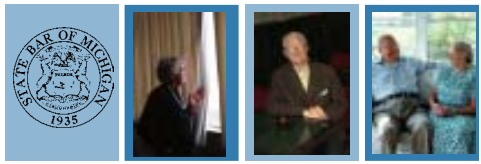
Probate and Estate Planning Section
State Bar of Michigan

Acting for Adults who become Disabled



Notes

Acting for Adults who Become Disabled

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An Overview

Every year certain adults become unable to conduct their personal affairs or manage their finances because of disability. The disability may be due to a physical condition, cognitive or developmental disability, mental or physical illness, advanced aging, chronic drug or alcohol abuse, or a serious accident. Although probate court appointment of a fiduciary may be required, there are other legally recognized means to handle the disabled person's affairs. One such means is a durable power of attorney which was executed by the person prior to disability.

A durable power of attorney is a legal document that names one or more individuals or a bank as attorney(s) in fact to act as agent(s) on behalf of the person who signed it with respect to those matters specified in the durable power of attorney. There are different types of durable powers of attorney. For example, the durable power of attorney may be effective upon the signing of the instrument or it may be effective only upon a stated occurrence, such as incapacity. In either case, when the person becomes unable to handle his or her own affairs, the attorney in fact may do those things specified in the document with the same effect as if they were done by the now disabled person.

Durable powers of attorney are recognized as valid for carrying out the financial affairs of the disabled person. In the area of medical decision-making, a person may also execute a medical durable power of attorney (also known as a patient advocate designation) and name another to act on his or her behalf in the event of incapacity.

More information on this important probate court alternative is contained in the Durable Power of Attorney pamphlet which is also published by the Probate and Estate Planning Section of the State Bar of Michigan. Other alternatives to court involvement, including the **revocable trust**, are discussed below.

In some cases, the extent of the disability and other circumstances require probate court involvement. In these instances, the court plays an important role in protecting the interests of disabled persons. The court is first called upon to decide whether an individual's physical or mental condition warrants the appointment of a fiduciary for the individual. If one is appointed, the court will periodically review the actions of the fiduciary and the condition of the disabled person to assure that the disabled person's best interests are being served. The probate court will also determine whether or not the disabled person continues to require a fiduciary to act on his or her behalf.

1. What is a Fiduciary?

A **fiduciary** is a person who is charged with the obligation to act on behalf of another. Upon determination after a hearing that a fiduciary is necessary, the probate court will appoint either a **guardian** or a **conservator** (or both) to act on behalf of the disabled person. A guardian acts on behalf of the disabled person in personal matters. If appointed under the Mental Health Code, a guardian also may manage all of the disabled person's finances and property. In cases of disability where the Mental Health Code does not apply, a conservator will be appointed to be responsible for such person's financial affairs. If both a guardian and a conservator are necessary, they need not be the same person. The appointment of a guardian or conservator is a serious matter. It may prevent the disabled person from entering into contracts and taking certain other actions.

2. Who are Disabled Persons?

In Michigan, adult persons who are "disabled" generally fall into two categories. The first, called **developmentally disabled persons (DDP),** includes those adults whose disabling condition began before age 22 and is expected to continue indefinitely. It should be emphasized that appointment of a guardian for a DDP requires a very specialized procedure under the Michigan Mental Health Code which is quite different from the procedure for other disabled persons under the Michigan Estates and Protected Individuals Code. A DDP is one who has impaired intelligence or impaired adaptive behavior which:

1. Has continued since its origination or can be expected to continue indefinitely;
2. Constitutes a substantial functional limitation in three or more of the following major life activity areas: self care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency; and
3. Is attributable to mental or physical impairment or a combination of both.

If the probate court determines after a hearing that an individual is a DDP, it will appoint a guardian to act on behalf of that person as to the person's personal matters, financial matters, or both, depending on the severity of the person's condition and other circumstances. The other category involves those adults whose "disability" occurred after reaching adulthood. An individual in this category is referred to as either (i) a **legally incapacitated individual (LII)**, in which case a **guardian** is appointed by the probate court to take care of the individual's personal activities, or (ii) a **protected individual (PI)**, in which case a **conservator** is appointed by the probate court to manage the individual's finances and property. In many cases, both a guardian and a conservator will be appointed.

