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Operation of a Conservatorship

Patricia Patterson Courie

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I. Overview

§10.1 A conservator has broad power to handle all assets held on behalf of the protected individual and to make payments from the assets for the health, benefit, and welfare of the protected individual. These include all the powers of a trustee. MCL 700.5423(1). A list of specific powers that the conservator may exercise without court authorization or confirmation, unless the court otherwise provides, is set forth in MCL 700.5423(2). These powers include

- to invest or reinvest funds in accordance with the Michigan Prudent Investor Rule;
- to retain assets in which the conservator has a personal interest;
- to exercise powers and duties relating to stock ownership;
- to hold stock in the name of a nominee;
- to continue and participate in the operation of the protected individual's business;
- to open a bank account;
- to acquire or lease real estate;
- to repair, erect, or demolish real estate improvements;
- to purchase insurance;
- to pay or settle claims by or against the estate;
- to employ professionals; and
- to respond to environmental concerns.

The statute also authorizes a conservator to sell or otherwise dispose of an interest in real estate, but only with court approval after a hearing with notice to interested persons. MCL 700.5423(3).

A conservator is a fiduciary and must observe the standard of care applicable to a trustee. MCL 700.5416. A conservator's primary duties are to preserve the protected individual's assets and to expend them for the support, education, care, and benefit of the individual and his or her dependents. The conservator has broad authority to determine the appropriate level and payment method of support. *See* MCL 700.5425. If the estate is more than ample to provide for these purposes, the conservator may also make gifts that do not exceed, in total for any year, 20 percent of the estate's annual income to charity and others that the protected individual, other than a minor, might have been expected to make. MCL 700.5426(1). All decisions regarding the use of the protected individual's assets— withdrawing from or revoking accounts, selecting assets for distribution—should be made with an eye to preserving any estate plan the protected individual established before incapacity. MCL 700.5428.

A conservator also has a duty to determine how much money the protected individual can personally handle and should encourage self-reliance and independence to the extent possible. With court authorization, the protected individual may be permitted to personally maintain a savings or checking account. MCL 700.5407(1).

A conservator's duties also include avoiding transactions involving a conflict of interest between the conservator's personal interests and the protected individual's interests. Any sale of assets to the conservator or to anyone else that involves a substantial conflict of interest is voidable unless the court approves the transaction after notice, the transaction involves a contract entered into (or claim acquired) by the conservator before the person became or contemplated becoming

conservator, or the transaction is otherwise authorized by statute. MCL 700.5421(1).

To qualify, most conservators are required to file a bond in an amount based on the value of the protected individual's assets and income. MCL 700.5410. If the protected individual's assets exceed \$2,000, a surety bond is usually required. A surety executing a bond of a conservator consents to the probate court's jurisdiction and to being named as a party respondent if the conservator's breach of duties results in a loss to the estate. MCL 700.5411. Surety bond annual premiums should be paid out of the protected individual's assets.

A conservator must gather and secure all of the protected individual's assets and must file an inventory with the probate court within 56 days after appointment. MCR 5.409(B). In fulfillment of these duties, the conservator must locate all bank and brokerage accounts and determine an inventory value for all securities, bonds, and real estate. If the protected individual moves into a different living facility, the conservator is also faced with cleaning out the home.

Title to the protected individual's property and all assets acquired on his or her behalf is vested in the conservator, with the letters of conservatorship serving as evidence of the transfer of title. MCL 700.5419, .5420. Fiduciary investments are subject to the prudent investor rule. *See* MCL 700.1501 et seq.

A conservator is obligated to pay the protected individual's bills out of the conservatorship estate, to the extent possible. The protected individual's obligations include paying the conservator reasonable compensation for services rendered. MCL 700.5413. If the estate is insufficient to cover all expenses, the procedures and priorities set forth in MCL 700.5429 govern. A conservator is not individually liable for obligations incurred on behalf of the protected individual unless the conservator fails to identify his or her representative capacity or is personally at fault. MCL 700.5430.

The conservator must file an annual account with the court of all receipts and disbursements from a conservatorship estate within 56 days after the end of the accounting period. MCR 5.409(C). The conservator must also prepare and file the protected individual's tax returns. MCL 700.5423(2)(v).

