

NUTS & BOLTS OF SERVING AS GUARDIAN AD LITEM AND ATTORNEY FOR LEGALLY INCAPACITATED PERSONS

By Elizabeth Stubbs

I. GUARDIAN AD LITEM (*MAKE A RECOMMENDATION*) (MCL700.5305)

A. What is the Issue → What does the Court need to determine?

1. Appointment of a Guardian → The Court needs to determine whether the person is legally incapacitated (**MCL700.5306**) (i.e. lacks the ability to make or communicate informed decisions regarding their care) AND who is most suitable to serve (**MCL700.5313**)
2. Modification or Termination of Guardian
3. Other; i.e. review of appointment in a contested matter, visitation with family

B. Investigation

1. Review Petition, attachments, and any other pertinent documents
2. Review Court file
3. Phone calls / interview
 - a. Petitioner
 - b. Attorney for any parties to the matter
 - c. Interested parties to ascertain objections / position
 - d. Ward (**personally** interview) and staff at any care facility (start with SW)

C. Report

1. State the Issue you are appointed to investigate
2. Detail what the extent of your investigation efforts were
3. Detail who you interviewed and the full extent of the conversations
4. Detail interview with the ward (**especially that they were made aware of the pending petition and their rights associated therein**)
5. Detail the ward's reaction or comments during the interview and state your impression as to their mental state
6. Report as to whether the ward wishes to exercise any of their rights (i.e. object to the petition, attend the hearing, have an attorney appointed, or makes a statement as to preference)

7. MAKE A CONCLUSION AND RECOMMENDATION

- a. Read the pertinent statute that applies to the matter pending. What facts must be met for the Petition to be granted and quote that statute in your report (gives the court something to hang it's hat on)

II. COURT APPOINTED ATTORNEY

1. What is the Issue

- a. Ward objects to the appointment of a Guardian
- b. Ward wants to modify or terminate the Guardian
- c. Other – i.e. review of appointment in a contested matter, visitation with family

2. Duty is to Advocate your Client's position

- a. Sometimes the client's position is not necessary in their best interest to achieve
- b. Sometimes the client is so impaired they are not able to clearly express their position to you
- c. Know **WHO** your client is – be careful of family opinions and input and stay conscious of confidentiality

3. Objecting to the Petition to Appoint a Guardian

- a. Can your client defeat the medical evidence supporting the Petition?
 1. Letter from the client's personal physician
 2. Request on Independent Medical Exam
- b. Maybe client actually does need a Guardian, but can they state their preference as to who should serve and is that person suitable (this will require counseling your client as to the best outcome of the case and giving them something to be in control of – be sure to interview the GAL as to whether the ward expressed their preference as to who should serve as Guardian)
- c. Be prepared for a contested hearing and know who your witnesses will be to support your client's position

ESTATES AND PROTECTED INDIVIDUALS CODE (EXCERPT)
Act 386 of 1998

700.5305 Guardian ad litem; duties; compensation; legal counsel.

Sec. 5305. (1) The duties of a guardian ad litem appointed for an individual alleged to be incapacitated include all of the following:

- (a) Personally visiting the individual.
- (b) Explaining to the individual the nature, purpose, and legal effects of a guardian's appointment.
- (c) Explaining to the individual the hearing procedure and the individual's rights in the hearing procedure, including, but not limited to, all of the following:
 - (i) The right to contest the petition.
 - (ii) The right to request limits on the guardian's powers, including a limitation on the guardian's power to execute a do-not-resuscitate order on behalf of the ward.
 - (iii) The right to object to a particular person being appointed guardian.
 - (iv) The right to be present at the hearing.
 - (v) The right to be represented by legal counsel.
 - (vi) The right to have legal counsel appointed for the individual if he or she is unable to afford legal counsel.
- (d) Informing the individual that if a guardian is appointed, the guardian may have the power to execute a do-not-resuscitate order on behalf of the individual and, if meaningful communication is possible, discern if the individual objects to having a do-not-resuscitate order executed on his or her behalf.
- (e) Informing the individual of the name of each person known to be seeking appointment as guardian.
- (f) Asking the individual and the petitioner about the amount of cash and property readily convertible into cash that is in the individual's estate.

