Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007-2017 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2019 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

He is a member of the Society of American Baseball Research (SABR).

For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: February 13, 2019
RE: ***In re O'Brien***
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re O'Brien*

- Expressio Unius Est Exclusion Alterius
- Right of an Interested Party to a Jury Trial
- Due Process of Law - Life, Liberty or Property must be at Stake
- Interested Parties Raising Issues of Their Own Disability for Trial Purposes

The facts of this case are simple. Appellant held the Power of Attorney for 18 years. An agency petitioned to have someone other than the holder of the Durable Power of Attorney appointed Guardian. A Guardian Ad Litem was appointed and found a lack of care by the holder of the DPOA and strong opposition by the future Ward to Appellant serving as Guardian, if the Court found she needed one.

The holder of a DPOA has no right to a Jury Trial said the Court of Appeals. The provision that he cited, MCR 5.158 says that a person with a right to a Jury Trial may demand it but it begs the question as to whether he had a right.

The Court of Appeals looked at EPIC and found that only a Ward in such case had a right to a Jury Trial and invoked the doctrine of Expressio unius est exclusion alterius.

Appellant was hard of hearing and made certain demands based on his disability. The lower Court said that he had a lawyer and that they wouldn't write out every question and answer for him. The Court of Appeals sustained the lower Court's ruling not being able to be someone's guardian does not impinge one's right to life, liberty or property. Hence, there was no denial of due process.

Once again, the Court of Appeals made the valid distinction of that factual findings are reviewed for clear error and that disposition rulings are reviewed for abusive discretion. There are, of course, good definitions in this case consistent with prior cases.

The right to revoke the DPOA was sustained because the issue was presented the first time by a Motion for Reconsideration.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

In re Guardianship of BEVERLY ANN O'BRIEN.

RON D'WATER,

Appellant,

v

LYNETTE DERROR, Guardian of BEVERLY ANN O'BRIEN, a legally protected person,

Appellee,

and

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

UNPUBLISHED
January 15, 2019

No. 344504
Kalkaska Probate Court
LC No. 18-009995-GA

Before: BOONSTRA, P.J., and SAWYER and TUKEL, JJ.

PER CURIAM.

Appellant appeals by right the probate court's order appointing a guardian for Beverly Ann O'Brien and revoking a durable power of attorney (DPOA) executed in July 2000 by O'Brien. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Appellant Ron D'Water lived with O'Brien for approximately 18 years, from 2000 to 2018. In July 2000, O'Brien executed a DPOA naming D'Water as her attorney-in-fact. In March 2018, the Department of Health and Human Services (DHHS) filed a petition with the probate court, requesting that the court appoint a guardian for O'Brien. The petition alleged that O'Brien had severe dementia and had sustained a broken shoulder, but that after two months she

still had not received proper care and the fracture was worsening. The petition also asserted that O'Brien had not received treatment for her shoulder injury because D'Water had "a problem" with all three surgeons to whom O'Brien had been referred for treatment. The petition also alleged that D'Water was not properly administering O'Brien's medication and that he may have physically abused her. The petition stated that O'Brien was "unable to make informed decisions regarding determining where to live, consenting to supportive services, handling personal financial affairs, and authorizing or refusing medical treatment," and requested the appointment of Lynette Derror as O'Brien's limited guardian with "Medical, Legal, and Placement Powers." Attached to the petition was a report from O'Brien's physician stating that on March 1, 2018, the physician's office staff had heard (but did not see) D'Water slap O'Brien and had contacted police. This incident resulted in an Adult Protective Services investigation and ultimately led to the filing of the petition.

The probate court appointed Derror as O'Brien's temporary guardian, and appointed Thomas J. Seger as guardian ad litem (GAL) to represent O'Brien in the proceedings on the petition. O'Brien was subsequently hospitalized and underwent surgery. Her physician wrote a letter to the court explaining that O'Brien had severe cognitive impairment and was often confused and disoriented. He recommended that she not be involved directly with the guardianship hearing to avoid causing her "psychosocial distress." The GAL visited O'Brien at her long-term care facility and reported to the probate court that O'Brien had indicated to him that she did not have an objection to a guardian, but that "under no circumstances" did she wish for D'Water "to act in that capacity." The GAL also reported that O'Brien showed him bruises on her body in reference to the allegations of physical abuse by D'Water.

