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The law has long recognized that certain people cannot properly care for their own property, and supplies mechanisms to provide such care on their behalf.

In Michigan, the law defines such individuals as "protected persons." A minor is generally considered, by reason of age (less than 18 years old), to be incapable of protecting his or her own assets? An adult (upon judicial determination) may be found to be unable to capably manage his or her property, typically because of mental or physical incapacities.

Michigan law provides two primary remedies for such incapacities? The first remedy is the judicial appointment of a conservator. The second is the use of a protective order to craft a specific remedy for the incapacitated person.[3] While many of the devices mentioned below may specifically relate to a minor or legally incapacitated adult, the suggestions are generally usable in both situations depending on the assets and needs of the alleged protected person.

CONSERVATORSHIPS

A conservator is empowered by the probate court to collect and preserve the assets of the protected person and account to the court for all such assets collected and, on a regular basis, to keep the court informed of the status of such assets through the filing of an inventory of assets and annual accountings. If for some reason it is necessary to have more than one conservator, the court can appoint more than one. Generally co-conservators must act unanimously unless otherwise directed by the court.

Typically, minors do not possess sufficient assets to require the court's intervention and protection. Children's allowances and earnings from part-time jobs are usually meager enough that such funds are quickly consumed. Additionally, family gifts are often made with Uniform Gift to Minors Act (UGMA) accounts, which are generally not subject to probate proceedings? Or, the grantor of the gifts creates a trust that is not subject to court supervision unless, for some reason, court intervention is requested.

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Minors do need protection in circumstances such as inheritances and the awarding of proceeds from lawsuits. While a parent may directly receive up to $5,000 on behalf of a child in a given year. funds to be delivered to a child in excess of this amount require further court proceedings, typically in the form of a conservatorship.

In general, minor conservatorships are premised upon the notion that the funds subject to the conservatorship are to be preserved during the child's minority. A conservator for a minor's estate is often required to file a surety bond (typically issued by an insurance company in an amount less than or equal to the value of the liquid assets subject to the conservatorship) in order to qualify for the issuance of letters of authority.[6] The annual premium expense for such a bond is an administrative expense of the conservatorship. Nominal bonds (where the fiduciary pledges $1,000.00 of his or her own funds to secure proper performance), or an Acceptance of Trust can also be ordered which do not require the payment of premiums?

Corporate surety bonds can be expensive. In addition, many bonding companies require that the bond premium be paid in advance for the duration of the minority. Also, some fiduciaries cannot qualify for bonds because of other financial problems. Query-should that person be appointed at all? However, if this is the case, a bonding company may be persuaded to bond if there is joint control of accounts with an attorney, or other financially stable person.

In a situation where the assets are modest, and a corporate fiduciary bond premium would consume a significant portion of the income, the court may be persuaded

to place the bulk of the assets in a restricted account that requires prior court approval before use of the funds and have a smaller "household" account for the conservator to pay day-to-day expenses. Depending on the size of the household account, a corporate bond may not be necessary or the amount can be greatly reduced. This alternative can be quite useful in an adult conservatorship where there are monthly expenditures.[8]

As a common alternative to a corporate surety bond in situations where relatively smaller amounts of liquid assets are involved, and use of the funds is not anticipated, the court may issue restricted letters of authority that prevent a conservator from expending any funds on behalf of the minor without prior court approval. The court may also restrict the conservator to depositing the minor's assets in an interest-bearing bank account that prohibits withdrawals from the account without prior court approval. These restrictions will generally appear in the Letters of Authority.

In such circumstances, the courts usually require the annual filing of a Verification of Funds On Deposit form when accounting for the assets. If the funds are restricted in this manner, a corporate bond is usually not required. And, if the assets are not liquid or easily movable, such as real estate, restricted letters of authority will provide sufficient protection, until and unless the property is sold?

While a conservator is not always required to obtain probate court approval to settle a lawsuit on behalf of a minor, prudent practice dictates that such approval be sought in advance of settlement.[10] The probate court should also be advised in advance of receipt of lawsuit proceeds, inheritances or other funds if the court is not aware of the amounts involved, in order to provide for adjustment of the surety bond or other protections as may be required by the court.[11]

Most of the requirements for minor conservatorships also apply to adult conservatorships. Sometimes, adult protected persons or wards (where the guardian collects the assets because the amounts received are minimal social security benefits or similar receipts) have no family or even friends interested in their welfare and a stranger must be appointed. Public administrators are the frequent choice to act as conservator and/or guardian. Using corporations (not banks or brokers and the like because the funds are auite small) to perform these services has proven to be efficient and cost effective, in many situations. But, at least one such entity converted the funds of disabled persons under it's care.[12] Similarly, the appointment of an attorney (who is not a public administrator) is, unfortunately, no guarantee of honesty either, as evidenced by grievance activity reported monthly in this journal.

