



DEFENDING OLDER CLIENTS IN GUARDIANSHIP PROCEEDINGS

By Nicole Shannon, Emily Miller, and Emma Holcomb



At a Glance

Attorneys representing low-income older adults in guardianship proceedings can address the underlying poverty issues that masquerade as incapacity, allowing clients to retain autonomy and avoid guardianships.

Mary is an 87-year-old woman who lives alone in her home of nearly 60 years. Her only income is Social Security, so she has a limited budget. She was recently released from the hospital after falling at home. After a home visit, Adult Protective Services (APS) saw her house needed substantial repairs and her pantry had few groceries. APS is talking to Mary's family about a guardianship. But are Mary's issues related to mental capacity or are they functions of poverty and physical disability?

The adult guardianship system under the Estates and Protected Individuals Code (EPIC) aims to protect some of the most vulnerable members of our society.¹ Unfortunately, this protection can come at a steep cost: the loss of an adult's ability to make many meaningful choices about their life. A probate court can appoint a guardian when it finds by clear and convincing evidence that the adult is an "incapacitated individual"² and the guardianship is necessary to provide care and supervision of the adult.³ Under EPIC, the guardianship must be designed "to encourage the development of maximum self-reliance and independence in the individual,"⁴ and courts cannot appoint full guardians if an adult retains some capacity for self-care.⁵ In practice, most guardianships are full guardianships; Supreme Court Administrative Office (SCAO) statistics from 2019 show 6,829 full guardianships were granted, compared to 261 limited petitions.⁶

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Adults under full guardianship lose authority over whether to marry or divorce,⁷ stay in their home,⁸ keep their belongings,⁹ handle their finances,¹⁰ or consent to do-not-resuscitate orders.¹¹ If a court finds there are no loved ones suitable and willing to serve as guardian, a corporate guardian—a stranger to the adult—may be appointed.¹²

Low-income older adults like Mary are at special risk for unnecessary guardianships. A bare cupboard or home in disrepair may be attributed to a decline in mental capacity due to age instead of other problems: poverty, physical disability, lack of access to physical and mental health care, and a lack of a social safety net. Low-income older adults may not have the resources to pay for access to common alternatives to guardianship like help with drafting powers of attorney or patient advocate designations.

While the Michigan Attorney General’s Elder Abuse Task Force is tackling many initiatives that will improve the adult guardianship system under EPIC, practitioners and courts do not need to wait for the task force to complete its work. Below are eight possible tools to help Mary—and the tens of thousands of Michiganders under guardianship—live as independently as possible.

Avoid a temporary guardian

It is often more difficult to terminate a guardianship once it has been ordered than it is to prevent it entirely. For individuals like Mary who may simply need additional support to regain stability, a temporary guardianship exposes them to loss of civil rights—potentially for the remainder of their lives. Additionally, appointing a temporary guardian could easily result in decisions being made on an individual’s behalf, such as placement in a nursing facility and the sale of their home, that would make it difficult for them to regain meaningful independence regardless of whether the guardianship remains in place long term.

MCL 700.5312 and MCR 5.403 allow appointment of a temporary guardian if an “emergency exists and no other person