Prior to trial, D'Water submitted a jury demand to the probate court. He contended that he was entitled to a jury as an "interested person" in the matter based on his status as O'Brien's agent under the DPOA.

At a hearing held on the petition, D'Water for the first time informed the probate court that he had a severe hearing disability and that he needed all words spoken at the hearing written down so that he could understand the proceedings. He refused to use the court's hearing-assisting technology because he said it would not be helpful. The probate court explained to D'Water that because he had an attorney who could assist him, the hearing would proceed. Later during the hearing, D'Water informed the court that he was not following the proceedings and that he wanted everything written out. His attorney expressed concern that it was not a "fair hearing." The court replied:

> Well . . . there's no way we can write things out. I mean, everything is recorded on the record, so you know, I guess I would trust that you're representing him and you can communicate if he's not able to follow. We gave him headphones that he could use, but he's clearly choosing not to utilize those to be able to hear what's going on here. Now he obviously is hearing what I'm saying because he just raised his hand to speak.

At the conclusion of the hearing, the probate court first held that D'Water was not entitled to a jury trial because the law only allowed the subject of a guardianship petition to demand a trial by jury. The probate court then made the following findings:

> [G]iven [the GAL's] comments and his report from the guardian ad litem, it's pretty clear that Beverly Ann O'Brien does not have an objection to these proceedings and does not have an objection to the guardianship and under no circumstances does she wish Ron Dwater [sic, throughout] to act in that capacity. There's some indication in the petition and the information that's been presented to the [c]ourt in the original filing of the petition that the individual has . . . severe dementia, and that Mr. Dwater has had the care of [O'Brien], but has failed to provide appropriate medical care or treatment, and that she has some medical issues with a fractured shoulder that she's had for some time that's getting worse and not healing. I mean, I can read all of that in the report, and basically Ms. O'Brien is not contesting the paperwork that's been filed . . . and they clearly indicate that she needs a guardian. There's also some allegation that Mr. Dwater was not administering medications appropriately and that he's also been physically abusive to her. And it's pretty clear, I think, given even [the GAL's] comments and his report, that she wishes to have that durable power of attorney that she previously issued to him revoked. So the paperwork should probably reflect that.

D'Water's attorney did not reply when the probate court asked him specifically whether he had "any other comments." The court issued an order appointing Derror as O'Brien's guardian. It also ordered that "[t]he durable power of attorney issued to Ronald G D'Water Date 7/11/2000 is hereby revoked." D'Water filed a motion for rehearing and reconsideration, which the probate court denied. This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a probate court's dispositional rulings, but review for clear error the factual findings underlying those rulings. *In re Guardianship of Bibi*, 315 Mich App 323, 328; 890 NW2d 387 (2016). An abuse of discretion occurs when the probate court "chooses an outcome outside the range of reasonable and principled outcomes." *Id*. at 329 (quotation marks and citation omitted). A finding of fact is "clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made . . . ." *Id*. (quotation marks and citation omitted). We review de novo preserved constitutional issues. *In re Guardianship of Redd*, 321 Mich App, 398, 404; 909 NW2d 289 (2017). However, unpreserved issues are reviewed for plain error affecting substantial rights. *In re BGP*, 320 Mich App 338, 342; 906 NW2d 228 (2017). We review de novo issues of statutory interpretation. See *McQueer v Perfect Fence Co*, 502 Mich 276, 285-286; 917 NW2d 584 (2018).

III. JURY DEMAND

D'Water argues that the probate court erred by not granting his jury demand and by not submitting the issues in the petition to a jury. We disagree. Michigan's Estates and Protected Individuals Code (EPIC), MCL 700.5301 *et seq*., governs the appointment of guardians for incapacitated individuals. MCL 700.5303(1) states that "[a]n individual in his or her own behalf, or any person interested in the individual's welfare, may petition for a finding of incapacity and appointment of a guardian." If the probate court finds by clear and convincing evidence that an individual is incapacitated and that a guardian is necessary as a means of providing care and

supervision, the court may appoint a guardian. MCL 700.5306(1). MCL 700.5304(5) provides that, in guardianship proceedings, the *allegedly incapacitated person* "is entitled to be represented by legal counsel, to present evidence, to cross-examine witnesses . . . and to trial by jury." (Emphasis added). No statute explicitly provides interested persons with a right to a jury trial.

