Wayne County Probate Court

PROBATE ROUNDTABLE/ QUESTION AND ANSWER SESSION October 15, 2015

Hon. Freddie G. Burton, Jr. Chief Judge
Wayne County Probate Court

&

Hon. Judy A. Hartsfield, Judge
Wayne County Probate Court

TABLE OF CONTENTS

TOPIC:

ESTATES

ISSUE:

1. What are the legal requirements for moving between formal and informal probate? How is the transition documented?

DISCUSSION:

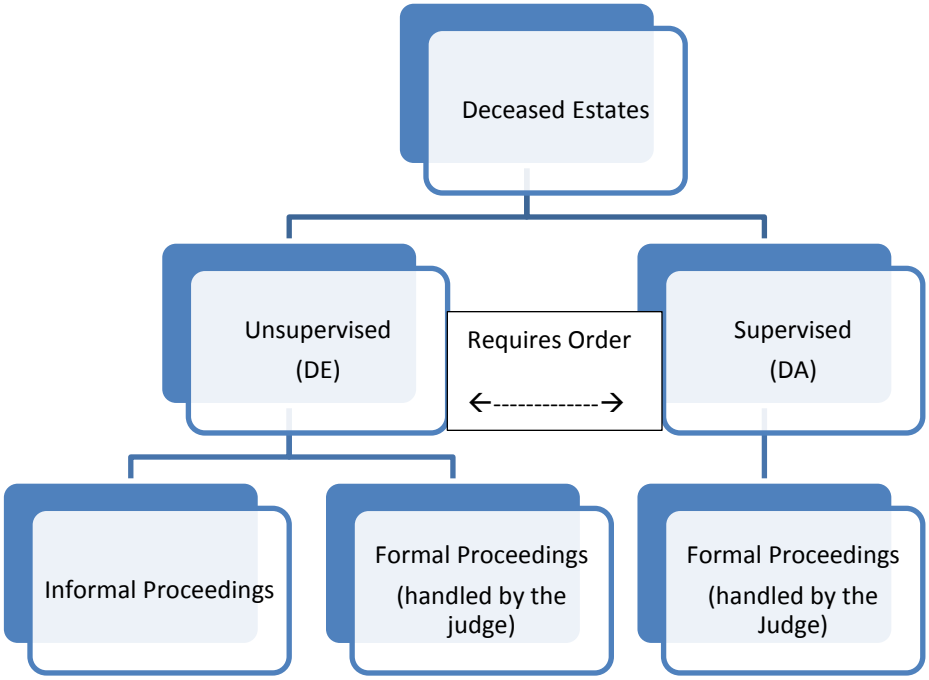
Probate proceedings are either supervised administration (DA) or unsupervised administration (DE). Transition from one to the other is documented by court order.

Definitions

- "Formal proceedings" means any type of proceeding conducted before a judge with notice to interested persons.
- "Informal proceedings" means proceedings for probate of a will or appointment of a personal representative conducted by the probate register without notice to interested persons.
- "Supervised administration" means the proceedings described in part 5 of article III.

Supervised administration requires formal proceedings.

Unsupervised administration can include formal and/or informal proceedings. Each person interested in an estate, including the personal representative, is entitled to make a request to the court for formal proceedings on a particular question or assumption relating to the estate. A request to the court for a formal proceeding does not change case code of supervised or unsupervised unless the formal proceeding was a request to move to or from supervised administration.



BEST PRACTICE CONSIDERATIONS:

- Change case code for JIS or other electronic case management system
- Change case code on file

REFERENCES:

Statutes

MCL 700.1104(h)	Definitions; E to H, Formal proceedings
MCL 700.1105(b)	Definitions; I to L, Informal proceedings
MCL 700.1107(i)	Definitions; R to T, Supervised administration
MCL 700.3415	Independent applications to court

Court Rules

MCR 5.310(F)	Changing from Supervised to Unsupervised Administration
MCR 8.117	Case Classification Codes

Publications

ICLE, Estate Administration in Michigan
ICLE, Michigan Probate Benchbook

Topic:

MENTAL HEALTH/GUARDIANSHIP

ISSUE:

2. Under MCL 330.1415, may an individual who has full guardian or a limited guardian with authority to admit consent to formal voluntary hospitalization without their guardian's consent? Is the answer different if the guardianship is a developmentally disabled guardianship?

