

# LEGAL ALERT

June 10, 2008

## AMENDMENT TO MEDICAL RECORDS ACCESS ACT PLACES BURDEN ON HEALTH CARE PROVIDERS

*Recent amendment places the burden on health care providers to determine who are “heirs at law” for purposes of accessing a decedent’s medical records.*

**By: Scott D. Harvey, Attorney**

Recently, the Michigan Legislature amended the Medical Records Access Act (the “Act”) to include “heirs at law” within its definition of “authorized representatives.” With this change, the Legislature expanded the class of persons authorized to access a deceased patient’s medical records to include a decedent’s “heirs at law” (in addition to the decedent’s Personal Representative and a beneficiary of the decedent’s life insurance policy in certain circumstances).

What the Legislature did not provide for in this amendment, however, is a definition of an “heir at law” (referred to in the balance of this Alert simply as an “heir”). Nor did the Legislature provide health care providers with any guidance as to how to determine whether a purported heir is in fact an heir of the decedent.

Notwithstanding the public policy implications of allowing an heir (who may or may not have a proper motive) to access a decedent’s medical records, this amendment places the burden on health care providers to determine who is indeed an heir. In making this determination, health care providers must also consider what evidence, if any, can or should be relied upon.

Under the Michigan Estates and Protected Individuals Code (“EPIC”), an heir is defined as a person – including the surviving spouse – or the state, who are entitled to the decedent’s property under the statutes of intestate succession.

**Significantly, therefore, an heir is not meant to describe a category that would include all potential heirs of a decedent, only those who would be entitled to the decedent’s property under the law of intestacy.**

By way of example:

- If the decedent dies with a surviving spouse and children, only the decedent’s surviving spouse and his or her children are the decedent’s heirs.
- If a decedent dies without a surviving spouse and without children, but with parents surviving, only the decedent’s parents are the decedent’s heirs.
- If a decedent dies with a surviving spouse, a surviving child, a predeceased child and two grandchildren (of the predeceased child), then only the decedent’s spouse, his or her surviving child and his or her surviving grandchildren are the decedent’s heirs.

It should be noted that neither a decedent’s step-children nor step-parents can be heirs of the decedent. One who “feloniously or intentionally” kills the decedent also cannot be an heir of the decedent. Adopted children are considered heirs of their adopted parents (however adopted children are not considered heirs of their natural

parents, unless adopted by the spouse of his or her natural parent).

Obviously, the particular familiar circumstances of the decedent will control who are his or her heirs under Michigan law. If you have any questions as to whether a potential heir is an heir of the decedent under Michigan law, please contact an attorney.

As previously mentioned, however, the amendment does not provide guidance to health care providers as to what procedures, if any, they should employ to ensure that a purported heir is in fact an heir of the decedent.

For guidance, we must look to EPIC and the Michigan Court Rules. Under these laws, every petition for the formal probate of a will, supervised administration of an estate or adjudication of intestacy must include a request for a determination of heirs. More commonly, a determination of heirs is made through a sworn "Testimony – Interested Persons" as part of the informal probate of an estate. This form is usually completed by the presumptive Personal Representative and filed with the documents commencing probate. Furthermore, any other person may at any time file a petition for the determination of heirs, even without the opening of an estate and the appointment of a Personal Representative.

**Given the ambiguity of the amendment and the compliance and liability risks associated with improper disclosure of protected health information, we recommend as a best practice that in any case where a provider receives a request for a decedent's medical record from an individual, the provider not disclose the record without verification of the requesting party's legal right to access the records.**

In the cases where the probate court has entered an Order determining heirs as part of the formal probate of a will, supervised administration of an estate or adjudication of intestacy, health care providers can rely upon this Order for such verification. In the cases where the estate is being informally probated, health care providers can rely

upon the "Testimony – Interested Persons" for such verification.

To obtain such verification in the cases where the decedent has no estate to probate (e.g., his or her assets were held in a trust), however, health care providers could either request that a family member file a petition for the determination of heirs with the probate court (or do so on themselves) or could request that an informal probate estate be opened for the purpose of establishing the decedent's heirs (this procedure would also appoint a Personal Representative for the estate, which may be necessary if the purported Personal Representative is requesting access to the decedent's medical records).

Alternatively, depending upon the particular circumstances, it may be appropriate to simply have the purported heir that has requested the decedent's medical records execute a document attesting that he or she is an heir of the decedent.

Finally, note that a decedent's state of residence will control the determination of heirs. Accordingly, if the decedent is not a resident of Michigan, the health care provider should require some type of determination of heirs be made by a probate court in the decedent's state of residence prior to providing individuals with access to the decedent's medical records.

If the state of Michigan issues any guidance for health care providers with respect to these issues, we will be sure to pass that information along to you. Should you have any questions with regard to the implementation of the provisions of this amendment, please contact a member of the health care law practice group.

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