



GUARDIANSHIP AND ALTERNATIVES

Thomas F. Kendziorski, Esq.

(tfk@thearcoakland.org)

Kathleen E. Winkler, Esq.

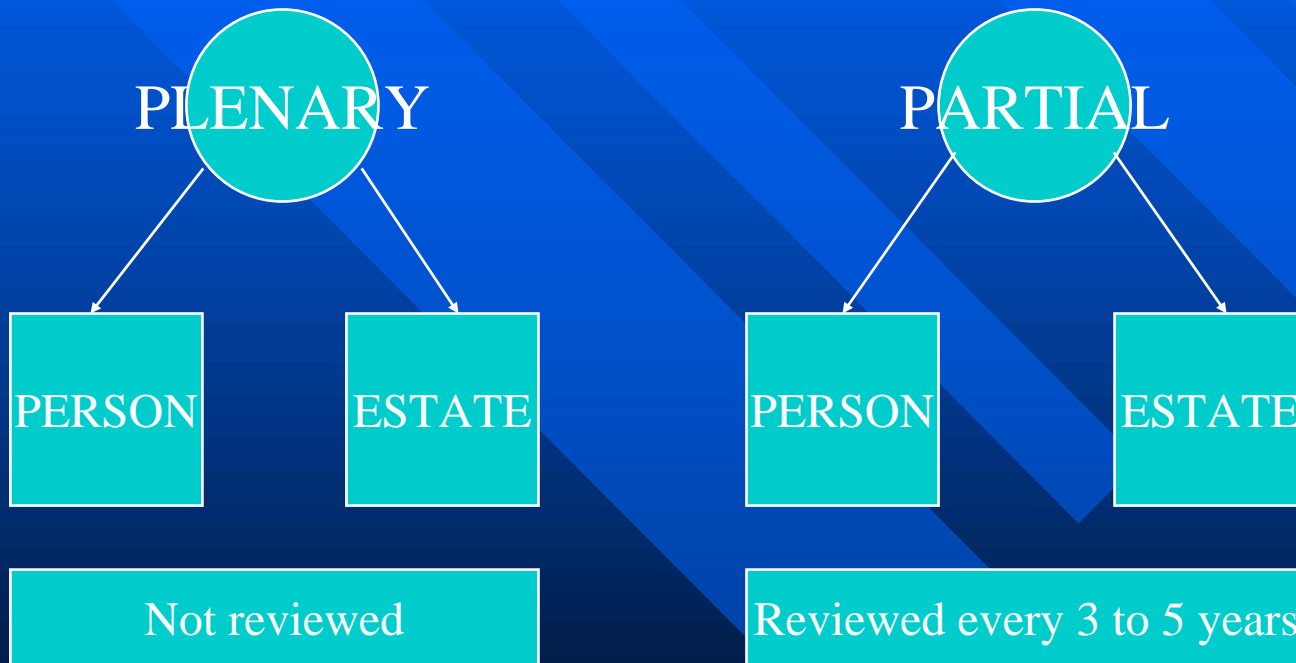
(kew@thearcoakland.org)

The Arc of Oakland County, Inc.

GUARDIANSHIP

(Chapter Six – Michigan Mental Health Code)

- Michigan Mental Health Code states guardianship only: “... as is necessary” - “... partial is the preferred choice.”



Guardianship (non-D.D.P.)

Minor Children (Michigan's Estates and Protected Individuals Code, 386 P.A. 1998, as amended; M.C.L.A. §700.5201-5219)

- 1. In the case of minors, parents who are available and able are considered acting in the role of guardian. Where parents are absent, unable or unwilling to fulfill those duties for a child, impairment or not, it is usually imperative that a guardian be appointed.
- 2. In certain circumstances, even a parent of a minor child may be required to become his/her child's legal representative (e.g., for purposes of an insurance settlement or jury award) in the form of a “conservator.”

Guardianship (non-D.D.P.)

Guardianship and Conservatorship for Persons with **Mental Illness/Closed Head Injury/Others** (Michigan's Estates and Protected Individuals Code 386 P.A.1999, as amended; M.C.L.A. §700.5301-5433)

- Differs from the Mental Health Code, Chapter Six for persons with DD. There is far less “due process” or vigilance relative to one’s civil rights.

Guardianship (non-D.D.P.)

Legally Incapacitated Person (“LIP”) - an adult who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, to the extent that the person lacks sufficient understanding or capacity to make or communicate informed decisions concerning his or her person.

Guardianship (non-D.D.P.)

- Petitions may be filed by any interested party, including care providers.
- A proposed guardian must be nominated in the petition.
- Unlike in a DDP, the alleged LIP is appointed a “guardian ad litem” or G.A.L., but not an attorney unless he or she requests one. The G.A.L. makes personal recommendations to the probate court judge about the person, whereas the court-appointed attorney represents only what the client wants.

Guardianship (non-D.D.P.)

- The probate judge **MAY** order an evaluation by a physician or mental health professional. Similar report requirements to that in the DDP, but it is not a mandatory item.
- Unless so limited by the court, a guardian for an LIP may change the person's residence and care without court approval --- including institutionalization --- , consent to medical treatment and control finances if no conservator has been appointed; or even sell a person's property/home. M.C.L. A. §700.5314 has an extensive list of powers the guardian has under the LIP procedures. The DDP guardian's powers are limited by the Mental Health Code and by what rights the judge removed from the Ward.

Guardianship (non-D.D.P.)