DISCUSSION:

2A: Yes, MCL 330.1415 (MI) (*) provides that an individual's guardian, limited guardian (with authority to admit) or patient advocate (with authority to make mental health treatment decisions) must execute application for hospitalization and individual must asset. Except that if the individual had limited the authority of the guardian to make mental health treatment decisions, reserving that right to themselves.

2B: Yes, MCL 330.1508 (DDP) provides for temporary admission (no more than 30 days) by applications executed by a "person" legally empowered to make the application. A developmentally disabled individual may very well retain mental health treatment rights as guardianships are required to be as limited as possible. MCL 330.1602, 330.1620.

Also see MCL 330.1509 which specifically allows developmentally disabled individuals to make application for themselves "if competent to do so".

(*) Statute does not intend to limit the M.I., who has a guardian, to voluntarily seek hospitalization for treatment of the M.I. If guardian files application the M.I. can "assent".

TOPIC:

DESIGNATION OF PATIENT ADVOCATE

ISSUE:

How do MCL 330.1419 and MCL 700.5515 work together?

DISCUSSION:

3. Designation of Patient Advocate-How do MCL 330.1419 and MCL 700.5515 work together?

The relationship between these two sections is further clarified by the language in MCL 330.1415. That section allows an individual to be hospitalized as a formal voluntary patient if the individual assents and the patient advocate executes an application for hospitalization. The hospital director also has to determine that hospitalization is appropriate. The key here is that the individual must assent to the admission for it to be considered voluntary, even if it is the patient advocate that completes the application.

As a formal voluntary patient, the individual then has the right to give written notice of an intention to terminate the hospitalization pursuant to MCL 330.1419. if the individual provides said notice, the hospital cannot keep the person for more than 3 days after the notice is given, excluding Sundays and holidays. (See 330.5509(1)(A)

When an individual waives his right to revoke a patient advocate designation as to mental health decisions pursuant to MCL 700.5515, that the individual is subject to continued mental health treatment for up to 30 days after he communicates his intent to revoke the patient advocate designation. However, such a waiver does not affect the individual's right to terminate hospitalization if he was hospitalized as a formal voluntary patient pursuant to MCL 330.1415.

This is Why: A patient advocate may only make mental health treatment decisions if a physician and mental health practitioner both certify that the patient is unable to give informed consent. See MCL 700.5515(2). If a patient is hospitalized as a result of a patient advocate exercising the power to make mental health treatment decisions, the patient is not a voluntary patient. The patient can revoke the patient advocate designation, but is subject to the additional 30 days of treatment as stated above.

If a patient is hospitalized as a formal voluntary patient, it is with the patient's assent, and there would not have been a determination as to the patient's ability to give informed consent. Since the patient agreed to be there, the patient can only be held for up to 3 days.

TOPIC:

ESTATES

ISSUE:

4. Parents are divorced with one minor child. Father dies leaving no will. Mother of the minor child and sister of the deceased's father both wish to serve as personal representative. Does anyone have priority for appointment of personal representative? Can any action be taken by either petitioner to secure priority for appointment of personal representative?

DISCUSSION:

No one holds priority because there is no will or spouse, and there is no heir who is the age of majority. MCL 700.3203. The mother of the minor and the sister of the decedent could seek the formal appointment of conservator for the minor prior to the opening of the estate. The appointed conservator of the minor may exercise the same right to nominate and object to another's appointment as the personal representative. MCL 700.3204. These rights are not conferred on a natural guardian.

Note the conservator does not acquire any priority held by the protected minor under MCL 700.3203 to be appointed personal representative but the conservator may nominate herself.

REFERENCES:

MCL 700.3203; MCL 700.3204.

TOPIC:

ESTATES

ISSUE:

5. Does one convicted of voluntary manslaughter of the decedent forfeit all benefits under the decedent's estate? Does one convicted of guilty but mentally ill to second degree murder of the decedent forfeit all benefits under the decedent's estate?

DISCUSSION:

Under the slayer statute, MCL 700.2803, "an individual who feloniously and intentionally kills or who is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits under this article with respect to the decedent's estate…"

Under the holding of *In Re: Nale Estate (Cook v Nale),* 290 Mich App 704(2010), one convicted of voluntary manslaughter forfeits all benefits as provided under MCL 700.2803. The argument to *Nale, id,* made by the respondent is that manslaughter does not involve an intentional killing and thus MCL 700.2803 does not bar respondent from receiving benefits from the estate of decedent, her late husband.