"A right to a jury trial can exist either statutorily or constitutionally." *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). D'Water cites MCR 5.125(C) and MCR 5.158(A) in support of his argument that he had a right to a jury trial. But court rules are procedural and do not create substantive rights. MCR 1.103; *Ramirez v Bureau of State Lottery*, 186 Mich App 275, 283; 463 NW2d 245 (1990). In any event, MCR 5.125(C) merely outlines who is entitled to notice as interested persons in various probate proceedings; it does not provide for a right to a jury trial.

MCR 5.158(A) states in relevant part that "A party may demand a trial by jury of an issue for which there is a right to a trial by jury . . . ." MCR 5.158(A). By its plain language, this court rule also does not create a substantive right. MCR 1.103; *Ramirez*, 186 Mich App at 283. D'Water directs this Court to the commentary to MCR 5.158(A), which states that "[a]ny such right is limited to a participant at the trial." See MCR 5.158, Comments. D'Water argues that since there is "no doubt that Mr. D'Water would be a participant at the trial since he is an interested party by virtue of having a power of attorney," this commentary supports his right to a jury trial. D'Water, however, neglects to include the entire commentary to the court rule, which states:

> [MCR 5.158] covers how *a party with a right to a jury trial* may exercise that right. *It does not purport to grant a right to a jury trial where none exists otherwise*. Any such right is limited to a participant at the trial. [Emphasis added.]

As the commentary makes clear, the court rule applies only to parties with an established right to a jury trial and does not grant a substantive right. We decline to adopt D'Water's strained interpretation of these court rules as providing any interested person a right to demand a trial by jury on the issue of an allegedly incapacitated person's guardianship.

Regarding statutory sources of a right to jury trial in guardianship proceedings, MCL 700.5304(4) provides that "[t]he *individual alleged to be incapacitated* is entitled to be present at the hearing . . . ." (Emphasis added.) MCL 700.5304(5) further states that "[t]he *individual* is entitled to be represented by legal counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician or mental health professional and the visitor, *and to trial by jury*." (Emphasis added.) This Court assumes that the Legislature intended its plain meaning, and when the language of a statute is clear and unambiguous it must be enforced as written. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). Further, we must "apply the language of the statute as enacted, without addition, subtraction, or modification." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002). We "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003). "The individual," as used in MCL 700.5304(5), means the allegedly incapacitated individual. Under

the plain language of the statute, it is the allegedly incapacitated individual who is entitled to a jury trial. We may not read into the statute an expansion of this right to all interested persons. See *Lesner*, 466 Mich at 101.

Although D'Water agrees that MCL 700.5304(5) provides that the allegedly incapacitated individual is entitled to a jury, he contends that since it "says nothing about whether any other individual is entitled to the same," there is an open question as to whether other interested parties have a right to a jury trial. While we hold that the plain language of the statutes discussed above does not affirmatively provide an interested person with a right to a jury trial, and we need not rely on doctrines designed to aid courts in interpreting ambiguous statutory language, we do note that D'Water's argument runs afoul of the canon of statutory interpretation *expressio unius est exclusio alterius*. *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 247; 590 NW2d 586 (1998) ("[T]he express mention of one thing in a statute implies the exclusion of other similar things.").

D'Water also contends that *McCord v McCord*, 243 Mich 309; 220 NW 710 (1928), and *In re Alexander*, 136 Mich 518; 99 NW 746 (1904), two cases decided before January 1, 1971, provide support for his contention that he is entitled to a jury trial under MCL 600.857(1), which provides in relevant part that

> [i]f a party to a proceeding in the probate court would have had a right before January 1, 1971 to demand a jury to determine a particular issue of fact in the circuit court upon a de novo appeal from that proceeding to the circuit court, that party shall on and after January 1, 1971 have the right to demand a jury to determine that issue of fact in the probate court proceeding.

