical Evaluations

a. Who Pays and How Much?

§11.10 The respondent has the right to an independent evaluation at the respondent's own expense or, if indigent, at public expense. A deferral followed by a demand for hearing (see §11.12) does not defeat this right if the request for an independent evaluation is made before the first scheduled hearing or at the first scheduled hearing before the first witness has been sworn. MCL 330.1463(1). An indigent respondent is also entitled to an independent clinical evaluation by a physician, psychiatrist, or licensed psychologist of choice on the issue of whether the respondent meets criteria for treatment. MCL 330.1463(1); MCR 5.733(A). The court must appoint the professional chosen by the respondent unless the person chosen refuses to examine the respondent or the appointment would require unreasonable expense. MCR 5.733(A). The examiner's fees must be reasonable; based on the time required to examine and evaluate the respondent, prepare reports, and appear in court; based on the examiner's experience and training; and in accordance with local fees for similar services. MCL 330.1463(2); MCR 5.733(B). The examiner must submit an itemized statement of services and expenses for court approval. MCL 330.1463(2); MCR 5.733(B).Some courts pay a flat fee. When the court has accepted an assignment of an out-of-county resident, the county in which the individual resides pays the cost of the independent clinical evaluation.

b. Use of the Report

§11.11 The independent examiner's report is for the sole use of the respondent, and the evaluation or the testimony of the individual performing the evaluation may not be introduced into evidence without the respondent's consent. MCL 330.1463(3).

8. Conferences and Deferrals of Hearings

§11.12 Within 72 hours after the petition and clinical certificates have been filed with the court, the respondent, if hospitalized pending the court hearing, must meet with legal counsel, a treatment team member assigned by the hospital director, a person assigned by the executive director of the responsible community mental health services program or other program as designated by DHHS, and, if possible, a person designated by the subject of the petition to be informed of

- the proposed plans of treatment, both in the hospital and in the community as an alternative to hospitalization or a combination of hospitalization and AOT with hospitalization not to exceed 60 days;
- the nature and possible consequences of commitment procedures; and
- the right to request that the hearing be temporarily deferred for 60 days if the respondent chooses to remain hospitalized or for 180 days if the respondent chooses outpatient treatment, and a continuing right to demand a hearing during the deferral period.

MCL 330.1455(3). It is the responsibility of the hospital to notify the participants, including the community mental health services program, of the conference. MCL 330.1455(5). If the individual agrees to outpatient treatment, the hospital must release the individual to the outpatient treatment program. MCL 330.1455(9). On receipt of a request for deferral (that includes a stipulation that the respondent agrees to remain hospitalized and/or to accept the proposed plan of alternative treatment for the deferral period), the court must defer the hearing. *See* SCAO form PCM 235 (Request to Defer Hearing on Commitment). During the deferral period, the original petition and certificates remain valid and the court retains continuing jurisdiction. If the deferral period expires without further action by any party, the petition is properly dismissed. If a notice or request for a hearing is received during the deferral period, when the hearing is convened, the court may require additional clinical certificates and information from the provider. MCL 330.1455(7).

In *In re Moriconi*, 337 Mich App 515, 977 NW2d 583 (2021), appellant clearly indicated at the start of the hearing for involuntary treatment that she wished to exercise a deferral of the hearing, that she would voluntarily remain hospitalized, and that she wanted to be provided with a deferral form and to receive guidance regarding the form and how to obtain a deferral. The probate court refused to delay the hearing, stating that appellant failed to execute and file the proper form to initiate a deferral. The court ordered appellant to undergo involuntary treatment. The court of appeals found that while respondent's request for a deferral did not meet the statutory procedure for obtaining a deferral, the probate court abused its discretion by dismissing outright appellant's arguments without inquiring whether the meeting to which appellant was entitled by statute and at which she would have been informed of the deferral procedure had even been held. Even though proper procedure was not followed, appellant should not have been denied a meaningful opportunity to request a deferral, noting that MCL 330.1455 does not contain any time limits regarding when an individual may request a deferral.

A hearing is held if a demand for hearing is filed and

- the respondent refuses prescribed treatment or does not comply with treatment during the deferral period,
- the respondent requests a hearing, or
- at the end of the deferral period the director of the hospital or of the community mental health board responsible for alternative treatment believes

that the respondent continues to require treatment and either will not agree to accept treatment voluntarily or is not considered suitable for voluntary treatment.

MCL 330.1455(8)–(11); *see* SCAO form PCM 236 (Demand for Hearing).

Requests for continuances or adjournments may be granted for good cause only. MCL 330.1462. See §11.13.

9. Adjournments

§11.13 A hearing may be adjourned only for good cause. MCL 330.1462(1); MCR 5.735. Adjournment may be appropriate when

- an independent medical examination is requested pursuant to MCR 5.733(A),
- counsel needs an adjournment to adequately investigate and prepare pursuant to MCL 330.1460,
- the respondent requests new counsel (see §11.9),
- the respondent requests a jury trial (see §11.15),
- the petitioner is not present, or
- the parties have agreed to mediation and mediation is ongoing.

An interested person generally has no right to an adjournment on the ground that the person did not receive adequate notice of the hearing. MCL 330.1462(2).

Practice Tip

- *When relief other than only AOT is sought, a timely hearing is critical because of the respondent's right not to be unreasonably detained. See In re Van Zant, 126 Mich App 732, 338 NW2d 1 (1983). Delays are also costly. Many courts make a special effort to get the consent of the respondent, the prosecutor, and the treatment team before allowing a nonessential adjournment (an adjournment not mandated by rule or statute).*

The good-cause reasoning must be submitted in writing to the court and to the opposing attorney or stated on the record.

C. Hearing

1. Notice of Hearing

§11.14 The court must set a hearing date within 7 days after receiving a petition requesting hospitalization under MCL 330.1401(1)(a)–(c) and the required clinical certificates. MCL 330.1452(1).

The court must set a hearing within 28 days after receiving the petition for AOT only under MCL 330.1401(1)(a)–(c). If the petition was filed while the individual was an inpatient at a psychiatric hospital, the hearing must be held within 7 days of the filing of the petition. MCL 330.1452(2).

The court must give notice of the petition and of the time and place of hearing to the following:

- the respondent
- the respondent's attorney
- the petitioner
- the prosecuting attorney or the petitioner's attorney
- the director of any hospital or center to which the respondent has been admitted
- the respondent's spouse if the spouse's whereabouts are known
- the respondent's guardian, if any
- in a proceeding for judicial admission to a center, or effective May 1, 2022, in a proceeding in which assisted outpatient treatment is ordered, the community mental health program
- other relatives or persons as the court may determine

MCR 5.125(C)(18); *see* SCAO form PCM 212 (Notice of Hearing and Advice of Rights).

For petitions requesting hospitalization, notice also must be provided to the hospital director of any hospital in which the respondent is hospitalized. For petitions requesting AOT, notice must be provided to the community mental health services program serving the community where the respondent resides.

Notice must be given at the earliest practicable time and sufficiently in advance of the hearing date to permit adequate time for preparation. MCL 330.1453(1). See exhibit 11.1 for a judicial script for a hearing on a petition for the commitment of an alleged mentally ill person and form 11.2 for a checklist for a hearing on the commitment of alleged mentally ill person.

Service of process. A notice of hearing must be served on the respondent (by personal service), the respondent's attorney, and other interested persons as follows:

- if the hearing is to be held within seven days, at least two days before the hearing
- otherwise, at least five days before the hearing

MCR 5.734(C). Service on interested persons other than the respondent may be by mail if the hearing is not to be held within seven days. The court may permit service within a shorter period of time with the consent of the respondent and the respondent's attorney.

All service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

2. Jury Trials

§11.15 Jury trials in probate matters are governed by MCR 2.508–.516, except as modified by the probate court rules or the Mental Health Code.

MCR 5.151. Only the respondent has a right to demand a jury, and the demand may be made at any time before testimony is received. MCL 330.1458; MCR 5.740(A), (B). No jury fee is required. MCR 5.740(D). Once made, the jury demand may not be withdrawn without the respondent's consent in writing or in open court. *See* MCR 2.508(D)(3). If a jury demand is filed, it must be done as a separate document. MCR 2.508(B)(1). Each party may peremptorily challenge three jurors, starting with the petitioner. MCR 2.511(E). Six jurors render the verdict, which must be unanimous. MCL 330.1458; MCR 5.740(C).

There are two model civil jury instructions, which are used both in cases initiated by an original petition for involuntary treatment and in cases initiated by a petition for continued involuntary treatment. *See* M Civ JI 171.01, 171.02.

Practice Tip

- *There are a variety of ways that courts help jurors understand some of the intricacies of the Mental Health Code. Some courts read the jury instructions both before and after testimony is taken so that jurors know what they are looking for at the outset. Courts are required to provide jurors with written copies of jury instructions. MCR 2.513(N)(3).*

3. Rights of the Respondent at Trial

§11.16 The respondent to a petition for treatment has a right to be present at all of the proceedings. MCL 330.1455(1). Hearings should be held at the hospital or facility when practicable. MCL 330.1456(1). Many courts have developed methods either to hold hearings directly at the hospital or to conduct hearings through video conferencing technology.

The respondent must be present at the hearing unless

- the respondent waives the right to be present
  - by filing a written waiver of attendance signed by the respondent and witnessed by respondent's legal counsel, *see* SCAO form PCM 223 (Certificate of Legal Counsel/Waiver of Attendance),
  - in open court at a scheduled hearing, or
  - by failing to appear after receipt of the required notice, providing the respondent had an opportunity to consult with counsel per MCL 330.1454;
- the respondent is excused from attendance because there is testimony from a physician or licensed psychologist who recently observed the respondent that the respondent's presence would expose the respondent to serious risk of physical harm; or
- the respondent is excluded from the hearing by the court because respondent's conduct makes it impossible to conduct the hearing.

MCL 330.1455(1). Due to the nature of mental health hearings, most courts are slow to exclude a respondent from a mental health hearing. However, if safety cannot be assured or a record cannot be made, the court has little choice. The

court must enter on the record its reasons for excluding the respondent from the hearing. *Id.*

The hearing must be held in a quiet, dignified setting. The setting must permit an undisturbed proceeding that inspires the participants' confidence in the integrity of the judicial process. MCR 5.738. The respondent may wear the respondent's own clothing and has the right not to appear in restraints, unless safety requires it. If it is alleged that safety requires that the respondent be restrained, the prosecutor should notify the court in advance of the hearing that the respondent is expected to appear in restraints. A separate record should be made before the hearing to establish that the respondent's immediate past conduct shows that the respondent is reasonably likely to try to escape or to inflict physical harm on self or others or that an incident occurred during transportation in which the respondent attempted to escape or inflict physical harm on self or others. *See* MCR 5.738(C).

Respondent, after consultation with counsel, may stipulate to the entry of any order for treatment. MCL 330.1455(2).

MCR 1.111 mandates the appointment of a foreign language interpreter in a case or court proceeding if (1) an interpreter is requested by a party or witness and the court determines the service is necessary for the person's meaningful participation or, (2) on the court's own determination, interpreter service is necessary for meaningful participation by a party or witness. MCR 1.111(B)(1). For more information on the interpreter appointment process, including waiver, potential conflicts of interest, interpreter oath, and payment or reimbursement of interpreter costs, see MCR 1.111.

4. Burden of Proof and Evidence

§11.17 The prosecuting attorney's office of the county in which the court has its principal office must participate in the hearing unless the petitioner or another appropriate person has private counsel who will be present in court to present the case for requiring treatment. MCL 330.1457. In some counties, corporation counsel for the county presents the case.

To order treatment, the respondent must be found to be a *person requiring treatment* by clear and convincing evidence. MCL 330.1465; *see also In re Baker*, 117 Mich App 591, 324 NW2d 91 (1982). For petitions seeking hospitalization, the respondent may not be found to require treatment unless at least one physician or licensed psychologist who personally examined the respondent testifies in person or by written deposition at the hearing. MCL 330.1461(1). If the petition does not seek hospitalization before the hearing and requests assisted outpatient treatment only, the respondent may not be found to require treatment unless a psychiatrist who personally examined the respondent testifies or signs the petition and at least one physician or licensed psychologist who personally examined the respondent testifies. MCL 330.1461(2). The respondent may waive the required in-person testimony; if it is waived, the respondent must present the court with a clinical certificate completed by a physician, licensed psychologist, or psychiatrist before or at the initial hearing. *Id.* Note that a written deposition may be intro-

duced as evidence only if the attorney for the respondent had the opportunity to be present at the deposition and to cross-examine the deponent. MCL 330.1461(4). The respondent may waive the testimony or deposition, and, provided there is competent evidence to establish the relevant criteria under MCL 330.1401, the petitioner does not need to testify. MCL 330.1461(4).

The proponent of a particular form of treatment or placement at a specific facility pursuant to MCL 330.1469a bears the burden of proof. The proponent must show by a preponderance of the evidence that the facts support the probate court's findings with regard to an individual's treatment and placement. *In re Portus*, 325 Mich App 374, 926 NW2d 33 (2018).

Practice Tip

- *The testifying physician need not be the same person who issued one of the medical certificates filed with the petition. Instead, it may be a physician who made a separate examination of the respondent a few days before the hearing. However, on petitions for continuing hospitalization (discussed in §11.25), it is more common to have testimony from the psychiatrist who has been in charge of the patient's treatment program during the patient's stay at the hospital.*

The rules of evidence for civil cases apply. MCL 330.1459(2). All relevant, competent and material evidence is admissible, except as provided otherwise by specific statute or court rule.

The petitioner does not have to testify if the criteria can be established from other competent evidence. MCL 330.1465. The court may not order involuntary treatment unless it receives a written report or oral testimony describing the type and extent of treatment that will be provided and the appropriateness and adequacy of the treatment (alternative treatment report). MCL 330.1453a; MCR 5.741(A). The court may receive a written report about the appropriateness and adequacy of the proposed treatment in evidence without accompanying testimony if a copy is filed with the court before the hearing with a copy to the respondent's counsel (who may subpoena the preparer to testify). MCR 5.741(B).

A respondent may be called to testify against the respondent's wishes as long as the respondent's answers will not tend to subject the respondent to criminal penalties. *Baker.* The court in *Baker* reasoned that it is only by hearing the respondent's answers to such questioning that the finder of fact may make an informed judgment about the nature of the respondent's mental or psychological disablement. In this case it was the judge who called the respondent to testify, but the same logic would apply if the prosecutor called the respondent to testify.

5. Testimony by Conference Telephone Call

§11.18 If the respondent is present in another county, it may be difficult for all of the witnesses to be present at the hearing. In such cases, the court may wish to permit testimony by conference telephone call, as permitted by MCR 2.402. A party who wants to arrange for testimony by telephone must submit a written request to the court at least seven days before the hearing, and serve a copy on the other parties, unless good cause is shown to waive this requirement. The

court may, with the consent of all parties or for good cause (with notice to the parties), direct that the testimony of a witness be taken by conference telephone call. The party who requests this procedure must pay the cost for its use, unless the court directs otherwise. If the procedure is initiated by the court, the cost for its use is to be shared equally, unless the court directs otherwise.

6. Conducting Hearing via Interactive Video Technology (IVT)

§11.19 MCR 5.140 provides that on the request of any participant or sua sponte, the probate court may allow videoconferencing (with some exceptions) in accordance with MCR 2.407. Effective September 9, 2022, under MCR 2.407, trial courts may determine the manner and extent of the use of videoconferencing and may require participants to attend proceedings by videoconferencing technology, including the use of a remote video platform through an audio-only option. *See* ADM File No 2020-08.

Probate courts are authorized to use two-way interactive video technology (IVT) to conduct hearings for initial involuntary treatment and continuing mental health treatment. Use of IVT must be in accordance with State Court Administrative Office requirements and guidelines. All proceedings using IVT must be recorded verbatim by the court. MCR 5.140(D). Check with the probate court where the petition has been filed to determine whether it uses IVT to conduct hearings.

In a mental health proceeding, the court must allow the subject of the petition to be physically present unless the court waives or excludes the physical presence of the subject under MCL 330.1455. This right does not apply to proceedings concerning an individual originally committed under MCL 330.2050.

D. Orders

1. In General

§11.20 If the court finds that the respondent is not a *person requiring treatment,* the court must enter a finding to that effect and, if the respondent was hospitalized or admitted to a facility before the hearing, must order that the person be discharged immediately. MCL 330.1468(1).

AOT (also known as "Kevin's Law") may be ordered regardless of what the petitioner has initially requested in the petition. AOT may be ordered in combination with hospitalization. MCL 330.1434; .1474; .1474a; .1475.

If the respondent is found to be a *person requiring treatment,* the court has the option to

- order that the individual be hospitalized in a hospital recommended by the community mental health services program or other entity as designated by DHHS;
- order that the individual be hospitalized in a private or veterans administration hospital at the request of the respondent or the respondent's family, if private or federal funds are to be used and if the hospital agrees;

- order that the individual undergo a program of combined hospitalization and assisted outpatient treatment as recommended by the community mental health services program or other entity as designated by DHHS; or
- order that the individual receive AOT through a community mental health services program or other entity as designated by DHHS. See MCL 330.1468(2)(d) for a list of therapies and treatments the order may include.

MCL 330.1468(2); *see* SCAO form PCM 214 (Initial Order After Hearing on Petition for Mental Health Treatment).

Before ordering a course of involuntary treatment, the court must

- except for petitions that seek only AOT, review the alternative to hospitalizations report prepared under MCL 330.1453a not more than 15 days before the court issues the order;
- inquire as to the adequacy of treatment to be provided, either by reviewing the written report or receiving oral testimony;
- determine if there is an agency or mental health professional capable of supervising the treatment program; and
- inquire into the individual's desires regarding alternatives to hospitalization.

