

CASE LAW AND LEGISLATIVE UPDATE

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I. INTRODUCTION

Materials address new court rules, legislation, and appellate court decisions in the probate area that have occurred within the last year.

II. COURT RULE AMENDMENTS

A. CORONAVIRUS COURT RULE AMENDMENTS – ADM 2020-08, Effective July 26, 2021

1. The following is a summary of the court rule changes related to the hearing/case processing procedures initiated in response to the public health emergency. All of the COVID Administrative Orders (AOs), except for the landlord/tenant procedure and remote taking of the Bar Exam, have been eliminated and replaced by these provisions.

SCAO's intent was to move the substance of the AOs into a court rule amendment format/revision procedure. The existing practices are being retained and public comment solicited. Although rules given immediate effect, comments are encouraged by SCAO and may be submitted until November 1, 2021; a public hearing will be held.

2. Fee Waiver: Until further order of the Court, a litigant must be able to seek a fee waiver via an entirely electronic process. **MCR 2.002(L)**.

Observation: Court already has electronic fee waiver request in place.

3. Service and Filing of Pleadings and Other Documents

Until further order of the Court, all service of process (except case initiation) must be done electronically (e-Filing where available, email, or fax, where available) to the greatest possible extent. Agreement by other party(s) not required to send via email, but the other provisions of **MCR 2.107(C)(4)** should be complied with as much as possible. **MCR 2.107(G)**.

Observation: Court is already actively promoting electronic notification.

4. Videoconferencing

Trial courts required to use remote participation technology to greatest extent possible. Courts must take the following steps:

- Verify participants are able to proceed remotely, and provide reasonable notice of the time and format of hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in the proceedings.
- Allow some participants to participate remotely even if all participants are not able to do so.

Note: Judges can participate from a location other than their judge's courtroom only with the chief judge's written permission. Permission shall be granted whenever the circumstances warrant, unless the court does not have\unable to obtain any equipment\licenses necessary for the court to operate remotely.

- Ensure proceedings consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.
- Provide public access either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access otherwise limited by statute or rule.

Observation: Court provides public access to all ZOOM hearings; access information on website.

- Ensure that the manner in which the proceeding conducted in manner sufficient to enable a transcript to be produced after the hearing.
- Any remote hearings must comply with any SCAO standards.
- Waive any fees currently charged for remote participation.

Note: Courts may collect contact information, including cell phone number(s) and email address(es) from any party\witness to a case to facilitate scheduling\participation in remote hearings or to facilitate case processing. Information can be collected using SCAO approved form, which will be confidential. Attorney email address for an attorney must be same as the one on file with the State Bar of Michigan.

MCR 2.407(G)(1)-(7)

Observation: Court already complying with these mandates.

5. COVID Mitigation\Protection & Stakeholder Meeting

Chief Judge directed to continue to utilize reasonable measures to avoid exposing hearing participants, court employees, and general public to COVID-19. Measures include continuing to provide a method(s) to file

other than in person. As necessary, courts may waive strict adherence to any adjournment rules\policies and administrative\ procedural time requirements.

Observation: Court will continue to provide remote filing options.

Stakeholder Meeting – Permanent Changes\Operations During Pandemic -

To evaluate effectiveness of emergency pandemic Supreme Court practices, each court's leadership team (including the chief judge(s) and court administrator(s)) shall convene a meeting to discuss (1) court's ability to manage operations during the pandemic and (2) identify potential permanent changes that might improve court processes. SCAO will provide guidance regarding the meetings. Meeting shall include (but not be limited to) representatives from the following stakeholders: court funding unit, local bar association, local legal aid organization, regional administrator, state and local government agencies active in the court (e.g., Michigan Department of Health and Human Services, law enforcement, friend of the court, etc.), and nongovernment agencies with interests in court proceedings, such as crime victim advocacy organizations, nonprofit safety net entities, including the local Housing Assessment Resource Agency, and others as reflective of the local community.

Meeting must be held by September 17, 2021; a summary of the discussion and proposed recommendations shall be transmitted to the regional office within two weeks after the meeting. Courts must accept written comments submitted by any of the entities listed above, must be accepted and included as an appendix.

MCR 8.110(C)(3)(i).

Observation: Stakeholders meeting held on August 26, 2021; a summary will be presented as part of the Administrative and Procedural Updates segment of Attorney Training.

