

## Finding the Law on Fiduciary Duties

By Ernschie Augustin

Clients are commonly confused about various fiduciary roles and their duties. The job of helping them understand these roles and the obligations that go with them is typically that of the elder and probate law attorney. But lawyers, especially those who have not practiced long or who have not practiced long in the probate and elder law arena, may find explaining the rules to their clients difficult. This can be true because there are so many forms of fiduciaries in probate and elder law, and the statutes that define and control these roles are scattered throughout the Estates and Protected Individuals Code (“EPIC”), and on occasion, other areas of the law. Additionally, the rules between various types of fiduciaries are intertwined, frequently cross-referencing and incorporating the rules of other types of fiduciaries.

By walking through (and untangling) the statutes applying to the various forms of fiduciaries commonly dealt with in the elder and probate law practice, this article hopes to help the practitioner find and understand the differences and similarities between these roles and to serve as a reference on fiduciary duties and potential breaches (with “breaches” being, more often than not, the failure to perform the defined duties in a reasonable manner).

### “Fiduciary” Defined

MCL 700.1104(e) defines the term “fiduciary” to include, but not be limited to, “personal representative, funeral representative, guardian, conservator, trustee, plenary guardian, partial guardian.”

MCL 700.1212 defines a “fiduciary relationship” and part (a) of that statute, in particular, provides a broad statement of what is encompassed by a fiduciary duty. In any case in which a question over whether a person acting in a fiduciary capacity has or has not performed in accordance with their duties, this section of EPIC is

a good place to start the analysis. The remainder of this article largely looks only at the nuances of these duties as they apply statutorily to specific types of fiduciary roles.

Another EPIC provision relating to fiduciary roles with an overarching aspect is MCL 700.1214. This section of EPIC addresses the topic of self-dealing, but it purports to restrain conduct engaged in by a person or entity holding a fiduciary relationship arising out of any “governing instrument.” In EPIC, a “governing instrument” is defined to encompass a broad class of documents that go well beyond wills and trusts. MCL 700.1104(m).

### Powers of Attorney

Moving now into the sources of law controlling the various forms of fiduciaries, we start with fiduciaries appointed to those positions through powers of attorney.

Although not expressly included in the definition of “fiduciary” set forth in MCL 700.1104, a person appointed as an agent has fiduciary duties as established in numerous cases as well as the commentary to this section.

MCL 700. 5501 provides the legal grounds for a “durable” power of attorney over finances or property. It is important to understand that this law controls only written agencies that remain functioning notwithstanding the subsequent incapacity of the principal. Other common law agencies, written or oral, would not fall within the scope of this statute.

The duties of an agent acting under a durable financial power of attorney are detailed in MCL 700. 5501(3). The failure of an agent to act according to these rules is a breach of duties.

A medical power of attorney, or “patient advocate designation,” is a unique form of durable power of attorney. The law controlling this type of agency is at MCL 700.5506 et seq.

MCL 700.5509 defines the duties and responsibilities of a patient advocate, any violation of which would accordingly give rise to a breach. MCL 700.5509(1)(a) expressly obligates a patient advocate to act in a fiduciary capacity with respect to such actions or inactions.

### **Guardians and Conservators**

It is worth noting that while MCL 700.1104 is a section of EPIC, as referenced above, it purports to define “plenary guardian” and “partial guardian” within the meaning of the term “fiduciary.” These term, however, apply to persons subjected to court protection as a result of their being determined to have developmental disabilities. This inclusion reveals an awkwardness in the fact that Michigan probate courts establish guardianships over various populations, and for various reasons (minority, incapacity, and developmental disability), but that the establishment of a guardianship over a person with a developmental disability is based on law outside of EPIC. Rather, it is the Mental Health Code that defines “plenary guardian” and “partial guardian” (MCL 330.1600) and that provides the processes for establishing, and the rules for acting, as a guardian over a person with a developmental disability. The inclusion of these terms in this section of EPIC is acknowledged and clarified in the Mental Health Code by MCL 330.1632, which provides:

[w]henever the court appoints a plenary guardian of the estate or a partial guardian with powers or duties respecting real or personal property, that guardian shall be considered a fiduciary for the purposes of the estates and protected individuals code . . . .

So, starting with guardians over persons with developmental disabilities, the duties of such guardians can be found at MCL 330.1631. A breach would be a violation of the duties defined there. In addition, because the term “conservator” is not used in the Mental Health Code, but rather persons who have authority over the funds or property of the ward are designated as “guardians over the estate,” their fiduciary ob-

ligations in relation to these activities are addressed by the incorporation of EPIC fiduciary duties, as explained above.

As for guardians over legally incapacitated individuals and their duties (and countervailing breaches), look to MCL 700.5314. And for guardians over a minor, MCL 700.5215.

As for conservators over minors or adults, the duty to inventory and account are spelled out in MCL 700.5417 and 700.5418, respectively. Otherwise, the fiduciary duties and standard of care applicable to a conservator are defined by MCL 700.5416, which incorporates by reference the duties of a trustee as spelled out in the Michigan Trust Code (the “MTC,” which is itself a subsection of EPIC), particularly, as will be discussed below, Part 8 of the MTC.

### **Personal Representative and Trustee**

The law regarding the duties and breaches of a personal representative or trustee are the most detailed and elaborate of all types of fiduciaries addressed in this article, and the nuances of these offices is well beyond the scope of this article.

That said, the duties of a personal representative, and therefore the countervailing grounds for breach, are set forth in Part 7 of Article III of EPIC (MCL 700.3701 et seq.), but see also MCL 700.3611(2)(c), which describes grounds for removal of a personal representative.

As for a trustee, the MTC defines duties and breaches in both Part 8 (MCL 700.7801 et seq.), but also in some areas of Part 9 (MCL 700.7901 et seq.). These include, importantly, the duty of a trustee to administer the trust in “good faith, expeditiously, in accordance with the terms and purpose, for the benefit of trust beneficiaries, and in accordance with this article.” MCL 700.7801. See also MCL 700.7706(2) for breaches that give rise to removal by a court.

### **Conclusion**

Michigan law regarding fiduciary duties and breaches is extensive, but finding it is not always

easy. This article hopefully provides a beginning reference for where to look—a starting point when these issues arise in practice.

And on that note, it is not wrong to look in other obvious places. Information contained on the court order and the letters of authority issued to guardians, conservators, or personal representatives, for instance, are always good sources of information about the duties for those offices.

Finally, this article is intended only to lead the reader through the law regarding fiduciary duties, and to point out places where the rules relating to one type of fiduciary cross over into those of another. The article focusses almost exclusively on the statutory rules, and it does not intend to address the applicability of common law fiduciary duties or breaches.



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