MCL 330.1469a(1); MCR 5.741(A). If an alternative to hospitalization is adequate to meet the individual's treatment needs and prevent harm that the individual might inflict on the individual's self or others in the near future and an agency or mental health professional is available to supervise the program, the court must issue an order for assisted outpatient treatment or combined hospitalization and assisted outpatient treatment in accordance with MCL 330.1472a. MCL 330.1469a(2). If the court orders assisted outpatient treatment as an alternative to hospitalization, the court order must follow MCL 330.1468(2)(d). MCL 330.1469a(3).

Hospitalization must not be ordered unless the hospital in which the respondent is to be hospitalized can provide the respondent with treatment adequate and appropriate to the respondent's condition. MCL 330.1470.

Copies of court orders must be given to

- the respondent,
- the respondent's guardian, if applicable,
- the respondent's attorney,
- the executive director of the community mental health services program, and
- the hospital director of any hospital in which the respondent is or will be a patient.

MCL 330.1464.

When an involuntary treatment order for hospitalization or for a combination of hospitalization and AOT is entered (but not an order for AOT only or an order of involuntary treatment for substance use disorder, MCL 330.1464a(3)), the

court must immediately order that the Department of State Police enter the order into the law enforcement information network (LEIN). An AOT-only order is not reported to LEIN unless there is a subsequent court-ordered hospitalization. MCL 330.1464a(1). The order is removed from LEIN only on receipt of a subsequent court order to that effect. MCL 330.1464a(2). See MC 239, Removal of Entry from LEIN.

Note that a determination that an individual requires treatment and a court order authorizing hospitalization or assisted outpatient treatment does not constitute a finding of legal incompetence. Only the appointment of a guardian operates as an adjudication of legal incompetence. MCL 330.1489. Individuals receiving involuntary mental health treatment must receive a copy of MCL 330.1489 on the commencement of treatment and may receive a copy on request when discharged. MCL 330.1490.

2. Hospitalization and AOT Order

§11.21 An initial order of combined hospitalization and assisted outpatient treatment program may not exceed 180 days, and the hospitalization portion may not exceed 60 days. MCL 330.1472a(1)(c). During the period of an order of combined hospitalization and AOT, hospitalization may be used as clinically appropriate and when ordered by a psychiatrist, for up to the maximum period specified in the order. Subject to MCL 330.1475 (see §11.24), the director of the AOT program makes the decision to hospitalize the individual and must notify the court that the individual is hospitalized and submit a statement from a psychiatrist explaining the need for hospitalization. MCL 330.1474a.

Practice Tips

- *AOT with hospitalization is a useful disposition if long-term hospitalization is not anticipated and there is a risk the individual will not follow through with treatment without a court order in place.*
- *It is often useful to ask the person who executed the clinical certificate to address the recommended course of treatment. This evidence can then be considered along with the report on alternative treatment programs. The court may be asked to order that, upon release from hospitalization, the individual reside in a setting approved by the person or agency supervising treatment. Such requests should be carefully considered because with this type of request, the court essentially delegates its responsibility to order the conditions of alternative treatment.*

3. Assisted Outpatient Treatment

§11.22 Along with the option that an AOT order include a case management plan and case management services, the court may order one or more of the following:

- medication
- blood or urine tests to determine compliance with or the effectiveness of prescribed medications
- individual or group therapy

- day or partial day programs
- educational and vocational training
- supervised living
- assertive community treatment team services
- alcohol or substance use disorder treatment, or both
- alcohol or substance abuse testing, or both, for individuals with a history of alcohol or substance abuse and for whom that testing is necessary to prevent a deterioration of their condition (a court order for alcohol or substance abuse testing is subject to review every six months)
- any other services prescribed to treat the individual's mental illness and either to assist the individual in living and functioning in the community or to help prevent a relapse or deterioration that may reasonably be predicted to result in suicide or the need for hospitalization

MCL 330.1468(2)(d).

A psychiatrist must supervise preparation and implementation of the AOT treatment plan, which must be completed within 30 days of entry of the order. A copy of the plan must be sent to the court within 3 days of completion of the plan, to be maintained in the individual's file. MCL 330.1468(3). The AOT treatment plan will be more detailed than the court order and enables the court to determine noncompliance, if necessary.

In developing an AOT order, the court must consider the preferences and medication experiences of the respondent or of the respondent's designated representative. MCL 330.1468(4). The court must also consider whether the respondent has an existing plan of services under MCL 330.1712. MCL 330.1468(4) This would include nearly everyone who has received court-ordered mental health services in the past. *See* MCL 330.1702.

The court must also take into consideration any durable powers of attorney or advance directives. MCL 330.1468(4) If the respondent does not have a power of attorney or advance directive, the community mental health services program must determine whether the respondent would like one and, if so, must direct the respondent to the appropriate community resource for help in obtaining one. MCL 330.1468(5).

If the court issues an AOT order that conflicts with a preexisting plan of service, a durable power of attorney, or an advance directive, the order must be reviewed by a psychiatrist not previously involved with the order for possible adjustment. Also, if there is a conflict, the court must state its reasoning for conflicting with these other directives on the record or in writing if the court takes the matter under advisement. MCL 330.1468(6).

Noncompliance with AOT orders. If the respondent does not comply with an AOT order, the supervising agency or mental health professional must notify the court of the noncompliance immediately. MCL 330.1475(1). If the court becomes

aware of the noncompliance, it may require one or more of the following, without a hearing:

- the individual be taken to the preadmission screening unit of a community mental health services program
- the individual be hospitalized for a period of not more than 10 days (even if all previously ordered hospitalization days have been used)
- if recommended by the community mental health services program serving the community where the individual resides, the individual be hospitalized for more than 10 days but not longer than the duration of the order for AOT or 90 days, whichever is less

MCL 330.1475(4); *see* SCAO form PCM 244 (Order After Notice of Noncompliance with Assisted Outpatient Treatment or Combined Hospitalization and Assisted Outpatient Treatment Order). The court may direct peace officers or security transport officers to transport the individual to a designated facility or to a preadmission screening unit. The court may also specify conditions under which the individual may return to AOT before the order expires. A respondent hospitalized without a hearing may object to the hospitalization according to the provisions of MCL 330.1475a.

4. Orders for Hospitalization

§11.23 An initial order for hospitalization must not exceed 60 days. MCL 330.1472a(1)(a).

Occasionally, the specific hospital where the treatment is to take place becomes an issue. When the individual is a client of a community mental health (CMH) services program, CMH makes the decision. MCL 330.1468(2). If there is a dispute among counties as to which is responsible, DHHS may be of assistance. The court may also take into account the individual's residence, giving preference to the hospital nearest the individual's residence, unless the individual specifically requests otherwise. MCL 330.1471. The bottom line is that CMH determines the site for treatment of its patients, and private-pay patients have their choice as long as the hospital agrees.

5. Proceedings Regarding Hospitalization Without a Hearing

§11.24 During the period of an order for assisted outpatient treatment or combined hospitalization and assisted outpatient treatment, the supervisor of the program must notify the court in writing if the individual is not complying with the court order or if the alternative treatment has not been or will not be sufficient to prevent the individual from harming the individual's self or others, and the individual may notify the court in writing if the individual believes that the assisted outpatient treatment program is not appropriate. MCL 330.1475(1); MCR 5.744(B); *see* SCAO form PCM 230 (Notification of Noncompliance and Request for Modified Order). The court may then do either of the following without a hearing:

- consider other alternatives to hospitalization and modify the order to direct that the individual undergo another program of assisted outpatient treatment for the duration of the order
- modify the order to direct that the individual undergo hospitalization or combined hospitalization and assisted outpatient treatment (The duration of the hospitalization, including the number of days the individual has already been hospitalized if the order being modified is a combined order, may not exceed 60 days for an initial order or 90 days for a second or continuing order. The modified order may provide that if the individual refuses to comply with the psychiatrist's order to return to the hospital, a peace officer will take the individual into protective custody for transport to the hospital.)

MCL 330.1475(2); *see also In re KB*, 221 Mich App 414, 562 NW2d 208 (1997) (the court's power to order rehospitalization without a prior hearing does not violate the due process clauses of the United States and Michigan constitutions). *See* SCAO form PCM 217a (Order to Modify Order for Assisted Outpatient Treatment or Combined Hospitalization and Assisted Outpatient Treatment). Although MCL 330.1475(2) authorizes the court to modify an order without a hearing, the court may require evidence to constitute a factual basis for modifying the order and hold a hearing at which the prosecutor and the respondent's attorney are present and testimony is taken.

If the court enters a new or modified order without a hearing, the court must serve the individual with a copy of the order and, if the order includes hospitalization, notice of the right to object and demand a hearing. MCR 5.744(C); *see* SCAO form PCM 241 (Notice of Right to Object to Hospitalization and Objection and Demand for Hearing). The individual may file an objection within 7 days after receipt of the notice. *See* SCAO form PCM 204 (Notice of Hearing and Appointment of Attorney on Objection to Hospitalization or Administrative Admission). If the individual files an objection, the court must schedule a hearing for a determination that the individual requires hospitalization within 10 days after receiving the objection. MCL 330.1475a; MCR 5.744(D). The hearing is without a jury, and the party seeking hospitalization must present evidence that it is necessary. MCR 5.744(E); *see* SCAO form PCM 234 (Order After Hearing on Objection to Hospitalization).

Procedures vary around the state on how orders are issued by the court when an individual on an alternative treatment order becomes noncompliant. Some courts place the testimony of the CMH worker on the record, showing the reasons modification is being sought. Some courts permit re-hospitalization without the necessity of a new court order.

6. Second and Continuing Orders

§11.25 At least 14 days before an order of involuntary mental health treatment expires, if the hospital director overseeing hospitalization or the agency or mental health professional supervising an individual's assisted outpatient treatment believes the individual continues to be a *person requiring treatment* and that the individual is likely to refuse voluntary treatment when the order expires, the

hospital director or supervisor must file a petition for a second or continuing order of involuntary mental health treatment. The petition must contain

- a statement setting forth the reasons for the hospital director's or supervisor's or their joint determination that the individual continues to be a *person requiring treatment,*
- a statement describing the treatment program provided to the individual,
- the results of that course of treatment, and
- a clinical estimate as to the time further treatment will be required.

The petition must also be accompanied by a clinical certificate executed by a psychiatrist. MCL 330.1473; *see* SCAO form PCM 218 (Petition for Second Mental Health Treatment Order).

The court, on receiving a petition before the initial order expires and finding that the individual continues to be a *person requiring treatment,* must issue a second order for involuntary treatment. The order cannot exceed 90 days, whether it directs hospitalization only, assisted outpatient treatment only, or a combination of hospitalization and assisted outpatient treatment.

MCL 330.1472a(2); *see* SCAO form PCM 219 (Second Order for Mental Health Treatment).

The court, on receiving a petition before the second order or a continuing order expires and finding that the individual continues to be a *person requiring treatment,* must issue a continuing order for involuntary treatment. The order cannot exceed one year. MCL 330.1472a(3), (4); *see* PCM 219. The court is limited to issuing consecutive one-year continuing orders for involuntary treatment until a continuing order expires without a petition having been filed or the court finds that the individual is not a *person requiring treatment.* MCL 330.1472a(4). A provider of assisted outpatient treatment must also notify the court when the assisted outpatient treatment is terminated. MCL 330.1477(2).

To determine the type of treatment to order after a hearing on a petition for a second or continuing order under MCL 330.1473, the court looks to MCL 330.1468(2). *In re Portus*, 325 Mich App 374, 926 NW2d 33 (2018).

Note that the statutory requirements for commitment proceedings, including the right to a jury trial, apply to both the original petition for involuntary treatment and all subsequent petitions for continuing involuntary treatment. *In re Wagstaff*, 93 Mich App 755, 761, 287 NW2d 339 (1979).

If a petition for a second or continuing order of involuntary treatment is not brought by the hospital director or supervisor at least 14 days before the expiration of the prior order, any person who believes that an individual continues to be a *person requiring treatment* may file a petition for another initial order of involuntary mental health treatment. MCL 330.1472a(5).

In *In re Eddins*, No 360060, ___ Mich App ___, ___ NW2d ___ (Aug 11, 2022), the court of appeals affirmed the trial court's decision to grant a continuing treatment petition, finding that the failure of the petition to meet all of the Men-

tal Health Code requirements did not deprive the probate court of jurisdiction. Although the petition failed to completely comply with MCL 330.1473 by failing to contain any information related to the respondent's current condition, at the hearing the petitioner requested and was allowed to amend the petition and cure the defect.

E. Discharges and Leaves

§11.26 Discharge or leave from hospitalization. The hospital must notify the court on discharge of an individual who was hospitalized by court order. MCL 330.1476.

If an individual is subject to a combined order of hospitalization and AOT, the decision to release the individual to the AOT program is made by a psychiatrist designated by the hospital director, and the psychiatrist must consult with the director of the AOT program. The decision regarding discharge from the AOT program is made by a psychiatrist designated by the AOT program. MCL 330.1474(1).

The hospital director must discharge any patient hospitalized subject to an order of continuing hospitalization who has been on an authorized leave or absence from the hospital for a continuous period of one year and must notify the court of the discharge. MCL 330.1479. Leaves and absences from the hospital otherwise are governed by the hospital's procedures. MCL 330.1479. However, when an individual receiving involuntary treatment is returned to the hospital from an authorized leave lasting more than 10 days, the hospital director must, within 24 hours, notify the court of the return and notify the individual of the right to appeal the return. The court must notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the individual wants a hearing. MCR 5.743(B); *see* SCAO form PCM 227 (Notice to Attorney of Return to Hospital/Facility from Authorized Leave). A hearing may be demanded within seven days after the individual receives notice of the right to appeal, and the court must schedule a hearing within seven days of the court's receipt of the demand. MCR 5.743(C). At least three days before the hearing, the hospital director must deliver copies of a clinical certificate and current alternative treatment report to

- the court,
- the individual, and
- the individual's attorney.

MCR 5.743(D); *see* SCAO form PCM 208a (Supplement to Clinical Certificate on Appeal of Return to Hospital/Facility). At the hearing, the hospital director must show that the individual requires treatment in a hospital. The clinical certificate may be admitted in evidence without accompanying testimony, but the individual's attorney may subpoena the preparer to testify. MCR 5.743(E).

If the court finds that the individual requires treatment at a hospital, it must dismiss the appeal and order the individual returned to the hospital. If not, the court may either

- order the individual returned to authorized leave status or
- order an alternative treatment to hospitalization—
  - if the individual was under an order of hospitalization of up to 60 days, for a period not to exceed the difference between 90 days and the combined time the individual has been hospitalized and on authorized leave status, or
  - if the individual was under an order of hospitalization of up to 90 days or under a continuing order, for a period not to exceed the difference between one year and the combined time the individual has been hospitalized and on authorized leave status.

MCR 5.743(F); *see* SCAO form PCM 232 (Order Following Hearing on Appeal of Return to Hospital/Facility from Authorized Leave).

Discharge or Leave from Intellectual Disability Treatment. The facility must notify the court on discharge of an individual who was admitted by court order and the prosecuting attorney if the individual met the criteria for treatment under MCL 330.1515(b) (i.e., the individual was arrested or charged with an offense that was the result of an intellectual disability). MCL 330.1525(3). A provider of alternative treatment must also notify the court when the alternative treatment is terminated. MCL 330.1526(2).

A resident admitted by court order may petition the court for discharge once a year from the date of the original order of admission. The petition must be accompanied by a physician's or a licensed psychologist's report stating the reasons that the resident no longer meets the criteria for treatment. If no report accompanies the petition because the resident is indigent or is unable for reasons satisfactory to the court to procure a report, the court must appoint a physician or a licensed psychologist to examine the resident and furnish a report to the court. If the report concludes that the resident continues to meet the criteria for treatment, the court must notify the resident and dismiss the petition for discharge. *See* SCAO form PCM 225 (Order Dismissing Petition for Discharge from Judicial Admission). If the report concludes otherwise, a hearing under MCL 330.1517–.1522 is held. MCL 330.1532.

The facility must discharge any resident admitted subject to court order who has been on an authorized leave or absence from the facility for a continuous period of one year and must notify the court of the discharge. MCL 330.1528(2). Leaves otherwise are governed by DHHS's procedures (or the procedures of a private facility's governing board). MCL 330.1528(1). However, when an individual receiving involuntary mental health treatment is returned to the facility from an authorized leave in excess of 10 days, the facility must, within 24 hours, notify the court of the return and notify the individual of the right to appeal the return and have a hearing to determine the appeal. MCL 330.1537(3); MCR 5.743b(B); *see Duckett v Solky*, No 357346, ___ Mich App ___, ___ NW2d ___ (June 2, 2022) (defendant's failure to provide notice and opportunity to appeal violated plaintiff's procedural due process rights guaranteed by Fourteenth Amendment); SCAO form PCM 233 (Notice of Right to Appeal Return and Appeal of Return from

Authorized Leave). The court must notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the individual wants a hearing. *See* PCM 227 (Notice to Attorney of Return to Hospital/Facility from Authorized Leave).

An individual who wishes to appeal must request a hearing in writing within 7 days of the notice to the individual. The court must schedule the hearing to be held within 7 days of the court's receipt of the request.

At least 3 days before the hearing, the director of the facility must deliver to the court, the individual, and the individual's attorney, a statement setting forth

- the reason for the individual's return,
- the reason the individual is believed to need care and treatment at the facility, and
- the plan for further care and treatment.

MCR 5.743b(D). The court may also order an examination of the individual and that a report be filed with the court. MCR 5.743b(E).

