Michigan Probate and Guardianship Guide

GOLDMAN& ASSOCIATES LAW FIRM

(248) 590-6600

DISCLAIMER:

The information contained in this document is made available by Goldman & Associates Law Firm purely for informational purposes. This should not be considered legal advice nor does the transmission and receipt of this information constitute an attorney-client relationship. The information provided on this website should not be acted upon without seeking professional legal counseling.

The purpose of this guide

This guide is intended to introduce and familiarize the reader with types of matters handled in a Michigan probate court. This includes wills, intestate estates, trusts, and the guardianship of disabled or otherwise dependent adults.

Introduction

What does Probate mean?

Probate typically refers to the process of executing the estate of someone who is deceased. It might involve a will, it might also involve determining out what happens if someone dies intestate, or without a will.

However, modern probate courts do sometimes handle matters that do not involve a decedent. Trusts established by a settlor and the guardianship of dependent adults are also probate matters.

Furthermore, not all estates require using a probate court. In fact, people often utilize particular legal instruments for the sole purpose of avoiding the inconvenience and expense of the probate process. This guide will not go into much detail about these instruments aside from a brief introduction.

Why do probate courts also handle those other issues?

The common thread of all of these matters is that they involve the use of a legal instrument in order to use or manipulate someone's property or legal rights in a way that is out of the decedent's direct control. Furthermore, these instruments are typically intended to continue functioning even after the one who originally established the instrument is deceased.

Should I write a will?

Although it is conventionally considered to be prudent to write a will containing one's dying wishes, this question cannot be answered so simply. A proper answer requires a basic understanding of how wills work, what happens if there is no will, and the rules and limitations about when wills are enforceable or unenforceable. It takes at least a modest amount of time, effort, and possibly attorney's fees to have a proper will written. If the expected outcome of dying intestate (without a will) is acceptable, then there is no reason to write one. Furthermore, a written will must still be processed by a probate court, especially if conflicts arise. There are multiple instruments which perform the same function which function outside of the probate system.

Writing and Executing a Will

What is a will?

Will is shorthand for "last will and testament." It is an official and legally recognized expression of a decedent's dying desires with respect to certain rights they possessed. This is an exercise of their common law "freedom of testation." In other words, you have the legal right to exercise property rights (among other rights and privileges) after your death so long as you do so in compliance with the relevant probate laws of your state.

Wills are typically used to determine what will happen with the decedent's property and may also be used to determine what happens with any minor children (a final exercise of parental rights). The person who writes a will to express his or her dying wishes is known as the "testator" of that will.

What are the requirements for a valid and enforceable will?

State probate codes place certain requirements that have to be met in order for a will to be legitimate and enforceable. These requirements are designed to ensure the authenticity of a will.

Under Michigan law you must be at least 18 years old to write a will. Writing a legally binding will is a serious act which must be done by someone with the capacity and competency to make decisions.

A valid will in Michigan typically requires the legal signature of the testator as well as the signatures of at least two witnesses who are also competent adults. These witnesses must have directly witnessed either the testator signing the will or otherwise acknowledging either the signature or the will itself.

It should be noted that Michigan allows for "Holographic Wills," which means that there are no witnesses. So long as the will is in writing, dated, and signed by the testator, courts will uphold the validity.

Can I have an oral will? Or a video will?

No, you may not. Michigan does not recognize oral wills. Wills must be in writing. If you wish to record yourself reading a valid, written will then you may do so. However, that recording cannot be submitted as the will itself.

Does the will have to be completely handwritten?

No, it does not. In fact, it does not need to be handwritten at all. You can use drafting software and templates if you wish. So long as the signatures are handwritten and valid.

Can a will still be valid if it does not meet every single requirement?

That depends on which requirements have and have not been met. That being said, a digital will that does not meet all of the requirements could still be found valid by the probate court. Michigan courts have often applied the harmless error doctrine. Under this doctrine a flawed will is still valid if the party seeking its recognition can show clear and convincing evidence that the person who wrote the will intended it to be his or her last will and testament. Although this demonstrates the court's commitment to respecting the testamentary desires of the deceased, it does not mean that people are free to ignore the legal requirements of a valid will. The added burden of proof will make the probate process more expensive for your loved ones and will make it easier to challenge. It is still better to have a proper will that meets all the requirements.