B. PERSONAL PROTECTED IDENTIFYING INFORMATION – ADM 2020-26, Effective January 1, 2022

1. The implementation of these court rule amendments has been delayed until January 1, 2022.
2. SCAO has developed and posted forms (MC 97 & MC 97a) to be used to provide the personal protected identifying information (PII) to the Court, specifically:
 - Date of birth
 - Social security\national ID number

- Driver's license\state ID card number
 - Passport number
 - Financial account numbers
3. You can use the current forms until January 1, 2022 or use the new PII forms now even though they are not required until January 1st.
 4. The ability of the Court to display documents on its website has been extended until January 1, 2022.

III. NEW LEGISLATION

DO NOT RESUSCITATE ORDERS FOR MINORS

2020 PA 363 - Effective April 4, 2021

2020 PA 364 - Effective April 4, 2021

2020 PA 365 - Effective March 24, 2021

A. 2020 PA 363 - Effective April 4, 2021

1. Amends the Michigan Do Not Resuscitate Act to allow a parent of a minor child to execute a do not resuscitate order (DNR) on behalf of a minor child suffering from an advanced illness. **MCL 330.1053b(1).**
2. Amends the DNR Act to permit the guardian of a minor to execute a DNR order on behalf of their ward. **MCL 330.1053a(1).**
3. Both parents must sign the order if one parent shares the legal decision making authority with another parent. **MCL 330.1053b(1).**
4. The order's format is similar to the DNR for adults. **MCL 330.1054.**
5. After execution of a DNR, a bracelet can be placed on the child. The parent may revoke the DNR order. **MCL 330.1053b(4); MCL 330.1060(1).**
6. A copy of the DNR order must be given to the minor's school. If the child is in distress at the school, no attempt at resuscitation to occur before a health professional's arrival. **MCL 330.1060(3).**

B. 2020 PA 364 - Effective April 4, 2021

1. Amends the Revised School Code to support implementation of a guardian or parent signed DNR and physician orders for scope of treatment (POST) forms in school where child enrolled.
2. Process for communicating revocation of DNRs and POST forms to school also included.

C. 2020 PA 365 - Effective March 24, 2021

Amends EPIC to give a minor guardian the authority to execute a DNR order on behalf of the child. **MCL 700.5215(h)**.

IV. CASE LAW

A. MEDICAID – PATIENT PAY AMOUNT – SUPPORT ORDERS – JURISDICTION\STANDARDS

In re Estate of Schroeder, In re Estate of Almy - Mich App - ; - NW 2d - (2020), #351,011, #351,012 rel'd. 12\17\20

1. This 3-0 Court of Appeals ruling reversed and remanded the Saginaw County Probate Court's decision in these two cases consolidated for appeal where, although neither husband had applied for or was receiving Medicaid benefits, a protective order was entered in each that transferred individual and joint interests in assets to the community spouses, required that the protected individuals make support payments to these spouses from a portion of their income stream, and terminated spousal rights in regard to any potential future inheritance.
2. In granting these protective order petitions, the Probate Court ruled that both Schroeder and Almy allegedly faced the likely prospect of residing permanently in long-term care facilities when the petitions were filed, and the nursing home aspect of the cases implicated issues about the cost of care, Medicaid, and patient-pay obligations under Medicaid rules. The Michigan Department of Health and Human Services (MDHHS) appealed both protective orders arguing for various reasons the proofs and/or evidentiary burden required under **MCL 700.5401(3)** had not been met. The main aspect of these appeals concerned the requirements of **MCL 700.5401** before a protective order could issue. These cases were subsequently consolidated on appeal
3. In **Schroeder**, the appellate panel ruled that the petitioner, the protected individual's son, had not proved by clear and convincing evidence that his father was unable to manage his property and business affairs effectively for reasons such as physical illness or disability. **MCL 700.5401(3)(a); MCL 700.5406(7)**. The son alleged in his petition that his father had suffered a spinal cord injury and was unable to take care of himself. He further asserted that Mr. Schroeder was unable to effectively manage his property and business affairs because of the spinal cord injury. However, the Court of Appeals determined that the allegations in the petition were not evidence, and noted the testimony of the GAL, who is not a medical professional, would not appear to constitute clear and convincing proof sufficient to grant the protective order according to statute. As a result, even though the Probate Court apparently reviewed medical reports in the file along with the GAL's

report, the appellate panel held it was unable to conclude whether clear and convincing evidence existed to establish that Mr. Schroeder was unable to manage his property and business affairs due to a spinal cord injury. They remanded the case and directed the Probate Court to revisit this finding.