At the hearing, the director of the facility must show that the individual requires treatment at the facility and that no alternative is available and adequate to meet the individual's needs.

If the court finds that the individual requires treatment at the facility, it must dismiss the appeal and order the individual to remain at the facility. If the court finds that the director lacked an adequate basis for concluding that the individual requires further treatment at the facility, it may either

- order the individual returned to authorized leave status or
- order that the individual undergo an alternative program of care and treatment for up to one year.

MCR 5.743b(G); *see* PCM 232.

F. Review Procedures

§11.27 Each individual subject to a one-year order of involuntary mental health treatment, including hospitalization and AOT, has the right to adequate and prompt review of the individual's current status as a person requiring treatment. Six months from the date of a one-year order of involuntary mental health treatment, the executive director of the community mental health services program responsible for treatment or, if private arrangements for the reimbursement of mental health treatment services have been made, the hospital director or director of the AOT program, must assign a physician or licensed psychologist to review the individual's clinical status as a person requiring treatment. MCL 330.1482.

The results of each periodic review are made part of the individual's record, and a written report, *see* SCAO form PCM 226, Six-Month Review Report, must be filed within five days of the review with the court that last ordered the individual's treatment. Within those five days, the director of the hospital or treatment

program must give notice of the results of the review and information on the individual's right to petition for discharge to

- the individual,
- the individual's attorney,
- the individual's guardian, and
- the individual's nearest relative or a person designated by the individual.

MCL 330.1483(1).

If the report concludes that the individual requires continuing involuntary mental health treatment and the individual or the executive director objects to the conclusion, the individual or the executive director has the right to a hearing and may petition the court for discharge of the individual from the treatment program. This petition must be presented to the court within seven days (excluding Sundays and holidays) after the report is received. MCL 330.1484; *see* SCAO form PCM 220 (Petition for Discharge from Continuing Mental Health Treatment).

If the court finds that the individual is no longer a *person requiring treatment,* the court must enter a finding to that effect and must order that the individual be discharged. If the court finds that the individual continues to be a *person requiring treatment,* after consideration of complaints submitted, the court may either

- continue the order or
- issue a new continuing order for involuntary mental health treatment under MCL 330.1472a(3) or (4) (see §11.25).

MCL 330.1485a; *see* SCAO form PCM 222 (Order After Hearing on Petition for Discharge from Continuing Mental Health Treatment).

II. Individuals with Developmental Disabilities

A. Jurisdiction and Venue

§11.28 The probate court has exclusive and original jurisdiction over civil commitment hearings. *See* MCL 330.1500(c); *People v McQuillan*, 392 Mich 511, 544, 221 NW2d 569 (1974).

Ancillary jurisdiction. The family division of circuit court is given ancillary jurisdiction over treatment of mentally ill persons for cases commenced on or after January 1, 1998. MCL 600.1021(2)(b). However, the ability of a court to exercise ancillary jurisdiction is extremely proscribed under Michigan jurisprudence and can be done only under extraordinary circumstances. *People v Young*, 220 Mich App 420, 434–435, 559 NW2d 670 (1996). The more likely scenario would be that a circuit and probate court in a particular county would execute a concurrent jurisdiction plan that expressly grants jurisdiction to the circuit court. MCL 600.1011.

A final order in a guardianship proceeding in probate court is appealable by right to the court of appeals. MCR 5.801(A). The court of appeals has jurisdiction over appeals from the family division of circuit court. MCR 7.203.

Venue is in the place where the individual with a developmental disability resides or is found. MCL 330.1500(c). The subject of a petition, any interested person, or the court on its own motion may request a change of venue because of residence; convenience to parties, witnesses, or the court; or the individual's mental or physical condition or because an impartial trial cannot be had in the county where the action is pending. MCL 330.1517(6); *see also* MCR 5.128. MCR 2.222 and 2.223 govern the procedure for change of venue. MCR 5.128.

B. Objections to Administrative Admissions

§11.29 An individual with a developmental disability under 18 years of age may be admitted to a facility on an administrative basis on application by a parent, guardian, or, in the absence of a parent or guardian, a person *in loco parentis* if it is determined that the minor is suitable for admission. An individual with a developmental disability who is 18 years of age or older may be admitted to a facility on an administrative basis on application by the individual if competent to do so, or by the individual's guardian if the individual is not competent to do so, and if it is determined that the individual is suitable for admission. MCL 330.1509.

Developmental disability is defined as a severe, chronic condition that

- is attributable to a mental or physical impairment or a combination of mental and physical impairments;
- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care
  - receptive and expressive language
  - learning
  - mobility
  - self-direction
  - capacity for independent living
  - economic self-sufficiency; and
- 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.

For individuals age five and under, a *developmental disability* is a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined above if services are not provided. MCL 330.1100a(26).

If the alleged individual with a developmental disability objects to administrative admission, an objection may be filed with the court by a person found suitable

by the court or by the resident if the person is at least 13 years old. *See* SCAO form PCM 203 (Objection to Administrative Admission (Individual with Developmental Disability)). An objection may be made within 30 days after admission and at any six-month interval following the date of the original objection or, if an original objection was not made, at any six-month interval following the date of admission. MCL 330.1511(1).

An objection to admission must be made in writing, except that if made by the resident, the objection may be communicated to the court or probate judge and the executive director of the community mental health services program by any means, including but not limited to oral communication or informal letter. If the resident informs the facility that the person wants to object to the admission, the facility must help the resident submit an objection to the court. MCL 330.1511(2).

On receiving notice of an objection, the court must schedule a hearing to be held within seven days (excluding Sundays and holidays) and give notice of hearing to

- the person who objected,
- the resident,
- the person who executed the application,
- the executive director, and
- the director of the facility.

MCL 330.1511(3); *see* SCAO form PCM 204 (Notice of Hearing and Appointment of Attorney on Objection to Hospitalization or Administrative Admission).

The hearing is governed by MCL 330.1517–.1522 (see §§11.38–11.41), including the appointment of counsel and an independent medical or psychological evaluation, that the court considers necessary to ensure that all relevant information is brought to its attention. MCL 330.1511(4).

The court must sustain the objection and order the resident's discharge if the resident does not need the care and treatment that is available at the facility or if an alternative to the care and treatment provided in a facility is available and adequate to meet the resident's needs. Unless the court sustains the objection and orders the resident's discharge, the facility may continue to provide residential and other services. MCL 330.1511(5), (6); *see* SCAO form PCM 205 (Order Following Hearing on Objection by Minor to Hospitalization/Administrative Admission).

Unwillingness or inability of the parent, guardian, or person in loco parentis to provide for the resident's management, care, or residence is not a ground for refusing to sustain the objection and order discharge, but in that event, the objecting person may, or a person authorized by the court will, promptly file a petition under the neglect provisions of the juvenile code to ensure that suitable management, care, or residence is provided. MCL 330.1511(7).

C. Individuals Subject to Intellectual Disability Treatment

§11.30 No person under age 18 may be judicially admitted to a center, facility, private facility, or other residential program. MCL 330.1503(1). An individual with a developmental disability other than intellectual disability is eligible for temporary admission under MCL 330.1508 and administrative admission under MCL 330.1509. MCL 330.1504.

Only an individual 18 years of age or older who has been diagnosed as having an intellectual disability who "can be reasonably expected within the near future to intentionally or unintentionally seriously physically injure himself or herself or another person, and has overtly acted in a manner substantially supportive of that expectation" or who has been arrested and charged with an offense that was a result of the intellectual disability may be court-ordered to an appropriate outpatient treatment or judicially admitted to an appropriate treatment facility. MCL 330.1515.

Intellectual disability refers to a condition manifesting before age 18 that is characterized by significantly subaverage intellectual functioning and related limitations in two or more adaptive skills and that is diagnosed based on the following assumptions:

- A valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.
- The existence of limitations in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the individual's particular needs for support.
- Specific adaptive skill limitations often coexist with strengths in other adaptive skills or other personal capabilities.
- With appropriate supports over a sustained period, the life functioning of the individual with an intellectual disability will generally improve.

MCL 330.1100b(13).

D. Petition for Intellectual Disability Treatment

1. Form and Contents

§11.31 Any person found suitable by the court may file a petition for treatment. MCL 330.1516(1). The petition must contain

- the alleged facts that are the basis for the assertion that the respondent meets the criteria for treatment,
- the names and addresses, if known, of any witnesses to alleged relevant facts, and
- if known, the name and address of the respondent's nearest relative or guardian.

MCL 330.1516(2).

The petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 points for body text and no less than 10 point for footnotes. The petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The petition must comply with MCR 1.109. The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6). If the state court administrative office (SCAO) has approved a form for a particular purpose, it must be used while preparing that particular document for filing with the court. MCR 5.113(A).

The petition must also

- identify the petitioner and state the petitioner's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

If a party is represented by an attorney, the petition must be signed by at least one attorney of record. MCR 1.109(E)(2). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2)–(4). An electronic signature is acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must be either authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b); *see* SCAO form PCM 224 (Petition for Judicial Admission).

Practice Tips

- *If a pick-up order for transport of the respondent to a facility for examination is sought, the petition should also allege facts from which the court may determine that the respondent will not comply with the order of examination. MCL 330.1516(4). See §11.33 regarding pick-up orders.*
- *A petition for involuntary mental health treatment under Chapter 4 of the Mental Health Code may be filed for an individual with developmental disabilities instead of a petition for intellectual disability treatment under Chapter 5. Consider the facts and circumstances of the situation to determine which type of petition to file.*

2. Order for Examination and Report

§11.32 If the petition appears on its face to be sufficient, the court must order that the respondent be examined and the report of examination be prepared. The court must appoint a qualified person (who may, but need not be, an employee of the community mental health services program or of the court) to arrange for the examination, to prepare the report, and file it with the court. MCL 330.1516(3).

The report of the examination must contain

- evaluations of the respondent's mental, physical, social, and educational condition;
- a conclusion as to whether the respondent meets the criteria for treatment specified in MCL 330.1515;
- a list of available forms of care and treatment that may serve as an alternative to admission to a facility;
- a recommendation as to the most appropriate living arrangement for the respondent; and
- the signatures of one physician and one licensed psychologist or two physicians who performed examinations serving in part as the basis of the report.

MCL 330.1516(6); *see* SCAO form PCM 215 (Order for Report on Petition for Judicial Admission), PCM 215a (Certification and Report on Petition for Judicial Admission). The court must dismiss the petition unless the report concludes that the respondent meets the criteria for treatment and is signed by one physician and one licensed psychologist or two physicians who made those conclusions. MCL 330.1516(8).

3. Pick-Up Orders

§11.33 If it appears to the court that the respondent will not comply with an order of examination, the court may order a peace officer to take the respondent into protective custody. MCL 330.1516(4). After the respondent is in custody, a peace officer or security transport officer must transport the respondent immediately to a facility or other suitable place recommended by the community mental health services program for up to 48 hours for the ordered examination. *Id.*; *see* SCAO form PCM 224 (Petition for Judicial Admission).

4. Orders for Immediate Admission

§11.34 If, after the respondent is examined, it appears to the court that the respondent requires immediate admission to the community mental health services program's recommended facility to prevent physical harm to the respondent's self or to others pending a hearing, the court must enter an order to that effect. Within 12 hours after the respondent is admitted, the facility must provide the respondent with

- a copy of the petition;

- a copy of the report; and
- a written statement in simple terms explaining the respondent's rights
  - to a hearing under MCL 330.1517,
  - to be present at the hearing, and
  - to be represented by counsel

  if one physician and one licensed psychologist or two physicians conclude that the individual meets the criteria for treatment. MCL 330.1516(5).

If immediate admission is not ordered, the respondent must be allowed to return home. *Id.*

5. Notice to Respondent of Rights

§11.35 Within four days of receipt of the report of the initial examination, the court must make sure the respondent is given a copy of the petition and of the report (unless previously given) and notice of the right

- to have a full court hearing,
- to be present at the hearing,
- to be represented by legal counsel,
- to demand a jury trial, and
- to obtain an independent medical or psychological evaluation.

MCL 330.1517(2)(d); *see* SCAO form PCM 212 (Notice of Hearing and Advice of Rights).

6. Appointment of Counsel and Guardians ad Litem

§11.36 The respondent is entitled to legal counsel in the same manner as counsel is provided for under MCL 330.1454. MCL 330.1517(3).

Counsel must be appointed 24 hours after receipt of the petition if the respondent has been admitted to a facility, and within 48 hours if respondent has not been admitted to a facility. MCL 330.1454(2). If the respondent is indigent, the court must compensate appointed counsel in a reasonable amount that is based on time and expenses. MCL 330.1454(5).

Counsel must consult with the respondent at least 24 hours before the hearing. If the respondent is admitted to a facility pending the hearing, counsel must consult with the respondent for the first time within 72 hours after the petition and report have been filed with the court. After consultation, counsel promptly must file with the court a certificate stating that counsel personally has seen and has consulted with the respondent. MCL 330.1454(7)–(9); *see* SCAO form PCM 223 (Certificate of Legal Counsel/Waiver of Attendance).

Counsel must represent the respondent in all probate court proceedings under the Mental Health Code until counsel is discharged by court order or another attorney files an appearance on the respondent's behalf. Counsel must serve as an

advocate for the respondent's preferred position or, if none is expressed, for the position that counsel believes is in the respondent's best interest. MCR 5.732.

On notice that the respondent prefers other counsel and the preferred counsel agrees to accept the appointment, the court must replace the initially appointed counsel. MCL 330.1454(4).

Practice Tip

- *Most courts will grant a request for other counsel once. Many courts encourage counsel to call at once when it is apparent the attorney-client relationship has broken down. This gives the court an opportunity to appoint successor counsel in time to meet the 24-hour requirement without having to grant an adjournment.*

The respondent has the right to waive counsel. MCL 330.1454(3). Any waiver must be made voluntarily and understandably. A waiver will not be granted unless it is made in open court after respondent has had an opportunity to confer with counsel. MCR 5.732(C).

The issue of whether a trial court was thorough enough when it allowed a criminal defendant to waive counsel was analyzed in *People v Blunt*, 189 Mich App 643, 473 NW2d 792 (1991). While commitment proceedings are civil proceedings, this case may provide the probate court with helpful guidelines when a respondent insists on the right to self-representation. The court should explain to the person the following:

- Counsel must advocate for the expressed wishes of the respondent.
- The respondent may request particular counsel. The court will make the appointment when the requested attorney agrees to serve at a reasonable fee.
- Self-representation is almost always unwise, and the respondent may conduct a defense ultimately to the respondent's detriment.
- The respondent can receive no special indulgence from the court.
- The respondent must follow all the technical rules of substantive law, procedure, and evidence in making motions, objections, presentation of evidence, voir dire, and argument.
- The petitioner will be represented by an experienced professional counsel who will not proceed less vigorously because the respondent is not represented by counsel. From the standpoint of professional skill, training, education, experience, and ability, it will definitely not be an even fight.

Guardians ad litem. If counsel is waived, or if the court deems it necessary for any other reason, the court may appoint a guardian ad litem to represent the respondent's interests. MCR 5.121(A), 5.732(C); *see* SCAO form PC 642 (Order Appointing Guardian Ad Litem/Attorney/Lawyer-Guardian Ad Litem). The court must state the purpose of the appointment in the order of appointment, which may be entered without notice. MCR 5.121(A). The guardian ad litem does not have an attorney-client relationship with the respondent, and communications between the two of them are not privileged. MCR 5.121(E)(1).

The guardian ad litem must, before the hearing date, conduct an investigation, report in open court or file a written report of the investigation, and give recommendations. The guardian ad litem need not appear personally at the hearing unless directed by the court. The guardian ad litem must file any written report with the court at least 24 hours before the hearing unless another time is specified by the court. MCR 5.121(C). The report may be received by the court and relied on as evidence, but the respondent has a right to cross examine the guardian ad litem on request. Other interested persons also have the right to cross-examine the guardian ad litem, but only if the person is reasonably available. MCR 5.121(D).

Practice Tip

- *If the respondent insists on self-representation, the court may wish to have appointed counsel present in the courtroom during the hearing and advise the respondent that the person may consult with appointed counsel at any time.*

7. Independent Medical Examination

§11.37 The respondent is entitled to an independent examination by a physician or psychologist of the respondent's choice on the issue of whether the respondent meets the criteria for treatment. MCL 330.1517(3)(g). If the respondent is indigent, the appointed examiner must be compensated by the county's community mental health services program in a reasonable amount that is based on time and expenses. MCL 330.1522.

If an indigent respondent requests an independent examination, the court must appoint the professional chosen by the respondent, unless that person refuses to examine the respondent or the appointment would be unreasonably expensive. MCR 5.733. The court's order of appointment must direct that the examiner submit an itemized statement of services and expenses for approval. In reviewing the fee, the court must consider

- the time required for examination, evaluation, preparation of reports, and court appearances;
- the examiner's experience and training; and
- the local fee for similar services.

MCR 5.733(B).

E. Hearing

1. Notice of Hearing

§11.38 Once the court sets a date and place for hearing, which must be held within 7 days (excluding Sundays and holidays) after the court's receipt of the petition and report, the court must cause notice of the petition and of the hearing to be given to

- the respondent,
- the respondent's attorney,
- the petitioner,

- the prosecuting attorney,
- the community mental health services program,
- the director of any facility to which the respondent is admitted,
- the respondent's spouse, if the spouse's whereabouts are known,
- the respondent's guardian, if any, and
- other relatives or persons as the court may determine.

MCR 5.125(C)(18); *see* SCAO form PCM 212 (Notice of Hearing and Advice of Rights). The notice must be given at the earliest practicable time and sufficiently in advance of the hearing date to permit preparation for the hearing. MCL 330.1517(2)(c).