What happens if I move to a state that has different probate laws? Do I have to write a new will?

You will most likely be able to keep your original will. The vast majority of states will still recognize a will as valid if it is valid in the state it was written.

Is it true that a beneficiary to a will cannot serve as a witness?

Michigan does not have an "interested witness" rule. As such a beneficiary of the will can still serve as a witness. The testator does not even have to tell that beneficiary about the will's contents.

How will the Court read and interpret my will?

The court will begin by asking the parties presenting the will to "prove" the will. This generally involves bringing the witnesses before the court to testify that they were proper witnesses to the will. Alternatively, the witnesses could file affidavits with the court to accomplish the same thing. However, both of these methods are rather cumbersome and inconvenient in today's society.

Even if the will satisfies all of the aforementioned requirements, the process is far from over. Written language is not always clear, and the meaning of essential clauses might be ambiguous.

Another issue that frequently pops up is multi-page wills and the manner they are presented. How does a court decide what pieces of paper are part of the will, and which ones are not? Typically, if they are fastened together and have labeled page and or line numbers, then a court will likely infer that they are part of the same document. Sometimes, Testators like to incorporate documents that existed prior to the writing of the will. It might say something like "the things listed on this memo are my gift to Jane Crocker." In that scenario, the court is also likely to incorporate that into the will.

Arrangement of pages aside, the court's primary concern is the content of those pages. First and foremost, the court will rely on the plain and ordinary meaning of the words written in the will. It is only where something is ambiguous, unclear, or possibly erroneous that the court will rely on other interpretive methods or look to sources outside the four corners of the will. If the issue is ambiguity (i.e. there appears to be some confusion or multiple possible meanings of the words) then the court's response will depend on the nature of the ambiguity.

To avoid getting too deep into the legal jargon, the court recognizes two distinct categories of ambiguity. These are "patent" and "latent" ambiguities. "Patent" can be understood as something which is obvious to anyone reading it. For example, there are four beneficiaries, and each has received "one fifth" of the estate. What happens to the remaining fifth? Did they forget to mention the fifth person? In that case, the court will likely do nothing to correct the error and place the remaining fifth into intestacy.

"Latent" ambiguities arise indirectly from context in otherwise clear language. If John Deere is mentioned, but it turns out the decedent is related to three John Deere's, who is he talking about? It is only in this situation that the court would allow outside evidence in order to show that there is ambiguity as well as to resolve that ambiguity.

If trying to interpret the ambiguous language fails to resolve the issue, the court will resort to customary rules and assumption to craft a solution. This will typically involve the following:

- Preferring relatives to non-relatives
- Preferring closer relatives to more distant ones
- In the event of a deceased beneficiary, preferring to give it to their descendants rather than passing it to any of the other original beneficiaries of the will
- Preferring favorable tax results.

What if I make a mistake in my will?

If you happen to catch the mistake you can try to amend the will or make an entirely new one (see later chapter for details). However, if your friends and family try to fix the issue after your death, then it is possible that the mistake may beirreversible.

Rest assured and be aware that a mistake of fact or law will not invalidate the will unless that mistake somehow undermines the donative intent of the testator or raises the specter of fraud and/or undue influence.

Modern probate courts have become relatively lenient when it comes to reformations to correct mistakes. So long as the party seeking reformation can show clear and convincing evidence that the mistake caused the plain language of the will to defeat the actual donative intent of the testator, then it is likely that the court will allow reformation.

What if something suddenly changes that interferes with one of the clauses of my will?

This is not an uncommon problem. A beneficiary dies, a specific gift is no longer in the decedent's possession, or the amount of stock of a particular company is now greater than it was when it was listed in the will. The last of these issues is usually pretty simple to solve. The court will assume that the testator meant to give "all" of that stock regardless of increased or decreased quantity, and act accordingly.

Other problems are not so easily fixed. When the death of a beneficiary causes a particular gift (a "devise") to fail, this is known as a "lapse." In the event of a lapse the gift will typically be shared among the remaining beneficiaries.