- A guardian must file an annual report on the condition of the ward, like the DDP requirement. However, where the DDP is time-limited by law or court order, the LIP guardian's say-so maintains the guardianship. Although periodic reviews are called for in the Probate Code for LIP's (at least "reviewed" every 3 years), they are rarely done due to no mandated funding available to the probate court to do so; contrast the partial DDP guardianship, which must be reviewed at least every three-to-five years by another complete petition/evaluation process.

BASIC REQUIREMENTS FOR BECOMING ELIGIBLE FOR SUPPLEMENTAL SECURITY INCOME (“SSI”)

- A. Can't have liquid assets over \$2,000; and
- B. Must have a disabling condition that is severe enough so that the person cannot perform “substantial gainful activity” or competitive employment.

>>> Funds may be handled by an individual known as a “Representative Payee.”

Social Security Disability Insurance (SSDI) Benefits

There are four ways to receive SSDI:

1. **Work and pay** into the Social Security Administration (SSA) system - F.I.C.A.
2. Insured parent through SSA is **disabled**.
3. Insured parent through SSA is **retired**, over 62, and receiving SSA pension.
4. Insured parent is **deceased**.

>>>Funds may be handled by an individual known as a “Representative Payee.”

Estate Planning (wills & trusts)

- Everyone needs a Last Will and Testament. Thirty percent of all lawyers die without wills (...physician heal thyself!).
- If you don't make a will, then the state makes one for you ... and you may not like the outcome.
- Estates and Protected Individuals Code (EPIC)



BASIC ELEMENTS OF A TRUST

FUNDING:

- 1) Property
- 2) Cash
- 3) Insurance
- 4) Etc.

RES
(Principal)

TRUSTEE
(legal title)

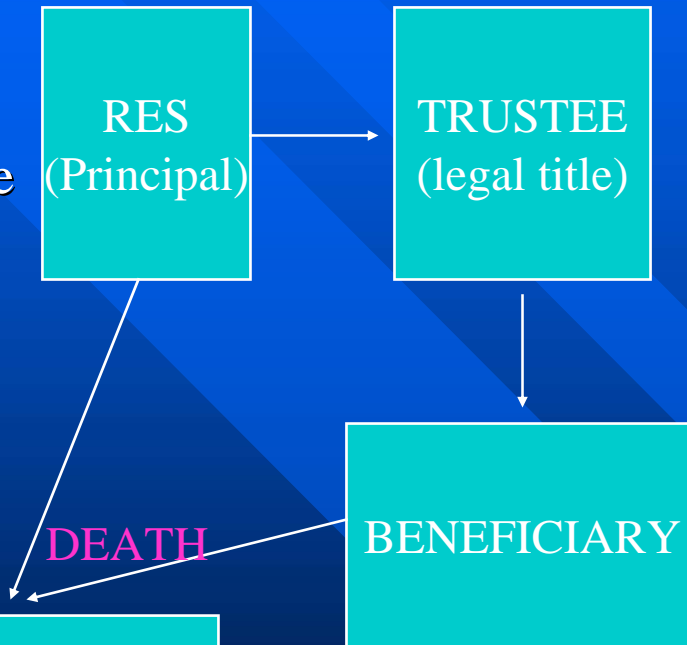
CO-TRUSTEE:

- 1) Bank
- 2) Family Member
- 3) Trusted Person

BENEFICIARY

DEATH

REMAINDERPERSON



POWER of ATTORNEY

E.P.I.C. (386 P.A. 1998; M.C.L.A. §700.5501-5213)

- Where the *individual* grants decision-making powers in writing to another to manage personal affairs and/or finances. Within this concept is what is known as a “Health Care Power of Attorney,” or “Patient Advocate Designation.”
- Document is signed, witnessed and notarized.
- An “80% solution” since reliance remains with the recipient of the document, that is, will the hospital, school, bank, insurance company, etc., accept the document as the true consent of the *individual*?

Power of Attorney

(Continued)

- Revocation of the PofA is a part of the document; however, all those who are relying on the PofA must be notified in writing of the revocation.
- An individual does not have to know their rights like a constitutional lawyer! “Sound mind” MCLA 700.5506 --- not defined; average ability.
- Consent is whether the person knows what right he has and that he wants someone else to have the ability to use that right.

“Legal Standing”

Black’s Law Dictionary:

>>>A party’s right to make a legal claim or seek judicial enforcement of a duty or a right. Third party standing is where someone else is claiming to protect the rights of others.

“By what legal authority do you claim the right to make a substituted judgment?”

Other Potential Alternatives

- “Doing Nothing” – merely assist a person make decisions. No legal authority. Mentor and advise only.
- Family Consent Policy – where in the case of a hospital, the next-of-kin is allowed to act as a surrogate decision-maker; not all hospital’s have such a practice. Not in the law, but if hospital is willing ... why not?

ATTORNEY LISTING

ESTATE PLANNING (WILLS & TRUSTS)

| | | |
|---------------------------|--------------|------------------|
| Kathleen E. Winkler | 248-816-1900 | Troy (The Arc) |
| Mary T. Schmitt Smith | 248-282-7700 | Bloomfield Hills |
| Patricia E. Kefalas Dudek | 248-731-3099 | Bloomfield Hills |
| Donald L. Rosenberg | 248-641-7070 | Troy |
| J. Douglas Otlewski | 248-651-6040 | Rochester |
| Joshua R. Fink | 734-665-4441 | Ann Arbor |
| Burton E. Isaacs | 248-354-3200 | Southfield |
| James P. Lampertius | 248-538-5480 | Farm. Hills |
| Sanford Mall | 248-538-1800 | Farm. Hills |
| Marsha L. Tuck | 248-335-0730 | Bloomfield Hills |
| Thomas V. Trainer | 248-740-5673 | Troy |

QUESTIONS?



Thank you for
your attention!