

II. Advance Directives Proceedings

A. Durable Powers of Attorney

§12.4 Although an agent under a durable power of attorney is not explicitly defined as a fiduciary under EPIC, the agent is commonly understood to be a fiduciary who must act in the best interests of the principal. *See In re Estate of Susser*, 254 Mich App 232, 657 NW2d 147 (2002). The fiduciary relationship is also implied by MCL 700.5503(1), which provides that if the principal becomes incapacitated after executing a durable power of attorney and the probate court appoints a conservator for the principal, the agent is accountable to the conservator as well as to the principal.

The actions of an agent under a durable power of attorney may be challenged on a petition to the probate court under its jurisdiction to require, hear, or settle an accounting of an agent under a power of attorney with respect to an estate of a decedent, a protected individual, a ward, or a trust. MCL 700.1303(1)(j). The persons interested in such a proceeding are the following:

- É the principal
- É the agent (attorney in fact)
- É any fiduciary of the principal
- É the principal's guardian ad litem or attorney
- É the principal's presumptive heirs

MCR 5.125(C)(31).

A conservator has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not disabled or incapacitated. MCL 700.5503(1). Therefore, if the agent is not acting in accordance with the terms of the power of attorney or is not acting in the best interests of a now-incapacitated principal, an action may be commenced to appoint a conservator who may then revoke the durable power of attorney.

B. Patient Advocate Designations

É §12.5 Challenges to validity. An individual, by patient advocate designation, may appoint a *patient advocate* to exercise powers concerning the individual's care, custody, and medical and mental health treatment following the individual's inability to make medical or mental health decisions. Furthermore, pursuant to broad amendments, the patient advocate designation has been expanded to allow a patient advocate to exercise powers over the patient's mental health treatment, if expressly authorized by the designation instrument. MCL 700.5506. EPIC and the Public Health Code also permit an individual to authorize a patient advocate to make an anatomical gift. MCL 333.10104, 700.1106(k). To be valid, a patient advocate designation must

- É be in writing;
- É dated;
- É signed voluntarily by an individual at least 18 years old (or an emancipated minor) and of sound mind;
- É executed in the presence of and signed by two witnesses (A witness may not be the patient's
 - É spouse,
 - É parent,
 - É child,
 - É grandchild,
 - É sibling,
 - É presumptive heir,
 - É known devisee at the time of the witnessing,
 - É physician,
 - É patient advocate, or
 - É employee of a life or health insurance provider for the patient, of a health facility that is treating the patient, or of a home for the aged where the patient resides, or a community mental health services program or hospital that is providing mental health services to the patient (community mental health services program or hospital means a community mental health services program as that term is defined in MCL 330.1100a or a hospital as that term is defined in MCL 330.1100b.); and

É before its implementation, made part of the patient's medical record with the patient's attending physician and, if applicable, with the facility where the patient is located.

The designation must include a statement that the authority conferred is not exercisable unless the patient is unable to participate in medical or mental health treatment decisions. However, if the patient advocate designation includes the right to make an anatomical gift, that authority remains exercisable after the patient's death. MCL 700.5507(4), .5508(3). A patient advocate designation with authorization to make an anatomical gift is not revoked by the patient's death. MCL 700.5508(3).

Further, regarding anatomical gifts, the Public Health Code gives the patient advocate priority status primary even to the spouse. MCL 333.10109(1). Persons having lesser priority—for example, adult sons or daughters, parents, or adult brothers or sisters—may not revoke an anatomical gift authorized by a patient advocate designation. MCL 333.10108(1), (3).

A patient advocate designation that includes mental health treatment provisions may waive the patient's right to revoke the designation regarding these treatment decisions. MCL 700.5507(4) (item 8). Further, the designation may provide that the patient's ability to revoke this waiver will be delayed until 30 days after the patient communicates the intent to revoke.

A legally incapacitated individual who has a guardian responsible for making medical or mental health treatment decisions may not designate another person as patient advocate. MCL 700.5520. Before acting, the proposed patient advocate must sign an acceptance of the designation that contains the statements in MCL 700.5507.

If the court is aware that an individual has executed a patient advocate designation under MCL 700.5506, the court shall not grant a guardian any of the powers held by the patient advocate. MCL 700.5306(2).

A challenge to validity based on failure to follow the execution requirements may be made in a petition for guardianship. See PC 625, item 5.

Disputes about patient advocate's authority or actions. A patient advocate has authority to act when the patient is unable to participate in medical treatment or mental health decisions. The patient's attending physician and another physician or a licensed psychologist must examine the patient and make a written determination that the patient is unable to participate in medical treatment decisions. The determination of the patient's ability to make mental health treatment decisions is decided under MCL 700.5515. MCL 700.5508(1). Under MCL 700.5515(2), a patient advocate with the power to make mental health treatment decisions may exercise those powers only if a physician and a mental health practitioner both certify in writing, and after examination of the patient, that the patient is unable to give informed consent to mental health treatment. The determination must be made part of the patient's medical record and must be reviewed at least annually. If the designation states that the patient's religious beliefs prohibit an examination, the designation must indicate the procedure for determining when the patient advocate may act. MCL 700.5508(1).

If a dispute arises about the patient's ability to participate in medical or mental health treatment decisions, about whether a patient advocate's actions are consistent with the patient's best interests, or about whether a patient advocate is complying with statutory requirements, any interested person or the patient's attending physician may file a petition requesting the probate court's determination. MCL 700.5508(2), .5511(5); MCR 5.784(A). This is often done in conjunction with a petition to appoint a guardian for the individual. See PC 625, item 5.