In *McCord*, a son petitioned the court to appoint a guardian for his mother; his mother waived objection to the petition, and a guardian was appointed. *McCord*, 243 Mich at 311. The court later set aside the guardianship order after the mother's daughter contested the appointment. *Id*. The son appealed that order to the circuit court; a jury trial was held, and the mother was found to be incompetent. *McCord* merely states that a jury trial was held following an appeal to the circuit court; it does not discuss whether any party had a statutory or constitutional right to a jury trial. *Alexander*'s facts are similar, and discussed in an even briefer fashion; moreover, in *Alexander*, it appears that it was the adjudged incompetent person herself who sought an appeal to the circuit court. *Alexander*, 136 Mich at 518.

D'Water asserts that these cases make "it clear that any interested party, including one who has power of attorney for a potential ward that is subject to a petition, should have the right to a jury trial." We disagree. At best, these cases might support an argument that a person permitted to file a petition for guardianship under the pre-1971 probate code possesses the right to a jury trial on the issue of the petition subject's incapacity. According to 1970 CL 703.2, a petition for appointment of guardian could be made by an individual, his or her father, mother, spouse, or next of kin, or by certain governmental entities. There is no mention of persons holding a DPOA; in fact, statutory authority for the execution of a DPOA did not exist until 1978. See MCL 700.495 (prior to repeal by MCL 700.5501 *et. seq*.) D'Water has not provided this Court with any statutory authority or caselaw, historical or current, that would support a

conclusion that an agent under a durable power of attorney has a right to a jury trial in a guardianship proceeding.[1]

Finally, D'Water has not established a constitutional right to a jury trial. Michigan's Constitution provides that "[t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." Const 1963, art 1, § 14. Accordingly, "the right to trial by jury is preserved in all cases where it existed prior to adoption of the Constitution." *Dep't of Environmental Quality v Morley*, 314 Mich App 306, 308; 885 NW2d 892 (2015). D'Water points to no authority that supports a conclusion that there was a constitutional right of an agent under a durable power of attorney to demand a fact-finding jury trial in the probate court at the time the Michigan Constitution was adopted. It is not the duty of this Court to discover the basis of a party's claim. *Southfield Ed Ass'n v Bd of Ed of Southfield Public Sch*, 320 Mich App 353, 379; 909 NW2d 1 (2017).

IV. DUE PROCESS AND EQUAL PROTECTION

D'Water also argues that he was denied due process of law and equal protection under the law because he was unable to understand or communicate during the hearing. We disagree. Under both the United States and Michigan Constitutions, no person may be deprived of life, liberty, or property without due process of law. US Const Am V and Am XIV; Const 1963, art 1, § 17. However, our Supreme Court has explained that where the interest allegedly infringed upon does not come within the definition of life, liberty, or property, "the Due Process Clause affords no protection." *Bonner v Brighton*, 495 Mich 209, 225; 848 NW2d 380 (2014).

The threshold inquiry in addressing D'Water's due-process claim is therefore whether he had a protected interest in the hearings. It is not clear what right to life, liberty, or property D'Water was denied when he was not appointed as O'Brien's guardian or when his DPOA was revoked. D'Water identifies no such protected interest. In fact, he erroneously contends that he does not need to identify a protected interest. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Southfield Ed Ass'n*, 320 Mich App at 379.

Moreover, even if D'Water had some protected right, we conclude that he had notice that he was required to inform the court in advance of the hearing that he needed reasonable accommodations for his disability, but that he failed to do so. D'Water and his attorney both received notices well in advance of the hearing containing the instruction, "If you require special accommodations to use the court because of a disability . . . please contact the court immediately to make arrangements." D'Water also elected not to employ the hearing accommodation provided by the court. D'Water cannot use his failure to request accommodations as an appellate parachute. See *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003) ("It is settled

[1] We also note that D'Water's ultimate challenge is not to the determination that O'Brien requires a guardian, but is instead to the determination that he was not a suitable candidate. The factual issue submitted to the juries in *McCord* and *Alexander* involved competence, not the suitability of the guardian chosen.

that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.") Also, D'Water's counsel was present at the hearing to advocate on his behalf, and appeared able to communicate with and represent his client. D'Water does not explain how further accommodations would have changed the outcome of the proceedings. The trial court did not violate D'Water's right to due process. *Redd*, 321 Mich App at 404.

