

TESTIMONY TO THE HOUSE JUDICIARY COMMITTEE

November 2, 2021

NATHAN PIWOWARSKI

120 WEST HARRIS STREET
CADILLAC, MICHIGAN 49601

(231) 775-1391 | (231) 577-5246

nathan@mwplegal.com

Good morning, Chairman Filler and Committee Members. My name is Nathan Piwowarski. I am testifying in favor of House Bills 4898 through 4901 on behalf of the Probate and Estate Planning Section of the State Bar of Michigan. The Probate and Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,351 members. The Section is not the State Bar of Michigan and the position that I am sharing today is that of the Section only, and not the State Bar. The Section has a public policy decision-making body with 22 members. At a series of regularly-schedule meetings in 2018 and 2019, the Section adopted its position in favor of these bills as currently constituted. The details of these meetings and votes are attached to my written testimony.

Over the last four years, the Section has developed these bills in collaboration with these bills' sponsors. They make a variety of improvements to the Estates and Protected Individuals Code, Uniform Transfers to Minors Act, and the after-death vehicle transfer provisions in the Motor Vehicle Code and Natural Resources and Environmental Protection Act.

The bills can be broken into five major areas of improvement.

I. Financial Threshold Changes

First, both sponsors' bills [Rep. Filler's HB 4898 and Rep. Bolden's HBs 4900, and 4901] would adjust various financial thresholds to address the effect of inflation on a variety of probate matters. In many cases, these adjustments will make it easier for the public to complete asset transfers without involving the court system.

[In the interest of brevity, the following is offered only as part of my written testimony:

1. EPIC Sec. 1210's COLA provision would be updated to incorporate the various new statutory thresholds subject to COLA.
2. EPIC Sec. 2519 would be amended to increase the "facility of payment" amount in the statutory Will from \$5,000 to \$25,000. The statutory Will itself would be subject to COLA.
3. EPIC Sec. 3605 would be changed to increase the threshold for demanding a bond from \$2,500.00 to \$25,000.00 and would subject this threshold to COLA.

4. EPIC Sec. 3916 would be amended to increase the “small sum” that can be distributed as part of the residue (in lieu of depositing for a missing beneficiary/heir/devisee) from \$250.00 to \$1,000.00, and would subject this threshold to COLA.
5. EPIC Sec. 3917 would be changed to modify the thresholds and interest charges for when the county treasurer holds funds for missing beneficiaries, heirs, and devisees. These thresholds shall be subject to COLA.
6. EPIC Sec. 3918 would be amended to increase amount that an estate’s personal representative can distribute to a legally-disabled person from \$5,000.00/year to \$25,000.00/year, and would subject these thresholds to COLA.
7. EPIC Sec. 3981 would be amended to increase the value of property that a hospital, nursing facility, morgue, or law enforcement agency may distribute without administration to select family members, to \$1,000.00 from \$500.00, and subject these thresholds to COLA.
8. EPIC Sec. 3982 would be modified to increase the pre-COLA base for a Petition and Order of Assignment to \$25,000.00, from \$15,000.00.
9. EPIC Sec. 3983 would be amended to increase the pre-COLA base for an Affidavits of Decedent’s Successor to \$25,000.00, from \$15,000.00.
10. EPIC Sec. 5102 would be amended to change the amount that one can distribute to a minor (or one with care and custody of the minor) without a conservatorship, increasing the threshold from \$5,000.00/year to \$25,000.00/year, and subject this threshold to COLA.
11. NREPA Sec. 80312 would be amended to increase the value of watercraft that can be transferred without opening a decedent estate to \$100,000.00, and will institute an annual COLA.
12. MVC Sec. 236 would be amended to increase the value of motor vehicles that can be transferred without opening a decedent estate to \$100,000.00, and will institute an annual COLA.
13. UTMA Sec. 10 would be amended to increase the amount that can be transferred under the UTMA to \$50,000.00.]

II. Standby Guardians

The second area of improvement concerns standby guardians. For years, our state’s Mental Health Code has allowed the designation of “standby guardians” for persons with developmental disabilities. This helps ensure continuity in the protection of vulnerable persons. HB 4988 would update EPIC to do this in all other Michigan guardianships.

[In the interest of brevity, the following is offered only as part of my written testimony:

1. EPIC Sec. 5301 empowers parents to appoint guardians through their Wills. This amendment would coordinate with the new standby guardian rules, providing that the court's designation of a standby guardian trumps the nomination of a guardian in a parent's Will.
2. A newly-created EPIC Sec. 5301c would authorize probate courts to designate standby guardians. The procedure is analogous to their ability to name standby guardians for persons with developmental disabilities under the Mental Health Code. Unlike the MHC, this new statute expressly describes the mechanisms of designation, acceptance, and transition into serving as current guardian. The provision would also offer broad third-party reliance protections.
3. EPIC Sec. 5305 sets out the notices that the GAL must give an adult who is the subject of a guardianship petition. If amended, it will include various notices regarding the designation of standby guardians.
4. EPIC Sec. 5306a lays out various procedural rights that an individual for whom a guardian is sought or appointed. It would be amended to create similar rights for any individual for whom a standby guardian's designation is being sought.
5. EPIC Sec. 5310 concerns petitions to modify guardianships. The proposed changes simply fit standby guardians into this statutory scheme.
6. EPIC Sec. 5313 governs the priority for serving as guardian for a legally-incapacitated adult. This amendment would clarify where the nominee from the will of that person's parent or spouse fits within the statutory scheme.
7. EPIC Sec. 5314 governs the report of guardian. If amended, it will require the affirmation of a standby guardian's continued willingness to serve.]

III. Technical Improvements to Patient Advocate Designations

Third, HB 4898 improves Michigan patient advocate laws. Among other things, they would better explain what happens when more than one person serves as a patient advocate. They would also make it possible for certain nurse practitioners and physicians' assistants to activate patient advocates' authority – an important reform to address the increased role of nurse practitioners and physicians' assistants in the delivery of primary care services in rural areas.

[In the interest of brevity, the following is offered only as part of my written testimony:

1. EPIC Sec. 5506 provides for more than one person simultaneously serving as patient advocate. It relieves third parties of inquiring into a co-advocate's authority to act alone. It would allow a designation to specify the process by which an advocate (or multiple co-advocates) are to make decisions.

2. EPIC Sec. 5507 would be amended to better accommodate co-patient advocates by allowing the designations to lay out instructions as to how an advocate (or advocates) make decisions.
3. EPIC Sec. 5508 would be amended to make it possible for certain nurse practitioners and physician's assistants to certify that a patient advocate designation is triggered. This is done by replacing the term "attending physician" with the broader "attending medical professional."
4. EPIC Sec. 5510 describes how a patient advocate may be removed. It would be amended to coordinate with the renumbering of Sec. 5511.
5. EPIC Sec. 5511 governs the "reliance protections" of medical care providers. It would be amended to clarify that a medical care provider is not required to determine whether an advocate has complied with the patient's instructions. This change is intended to confer the broadest possible protection on medical providers, so that they need not parse the meaning of written decision-making instructions under Sec. 5507 — or verbal instructions that may've superseded the written ones contained in the patient advocate designation.]

IV. Notice-Related Clarifications and Improvements

Fourth, the proposals would make certain notice-related rules in the Michigan Trust Code more user-friendly.

[In the interest of brevity, the following is offered only as part of my written testimony:

1. MTC Sec. 7103 is a definitional section for the Trust Code. Two definitions would be amended to reduce notice- and representation-related difficulties that can arise from charities and other beneficiaries who are highly unlikely to take, particularly those named in trusts' wipeout clauses. The definition of "charitable trust" would be changed to apply only to trusts for which the charitable purpose was a "material purpose." And the definition of "qualified trust beneficiary" would be similarly amended to include individuals whose benefit is a material purpose of the trust. Under this proposal, a wipe-out beneficiary may later become a "qualified trust beneficiary" if there are no remaining qualified trust beneficiaries ahead of them in line.
2. MTC Sec. 7110 gives the status of "qualified trust beneficiary" to certain charitable organizations and persons empowered to enforce pet and purpose trusts. This section would be amended to update certain cross-references. It also would confer the rights of a qualified trust beneficiary on an individual with "protection" powers under a silent trust during its nondisclosure period.
3. MTC Sec. 7302 would clarify when the holder of a power of appointment may bind potential appointees under the MTC's representation rules.]

V. Nondisclosure Periods for Trusts

Fifth, the bills would authorize specialized trusts whose existence can be confidential for a limited period of time, as in possible in other states, including Alaska, Delaware, New Hampshire, Ohio, South Dakota, Tennessee and Wyoming. These trusts may help address the “moral hazards” of large gifts, protect a donor’s desire for confidentiality, and minimize conflict related to beneficiaries’ in-laws and undesirable friends.

