

Planning for mental decline in the elderly in light of EPIC

by Jamie Verdi, Esq.

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Mental decline in the elderly is a subject that many family members simply do not want to address until a situation forces them into action.

Due to an aversion to accept that an elderly family member is no longer able to make his or her own decisions, many people find themselves scrambling to take emergency action to preserve their elderly ward's assets and safety.

As today's elderly population continues to grow, practitioners of all types of law may find themselves assisting their clients to deal with aging family members who are in mental decline.

Most attorneys understand the basic planning mechanisms that are available to tackle mental incompetency, such as powers of attorney, patient advocate designations and guardianships/conservatorships.

However, because of inherent vagaries in the way courts interpret Michigan's Estate and Protected Individuals Code (EPIC), many practitioners who do not regularly appear in probate court do not experience the seemingly harsh results that can occur when a client seeks to protect their elderly family member.

Patient advocate

The most widely used health care planning mechanisms for the elderly are patient advocate designations and powers of attorney. EPIC defines the requirements for implementing a patient advocate designation, and these should be followed strictly.

A standard patient advocate designation form is widely available from online sources. The most common pitfall with their creation lies with the witness requirements. EPIC mandates that two non-family, non-health care provider witnesses must concurrently execute the form. Failure of the witnesses to properly execute the form can be fatal to its enforcement.

Another common error is the failure of the person designated as the patient advocate to sign and execute an acceptance. EPIC provides that the patient advocate designation is not effective unless an acceptance is made in writing. During an emergency, the failure of the patient advocate to execute the acceptance can lead to confusion and delayed treatment.

Creating a patient advocate designation will not guarantee freedom from court intervention. If the alleged ward disputes that he or she is unable to make his or her own medical decisions, a court may make a finding of mental competency.

However, even if a court makes such a finding, the ward is free to revoke the patient advocate designation through any manner in which the ward is able to communicate. This provision in EPIC can cause chaos when an elderly ward in mental decline makes an impulsive choice to terminate a patient advocate designation.

A durable health care power of attorney is essentially the same as a patient advocate form, but medical providers usually prefer to have a patient advocate form because they are more familiar and comfortable with its use.

A financial power of attorney may allow a family member (or other trusted person) to manage the financial affairs of an elderly ward without any court intervention.

Guardianships

Guardianships and conservatorships should only be used as a last resort. The statutory criteria for imposing both are found in EPIC.

A guardianship allows a person to make decisions for another because of a physical or mental impairment. A guardian may make financial decisions and control the ward's money for living expenses, but if the ward has a large estate (generally more than \$10,000), a conservatorship will usually be required.

Any person interested in the alleged ward's affairs (which is different from an "interested person" as defined in EPIC) may file a petition to establish a guardianship or conservatorship.

A guardianship should only be granted where clear and convincing evidence exists that the ward is incapacitated and the appointment is necessary to provide care and supervision. EPIC requires that both elements must be established by separate findings.

A conservatorship contains a similar standard and should only be granted where the ward is unable to manage his or her property or business affairs due to a mental, physical or age-related impairment.

The Michigan Court of Appeals recently issued a decision that provides some guidance for determining the standards for imposing conservatorships for the elderly.

In Townsend v. Townsend, ___ MichApp __; ___ NW2d ___ (2011), the alleged ward exhibited the habit of giving large sums of money to family members. This caused alarm, and the alleged ward's son petitioned for a conservatorship to preserve the remaining assets. There was no evidence that the ward suffered from any mental impairment. The Court of Appeals held that the conservatorship could not be granted under the standards in EPIC, simply because the alleged ward was elderly and exhibiting perceived reckless behavior.

Even if the court finds that a guardianship or conservatorship should be granted due to an impairment, family members should bear in mind that they will not automatically qualify to be the guardian/conservator. EPIC contains priorities for appointing guardians/conservators, which begin with any person designated by the ward, followed by the ward's spouse, adult child, parent and finally any relative with whom the ward has resided for the previous six months.

The greatest gamble with any guardianship/conservatorship petition is whether the court finds any of the above persons with priority "suitable." Suitability is left to the discretion of the probate court, and EPIC provides no guidance for any factors that a judge should consider when making a finding of suitability.

In the worst case scenario, a court can appoint a professional guardian who has little oversight or accountability to the ward's family. This can occur when disputes among family members filter into the courtroom and cause disruptions.

In light of the ease with which patient advocate forms can be terminated by the most severely incapacitated ward and the dangers that can await a family heading into probate court on a guardianship or conservatorship petition, careful planning for the mental decline of an elderly family member should be performed early and with the input of as many family members as possible.

Family unity is the best approach to preventing uncertainty.

Jamie M. Verdi is an elder/probate attorney and the founder of Michigan Patient Advocacy Liaison, PLLC (MI-PAL). She represents people with mental and physical disabilities as well as their family members. Contact her at (248) 410-4945 or jamieverdi@mipalhealth.com.