Service of process. A notice of hearing must be served on the respondent (by personal service), the respondent's attorney, and other interested persons as follows:

- if the hearing is to be held within seven days, at least two days before the hearing
- otherwise, at least five days before the hearing.

MCR 5.734(C). Service on interested persons other than the respondent may be by mail if the hearing will not be held within seven days. The court may permit service within a shorter period of time with the consent of the respondent and the respondent's attorney.

2. Jury Trials

§11.39 Only the respondent has a right to demand a jury, and the demand may be made at any time before testimony is received. MCR 5.740(A), (B). A written demand must be filed with the probate register, and the court may adjourn the hearing in order to impanel the jury. MCR 5.158(A). No jury fee is required. MCR 5.740(D). Once made, the jury demand may not be withdrawn without the respondent's consent in writing or in open court. *See* MCR 2.508(D)(3). Each party may peremptorily challenge three jurors, starting with the petitioner. MCR 2.511(E). Six jurors render the verdict, which must be unanimous. MCR 5.740(C).

3. Continuances and Adjournments

§11.40 The respondent is entitled to obtain a continuance for a reasonable time for good cause. MCL 330.1517(3)(c).

The failure to timely notify a spouse, guardian, or other person entitled to notice is not cause to adjourn or continue a hearing, unless the respondent or the respondent's attorney objects. MCL 330.1517(5).

4. Hearing Procedures

§11.41 The hearing must be held at either a facility or other convenient place, within or outside of the county. MCL 330.1517(2)(b). If the hearing

is not held in the court's regular courtroom, the court must ensure a quiet and dignified setting that permits an undisturbed proceeding and inspires the participants' confidence in the integrity of the judicial process. MCR 5.738(A).

The respondent is entitled to

- be represented by legal counsel,
- be present at the hearing,
- have on demand a trial by jury of six,
- obtain a continuance for any reasonable time for good cause,
- present documents and witnesses,
- cross-examine witnesses,
- require testimony in court in person from one physician or one licensed psychologist who has personally examined the respondent, and
- receive an independent examination by a physician or licensed psychologist of the respondent's choice on the issue of whether the respondent meets the criteria for treatment.

MCL 330.1517(3).

The prosecuting attorney of the county in which the court has its principal office must participate in the hearing, either in person or by assistant, unless the petitioner or another appropriate person has private counsel who will be present in court to present the case for a finding that the respondent meets the criteria for treatment. MCL 330.1517(4).

The grounds for commitment (the respondent is age 18 or older, has been diagnosed as having intellectual disability, can be reasonably expected within the near future to do seriously physical injury to the respondent's self or another and has overtly acted in a manner substantially supportive of that expectation) must be shown by clear and convincing evidence. *Addington v Texas*, 441 US 418 (1979), *cited with approval by In re Baker*, 117 Mich App 591, 594–595, 324 NW2d 91 (1982).

A respondent may be called to testify against the respondent's wishes at a mental health hearing as long as the respondent's answers will not tend to subject the respondent to criminal penalties. *Baker.*

F. Orders

1. Initial Disposition

§11.42 If the court finds that the respondent does not meet the criteria for treatment, the court must enter a finding to that effect, dismiss the petition, and, if the respondent was admitted to a facility before the hearing, direct that the respondent be discharged. MCL 330.1518(1).

If the court finds that the respondent meets the criteria for treatment, the court may enter an order that the respondent do one or a combination of the following:

- be admitted to a facility designated by DHHS and recommended by the community mental health services program
- be admitted to a licensed hospital at the respondent's request or the request of the respondent's family member, if private funds will be used and the private facility complies with all of the admission, continuing care, and discharge duties and requirements for facilities
- undergo an outpatient program for one year of care and treatment recommended by the community mental health services program as an alternative to being admitted to a facility

MCL 330.1518(2); *see* SCAO form PCM 214a (Order Following Hearing on Petition for Judicial Admission).

Before making an order of disposition under MCL 330.1518(2), the court must consider ordering a course of alternative care and treatment. To that end, the court must review the report submitted to the court under MCL 330.1516(3), considering alternatives and recommendations as provided under MCL 330.1516(6)(c)–(d). MCL 330.1519(1). If the court finds that an alternative program of care and treatment is adequate to meet the respondent's care and treatment needs and is sufficient to prevent harm or injury that the respondent may inflict on the respondent's self or on others, the court must order that the respondent receive whatever care and treatment is appropriate under MCL 330.1518(2)(c). MCL 330.1519(2). If at the end of one year it is believed that the respondent continues to meet the criteria for treatment, a new petition may be filed under MCL 330.1516. MCL 330.1519(3).

Before ordering admission to a facility, the court must inquire into the adequacy of care and treatment to be provided. The court may not order admission unless the facility can provide the respondent with care and treatment that is adequate and appropriate to the respondent's condition. MCL 330.1520. Preference between facilities must be given to the facility that can appropriately meet the respondent's needs in the least restrictive environment and that is located nearest to the respondent's residence unless the respondent requests another facility or there are other compelling reasons to reverse the preference. MCL 330.1521.

Note that a determination that an individual meets the criteria for treatment and a court order authorizing admission to a facility or alternative treatment does not constitute a finding of legal incompetence. Only the appointment of a guardian operates as an adjudication of legal incompetence. MCL 330.1540.

2. Modification of Orders for Alternative Treatment

§11.43 If at any time during the one-year period, it comes to the attention of the court either that an individual ordered to undergo an alternative treatment program is not complying with the order or that the alternative care and treatment has not been sufficient to prevent harm or injuries, the court may, without a hearing and based on the record and other available information, direct the filing of additional information and may

- consider other alternatives to admission, modify its original order, and direct that the individual undergo another outpatient program of alternative care and treatment for the rest of the one-year period;
- enter a new order for admission to a facility recommended by the community mental health services program or, if private funds are to be used, a licensed hospital requested by the individual or the individual's family; or
- set a date for a hearing.

MCL 330.1519(4); MCR 5.744a(B). Immediately on receiving notice, the court must promptly obtain from the community mental health services program a report stating the reason for concern about the adequacy of the care and treatment, its continued suitability, and the adequacy of care and treatment available elsewhere. MCR 5.744a(C); *see* SCAO form PCM 231 (Order for Report After Notification and Report).

If the court enters a new order without a hearing, it must serve the interested persons with

- a copy of the order,
- a copy of the investigation report, when available, and
- if the order includes transfer of the individual to a facility, written notification of the individual's right to object and demand a hearing. *See* SCAO form PCM 241 (Notice of Right to Object to Hospitalization and Objection and Demand for Hearing).

MCR 5.744a(D). If the court receives a written objection within 7 days from the individual or the individual's attorney, guardian, or presumptive heir, the court must schedule a hearing to be held within 10 days after receipt of the objection. MCR 5.744a(E).

The hearing is without a jury. The person seeking transfer of the individual must present evidence that the individual has not complied with the order or that the order is not sufficient to prevent the individual from inflicting harm or injury on the individual's self or others. The evidence must support a finding that transfer to another alternative treatment program, a facility, or a licensed hospital is necessary. MCR 5.744a(F).

The court may

- affirm or rescind its order of transfer,
- order a new program of care and treatment, or
- order discharge.

The court must inquire into the adequacy of available care and treatment for the individual before placing the individual in a facility. MCR 5.744a(G).

G. Discharges and Leaves

§11.44 The facility must notify the court on discharge of an individual who was admitted by court order, and the prosecuting attorney if the individual

met the criteria for treatment under MCL 330.1515(b) (i.e., the individual was arrested or charged with an offense that was the result of intellectual disability). MCL 330.1525(3). A provider of alternative treatment must also notify the court when the alternative treatment is terminated. MCL 330.1526(2).

A resident admitted by court order may petition the court for discharge once a year from the date of the original order of admission. The petition must be accompanied by a physician's or a licensed psychologist's report setting forth the reasons that the resident no longer meets the criteria for treatment. If no report accompanies the petition because the resident is indigent or is unable for reasons satisfactory to the court to procure a report, the court must appoint a physician or a licensed psychologist to examine the resident and furnish a report to the court. If the report concludes that the resident continues to meet the criteria for treatment, the court must notify the resident and dismiss the petition for discharge. *See* SCAO form PCM 225 (Order Dismissing Petition for Discharge from Judicial Admission). If the report concludes otherwise, a hearing is held pursuant to MCL 330.1517–.1522. MCL 330.1532.

The facility must discharge any resident admitted subject to court order who has been on an authorized leave or absence from the facility for a continuous period of one year and must notify the court of the discharge. MCL 330.1528(2). Leaves otherwise are governed by DHHS's procedures (or the procedures of a private facility's governing board). MCL 330.1528(1). However, when an individual receiving involuntary mental health treatment is returned to the facility from an authorized leave in excess of 10 days, the facility must, within 24 hours, notify the court of the return and notify the individual of the right to appeal the return and have a hearing to determine the appeal. MCL 330.1537(3); MCR 5.743b(B); *see* SCAO form PCM 233 (Notice of Right to Appeal Return and Appeal of Return from Authorized Leave). The court must notify the individual's attorney or appoint a new attorney to consult with the individual and determine whether the individual wants a hearing. *See* SCAO form PCM 227 (Notice to Attorney of Return to Hospital/Facility from Authorized Leave).

An individual who wishes to appeal must request a hearing in writing within seven days of the notice to the individual. The court must schedule the hearing to be held within seven days of the court's receipt of the request.

At least three days before the hearing, the director of the facility must deliver to the court, the individual, and the individual's attorney, a statement setting forth

- the reason for the individual's return,
- the reason the individual is believed to need care and treatment at the facility, and
- the plan for further care and treatment.

MCR 5.743b(D). The court may also order an examination of the individual and that a report be filed with the court. MCR 5.743b(E).

At the hearing, the director of the facility must show that the individual requires treatment at the facility and that no alternative is available and adequate to meet the individual's needs.

If the court finds that the individual requires treatment at the facility, it must dismiss the appeal and order the individual to remain at the facility. If the court finds that the director lacked an adequate basis for concluding that the individual requires further treatment at the facility, it may either

- order the individual returned to authorized leave status or
- order that the individual undergo an alternative program of care and treatment for up to one year.

MCR 5.743b(G); *see* SCAO form PCM 232 (Order Following Hearing on Appeal of Return to Hospital/Facility from Authorized Leave).

H. Periodic Reviews

§11.45 Six months after the date of an order of treatment, and every six months after that, the director of a facility to which a resident was admitted must review the resident's status as an individual meeting the criteria for treatment. MCL 330.1531(1). The results of each review must be made part of the resident's record and must be filed within 5 days of the review in the form of a written report with the court that ordered the resident's admission, *see* SCAO form PCM 226, Six-Month Review Report, and within the 5 days, the facility must give notice of the results of the review to the resident, the resident's attorney, and the resident's nearest relative or guardian. MCL 330.1531(2). If the report concludes that the resident continues to meet the criteria for treatment and the resident or someone on the resident's behalf objects to that conclusion, the resident has the right to a hearing and all other rights expressed or implied in MCL 330.1517–.1522 (see §§11.38–11.41) and may petition the court for discharge. The petition must be presented to the court or a representative of the facility within seven days (excluding Sundays and holidays) after the report is received. If the petition is presented to a representative of the facility, the representative must transmit it to the court immediately. MCL 330.1531.

III. Incompetence to Stand Trial for a Criminal Offense

A. In General

§11.46 A defendant to a criminal charge is presumed to be competent to stand trial. MCL 330.2020(1). If a defendant is determined to be incompetent, no criminal proceeding may be brought against the person during their incompetency. MCL 330.2022(1). The issue of incompetence may be raised by the defense, the prosecution, or the court at any time during the proceedings. MCL 330.2024; MCR 6.125(B).

B. Examination

§11.47 If a showing is made that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination

either at the center for forensic psychiatry or at another facility certified by the state department of mental health to perform competency examinations. MCL 330.2026(1); MCR 6.125(C)(1). If the defendant is being held in jail pending trial, the examination can be performed at the place of detention or the individual may be transported by the sheriff to a facility for examination. MCL 330.2026(2); MCR 6.125(C)(3). See MC 204.

As part of the examination process, the facility must consult with defense counsel and may consult with the prosecutor or other persons. The report must be completed within 60 days of the order. It must contain the following:

- clinical findings
- facts that are the basis of findings and additional germane facts on request of court, defense, or prosecution
- an opinion on competency
- if the opinion is that the defendant is incompetent to stand trial, an opinion on whether competency could be regained via a course of treatment within the time periods in MCL 330.2030 and .2040.

MCL 330.2028(1)–(2).

C. Hearing and Orders

§11.48 A hearing must be held within five days of the report's receipt by the court unless the prosecution or defense requests a reasonable delay for good cause that is granted by the court. MCL 330.2030(1); MCR 6.125(E). If the court determines the defendant is incompetent to stand trial, it must determine whether treatment would render the defendant competent within the time limit of MCL 330.2034 (i.e., 15 months or 1/3 the maximum sentence, whichever is lesser). MCL 330.2030(2).

If the defendant is determined incompetent to stand trial, and the court determines that treatment would not render the defendant competent within the time limit of MCL 330.2034, the court may direct the prosecutor to file, with the probate court of the defendant's county of residence, a petition asserting that the individual meets the definition of a person requiring treatment under MCL 330.1401 or the criteria for judicial admission under MCL 330.1515. MCL 330.2031. If the court determines there is a substantial probability that with treatment the defendant can be rendered competent within the time limit, treatment will be ordered, which may include, if necessary, commitment to the state department of mental health or, if the defendant agrees, another inpatient mental health facility. MCL 330.2032. See MC 205.

D. Liberty Pending Trial and Treatment Reports

§11.49 The right to liberty pending trial will not be impaired due to the issue of incompetency being raised. MCL 330.2036.

When treatment is ordered to attempt to render the defendant competent, the medical supervisor must send a written report to the court, prosecuting attorney,

defense counsel, and the center for forensic psychiatry (1) at least once every 90 days from the treatment order; (2) whenever it is believed that the defendant is no longer incompetent; and (3) whenever it is believed that there is no substantial probability that the defendant will regain competency within the time period of MCL 330.2034. MCL 330.2038.

E. Dismissal of Charges

§11.50 Charges against a person determined incompetent to stand trial will be dismissed when the court is notified by the prosecutor of an intent not to prosecute or 15 months after the date of the original determination of incompetency. The prosecutor can petition for permission to refile charges at any time if the crime alleged is punishable by life imprisonment or for other crimes within one-third of the maximum sentence for the offense. MCL 330.2044(1), (3).

Practice Tip

- *If the defendant is to be discharged or released due to expiration of time limits of MCL 330.2030, the treatment supervisor may file a petition asserting the individual meets the definition of a person requiring treatment under MCL 330.1401 or the criteria for judicial admission under MCL 330.1515. MCL 330.2034(3).*

IV. Persons Found Not Guilty by Reason of Insanity

A. Commitment to Forensic Center

§11.51 If a person is acquitted of a crime by reason of insanity, the individual must be placed in the center for forensic psychiatry for a maximum period of 60 days. A full report must be forwarded by the trial court to the center in the form of a settled record regarding the crime the patient was found to have committed but of which the patient was acquitted due to insanity. MCR 6.304(D). The center must evaluate the patient's mental condition to determine whether the patient meets the definition of a person requiring treatment under MCL 330.1401 or is eligible for judicial admission under MCL 330.1515. MCL 330.2050(1). See MC 207.

B. Report

§11.52 The center for forensic psychiatry is required to file a report with the court, the prosecuting attorney, and the defense counsel within the 60-day period. The report must contain the following:

- a summary of the not-guilty-by-reason-of-insanity (NGRI) crime
- an opinion on whether the person meets the definition of a person requiring treatment under MCL 330.1401 or the criteria for judicial admission under MCL 330.1515 and the facts forming the basis of the opinion
- if the report opines that the individual is a person requiring treatment, two clinical certificates (each must be from a physician and at least one must be from a psychiatrist)

MCL 330.2050(2).

C. Petition and Discharge

§11.53 After the court receives the report, it may direct the prosecuting attorney to file a petition under MCL 330.1434 or .1516 for an order of hospitalization or an order of admission to a facility. The petition must be filed with the probate court of the person's county of residence or in the county where the criminal trial was held. Any certificates accompanying the report may be filed with the petition even if they were not executed within 72 hours of the petition's filing. The report from the court containing the facts of the NGRI crime is admissible in the probate hearing. MCL 330.2050(3).

If the report opines that the individual is a person requiring treatment or meets the criteria for judicial admission, and if a petition is to be filed, the center for forensic psychiatry may retain the person pending the hearing. If no petition is to be filed, the prosecutor must inform the center in writing; the person will be discharged on receipt of the notification. MCL 330.2050(4); *see* SCAO form PCM 201(Petition for Mental Health Treatment), PCM 224 (Petition for Judicial Admission).

D. Release and Hospital Leave

§11.54 The release provisions of MCL 330.1476–.1479 apply to the NGRI person, except that (1) the person may not be discharged or put on leave without being evaluated and recommended for discharge or leave by the forensic program, and (2) authorized leave or absence from the hospital may be extended for up to 5 years. MCL 330.2050(5).

Pursuant to a 2021 settlement in *Pelichet v Hertel*, No 2:18-cv-11385, ___ F Supp ___ (ED Mich Mar 29, 2021), the NGRI committee will not recommend continuing hospitalization orders for NGRI persons residing in the community but, rather, may recommend continuing AOT orders. NGRI committee involvement will not exceed five continuous years of AOT.