The interested persons are the following:

- the patient
- the patient's advocate the patient's spouse the patient's adult children
- the patient's parents, if the patient has no adult children
- if the patient has no spouse, adult children, or parents, the patient's minor children, or, if none, the presumptive heirs whose addresses are known
- the patient's guardian and conservator
- the patient's guardian ad litem

MCR 5.125(C)(30).

Venue is in the county in which the patient resides or is located. MCL 700.5511(5); MCR 5.784(B). Notice must be given by mail or personal service if the address of an interested person is known or can be learned by diligent inquiry. Service by mail must be supplemented by facsimile or telephone contact within the period for timely service for an expedited hearing or a hearing on the initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions. MCR 5.784(C)(1). At an expedited hearing or a hearing on the initial determination, the court may dispense with notice of hearing on those interested persons who could not be contacted after the petitioner's diligent effort. MCR 5.784(C)(2). Notice of hearing must be served at least two days before the hearing on an initial determination. Notice of an expedited hearing must be served at such time as directed by the court. Notice of other hearings is governed by MCR 5.108. MCR 5.784(C)(3). See §12.2 for notice-of-hearing requirements for nonexpedited hearings.

If the petition concerns a dispute about the patient's ability to participate in medical or mental health treatment decisions, the court must do the following:

- appoint a guardian ad litem to represent the patient
- É conduct a hearing as soon as possible and not later than seven days after the court receives the petition
- É determine whether the patient is able to participate in medical or mental health treatment decisions as soon as possible and not later than seven days after the hearing

MCL 700.5508(2); MCR 5.784(D)(1).

The court may order an expedited hearing on any petition on a showing of good cause to expedite the proceedings, which may be made ex parte. MCR 5.784(D)(1). Trial is by the court without a jury. The petitioner has the burden of proof by a preponderance of the evidence on all contested issues, except that the standard is clear and convincing evidence on the issues of whether a patient has authorized the patient advocate to decide to withhold or withdraw treatment, if the decision could or would result in the patient's death, or authorized the patient advocate under a durable power of attorney for mental health treatment to seek the forced administration of medication or hospitalization. The physician-patient privilege may not be asserted. MCR 5.784(D). On a sufficient showing of need, the court may issue a temporary restraining order pursuant to MCR 3.310 pending a hearing. MCR 5.784(E).

C. Do-Not-Resuscitate Orders

§12.6 An individual may execute a do-not-resuscitate order to direct that if the individual suffers cessation of both spontaneous respiration and circulation in a setting outside of a hospital, a nursing home, or a mental health facility owned or operated by the department of community health, resuscitation will not be initiated. To be valid, a do-not-resuscitate order must be

- É made by an individual who is at least 18 years old and of sound mind or by the patient advocate of an individual who is at least 18 years old on that individual's behalf;
- É on a form described in MCL 333.1054;
- É dated; and
- É voluntarily signed by

- É the individual or another person who, at the time of the signing, is in the individual's presence and acting pursuant to the individual's directions;
 - É the individual's attending physician; and
 - É two witnesses who are at least 18 years old. At least one of the witnesses may not be the individual's spouse, parent, child, grandchild, sibling, or presumptive heir.
- The name of each of these individuals must be printed or typed below his or her signature.

MCL 333.1053.

A person interested in the welfare of the individual who has reason to believe that an order has been executed contrary to the individual's wishes may petition the probate court to have the order and the conditions of its execution reviewed. MCL 333.1059.

D. Michigan Dignified Death Act

§12.7 The Michigan Dignified Death Act, MCL 333.5651 et seq., was enacted to increase the awareness of patients with reduced life expectancy due to advanced illnesses of their right to decide whether to receive, continue, discontinue, or refuse medical treatment. MCL 333.5652(2).

The act requires a physician to orally inform such a patient or his or her patient advocate (if the patient is unable to make medical treatment decisions) about the recommended medical treatment, alternatives to it, the advantages, disadvantages, and risks of each, and the procedures involved in each. MCL 333.5654(1). The physician must also, both orally and in writing, inform the patient (1) that the patient has the option of designating a patient advocate, (2) that the patient or patient advocate has the right to make an informed decision about treatment for the illness, and (3) that the patient or patient advocate may choose palliative care treatment, including hospice care and pain management. MCL 333.5655. The act confers immunity from liability on a physician who, in good faith, prescribes a controlled substance that is a narcotic drug to such a patient with the intent to treat the patient, to alleviate the patient's pain, or to do both. MCL 333.5658.

In proceedings regarding termination of life support and other medical treatment decisions for such patients, it is important to note that the act does not do the following:

- É impair or supersede a legal right a parent, patient, patient advocate, legal guardian, or other individual may have to consent to or refuse medical treatment on the patient's behalf create a presumption about the desire of the patient who has reduced life expectancy due to advanced illness to receive or refuse medical treatment, regardless of the patient's ability to participate in medical treatment decisions
- É limit the ability of a court making a determination about a decision of a patient who has reduced life expectancy due to advanced illness to take into consideration the following:
 - É the preservation of life
 - É the prevention of suicide
 - É the protection of innocent third parties
 - É the preservation of the medical profession's integrity
- É condone, authorize, or approve suicide, assisted suicide, mercy killing, or euthanasia

MCL 333.5660.