The Michigan Supreme Court, however, defined voluntary manslaughter as an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool. *People v Mendoza*, 468 Mich 527 (2003). Murder and voluntary manslaughter are both homicides that share the element of being "intentional" killing. *People v Hess*, 214 Mich App 33 (1995). In addition, the common law "slayer rule" has never been limited to the crime of murder. The Michigan Supreme Court has embraced the common law "slayer rule" as described in *Wharton on Homicide* (3d Ed), Section 665:

> To permit a person who commits a murder, or any person claiming under him, to benefit by his criminal act, would be contrary to public policy. And no devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself. And if applying this rule, no distinction can be made between a death case by murder and one caused by manslaughter. *Garwols v Bankers Trust Company*, 251 Mich 420 at 428 (1930).

Because voluntary manslaughter has been defined by Michigan courts as an intentional killing and because the common law "slayer rule" has never been limited to the crime of murder, MCL 700.2803 operates to prevent one convicted of voluntary manslaughter from benefitting from the estate of the decedent.

REFERENCES:

MCL 700.2803; *In Re: Nale Estate (Cook v Nale),* 290 Mich App 704 (2010); *People v Mendoza*, 468 Mich 527 (2003); *People v Hess*, 214 Mich App 33 (1995); *Wharton on Homicide* (3d Ed), Section 665; *Garwols v Bankers Trust Company*, 251 Mich 420 at 428 (1930); *In Re: Estate of Mikes*, unpublished, 3-17-15, Court of Appeals No. 319362; MCL 700.2803(5); *Hughes v Judge's Retirement Board,* 407 Mich 75 (1979); *In Re: Certified Questions from U.S. Court of Appeals for the 6th Circuit*, 416 Mich 558 (1982); *Basic Prop Ins Ass'n v Ware*, 230 Mich App 44(1998); *In Re: Estate of Haviland*, 177 Wash 2d 68 (2013).

TOPIC:

GUARDIANSHIP/CONSERVATORSHIP

ISSUE:

6. Is a petitioner who is employed by another entity (i.e., CMH, Hospital) required to be represented by an attorney? Does is make any difference to the answer if the petition is contested? (Yes per some Judges)

DISCUSSION:

An individual in his or her own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment of a guardian. MCL 700.5303(1).

The individual to be protected, a person who is interested in the individual's estate, affairs, or welfare, including a parent, guardian, or custodian, or a person who would be adversely affected by lack of effective management of the individual's property and business concerns may petition for a conservator's appointment or for another appropriate protective order. MCL 700.5404(1).

While an individual may appear in proper person, a corporation, because of the very fact of its being a corporation, can appear only by attorney, regardless whether it is interested in its own corporate capacity or in a fiduciary capacity. *Detroit Bar Association v. Union Guardian Trust Company*, 282 Mich. 707 (1938).

We note that defendant was represented below and on appeal by Harvey L. Desnick, who is not a licensed attorney. An individual may appear in propria persona; a corporation, however, can appear only by attorney regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity. *Peters Production, Inc. v Desnick Broadcasting Company* 171 Mich App 283 (1988)

BEST PRACTICE CONSIDERATION:

It is clear from common law that a petitioner who files a petition or appears on behalf of her corporate employer is required to be represented by counsel. Her appearance without counsel is the unauthorized practice of law.

There are pertinent practical considerations in the enforcement of this rule, including additional costs, the lack of available counsel in remote areas, and the possible chilling effect upon the accessibility to the probate court.

REFERENCES:

MCL 700.5303(1); MCL 700.5404(1); *Detroit Bar Association v. Union Guardian Trust Company*, 282 Mich 706 (1938); *Peters Production, Inc. v Desnick Broadcasting Company* 171 Mich App 283 (1988).

TOPIC:

GUARDIANSHIP

ISSUE:

7. Can the Court limit the ability of an interested person to seek modification or dismissal of a guardianship? (Yes as to LII; maybe re: DDP; maybe re: minors)

DISCUSSION:

Yes as to an incapacitated individual. An order finding incapacity may specify a period up to 182 days during which petitions cannot be filed without leave of the court seeking determination a ward is no longer incapacitated, or for removal, modification, or termination.

Maybe as to a developmentally disabled individual. Actions the court can take following a hearing on petition to discharge of modify include 'any other order the court considers appropriate and in the interests of the individual with a developmental disability.'