Importantly, these new rules would impose accountability by having at least one person receive notice in the beneficiaries’ stead during the nondisclosure period.

[In the interest of brevity, the following is offered only as part of my written testimony:

1. MTC Sec. 7105 specifies what provisions of the MTC may not be overridden by a trust instrument’s terms. It would be amended to make the durational limits for pet trusts and noncharitable purpose trusts non-waivable. Further, it would carve out an exception to the duty to inform – a complement to the “silent trusts” proposal.
2. New MTC Sec. 7409a would create “silent trusts” that need not be disclosure for a period of up to 25 years.
3. MTC Sec. 7604 would be amended mesh this provision with the “silent trust” proposal.]

VI. Miscellaneous Technical Fixes and Improvements

[In the interest of brevity, the following is offered only as part of my written testimony:

Finally, the proposals make a variety of small technical improvements and “fixes” to Michigan’s probate and trust statutes.

1. EPIC Sec. 1106 would incorporate a definition of “power of appointment.”
2. EPIC Sec. 2806 would be amended to incorporate gender-neutral terminology.
3. EPIC Sec. 3206 would more clearly define the term, “armed forces.”
4. EPIC Sec. 3959 would have some unartful language clarified, concerning the requirements to reopen a decedent estate.
5. MTC Sec. 7402 would be amended to update a reference to the new pet and noncharitable trust provisions.
6. New MTC Sec. 7408 would incorporate the modernized UTC provision concerning trusts for the care of animals (our existing provision is derived from the Uniform Probate Code).
7. New MTC Sec. 7409 incorporates the modernized UTC provision concerning noncharitable purpose trusts. Our existing law is derived from the Uniform Probate Code.

8. MTC Sec. 7506 would be amended to clarify that Spousal Lifetime Access Trusts should not be subject to the reciprocal trust doctrine.]

Thank you for your consideration. I will gladly answer any questions that you may have.

Public Policy Position

Proposal to Add a Section to EPIC Concerning Undisclosed Trusts (700.7409a)

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,238 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On June 16, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on proposed amendments to EPIC concerning undisclosed trusts, 1 member voted against this position, 0 members abstained, 6 members did not vote.

Support

Explanation:

The Probate and Estate Planning Section (i) supports a bill to amend 1998 PA 386, entitled "estates and protected individuals code" by adding a new section 7409a (MCL 700.7409a), as presented to the Council in the memorandum dated June 7, 2018; (ii) with the addition of the phrase "acting in a fiduciary capacity," to proposed section 7409a(5)(e) immediately after the first use of the term "power holder" in such section; and (iii) with the authority of the CSP Chair to consent to non-substantive changes to such proposal on behalf of the Section.

Contact Person: Marguerite Munson Lentz

Email: mlentz@bodmanlaw.com

M E M O R A N D U M

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
Legislation Development & Drafting Committee

From: James P. Spica

Re: Undisclosed Trusts Proposal

Date: June 7, 2018

I. Undisclosed Trusts and Secret Trusts Distinguished

Undisclosed trusts are sometimes misleadingly referred to as “secret trusts.” Technically, the term ‘secret trust’¹ refers to a testamentary trust that is enforceable (*if it comes to light*) notwithstanding that it is not disclosed in the will that transfers the *res* to the trustee.² In that acceptance, ‘secret trust’ denotes a trust that is designed primarily to protect the settlor’s privacy, that is, therefore, generally not disclosed to anyone other than the trustee, and that is likely to be documented, if at all, only in private communications to the trustee.³ Now, for our purposes here, we do not care about the secret trust’s particular, technical association with the statute of wills;⁴ what is important for our purposes is that a secret trust is meant to be concealed from as many people as possible—to the world, a secret trust appears to be an outright gift.

As used in this memorandum, the term ‘undisclosed trust’ refers to something very different from a secret trust: an “undisclosed trust” is intended primarily, not to protect the settlor’s privacy, but to protect one or more beneficiaries of the trust from a possible deformation of character or of will; the settlor thinks *the beneficiary* is better off not knowing (at least for a time) of the trust’s existence (or of the extent or nature of the trust property), but as far as the trust itself is concerned, the settlor has no motivation to dissemble beyond what may be necessary to keep benighted beneficiaries in the dark. The settlor’s motivation is thus consistent with the trust’s being both well-documented and relatively widely disclosed. Indeed, to the extent she can do so without alerting the focal beneficiaries, the settlor may want to empower “enforcers” to hold the trustee’s feet to the (proverbial) fire.

¹ Here we adopt the convenient, technical convention (common among logicians) of using single quotation marks “to construct a name for the [marked] expression.” ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 6 n.4 (1990). We shall use “[d]ouble quotes [sic] . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath.” *Id.*

² See, e.g., J. E. PENNER, *THE LAW OF TRUSTS* ¶ 6.48 (8th ed. 2012); SIMON GARDNER, *AN INTRODUCTION TO THE LAW OF TRUSTS* 93-94 (3d ed. 2011); MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* 110, 114 (Simon Dix trans., 2000); HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, *MODERN EQUITY* 147-55 (Jill E. Martin ed., 13th ed. 1989). In the United States, secret trusts are enforceable (*if they come to light*) as constructive trusts for the intended objects. See *RESTATEMENT (THIRD) OF TRUSTS* § 18 (2003).

³ See, e.g., PENNER, *supra* note 2, ¶ 6.50.

⁴ It is the testator’s failure satisfy the requirements of the wills statute that causes a “secret trust” (in the technical sense described *supra* in the text accompanying note 2) to be unenforceable as an express (as opposed to *constructive*) trust. See *RESTATEMENT (THIRD) OF TRUSTS* § 18 cmt. a (2003).

II. A Causal Connection

Michigan law does not permit a settlor to create an express trust that is “undisclosed” in the sense described above because (1) we have so far assumed that the trusts in question are for the benefit of definite or definitely ascertainable beneficiaries and (2) the statutory duty of a trustee to provide notice of a trust’s existence to trust beneficiaries cannot be waived by the terms of the trust.⁵ Thus, a Michigan settlor who is determined to create an undisclosed trust for one or more intended beneficiaries must either create a trust the meaning and effect of whose terms will be governed by the law of a state that permits undisclosed trusts⁶ or create a trust that is “*secret*” in the sense described above. In the latter case, the trust must look for all the world like a gift outright, for if the tacit trust relation should be detected (and enforced for the beneficiaries as such), the trustee will be bound to provide the beneficiaries notice.⁷

Thus, a trust that could have been well-documented and somewhat widely disclosed, that might even have empowered “enforcers,” will likely not be disclosed to anyone other than the trustee and will be documented, if at all, only in private communications to the trustee. As a matter of policy, of course, such a triumph of subterfuge is regrettable: temptation can be expected to work mischief in the dark that daylight would prevent.

III. Purpose Trusts

What if our would-be settlor does not intend to benefit any definite or definitely ascertainable beneficiary? We can ask that question because, for the very reason of policy just mentioned, Michigan law countenances the “purpose trusts”⁸ currently permitted by Estates and Protected Individuals Code (EPIC) section 2722, trusts whose distinguishing characteristic is that they lack definite or definitely ascertainable beneficiaries.⁹ And here we find that the settlor can create an undisclosed trust, with Michigan’s blessing, as a purpose trust: a settlor who wishes to support the pursuit of some noncharitable endeavor *without directly motivating the endeavor for certain potential adherents* can articulate a purpose within the contemplation of EPIC section 2722(1) to which the concealment of means is integral.

⁵ MICH. COMP. LAWS § 700.7105(2)(i).

⁶ There are currently twelve jurisdictions in the United States that permit undisclosed trusts in one form or another. These are Alaska, Arizona, Delaware, the District of Columbia, Maine, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Virginia, and Wyoming. (I am indebted for this information to a survey of state laws permitting undisclosed trusts that was compiled in 2017 by Richard C. Mills.)

⁷ It is true that the trustee’s duty to provide notice of trust existence is subject to the Michigan Trust Code’s “virtual” representation rules. See MICH. COMP. LAWS § 700.7301. So, a settlor determined to create an undisclosed trust for definitely ascertainable beneficiaries could, for example, provide a nontrustee a special power of appointment over the trust assets and require the trustee to provide all required notices to the fewest possible trust beneficiaries. See *id.* §§ 700.7302 (virtual representation by holder of power of appointment), .7103(l)(ii) (‘trust beneficiary’ defined to include nontrustee holder of a power of appointment over trust property). But that would simply shift the “secret”: in that case, it is not the trust that is dissembled, but rather the purpose of the power of appointment, and the settlor has created a nominal “power of appointment” whose exercise would itself be a fraud on the power! (For the concept of fraud on a power, see GERAIN THOMAS, THOMAS ON POWERS ¶ 9.05 (2d ed. 2012); JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 981 at 547 (3d ed. 2004).)