- (g) Making determinations, and informing the court of those determinations, on all of the following:
 - (i) Whether there are 1 or more appropriate alternatives to the appointment of a full guardian or whether 1 or more actions should be taken in addition to the appointment of a guardian. Before informing the court of his or her determination under this subparagraph, the guardian ad litem shall consider the appropriateness of at least each of the following as alternatives or additional actions:
 - (A) Appointment of a limited guardian, including the specific powers and limitation on those powers the guardian ad litem believes appropriate.
 - (B) Appointment of a conservator or another protective order under part 4 of this article. In the report informing the court of the determinations under this subdivision, the guardian ad litem shall include an estimate of the amount of cash and property readily convertible into cash that is in the individual's estate.
 - (C) Execution of a patient advocate designation, do-not-resuscitate order, or durable power of attorney with or without limitations on purpose, authority, or duration.
 - (ii) Whether a disagreement or dispute related to the guardianship petition might be resolved through court ordered mediation.
 - (iii) Whether the individual wishes to be present at the hearing.
 - (iv) Whether the individual wishes to contest the petition.
 - (v) Whether the individual wishes limits placed on the guardian's powers.
 - (vi) Whether the individual objects to having a do-not-resuscitate order executed on his or her behalf.
 - (vii) Whether the individual objects to a particular person being appointed guardian.

(2) The court shall not order compensation of the guardian ad litem unless the guardian ad litem states on the record or in the guardian ad litem's written report that he or she has complied with subsection (1).

(3) If the individual alleged to be incapacitated wishes to contest the petition, to have limits placed on the guardian's powers, or to object to a particular person being appointed guardian and if legal counsel has not been secured, the court shall appoint legal counsel to represent the individual alleged to be incapacitated. If the individual alleged to be incapacitated is indigent, the state shall bear the expense of legal counsel.

(4) If the individual alleged to be incapacitated requests legal counsel or the guardian ad litem determines it is in the individual's best interest to have legal counsel, and if legal counsel has not been secured, the court shall appoint legal counsel. If the individual alleged to be incapacitated is indigent, the state shall bear the expense of legal counsel.

(5) If the individual alleged to be incapacitated has legal counsel appointed under subsection (3) or (4), the appointment of a guardian ad litem terminates.

History: 1998, Act 386, Eff. Apr. 1, 2000;—Am. 2000, Act 464, Eff. June 1, 2001;—Am. 2012, Act 210, Eff. Oct. 1, 2012;—Am. 2013, Act 157, Eff. Feb. 3, 2014.

Popular name: EPIC

Rendered Friday, November 7, 2014

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Michigan Compiled Laws Complete Through PA 354 of 2014

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Ex. B

* No objection

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF MACOMB

In the Matter of [REDACTED]
Legally Incapacitated Individual

File #2014-214019-GA
Honorable Carl J. Marlinga

ACCEPTANCE OF APPOINTMENT AND REPORT OF GUARDIAN AD LITEM

I have been appointed by this Court as the Guardian Ad Litem for [REDACTED] and accept this appointment in conjunction with a Petition to Appoint Guardian. In accordance with my duties as Guardian Ad Litem I have reviewed the Petition along with the Physician's statement, interviewed the Petitioner and the ward's son, traveled to the Sanctuary at Abby Nursing Home and met with the ward, and report as follows:

I met with the ward at the Sanctuary of Abby Nursing Home located on 12 Mile Road in Warren, Michigan, on Tuesday, October 21, 2014, at noon. She was in the dining room with her children and had just finished having lunch. I identified myself, the purpose for my visit, and the ward's rights associated with the pending petition. The ward was very confused and did not appear to understand anything that I was saying. I asked her to identify the people that were at the table with her. When I referenced her daughter she denied that she knew who she was and refused to attempt to identify her son. Her speech was very incoherent and she was not able to engage in any

appropriate or meaningful conversation. Her responses or speech were short bursts of words that just did not seem to make any sense. The ward was not able to verbalize whether she objected or consented to the Petition, as I do not believe she could understand what was being said to her. The ward was not oriented as to time or place. She could not tell me the date, day of the week, or year. I asked if it would be helpful to have a calendar in her room and she did not seem to understand what that was.

According to the Petitioner, the ward had been living with her for several years prior to her admission to the nursing home. The ward was experiencing a physical and mental decline recently and therefore was admitted to the hospital. It was discovered that she needed 2 units of blood and had a urinary tract infection. The ward was treated at the hospital and then transferred to the nursing home just about three months ago. The ward requires 24 hour supervision and assistance with her activities of daily living, and according to her medical records, is suffering from Dementia – which was clearly present to me during our meeting.

The ward is currently receiving Medicaid benefits to pay for her care. She does not own a home or a car. Her only asset is an account at Comerica Bank with a balance of approximately \$1,000. The ward's only source of income is her social security with a monthly benefit of \$700.00 which deposits into the Comerica Bank account and is used toward her patient pay amount at the nursing home.