This pamphlet will focus on individuals who have become disabled after reaching adulthood.

3. Acting for Disabled Persons Regarding their Personal Activities

Alternatives to Guardianship

When a person becomes disabled, a spouse or other family member can often informally make decisions concerning the person's care and custody without having probate court proceedings for guardianship. Also, a person, while competent, may execute a durable power of attorney designating another to make decisions for the person in the event of incapacity, and designate a patient advocate in a medical durable power of attorney.

Appointment of a Guardian

In many instances, it may be necessary to ask the probate court to appoint a **guardian**. Either the disabled person or another person interested in that person's welfare may request a guardianship by filing a petition with the court. The petition must be filed in the probate court in the county in which the person needing the appointment of the guardian resides or is present. The petition for appointment of the guardian must contain specific facts about the person's condition and recent conduct which demonstrates the person's need for assistance. Before a guardian may be appointed, the court must find by clear and convincing evidence at a hearing that the person is a **legally incapacitated individual (LII)** and that a guardian's appointment is necessary to provide continuing care and supervision for such person. An LII is:

> "... one 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."

The law requires that the proposed LII be personally served with notice of the hearing. In addition, the proposed LII's spouse, a person named as an attorney in fact in a durable power of attorney, and children (or, if none, parents) must be notified of the hearing and are likewise entitled to object to the appointment of a guardian. The proposed LII also has the right to have a trial by jury and to have the hearing closed to the public. The probate court may also appoint a limited guardian if a person is legally incapacitated and lacks the ability to do some required task or tasks, but not all.

The law also provides that, unless the LII is represented by his or her own counsel, the court must appoint a **guardian ad litem (GAL)** to represent the proposed LII. Among other duties, the GAL must (i) personally visit the proposed LII, (ii) explain to the proposed LII the nature, purpose and legal effects of the appointment of a guardian as well as his or her rights at the hearing, (iii) inform the proposed LII of the name of the person(s) seeking appointment as guardian, and (iv) submit a report to the court. If the proposed LII wishes to contest the petition in any way, the court must appoint legal counsel unless the

person is already represented by his or her own counsel. The court may appoint a physician or mental health professional to examine the proposed LII and to submit a detailed report to the court. The proposed LII has a right to an independent evaluation at public expense if the LII is indigent.

Any competent person or a professional guardian may be appointed as guardian - although the court will give preference to the individual nominated by the LII or to a person he or she designated in a durable power of attorney or, if none, to the LII's spouse, an adult child, a parent, or relative with whom the LII resided for over 6 months, or someone nominated by the person who is caring for or paying benefits to the LII. As a general rule, the closer the family relationship, the higher the priority.

Powers and Duties of a Guardian

Michigan's Estates and Protected Individuals Code determines the powers and the duties of a guardian. Generally, a guardian is responsible for the care, custody, and control of the LII - but is not liable to third persons for acts of the LII. The guardian may give consent which will enable the LII to receive medical or other professional care and treatment. However, under the Mental Health Code, a guardian may not place the LII in a mental institution without a full court hearing. The guardian must always try to restore the LII to independence. Each year the guardian must file a report on the condition of the LII with the probate court where the appointment took place and give a copy to the LII and the interested persons.

If there is no conservator appointed for the LII, the guardian may receive limited amounts of monies and hold certain personal possessions on behalf of the LII. Such sums and/or possessions can be used for the support, care, and education of the LII without the necessity of the appointment of a conservator.

Compensation of a Guardian

A guardian may be compensated from the LII's estate for acting as such. The amount of compensation will depend principally on the amount of time spent by the guardian, the nature of services provided, the amount of the LII's available funds, and the specialized needs of the LII.

4. Acting for Disabled Adults Regarding their Financial Interests

Alternatives to Conservatorship

Sometimes adults must have someone to act for them when they cannot effectively manage their financial affairs. Whether a proceeding in the probate court **(a conservatorship)** is required depends on the extent and nature of the person's financial interests.