⁸ Adopting this term from, e.g., PENNER, *supra* note 2, ¶¶ 9.1-9.30; Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW 1, *passim* (A. J. Oakley ed., 1996). Purpose trusts are also sometimes called “trusts of imperfect obligation(s).” See PENNER, *supra* note 2, ¶ 9.18; LUPOLI, *supra* note 2, at 124.

⁹ See MICH. COMP. LAWS § 700.2722(1).

Suppose, for example, that I am a highly distinguished concert violinist of a family that includes (a) a long line of highly distinguished concert violinists who have all espoused the use of a particular style of bow (A Line) and (b) a great many inveterate music-haters (B Class) whose parents, prospecting for genetically transmitted talent, subjected their unpromising offspring to arduous and thoroughly unprofitable courses of musical instruction. I would very much like to see the cult of the relevant bow flourish and the A Line continue, but I am very much loath to augment the B Class. So, I create a trust to support the future musical education of young and as yet unborn violinists who eventually display talent and in whom the cult of the relevant bow can be inculcated (through the trustees' exertions), but to protect those innocent of talent within my own family from stray parental enthusiasm, I enjoin the trustees to pursue the trust's purpose "for as long as possible (and to the greatest extent permitted by law)" without disclosing the existence of the trust, the source or extent of the trust fund, the trust's purpose, or the considerations that inform the trustees' dispositive discretions.

The bow-cult concert violinist is just one interpretation of the relevant model, *viz.*, a settlor who wants to support a noncharitable endeavor she regards as a "calling" without stimulating disingenuous or misguided attempts to heed "the call." One can easily imagine analogous stories involving draft-horse farming, heritage livestock breeding, artisan passementerie manufacture, etc. In each case, (it is submitted) the resultant trust is one that can be performed by the trustee for up to twenty-one years under EPIC section 2722(1)¹⁰ (up to twenty-five years under the Committee's proposal to substitute Uniform Trust Code sections 408 and 409¹¹ for section 2722). So, for the limited period permitted by section 2722 (or by Michigan Trust Code section 7409 if the Committee's prior proposal, which has been approved by Council, becomes law), Michigan law permits undisclosed trusts¹² when concealment of means is an integral part of the settlor's pet project *provided* the settlor does not aim to benefit any "definite or definitely ascertainable beneficiary."¹³

But, of course, a trust of the kind we have imagined might be drafted so that a particular person will become *entitled*, in certain circumstances, to a trust distribution or distributions. It may be, for example, that the trustee (in our hypothetical above) is instructed by the terms of the trust to engineer an anonymous, bow-style-referential gift to any devotee of the relevant bow who becomes a finalist in a certain international violin competition. In that case, if such a devotee becomes such a finalist during the trust's continuance, she will have an equitable claim¹⁴ (to trust property) of which she is permitted by section 2722 to remain ignorant.¹⁵ If the trustee arranges the payment, the devotee's ignorance does no harm, but if the trustee is derelict or obdurate, the devotee cannot assert her claim for want of information.¹⁶

This last example emphasizes that section 2722 permits trusts whose terms cannot be enforced (for lack of notice) by people who would otherwise be, in certain circumstances at least,

¹⁰ *See id.*

¹¹ *See* UNIF. TRUST CODE §§ 408-409, 7C U.L.A. 490-94 (2006).

¹² "Except as ordered by the court or required by the terms of the trust, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the [purpose trust]." MICH. COMP. LAWS § 700.2722(3)(e).

¹³ *Id.* § 700.2722(1) (UNIF. TRUST CODE § 409(1)).

¹⁴ EPIC section 2722 purports to make purpose trusts "enforceable" regardless of whether the terms of the "trust" designate someone to enforce it. *See id.* § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)).

¹⁵ *See supra* note 12.

¹⁶ In that case, it would fall to a person described in *id.* § 700.2722(3)(d) (UNIF. TRUST CODE § 409(2)), if there is one, to protect the devotee's interest.

indistinguishable from ordinary trust beneficiaries. Yet that is the salient objection to nondisclosure of noncharitable trusts: “If the beneficiaries have no rights enforceable against the trustees, there are no trusts’ . . . [and] the beneficiaries cannot enforce [their] right[s] without information.”¹⁷ But why should a jurisdiction that allows a settlor to thwart these precepts (if only temporarily) for the advancement of a *purpose* prevent her from thwarting them (if only for the same duration) for the benefit—as she sees it—of particular persons? Shall we say that the policy of our law is *laissez faire* (in the relevant interval) provided the settlor means to confer benefits only on persons whose identities are indifferent to her; but that when she aims to confer benefits on particular persons, our respect for her intent is so great that we feel constrained (even in that narrow interval) to ignore what she thinks best for the persons in question?

It is true that under any conventional conception of the law of trusts, purpose trusts (pet trusts included) are anomalous.¹⁸ But at the level of policy, sanctioned anomalies are not self-limiting: if we are prepared to permit something anomalous by way of a purpose trust, it makes sense for us to ask whether we really have a rationale for limiting that permission to cases in which, from the settlor’s point of view, the persons benefited have only *instrumental* value (pun intended!) and are not ends in themselves. The proposal below eschews the need for such a rationale: it treats concealment of means itself as a permissible noncharitable trust purpose within the period permitted for the continuance of a purpose trust and it allows the settlor to confer, within that period, what she conceives as the benefit of concealment on definite or definitely ascertainable beneficiaries.

A bill to amend 1998 PA 386, entitled “estates and protected individuals code,” by adding new section 7409a.¹⁹

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 7409a Undisclosed trust

Sec. 7409a. (1) If the terms of a trust other than a charitable trust are embodied in a trust instrument that clearly express the settlor’s intent that 1 or more items of prime disclosure information should be withheld, generally or in specified circumstances, from 1 or more of the trust beneficiaries:

(a) During the nondisclosure period:

(i) To the extent necessary to effectuate the settlor’s expressed intent, the trustee does not have the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust’s property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee.

(ii) The trustee may administer the trust in accordance with the settlor’s expressed intent regarding nondisclosure of primary disclosure information to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any

¹⁷ PENNER, *supra* note 2, ¶¶ 10.60 (quoting *Armitage v. Nurse*, [1998] Ch. 241 at 253 (Eng.)).

¹⁸ See, e.g., *id.* at ¶ 9.30; Matthews, *supra* note 8; F. W. MAITLAND, *The Unincorporate Body*, in *SELECTED ESSAYS* 128, 137-39 (H. D. Hazeltine et al. eds., 1936). (For a decidedly unconventional conception that seeks to normalize trusts lacking beneficiaries, see LUPOLI, *supra* note 2, at 2-3, 123-126, 178-83.)

¹⁹ The proposal would be supported by amendments providing cross references to the new section in MICH. COMP. LAWS §§ 700. 7105(2), .7110(2).

reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

(iii) If the trust instrument grants a nondisclosure correlative right, the trustee has a duty to administer the trust in accordance with the settlor's expressed intent regarding nondisclosure of primary disclosure information, but only to the extent made practicable by the terms of the trust given the circumstances of the beneficiaries and any reporting obligations imposed on the trustee by law other than this [estates and protected individuals] code.

(iv) Any purported appointment or distribution of assets of the instant trust to another undisclosed trust is ineffective to the extent it could cause the appointed or distributed assets to be administered continuously under the authority of this section for a period ending after the date on which the instant trust's maximum nondisclosure period ends.

(b) Neither the trustee nor any nondisclosure correlative right holder shall be liable to any trust beneficiary on account of the trustee's failure to follow the terms of the trust prescribing nondisclosure of prime disclosure information. The trustee's duty (if any) to follow the terms of the trust prescribing nondisclosure of prime disclosure information during the trust's nondisclosure period is owed solely to the holders (if any) of nondisclosure correlative rights, and the sole remedy of a nondisclosure correlative right holder for the trustee's breach of that duty is removal.

(2) If the trust instrument grants either a nondisclosure correlative right or a protection power:

(a) Upon the reasonable request of a nondisclosure correlative right holder or protection power holder at any time during the trust's nondisclosure period, the trustee shall promptly furnish to the right or power holder a copy of the terms of the trust that describe or affect the holder's right or power.

(b) Within 63 days after accepting trusteeship of an undisclosed trust, the trustee shall notify all nondisclosure correlative right holders and protection power holders of the acceptance, of the court in which the trust is registered, if it is registered, and of the trustee's name, address, and telephone number.

(c) Within 63 days after the date the trustee acquires knowledge of the creation of an undisclosed trust of which the trustee is trustee or the date the trustee acquires knowledge that a formerly revocable trust of which the trustee is trustee has, by becoming irrevocable, whether by the death of the settlor or otherwise, become an undisclosed trust, the trustee shall notify all nondisclosure correlative right holders and protection power holders of the trust's existence, of the identity of the settlor or settlors, of the court in which the trust is registered, if it is registered, and of the right to request a copy of the terms of the trust that describe or affect the right or power holders' rights or powers.