4. Regarding Almy, the Court of Appeals held that the unchallenged medical report and the GAL's assessment supported the Probate Court's ruling as to **MCL 700.5401(3)(a)**. It was uncontroverted Mr. Almy had dementia and was unable to manage his affairs any longer. However, regarding **MCL 700.5401(3)(b)**, the appellate panel found the Probate Court erred when it considered his needs in the context of Medicaid-related circumstances even though both men were not receiving Medicaid benefits and were awaiting Medicaid eligibility determinations. As a result, reversal was necessary in both cases.
5. MDHHS argued that the assets transferred to the community spouses were not owned by the protected individuals – i.e., they were already titled in the community spouses. While acknowledging that EPIC did not specifically require this, the Court of Appeals declared it was necessary to determine the nature and value of the assets or interests to be transferred, and directed that on remand that the Probate Court require evidence of these items.
6. This case is informative on three main issues. First, it is instructive as to the type of medical proof necessary to meet the clear and convincing standard under **MCL 700.5401(3)(a)** before a protective order may issue. Second, it further clarifies the type of examination and valuation of assets required of a Probate Court before ordering the transfer of assets by protective order to a spouse in such a Medicaid scenario. Finally, and most importantly, it mandates that in order to assess the need for a person's support and care pursuant to **MCL 700.5401(3)(b)** due to Medicaid related circumstances an actual Medicaid determination must be made concerning eligibility and patient pay amounts.
7. Application for leave to appeal was not filed in either case.

B. CONSERVATORSHIP – BREACH OF FIDUCIARY DUTY - SURCHARGE – JOINT ACCOUNT - PRESUMPTION

In re Murray Conservatorship, - Mich App - ; - NW 2d - (2021), #349,068, rel'd. 3/4/21

1. This unanimous Court of Appeals decision affirmed the Livingston County Probate Court's order surcharging the prior conservator and determining that he breached his fiduciary duties.
2. In Murray, a conservator (Appellant) was appointed on September 3, 2014. A petition to modify the conservatorship was filed on April 1, 2015 alleging failure to file an inventory, failure to disclose assets, self-dealing, and otherwise failing to properly manage assets. On August 11, 2015 the

appellant was permitted to resign, ordered to file a final account by September 4, 2015, and a successor conservator appointed. The Appellant was suspended as conservator on August 26, 2016 for failure to file a final account; a special fiduciary was appointed to assist in the preparation of the account. The ward died on December 23, 2016.

Appellant failed to provide information to the special fiduciary and did not file a final account. The special fiduciary unilaterally filed an amended inventory and final account. He noted that an \$1,800 discrepancy existed and indicated Appellant became a joint owner of the ward's bank accounts five months before the conservatorship was established. The personal representative of the ward's estate (Appellee) filed a petition for surcharge on December 21, 2017. The Probate Court found Appellant breached his fiduciary duties and surcharged him \$51,348.86, which consisted of (1) \$6,540.90 for special fiduciary fees; (2) \$1,800 for final account discrepancy; (3) \$37,099.58 for checks written on ward's account (either misappropriated or failed to account for); (4) \$4,300 for payment made to appellant's wife; and (5) \$2,508.38 for funds misappropriated after ward's death.

3. The Court of Appeals rejected the Appellant's argument that breach of fiduciary duty had to be shown by clear and convincing evidence. They noted that EPIC did not contain a standard of proof on this issue; as a result, under Michigan jurisprudence, the default preponderance of evidence standard is applicable.

In upholding the Probate Court's decision to surcharge appellant for the \$6,540.90 special fiduciary fee, the appellate panel noted that he breached his fiduciary duties which necessitated the services provided, including the filing of a final account for the conservatorship. Regarding the \$1,800 account shortfall, Appellant was unable to explain this discrepancy.

The Court of Appeals also rejected the Appellant's argument that he should not have been surcharged for \$37,099.58 of checks written on the ward's account. The evidence showed that he had no explanation for some checks and for others documentation was lacking to support his explanations. Appellant's contention that as the surviving joint owner of the ward's bank account he was entitled to its use was not accepted. The evidence demonstrated that his name was added to the account after the ward named him agent under a durable power of attorney five months before the conservatorship was established but after she had been diagnosed as suffering from dementia. Based on the fiduciary relationship, a presumption of undue influence existed which the Appellant failed to rebut. As a result, he was not a joint owner of the account.

Appellant's argument that it was error to surcharge him \$3,400 for payments to his wife was found to be without merit. He had no documentation to support his allegation that the money was reimbursement for expenses related to an estate sale. The surcharge of \$6,916.58 for payment to a law firm for action against a debtor of the ward was upheld. While conceding that this

would have been a proper expenditure of the ward's monies, surcharge was appropriate because payment was made after the Appellant was no longer conservator; only the successor conservator could have authorized this action. Finally, the \$2,508.38 surcharge involving monies misappropriated after the ward's death was affirmed. The evidence indicated that the Appellant deposited the ward's monies in his own account and continued to use her funds for personal expenses after her death.