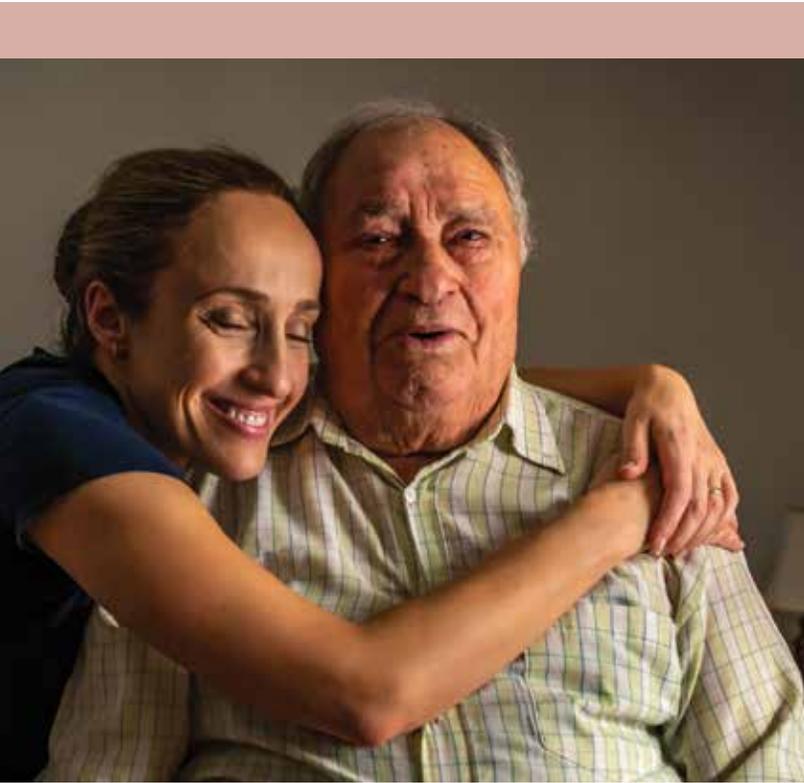
appears to have the authority to act in the circumstance.” Because “emergency” is not specifically defined in the law, judges have great discretion in determining what level of instability in an individual’s life requires appointing a guardian on a temporary basis. Unfortunately, this discretion can lead to courts being overly cautious, which disproportionately impacts low-income individuals navigating a myriad of supportive programs with varying eligibility requirements (which many legal practitioners themselves do not understand) in order to access the resources they need to remain autonomous.

Fortunately, even if an emergency exists, an attorney can easily serve as the person “with authority to act in the circumstance” to connect clients to the services, alleviating the need for a temporary guardian. The use of a simple release of information signed by the client and sent to the right agencies can help connect your client to much needed food delivery, in-home care, home repairs, transportation, emergency cash assistance, and money management guidance. Attorneys engaged in this area of law must educate themselves on available local resources that can provide stability, safety, and autonomy to clients.¹³ Attorneys helping to make these connections save clients from the stressful process of fighting to maintain their independence and undergoing a contested trial.

Include positive medical evidence

Getting medical professionals to participate in cases can be challenging, particularly if you are on a shoestring budget. Fortunately, probate court rules allow admission of a written report by a “physician or mental health professional” into evidence *without the testimony by the author* provided it is filed five days prior to the hearing.¹⁴ MCL 700.5304(2) also allows for an “independent evaluation,” often referred to as an independent





medical exam (IME), which your client has a right to secure and, if indigent, has the right to obtain “at public expense” if the court approves the cost as being reasonable.

Obtaining an IME from a non-traditional source may be the key to avoiding a guardianship based on a highly narrow view of your client. Because an IME is not specifically defined, it appears to refer to the court’s ability to require an individual to be examined by a “physician or mental health professional,” which includes a broad range of individuals who can provide an assessment.¹⁵ For example, a mental health professional may include a registered professional nurse, a licensed master social worker, a licensed physician’s assistant, or a licensed professional counselor.¹⁶ These individuals often have more contact (and a closer relationship) with your client and a greater ability to assess their day-to-day abilities and limitations. Thus, if your client does in fact have some issues that would be unfavorably flagged by a narrow psychological assessment, working with a master social worker (for example) who views your client more holistically may be the key to avoiding guardianship.

Alternatively, if obtaining a report is not an option for your client, introduction of medical records absent a report can also be used at trial with an affidavit certifying medical records.¹⁷ Individuals on Medicaid have a right to a free copy of their medical records, so having the request come directly from your client can save you the expense of requesting hundreds of pages of medical records.¹⁸ For example, medical

records from a client’s primary care physician, particularly if your client has had a lengthy relationship with their doctor, may provide a broader perspective on your client’s health and abilities.

Exclude negative medical evidence

Reports prepared for the court are required to include specific information for them to be admissible.¹⁹ These requirements are particularly important if the author of the report will be absent from the hearing and unable to explain their findings or submit to cross-examination. Physicians drafting reports do not always include all the required information such as a detailed description of the individual’s infirmities; an explanation of how and to what extent each infirmity interferes with the individual’s ability to make decisions; a listing of all medications the individual receives and their effects on the individual’s behavior; a prognosis for improvement and recommendations for rehabilitations; and the signatures of all involved in the evaluation.²⁰

While doctors may provide a clear statement of your client’s incapacities and list of their medical diagnoses, it is not uncommon that the remaining statutory requirements are left unaddressed despite their relevance to your client’s capabilities. If a physician’s signature is unreadable and without a printed name or no list of medications is included, the evidence is arguably inadmissible. Holding your opponent and the court to the requirements described in the law regarding entry of evidence may be critical to defending a guardianship case at trial and, if necessary, on appeal.