(3) On the date on which the nondisclosure period ends, the trust ceases to be an undisclosed trust within the meaning of this section and to the extent terms of the trust are inconsistent with the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee, those terms cease to be effective.

(4) To the extent the trustee has not already provided the notice of the trust required under section 7814(2) by the end of the trust's nondisclosure period, the trustee is deemed for that purpose to have accepted the trust and to have acquired knowledge of the trust's creation on the date on which the nondisclosure period ends, and the identities of the qualified trust beneficiaries

are determined for that purpose as of the time immediately preceding the end of the nondisclosure period.

(5) As used in this section:

(a) "Maximum nondisclosure period" means a period of 25 years²⁰ from the later of the first date on which property becomes subject to the terms of the trust or the date on which the trust ceases to be revocable by the settlor.²¹

(b) "Nondisclosure period" means the shorter of the trust's maximum nondisclosure period or the period from the beginning of the maximum nondisclosure period to the trust's termination.

(c) "Nondisclosure correlative right" means a right granted by the terms of a trust that allows the right holder to remove a trustee of the trust for the trustee's failure during the trust's nondisclosure period to follow, to the extent practicable, the terms of the trust prescribing nondisclosure of prime disclosure information.

(d) "Prime disclosure information" concerning a trust means the fact of the trust's existence, the identity of the trustee, the terms of the trust, or the nature or extent of the trust property.

(e) "Protection power" means a power granted by the terms of a trust that allows the power holder to direct the trustee of the trust for the benefit of the trust beneficiaries during the trust's nondisclosure period. A protection power may authorize the power holder to represent the trust beneficiaries in the sense described in section 7301(1) to (2) without regard to the application of sections 7302 to 7304.

(f) "Undisclosed trust" means a trust administered pursuant to this section during the nondisclosure period.

JPS

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²⁰ See *supra* notes 10-11 and accompanying text.

²¹ This is to analogize the period during which the vesting of future interests in the assets of a trust can be postponed by the exercise of a power of appointment: that period begins when the trust in question can no longer be revoked by the settlor, not when the trust instrument begins to govern *in res*. See MICH. COMP. LAWS § 556.125. See generally JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 524.1 (4th ed. 1942); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 38 (1979).

**Public Policy Position
Proposed Amendments
to MCL 554.92 to 554.93**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,201 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 20, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Section's position on Proposed Amendments to MCL 554.92 and 554.93, 0 members voted against this position, 0 members abstained, 4 members did not vote.

Support

Explanation:

That the Council supports the proposed amendments to MCL 554.92 to 554.93 as described in the memorandum from James P. Spica included in the meeting agenda materials, provided that the references to "subsection (3)" in the proposed amendments to MCL 554.93(1) and (2) should be replaced with "section (2)," and grants Mr. Spica on behalf of the Legislative Development and Drafting Committee to make any non-substantive, technical amendments which become necessary during the legislative process.

Contact Person: David Skidmore

Email: dskidmore@wnj.com

Public Policy Position
MCL 554.531(3)

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,253 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On January 25, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on MCL 554.531(3), 0 members voted against this position, 0 members abstained, 7 members did not vote.

Support Amending MCL 554.531(3)

Explanation:

The Probate and Estate Planning Section supports amending MCL 554.531(3) to increase the limit from \$10,000 to \$50,000 for a transfer by a third party (other than a personal representative, trustee, or conservator) to a custodian under the Uniform Transfers to Minors Act, 1998 PA 433, MCL 554.521 et seq.

The Probate and Estate Planning Section would like this public policy position to be included in proposed omnibus legislation to make various amendments to EPIC, in addition to other positions previously taken by the Section.

Contact Person: David Skidmore

Email: dskidmore@wnj.com

**Public Policy Position
Amendments to MCL 700.3206(14)(a)**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on amendments to MCL 700.3206(14)(a), 0 members voted against this position, 0 members abstained, 6 members did not vote.

The Section supports adding a revised definition of "armed forces" (MCL 700.3206(14)(a)).

Explanation:

The Section supports added a revised definition of "armed forces" in MCL 700.3206(14)(a) as follows:

- (a) "Armed forces" means the United States Armed Forces, including the reserve components~~service units referred to that term as defined in section 1 of the veteran right to employment services act, 1994 PA 39, MCL 35.1092.~~

Contact Person: David Skidmore

Email: dskidmore@wnj.com

**Public Policy Position
Amendments to MCL 700.5506**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on amendments to MCL 700.5506, 0 members voted against this position, 0 members abstained, 6 members did not vote.

Explanation:

The Section supports amending MCL 700.7506 as stated below:

.5506 (1) An individual 18 years of age or older who is of sound mind at the time a patient advocate designation is made may designate in writing another individual or group committee of individuals who is 18 years of age or older to exercise powers concerning care, custody and medical or mental health treatment decisions for the individual making the patient advocate designation. An individual making a patient advocate designation under this subsection may include in the patient advocate designation the authority for the designated individual or committee of individuals, to make an anatomical gift of all or part of the individual's body in accordance with this act and part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123. the authority regarding an anatomical gift under this subsection may include the authority to resolve a conflict between the terms of the advance health care directive and the administration of means necessary to ensure the medical suitability of the anatomical gift. If a group committee of individuals is designated, third parties may rely on representations of any designated individual. If more than one individual is designated as a patient advocate to serve at the same time, a person providing care, custody or medical or mental health treatment may rely on the representations of any designated patient advocate without further inquiry.

Contact Person: David Skidmore

Email: dskidmore@wnj.com

Public Policy Position
Amendments to MCL 700.5507(2)

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on amendments to MCL 700.5507(2), 0 members voted against this position, 0 members abstained, 7 members did not vote.

Explanation:

The Section supports adding to the EPIC amendments omnibus legislation a revised MCL 700.5507(2), providing: "A patient advocate designation may also include instructions about how the patient advocate is to make decisions."

Contact Person: David Skidmore**Email:** dskidmore@wnj.com

**Public Policy Position
Amendments to MCL 700.5508**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on amendments to MCL 700.5508, 0 members voted against this position, 0 members abstained, 7 members did not vote.

Explanation:

The Section votes to add to the EPIC amendments omnibus legislation the revised MCL 700.5508, as presented in the attachment, with the following revision to (4)(b): "Attending medical professional' means a medical professional who has primary responsibility for the treatment and care of the patient."

Contact Person: David Skidmore

Email: dskidmore@vnj.com

Suggested Changes to MCL 700.5508 of EPIC:
REVISED FEBRUARY 2019

700.5508 Determination of advocate's authority to act.
Sec. 5508.

(1) Except as provided under subsection (3), the authority under a patient advocate designation is exercisable by a patient advocate only when the patient is unable to participate in medical treatment or, as applicable, mental health treatment decisions. The patient's attending ~~physician~~ medical professional and ~~another physician~~ one other medical professional or licensed psychologist shall determine upon examination of the patient whether the patient is unable to participate in medical treatment decisions, shall put the determination in writing, shall make the determination part of the patient's medical record, and shall review the determination not less than annually. If the patient's religious beliefs prohibit an examination and this is stated in the designation, the patient must indicate in the designation how the determination under this subsection shall be made. The determination of the patient's ability to make mental health treatment decisions shall be made under section 5515.

(2) If a dispute arises as to whether the patient is unable to participate in medical or mental health treatment decisions, a petition may be filed with the court in the county in which the patient resides or is located requesting the court's determination as to whether the patient is unable to participate in decisions regarding medical treatment or mental health treatment, as applicable. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the patient for the purposes of this subsection. The court shall conduct a hearing on a petition under this subsection as soon as possible and not later than 7 days after the court receives the petition. As soon as possible and not later than 7 days after the hearing, the court shall determine whether or not the patient is able to participate in decisions regarding medical treatment or mental health treatment, as applicable. If the court determines that the patient is unable to participate in the decisions, the patient advocate's authority, rights, and responsibilities are effective. If the court determines that the patient is able to participate in the decisions, the patient advocate's authority, rights, and responsibilities are not effective.

(3) In the case of a patient advocate designation that authorizes a patient advocate to make an anatomical gift of all or part of the patient's body, the patient advocate shall act on the patient's behalf in accordance with part 101 of the public health code, 1978 PA 368, MCL 333.10101 to 333.10123, and may do so only after the patient has been declared unable to participate in medical treatment decisions as provided in subsection (1) or declared dead by a licensed physician. The patient advocate's authority to make an anatomical gift remains exercisable after the patient's death.