4. This case reiterates the concept under EPIC that a fiduciary must only use a ward's asset for that individual's benefit and is under a duty to account for their disbursements. Surcharge is appropriate if they are unable to do so and also if their actions (and inactions) constitute a breach of their duties and cause additional expenses to the ward. It also illustrates Michigan jurisprudence that the presumption of undue influence which arises when an individual is in a fiduciary relationship with a joint account holder remains when no rebuttal evidence is presented.
5. Application for leave to appeal to the Supreme Court has not been filed.

C. GUARDIANSHIP – PETITION TO TERMINATE – BURDEN OF PROOF

In re Gordon Guardianship, - Mich App - ; - NW 2d (2021), #354,646, rel'd. 5\13\21

1. This 3-0 ruling by the Court of Appeals reversed the decision of the Wayne County Probate Court denying a petition to terminate guardianship and remanded the case for a redetermination utilizing the appropriate legal standard.
2. **Gordon** involved a deaf and blind man for whom a guardian was appointed. A petition to terminate was filed by the ward. The Court stated that the case was controlled by **MCL 700.5219(1)**, which provides in pertinent part:

A person interested in the ward's welfare, or if 14 years of age or older, the ward may petition for the removal of the guardian on the ground that the removal would serve the ward's welfare or for another order that would serve the ward's welfare. ...

(emphasis added)

The Court denied the petition, finding there was no evidence that termination was in the ward's best interest. The ward appealed.

3. The appeals panel noted that **MCL 700.5219(1)** is applicable to minor guardianships. Termination of adult guardianships is governed by **MCL 700.5310**, which declares in relevant portion:

(2) The ward or person interested in the ward's welfare may petition for an order removing the guardian, appointing a successor

guardian, modifying the guardianship's terms, or terminating the guardianship. ...

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

(emphasis added)

The standard of proof to establish a guardianship for an adult is found in **MCL 700.5306(1)**, which is a finding by clear and convincing evidence that the person is an incapacitated individual and appointment is necessary to provide for their continued care and supervision, with each finding separately supported on the record. Since this standard was not applied, the case was remanded to utilize this criteria.

4. This decision illustrates the due process protections provided under EPIC for adult wards. When a petition for termination is filed, the proceeding is "rebooted" and the petitioner must meet their burden, by clear and convincing evidence, that a guardian is required.
5. Application for leave to appeal to the Supreme Court has not been filed.

D. INVOLUNTARY MENTAL HEALTH TREATMENT – DEFERRAL – DUE PROCESS
In re Moriconi, - Mich App - ; - NW 2d - (2021), #356,037, rel'd. 6\10\21

1. This unanimous Court of Appeals decision vacated an Oakland County Probate Court order for involuntary mental health treatment and remanded for an examination as to whether proper deferral procedures were followed or to permit the filing of a deferral in compliance with the statute.
2. In **Moriconi**, a petition for involuntary mental health treatment was filed. At the hearing but before any testimony was taken Ms. Moriconi requested a deferral and indicated she had not been given the form to do so. The Judge did not inquire as to whether the deferral period was discussed with the patient by her counsel, but instead proceeded with the hearing, stating that the deferral period had passed. The psychologist appeared to testify that hospital staff spoke with the patient about a deferral but she indicated she was not feeling well, went to her room, and did not return (his answer could not be completely transcribed so this statement is not completely clear from the record). Ms. Moriconi again objected to the hearing and stated she was sick when presented with the deferral information. Her counsel did not address the deferral issue or present a closing argument. The Judge issued a 60\180 day

combined order and denied successor counsel's motion for reconsideration on the basis that the patient was deprived of her deferral right. Ms. Moriconi appealed.

3. The Court of Appeals held that the Probate Court abused its discretion by granting the treatment petition after the Appellant clearly expressed a desire to defer the hearing. The deferral process is enunciated in **MCL 330.1455**, which provides in pertinent portion that the subject of a mental health petition hospitalized pending their hearing:

...shall meet with legal counsel, a treatment team member assigned by the hospital director, a person assigned by the executive director of the responsible community health services program or other program as designated by the department and, if possible, a person designated by the subject of the petition... **MCL 330.1455(3)**.

The request to temporarily defer the hearing shall be on a form provided by the department and signed by the individual in the presence of his or her legal counsel and shall be filed with the court by legal counsel. **MCL 330.1455(6)**.