Recommendation: Based on the information reviewed and conversations with the various parties, [REDACTED] lacks the ability to make or communicate

informed decisions regarding her care, coming within the definition of a legally incapacitated individual. The Petitioner is willing and suitable to serve as Guardian, and neither the ward nor any interested party is objecting. Therefore, I recommend that the ***petition be granted as presented.***

Respectfully submitted

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Dated: October 23, 2014

Ex.C

*Objection by Ward
- Stated preference

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF MACOMB

In the Matter of [REDACTED]
Legally Incapacitated Individual

File #2014-212968-GA
Honorable Carl J. Marlinga

ACCEPTANCE OF APPOINTMENT AND REPORT OF GUARDIAN AD LITEM

I have been appointed by this Court as the Guardian Ad Litem for [REDACTED] and accept this appointment in conjunction with a Petition for Appointment of Guardian. In accordance with my duties as Guardian Ad Litem I have reviewed the Petition, interviewed Petitioner, the ward's two sisters Karen Studders and Joyce Welser, George Heitmanis, and the ward, and report as follows.

The ward was admitted to Beaumont Hospital in Troy Michigan on or about May 15, 2014, due to an emergency need for dialysis. She was evaluated by a psychologist and diagnosed with Senile Dementia. Once stabilized, she was transferred to Clinton Aire Nursing home on or about May 29, 2014. I met with the ward at the nursing home on Monday June 2, 2014. She was alert and responsive but not completely oriented as to time and place. She accurately stated the year and season, however she thought it "might be" July and thought she was still at Beaumont, denying that her placement has changed since she left her home "a long time ago". She denied that she has a primary care physician or that she was advised that she required dialysis, although she stated that she is currently receiving the treatment 3 times a week.

I discussed the pending petition with the ward as well as her rights associated with the proceeding. She was aware of the matter and immediately objected to the

appointment of a Guardian and stated that she has never seen George Heitmanis nor did she sign any paperwork saying that she would work with him. She would like to attend the hearing and have an attorney appointed to represent her interest.

I asked the ward to inform me as to whom her family is. She stated that she had a son, Richard, who lived in Florida, but he passed away. She stated that she has two living daughters, Karen Sales who she thinks lives somewhere in Michigan but does not know where, and Donna (she did not know her last name) who is in prison in Alaska. She stated that she has two sisters, Karren Studdard and Joyce Welser, who both live in Mississippi, and further stated that if the court were inclined to appoint a Guardian for her, her preference is her sister Joyce Welser.

I spoke to Joyce Welser who is willing and able to assume the role as the ward's guardian, however she advised me that the ward executed a Durable Power of Attorney dated July 23, 2009, which nominates Ms. Welser as the ward's agent. Ms. Welser forwarded to my office a copy of the Durable Power of Attorney which I am attaching to this report and find that it is a valid power of attorney

According to the Estates and Protected Individuals Code at Section 700.5313 (2), the ward, having executed a Durable Power of Attorney to identify her preference, supported by her clearly communicated preference, the court must appoint Joyce Welser as having priority to serve as guardian, so long as this court finds her to be suitable to serve. Although Ms. Welser is not able to travel to Michigan to attend the hearing on the Petition to Appoint Guardian, I advised her that she may need to make herself available for telephone testimony if the court found that to be necessary.

As far as the ward's financial estate, she stated that she owns her home in her sole name in Sterling Heights, has two accounts at Chase Bank, although she does not know the balances, and receives monthly social security benefits, but does not recall how much that is. I interviewed Mr. Heitmanis who is serving as the Temporary Guardian and he has not been able to confirm the whereabouts of the ward's assets except for her residence, nor the amount of her monthly income.

Recommendation:

Based on the various conversations with the parties and observations of the ward, [REDACTED] lacks the ability to make or communicate informed decisions regarding her care coming within the definition of a legally incapacitated person. The appointment of a guardian is necessary for her continued care and supervision. Based on the ward's current estate plan document and stated preference, pursuant to MCL 700.5313(2), the court must appoint Joyce Welser as Guardian so long as she is able to present her suitability to so serve.

Respectfully submitted

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Dated: June 2, 2014

Ex. D

*Objection by I.P.

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF MACOMB

In the Matter of [REDACTED]
Legally Incapacitated Individual

File #2014-212019-GA
Honorable Carl J. Marlinga

ACCEPTANCE OF APPOINTMENT AND REPORT OF GUARDIAN AD LITEM

I have been appointed by this Court as the Guardian Ad Litem for [REDACTED] and accept this appointment in conjunction with a Petition for Appointment of Guardian. In accordance with my duties as Guardian Ad Litem I have reviewed the Petition with the attached Physician Statement, interviewed Petitioner, the ward's spouse, case manager Jean Ward at Rehabilitation Institute of Michigan, and the ward, and report as follows.