Make the court come to you

EPIC gives individuals in guardianship proceedings the right to be present at their hearings.²¹ The law states “all practical steps shall be taken” to ensure that the individual can be present at their hearing, including moving the hearing site.²² Being able to see and speak to the individuals central to the proceedings provides judges with crucial information about whether guardianship is necessary. At the hearing, individuals can see and hear the evidence the judge will consider, exercise their rights to cross-examine witnesses, and present their own evidence. They can explain their situations and argue against evidence that does not accurately represent their capacities. Without them, judges lose valuable information: the firsthand accounts, explanations, and wishes of the individual subject for the proceedings.²³ However, attending hearings may be impossible for individuals with limited mobility or without access to transportation. Courts should move these hearings to the individual in these cases; the COVID-19 pandemic has shown that technology can enable participation in the justice system in ways that would have been unthinkable as little as a year ago.

Destroy the necessity argument

In order to appoint a guardian, EPIC requires the court to find that an individual is “incapacitated” *and* that the guardianship is “necessary” for providing care and supervision.²⁴ Thus, even if an adult is incapacitated, good advocacy and exploration of alternatives can make a guardianship unnecessary and restore decision-making power and dignity to your client. Because adult guardianship cases move quickly, consider requesting a stay if these alternatives would benefit your client:

1. A valid power of attorney allows a trusted agent to handle any financial and property issues for the adult, making a guardianship unnecessary. It also allows your client to choose whom to appoint rather than that decision being at the discretion of the court.
2. The law explicitly prohibits a court from having a guardian make decisions where there is a valid patient advocate designation.²⁵
3. For adults whose primary sources of income are Social Security or Veterans Affairs benefits, a representative payee or administratively appointed agent is overseen by the Social Security Administration or the Department of Veterans Affairs and must use benefits to pay for current needs like shelter, food, clothing, medical care, and other typical personal expenses.²⁶
4. For low-income older adults like Mary, poverty and age often masquerade as diminished mental capacity. Adults eligible for Medicaid can contact their Department of Health and Human Services caseworker or local Medicaid waiver agents (such as your local Area Agency on Aging) to request in-home assessments for services such as meal delivery or nursing home-level of care services provided directly in the home.

Advocate for a case manager as a visitor

Having a case manager appointed as a visitor can help make a complete record about the reality of your client’s life. EPIC authorizes visitors—people with “special training in law, nursing or social work”—to visit the home of the individual subject to a guardianship petition.²⁷ Professional case managers, like those from Medicaid home- and community-based service programs, often have more expertise in an adult’s day-to-day abilities and limitations than the “usual suspects” like guardians ad litem and can testify on how service programs can make guardianship unnecessary. By providing better evidence to the court about available social supports, your client can retain autonomy.

Advocate for a limited guardianship

If the court appoints a guardian, advocate for a limited guardianship. Although a guardianship must be tailored to the needs of the individual after specific findings of fact,²⁸ few adult guardianships under EPIC are limited guardianships.²⁹ Additionally, “to encourage self-reliance and independence,” courts can authorize adults under guardianship to handle some of their own money or property without oversight from a guardian—including maintaining their own bank account.³⁰

The letters of guardianship are crucial. The SCAO form gives three options: all authority under law, all authority except as specified, and only the authority specified.³¹ When possible, use the third option to ensure your client retains as much authority as possible over their life.

Get the right person for the job

If a guardian must be appointed, find the best person for the job. EPIC requires the court appoint the person with priority so long as that person is both “suitable and willing to serve.”³² This is not a best interests analysis.³³ Even if someone with lower priority may be better equipped to act as guardian, they cannot be appointed if someone with higher priority is “suitable and willing to serve.”³⁴

The easiest path is having your client nominate who they want. That person has priority unless a guardian was appointed in another jurisdiction.³⁵ Focus on what makes them suitable. The Michigan Court of Appeals defines “suitable” broadly as “qualified and able to provide for the ward’s care, custody, and control.”³⁶ Through our participation in the Elder Abuse Task Force the authors worked on a proposal to codify

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suitability factors for the probate court to consider, with the proposed factors listed below:

- Ability to fulfill the statutory duties.
- Availability and responsiveness to the adult.
- History and relationship with the adult.
- Relevant criminal history.
- Personal history including but not limited to employment, training, skills, and stability.
- Ability to fulfill duties regardless of interpersonal disputes between interested parties or others in the adult's life.