However, Michigan accounts for this with its "anti-lapse" statutes to serve as a backstop. In such cases, the gift will be passed to the descendants of the deceased beneficiary.What precisely happens in the event of a lapse, or any other failure depends on the nature of the gift:

- Specific gift: This will giveBeneficiary A, a specific item. If the item is no longer part of the estate, then the gift will typically fail (Ademption by extinction) and the beneficiary will have to share with the residual beneficiaries (see "residue" below). If the item was lost to an involuntary sale (such as bankruptcy or condemnation)or if the item has not yet been completely paid for by the new owner, then Beneficiary A is entitled to the proceeds of the sale. If the gift fails due to Beneficiary A's death, then Descendants shall inherit instead. If there are no living descendants, then the gift lapses (the item will likely be sold and the proceeds added to the residue).
- General gift: Beneficiary B is given $1000. If there is no cash in the estate, then Beneficiary B can receive property worth that amount, or the estate can sell property and then give that cash amount from the proceeds. If Beneficiary B dies before the testator, then the gift will pass to their descendants. If there are no living descendants, then the cash falls to the residue.
- Specific or general gift of securities (such as stocks): If the specific stock or security is absent because it was replaced by another due to something like a merger, then the new stock is considered to be a replacement for the original stock as a gift in the will.
- Demonstrative gift: Beneficiary C is given money from a specific source (i.e. "$2000 from my savings account"). If there is less than the specified amount (or the specific account/other source no longer exists), then the court will make up the difference from other accounts at the same bank or from the remainder of the estate. If Beneficiary C dies before the testator, then the gift passes to their descendants. If there are no living descendants, then it falls to the residue.
- Residue: Anything that remains in the estate after all other gifts are distributed. Must be mentioned in the will and given to one or more specific people (i.e. "the remainder of my estate to Beneficiary D"). If one of the residuary beneficiaries dies, then their portion is simply shared with the remaining reliquaries (no anti-lapse statute for the residue). If there are no living residuary beneficiaries, then the residue falls into intestacy (see relevant chapter below).

It should also be noted that the death of the beneficiary is only relevant if too little time passes between the beneficiary's demise and the death of the testator (and subsequent execution of their

will). In Michigan, that time frame is 120 hours. If the time between the deaths is more than 120 hours (i.e. the beneficiary was alive for at least 120 hours after the testator died), then courts will resort to the legal fiction that the beneficiary actually survived to inherit the gift. The gift will then be added to that person's estate and distributed according to their will and the probate laws of Michigan.

What happens if there is a conflict between my heirs/relatives or if someone challenges my will?

A quarrel among relatives and beneficiaries is typically a personal problem of those parties that has no bearing on the will or any of its clauses. A will contest is only valid in a select number of circumstances. A will or gift can be challenged on the basis that the court did not properly follow probate law when interpreting the will or that the court executed a will that was actually invalid. Otherwise, the only valid challenges arise from an accusation that will, or a portion of it,is a product result of fraud, coercion, or undue influence.

Wills and will clauses can also be challenged on the grounds that the testator lacked capacity or was otherwise insane. The general capacity to write a will only requires that the testator had the presence of mind to understand what it means to write a will and had a decent enough grasp of their assets. Insanity in the probate context typically takes the form of insane delusions. Say, for example, that someone tried to execute a holographic will written moments before that person's death. That will contain statements of fact that are provably contrary to reality. If the court accepts this as an insane delusion, then they will find that the testator lacked capacity to write a valid will and will instead use whatever will was written previously.

Another, interesting type of will contest will also pop up occasionally. Let's suppose someone is gifted $10,000 by a will; however, during the lifetime of the testator, they gave that person $5,000. A challenger might try to argue that the $5000 was an advance payment of the gift in the will. As a result, that person should only be given $5000 by the estate. Such a challenger has the burden to prove that the lifetime gift was meant to be such an advanced gift.

If the testator has particularly strong feelings about avoiding will contests, they can write clauses which revoke gifts to any beneficiary who challenges the will or its clauses. Keep in mind that if the will's validity is challenged, and it is found to be invalid, then the no-contest clause is equally invalid.

What happens if there is a mortgage on a gift in the will, or debt that remains on the estate?