(4) As used in this section:

(a) "Medical professional" means an individual who is one of the following:

(i) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(ii) A physician's assistant licensed to practice in this state under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(iii) A certified nurse practitioner under part 172 of the public health code, MCL 333.17201 to 333.17242.

(b) "Attending medical professional" means a physician, physician's assistant, or certified nurse practitioner, who has primary responsibility for the treatment and care of a patient.

**Public Policy Position
Amendments to MCL 700.7103 and 700.7506**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on amendments to MCL 700.7103 and 700.7506, 0 members voted against this position, 0 members abstained, 6 members did not vote.

Explanation:

The Section supports amending MCL 700.7103 and 700.7506 as provided in the attachment.

Contact Person: David Skidmore

Email: dskidmore@wnj.com

700.7103 Definitions.

Sec. 7103.

As used in this article:

(a) "Action", with respect to a trustee or a trust protector, includes an act or a failure to act.

(b) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the internal revenue code, 26 USC 2041 and 2514.

(c) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in section 7405(1).

(d) "Discretionary trust provision" means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains a spendthrift provision, that provides that the trustee has discretion, or words of similar import, to determine 1 or more of the following:

(i) Whether to distribute to or for the benefit of an individual or a class of beneficiaries the income or principal or both of the trust.

(ii) The amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual or a class of beneficiaries.

(iii) Who, if any, among a class of beneficiaries will receive income or principal or both of the trust.

(iv) Whether the distribution of trust property is from income or principal or both of the trust.

(v) When to pay income or principal, except that a power to determine when to distribute income or principal within or with respect to a calendar or taxable year of the trust is not a discretionary trust provision if the distribution must be made.

(e) "Interests of the trust beneficiaries" means the beneficial interests provided in the terms of the trust.

(f) "Power of withdrawal" means a presently exercisable general power of appointment other than a power that is either of the following:

(i) Exercisable by a trustee and limited by an ascertainable standard.

(ii) Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(g) "Qualified trust beneficiary" means a trust beneficiary to whom 1 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.

(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

(i) Except as provided in section 7506, "Settlor" means a person, including a testator or a trustee, who creates a trust. If more than 1 person creates a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution. The lapse, release, or waiver of a power of appointment shall not cause the holder of a power of appointment to be treated as a settlor of the trust.

(j) "Spendthrift provision" means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest.

(k) "Support provision" means a provision in a trust that provides the trustee shall distribute income or principal or both for the health, education, support, or maintenance of a trust beneficiary, or language of similar import. A provision in a trust that provides a trustee has discretion whether to

distribute income or principal or both for these purposes or to select from among a class of beneficiaries to receive distributions pursuant to the trust provision is not a support provision, but rather is a discretionary trust provision.

(l) "Trust beneficiary" means a person to whom 1 or both of the following apply:

(i) The person has a present or future beneficial interest in a trust, vested or contingent.

(ii) The person holds a power of appointment over trust property in a capacity other than that of trustee.

(m) "Trust instrument" means a governing instrument that contains the terms of the trust, including any amendment to a term of the trust.

(n) "Trust protector" means a person or committee of persons appointed pursuant to the terms of the trust who has the power to direct certain actions with respect to the trust. Trust protector does not include either of the following:

(i) The settlor of a trust.

(ii) The holder of a power of appointment.

700.7506 Creditor's claim against settlor; "settlor" explained.

Sec. 7506.

(1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(b) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that at the settlor's death was revocable by the settlor, either alone or in conjunction with another person, is subject to expenses, claims, and allowances as provided in section 7605.

(c) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach no more than the lesser of the following:

(i) The claim of the creditor or assignee.

(ii) The maximum amount that can be distributed to or for the settlor's benefit exclusive of sums to pay the settlor's taxes during the settlor's lifetime.

(2) If a trust has more than 1 settlor, the amount a creditor or assignee of a particular settlor may reach under subsection (1)(c) shall not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) A trust beneficiary is not considered a settlor merely because of a lapse, waiver, or release of a power of withdrawal over the trust property.

(4) An individual who creates a trust shall not be considered a settlor with regard to the individual's retained beneficial interest in the trust that follows the termination of the individual's spouse's prior beneficial interest in the trust if all of the following apply:

~~(a) The individual creates, or has created, the trust~~
(a) During the lifetime of the individual's spouse the only distributees or permissible distributees of trust income or principal are either (i) the individual's spouse, or (ii) the individual's spouse and the individual's issue or the issue of the individual's spouse, for the benefit of the individual's spouse.

~~(b) The trust is treated as qualified terminable interest property under section 2523(f) of the internal revenue code, 26 USC 2523.~~

~~(c) The individual retains a beneficial interest in the trust income, trust principal, or both, which beneficial interest follows the termination of the individual's spouse's prior beneficial interest in the trust.~~

(5) An individual shall not be considered a settlor of a trust for the benefit of the individual:

(a) if the settlor is the individual's spouse, regardless of whether or when the individual was the settlor of a trust for the benefit of that spouse; or

(b) to the extent that the property of the trust was subject to a general power of appointment in another individual.

Public Policy Position
EPIC Omnibus Amendment Legislation to Amend MCL 700.7604

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,270 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On June 14, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 19 members voted in favor of the Section's position on EPIC Omnibus amendment legislation to amend MCL 700.7604, 0 members voted against this position, 0 members abstained, 4 members did not vote.

Support

Explanation:

To amend the EPIC omnibus amendment legislation to amend MCL 700.7604 to add a new subsection (2), as shown in the attached document.

Contact Person: David Skidmore

Email: dskidmore@vnj.com

700.7604 Proceeding to contest validity of revocable trust; limitation; distribution of property; liability.

Sec. 7604. (1) ~~A~~ Except as provided in subsection (2), a person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:

(a) Two years after the settlor's death.
(b) Six months after the trustee sent the person a notice informing the person of all of the following:

- (i) The trust's existence.
- (ii) The date of the trust instrument.
- (iii) The date of any amendments known to the trustee.
- (iv) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any.
- (v) The settlor's name.
- (vi) The trustee's name and address.
- (vii) The time allowed for commencing a proceeding.

(2) If a trust that was revocable at the settlor's death becomes an undisclosed trust, within the meaning of section 7409a, a person from whom information described in section 7814(2)(a) to (c) is withheld during the two-year period following the settlor's death pursuant to section 7409a(1)(a)(i) may commence a judicial proceeding to contest the validity of the trust within the earlier of the following:

(a) Two years after the trustee provided the person the information described in section 7814(2)(a) to (c) that was withheld from the person during the two-year period following the settlor's death pursuant to section 7409a(1)(a)(i).

(b) Six months after the trustee sent the person a notice described in subsection (1)(b) of this section.

(3) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless either of the following applies:

- (a) The trustee knows of a pending judicial proceeding contesting the validity of the trust.
- (b) A potential contestant has notified the trustee in writing of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 63 days after the contestant sent the notification.

(4) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

**Public Policy Position
HB 6467**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,266 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 8, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on the bill proposal now included in HB 6467, 0 member voted against this position, 0 members abstained, 5 members did not vote.

SUPPORT

Contact Person: David Skidmore

Email: dskidmore@vnj.com

**Public Policy Position
HB 6470**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,266 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 8, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on the bill proposal now included in HB 6470, 0 member voted against this position, 0 members abstained, 5 members did not vote.

SUPPORT

Contact Person: David Skidmore

Email: dskidmore@wnj.com

**Public Policy Position
HB 6471**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,266 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 22 members. On September 8, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position on the bill proposal now included in HB 6471, 0 member voted against this position, 0 members abstained, 5 members did not vote.

SUPPORT

Contact Person: David Skidmore

Email: dskidmore@wnj.com

**Public Policy Position
Amendments to EPIC Standby Guardian Sections**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,227 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On March 8, 2019, the Section adopted its position after a discussion and vote at a scheduled meeting. 17 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 6 members did not vote.

The Section supports adding to the EPIC amendments omnibus legislation the standby guardian sections as found in the attachment, with the following revisions: (1) in MCL 700.531new(2), add "nominated" before "standby guardian;" and (2) in MCL 700.531new(4), add "in writing" after "notify the court and interested persons."