Maybe as to a minor guardianship or limited guardianship. Actions the court can take following a petition to terminate include 'Take any other action considered necessary in a particular case.'

BEST PRACTICE CONSIDERATIONS:

- Always review requests for removal, modifications, or termination.
- Appoint visitor or guardian ad litem to report on ward's circumstances.
- Appoint an attorney to prepare and file petition.

REFERENCES:

Statutes

MCL 700.5310(3)	Resignation or removal of guardian
MCL 330.1637(2), (4)(e)	Discharge or modification order; petition; hearing; order
MCL 700.5208	Petition to terminate guardianship of minor
MCL 700.5209(2)(d)	Court action on petition to terminate guardianship of minor
MCL 700.5219	Resignation, removal, and other post-appointment proceedings

Court Rules

MCL 5.121 Guardian ad Litem; Visitor

TOPIC:

GUARDIANSHIP

ISSUE:

8. An order appointing a temporary guardian, under current procedure, is not entered into LIEN. Is this appropriate?

DISCUSSION:

Yes. We do not enter an order appointing temporary guardian into LEIN.

PC 631, Order Regarding Appointment of Guardian of Incapacitated Individual, paragraph 13 requires that if a guardian is appointed the Michigan State Police is required to enter the legally incapacitated individual's information into LEIN.

PC 632, Order Regarding Appointment of Temporary Guardian of Incapacitated Individual, has no similar order to the Michigan State Police to enter a finding of incapacity into LEIN.

BEST PRACTICE CONSIDERATION:

- Follow the form.

REFERENCES:

Statutes:

MCL 700.5107 Entry or removal from LEIN

Forms

PC 631 Order Regarding Appointment of Guardian of Incapacitated Individual
PC 632 Order Regarding Appointment of Temporary Guardian of Incapacitated Individual

TOPIC:

DEVELOPMENTALLY DISABLED GUARDIANSHIPS

ISSUE:

9. Can the process to appoint a guardian for a developmentally disabled person begin before their 18th birthday? Can a guardian be appointed before their 18th birthday, as long as the effective date is delayed?

DISCUSSION:

Provisions contained in Chapter 6 of the Michigan Mental Health Code: Guardianship for the Developmentally Disabled, appear to apply to minors despite the fact that the parent is natural guardian for one's child.

MCL 330.110(b)(6) defines "guardian" as a person appointed by the Court to exercise specific powers over an individual who is a *minor*, legally incapacitated or developmentally disabled.

MCL 330.1600(a)(ii) defines "facility" as a *child caring institution,* a *boarding school,* a convalescent home, a nursing home or home for the aged, or a community residential program.

MCL 330.1604 states an appointment of a guardian for a developmentally disabled person shall be made *only* under this chapter, except that a guardian may be appointed for a minor when appropriate under Section 5201-5219 of the Estates and Protected Individuals Code (EPIC).

MCL 330.1642 allows for the surviving parent of a minor with a developmental disability for whom a guardian has not been appointed, to appoint a testamentary guardian by will. The testamentary guardian possesses the powers of a parent, and shall serve subject to the Probate Court's power to reduce the scope of guardianship authority or to dismiss a guardian. The appointment terminates when the minor turns 18 years of age, or the guardian is dismissed. This statutory provision also allows a parent who has been appointed guardian of a minor or adult child with a developmental disability to appoint by will a testamentary guardian unless a standby guardian has been designated.

Despite the statutory provisions, many assume Chapter 6 of the Michigan Mental Health Code applies exclusively to adults with a developmental disability. The vast majority of provisions contained in Chapter 6 of the Michigan Mental Health Code simply do not pertain to minors. Indeed, in 2013 legislation was proposed but not introduced which would have allowed the filing of a developmentally disabled guardian petition six months prior to a minor respondent's 18th birthday. The purpose of the proposed legislation is obvious. With minor children in psychiatric facilities or residential placements, parents desire to care for their disabled child seamlessly after their child reaches the age of majority. Some developmentally disabled minors intend to terminate placement or services when they reach age 18.

KENT COUNTY PRACTICE:

The Kent County Probate Court allows the filing of developmentally disabled guardianship petitions and the conducting of the guardianship hearing prior to the minor's 18th birthday. Letters of authority are either held until the respondent's 18th birthday or post-dated to the respondent's 18th birthday and released to the guardian.

REFERENCES:

MCL 330.110(b)(6); MCL 300.1600(a)(ii); MCL 330.1604; MCL 330.1642.