This depends on what is written in the will and the actions taken by the executor. Estate executors are given broad discretion in Michigan. Furthermore, Michigan probate law does not specifically direct executives to pay off debts and mortgages unless instructed to do so by the will. In the event that any debts remain on the estate at large, the probate court has a default standard for which gifts should be liquidated (abated) in order to pay off debts. Gifts will abate in the following order:

- Any property not specifically disposed of by the will
- The residue
- A proportional share of all general gifts
- A proportional share of specific gifts.

“Proportional share” just means that each beneficiary in that group will pay in proportion to the relative size of their gift. Otherwise, smaller gifts would be lost entirely and the largest beneficiaries would lose nothing.

If the testator specifically mentions abatement in their will, then their preferences will be used rather than the default rules.

Estate taxes also create an issue in this regard. Although the practice may vary between counties, the common rule in Michigan is that the burden of taxes are shared equally among all beneficiaries.

It should also be noted that certain types of gifts, such as a spouse’s interest in a retirement benefit, are exempt from being used to pay off debts.

What happens if there is a gift given to a defined group of people rather than specific names?

This is the sort of situation that arises when something is given to “my descendants” or my “cousins”. The probate court’s approach will vary depending on the nature of the group and what is written in the will. If the class is multi-generational, and a class member dies, then their portion will be shared among their descendants. If the gift was not multi-generational, then the court will treat descendants as if they were part of the class from the beginning. As such they will be treated to their own share and all other class members will receive proportionally smaller pieces of the class gift.

If a specific instruction is given in the will, then that instruction will be followed rather that this default rule used by the probate court.

Is there anything I could put in my will that the probate court would refuse to enforce?

There are a few items that are inadvisable to put in a will, for a variety of reasons.

For one thing, you should not put your preferences for the disposal of your remains in your will. This may seem counterintuitive given that the will is meant to be an instrument allowing you to exercise rights after death, and bodily autonomy is a quintessential right. However, it is somewhat legally dubious as to whether a body counts as property, and only property may be disposed of in a will. Furthermore, the will may not be found or read for weeks after you die. Your earthly husk will have to be handled much sooner than that.

Refrain from including “digital property” in your estate. This sort of property is too new and the probate court may not enforce those gifts. You can, however, gift the account info and passwords.

Property held in joint tenancy may not be gifted in a will. The other joint tenant has a right of survivorship and therefore automatically inherits it when you pass away.

Life insurance and retirement funds are also verboten in wills. This one also comes across as counter-intuitive at first glance, but there is a good reason to not include it. The main reason is that both accounts require you to designate a beneficiary when you acquire them, therefore they cannot be gifted in a will. In fact, these funds function as alternatives to wills and probate.

Refrain from including illegal gifts and requests. This one ispretty easy to understand. The probate court is an organ of the government, so it will refuse to enforce any clause which violates the law. No gifting drug stashes to your favorite nephew, no hit lists, no asking your relatives to burn down a building in your honor.

Other than these things, Michigan law will permit you to include just about anything in your last will and testament.

Can I change my will after it has been finalized?

Absolutely. It would be completely unreasonable to expect someone to write up an entirely new will every time they wanted to remove, change, or add something. If you write an amendment to the original will and do so while meeting the same requirements and formalities as a standard will, then this “codicil” will change the content of the original will. Furthermore, the will shall be treated as if it were written and formalized on the day the codicil was implemented. This is relevant for the purposes of many probate laws and doctrines. For example, the aforementioned rule about beneficiaries dying within a certain proximity of the will being executed would be affected by the new date.

Can I revoke my will completely?

Yes, you may. The right to enact a legally enforceable will implies the right to revoke it at any time you wish (so long as you have the proper capacity to write a legitimate will). There are a number of ways that you can accomplish this. You can revoke a will by writing an entirely new will. If the new will covers the entirety of the estate, then the court will assume that you are replacing your old will. Even if the new will is not comprehensive, it could still cause a revocation if it clearly contradicts the old will. Take care in using partial wills as a means of revocation, or the court may end up treating the newer document as a supplement or a codicil to the original. A really great way to revoke is to clearly write that you are revoking the original will.