Upon receipt of the request and stipulation under subsection (6), the court shall temporarily defer the hearing. **MCL 330.1455(7)**.

The appellate panel noted that based on the record available there was no indication that the meeting actually occurred. Also, there is no time limit regarding when a deferral may be requested by the subject of a petition. While Appellant's statements at the beginning of the hearing did not meet the requirements of a deferral, it was an error by the Probate Court to conclude that a deferral could not be requested at the beginning of the trial. The Court of Appeals declared that due process concerns were raised where the Probate Court was on notice that the Mental Health Code procedures were apparently not followed. As a result, at a minimum an inquiry should have been made regarding whether the Appellant had been denied her right to a deferral hearing. Failure to do so constituted an abuse of discretion.

4. This case reiterates the important due process rights for the subject of a petition for involuntary treatment under the Mental Health Code, including that of deferral, and the importance of following the appropriate procedures. Since the Probate Court did not at least inquire as to whether the deferral conference was held and appellant given an opportunity to defer remand was appropriate.
5. Application for leave to appeal has not yet been filed.

E. JURISDICTION – PROBATE\CIRCUIT COURT - TRUSTS

Schaaf v Forbes, - Mich App - ; - NW 2d - (2021), #343,630, rel'd. 7/1/21

1. On remand from the Supreme Court, the Court of Appeals in a 2-1 decision ruled (1) that the Circuit Court had jurisdiction to adjudicate interests in real property, its sale, and contribution to ownership responsibilities and (2) a trust cannot hold or convey real property as a joint tenant with right of survivorship.
2. **Schaff** involved a dispute over the sale of and contribution to real property partially owned by a trust. The Supreme Court remanded the case for consideration of the Circuit Court's jurisdiction over this matter. The trustee attempted to convey real estate to remainderman with the trust as joint tenant with rights of survivorship. The court voided the conveyances, which resulted in the interests being held as tenants in common. Since an equitable division could not be achieved, the property was ordered sold intact. It also ruled that the parties were jointly responsible for taxes and maintenance expenses and determined, after the review of extensive documentation, that the Plaintiffs were entitled to \$30,000.86 from the Defendant's portion of the sales proceeds for their share of the costs.

The Defendant appealed. In an unpublished 2-1 ruling, the claim of error on reviewing the documentation was rejected but it was held that the trial judge committed reversible error when it ruled as a matter of law that a trust may not hold land as a joint tenant with right of survivorship. Plaintiff filed application for leave to appeal to the Supreme Court, who vacated the judgment and remanded to the Court of Appeals to initially rule on the Plaintiff's jurisdictional challenge before ruling on the merits of the other issues.

3. The appellant panel rejected the Defendant's argument that the Circuit Court lacked jurisdiction to adjudicate this matter. They noted that Circuit Court is a court of general jurisdiction, and that Probate Court is given exclusive jurisdiction over specific trust issues as well as concurrent jurisdiction over others. **MCL 700.1302(b), .1303**. The Circuit Court was not asked to construe, invalidate, or modify the trust in question. Instead, the action involved claims regarding interests in real property, its sale, and contribution of the Defendant for ownership responsibilities. None of these issues fall within the Probate Court's exclusive jurisdiction.

The Court of Appeals also did not accept the Defendant's argument that a trust can hold property as a joint tenant with right of survivorship. It noted that survivorship rights relate to the life and death of a joint tenant. A trust is not a natural person; it has no residential needs, cannot occupy real property, and does not die. A survivorship right could be rendered illusory if a trust were allowed to hold property as a joint tenant with rights of survivorship. Finally, the appellate panel disagreed with the Defendant's argument that the property was not capable of being partitioned fairly in kind and that its contribution order was inappropriate.

4. In a partial concurrence and dissent, a panel member agreed that the Circuit Court had jurisdiction and that contribution was appropriate, but believed the majority erred in ruling that a trust was incapable of holding real property as a joint tenant with right of survivorship. He noted that the majority conceded that a trust cannot under common law exist in perpetuity and that they did not cite any authority prohibiting a trust under common law from holding title as a joint tenant. In addition, no provision in the Michigan Trust Code precludes a trust from holding real property in the same manner as a natural person could.
5. This case provides useful guidance on the boundaries of exclusive and concurrent jurisdiction in trust proceedings involving real property.
6. Application for leave to appeal has been filed and is still pending.

V. CONCLUSION

Knowledge of the preceding court rule amendments and new case law will enhance your skills as a probate practitioner.