As explained above, the durable power of attorney can be an excellent tool to avoid the need for a conservatorship to manage a disabled person's

property. Alternatively, assets held in a trust for the benefit of a person will normally not be subject to probate court conservatorship proceedings should that person become disabled. A trust may be set up by the person for his or her own benefit (this is frequently called a **revocable trust**) or by third parties (by gifts made during lifetime or upon death to an **irrevocable trust**). Under either arrangement, assets are owned by the trust and managed by the trustee for the benefit of the person to be protected. To the extent that a trust holds the person's assets, the disabled person's financial affairs are managed by the trustee without need for or involvement in any probate court conservatorship.

Another alternative is the use of joint bank accounts. The other party to a joint bank account (to which social security and other payments are directly deposited) can use such funds for the disabled co-owner without court action. However, this may involve a loss of control over the funds by the disabled person, since the joint owner could remove all of the money from the account.

In addition, certain government benefits (such as social security) may be paid to a third party (a payee) who is under an obligation to make sure that those monies are applied for the benefit of the person in whose name they are paid. The payee is a federal fiduciary and is not required to be appointed by the probate court. If these benefits are the sole source of income for the protected person, the designation of such a representative payee may provide a means of managing the person's affairs without court involvement.

Appointment of a Conservator

When a person has assets in his or her own name, the probate court will appoint a **conservator** when it determines that:

> "... the individual is unable to manage his or her property and business affairs effectively for reasons such as mental illness, mental incompetency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and the individual has property that will be wasted or dissipated unless proper management is provided, or that money is needed for the individual's support, care, and welfare or for those entitled to the individual's support and that protection is necessary or desirable to obtain or provide money."

Conservatorships often are of an indefinite duration and involve the management of various assets for the protected individual. However, a full conservatorship is not always necessary. When only a single transaction requires attention, the probate court may enter a **protective order** to accomplish this onetime matter. Before such an order may be entered, the court will conduct the same hearing and make the same findings that are required for a full con-

servatorship. Such a protective order could cause the transfer of the protected person's property to a privately managed protective trust.

Conservatorship proceedings may be initiated by:

- ⇨ The individual to be protected,
- ⇨ Anyone who is interested in the individual's estate, affairs, or welfare (including a parent, guardian or custodian), or
- ⇨ Anyone who would be adversely affected by a lack of effective management of the individual's property or business affairs.

However, only the individual to be protected may seek appointment of a conservator if that person is mentally competent but, due to age or physical infirmity, desires a conservator to assist in the management of his or her property and affairs.

Like a guardianship proceeding, the procedure or appointment of a conservator requires that notice of the hearing be given personally to the individual to be protected. Notice must also be given to:

- ⇨ The individual's children or, if none, to the parents (or otherwise to the individual's presumptive heirs);
- ⇨ Any person who is an attorney in fact under a durable power of attorney from the individual to be protected;
- ⇨ The nominated conservator;
- ⇨ A government agency paying benefits to the individual or before which an application for benefits is pending; and
- ⇨ The U.S. Administrator of Veterans Affairs (through their Michigan district counsel) if the protected person is receiving or entitled to benefits.

The court hearing has many of the same safeguards and protections as a hearing on a guardianship as described above. There will also be a court-appointed GAL to review the accounts and petitions filed by the conservator during the conservatorship. The fees of the GAL are paid from the conservatorship assets.

The conservator appointed by the court may be one or more individuals, a professional conservator, or both. Although Michigan law lists the priorities for appointment, the probate court may choose another party (without priority or with lesser priority) for good cause.

Powers and Duties of a Conservator

Once appointed, the conservator is responsible for the collection, preservation, and investment of the protected individual's property and must use the property for the support, care, and benefit of the protected individual and his or her dependents. A conservator has a duty of loyalty and may not use any of the protected person's assets for personal benefit. The court may require the filing of a fiduciary bond to provide protection for the protected individual if there is loss caused by the wrongful actions of the conservator.

Since a conservator is a fiduciary, the protected individual's assets must be carefully managed consistent with the Michigan Prudent Investor Rule. A reasonable amount of income must be earned while keeping risk of loss at minimum. If property is unproductive, costly to maintain, and not likely to be used by the protected individual, the conservator should consider making it productive or selling it to invest the proceeds so as to achieve a reasonable rate of return.