TOPIC:

LEGALLY INCAPACITATED INDIVIDUAL GUARDIANSHIPS

ISSUE:

10. How do you balance the priorities for appointment, particularly in the case of second marriages where there is a dispute between the children of the first marriage and the spouse of the second?

DISCUSSION:

MCL 700.5313 defines priority:

> Must appoint person designated by individual "if suitable".
>
> If no one is designated or the person designated is "unsuitable" or unwilling to serve priorities are as follows:
>
> a) Spouse
> b) Adult child (more than one would have equal priority)
> c) Parent
> d) Relative with whom living more than six months
> e) Person nominated by a person who is caring for or paying benefits to the legally incapacitated individual

There really is no "balancing" of priorities, simply a determination of "suitability". However, Judges in other Probate Courts often appoint a Lawyer Guardian Ad Litem (LGAL) to provide a report and recommendation. In some case a third party unrelated guardian is appointed. Occasionally co-guardians are appointed. Also, ordering guardians to provide information about and access to the ward often resolves concerns.

TOPIC:

WILLS

ISSUE:

11. While MCL 700.2515 says the content of a will deposited with the Court cannot be revealed, can the Court reveal the fact one is on deposit?

DISCUSSION:

Yes and No.

Yes, if testator's certified death certificate is delivered to the court. On receipt of a certified death certificate, the will is opened, filed with the death certificate, and is a public record.

No, if no certified death certificate is presented to the court. The appropriate response to an inquiry without a certified death certificate is:

> "All wills filed for safekeeping under MCL 700.2515 are sealed until the testator's death."

BEST PRACTICE CONSIDERATIONS:

- To ensure that procedures are carried out uniformly and correctly, only authorized personnel should be assigned the responsibility of processing requests for restricted access records. If court staff is able to acknowledge that a requested record exists, inquiries regarding these records should be referred to authorized personnel.

REFERENCES:

Statutes

MCL 700.2515 Deposit of will with court in testator's lifetime

Court Rules

MCR 8.118(E),(H) Court Records and Reports; Deputies of Clerks

Forms

PC 548 Authorization to Release Will Held for Safe Keeping

(Note: Also, see MCL 700.5428, which allows a conservator to reveal the Last Will &Testament of the Protected Individual. Some judges would require a conservator to see the Last Will & Testament from some other source than the Court.)

Publications

SCAO, Case File Management Standards (rev. 07/14), AREA 1: Active Case File Management, 1.1.6: Providing Public Access to Records; Confidential Records.

SCAO, Non-Public and Limited Access Court Records, Wills Filed for Safekeeping, page 48.

TOPIC:

GUARDIANSHIP

ISSUE:

12. What alternatives does the Court have to the appointment of traditional (i.e., family, public or professional) guardians, particularly with those individuals with a history of violence or threats against their guardian?

DISCUSSION:

In a few cases I have appointed one of our Lawyer Guardian Ad Litems's guardian, but cost can be an issue particularly where the ward is indigent.

In most cases our Community Mental Health Authority is involved and is usually able to locate someone to serve as guardian or will petition under the Mental Health Code.

TOPIC:

WRONGFUL DEATH ACTIONS

ISSUE:

13. A wrongful death settlement stemming from a motor vehicle accident has been reached in a decedent's estate without the filing of a civil action. The personal representative wishes to determine whether the at-fault driver has other sources of recovery, including other policies of insurance and personal assets. May the attorney for the personal representative depose the at-fault driver and conduct discovery within the decedent's estate case?

DISCUSSION:

No. Effective January 1, 2002, MCR 5.131(B) clarifies that discovery in a probate proceeding is not available for the subject matter of a prospective civil action before the filing of such an action. MCR 5.131(B) reads: "Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the Court. Discovery for civil actions in probate court is governed by subchapter 2.300."

Prior to the 2002 amendment to this rule, discovery was not precluded in the probate court when no civil action had been commenced under the general rules of civil procedure because an "action" sufficient to authorize the use of a deposition subpoena in the probate court includes a properly commenced proceeding. *In Re: Brown*, 229 Mich App 496 (1998).

The amendment to 5.131 came in response to the ruling in *Brown*, supra

BEST PRACTICE CONSIDERATION:

The attorney for the estate could request a sworn statement from the at-fault driver regarding assets and insurance.

REFERENCES:

MCR 5.131; *In Re: Brown*, 229 Mich App 496(1998).