On Monday, February 17, 2014, I met with the ward in his room at the Rehabilitation Institute of Michigan (RIM). He was sitting in a wheel chair and was alert and responsive, although he is nonverbal. The ward suffers traumatic brain damage from a self-inflicted gunshot to the head which occurred on January 28, 2014. After being treated at St. John Main, the ward was transferred and admitted to RIM on Monday, February 10, 2014. According to conversations with the ward's case manager employed at RIM, rehab is intensive and a patient remains in-patient status for only a few weeks. The concern prompting the filing of this petition by the ward's sister is his pending discharge from in-patient rehab and need to set up placement for him. The plan is for the ward to move in with petitioner. According to petitioner and the ward's spouse, the marital home has been lost to mortgage foreclosure and the family must

move out by March 6, 2014. The ward's spouse states that she is willing and able to oversee the ward's continued medical care, but she just needs somewhere for him to live for the time being until she can get herself settled, given all that is happening to the family all at once. Mrs. [REDACTED] stated that she had conversations with the petitioner regarding help with placement only, but never discussed her becoming guardian for her husband. In fact, according to all parties, including the case manager at RIM, guardianship has not been necessary for communication with medical professionals as to treatment decisions on behalf of the ward. The ward's spouse stated that while receiving medical attention at the hospital the staff contacted her for all consents and authorization to release medical information to other family members, however, since being at RIM the doctor and staff have not contacted her. Petitioner is concerned about Mrs. [REDACTED]' lack of involvement as she has not been to see her husband very often, however, Mrs. [REDACTED] states that she does not have the ability to be with him every day because of her need to work as she has been the sole provider for the family for the past 9 years, she is also dealing with their traumatized 15 year old child who found her father after the gunshot, and legal troubles with their 17 year old child. My understanding from communication with the petitioner is that she needs the authority as guardian to make ongoing medical decisions for her brother while in her care. While this would be convenient, it is not entirely necessary as anyone who serves as guardian can delegate authority to some degree to those providing the care and custody. Petitioner also has a concern that the guardianship is necessary to

start the application process with the social security administration to obtain social security disability for the ward.

I discussed the pending petition with the ward in private, as well as his rights associated with the proceeding. While he was not able to verbalize any response I do believe that he was understanding some of what I was saying. Communication was difficult but I believe he really wanted to try. He responded by nodding or shaking his head to subtle cues such as his name, including his nick name "Bird", the name of his sister and his wife. When I mentioned his wife he held up a piece of paper that was on his bed that had her home and cell phone numbers written on it. I do not believe that the ward objects to the petition, nor does he want to attend the hearing. Based on his hand gestures he seemed to be asking me what a guardian means or what that person would be doing for him. I attempted to elicit his preference between his sister and his wife and he just shrugged his shoulders. He appeared to be conflicted and a little anxious about making a decision so I assured him that he didn't need to if he was not able to. He nodded and his body appeared to relax as if I spared him a tough decision.

According to the Estates and Protected Individuals Code at Section 700.5313 (3), the ward, not having any estate plan documents to identify his preference, nor his ability to communicate his preference, the court may appoint his spouse as having priority to serve as guardian, so long as she is willing and suitable to serve. Although she stated to me that she is willing to continue to care for her husband as demonstrated by providing for him and their children as sole provider for the past 9 years, I am concerned about her ability to do so at this time given all of the stressors in her life. I

believe that the petitioner thought she was doing the right thing for the benefit of her brother by filing for guardianship and that communications with the ward's spouse regarding this issue fell apart causing hard feelings and possibly offending the spouse.

Recommendation:

Based on the various conversations with the parties and observations of the ward, [REDACTED] lacks the ability to make or communicate informed decisions regarding his care coming within the definition of a legally incapacitated person. The appointment of a guardian is necessary for his continued care and supervision. Although the ward's spouse has priority for the appointment as his guardian, I do have some reservations that she will be effective in that role at this time. As an alternative, petitioner is also willing and suitable to serve as guardian, however, I am also concerned about the breakdown in the communication between the petitioner and the ward's spouse that will hinder ongoing status to Mrs. [REDACTED]. I have instructed both ladies to appear at the hearing to address their willingness and suitability to this court. As a compromise to the family situation at this time I am recommending that petitioner be appointed as guardian and that the guardianship be reviewed in six months to determine whether the ward's spouse has been able to stabilize her situation and family affairs that will enable her to continue the care of her husband. If that is the case, the guardianship should be modified to appoint her as full guardian for her husband according to the priority established by statute. In the meantime I believe that an order should be in place so that the spouse is authorized to

receive any and all medical information relative to her husband, and be consulted with and able to participate in her husband's care and rehabilitation.

Respectfully submitted

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Dated: February 18, 2014