Another fun way to revoke a will is to perform a “revocatory act”. This typically involves burning, tearing, or otherwise damaging/destroying the old will. You must do so with the explicit intent to revoke the will, so you don’t need to worry about accidentally revoking the will if you

accidentally damage it. You can also get someone else to do the deed for you. So long as you directed them to do so with the intent to revoke the will.

A will also becomes revoked automatically in response to certain circumstances In the event of a divorce, the original will shall be revoked if it contains gifts to the former spouse. If the testator wishes to retain these gifts in spite of the divorce, they will have to enact a new will after the divorce that contains such a gift.

If the beneficiary murdered the testator, then said beneficiary will be treated as if he or she predeceased the testator; however, the killer's descendants can still inherit that gift.

What happens if get married and my spouse dies before writing a new will that includes me?

In the event that you marry but die before writing a new will that includes your spouse, the old will be treated as being altered by the court to remedy the problem. If the will would otherwise disinherit them, spouses of the testator are entitled to his or her "omitted spouse" share.

What happens if the will is lost after I die, but before it can be executed in probate court?

If this is the case, then your heirs and relatives are in for a relatively tough time. Presenting a copy of the document will go a long way towards fixing the problem. Either way, the parties seeking to execute the copy will have to prove that the original was destroyed and that the copy is an accurate representation of the original will's content.

If the missing will was last seen in the possession of the testator, then the probate court will presume that the testator destroyed the will with the intent to revoke it. The burden of proof is on anyone presenting a copy of the will to show otherwise.

Do I need to worry about estate taxes?

No, you do not. Michigan has abolished the estate/inheritance tax.

Intestate succession

What is intestacy?

Intestacy is the process of executing an estate when the decedent has not left a will. The probate courts of the fifty states each have a different set of standards for determining how property is distributed. Any money and property that is not under joint ownership or does not already have a designated beneficiary will go through this process. It also applies where there is a will, but the decedent forgot to include some of their property in said will.

If there are no descendants and no living parents of the decedent, then the entire estate passes to the surviving spouse. If there is no surviving spouse, the descendants inherit everything. If there

are no spouses or children, the parents receive everything. If there are no surviving immediate family members, then the court will look for any other living descendants of the decedent's grandparents (i.e. siblings, aunts, uncles, and cousins). If those relatives are more than one generation removed from the deceased (i.e. second and third cousins), they must split the portion of the estate that would have gone to their parents. In other words, deceased cousins who had more children will pass smaller portions to their children "by representation".

If no relatives descended from the grandparents exist, then the estate "escheats" to the state of Michigan".

Trusts

What is a trust and what would I use it for?

A trust is any arrangement where the owner of the trust property,the settlor, gives another person control of the asset, the trustee,for the benefit of the beneficiary. A trust is a common and very useful estate planning tool.

Establishing a trust can serve many purposes. If the intended beneficiary has trouble handling money responsibly, the control of the trustee provides safety in that regard. If the settler sets aside a trust for a child with special needs, that asset will not reduce any government benefits he or she might otherwise receive. The biggest benefit of the trust is that, if used to pass on the estate after death, it completely avoids the probate court. Trusts usually have fewer requirements and formalities that wills.

What are the requirements to create a trust?

A trust requires the presence of all the core components: the trustee, the asset, and the beneficiary(s). The asset is a particularly important component. You cannot create a trust without placing at least some form of money or property into it. Even if your intention is to fill it with your estate upon your passing, you cannot simply leave it empty.

A valid trust also requires a valid purpose. The structure of the trust lends itself well to concealing assets from creditors or the government. Such trusts are invalid and unenforceable. The same limitation applies to trusts designed to perpetuate criminal activity.

Are there different types of trusts?

There are a great many types of trusts. For the purposes of this guide, only a couple of relevant variables will be discussed. The two most important variables that distinguish trusts are the time of creation relative to the settlor's death (inter-vivos vs testamentary) and the level of control retained by the settlor (revocable vs. irrevocable trusts). A trust that is established while the settlor is still alive is an inter-vivos trust. A testamentary trust is created by the settlor's will upon the settlor's death.

A much more significant difference exists between revocable and irrevocable trust. A revocable trust is simply a trust in which the settlor retains a greater amount of control. Furthermore, a settlor is capable of dissolving the trust and reclaiming those assets. If a revocable trust is used as an alternative to a will, then it must meet some of the requirements of a will.