D'Water states in a single sentence of his appellate brief that "his right to equal protection is violated as he has a handicap (hearing condition) and is treated differently than others who [do not] have such a handicapping condition." This argument was not raised in the probate court, the parties have not presented the facts necessary to resolve this issue as a question of law, the determination of this issue is not necessary to the resolution of this case, and "manifest injustice" will not result if we decline to address this one-sentence argument; we therefore decline to address it. See *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

V. ADA AND PWDCRA VIOLATIONS

D'Water argues that the probate court's decision to move forward with the hearing violated his rights under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*., and Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. This Court has held, although in the context of termination of parental rights, that the ADA and the PWDCRA do not allow an appellant to collaterally attack the validity of decisions and procedures of the lower court:

> [D]iscriminatory conduct in judicial proceedings may give rise to a due process or equal protection claim, which are legally cognizable means to invalidate the outcome or a particular aspect of a judicial proceeding. However, the PWDCRA and the ADA do not provide the same relief in cases not originally involving those antidiscrimination acts. [*In re AMB*, 248 Mich App 144, 197; 640 NW2d 262 (2001).]

We reach the same conclusion here. Resolution of D'Water's claims under these statutes would require us to make original factual findings on issues not raised before the probate court. *Id*. at 194. We decline to address D'Water's ADA and PWDCRA challenges to "the result of proceedings in a case that did not originally allege an ADA or PWDCRA violation."

VI. REVOCATION OF DURABLE POWER OF ATTORNEY

D'Water argues that the probate court erred by issuing an order revoking the DPOA. We disagree. D'Water did not object to the revocation of the DPOA in the probate court until he filed a motion for reconsideration. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We review unpreserved issues for plain error. *BGP*, 320 Mich App at 342.

A DPOA remains valid after a principal's subsequent disability or incapacity. MCL 700.5501(1). But a power of attorney is revocable at the principal's will. *LaFond v*

Rumler, 226 Mich App 447, 458; 574 NW2d 40 (1997) ("Generally, a principal may revoke the authority of his agent at any time . . . ."). A guardian, among other fiduciaries, may also revoke a DPOA on behalf of the principal. MCL 700.5503(1).

D'Water contends that the probate court revoked the DPOA on its own accord without "any testimony or evidence." We disagree with that characterization. The record reveals that, based on the GAL's report that O'Brien had expressed a wish that D'Water not become her guardian and had shown the GAL bruises in connection with the allegations of abuse against D'Water, the probate court inferred that O'Brien had revoked or wished to revoke the DPOA. As this was the only evidence presented concerning whether the DPOA was valid, we conclude that the trial court's finding that O'Brien wished to revoke the DPOA was not clear error, and, therefore, it did not abuse its discretion in ordering the DPOA revoked. *Bibi*, 315 Mich App at 329; *LaFond*, 226 Mich App at 447. Additionally, we do not find persuasive D'Water's arguments that he was surprised by the revocation or prevented from presenting witnesses. The petition sought to establish a guardian for O'Brien with "Medical, Legal, and Placement Powers." The DPOA had granted D'Water the full authority to make medical and legal decisions on behalf of O'Brien. Further, the petition contained allegations that D'Water was not exercising his fiduciary duty with regard to getting medical care for O'Brien and potentially was abusing her. D'Water was represented by counsel at the hearing, at which his counsel stated that he had "a couple of witnesses," but that he had "several more" that he would introduce if D'Water's request for a jury trial was granted; yet his counsel never sought to present any witnesses, or indeed to object to the revocation of the DPOA. After the trial court orally announced its intent to enter an order revoking the DPOA, his attorney declined to comment even when specifically asked. He did not ask for the opportunity to call his witnesses or present any evidence. On appeal, D'Water does not indicate what witnesses or evidence he wished to present or how any of the testimony or evidence would have altered the proceedings below.