Form 11.1
Order to Provide Mental Health Treatment Information

STATE OF MICHIGAN
[COUNTY] PROBATE COURT

In re *[name]*, Allegedly Mentally Ill Person	File No. *[number]-[case-type code]*
_____/	Judge *[name]*

[Attorney's name] (P*[number]*)
Attorney for Petitioner
[Address, telephone, email]

ORDER

A petition has been filed in this court alleging that the above-named individual is a person requiring involuntary mental health treatment under the Michigan Mental Health Code.

This petition puts the respondent's mental health at issue.

As a result of the petition, the court may order a course of treatment for mental illness. It is in the respondent's interest that any order for involuntary treatment is based on the best available information.

IT IS THEREFORE ORDERED that, after the completion of two clinical certificates as required by MCL 330.1434(3), respondent's treating physician is authorized to contact and obtain information from any other individual, including but not limited to family members or medical personnel who may have provided mental health treatment to the respondent in the past, for purposes of providing accurate diagnosis and treatment.

Dated: *[date]*

[Signature line]
Probate Court Judge

Form 11.2
Checklist for Commitment Hearing of Alleged Mentally Ill Person

Checklist for Commitment Hearing of Alleged Mentally Ill Person

- ☐ The court calls the case and the file number and indicates the type of order requested (60-day/180-day, 90-day/90-day, 365-day/365-day, straight hospitalization, assisted outpatient treatment (AOT)).
- ☐ The court asks the parties to identify themselves.
- ☐ The prosecutor proceeds: calls an expert, sometimes the petitioner, establishing the following:
  - ☐ mental illness as defined by the Mental Health Code
  - ☐ diagnosis
  - ☐ at least one of three results from the mental illness
  - ☐ no alternative to an order per an alternative treatment plan or a doctor
  - ☐ that the order requested is appropriate
  - ☐ that the outpatient means are appropriate
  - ☐ possible hospitals that are appropriate
- ☐ The respondent proceeds with proofs.
- ☐ The court makes findings:
  - ☐ The expert was qualified.
  - ☐ The expert testified that the respondent is mentally ill as defined by the Mental Health Code and regarding results.
  - ☐ The court finds by clear and convincing evidence that the respondent is mentally ill as defined by the Mental Health Code and meets at least one of three conditions.
  - ☐ There is or is not an available treatment program as an alternative to hospitalization.
  - ☐ The court identifies appropriate hospitals, outpatient treatment, and plan.
  - ☐ The court indicates that the respondent may be brought in on a psychiatrist's letter of noncompliance.
  - ☐ If AOT only, a psychiatrist must complete a treatment plan within 30 days and file it with the court within 3 days of completion.
- ☐ The court signs the order.

Exhibit 11.1
Judicial Script for Hearing on Petition for Commitment of an Alleged Mentally Ill Person

The court will call the case of *[name]*, file number *[number]*, for the county of *[county]*.

This petition is for a *[first order / second order / continuing order / order for discharge from treatment]*.

Will counsel please identify themselves for the record?

Prosecutor, you may proceed.

The Prosecutor's Case

[Make sure all required questions are asked of the testifying doctor. The prosecutor may call the doctor; some call the petitioner. Before the testimony of the doctor, qualify the person as an expert by stipulation or voir dire.]

Testimony of a Psychiatrist or Psychologist

[For a petition filed under MCL 330.1434(7) that does not seek hospitalization before the hearing, an individual may not be found to require treatment unless a psychiatrist who has personally examined that individual testifies. A psychiatrist's testimony is not necessary if a psychiatrist signs the petition. If a psychiatrist signs the petition, at least one physician or licensed psychologist who has personally examined that individual must testify. The requirement for testimony may be waived by the subject of the petition. If the testimony given in person is waived, a clinical certificate completed by a physician, licensed psychologist, or psychiatrist must be presented to the court before or at the initial hearing.]

Doctor, please state your full name and occupation.

Counsel, will you stipulate to the doctor's qualifications?

Doctor, have you had an opportunity to review the records and examine *[patient name]*?

Were you able to come to a diagnosis after your review of records and examination?

What is your diagnosis?

Does that diagnosis meet the definition of a mental illness as defined by the Michigan Mental Health Code?

As a result of that mental illness do you believe that

1. *[patient name]* can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure *[himself / herself]* or others and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation?

2. *[patient name]* is unable to attend to those basic physical needs that must be attended to in order to avoid serious harm in the near future and has demonstrated that inability by failing to attend to those basic physical needs?
3. the impairment of *[patient name]*'s judgment and *[his / her]* lack of understanding of the need for treatment has caused *[him / her]* to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of *[his / her]* condition and presents a substantial risk of significant physical or mental harm to the individual or others.

What type of order are you requesting?

Is there an available treatment program other than the order being requested today?

Is *[hospital]* an appropriate hospital for hospitalization?

Testimony of the Petitioner

[If the petitioner needs to testify, pursuant to MRE 1101(b)(10); the court may consider hearsay data that are part of the basis for the opinion presented by a testifying mental health expert. Therefore, the petitioner may use the petition and statements in it.]

Please state your name.

Are you the petitioner in this matter?

How do you know the subject of the petition?

Why did you file the petition?

What were your observations of the subject of the petition?

Based on your review of the records or observations, is it your opinion that

1. *[patient name]* can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure *[himself / herself]* or others?
2. *[patient name]* is unable to attend to those basic physical needs that must be attended to in order to avoid serious harm in the near future?
3. *[patient name]* has impaired judgment and is unable to understand the need for treatment?

The prosecutor rests its case.

The Respondent's Case

Respondent's counsel, you may proceed. *[Counsel may or may not call the client or have the client present.]*

The respondent rests its case.

Court Order Following a Hearing on a Petition for an Initial, Second, or Continuing Order

The court has been presented with *[an initial petition for a 60/180-day order / a petition for a second 90/90-day order / a petition for a continuing 365/365-day order / a petition for hospitalization only for [number] days [usually for not-guilty-by-reason-of-insanity plea] / a petition for assisted outpatient treatment without hospitalization]*.

The court has heard testimony from the following people: *[the petitioner / a psychologist / the person alleged to be mentally ill / [list others]]*. *[Briefly cover the testimony of the testifying mental health expert since that may be the only or most of the testimony given.]*

[Example summary of a doctor's testimony:]

Dr. *[name]*, a *[psychologist / psychiatrist]*, testified and *[his / her]* expertise was stipulated to by the parties.

Dr. *[name]* examined the patient on or about *[date]*, for purposes of this hearing and found *[him / her]* mentally ill as mental illness is defined by statute, with a particular diagnosis of *[diagnosis]*.

Dr. *[name]* further testified to the results that could be expected from that illness.

[Example summary of the respondent testimony:]

Respondent *[name]* testified on *[his / her]* own behalf, indicating that *[he / she]* feels *[he / she]* does not have a mental illness *[or briefly what patient claims]*.

From the testimony and the Court's own observation during the hearing *[if the respondent is present]*, this court finds by clear and convincing evidence that *[name]* is a person requiring treatment as defined by MCL 330.1401 of the Michigan Mental Health Code and does have a mental illness.

As a result of the mental illness, the court finds the following *[use all that apply]*:

1. *[Patient name]* can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure *[himself / herself]* or others and has engaged in an act or acts or made significant threats that are substantially supportive of this expectation.
2. *[Patient name]* is unable to attend to those basic physical needs that must be attended to in order to avoid serious harm in the near future and has demonstrated that inability by failing to attend to those basic physical needs.
3. The impairment of *[patient name]*'s judgment and *[his / her]* lack of understanding of the need for treatment has caused *[him / her]* to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of *[his / her]* condition and presents a substantial risk of significant physical or mental harm to the individual or others.

Based on this, the court finds that there is no alternative to the order per the doctor and the alternative treatment plan and further orders *[hospitalization for up*

to [number] days, with no assisted outpatient treatment / a 60/180-day order / a 90/90-day order / a 365/365-day order / assisted outpatient treatment only for no longer than 180 days, supervised by [county] Mental Health Services. Assisted outpatient treatment services are ordered as follows: [describe]. The assisted outpatient treatment plan must be completed by the psychiatrist within 30 days and sent to the court within three days of its completion.]

Appropriate hospitals are *[hospital name]* or any other appropriate state or Veterans Affairs hospital with follow-up through *[name of mental health authority]*, and Box 17/16 can be checked on the order also. The court has further indicated on the order all case management services allowed.

Is there anything further from counsel?

Adjourned.

12
Miscellaneous Proceedings

I. General Petition, Notice, and Service Requirements

A. Petitions

§12.1 A petition must be legibly typewritten or printed in ink and, except for attachments, with a font size of 12 or 13 point for body text and no less than 10 point for footnotes. A petition must include the name of the court and the title of the proceeding; the case number; the identification of the document; and the name, address, and telephone number of the petitioner's attorney. MCR 1.109(D)(1)(a)–(b), 5.113(A). The clerk of the court may reject a paper that does not comply. MCR 1.109(D)(6). If the State Court Administrative Office (SCAO) has approved a form for a particular purpose, it must be used when preparing that particular document for filing with the court. MCR 5.113(A).

A petition must include allegations and representations sufficient to justify the relief sought and must

- identify the petitioner and state the person's interest in the proceedings and qualification to file the petition;
- include allegations essential to establishing court jurisdiction;
- identify and incorporate any documents to be admitted, construed, or interpreted;
- include any additional allegations required by law or court rule; and
- include a current list of interested persons, indicate the existence and form of incapacity of any of them, the mailing addresses of the interested persons or their representatives, the nature of the representation, and the need for special representation.

MCR 5.113(B)(1)(a)–(e).

A petition concerning a minor who is subject to prior continuing jurisdiction of another court must contain allegations concerning the prior proceedings. MCR 5.112. MC 28, Notice to Prior Court of Proceedings Affecting Minor(s), is used to notify the prior court of the present proceeding. Many courts complete and mail this form on receipt of a petition reporting a prior proceeding. Others require that the petitioner do so.

The attorney must sign the petition but may sign on behalf of the petitioner. MCR 1.109(E)(2)(b). If the petitioner is not represented by an attorney, the petitioner must sign the petition. MCR 1.109(E)(2). An electronic signature is

acceptable if it complies with MCR 1.109(E)(4). The petition must be verified in accordance with MCR 1.109(D)(3). MCR 5.113(A). The petition must either be authenticated by verification under oath by the person making it or contain a statement immediately above the date and signature of the maker: "I declare under the penalties of perjury that this [petition] has been examined by me and that its contents are true to the best of my information, knowledge, and belief." MCR 1.109(D)(3)(a)–(b).

Filing fee. The total filing fee for commencing a civil action in probate court is $175. This includes a $150 filing fee plus a $25 electronic filing system fee. MCL 600.880(1), .1986(1)(a). The court may waive the fee if the petitioner is indigent or unable to pay and files an affidavit to that effect. MCL 600.880d. If a petition is filed by a government agency, such as the Attorney General, Department of Treasury, Department of Health and Human Services (DHHS), state public administrator, or administrator of Veterans Affairs, or by an agency of county government, there is no filing fee. MCL 600.880(4). Guardianships require a $175 filing fee. MCL 600.880a, .1986(1)(a).

B. Notice of Hearing and Service of Process

§12.2 The petitioner, fiduciary, or other moving party is responsible for serving notice of hearing and a copy of the petition on all interested persons. MCR 5.102; .107(A); *see* SCAO form PC 562 (Notice of Hearing). Service on the petitioner is not required. MCR 5.105(C).

All service of process except case initiation must be performed by electronic means (e-Filing where available, email, or fax where available) to the greatest extent possible. Email transmission does not require the other party's agreement but must comply as much as possible with MCR 2.107(C)(4). MCR 2.107(G).

Service may be made by any adult or emancipated minor. MCR 5.103(A). Personal and electronic service must be made at least 7 days before the hearing date, and service by mail must be made at least 14 days before the hearing date. MCR 5.108. Service may also be made electronically in accordance with MCR 1.109(G)(6)(a). MCR 5.105(A)(2)(b).

Notice of hearing may be served by publication on an interested person whose address or whereabouts is unknown. MCR 5.105(A)(3). The manner of service by publication is set forth in MCR 5.106. MCR 5.105(B)(3). This requires the filing of a Declaration of Intent to Give Notice by Publication, SCAO form PC 617, which establishes that the address or whereabouts of the interested person could not be ascertained on diligent inquiry. Publication must be in a newspaper in the county where the court is located at least 14 days before the date of the hearing. The notice must include the name of the person to whom notice is given and a statement that the result of the hearing may be to bar or affect the person's interest in the matter. *See* SCAO form PC 563 (Publication of Notice of Hearing). The person who orders publication is responsible for filing the publisher's affidavit of publication with the court. In addition, a copy of the notice must be mailed to the interested person at the person's last known address, if available. MCR 5.106. After an interested person has been served by publication, further notice on that

person is required only if the person's address becomes known during the proceedings. MCR 5.105(A)(3).

The court may direct the manner of service if service cannot otherwise reasonably be made. MCR 5.105(A)(4).

A proof of service must be filed with the court before the hearing, or if a hearing is not involved, proof of service must be filed with the document. MCR 5.104(A); *see* SCAO form PC 564 (Proof of Service).

If all interested persons waive notice and consent in writing to the relief requested in the petition, the court may enter an appropriate order without a hearing. MCL 700.1402; MCR 5.104(B).

C. Waiver and Consent

§12.3 The right to notice of hearing may be waived if the interested person or someone authorized to consent on that person's behalf signs and files with the court a Waiver/Consent form, SCAO form PC 561, specifying the hearing to which the waiver applies. MCR 5.104(B)(1). A waiver must be stated on the record at the hearing or be a writing, specifying the hearing to which it applies, signed and dated by the interested person or by someone authorized to consent on the interested person's behalf. *Id.*

An interested person may consent to the relief requested in an application, petition, or motion, and if an interested person does consent, the person does not have to be served with or waive notice of hearing. MCR 5.104(B)(2). A consent must be stated on the record or be a writing containing a statement that the signatory has received a copy of the application, petition, or motion. *Id.* A consent must be signed and dated by the interested person or someone authorized to consent on the person's behalf. *Id.*

A waiver and consent may be made

- by a legally competent interested person;
- by a person designated as eligible in the court rules to be served on behalf of an interested person who is legally disabled (except that a fiduciary may not waive or consent with regard to petitions made by that person as fiduciary); or
- on behalf of an interested person by an attorney who has filed a written appearance.

MCR 5.104(B)(3).

Service on a person who is legally disabled or otherwise legally represented may be made on the following:

- an adult's guardian, a conservator, or a minor's guardian ad litem except for a petition for commitment or a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem
- the trustee of a trust with respect to a beneficiary of the trust

- the guardian ad litem of any person, including unborn or unascertained, except as indicated in MCR 5.105(D)(1)
- a parent of a minor with whom the minor resides if the parent has filed an appearance and the parent and child do not have conflicting interests with respect to the outcome of the hearing
- the attorney for an interested person who has filed a written appearance in the proceeding
- the agent of an interested person under an unrevoked power of attorney filed with the court

MCR 5.105(D).

II. Advance Directives Proceedings

A. Durable Powers of Attorney

§12.4 Although an agent under a durable power of attorney is not explicitly defined as a fiduciary under EPIC, the agent is commonly understood to be a fiduciary who must act in the best interests of the principal. *See In re Estate of Susser*, 254 Mich App 232, 657 NW2d 147 (2002). The fiduciary relationship is also implied by MCL 700.5503(1), which provides that if the principal becomes incapacitated after executing a durable power of attorney and the probate court appoints a conservator for the principal, the agent is accountable to the conservator as well as to the principal.

The actions of an agent under a durable power of attorney may be challenged on a petition to the probate court under its jurisdiction to require, hear, or settle an accounting of an agent under a power of attorney with respect to an estate of a decedent, a protected individual, a ward, or a trust. MCL 700.1303(1)(j). The persons interested in such a proceeding are the following:

- the principal
- the agent (attorney in fact)
- any fiduciary of the principal
- the principal's guardian ad litem or attorney
- the principal's presumptive heirs

MCR 5.125(C)(31).

A conservator has the same power to revoke or amend the power of attorney that the principal would have had if the principal were not disabled or incapacitated. MCL 700.5503(1). Therefore, if the agent is not acting in accordance with the terms of the power of attorney or is not acting in the best interests of a now-incapacitated principal, an action may be commenced to appoint a conservator who may then revoke the durable power of attorney.

B. Patient Advocate Designations

§12.5 Challenges to validity. An individual, by patient advocate designation, may appoint a *patient advocate* to exercise powers concerning the indi-

vidual's care, custody, and medical and mental health treatment following the individual's inability to make medical or mental health decisions. Furthermore, pursuant to broad amendments, the patient advocate designation has been expanded to allow a patient advocate to exercise powers over the patient's mental health treatment, if expressly authorized by the designation instrument. MCL 700.5506. EPIC and the Public Health Code also permit an individual to authorize a patient advocate to make an anatomical gift. MCL 333.10104, 700.1106(*l*). To be valid, a patient advocate designation must be

- in writing;
- dated;
- signed voluntarily by an individual at least 18 years old (or an emancipated minor) and of sound mind;
- executed in the presence of and signed by two witnesses; a witness may not be the patient's
  - spouse,
  - parent,
  - child,
  - grandchild,
  - sibling,
  - presumptive heir,
  - known devisee at the time of the witnessing,
  - physician,
  - patient advocate, or
  - employee of a life or health insurance provider for the patient, of a health facility that is treating the patient, or of a home for the aged where the patient resides, or a community mental health services program or hospital that is providing mental health services to the patient ("community mental health services program or hospital" means a community mental health services program as that term is defined in MCL 330.1100a or a hospital as that term is defined in MCL 330.1100b); and
- before its implementation, made part of the patient's medical record with the patient's attending physician and, if applicable, with the facility where the patient is located.