TRUSTS

Using the protective order provisions of the Probate Code, courts may alternatively elect to impose a trust upon the protected person's assets and appoint one or more trustees to oversee the assets within the terms and conditions of the trust established by the court. Such trusts may be actively supervised by the court with similar reporting requirements as a conservatorship. Thus, for larger settlements, inheritances or funds due a protected person, many practitioners seek court approval for the creation of a trust for the benefit of the protected person.[13]

In the case of minors, one of the major problems with conservatorships is that the funds are turned over to the minor at age 18. With a trust, payment *can* be commensurate with anticipated maturity.

In certain circumstances, a carefully crafted trust may be approved by the court that may preserve the assets of the trust

of their responsibilities. Left to their own devices, they may miss crucial deadlines or omit critical details in their reporting responsibilities without expert guidance and counsel.

When serving as counsel to a fiduciary it is incumbent that the practitioner remain involved and informed of events and actions of the trust or conservatorship. If your client says that you are not needed once he or she is appointed, file a petition to withdraw.

Send reminder letters of the impending anniversary dates and the need for preparation of accountings. To a reasonable extent, you should keep abreast of current events to see that your client is administering the conservatorship or trust in accordance with the court's directions or the stated terms of the trust. While the court will hold the fiduciary accountable for their actions (or lack thereof), you might not be far behind. Yet, this oversight process can be expensive and the attorney faithfully fulfilling his or her duties to the fiduciary can later be criticized if the cost for protecting the assets is high, in relation to the value of the assets.

Thus, one can be "damned if they do, and damned if they don't." However, having the fiduciary send (or arrange for the institution where assets are invested to send) copies of monthly statements showing account activity to you and perhaps other interested parties is not expensive or burdensome. The purpose is not to look over the fiduciary's shoulder, but to watch for a sudden change in spending routine, or large, unexplained expenditures.

In terms of self dealing, a fiduciary is prohibited from engaging in any type of transaction with the estate unless they have obtained written court approval.[21] Moreover, a fiduciary may not personally profit from the sale or transfer of estate property.[22] While occasions of fiduciary nonfeasance, malfeasance, misfeasance or negligence may be unusual in your practice, court records are replete with such instances, and, unfortunately the trend is increasing.

Parents sometimes consider assets of a child's conservatorship to be "family" property and may convert these assets for their own use. Parents also may lack funds to make the rent or car payment, so they borrow from "Johnny's money" and then can't pay it back. Or, the fiduciary may buy a new house because after all, "Sally" will be living there too, but fail to get court approval, and perhaps not take title in his or her fiduciary capacity. A favorite story is where the parent fiduciary bought a Corvette with the child's money to transport the child to school. The obvious problem in these situations is collecting from the unbonded, or underbonded fiduciary who takes such action.

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Depending on the facts and circumstances, the probate court, on petition, may allow expenditure of funds for suitable housing, transportation, etc., of the minor, that might also benefit other family members. Funds may also be distributed to the parent for special care that they provide.[23] However, courts are generally not sympathetic to the parent who wishes to become the "beneficiary" of the child's money.

The failure to file timely inventories and accountings is a "red flag" of possible trouble with the fiduciary. Probate courts have the authority to act swiftly when fiduciaries fail to comply with filing requirements or file incomplete reports, if they are made aware that a problem exists. But, most courts are not equipped to be the "watch dog" of every conservator because there can be extensions, and administratively it takes time to identify errant fiduciaries. Therefore, months, and occasionally years, can pass before action is taken, unless the court is specifically notified that the reason the inventory or account has not been filed is because the fiduciary has absconded with all or part of the protected person's assets. Laypersons, and some attorneys, do not understand that the courts typically do not respond to letters and telephone calls of complaint. A petition is required to bring possible breach of fiduciary duties to the attention of the court.

In response to the problem of the errant fiduciary who is an attorney or corporation, some courts are requiring that the non-family member attorney or corporate guardians have proof of liability insurance of at least $250,000.[24] Also courts are requiring that many attorney fiduciaries file bonds.

TYPES OF COURT INTERVENTION

This article is aimed at lawyers who assist fiduciaries. But many petitioners and fiduciaries cannot afford legal counsel and, therefore, unless the assets are protected with a bond, restrictions or otherwise, as discussed above, there is no one to advise and oversee the fiduciary.

If you become aware that the fiduciary, who is not your client, may be acting improperly, but have insufficient proof to file a petition to remove, filing a petition to appoint a guardian *ad litem* to review the matter is one way to bring a troublesome file to the attention of the court.[25] Additionally, the guardian *ad litem* may be reappointed annually to review the conservator's accounts.

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Other possible requested relief may be a petition for an interim accounting; confirmation that something has or has not been done (if the fiduciary refuses to do so voluntarily); or to remove the fiduciary.

In some instances, where a petition for assistance is filed and it is quite obvious that the fiduciary is breaching his or her duties, the court will immediately suspend the powers and authority of the fiduciary and appoint a special fiduciary to investigate the situation for other limited purposes. If necessary, the special fiduciary, who, unless his or her letters are restricted, has the same powers as a temporary personal representative, may take possession of the assets and seek appropriate sanctions against the original fiduciary, including removal.[26]

If the special fiduciary determines that assets are missing, a petition for dlscovery or surcharge may be filed in an attempt to recover the property. If the original fiduciary obtained a surety bond, the bonding company can be compelled by the court to reimburse the missing asset value to the trust or conservatorship and the costs associated with the related proceeds.