Any person interested in the protected individual, including the protected individual, may petition the court to terminate or modify the conservatorship. MCL 700.5431. The conservatorship otherwise terminates, in the case of a conservatorship of a minor, when the individual reaches the age of majority or, in the case of a conservatorship of an adult, when the protected individual regains capacity or dies. When the protected individual turns 18 or regains capacity, the conservator must return all assets to his or her control, after making final payments of claims and administration expenses. MCL 700.5426(3). If the protected individual dies, the conservator must deliver any will of the protected individual in his or her possession to the court, inform the personal representative or a will beneficiary that the will has been so delivered, and retain the estate for delivery to the personal representative. There is no statutory requirement that the conservator be allowed to file a final account or that the conservator be discharged before delivering the estate to the personal representative. If no petition for administration is

filed within 42 days of the death and no personal representative has been appointed, the conservator may petition the court for the powers of a personal representative. MCL 700.5426(4).

An attorney representing a conservator needs to be familiar not only with the technical legal requirements but also with the issues relating to practical application of the law. When the conservator is a relative or friend of the protected individual, questions often arise regarding the scope of the conservator's authority such as, "What may I throw away?" An attorney who serves as conservator also needs to be familiar with such details.

II. Powers and Duties of Conservators of Adults

A. In General

§10.2 Attorneys practicing in the field of guardianships and conservatorships may find themselves in a number of different roles. Most common is the attorney representing the conservator, who is usually a close family member of the protected individual. In representing a client serving as conservator, the attorney must make sure that the client knows and understands the duties of his or her office and provide parameters for the client's activities. The attorney should assist in obtaining the bond, make sure appropriate bank accounts are established on behalf of the protected individual, review all documents showing the assets owned by the protected individual, assist in preparing the inventory, explain all limitations and restrictions placed on the conservator either by law or by the probate court, review expenditures and bank statements, and assist in the preparation and filing of the appropriate accounts. By fully advising the client, the attorney helps him or her to avoid problems with the court, including suspension for failure to perform the conservator's duties. The most important function of the attorney is to fully explain to the client that the money and assets of the protected individual are not the conservator's assets to spend as the client pleases.

Many times the attorney is serving as the conservator rather than a family member (or the attorney is a family member of the protected individual). Attorneys serving in a fiduciary capacity are held to a standard higher than that for lay persons. As such, attorneys are deemed to know the law and court rules involved in representing a protected individual and handling his or her assets. Attorneys not otherwise practicing in this field of law must educate themselves about their responsibilities and take greater care in preserving and accounting for the funds of a protected individual.

The conservator has broad power to handle all assets held on behalf of the protected individual and to make payments from those assets for his or her health, benefit, and welfare. A conservator's powers include all powers conferred on a trustee. A new conservator should review the following list of powers, provided in MCL 700.5423(2), to establish the parameters of his or her powers:

- (a) Collect, hold, or retain estate property, including land in another state, until the conservator determines that disposition of the property should be made. Property may be retained even though it includes property in which the conservator is personally interested.

- (b) Receive an addition to the estate.
- (c) Continue or participate in the operation of a business or other enterprise.
- (d) Acquire an undivided interest in estate property in which the conservator, in a fiduciary capacity, holds an undivided interest.
- (e) Invest or reinvest estate property. If the conservator exercises the power conferred by this subdivision, the conservator must invest or reinvest the property in accordance with the Michigan prudent investor rule.
- (f) Deposit estate money in a state or federally insured financial institution including one operated by the conservator.
- (g) Except as provided in subsection (3), acquire or dispose of estate property, including land in another state, for cash or on credit, at public or private sale, or manage, develop, improve, exchange, partition, change the character of, or abandon estate property.
- (h) Make an ordinary or extraordinary repair or alteration in a building or other structure, demolish an improvement, or raze an existing or erect a new party wall or building.
- (i) Subdivide, develop, or dedicate land to public use; make or obtain the vacation of a plat or adjust a boundary; adjust a difference in valuation on exchange or partition by giving or receiving consideration; or dedicate an easement to public use without consideration.
- (j) Enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship.
- (k) Enter into a lease or arrangement for exploration and removal of a mineral or other natural resource or enter into a pooling or unitization agreement.
- (l) Grant an option involving disposition of estate property or take an option for the acquisition of property.
- (m) Vote a security, in person or by general or limited proxy.
- (n) Pay a call, assessment, or other amount chargeable or accruing against or on account of a security.
- (o) Sell or exercise stock subscription or conversion rights.
- (p) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
- (q) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery. However, the conservator is liable for an act of the nominee in connection with the stock so held.
- (r) Insure the estate property against damage or loss or the conservator against liability with respect to third persons.
- (s) Borrow money to be repaid from estate property or otherwise.
- (t) Advance money for the protection of the estate or the protected individual, and for all expense, loss, or liability sustained in the estate's administration or