The designation must include a statement that the authority conferred is not exercisable unless the patient is unable to participate in medical or mental health treatment decisions. However, if the patient advocate designation includes the right to make an anatomical gift, that authority remains exercisable after the patient's death. MCL 700.5507(4), .5508(3). A patient advocate designation—with authorization to make an anatomical gift—is not revoked by the patient's death. MCL 700.5508(3).

Further, regarding anatomical gifts, the Public Health Code gives the patient advocate priority status primary even to the spouse. MCL 333.10109(1). Persons having lesser priority—for example, adult sons or daughters, parents, or adult brothers or sisters—may not revoke an anatomical gift authorized by a patient advocate designation. MCL 333.10108(1), (3).

A patient advocate designation that includes mental health treatment provisions may waive the patient's right to revoke the designation regarding these treatment decisions. MCL 700.5507(4) (item 8). Further, the designation may provide that the patient's ability to revoke this waiver will be delayed until 30 days after the patient communicates the intent to revoke.

A legally incapacitated individual who has a guardian responsible for making medical or mental health treatment decisions may not designate another person as patient advocate. MCL 700.5520. Before acting, the proposed patient advocate must sign an acceptance of the designation that contains the statements in MCL 700.5507.

If the court is aware that an individual has executed a patient advocate designation under MCL 700.5506, the court generally must not grant a guardian any of the powers held by the patient advocate. MCL 700.5306(2). However, if the petition for guardianship alleges, and the court finds, that the patient advocate designation was not executed in compliance with the statute, that the patient advocate is not complying with the terms of the designation or with the applicable statutes, or that the patient advocate is not acting consistent with the ward's best interests, the court can grant the patient advocate's powers to the guardian. MCL 700.5306(5).

A challenge to validity based on failure to follow the execution requirements may be made in a petition for guardianship. *See* SCAO form PC 625 (Petition for Appointment of Guardian of Incapacitated Individual), item 5.

Disputes about patient advocate's authority or actions. A patient advocate has authority to act when the patient is unable to participate in medical treatment or mental health decisions. The patient's attending physician and another physician or a licensed psychologist must examine the patient and make a written determination that the patient is unable to participate in medical treatment decisions. The determination of the patient's ability to make mental health treatment decisions is decided under MCL 700.5515. MCL 700.5508(1). Under MCL 700.5515(2), a patient advocate with the power to make mental health treatment decisions may exercise those powers only if a physician and a mental health practitioner both certify in writing, and after examination of the patient, that the patient is unable to give informed consent to mental health treatment. The determination must be made part of the patient's medical record and must be reviewed at least annually. If the designation states that the patient's religious beliefs prohibit an examination, the designation must indicate the procedure for determining when the patient advocate may act. MCL 700.5508(1).

If a dispute arises about the patient's ability to participate in medical or mental health treatment decisions, about whether a patient advocate's actions are consistent with the patient's best interests, or about whether a patient advocate is

complying with statutory requirements, any interested person or the patient's attending physician may file a petition requesting the probate court's determination. MCL 700.5508(2), .5511(5); MCR 5.784(A). This is often done in conjunction with a petition to appoint a guardian for the individual. *See* PC 625, item 5. More commonly, however, a petition for guardianship is filed.

The interested persons are the following:

- the patient
- the patient's advocate
- the patient's spouse
- the patient's adult children
- the patient's parents, if the patient has no adult children
- if the patient has no spouse, adult children, or parents, the patient's minor children, or, if none, the presumptive heirs whose addresses are known
- the patient's guardian and conservator
- the patient's guardian ad litem

MCR 5.125(C)(30).

Venue is in the county in which the patient resides or is located. MCL 700.5511(5); MCR 5.784(B). Notice must be given by mail or personal service if the address of an interested person is known or can be learned by diligent inquiry. Service by mail must be supplemented by facsimile, electronic mail, or telephone contact within the period for timely service for an expedited hearing or a hearing on the initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions. MCR 5.784(C)(1). At an expedited hearing or a hearing on the initial determination, the court may dispense with notice of hearing on those interested persons who could not be contacted after the petitioner's diligent effort. MCR 5.784(C)(2). Notice of hearing must be served at least two days before the hearing on an initial determination. Notice of an expedited hearing must be served at such time as directed by the court. Notice of other hearings is governed by MCR 5.108. MCR 5.784(C)(3). See §12.2 for notice-of-hearing requirements for nonexpedited hearings.

If the petition concerns a dispute about the patient's ability to participate in medical or mental health treatment decisions, the court must do the following:

- appoint a guardian ad litem to represent the patient
- conduct a hearing as soon as possible and not later than seven days after the court receives the petition
- determine whether the patient is able to participate in medical or mental health treatment decisions as soon as possible and not later than seven days after the hearing

MCL 700.5508(2); MCR 5.784(D)(1).

The court may order an expedited hearing on any petition on a showing of good cause to expedite the proceedings, which may be made ex parte. MCR 5.784(D)(1). Trial is by the court without a jury. The petitioner has the burden of proof by a preponderance of the evidence on all contested issues, except that the standard is clear and convincing evidence on the issues of whether a patient has authorized the patient advocate to decide to withhold or withdraw treatment, if the decision could or would result in the patient's death, or authorized the patient advocate under a durable power of attorney for mental health treatment to seek the forced administration of medication or hospitalization. The physician-patient privilege may not be asserted. MCR 5.784(D). On a sufficient showing of need, the court may issue a temporary restraining order pursuant to MCR 3.310 pending a hearing. MCR 5.784(E).

C. Do-Not-Resuscitate Orders

§12.6 An individual may execute a do-not-resuscitate order to direct that if the individual suffers cessation of both spontaneous respiration and circulation in a setting outside of a hospital, resuscitation will not be initiated. To be valid, a do-not-resuscitate order must be

- made by an individual who is at least 18 years old and of sound mind or by the patient advocate of an individual who is at least 18 years old on that individual's behalf;
- on a form described in MCL 333.1054;
- dated; and
- voluntarily signed by
  - the individual or another person who, at the time of the signing, is in the individual's presence and acting pursuant to the individual's directions;
  - the individual's attending physician; and
  - two witnesses who are at least 18 years old. At least one of the witnesses may not be the individual's spouse, parent, child, grandchild, sibling, or presumptive heir.

  The name of each of these individuals must be printed or typed below the individual's signature.

MCL 333.1053.

A guardian of a legally incapacitated adult may execute a do-not-resuscitate order for the ward provided certain conditions are met. MCL 333.1053a, 700.5314(d). A guardian for a minor may execute a do-not resuscitate order on behalf of the ward as provided in MCL 333.1053a. MCL 700.5215(h).

MCL 333.1053b sets forth the requirements for a do-not-resuscitate order executed by a parent on behalf of a minor child. The order must be dated, executed voluntarily, and signed by (1) one or both parents, *see* MCL 333.1053b(1); (2) the minor child's attending physician; and (3) two witnesses 18 years of age or older who may not be the minor child's parent, child, grandchild, sibling, or pre-

sumptive heir. MCL 333.1053b(2). A parent who executes a do-not-resuscitate order must keep the order and have it accessible within the child's residence or other setting outside of a hospital and, if applicable, provide a copy to the administrator of the child's school or the administrator of the facility where the child is a patient or resident. MCL 333.1053b(5). The order must be on a form described in MCL 333.1054.

A person interested in the welfare of the individual who has reason to believe that an order has been executed contrary to the individual's wishes may petition the probate court to have the order and the conditions of its execution reviewed. MCL 333.1059.

III. Marriages and Marriage Licenses

A. Unpublicized Licenses

§12.7 When a person wants to keep the exact date of the person's marriage a secret, the probate judge may issue a marriage license without publicity if

- the person makes an application under oath and
- the probate judge determines that a good and sufficient reason is expressed in the application.

MCL 551.201(1). The application must be in the usual form and must be accompanied by a $3 fee, $2 of which the probate judge keeps for services rendered, and $1 of which the probate judge forwards to the state registrar for deposit in the state general fund. MCL 551.202.

The probate judge performs the marriage ceremony unless the applicant or either of the parties to the marriage wants to have the marriage ceremony performed by another person competent to do so. If the probate judge performs the ceremony, the probate court collects a $10 fee, which may be waived if the parties are indigent. MCL 600.874. If a party to the marriage designates someone else, the probate judge issues a written permit to the designated person directing that that person perform the marriage ceremony. The designated person performs the marriage ceremony, but no record is made of the marriage, except the record made by the probate judge. After the marriage ceremony, the person who performed it returns the marriage certificate to the probate judge, who attaches the license and certificate to the application. The marriage papers must be executed in duplicate, and the person performing the marriage ceremony must also deliver a marriage certificate to the parties. MCL 551.202.

The probate judge must file a complete set of all papers in each case in a private file, and, within 10 days after the marriage, forward a duplicate to the state registrar. The state registrar must file the duplicate in a private file and record the filing in a private register. Generally, the file in the probate court, and the duplicate and record in the state department of public health, are open to inspection only on the written request and proper proof of identification of one or both of the partners to the marriage, or on the written order of a Michigan circuit court judge, and only for the use designated in the order. An order may be made only on the

written request of a partner to the marriage or if necessary for the protection of property rights affected by the marriage. MCL 551.203.

Both parties to the marriage may petition the court to unseal the record of their marriage once the parties are over 18 years of age. If the court receives such a petition, the court must order the record unsealed if

- the petitioners were married without publicity under MCL 551.201,
- the petitioners are both over 18 years of age, and
- both petitioners wish to unseal the record.

MCL 551.203(2). In addition, if one party to a marriage made private under MCL 551.201 is deceased and the other party is 18 years of age or older, the surviving party may petition the court to unseal the record of the marriage. MCL 551.203(3).

Unless a marriage record is unsealed pursuant to MCL 551.203(2), all knowledge of facts related to a secret marriage that comes to the probate judge, state registrar or an agent or employee of the state registrar, the physician endorsing the application, or a witness to the marriage are privileged communications. A violation of confidence is a misdemeanor, punishable by a fine of $25 to $100, plus the costs of prosecution, and, in default of payment, imprisonment for up to three months. An editor, publisher, or proprietor of a newspaper or other publication in Michigan who gives publicity to an unpublicized license or secret marriage performed is also guilty of a misdemeanor punishable by a fine of $50 to $100, plus the costs of prosecution, and, in default of the payment, imprisonment for up to 30 days. In addition, the editor, publisher, or proprietor is liable in a libel action to the parties married under the license. If the probate judge performing the marriage ceremony under an unpublicized license neglects to make proper return, the judge will be fined, in addition to the penalties prescribed by law, up to $50. MCL 551.204(1). MCL 551.204(1) does not apply to a license that is unsealed under MCL 551.203(2) or (3). MCL 551.204(2).

A probate judge may authorize an order *nunc pro tunc* regarding the date to appear on the marriage license. MCL 551.201(4). That is, the judge may authorize a back-dated unpublicized marriage license, keeping in mind, however, that the parties must have been free to marry at that time.

B. Persons Under Marriageable Age

§12.8 Marriageable age is age 18 or age 16 with parental consent. MCL 551.103; *see also* MCL 551.51. The probate judge may marry persons under marriageable age without publicity if the application for the license is accompanied by one of the following:

- if both parties are under age, the written request of their biological or adopting living parents, and their guardian or guardians if either or both of the parties' parents are dead
- if only one party is under age, the written request of the parents or guardians of the party under marriageable age

MCL 551.201(2). If the noncustodial parent has been given notice of the request for consent by personal service or registered mail at the parent's last known address and does not object within 5 days after receipt of notice, only the custodial parent must consent.

Practice Tip

- *A limited guardian may not give consent to the ward's marriage. MCL 700.5206(4).*

Consent is not required of a parent

- confined under sentence in a state or federal penal institution;
- confined in a mental hospital under adjudication of legal incapacity; or
- on the return of process by the sheriff of the county in which the parent was last known to reside made not less than 5 or more than 14 days after issuance of the process certifying that after diligent search the parent cannot be found within the county.

MCL 555.201(3).

The application, fee, and other requirements applicable to secret marriages, discussed in §12.7, also apply to marriages of persons under marriageable age.

C. Solemnizing Marriages

§12.9 A probate judge may solemnize marriages anywhere in the state. MCL 551.7(1)(d). A circuit court can be assigned into probate court for the purpose of performing a marriage.

No particular form of solemnization is required, except

- that the parties must solemnly declare, in the presence of the person solemnizing the marriage and the attending witnesses, that they take each other as husband and wife; and
- that there must be at least two witnesses, besides the person solemnizing the marriage, present at the ceremony.

MCL 551.9. The statute uses the phrase "husband and wife"; however, the U.S. Supreme Court's decision in *Obergefell v Hodges*, 576 US 644 (2015), will likely result in statutory changes. The Michigan Law Revision Commission will be reviewing the statutes affected by the Supreme Court's decision and making recommendations to the legislature. The probate court collects a $10 fee for performing a marriage ceremony, which may be waived if the parties are indigent. MCL 600.874. The probate judge may not receive a fee other than the fee expressly authorized by law. MCL 600.879(2).

A probate judge who officiates at a marriage is responsible for typing or legibly printing the time and place of the marriage and the names and residences of two witnesses on the marriage certificate and must sign it in certification that they performed the marriage. The judge must separate the duplicate license and certificate, and deliver the half part designated duplicate to one of the parties to the

marriage and, within 10 days, return the original to the county clerk that issued the license. The probate judge must also keep an accurate record of all marriages solemnized in a book used expressly for that purpose. MCL 551.104.

IV. Lost Instruments

A. Jurisdiction and Venue

§12.10 An application regarding a lost deed, mortgage, or other instrument affecting title to real estate affecting land in two or more counties which was lost or destroyed after being recorded in one county, but before being recorded in all counties, may be filed in the probate court of the county where the real estate is situated and the instrument has not been recorded. MCL 565.321.

B. Application

§12.11 Any party or parties interested in a lost instrument may apply for an order to record a duly certified transcript of the instrument in the county where the instrument was not recorded. MCL 565.321. The required form and contents for a petition, discussed in §12.1, also apply to an application.

C. Notice of Hearing

§12.12 The probate judge must give notice of the application and of the time and place of hearing by publication for three successive weeks. MCL 565.321. See §12.2 regarding notice of hearing by publication. Note that while giving notice of hearing is generally the responsibility of the moving party per MCR 5.119(A), MCL 600.854 provides that notice is governed by supreme court rule *except as otherwise provided by law.*

D. Decision and Order

§12.13 The probate judge must issue an order authorizing a certified transcript of the instrument if it appears to the probate judge that the instrument was

- duly executed,
- legally recorded in another Michigan county, and
- lost or destroyed before being recorded in this county.

MCL 565.321. The certified copy of the instrument and the order may be recorded in the office of the register of deeds of the county where the order was made, and that record has the same force and effect as the record of the original instrument would have had if it had been recorded before being lost or destroyed.

V. Support of Poor Persons

A. Jurisdiction and Venue

§12.14 An application for an order to compel support of a poor person may be made to the probate court of the county where the poor person dwells or has a legal settlement. MCL 401.3. A *poor person* is

- a person who does not have property and who is unable, because of physical or mental disability or age, to earn a livelihood; or
- a person who has some means, but is eligible to receive relief or assistance granted under the Social Welfare Act, MCL 400.1 et seq.

MCL 401.1(a). A *settlement* is "the place where a person last continuously lived, for 1 year, without receiving public relief or assistance." MCL 401.1(b).

B. Application for Order to Compel Support

§12.15 DHHS in the county where the poor person resides may apply for an order to compel support, with the advice and assistance of the prosecuting attorney, on the failure of the poor person's relatives to relieve and maintain the poor person. MCL 401.3. A *relative* is a spouse or parent. MCL 401.1(e).

C. Notice of Hearing

§12.16 Upon application for an order to compel support, notice must be given to necessary parties, as provided by law. MCL 401.3. The statute does not define *necessary parties,* but any relatives who may be liable for support should be considered necessary parties for this purpose. See §12.2 regarding notice of hearing and service of process.

The statute also provides that the court must proceed in a summary way to hear the proofs and allegations of the parties. MCL 401.4. As a result, rather than following the time-for-service rules discussed in §12.2, the procedure should be like that for an order to show cause. *See* OAG No 1713 (Oct 1, 1953). An order to show cause must set the time for service of the order and for the hearing. MCR 2.108.

D. Decision and Order

§12.17 The court must proceed in a summary way to hear the proofs and allegations of the parties. MCL 401.4. This means that no jury is available to the parties. *See* OAG No 1713 (Oct 1, 1953). The court must then order the relatives of the poor person who owe a duty of support and appear able to do so to relieve and maintain the poor person. The order must specify the sum that will be sufficient for support and how it is to be paid. MCL 401.4.

The spouse is the first relative ordered to maintain the poor person, if the spouse is able to do so. If there is no spouse or the spouse does not have sufficient ability to support the poor person, then the poor person's father or mother must be ordered to maintain the poor person. MCL 401.5.

If it appears that a relative is unable wholly to maintain the poor person, but is able to contribute towards their support, the court may, in its discretion, direct two or more relatives of different degrees to maintain the poor person. The court must prescribe the proportion that each must contribute for that purpose. If it appears that the relatives are not able wholly to maintain the poor person, but are able to contribute something, the court directs the sum, in proportion to their

ability, that the relatives must severally pay weekly or monthly for that purpose. MCL 401.6.

The order may specify the time during which the relatives must maintain the poor person, or during which any of the sums directed by the court must be paid, or it may be indefinite, or until the further order of the court. MCL 401.7.

The costs and expenses of the application must be ascertained by the court and paid by the relatives against whom any order is made. MCL 401.8.