If assets were originally ordered by the court to be held in a bank account that prohibited withdrawal without prior court order, and the bank allowed the conservator to withdraw funds without such an order, the bank may be liable for the loss and may be ordered to reimburse the conservatorship for such funds improperly withdrawn.[27]

If counsel for the fiduciary did not oversee their client's activities as required by the court, the attorney could be held liable.

CONCLUSION

The courts need some mechanism to identlfy problem cases. In smaller counties, the courts may actually be aware of fiduciaries gone awry. In larger counties, because of the sheer volume of cases, by the time the court is made aware of problems it could be too late.

The authors offer no panacea here, as better minds have failed to solve this problem, but some type of overseeing mechanism would be useful. The problem, of course, is cost. The conservator of a very small estate, or the guardian, already has little funds available for the incapacitated person, so making sure that the fiduciary is honest is difficult if one wishes to be cost effective.

The best way to protect the minor or adult protected person is to create the proper entity at the outset using the various statutes available. If the funds are substantial, make sure that the fiduciary has proper investment assistance. If there is to be an ongoing conservatorship, make sure that there are safeguards to protect the assets.

Increasingly, the courts and other affected parties are looking beyond the parties directly involved in wrongdoing to their counsel and require a growing level of responsibility on the part of counsel for their client's actions. For example, attorneys who abandon the client after a lawsuit recovery without properly assisting the fiduciary have been held liable for the resulting special fiduciary costs.

The surest way to avoid being in the uncomfortable circumstance of standing before the bench and trying to explain why your client did something stupid (or failed to take required actions) is to proactively communicate the proper course of action to your client and follow up to see that all appropriate client responsibilities are attended to.

The lawyer practicing in this area should be creative in selecting the statutory device that is most responsive to the matter at hand, looking at the situation with hindsight on what could go wrong. Be sure to retain copies of client correspondence and directions to document your efforts to ensure that your clients comply with their required duties and responsibilities. Then, to protect your own family, make sure that you carry sufficient malpractice insurance. ■

Footnotes

1. MCLA 700.461(a).
2. MCLA 700.461(b).
3. MCLA 700.461-MCLA 700.470.
4. MCLA 554.451, et seq.
5. MCLA 700.403. Note, however, that this direct payment provision may not be utilized if the person making the payment knows that a conservator has been appointed on behalf of the minor, or knows that proceedings to appoint a conservator are pending. Additionally, this $5,000 exception is not available for adults receiving funds for other adults.
6. MCLA 700.471 and MCLA 700.502.
7. Id. See also Probate Court Forms PC 13 for bonds and PC 14 for Acceptance of Trust.
8. MCLA 700.471 and MCR 5.716.
9. Id
10. Pursuant to MCR 5.716(C), some probate court judges place restrictions in their letters of authority that prohibit a minor's conservator from entering into a settlement without prior court approval. Also, MCR 2.420 states that if a lawsuit is started, a next friend, guardian or conservator can settle the claim in circuit court. If no action is started, only the conservator can settle.
11. MCR 2.420(B)(2) provides that if a conservator is in place and the proposed settlement amount for a lawsuit exceeds the amount of the conservator'sbond, no judgment or dismissal may be issued until the probate court passes on the sufficiency of the bond. This means that the lawsuit may have to be allowed in two courts.
12. *E.g.,* the Guardian, Inc., case in Wayne County Probate Court.
13. MCLA 700.469.
14. Miller *v* Department of Mental Health, 432 Mich 426 (1989). See also, "Protecting Eligbility For Governmental Benefits: Special Needs Trusts, in ICLE Seminar Materials prepared by Mary T. Schmitt-Smith (1995).
15. Id.
16. MCLA 700.469(3).
17. If the attorney is involved at this juncture, it is recommended that the annuity company be checked in ratings publications.
18. MCLA 700.478; for guardians see MCR 5.769(B)(2).
19. MCR 5.769(C) and (D). Interested parties, as defined in MCLA 700.7(3) should be distinguished from interested person in MCLA 700.7(4).
20. MCLA 700.561; MCLA 555.201 and MCLA 700.813. See also, In Re Buhl's Estate, 211 Mich 124 (1920).
21. MCLA 700.482.
22. MCLA 700.561(1).
23. MCLA 700.485.
24. Wayne County Probate Barksociation Newslettel: co-edited by Patricia L. Patterson, Kathy Henry and Avery Bradley, Volume 111, No. 2 (April 1996).
25. While a guardian *ad* litem is initially appointed by the court to protect the interests of an adult alleged protected person (but generally not a minor) upon the filing of a petition for a conservator, often, the guardian *ad litem'*sinvolvement ends after the conservatorship hearing. However, the guardian *ad litem* may continue on at the court's own motion or suggestion of others, if the circumstances so require.
26. MCR 5.718.
27. See In Re Thomas Estate, 211 Mich App 594 dealing with the release of funds by a financial institution after the expiration of the letters of authority.