An irrevocable trust is one where the settlor loses that control and ability to reclaim. A testamentary trust is irrevocable by definition because the settlor is no longer alive to exercise control. A trust can be made irrevocable by stating so in the trust.

What are some pros and cons of revocable and irrevocable trusts and of trusts in general?

Starting with the major advantage of trusts. Trusts allow you to skip the probate process unless something goes wrong. This can make it cheaper than using a will or going through intestacy. This isn't guaranteed however, because establishing a trust will almost certainly cost more in attorney's fees to create.

Revocable trusts allow more control and flexibility, which can help prevent mishaps due to poor planning or unexpected events. The downside of revocability is that it has fewer protections from the settler's creditors.

On the other side of the coin is the irrevocable trust, with less flexibility but greater protection from creditors.

What might cause a trust to fail?

Aside from being invalid from its inception, the most common source of failure is the expected or unexpected loss of the trust's purpose. Suppose you establish a trust to pay for your child's college. That trust will inevitably disappear upon graduation. The same thing might happen if they drop out, or tragically pass away before they even graduate high school.

Guardianships

What is a guardianship?

Guardianship is a process by which the power to make legal decisions for an individual is entrusted to someone else. This is a common occurrence for people with certain disabilities or those who become incapacitated. More specifically, it is meant to help those who have lost the ability to communicate, understand, or make important informed decisions for themselves.

Does every individual in such a situation need a guardian?

Not necessarily. If the individual has a durable power of attorney or a designated patient advocate on their behalf, then there will likely be no need for a guardian to be appointed. Furthermore, appointing a guardian comes with its own risks and drawbacks. It can be a rather

draconian step to place a vulnerable individual under the effective control of another. Aside from the examples that were just mentioned, there are other alternatives to appointing a guardian.

How is a guardian appointed?

The whole process starts when a concerned person (known as the petitioner) petitions the probate court to appoint a guardian. The petition must be filed in the county where the individual that allegedly needs a guardian lives. The petition can also be filed by the incapacitated individual on their own behalf.

Once that petition is received, a hearing will be scheduled. Either way, the subject of the guardianship will receive notice of the petition and hearing. The same notice must be given by the petitioner to the individual's spouse, children (or parents if there are no children), any agents with durable power of attorney, and any guardians/conservators appointed in another state. Any of these parties, as well as the individual themselves is entitled to object to the appointment of a guardian.

If that individual does not have his or her own attorney, then the court will appoint someone called a "guardian ad litem"(see "guardian ad litem" below).A guardian ad litem will explain to the individual what the petition means, what his or her rights are, and will try to discern what the individual wants to do in response.

The probate court may (but does not always) appoint physicians or mental health experts to investigate the factual issues of the petition. Sometimes these experts, or the guardian ad litem, are charged with submitting a report about the individual targeted by the petition and are asked to submit a recommendation.

At the hearing proper, the judge must find by clear and convincing evidence that the subject of the petition has an incapacity that inhibits independent living and informed decision making, and must also find that a guardian is necessary for the sake of that individual's supervision and care.

Most guardianship hearings are conducted within a month or two of a petition being filed. In many cases the hearing is not overly complicated or combative because either there is an agreement between the parties, or no parent is available to object to the request being made. However, some individuals may find themselves in a position of having to prove their own fitness to act as a guardian.

The person petitioning the court always has the burden of proving that a guardianship must be put in place and that they are the right person for the appointment. Usually testimony of the petitioner, child or a DHHS representative is all that will be required for a court to find that a basis for granting a guardianship exists. The decision of whether to grant a guardianship is made by a Judge; there is no right to a jury trial in these cases. A court must grant a guardianship request if the request will serve the child or legally incapacitated individuals' welfare. If the court is unsure as to whether a petitioner is fit and capable of being appointed, the court may enter virtually any other order that will serve the individual's best welfare.

What is guardian ad litem?