E. Enforcement and Modification of Support Order

§12.18 The order of support and the payment of costs may be enforced by process of attachment from the court. MCL 401.8.

DHHS or the bureau of social aid of the county department of social welfare may maintain an action against any relative subject to an order of support who neglects to relieve and maintain the poor person. The department or bureau is entitled to recover the sum prescribed by the court for every period of time stated in the order during which the order was disobeyed, up to the time of recovery, and the costs of the suit. MCL 401.9.

If any relative who has the ability to do so fails or refuses to obey the order of support and is found guilty of contempt of court for the failure or refusal (in a proceeding held for that purpose), the court may, in addition to the other remedies provided by law,

- place the delinquent relative on probation or
- order the delinquent relative confined in the county jail, where the relative's earnings, or at least half of them, will be applied to the support of the poor person until the court order has been complied with or until the further order of the court, but for a period not to exceed one year.

MCL 401.9.

The court may from time to time vary the order, whenever circumstances require it, on the application of

- any relative affected by the order,
- the county DHHS, or
- the bureau of social aid of the county department of social welfare.

MCL 401.7

VI. Kidney Donation by Minor

A. Jurisdiction and Venue

§12.19 A probate court that has jurisdiction over the prospective donor may authorize a kidney donation by a person who is at least 14 years old. MCL 700.5105.

B. Petition

§12.20 A petition for authorization of kidney donation may be filed by any of the following, other than the intended donee:

- the donor's guardian
- the donor's parent
- the donor's spouse
- the donor's child
- the donor's other next of kin

MCL 700.5105.

The only eligible donees of a gift of one of the donor's two kidneys for a needed transplant are the donor's

- parents,
- children, or
- siblings.

Id.

C. Guardian ad Litem

§12.21 If the prospective donor does not have a guardian, the court must appoint a guardian ad litem to protect the prospective donor's interests. MCL 700.5105. The petitioner may not choose or indicate in any manner the person's preference regarding who should be appointed guardian ad litem. MCL 700.5108. Appointment of an attorney as guardian ad litem does not create an attorney-client relationship, and communications between the guardian ad litem and the prospective donor are not privileged. MCR 5.121(E).

Before the date set for hearing, the guardian ad litem must conduct an investigation. The guardian ad litem must then file a written report of the investigation and recommendation with the court at least 24 hours before the hearing or at another time specified by the court, or the guardian ad litem may make a report in open court. The guardian ad litem need not appear personally at the hearing unless the court directs otherwise. MCR 5.121(C).

The report may be received by the court and relied on to the extent of its probative value even if it is not admissible under the Michigan Rules of Evidence. The report may be examined and controverted by any interested person. The subject of the report may cross-examine the guardian ad litem on request, and other interested persons may cross-examine the guardian ad litem if the person is reasonably available. MCR 5.121(D).

D. Notice of Hearing

§12.22 The court is responsible for giving notice of the hearing on the petition. MCL 700.5105. Note that while giving notice of hearing is generally the

responsibility of the moving party per MCR 5.119(A), MCL 600.854 provides that notice is governed by supreme court rule *except as otherwise provided by law.*

The statute and court rules do not indicate who is entitled to notice of hearing. However, it would be good practice to require that notice be given to

- the donor,
- the donor's guardian or guardian ad litem (required by MCR 5.125(A)(4)),
- the donor's relatives (parents, children, or other next of kin) other than the petitioner, and
- the prospective donee.

Note that the natural father of a child born out of wedlock need not be served notice of proceedings in which the child's parents are interested persons unless his paternity has been legally determined. MCR 5.125(B)(4).

Service should be provided in the manner discussed in §12.2.

E. Hearing

§12.23 The prospective donor must be present at the hearing and examined by the petitioner or the court or both. MCL 700.5105.

F. Decision and Order

§12.24 The court may enter an order authorizing the gift if the court determines that

- the prospective donor is sufficiently sound of mind to understand the needs and probable consequences of the gift to both the donor and donee, and
- the donor agrees to the gift.

MCL 700.5105.

VII. Uniform Transfers to Minors Act Proceedings

A. Jurisdiction and Venue

§12.25 The probate court for the county in which a minor resides may be petitioned to

- authorize a fiduciary or other person who holds property for a minor to transfer the property to a custodian for the minor's benefit, MCL 554.530, .531;
- order a custodian to pay to or for the benefit of the minor as much of the custodial property as the court considers advisable for the minor's use and benefit, MCL 554.539;
- enforce the obligation to deliver custodial property and records to a successor custodian, MCL 554.544;
- remove a custodian or designate a successor, MCL 554.544;
- require a custodian to give a bond, MCL 554.544;

- require an accounting by the custodian or the custodian's legal representative, MCL 554.545; or
- appoint a successor custodian, MCL 554.544(2).

MCL 554.523(5).

B. Petition for Authorization to Transfer Property to a Custodian

§12.26 The court may authorize a personal representative (if not otherwise authorized by a will), trustee (if not otherwise authorized by the trust agreement), or conservator to make an irrevocable transfer of more than $10,000 to another adult or trust company as custodian for the minor's benefit if

- the fiduciary considers the transfer to be in the minor's best interest, and
- the transfer is not prohibited by or inconsistent with provisions of any applicable will, trust agreement, or other governing instrument.

MCL 554.530.

The court may authorize another person who holds property of, or owes a liquidated debt to, a minor not having a conservator to make an irrevocable transfer of more than $10,000 to

- a custodian for the minor's benefit nominated pursuant to MCL 554.527 or, if none,
- an adult member of the minor's family or a trust company as custodian for the minor's benefit.

MCL 554.531.

C. Petition to Pay Custodial Property for the Use and Benefit of the Minor

§12.27 An interested person, including the minor if the person is at least 14 years old, may petition the court to order that the custodian pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor. MCL 554.539(2).

D. Appointment of Successor Custodian

§12.28 If a custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor and the minor is either less than 14 years old or fails to appoint a successor within 60 days after the custodian's ineligibility, death, or incapacity, the successor custodian is the minor's conservator. If there is no conservator or the conservator declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or another interested person may petition the court to designate a successor custodian. MCL 554.544(2).

A custodian who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodian, as soon as practicable, must deliver the custodial property and records to the successor custodian. The successor custodian may

bring an action to enforce this obligation and becomes responsible for each item as received. MCL 554.544(3).

E. Removal of Custodian or Request for Bond

§12.29 A transferor, a transferor's legal representative, an adult member of the minor's family, the minor's conservator, or the minor, if the minor is at least 14 years old, may petition the court to

- remove the custodian for cause and designate a successor custodian other than a transferor, or
- require that the custodian give appropriate bond.

MCL 554.544(4).

Upon removal of a custodian, the court must require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property. MCL 554.545(4).

F. Accounting by Custodian

§12.30 A minor (if the person is at least 14 years old), the minor's legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative may petition the court for

- an accounting by the custodian or the custodian's legal representative or
- a determination of responsibility between the custodial property and the custodian personally for claims against the custodial property, unless the responsibility has already been adjudicated in an action to which the minor or the minor's legal representative was a party.

A successor custodian may petition the court for an accounting by the predecessor custodian. MCL 554.545(1), (2).

The court may require or permit a custodian or the custodian's legal representative to account in any proceeding. On removal of a custodian, the court must require an accounting. MCL 554.545(3), (4).

G. Liability of Custodian or Minor

§12.31 A claim may be asserted against the custodial property based on

- a contract entered into by a custodian acting in a custodial capacity,
- an obligation arising from the ownership or control of custodial property, or
- a tort.

The proper procedure is to proceed against the custodian in the person's custodial capacity regardless of whether the custodian or the minor is personally liable for the contract, obligation, or tort. MCL 554.542(1).

The custodian is not personally liable

- on a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and fails to identify the custodianship in the contract, or
- for an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

The minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault. MCL 554.542(2), (3).

A custodian who does not understand that a transfer of the custodian's own funds into an account established under the Uniform Transfers to Minors Act (UTMA) is an irrevocable transfer will be criminally liable for embezzlement if the custodian withdraws the funds for the custodian's own use. In *People v Couzens*, 480 Mich 240, 747 NW2d 849 (2008), a noncustodial father opened a UTMA account in his son's name into which he transferred shares of stock from his personal account. Later, checks were issued to the custodian from the account for funds obtained from the sale of the stock. The minor son never received these funds. The remaining stock was subsequently transferred back to the custodian's personal account. In affirming the custodian's conviction for embezzlement, the Michigan Supreme Court rejected the custodian's argument that the transfer of stock into the account created only a presumption of a gift. Under the plain language of the UTMA, once assets were transferred, the transfer was irrevocable. MCL 554.528, .536(2).

VIII. County Election Commissioners

§12.32 Membership. The board of county election commissioners for a county includes

- the chief or only probate judge of the county or probate court district, who serves as chairperson;
- the county clerk, who serves as secretary; and
- the county treasurer.

In the absence or disqualification of the county clerk from any meeting, the board may select one of the county clerk's deputies to act in the county clerk's place. In the absence or disqualification of any other member of the board, the members who are present must appoint another county officer in the absent or disqualified member's place. MCL 168.23(1). In the absence or disqualification of any other member of the board, the members who are present must appoint the county prosecuting attorney, county sheriff, or register of deeds to fill the member's place. *Id.*

A board member who is involved in the recall of an officer, either by assisting in the preparation of the petition for recall or by being the officer whose recall is sought, is disqualified with respect to any determination as to the clarity and factual nature of the petition and must be replaced as provided above. MCL 168.23(2).

Recall petitions. A petition for the recall of an officer must

- comply with format requirements for a nominating petition, described in MCL 168.544c(1)–(2);
- be printed;
- state factually and clearly each reason for the recall, which must be based on the officer's conduct during the person's current term of office (note: the reasons for the recall may be typewritten);
- contain a certificate of the circulator, which may be printed on the back of the petition; and
- be in a form prescribed by the secretary of state.

MCL 168.952(1). Before being circulated, the petition must be submitted to the board of county election commissioners of the county where the officer whose recall is sought resides. MCL 168.952(2).

Within three business days after receipt of a petition for recall, the board of county election commissioners must notify the officer whose recall is sought of each reason stated in the petition and of the date of the meeting of the board of county election commissioners to consider whether each reason is factual and of sufficient clarity. MCL 168.952(4).

Clarity hearing. The meeting to determine whether each reason for the recall stated in the petition is factual and of sufficient clarity to enable the officer whose recall is sought and the electors to identify the conduct that is the basis for the recall must be held between 10 and 20 days after submission of the petition for recall. The officer whose recall is sought and the sponsors of the petition may appear at the meeting and present arguments on the factual nature and clarity of each reason. A petition of recall is of sufficient clarity when

- it clearly states the charge so that the officer may identify the incident and prepare a justification and
- it informs the electorate of the specific character and instance of official misconduct relied on for recall.

Noel v Oakland Cty Clerk, 92 Mich App 181, 187–188, 284 NW2d 761 (1979). If any reason for the recall is not factual or of sufficient clarity, the entire recall petition shall be rejected. MCL 168.952(3). Failure of the board of county election commissioners to hold this meeting constitutes a determination that each reason for the recall stated in the petition is sufficiently clear. *Id.*

Note that the board of county election commissioners has no authority to revise the petition for recall, but merely to determine whether the language is sufficiently clear.

Appeal of board's determination. The board's determination may be appealed by the officer whose recall is sought or by the sponsors of the petition to the circuit court in the county. The appeal must be filed within 10 days after the board's determination. If a determination by the board is appealed, the recall petition is not valid for circulation until a determination of whether each reason is factual

and of sufficient clarity is made by the circuit court or until 40 days after the date of the appeal, whichever is sooner. MCL 168.952(6).

Validity of petition. A petition is valid for 180 days after either of the following, whichever is later:

- the date of determination of whether each reason is factual and of sufficient clarity by the board
- the sooner of
  - the date of determination of whether each reason is factual and of sufficient clarity by the circuit court or
  - 40 days after the date of the appeal

MCL 168.952(8). A petition is not valid for circulation if at any time a circuit court determines that each reason on the petition is not factual and of sufficient clarity. MCL 168.952(7).

IX. Drain Appeals

§12.33 The probate court becomes involved in drain proceedings when the governing body of the township, city, or village appeals the necessity or denial of the necessity of a drain. MCL 280.72(5). The appeal must be filed within 20 days of the governing body's receipt of notification by registered mail from the drain commissioner. Appeals by other people who feel aggrieved by a determination of necessity or of no necessity are in the circuit court. MCL 280.72a. Disputes over assessments are heard by the tax tribunal. MCL 205.731.

The probate court also has jurisdiction in appointing a board of review for persons who want to appeal their apportionment of drain benefits. *See* MCL 280.151–.159.

X. Soldiers' Relief Commission

§12.34 The chief probate judge in each county appoints three veterans to the local Soldiers' Relief Commission. MCL 35.22. Each member must file a constitutional oath with the court and receive a certificate of appointment from the court. The commission is responsible for administering a relief fund for the benefit of honorably discharged indigent military personnel and their spouses, minor children, and parents. MCL 35.21.

XI. State Boundary Commission

§12.35 The chief probate judge in each county appoints the local members of the State Boundary Commission when the commission considers municipal boundary adjustments for territory within the county. MCL 123.1005.

13
Rehearings, Modification of Orders, and Appeals

Summary of Rehearings, Modification of Orders, and Appeals

This is a summary of major principles only, with cross-references to more detailed discussion in sections of the *Benchbook*.

Rehearings. §13.1.

On petition, the probate court may grant rehearings and modify and set aside orders, sentences, or judgments when justice requires. The court must enter its order within 30 days after the rehearing.

Modification or vacation of orders. §§13.2–13.3.

The probate court may correct clerical mistakes on its own initiative or on a party's motion after notice.

The probate court may relieve a party from final judgment on the following grounds:

- mistake, inadvertence, surprise, or excusable neglect
- newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial

- fraud, misrepresentation, or other misconduct of an adverse party
- the judgment is void
- the judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application
- any other reason justifying relief

MCR 2.612(C)(1). Errors in process are not grounds for granting a new trial or vacating or modifying an order unless refusal of postjudgment relief would be inconsistent with substantial justice.

Decedent estate proceedings.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

Formal testacy orders are final for all persons and all issues that could have been considered unless

- proponents of a later-offered will were unaware of the will's existence at the time of the earlier proceeding or were unaware of the proceeding and given no notice of it except by publication or
- an individual omitted from a determination of heirs was unaware of the individual's relationship to the decedent, unaware of the decedent's death, or not given notice except by publication.

The finding of the fact of death is binding on the alleged decedent only if notice was sent by registered or certified mail to the person's last known address and a reasonably diligent search for the person was made. Even so, if not dead, the alleged decedent may recover estate assets held by the personal representative and, to the extent that recovery is equitable, from the distributees.

Appealable orders. §§13.4–13.5.

Appeals by right.

All final orders and judgments from the probate court are appealable by right to the court of appeals. MCL 600.308.

Appeals by leave.

An interlocutory order of the probate court is appealable by application for leave to the court of appeals. MCL 600.308(2)(c).

Appellate procedure. §§13.6–13.9.

Appeals are not tried de novo.

The probate court may appoint counsel for appeal and should do so if necessary to insure the right to appeal.

Appeals to the court of appeals.

An appeal of right must be taken within 21 days after the entry of the order appealed from or from the order denying a motion for postjudgment relief. The appellant must file a number of documents with the probate court, including the claim of appeal, an appeal bond, and the court reporter's certificate that a transcript of the proceedings has been ordered.

Within 21 days after the claim of appeal is filed, all exhibits offered in evidence must be filed with the probate court. Within 21 days after the appellate briefs are filed, or on the court of appeals' request, the probate court must send the record on appeal to the court of appeals, with the exception of those items omitted by written stipulation of the parties.

After the appeal is decided or dismissed, the court of appeals sends the probate court a certified copy of the opinion or order and (after the period for application for leave to appeal expires) the original record. The probate court must then notify the parties of the record's return so that they may take appropriate action.

An appeal by leave begins with an application that is decided on the documents filed. The court of appeals may require a certified concise statement of proceedings and facts from the probate court.

If the application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits run from the date the order granting leave is certified.

Probate court's jurisdiction pending appeal to the court of appeals. §13.10.

After a claim of appeal is filed or leave to appeal is granted, the probate court may not set aside or amend the order appealed from except by order of the court of appeals or by stipulation of the parties. However, the probate court may grant time to correct acts in connection with the appeal and may, with notice to the parties, correct the record to be transmitted to the court of appeals. The probate court also retains authority

- over stay and bond matters;
- to appoint, remove, or replace an attorney; and
- to rule on requests for costs or attorney fees.

Stay of proceedings in probate court. §13.11.

Unless ordered by the probate court on a motion for good cause, the following orders are not stayed pending appeal:

- an order removing a fiduciary
- an order appointing a special personal representative or a special fiduciary
- an order granting a new trial or rehearing
- an order granting an allowance to the spouse or children of a decedent;
- an order granting permission to sue on a fiduciary's bond

- an order suspending a fiduciary and appointing a special fiduciary
- an order entered pursuant to the Mental Health Code

In all other probate court matters, filing a claim of appeal stays proceedings under the order being appealed, pending disposition of the appeal.

I. Rehearings

§13.1 On petition, when justice requires and after notice to all interested persons, the probate court may grant rehearings and modify and set aside orders, sentences, or judgments. The probate court must enter an order with respect to the original hearing or rehearing of a contested matter within 30 days after the hearing or rehearing ends. MCL 600.848.

II. Modification or Vacation of Probate Court Orders

A. Relief from Judgments and Orders

§13.2 The probate court may correct clerical mistakes in orders or other parts of the record and errors arising from oversight or omission at any time before a claim of appeal is filed or leave to appeal granted on its own initiative or on a party's motion and after notice. MCR 2.612(A).