The nature of investments as well as the amount of funds expended for the protected individual's benefit should be based on:

- ⇨ The size of the protected individual's estate;
- ⇨ The probable duration of the conservatorship and the likelihood that, sometime in the future, the protected person may be fully able to manage his or her own affairs;
- ⇨ The accustomed standard of living of the protected individual and members of the protected individual's household; and
- ⇨ The availability of other funds for the support of the protected individual.

Incidentally, Michigan law instructs the conservator to consider the protected individual's estate plan in making investments and distributions for the protected person. Therefore, the conservator should examine the protected individual's will, trust agreement, and informal estate plan arrangements (such as joint bank accounts, life insurance policies, etc.) and not take any inconsistent actions without prior court approval.

Immediately upon appointment, a conservator must review all of the protected individual's records in order to assemble a list of all of the protected individual's properties, debts, charge accounts, and credit cards. Stores and firms with which the protected person has been a customer, including credit card companies, should be notified of the conservator's appointment. Within 56 days after being appointed, a conservator must file with the probate court an inventory of all properties belonging to the protected individual. A copy of the inventory must be sent to the "interested persons"—essentially, these are the same persons who would at that time be entitled to notice of a hearing for appointment of a conservator. Careful records must also be maintained by the conservator. It is especially important that all payments from the estate be evidenced by a cancelled check or a receipt (with a notation of the purpose of the disbursement).

Each year, the conservator must file with the court for its review an itemized accounting which shows all receipts, disbursements, and distributions as well as all remaining cash and property. Copies of the accounting must be sent to the interested persons before the court approval hearing. The conservator may also be required to file federal, state, and city income tax returns and intangibles tax returns in April of each year.

Compensation of the Conservator

Like a guardian, a conservator is entitled to just and reasonable compensation for services. In approving a conservator's fee, the court will usually consider the following six major factors:

- ⇨ The time expended by the conservator (it is important that the conservator who wishes to be compensated keep accurate time records and be able to demonstrate to the court that the services were both necessary and beneficial);
- ⇨ The professional expertise and skill required;
- ⇨ The nature, number, and complexity of assets;
- ⇨ The makeup of parties who are interested in the conservatorship;
- ⇨ The extent of the responsibilities and risks assumed; and
- ⇨ The results obtained in administering the property.

5. Other Matters Affecting Guardianships and Conservatorships

Modification and Termination

At any time, an LII or protected individual may request a modification or termination of the guardianship or conservatorship. These requests may also be filed in a guardianship by anyone interested in the LLI's welfare and in a conservatorship by the conservator or any other interested person. The request is made by filing a petition with the probate court or, in the case of guardianship, by informal letter to the court or judge. Copies of the petition must also be served on all interested persons, including the LII or protected individual (in other words, those who would be entitled to be notified if a petition for guardianship or conservatorship had been filed at that time) and the guardian or conservator. A hearing is then held on the petition. The same procedural protections are available at that hearing as were available at the initial hearing on the appointment. The court may find that the condition of the LII or protected individual has improved or worsened, in which case the guardian's or conservator's responsibilities could be decreased or increased. If the guardianship or conservatorship is terminated by the court, the powers and authority of the guardian or conservator will be cancelled. Each fiduciary will then be required to turn over all property to the person for whom the fiduciary was acting (i.e., the LII or protected individual). The conservator must also file and have approved by the court a final accounting through the time the last of the property was transferred to the former protected individual.

6. Using an Attorney and Other Professionals

Many persons who assist a disabled person do not have the technical expertise to carry out all of the attendant responsibilities and duties. This can be especially true if the person is appointed as a guardian or conservator. In

many instances, it will be necessary for such a person to retain the professional assistance of an attorney, accountant, bank trust department, investment counselor, psychiatrist, family counselor, and/or other professional. It is important that the professional's proposed fee (whether it will be a fixed amount, an amount based on time and effort expended, a percentage, etc.) be discussed, understood, and agreed upon in advance—preferably in writing. In any event, these fees will be subject to the approval of the probate court. The role to be assumed by each professional should be expressly defined and monitored by the guardian and/or conservator throughout the period the services are being rendered. While the services of one or more professionals may have been retained, the guardian or conservator is still required by law to see that their responsibilities are being properly discharged. Reliance on the improper actions of a professional will not necessarily prevent personal liability on the part of the guardian or conservator for misdeeds or oversights.