Provide evidence of your preferred guardian's suitability and it will be hard for the court to skip to the next person on the list.

Conclusion

By using these tools, you can ensure that your client's poverty will not be mistaken for a lack of capacity. You can help an older adult stay in control of their affairs, maintain their dignity, and increase their quality of life along the way. ■



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ENDNOTES

1. Michigan has two adult guardianship systems. Chapter 6 of the Michigan Mental Health Code covers guardianships over adults with developmental disabilities (MCL 330.1600 *et seq.*). The Estates and Protected Individuals Code covers guardianships over "legally incapacitated individuals" who are not individuals with developmental disabilities (MCL 700.5301 *et seq.*).
2. "Incapacitated individual" is defined as "[A]n individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." MCL 700.1105(a).
3. MCL 700.5306(1)
4. MCL 700.5306(2).
5. *Id.*
6. *Statewide Circuit Court Summary, 2019 Court Caseload Report*, SCAO, Michigan Courts, p 10 (full guardianships are coded as "GA" while limited guardianships are coded as "GL."), available at <<https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf>> [<https://perma.cc/HVW4E-FUE5>]. All websites cited in this article were accessed October 29, 2020.
7. *May v Leneair*, 99 Mich App 209, 216; 297 NW2d 882 (1980) (holding that an individual found to lack capacity to contract lacks capacity to marry) and *Houghton v Keller*, 256 Mich App 336, 338; 662 NW2d 854 (2003) (holding that a guardian can bring an action for divorce on behalf of an individual subject to guardianship).
8. MCL 700.5314(a) (permitting a guardian to choose a place of residence for the individual subject to guardianship).
9. MCL 700.5314(b) (granting a guardian authority over the personal property of the individual subject to guardianship).
10. *Id.*
11. MCL 700.5314(d).
12. MCL 700.5313.
13. There are many organizations with a mission to serve older adults who need supportive services. For example, the Michigan Department of Health and Human Services Area Agency on Aging in your county is a good first step in gathering information <<https://www.michigan.gov/osa/1,4635,7234-64081-295815-00.html>> [<https://perma.cc/6AUB-P9V7>].
14. MCR 5.405.
15. MCL 700.5306a(f), MCL 700.5304(2), and MCL 700.1106(a)
16. MCL 700.1106(a).
17. MRE 901(11).
18. MCL 333.26269(3) (prohibiting a health care provider, health facility, or medical records company from charging fees to "medically indigent individual.")
19. MCL 700.5304(3).
20. *Id.*
21. MCL 700.5304(4).
22. *Id.*
23. Individuals who miss their guardianship hearings are uniquely vulnerable. If an individual is not present at their guardianship hearing, judges should question if they were informed of their right to be present and their right to have the hearing moved.
24. MCL 700.5306(1).
25. MCL 700.5306(5).
26. 38 CFR 13.140 and SSA POMS GN 00502.114. The Program Operations Manual System (POMS) is a primary source of information used by Social Security Administration employees to process claims for Social Security benefits <<https://secure.ssa.gov/poms.nsf/homelreadform>> [<https://perma.cc/6KEZLG6A>].
27. MCL 700.5101 (defining "visitor") and MCL 700.5304, MCL 700.5306a, MCL 700.5310, and MCL 700.5311 (collectively, discussing the use of a visitor).
28. MCL 700.5306(2)–(3).
29. *Statewide Circuit Court Summary, 2019 Court Caseload Report*.
30. MCL 700.5316.
31. "Letters of Guardianship," SCAO Form PC 633 (9/12), available at <<https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/pc633.pdf>> [<https://perma.cc/UE2D-8XBJ>].
32. MCL 700.5313.
33. *In re Vanpoppelen*, unpublished per curiam opinion of the Court of Appeals, issued Dec 4, 2018 (Docket No. 340224), p 6 ("Simply put, there is no weighing involved; by listing the priorities, the Legislature eschewed a 'best interests' approach in favor of a decision process anchored in family relationships").
34. *Id.*
35. MCL 700.5313(2).
36. *In re Redd*, 321 Mich App 398, 408; 909 NW2d 289 (2017).