The court also may relieve a party or the legal representative of a party from a final judgment or order on the following grounds:

- mistake, inadvertence, surprise, or excusable neglect
- newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial
- fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party
- the judgment is void
- the judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application
- any other reason justifying relief

The procedure for obtaining relief from judgment is by motion as prescribed by the court rules or by an independent action. MCR 2.612(C)(4). The motion for relief must be made within a reasonable time, and, if for the first three grounds listed above (mistake, newly discovered evidence or fraud), within one year after the order was entered. Except as provided in MCR 2.614(A)(1), the motion does not affect the finality of a judgment or suspend its operation. MCR 2.612(C).

An error in the admission or exclusion of evidence, in a ruling or order, or in anything done or omitted by the court or by the parties is not a ground for granting a new trial, for setting aside a verdict, or for vacating or modifying a judgment or order unless refusal to take this action appears to the court to be inconsistent with substantial justice. MCR 2.613(A).

B. Modification or Vacation of Orders in Decedent Estates

§13.3 In decedent estate proceedings, for good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal (21 days). MCL 700.3413.

Testacy orders and orders determining heirs. Subject to appeal and vacation, a formal testacy order, including an order that the decedent did not leave a valid will and that determines heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered except as follows:

- If the proponents of a later-offered will were unaware of that will's existence at the time of the earlier proceeding, or were unaware of the earlier proceeding and given no notice of it except by publication, the court must entertain a petition for modification or vacation of its order and probate the later-offered will.
- If intestacy has been ordered, the determination of the decedent's heirs may be reconsidered if an individual was omitted from the determination and was
  - unaware of the individual's relationship to the decedent,
  - unaware of the decedent's death, or
  - not given notice of any proceeding concerning the decedent's estate, except by publication.

The petition for vacation must be filed before the earlier of the following:

- if a personal representative is appointed for the estate, the entry of an order approving final distribution of the estate or, if the estate is closed by statement, six months after the filing of the closing statement, or
- one year after the entry of the order sought to be vacated.

The original order may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs. MCL 700.3412(1)–(3).

Fact of death. The finding of the fact of death is conclusive for the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at the person's last known address and the court finds that a reasonably diligent search was made as required by MCL 700.3403. If the alleged decedent is not dead, even if notice was sent and the search was made, the alleged decedent may recover estate assets held by the personal representative. In addition, the alleged decedent may recover estate assets or their proceeds from distributees to the extent that recovery is equitable in view of all of the circumstances. MCL 700.3412(4)–(5).

III. Orders Appealable by Right

§13.4 All final orders and judgments from the probate court are appealable by right to the court of appeals. MCL 600.308; MCR 5.801(A).

A party to a proceeding in the probate court may appeal as a matter of right to the court of appeals the following:

- a final order affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C). MCR 5.801(A)(1).

- a final order affecting the rights or interests of any interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, an adult or minor in a guardianship proceeding under the Estates and Protected Individuals Code (EPIC), a person under the Mental Health Code, or an inter vivos trust or a trust created under a will. These rights are limited to orders resolving the following matters:

  (a) appointing or removing a fiduciary or trust director as defined in MCL 700.7103(m), or denying such an appointment or removal;

  (b) admitting or denying to probate of a will, codicil, or other testamentary instrument;

  (c) determining the validity of a governing instrument as defined in MCL 700.1104(m);

  (d) interpreting or construing a governing instrument as defined in MCL 700.1104(m);

  (e) approving or denying a settlement relating to a governing instrument as defined in MCL 700.1104(m);

  (f) reforming, terminating, or modifying or denying the reformation, termination or modification of a trust;

  (g) granting or denying a petition to consolidate or divide trusts;

  (h) discharging or denying the discharge of a surety on a bond from further liability;

  (i) allowing, disallowing, or denying a claim;

  (j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;

  (k) authorizing or denying the continuation of a business;

  (*l*) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;

  (m) authorizing or denying rights of election;

  (n) determining heirs, devisees, or beneficiaries;

  (o) determining title to or rights or interests in property;

  (p) authorizing or denying partition of property;

  (q) authorizing or denying specific performance;

  (r) ascertaining survivorship of parties;

  (s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;

  (t) granting or denying a petition to determine *cy pres*;

  (u) directing or denying the making or repayment of distributions;

  (v) determining or denying a constructive trust;

(w) determining or denying an oral contract relating to a will;

(x) allowing or disallowing an account, fees, or administration expenses;

(y) surcharging or refusing to surcharge a fiduciary or trust director as referred to in MCL 700.7103(m);

(z) determining or directing payment or apportionment of taxes;

(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;

(bb) assigning residue;

(cc) granting or denying a petition for instructions;

(dd) authorizing disclaimers;

(ee) allowing or disallowing a trustee to change the principal place of a trust's administration;

(ff) adoption assistance determinations pursuant to MCL 400.115k;

MCR 5.801(A)(2).

A party to a proceeding in the probate court may appeal as a matter of right to the court of appeals a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding under EPIC, a person under the Mental Health Code, and "an order entered in a probate proceeding, other than a civil action commenced in probate court, that otherwise affects with finality the rights or interests of a party or an interested person in the subject matter." MCR 5.801(A)(3), (4), (5). Other appeals by right to the court of appeals may be defined by statute. MCR 5.801(A)(6).

IV. Orders Appealable by Leave

§13.5 An interlocutory order of the probate court or any other judgment from the probate court is appealable by application for leave to appeal to the court of appeals. MCL 600.308(2)(c).

V. Appellate Procedure

A. In General

§13.6 MCR chapter 7 governs appeals from probate court, except as modified by MCR subchapter 5.800. MCR 5.802(A).

All appeals from the probate court must be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the probate court. Appeals are not tried de novo. MCL 600.866(1).

B. Right to Counsel for Appeal

§13.7 Although there is no statute or court rule that requires the appointment of counsel for appeal, the probate court could use its discretion to appoint counsel if necessary to ensure the right to appeal. *See* SCAO form PC 628 (Order Appointing Attorney). Note that the Michigan Supreme Court has held

in an adoption case that where the trial court has exercised discretion to appoint counsel, counsel must be appointed for an appeal unless the court identifies a change in circumstances justifying the denial of appellate appointed counsel. *In re Sanchez*, 422 Mich 758, 375 NW2d 353 (1985).

C. Appeals to the Court of Appeals

1. Appeals by Right

§13.8 Time for appeal. Unless another time is provided by law, an appeal of right to the court of appeals must be taken within 21 days after the entry of

- the judgment or order appealed from;
- an order appointing counsel;
- an order denying a party's request for appointed counsel in a civil case involving an indigent party who is entitled to appointed counsel, as long as the trial court received the request within the initial 21-day period; or
- an order deciding a postjudgment motion for new trial, for rehearing, reconsideration, or other relief from the order or judgment appealed if the motion was filed within the initial 21-day appeal period or within any further time that the trial court allowed for good cause during that 21-day period.

MCR 7.204(A)(1).

The court rules define *entry* for the purposes of determining the effective date of judgments and orders, which triggers the period for timely claims of appeal. *Entry* means the date a judgment or order is signed or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions. MCR 7.204(A), .205(A).

MCR 7.204(A)(3) includes protection for an appellant whose claim of appeal of a judgment or order is untimely because service of the judgment or order was delayed. Specifically, the rule provides that if an appellant is served with a judgment or order outside of the time mandated in MCR 2.602, the untimely claim of appeal must be accompanied by appellant's affidavit attesting to the delayed service of the judgment or order. The appellee may file a counter affidavit. The court will deem the claim of appeal timely if it finds that service of the judgment or order was outside the time permitted by MCR 2.602 and the claim of appeal was filed within 14 days of service of the delayed order.

Papers filed with the probate court. Within the time for taking the appeal, the appellant must file in the probate court from which the appeal is taken the following:

- a copy of the claim of appeal (see MC 55)
- the $25 fee required by MCL 600.880c(1)
- any bond required by law as a condition for taking the appeal (see MC 56)
- unless there is no record to be transcribed, the certificate of the court reporter or recorder stating that a transcript has been ordered and payment

for it made or secured, and that it has been filed or will be filed as soon as possible

MCR 7.204(E).

Service of process. The appellant must also serve on all interested persons a copy of the claim of appeal and a copy of any bond. MCL 600.866(2); MCR 7.204(F). Interested persons are defined for specific probate actions in MCR 5.125.

Within 14 days after being served with the claim of appeal, the appellee must file an appearance (identifying the individual attorneys of record) in the court of appeals and in the probate court from which the appeal is taken. An appellee who does not file a timely appearance is not entitled to notice of further proceedings until an appearance is filed. MCR 7.204(G).

Record on appeal. Appeals are heard on the original record. The record consists of

- the original papers filed in probate court, or a certified copy (per MCR 5.802(B)(2) if the original papers are needed for further proceedings in the probate court; the parties are not required to pay for the copies as costs or otherwise);
- the transcript of any testimony or other proceedings in the case appealed;
- the exhibits introduced; and
- the substance or transcript of excluded evidence offered at trial and the trial proceedings in relation to it.

MCR 7.210(A)(1), (3). When the appeal is from an order in an estate or trust proceeding, an adult or minor guardianship proceeding under EPIC, or a proceeding under the Mental Health Code, only the order appealed from and the petitions, opinions, and other documents pertaining to it must be included. MCR 7.210(A)(1).

The appellant is responsible for securing the transcript unless otherwise provided by the court of appeals. In estate or trust proceedings, an adult or minor guardianship proceeding under EPIC, or a proceeding under the Mental Health Code, only that portion of the transcript concerning the order appealed from need be filed, and the appellee may file additional portions of the transcript. MCR 7.210(B)(1)(b). In addition, the probate court, on appellant's motion and with notice to appellee, may order that some portion less than the full transcript (or no transcript at all) be included in the record on appeal. The motion must be filed within the time required for filing an appeal. If the motion is granted, the appellee may file any portions of the transcript omitted. MCR 7.210(B)(1)(c). Alternatively, the parties may stipulate that some portion less than the full transcript (or none) be filed or may agree on a statement of facts without procuring the transcript. MCR 7.210(B)(1)(d), (e). The statement of facts, signed by the parties, may be filed with the probate register and sent as the record of testimony.

Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, must file them with the probate

court unless, by stipulation of the parties or order of the probate court, they are not to be sent, or copies, summaries, or excerpts are to be sent. Copies of exhibits may be filed in lieu of originals unless the probate court orders otherwise. When the record is returned to the probate court, the exhibits must be returned to the parties who filed them. MCR 7.210(C).

If a motion is pending in the court of appeals before the time the complete record on appeal is transferred, the probate register must, on request of a party of the court of the appeals, send the court of appeals the documents needed. MCR 7.210(E).

Within 21 days after the transcript is filed with the probate register, the appellant must serve a copy of the record on appeal on each appellee and file proof of service with the probate court and court of appeals. MCR 7.210(F).

Within 21 days after the briefs are filed or the time for filing the appellee's brief has expired, or on the court of appeals' request, the probate court must send the court of appeals the record on appeal, except for those things omitted by written stipulation of the parties, along with a certificate identifying the name of the cases and the papers included. See MC 57. The following documents must be included as part of the record:

- a register of actions in the case
- all opinions, findings, and orders of the probate court
- the order or judgment appealed from

Weapons, drugs, or money are not to be sent unless the court of appeals requests them. Transcripts and all other documents must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the probate court, the title of the case, and the file number. MCR 7.210(G).

Decision or dismissal by court of appeals. After disposing of an appeal, the court of appeals must send a certified copy of the opinion or order to each party and to the probate court from which the appeal was received. MCR 7.215(E)(1). Certified copies of all other orders must also be sent to the parties and to the probate court. MCR 7.215(G). After the period for application for leave to appeal has expired without the filing of an application, the court of appeals must also return the original record to the probate court. MCR 7.210(H). The probate court must then notify the parties so that they may take appropriate action in the probate court. MCR 7.210(I). See MC 60.

Execution on the judgment is obtained or enforced through proceedings in the probate court after the record has been returned with a copy of the court's judgment. MCR 7.215(F)(1)(b).

2. Appeals by Leave

§13.9 Time for appeal. An application for leave to appeal must be filed within 21 days after entry of

- the order to be appealed from or

- an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order of judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the probate court allowed for good cause during that 21-day period.

MCR 7.205(A).

When an application is not filed within the time provided by MCR 7.205(A)(1), the appellant may file a delayed application for leave to appeal within six months of the entry of a judgment or order. MCR 7.205(A)(4)(a). When an appeal of right was dismissed for lack of jurisdiction, the appellant may file a delayed application within 21 days of the entry of the dismissal order or an order denying reconsideration of that order if

- the delayed application is taken from the same lower court judgment or order as the claim of appeal and
- the claim of appeal was filed within the applicable time period under MCR 7.205(A)(1).

MCR 7.205(A)(4)(b). Delayed applications must contain a statement of facts explaining the delay in filing. The opposing party may challenge the reasons given for the delay. MCR 7.205(A)(4).

Decision. The application is decided on the documents filed. The court of appeals may consider the length of time the application was delayed and the reasons given for the delay when it decides whether to grant the delayed application for leave to appeal. *Id.* The court of appeals may

- grant or deny the application,
- enter a final decision,
- grant other relief, or
- request additional material from the record.

If an application is granted, the case proceeds as an appeal of right, except that the filing of a claim of appeal is not required and the time limits for the filing of a cross appeal and for the taking of the other steps in the appeal, including the filing of the docketing statement (28 days) and the filing of the court reporter's or recorder's certificate, if the transcript has not been filed (14 days), run from the date the order granting leave is certified. Unless otherwise ordered, the appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E).

VI. Probate Court's Jurisdiction Pending Appeal

§13.10 After a claim of appeal is filed with the court of appeals or leave to appeal is granted by the court of appeals, the probate court may not set aside or amend the order appealed from except by order of the court of appeals or by stipulation of the parties. MCR 7.208(A).

Until the record is filed in the court of appeals, the probate court has jurisdiction

- to grant further time to do, properly perform, or correct any act in the probate court in connection with the appeal that was omitted or insufficiently done, other than to extend the time for filing a claim of appeal or for paying the entry fee or to allow delayed appeal; and
- to correct any part of the record to be transmitted to the court of appeals, but only after notice to the parties and an opportunity for a hearing.

After the record is filed in the court of appeals, the trial court may correct the record only with leave of the court of appeals. MCR 7.208(C).

"The probate court retains continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed." MCR 7.208(D). If property is being held for conservation or management under the probate court's order, the probate court retains jurisdiction over the property pending the outcome of the appeal, except as otherwise ordered by the court of appeals. MCR 7.208(E). A probate court order entered before final judgment concerning custody, control, and management of property or a preliminary injunction remains in effect and is enforceable in the probate court, pending interlocutory appeal, except as otherwise ordered by the probate court or the court of appeals. MCR 7.208(F).

Except as otherwise ordered by the court of appeals, the probate court also retains authority

- over stay and bond matters;
- to appoint, remove, or replace an attorney; and
- to rule on requests for costs or attorney fees.

MCR 7.208(G), (H), (J).

VII. Stay of Proceedings in Probate Court

§13.11 Probate court orders for the following are not stayed pending appeal, unless ordered by the probate court on a motion for good cause:

- removing or appointing a fiduciary
- appointing a special personal representative or a special fiduciary
- granting a new trial or rehearing
- granting an allowance to the spouse or children of a decedent
- granting permission to sue on a fiduciary's bond
- suspending a fiduciary and appointing a special fiduciary

MCR 5.802(C).

Appeals of probate court orders entered pursuant to the Mental Health Code or EPIC are not stayed unless the probate or appellate court specifically orders a stay of proceedings. MCL 600.867(2).

In all other probate court matters, filing a claim of appeal and notice with the probate court stays proceedings under the order being appealed. MCL

600.867(1). Proceedings are stayed for 21 days or, if a motion for stay pending appeal is granted, until the appeal is determined. MCL 600.867(1).

ADR	alternative dispute resolution
AOT	assisted outpatient treatment
CMH	community mental health
DHHS	Department of Health and Human Services
DNR Act	Do-Not-Resuscitate Procedure Act
EPIC	Estates and Protected Individuals Code
ESI	electronically stored information
ICWA	Indian Child Welfare Act
IVT	interactive video technology
JNOV	judgment notwithstanding the verdict
LEIN	law enforcement information network
MAA	Michigan Arbitration Act
MIFPA	Michigan Indian Family Preservation Act
MTC	Michigan Trust Code
NGRI	not guilty by reason of insanity
PAD	patient advocate designation
RUAA	Revised Uniform Arbitration Act
SCAO	State Court Administrative Office
SCRA	Servicemembers Civil Relief Act
UPC	Uniform Probate Code
UTMA	Uniform Transfers to Minors Act

Statutes

(References are to sections, forms, and exhibits.)

United States Code

Michigan Compiled Laws

Public Acts of Michigan

Court Rules, Rules of Evidence, and Related Orders

(References are to sections, forms, and exhibits.)

Michigan

Michigan Court Rules

Michigan Rules of Evidence

Regulations and Other Administrative Materials

(References are to sections, forms, and exhibits.)

Michigan

Michigan Rules of Professional Conduct

Federal

Code of Federal Regulations

Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings

Native American Affairs Policy Manual

Private Letter Rulings

Attorney General Opinions

(References are to sections, forms, and exhibits.)

Opinions of the Attorney General

Jury Instructions

(References are to sections, forms, and exhibits.)

Michigan Model Civil Jury Instructions

Cases

(References are to sections, forms, and exhibits.)