Contact Person: David Skidmore
Email: dskidmore@wnj.com

Legislative Development and Drafting Committee
2019 EPIC Omnibus– Standby Guardian Provisions Only
This document was last edited 03/01/19

1	MCL 700.531	<i>new</i> Standby Guardian; qualifications	2
2	MCL 700.5301	Appointment of guardian for incapacitated individual by will or other writing.	4
3	MCL 700.5305	Guardian ad litem; duties; compensation; legal counsel.....	6
4	MCL 700.5306a	Rights of individual for whom guardian is sought or appointed; form.....	10
5	MCL 700.5310	Resignation or removal of guardian.....	14
6	MCL 700.5311	Appointment or removal of guardian; notice of hearing.	15
7	MCL 700.5313	Guardian; qualifications.....	16
8	MCL 700.5314	Powers and duties of guardian	18
9			

1 MCL 700.531^{new} Standby Guardian; qualifications

- 2 (1) At a hearing convened under this part, the court may designate 1 or
3 more standby guardians. The court may designate as standby guardian
4 any competent person who is suitable and willing to serve in the order
5 of priority set forth in section 5313(2) and (3).
- 6 (2) The standby guardian shall receive a copy of the petition nominating
7 him or her to serve, the court order establishing or modifying the
8 guardianship, and the order designating the standby guardian.
- 9 (3) A standby guardian shall file an acceptance of his or her designation
10 under subsection (2) within 28 days of receiving notice of the order
11 designating the standby guardian.
- 12 (4) If, for any reason, the standby guardian is unable or unwilling to serve,
13 the standby guardian shall promptly notify the court and interested
14 persons.
- 15 (5) A standby guardian has no authority to act unless the guardian is
16 unavailable for any reason, including the following:
- 17 (a) the guardian dies;
- 18 (b) the guardian is permanently or temporarily unavailable; or,
- 19 (c) the guardian is removed or suspended by the court.
- 20 (6) During an emergency affecting the protected person's welfare when the
21 guardian is unavailable, the standby guardian may temporarily assume
22 the powers and duties of the guardian. A person may rely on the
23 standby guardian's representation that she has authority to act, if given
24 the order issued under subsection (2) and acceptance filed under
25 subsection (3). A person who acts in reliance upon the representations
26 and documentation described in this subsection without knowledge that
27 the representations are incorrect is not liable to any person for so acting
28 and may assume without further inquiry the existence of the standby
29 guardian's authority.

1 (7) A standby guardian's appointment as guardian shall become effective
2 without further proceedings or reiteration of acceptance immediately
3 upon the guardian's unavailability as described in subsection (5). The
4 powers and duties of the standby guardian shall be the same as those of
5 the prior guardian.

6 (8) Upon assuming office, the standby guardian shall promptly notify the
7 court, any known agent appointed under a power of attorney executed
8 pursuant to section 5103, and interested persons. Upon receiving notice,
9 the court may enter an order appointing the standby guardian as
10 guardian without the need for additional proceedings. The guardian
11 shall serve this order on the interested persons.

12

1 MCL 700.5301 Appointment of guardian for incapacitated individual by will or
2 other writing

3 (1) If serving as guardian, the parent of an unmarried legally incapacitated
4 individual may appoint by will, or other writing signed by the parent and
5 attested by at least 2 witnesses, a guardian for the legally incapacitated
6 individual. If both parents are dead or the surviving parent is adjudged
7 legally incapacitated, **and no standby guardian has been appointed**
8 **pursuant to section 531new**, a parental appointment becomes effective
9 when, after having given 7 days' prior written notice of intention to do so to
10 the legally incapacitated individual and to the person having the care of the
11 legally incapacitated individual or to the nearest adult relative, the guardian
12 files acceptance of appointment in the court in which the will containing the
13 nomination is probated or, if the nomination is contained in a
14 nontestamentary nominating instrument or the testator who made the
15 nomination is not deceased, when the guardian's acceptance is filed in the
16 court at the place where the legally incapacitated individual resides or is
17 present. The notice must state that the appointment may be terminated by
18 filing a written objection in the court as provided by subsection (4). If both
19 parents are dead, an effective appointment by the parent who died later has
20 priority.

21 (2) If serving as guardian, the spouse of a married legally incapacitated
22 individual may appoint by will, or other writing signed by the spouse and
23 attested by at least 2 witnesses, a guardian of the legally incapacitated
24 individual. **If no standby guardian has been appointed pursuant to**
25 **Section 531new, the**~~The~~ **appointment by will or other writing** becomes
26 effective when, after having given 7 days' prior written notice of intention to
27 do so to the legally incapacitated individual and to the person having care of
28 the legally incapacitated individual or to the nearest adult relative, the
29 guardian files acceptance of appointment in the court in which the will
30 containing the nomination is probated or, if the nomination is contained in a
31 nontestamentary nominating instrument or the testator who made the
32 nomination is not deceased, when the guardian's acceptance is filed in the
33 court at the place where the legally incapacitated individual resides or is
34 present. The notice must state that the appointment may be terminated by
35 filing a written objection in the court as provided by subsection (4).

1 (3) An appointment effected by filing the guardian’s acceptance under a will
2 probated in the state of the decedent’s domicile is effective in this state.

3 (4) Upon the filing of the legally incapacitated individual’s written
4 objection to a guardian’s appointment under this section in either the
5 court in which the will was probated or, for a nontestamentary
6 nominating instrument or a testamentary nominating instrument made
7 by a testator who is not deceased, the court at the place where the
8 legally incapacitated individual resides or is present, the appointment is
9 terminated. An objection does not prevent appointment by the court in
10 a proper proceeding of the parental or spousal nominee or another
11 suitable person upon an adjudication of incapacity in a proceeding
12 under sections 5302 to 5317.

1 **MCL 700.5305 Guardian ad litem; duties; compensation; legal counsel.**

2 (1) The duties of a guardian ad litem appointed for an individual alleged
3 to be incapacitated include all of the following:

4 (a) Personally visiting the individual.

5 (b) Explaining to the individual the nature, purpose, and legal effects of a
6 guardian's appointment.

7 (c) Explaining to the individual the hearing procedure and the
8 individual's rights in the hearing procedure, including, but not limited
9 to, all of the following:

10 (i) The right to contest the petition.

11 (ii) The right to request limits on the guardian's powers, including a
12 limitation on the guardian's power to execute on behalf of the
13 ward either of the following:

14 (A) A do-not-resuscitate order.

15 (B) A physician orders for scope of treatment form.

16 (iii) The right to object to a particular person being appointed
17 guardian **or designated as a standby guardian.**

18 (iv) The right to be present at the hearing.

19 (v) The right to be represented by legal counsel.

20 (vi) The right to have legal counsel appointed for the
21 individual if he or she is unable to afford legal counsel.

22 (d) Informing the individual that if a guardian is appointed, the guardian
23 may have the power to execute a do-not-resuscitate order on behalf of
24 the individual and, if meaningful communication is possible, discern
25 if the individual objects to having a do-not-resuscitate order executed
26 on his or her behalf.

- 1 (e) Informing the individual that if a guardian is appointed, the guardian
2 may have the power to execute a physician orders for scope of
3 treatment form on behalf of the individual and, if meaningful
4 communication is possible, discern if the individual objects to
5 having a physician orders for scope of treatment form executed
6 on his or her behalf.
- 7 (f) Informing the individual of the name of each person known to be
8 seeking appointment as guardian or designation as a standby
9 guardian.
- 10 (g) Asking the individual and the petitioner about the amount of cash and
11 property readily convertible into cash that is in the individual’s estate.
- 12 (h) Making determinations, and informing the court of those
13 determinations, on all of the following:
- 14 (i) Whether there are 1 or more appropriate alternatives to the
15 appointment of a full guardian or whether 1 or more actions
16 should be taken in addition to the appointment of a guardian.
17 Before informing the court of his or her determination under
18 this subparagraph, the guardian ad litem shall consider the
19 appropriateness of at least each of the following as alternatives
20 or additional actions:

- 1 (A) Appointment of a limited guardian, including the
2 specific powers and limitation on those powers the
3 guardian ad litem believes appropriate.
- 4 (B) Appointment of a conservator or another protective
5 order under part 4 of this article. In the report
6 informing the court of the determinations under this
7 subdivision, the guardian ad litem shall include an
8 estimate of the amount of cash and property readily
9 convertible into cash that is in the individual's estate.
- 10 (C) Execution of a patient advocate designation, do-not-
11 resuscitate order, physician orders for scope of
12 treatment form, or durable power of attorney with or
13 without limitations on purpose, authority, or duration.
- 14 (ii) Whether a disagreement or dispute related to the guardianship
15 petition might be resolved through court ordered mediation.
- 16 (iii) Whether the individual wishes to be present at the hearing.
- 17 (iv) Whether the individual wishes to contest the petition.
- 18 (v) Whether the individual wishes limits placed on the guardian's
19 powers.
- 20 (vi) Whether the individual objects to having a do-not-resuscitate
21 order executed on his or her behalf.
- 22 (vii) Whether the individual objects to having a physician orders for
23 scope of treatment form executed on his or her behalf.
- 24 (viii) Whether the individual objects to a particular person being
25 appointed guardian or designated as a standby guardian.
- 26 (2) The court shall not order compensation of the guardian ad litem unless the
27 guardian ad litem states on the record or in the guardian ad litem's written
28 report that he or she has complied with subsection (1).