Aguardian ad litem is a person who represents the best interests of the minor child or incapacitated individual. These individuals are appointed by the court to not only represent the child or individual in court, but to also gather information and investigate the circumstances of the parties. Make no mistake about it, a guardian ad litem has significant influence over a court. These individuals are usually probate attorneys the court is familiar with, and courts trust what these individuals have to say because they are tasked with acting in a neutral, objective fashion without having to take the side of a parent or a petitioner who is seeking a guardianship. Taking a position that is contrary to a guardian ad litem's recommendation is often an uphill battle unless new evidence presents itself or some kind of bias may be shown.

Guardian ad litems may interview the incapacitated individual, parties, doctors, therapists, CPS workers and the like. They often review school records, employment records, police reports, medical records, and counseling and psychiatric records. Guardian ad litems often draft reports and recommendations to Judges and represent the minor child or incapacitated individual during hearings.

When one finds himself in a guardianship proceeding, it is best to treat guardian ad litems with respect and to timely provide them with requested information. Retaining an attorney to assist a parent or petitioner in these situations is highly recommended given the importance of one's interactions with guardian ad litem.

What are the different types of guardianship?

Full Guardianship

Full guardianship allows a guardian to make virtually every decision that a parent can make as it concerns a child or legally incapacitated individual. Additionally, special legal standing is conferred upon a legal guardian so they may seek legal custody of the child. Acting as a legal guardian may also simplify the process of adopting a child should such action be warranted. A full guardianship may be granted over a child pursuant to MCL 700.5204 only where any one of the following circumstances exist:

1. the parental rights of the parent(s) have been terminated or suspended by prior court order, by a judgment of divorce or separate maintenance, by death, by a judicial determination of mental incompetency, by disappearance, or by confinement in a place of detention;

2. the parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with the parent or parents when the petition is filed; or

3. the custodial parent dies or disappears, never having married the other parent, and the other parent has not been granted legal custody.

Unless one of these scenarios exist, the court will not have authority to grant a full guardianship. If an interested person believes that full guardianship is appropriate and none of these situations apply, other guardianship options should be explored.

Limited Guardianship

Limited guardianships are utilized in those situations where a parent understands that another adult is better positioned to act in the role of a parent. These guardianships still provide an adult with the ability to make major decisions concerning a child. However, as the title implies, the authority granted to these guardians is limited. A limited guardian does not have the ability to consent to allowing the child to be married, adopted, or released for adoption, and may also be further limited by agreement of the parties. Limited guardians generally lack standing to pursue custody of a child unless a parent substantially fails to comply with a limited guardianship placement plan.

MCL 700.5205 specifies that limited guardianships require consent of the custodial parent(s). Without the parent's blessing, a limited guardianship cannot be granted. Additionally, the custodial parent(s) must agree to suspend their parental rights, and the court must approve a limited guardianship placement plan. These plans must provide the court with a reason or purpose for the guardianship. They must also set out appropriate parenting time between the parent and child, the duration of the guardianship, child support during the guardianship and any other provision that the parties agree upon.

The guardianship placement plan provides the parties with some form of certainty so long as the plan is followed. Parents may be directed to obtain stable housing, obtain counseling or therapy, treat a drug or alcohol problem, successfully complete probation and enroll in parenting classes amongst other things. Reevaluation of a placement plan may become necessary if a parent substantially fails to comply with the ordered agreement. However, the guardianship plan should be terminated once a parent fulfills the required conditions imposed upon them
where the circumstances which led to imposition of the guardianship have been corrected.

Temporary Guardianship

In some circumstances a court may find that it is necessary to appoint a temporary guardian. Authority to appoint a temporary guardian for up to 6 months is vested in a court under MCL 700.5213. These situations may arise where full or limited guardianship proceedings are pending, or where an already appointed guardian must be replaced because they no longer wish to be a guardian, are no longer capable of acting, or where they have failed to protect a child's welfare.

Who might be appointed as the guardian?

Any competent person over the age of 18 may serve as guardian. Priority will be given to a pre-existing guardian appointed in another state, as well as any preference expressed by the individual themselves. A professional guardian may be appointed if no other candidate is found.

What if the individual opposes the appointment of a guardian?

If this happens, then the court must appoint an attorney to represent the individual if he or she cannot afford one themselves. The judge must then schedule a second, contested hearing where the attorney will be present.

Can a guardianship be modified or terminated?