We cannot conclude on this record that D'Water and his counsel were taken completely by surprise by the revocation of the DPOA. Moreover, a probate court has the discretion to determine whether an evidentiary hearing is necessary. See *Parks v Parks*, 304 Mich App 232, 239-240; 850 NW2d 595 (2014). Reviewing the probate court's decision, we cannot conclude that a mistake was made by the probate court in finding that O'Brien wished to revoke the durable power of attorney. *Bibi*, 315 Mich App at 329. There was no plain error.[2] For the same reasons, the probate court did not abuse its discretion by denying D'Water's motion for reconsideration. See MCR 2.119(F)(3); *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008).

VII. GUARDIANSHIP

Lastly, D'Water argues that the trial court erred by appointing Derror as guardian for O'Brien. We disagree.

[2] We note that any relief we might grant D'Water on this issue would be rather illusory, as O'Brien's guardian could immediately revoke the DPOA under MCL 700.5503(1) even if we reinstated it.

"The court may appoint a guardian if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record." MCL 700.5306(1).

MCL 700.5313 sets forth a prioritized list of persons who may serve as a guardian. It provides, in relevant part:

> (2) In appointing a guardian under this section, the court shall appoint a person, if suitable and willing to serve, in the following order of priority:
>
> * * *
>
> (d) A person named by the individual as a patient advocate or attorney in fact in a durable power of attorney. [MCL 700.5313(2).]

If none of those persons is suitable or willing to serve, the statute provides a prioritized list of relatives. MCL 700.5313(3). If none of the persons listed in subsections (2) and (3) are suitable or willing to serve, "the court may appoint any competent person who is suitable and willing to serve, including a professional guardian . . . ." MCL 700.5313(4).

The majority of D'Water's arguments on this issue are simply restatements of his arguments concerning his asserted right to a jury trial and alleged violations of his constitutional rights. As discussed, we have found those arguments to lack merit. D'Water also argues that the probate court appointed a guardian for O'Brien "on its own based only on the information . . . in [the] court file" without seeking out further evidence or witnesses. As discussed, the probate court has the discretion to determine whether an evidentiary hearing is necessary at all. See *Parks*, 304 Mich App at 239-240. The purpose of an evidentiary hearing is to assist the court in making an informed decision on a factually disputed issue. *Id*. In this case, the probate court had a physician's report, the original petition's allegations, and, most importantly, the wishes expressed by O'Brien herself that she did not wish for D'Water to be appointed as her guardian. The probate court did not abuse its discretion by not holding an evidentiary hearing because O'Brien had already made her wishes clear to the GAL.

O'Brien designated D'Water as her attorney-in-fact in the DPOA executed in July 2000. Accordingly, he had priority of appointment unless he was not "suitable and willing to serve." A guardian is suitable if he is "qualified and able to provide for the ward's care, custody, and control." *Redd*, 321 Mich App at 408. The probate court made a finding that D'Water was not suitable before it appointed a professional guardian. Specifically, the probate court explained:

> [I]t's pretty clear that Beverly Ann O'Brien does not have an objection to these proceedings and does not have an objection to the guardianship and under no circumstances does she wish Ron Dwater to act in that capacity. There's been some indication in the petition and the information that's been presented to the [c]ourt . . . that this individual has . . . severe dementia, and that Mr. Dwater has had the care of Beverly Ann O'Brien, but has failed to provide appropriate medical care or treatment, and that she has some medical issues with a fractured

> shoulder that she's had for some time that's getting worse and not healing. . . . There's also some allegation that Mr. Dwater has not been administering medications appropriately and he's also been physically abusive to her.
>
> * * *
>
> And I think, based upon the information that's in my court file . . . clearly indicates there is a need for a guardian to be appointed, and there is clearly a concern that Mr. Dwater is not suitable and not acting in the ward's best interests and that somebody else should be appointed in that capacity.

The probate court's findings that O'Brien was incapacitated because of severe dementia and that D'Water was not a suitable guardian were not clearly erroneous and do not leave this Court with a definite and firm conviction that a mistake was made. *Bibi*, 315 Mich App at 329. Accordingly, the appointment of Derror was not an abuse of discretion. *Id*.

Affirmed.

/s/ Mark T. Boonstra
/s/ David H. Sawyer
/s/ Jonathan Tukel