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- 1 (3) If the individual alleged to be incapacitated wishes to contest the petition, to
2 have limits placed on the guardian's powers, or to object to a particular
3 person being appointed guardian or designated as a standby guardian,
4 and if legal counsel has not been secured, the court shall appoint legal
5 counsel to represent the individual alleged to be incapacitated. If the
6 individual alleged to be incapacitated is indigent, this state shall bear the
7 expense of legal counsel.
- 8 (4) If the individual alleged to be incapacitated requests legal counsel or the
9 guardian ad litem determines it is in the individual's best interest to have
10 legal counsel, and if legal counsel has not been secured, the court shall
11 appoint legal counsel. If the individual alleged to be incapacitated is
12 indigent, this state shall bear the expense of legal counsel.
- 13 (5) If the individual alleged to be incapacitated has legal counsel appointed
14 under subsection (3) or (4), the appointment of a guardian ad litem
15 terminates.

16

1 **MCL 700.5306a Rights of individual for whom guardian is sought or appointed;**
2 **form.**

- 3 (1) An individual for whom a guardian is sought or has been appointed under
4 section 5306 has all of the following rights:
- 5 (a) To object to the appointment of a successor guardian by will or other
6 writing, as provided in section 5301.
 - 7 (b) To have the guardianship proceeding commenced and conducted in
8 the place where the individual resides or is present or, if the individual
9 is admitted to an institution by a court, in the county in which the
10 court is located, as provided in section 5302.
 - 11 (c) To petition on his or her own behalf for the appointment of a guardian
12 or designation of a standby guardian, as provided in section 5303.
 - 13 (d) To have legal counsel of his or her own choice represent him or her on
14 the petition to appoint a guardian or designate a standby guardian,
15 as provided in sections 5303, 5304, and 5305.
 - 16 (e) If he or she is not represented by legal counsel, to the appointment of
17 a guardian ad litem to represent the individual on the petition to
18 appoint a guardian or designate a standby guardian, as provided in
19 section 5303.
 - 20 (f) To an independent evaluation of his or her capacity by a physician or
21 mental health professional, at public expense if he or she is indigent,
22 as provided in section 5304.
 - 23 (g) To be present at the hearing on the petition to appoint a guardian or
24 designate a standby guardian and to have all practical steps taken to
25 ensure this, including, if necessary, moving the hearing site, as
26 provided by section 5304.
 - 27 (h) To see or hear all the evidence presented in the hearing on the petition
28 to appoint a guardian or designate a standby guardian, as provided
29 in section 5304.

- 1 (i) To present evidence and cross-examine witnesses in the hearing on
2 the petition to appoint a guardian or designate a standby guardian,
3 as provided in section 5304.
- 4 (j) To a trial by jury on the petition to appoint a guardian or designate a
5 standby guardian, as provided in section 5304.
- 6 (k) To a closed hearing on the petition to appoint a guardian or designate
7 a standby guardian, as provided in section 5304.
- 8 (l) If a guardian ad litem is appointed, to be personally visited by the
9 guardian ad litem, as provided in section 5305.
- 10 (m) If a guardian ad litem is appointed, to an explanation by the guardian
11 ad litem of the nature, purpose, and legal effects of a guardian’s
12 appointment, as provided in section 5305.
- 13 (n) If a guardian ad litem is appointed, to an explanation by the guardian
14 ad litem of the individual’s rights in the hearing procedure, as
15 provided in section 5305.
- 16 (o) If a guardian ad litem is appointed, to be informed by the guardian ad
17 litem of the right to contest the petition, to request limits on the
18 guardian’s powers, to object to a particular person being appointed
19 guardian or designated as a standby guardian, to be present at the
20 hearing, to be represented by legal counsel, and to have legal counsel
21 appointed if the individual is unable to afford legal counsel, as
22 provided in section 5305.
- 23 (p) To be informed of the name of each person known to be seeking
24 appointment as guardian or designated as a standby guardian,
25 including, if a guardian ad litem is appointed, to be informed of the
26 names by the guardian ad litem as provided in section 5305.
- 27 (q) To require that proof of incapacity and the need for a guardian be
28 proven by clear and convincing evidence, as provided in section 5306.
- 29 (r) To the limitation of the powers and period of time of a guardianship to
30 only the amount and time that is necessary, as provided in section
31 5306.

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- 1 (s) To a guardianship designed to encourage the development of
2 maximum self-reliance and independence as provided in section 5306.
- 3 (t) To prevent the grant of powers to a guardian if those powers are
4 already held by a valid patient advocate, as provided in section 5306.
- 5 (u) To periodic review of the guardianship by the court, including the
6 right to a hearing and the appointment of an attorney if issues arise
7 upon the review of the guardianship, as provided in section 5309.
- 8 (v) To, at any time, seek modification or termination of the guardianship
9 by informal letter to the judge, as provided in section 5310.
- 10 (w) To a hearing within 28 days of requesting a review, modification, or
11 termination of the guardianship, as provided in section 5310.
- 12 (x) To the same rights on a petition for modification or termination of the
13 guardianship including the appointment of a visitor as apply to a
14 petition for appointment of a guardian, as provided in section 5310.
- 15 (y) To personal notice of a petition for appointment or removal of a
16 guardian or a standby guardian, as provided in section 5311.
- 17 (z) To written notice of the nature, purpose, and legal effects of the
18 appointment of a guardian, as provided in section 5311.
- 19 (aa) To choose the person who will serve as guardian and the person
20 designated as standby guardian, if the chosen persons are suitable
21 and willing to serve, as provided in section 5313 and section 531x,
22 respectively.
- 23 (bb) To consult with the guardian about major decisions affecting the
24 individual, if meaningful conversation is possible, as provided in
25 section 5314.
- 26 (cc) To quarterly visits by the guardian, as provided in section 5314.
- 27 (dd) To have the guardian notify the court within 14 days of a change in
28 the individual's residence, as provided in section 5314.

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- 1 (ee) To have the guardian secure services to restore the individual to the
2 best possible state of mental and physical well-being so that the
3 individual can return to self-management at the earliest possible time,
4 as provided in section 5314.
- 5 (ff) To have the guardian take reasonable care of the individual’s clothing,
6 furniture, vehicles, and other personal effects, as provided in section
7 5314.
- 8 (2) A guardian ad litem shall inform the ward in writing of his or her rights
9 enumerated in this section. The state court administrative office and the
10 office of services to the aging created in section 5 of the older Michiganians
11 act, 1981 PA 180, MCL 400.585, shall promulgate a form to be used to give
12 the written notice under this section, which shall include space for the court
13 to include information on how to contact the court or other relevant
14 personnel with respect to the rights enumerated in this section.

15

1 MCL 700.5310 Resignation or removal of guardian

2 (1) On petition of the guardian and subject to the filing and approval of a report
3 prepared as required by section 5314, the court shall accept the guardian's
4 resignation and make any other order that is appropriate.

5 (2) The ward, a person appointed to be guardian in a will or other writing
6 by a parent or spouse under section 5301, or any other a person interested
7 in the ward's welfare may petition for an order removing the guardian,
8 appointing a successor guardian, changing the designated standby
9 guardian, modifying the guardianship's terms, or terminating the
10 guardianship. A request for this order may be made by informal letter to the
11 court or judge. If the request is made by the person appointed by will or
12 other writing under section 5301, the person shall also present proof of
13 their appointment by will or other writing. A person who knowingly
14 interferes with the transmission of this kind of request to the court or judge
15 is subject to a finding of contempt of court.

16 (3) Except as otherwise provided in the order finding incapacity, upon receiving
17 a petition or request under this section, the court shall set a date for a hearing
18 to be held within 28 days after the receipt of the petition or request. An order
19 finding incapacity may specify a minimum period, not exceeding 182 days,
20 during which a petition or request for a finding that a ward is no longer an
21 incapacitated individual, or for an order removing the guardian, modifying
22 the guardianship's terms, or terminating the guardianship, shall not be filed
23 without special leave of the court.

24 (4) Before removing a guardian, appointing a successor guardian, changing the
25 designated standby guardian, modifying the guardianship's terms, or
26 terminating a guardianship, and following the same procedures to safeguard
27 the ward's rights as apply to a petition for a guardian's appointment, the
28 court may send a visitor to the present guardian's residence and to the place
29 where the ward resides or is detained to observe conditions and report in
30 writing to the court.

31

1 MCL 700.5311 Appointment or removal of guardian; notice of hearing.

2 (1) In a proceeding for the appointment or removal of an incapacitated
3 individual's guardian or the changing of the designated standby
4 guardian, other than the appointment of a temporary guardian or temporary
5 suspension of a guardian, notice of hearing must be given to each of the
6 following:

7 (a) The ward or the individual alleged to be incapacitated and that
8 individual's spouse, parents, and adult children.