Yes. Contentious guardianship hearings often come about where an individual asks the court to terminate or modify a guardianship. These cases may arise where an individual no longer desires to serve as a guardian, or where an interested individual does not feel that an appointed guardian is serving an incapacitated individual's best welfare.

They may also arise where there is a dispute as to whether a parent has complied with court-imposed conditions or whether the original purpose of the guardianship still exists. Many parents may petition the court to modify a guardianship in an effort to obtain more parenting time or parenting time with fewer restrictions.When a petition is filed to terminate or modify a guardianship involving a child, the child's best interests control the Judge's decision. They are outlined in MCL 700.5101(a) which identifies the factors as follows:

> (i) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (ii) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue educating and raising the child in the child's religion or creed, if any.
>
> (iii) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (iv) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (v) The permanence, as a family unit, of the existing or proposed custodial home.
>
> (vi) The moral fitness of the parties involved.
>
> (vii) The mental and physical health of the parties involved.
>
> (viii) The child's home, school, and community record.
>
> (ix) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference.
>
> (x) The party's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and his or her parent or parents.

(xi) Domestic violence regardless of whether the violence is directed against or witnessed by the child.

(xii) Any other factor considered by the court to be relevant to a particular dispute regarding termination of a guardianship, removal of a guardian, or parenting time.

Limited guardianships may be terminated if a parent(s) shows that they have substantially complied with a limited guardianship plan. Whether a parent has succeeded in this effort is within the discretion of the court. The court's findings and decision are heavily influenced by guardian ad litems, CPS and DHHS workers, law enforcement, and medical, counseling and therapy providers. Therefore, it is important for parents who seek termination of a limited guardianship to follow directions from these individuals and use their best efforts to comply with the plan.

When a petition to terminate is filed, courts have authority to terminate a guardianship, continue or extend the guardianship, modify the guardianship, or refer the matter for further investigation to DHHS.

Instruments of a Non-Probate Estate

Also known as non-probate transfers. These are legal instruments that allow you to convey or bequeath property after death without forcing your loved ones to resort to probate court.

- Any asset for which there is a designated beneficiary or a payable on death designation (i.e. life insurance, bank accounts, certain brokerage accounts, 401k's (and certain other retirement accounts),pension benefits, and IRAs)
- Living trusts
- Any property owned in a joint tenancy with one or more people
- Properties owned by a revocable trust
- Certain other property otherwise subject to probate can sometimes avoid it (i.e unpaid wages, up to $500 worth of apparel or cash, travelers checks, motor vehicle transfers (worth $60,000 in total so long as there are not ongoing probate proceedings), watercraft transfers (up to $100,000 in total so long as there are not probate proceedings ongoing), income tax refunds, up to $15,000 transferred by affidavit.

Purpose

Perhaps the greatest responsibility the court system is tasked with is to protect children and ensure that they receive suitable care and supervision. A child's best interests may be neglected or overlooked by a parent for a variety of reasons, and when that happens, the court must find another person to fill the shoes of a parent. Sometimes a parent realizes that the best thing for their child is to hand the reins to another person who can provide a more stable or safe environment. Often times, being a legal guardian means more than providing a child with a roof over their head or food in their belly. Amongst other things, legal guardians may be tasked with enrolling a child in school, making financial decisions on a child's behalf, or making sure that a child receives appropriate medical care and treatment. Any person who is interested in the welfare of a child may file a petition to seek a guardianship.

Very specific criteria must exist for a guardianship to be granted, and one would be wise to consult with an attorney before deciding on an approach that makes sense. Sometimes these arrangements are made amongst consenting adults, sometimes they come about because a parent has issues which impact their ability to provide care and comfort to a child, and sometimes they occur because a child has been abandoned. Whatever the reason may be, it is important to understand that a child's welfare and best interests will always direct a Judge on how to rule.

Conclusion

Even the most routine and mundane guardianship cases have the potential to spiral out of control. Many guardianship cases are similar to custody and parenting time battles as they revolve around children and usually involve parties who are related to one another. As courts are only interested in seeing to it that a child's welfare and best interests are met, interested persons and parents may often feel that their pleas have fallen upon deaf ears. It is an attorney's job to ensure that their client's position is never ignored.