9 (b) A person who is serving as the guardian or conservator or who has the
10 individual's care and custody.

11 (c) If known, a person named as attorney in fact under a durable power of
12 attorney.

13 (d) The standby guardian.

14 (e) If no other person is notified under subdivision (a), (b), ~~or (c)~~ or (d),
15 at least 1 of the individual's closest adult relatives, if any can be
16 found.

17 (2) Notice must be served personally on the alleged incapacitated individual.
18 Notice to all other persons must be given as prescribed by court rule. Waiver
19 of notice by the individual alleged to be incapacitated is not effective unless
20 the individual attends the hearing or a waiver of notice is confirmed in an
21 interview with the visitor.

22 (3) In a proceeding for a guardian's appointment under sections 5303 and 5304,
23 a copy of the petition must be attached to the hearing notice, and the notice
24 to the alleged incapacitated individual must contain all of the following
25 information:

26 (a) The nature, purpose, and legal effects of the appointment of a
27 guardian.

28 (b) The alleged incapacitated individual's rights in the proceeding,
29 including the right to appointed legal counsel.

1 **MCL 700.5313 Guardian; qualifications**

2 (1) The court may appoint a competent person as guardian of a legally
3 incapacitated individual. The court shall not appoint as a guardian an
4 agency, public or private, that financially benefits from directly providing
5 housing, medical, mental health, or social services to the legally
6 incapacitated individual. If the court determines that the ward's property
7 needs protection, the court shall order the guardian to furnish a bond or shall
8 include restrictions in the letters of guardianship as necessary to protect the
9 property.

10 (2) In appointing a guardian under this section, the court shall appoint a person,
11 if suitable and willing to serve, in the following order of priority:

12 (a) A person previously appointed, qualified, and serving in good
13 standing as guardian for the legally incapacitated individual in this or
14 another state.

15 (b) A person the individual subject to the petition chooses to serve as
16 guardian.

17 (c) A person nominated as guardian in a durable power of attorney or
18 other writing by the individual subject to the petition.

19 (d) A person named by the individual as a patient advocate or attorney in
20 fact in a durable power of attorney.

21 (e) A person appointed by a parent or spouse of a legally
22 incapacitated person by will or other writing pursuant to Section
23 5301.

24 (3) If there is no person chosen, nominated, or named under subsection (2), or if
25 none of the persons listed in subsection (2) are suitable or willing to serve,
26 the court may appoint as a guardian an individual who is related to the
27 individual who is the subject of the petition in the following order of
28 preference:

29 (a) The legally incapacitated individual's spouse. This subdivision shall
30 be considered to include a person nominated by will or other writing
31 signed by a deceased spouse.

- 1 (b) An adult child of the legally incapacitated individual.
- 2 (c) A parent of the legally incapacitated individual. This subdivision shall
3 be considered to include a person nominated by will or other writing
4 signed by a deceased parent.
- 5 (d) A relative of the legally incapacitated individual with whom the
6 individual has resided for more than 6 months before the filing of the
7 petition.
- 8 (e) A person nominated by a person who is caring for the legally
9 incapacitated individual or paying benefits to the legally incapacitated
10 individual.
- 11 (4) If none of the persons as designated or listed in subsection (2) or (3) are
12 suitable or willing to serve, the court may appoint any competent person
13 who is suitable and willing to serve, including a professional guardian as
14 provided in section 5106.

1 **MCL 700.5314 Powers and duties of guardian**

2 Whenever meaningful communication is possible, a legally incapacitated
3 individual's guardian shall consult with the legally incapacitated individual
4 before making a major decision affecting the legally incapacitated
5 individual. To the extent a guardian of a legally incapacitated individual is
6 granted powers by the court under section 5306, the guardian is responsible
7 for the ward's care, custody, and control, but is not liable to third persons by
8 reason of that responsibility for the ward's acts. In particular and without
9 qualifying the previous sentences, a guardian has all of the following powers
10 and duties, to the extent granted by court order:

- 11 (a) The custody of the person of the ward and the power to establish the
12 ward's place of residence within or without this state. The guardian
13 shall visit the ward within 3 months after the guardian's appointment
14 and not less than once within 3 months after each previous visit. The
15 guardian shall notify the court within 14 days of a change in the
16 ward's place of residence or a change in the guardian's place of
17 residence.
- 18 (b) If entitled to custody of the ward, the duty to make provision for the
19 ward's care, comfort, and maintenance and, when appropriate, arrange
20 for the ward's training and education. The guardian shall secure
21 services to restore the ward to the best possible state of mental and
22 physical well-being so that the ward can return to self-management at
23 the earliest possible time. Without regard to custodial rights of the
24 ward's person, the guardian shall take reasonable care of the ward's
25 clothing, furniture, vehicles, and other personal effects and commence
26 a protective proceeding if the ward's other property needs protection.
27 If a guardian commences a protective proceeding because the
28 guardian believes that it is in the ward's best interest to sell or
29 otherwise dispose of the ward's real property or interest in real
30 property, the court may appoint the guardian as special conservator
31 and authorize the special conservator to proceed under section
32 5423(3). A guardian shall not otherwise sell the ward's real property
33 or interest in real property.

- 1 (c) The power to give the consent or approval that is necessary to enable
2 the ward to receive medical or other professional care, counsel,
3 treatment, or service. The power of a guardian to execute a do-not-
4 resuscitate order under subdivision (d) does not affect or limit the
5 power of a guardian to consent to a physician’s order to withhold
6 resuscitative measures in a hospital.
- 7 (d) The power of a guardian to execute, reaffirm, and revoke a do-not-
8 resuscitate order on behalf of a ward is subject to this subdivision. A
9 guardian shall not execute a do-not-resuscitate order unless the
10 guardian does all of the following:
- 11 (i) Not more than 14 days before executing the do-not-resuscitate
12 order, the guardian visits the ward and, if meaningful
13 communication is possible, consults with the ward about
14 executing the do-not-resuscitate order.
- 15 (ii) The guardian consults directly with the ward’s attending
16 physician as to the specific medical indications that warrant the
17 do-not-resuscitate order.
- 18 (e) If a guardian executes a do-not-resuscitate order under subdivision
19 (d), not less than annually after the do-not-resuscitate order is first
20 executed, the guardian shall do all of the following:
- 21 (i) Visit the ward and, if meaningful communication is possible,
22 consult with the ward about reaffirming the do-not-resuscitate
23 order.
- 24 (ii) Consult directly with the ward’s attending physician as to
25 specific medical indications that may warrant reaffirming the
26 do-not-resuscitate order.
- 27 (f) If a conservator for the ward’s estate is not appointed, the power to do
28 any of the following:
- 29 (i) Institute a proceeding to compel a person under a duty to
30 support the ward or to pay money for the ward’s welfare to
31 perform that duty.

- 1 (ii) Receive money and tangible property deliverable to the ward
2 and apply the money and property for the ward’s support, care,
3 and education. The guardian shall not use money from the
4 ward’s estate for room and board that the guardian or the
5 guardian’s spouse, parent, or child have furnished the ward
6 unless a charge for the service is approved by court order made
7 upon notice to at least 1 of the ward’s next of kin, if notice is
8 possible. The guardian shall exercise care to conserve any
9 excess for the ward’s needs.
- 10 (g) The guardian shall report the condition of the ward and the ward’s
11 estate that is subject to the guardian’s possession or control, as
12 required by the court, but not less often than annually. The guardian
13 shall also serve the report required under this subdivision on the ward
14 and interested persons as specified in the Michigan court rules. A
15 report under this subdivision shall contain all of the following:
- 16 (i) The ward’s current mental, physical, and social condition.
- 17 (ii) Improvement or deterioration in the ward’s mental, physical,
18 and social condition that occurred during the past year.
- 19 (iii) The ward’s present living arrangement and changes in his or her
20 living arrangement that occurred during the past year.
- 21 (iv) Whether the guardian recommends a more suitable living
22 arrangement for the ward.
- 23 (v) Medical treatment received by the ward.
- 24 (vi) Whether the guardian has executed, reaffirmed, or revoked a
25 do-not-resuscitate order on behalf of the ward during the past
26 year.
- 27 (vii) Services received by the ward.
- 28 (viii) A list of the guardian’s visits with, and activities on behalf of,
29 the ward.
- 30 (ix) A recommendation as to the need for continued guardianship.

- 1 (x) A statement signed by the standby guardian, if any have
2 been appointed, that the standby guardian continues to be
3 willing to serve in the event of the unavailability, death,
4 incapacity, or resignation of the guardian.
- 5 (h) If a conservator is appointed, the duty to pay to the conservator, for
6 management as provided in this act, the amount of the ward’s estate
7 received by the guardian in excess of the amount the guardian
8 expends for the ward’s current support, care, and education. The
9 guardian shall account to the conservator for the amount expended.

