

**MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN**

Saturday, October 14, 2023

Minutes

I. Commencement (Jim Spica)

A. Call to Order and Welcome

Chair Jim Spica called the meeting to order at 10:30 AM noting that the meeting was being recorded and that the resulting recording is to be deleted once the minutes of the meeting have been submitted by the Secretary and accepted by the Council.

B. Zoom Roll Call

Kenneth Silver, Michael Shelton, Ernschie Augustin, James F. Anderton, V, Joe Viviano, Kathleen Goetsch, Hon. Shauna Dunnings, Kathleen Cieslik, Ponce D. Clay, Marguerite Munson Lentz, and Neal Nusholtz

C. Confirmation of In-Person Attendees

Rebecca Wrock, Christine Savage, David P. Lucas, Nathan Piwowarski, Melisa M.W. Mysliwicz, Katie Lynwood, James P. Spica, Mark E. Kellogg, Richard C. Mills, Patricia Davis, Angela Hentkowski, Daniel Hilker, Alexander S. Mallory, and Andrea Neighbors

D. Excused Absences

Sandra Glazier, Andrew Mayoras, David Sprague, Georgette David, Warren Krueger, and Daniel Borst

E. Unexcused Absences

Susan Chalgian

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates): There was no one from Public Affairs Associates at the meeting to provide a report.

B. Minutes of Prior Council Meeting – September (Nathan Piwowarski) – **Attachment 1**. Chair Jim Spica requested postponement of a motion accepting the

September meeting minutes until the November meeting so that he and others could have time to review them.

C. Chair's Report (Jim Spica) – Jim reported that Kathleen Cieslik has agreed to become the new chair of the Electronic Wills Committee. There is a proposal before the Michigan legislature that is an electronic-acknowledgment statute sponsored by Rep. Fink. It has already been reviewed by the Monitoring Committee and, and Jim has asked that it be further reviewed by the Electronic Wills Committee.

D. Treasurer's Report (Christine Savage)

Chris asked that those who would like to donate to the Hearts and Flowers Fund please send checks payable to Lowe Law Firm, PC. A suggested donation is \$35.00.

III Committee Reports

A. Committee on Special Projects

The CSP completed their review of the legislative proposal of the Nonbanking Entity Trust Powers Ad Hoc Committee. Rick Mills reported on behalf of CSP Chair Melisa Mysliwicz, that CSP recommended that Council adopt a public policy position in favor of the proposed draft of the Michigan Trust Company Act attached as exhibit 1A of the October 14, 2023 CSP agenda and the corresponding amendments to EPIC (as it will be when the Omnibus package of bills passes) and the Qualified Dispositions in Trust Act that are attached to and exhibit 1B of the October 14, 2023 CSP agenda. The motion further authorized the co-chairs of the Nonbanking Entity Trust Powers Ad Hoc Committee to make non-substantive changes to the draft legislation during the legislative process and authorized the Council's secretary to submit a public policy position in favor of any House or Senate bills implementing the proposed Michigan Trust Company Act and the corresponding amendments to EPIC and the Qualified Dispositions in Trust Act without any additional vote by Council. Secretary Rick Mills recorded a vote of 13 Council members in favor and 10 not voting.

B. Amicus Curiae (Mayoras): No report.

C. Annual Meeting (Spica): No report.

- D. Awards (Kellogg): No report.
- E. Budget (Mills): No report.
- F. Bylaws (Lucas): No report. Chair Jim Spica moved that the Council recognize the change in what had been custom, as interpreted by Past Chair David Lucas, that the Council Chair was ex-officio of every committee, to add the Chair-Elect as an ex-officio member of every committee. The motion was supported by David Lucas. A voice vote was taken, after which the Chair declared that the motion had passed.
- G. Charitable and Exempt Organizations (Wrock). Rebecca Wrock reported that the committee has been engaged in discussion as to who should have standing to enforce charitable gifts. The committee comprises trust and estate practitioners, non-profit attorneys, and Brien Heckman from the Attorney General's office. The committee meets every other Friday at 10:00AM if anyone would like to join the committee.
- H. Citizens Outreach (Goetsch): The committee will be meeting once the Omnibus is passed to keep the website current with materials for the public.
- I. Court Rules, Forms, and Proceedings (David): No report.
- J. Electronic Communications (Hentkowski): Angela Hentkowski motioned for the Council to reimburse her for \$158.89 she paid for the Zoom account for the next year, seconded by Jim Spica. A voice vote was taken, after which the Chair declared that the motion had passed.
- K. Ethics and Unauthorized Practice of Law (Mallory): No report.
- L. Guardianship, Conservatorship, and End of Life (Glazier): a written report is attached to the October 14, 2023, meeting materials as attachment 2.
- M. Legislation Development and Drafting (Tiplady/Mills): No report.
- N. Legislation Monitoring and Analysis (Shelton). On behalf of the Legislative Monitoring and Analysis Committee, the Committee chair, Michael D. Shelton, moved that Council adopt the following public policy position: Oppose HB 4654 of 2023.
Explanation:

1. HB 4654 would impose significant financial burdens on State and local government by substantially increasing the volume of litigated matters before the probate courts and appellate courts of this State.
2. HB 4654 would increase litigation, uncertainty, and expense in the probate process.
3. Electronic wills of the type contemplated in this bill are already permissible in Michigan; however, such wills are subject to a heightened standard of probate court review, because of their susceptibility to fraud. See MCL 700.2503. See *In re Estate of Horton*, 325 Mich App 325, 925 NW2d 207 (2018). This bill subverts the reasoned opinion of Michigan’s legislature and the Courts that such wills require additional scrutiny.
4. This bill would recognize any of the following as an e-will: an email, text message, Microsoft Word file, or MS Paint file.
5. This bill does not set standards for signatures to ensure that the testator and witnesses are in fact the people who signed the e-will.
6. This bill’s lack of encryption or audit-trail standards would invite tampering, forgery, and fraud.
7. The bill does not require any evidence that a computer file was actually was a person’s will.
8. The bill does not set technological standards to prevent tampering after an electronic will has been signed. Because the bill does not require that an e-will be “fixed” and un-editable after it is signed, it would call into question whether a document is a draft, a true will, or a codicil (amendment) to a will.
9. The bill does not create procedural requirements to make clear to a person when she or he is creating, amending, or revoking a will.
10. Other states have enacted statutes related to electronic wills that offer better safeguards; there is nothing in this bill requiring them.
11. If enacted, this bill would:
 - a. Impose financial burdens on State and local government, including a likely need for additional probate judges and staff.

- b. Force families to use higher-cost options like “formal probate,” in order to get electronic wills admitted.
- c. Create more litigation over whether a file on a person’s computer or phone was intended to be a will.
- d. Increase the risk that Michiganders’ wills are lost through the accidental file deletion and corruption.
- e. Make legal disputes more expensive, when parties have to use technology experts to resolve whether someone tampered with an electronic will.
- f. Cause a flurry of appellate litigation, since the bill does not specify what makes an electronic will “tamper-evident.” Since the bill does not create that definition, trial and appellate judges will be forced to do so.

The Probate and Estate Planning Section encourages the bill’s sponsor to develop robust standards to protect the public from the litigation, uncertainty, and expense that would arise from this bill. Until those standards have been developed, the Section respectfully opposes House Bill 4654. The secretary recorded a vote of 13 Council members in favor and 10 not voting. The Chair declared that the motion had passed.

- O. Legislative Testimony (Mysliwicz): No report.
- P. Membership (Hentkowski): No report.
- Q. Nominating (Lucas): Mr. Lucas reported that the Nominating Committee will take up its work later in the year. Part of the Nominating Committee’s consideration is participation in meetings and committees of the Council.
- R. Planning (Spica). The Executive Committee in this term of the Council is meeting regularly on the Monday following each Council meeting.
- S. Probate Institute (Piwowarski): The 2024 Institute national speaker is Liz Arias and her topics this year will be drafting to avoid litigation and buy-sell agreements.

- T. Real Estate (Silver): Ken Silver expressed a wish to be relieved of his charge as chair of the committee, Angela Hentkowski expressed a willingness to serve in that capacity; Chair Jim Spica promptly accepted Angela's offer and thanked Ken for his previous service.
- U. State Bar and Section Journals (Mysliwicz): Mr. Mills reported that the committee is working on the winter issue of the journal. He encouraged members to write an article for the Journal.
- V. Tax (Anderton): The report is attachment 3 to the October 14, 2023 meeting materials.
- W. Assisted Reproductive Technology (Welber): No report.
- X. Electronic Wills (Cieslik): The committee will be meeting on October 16, 2023 at 12:00PM if anyone would like to attend the meeting.
- Y. Fiduciary Exception to the Attorney-Client Privilege (Krueger): No report.
- Z. Nonbanking Entity Trust Powers (Spica): Committee co-chair Jim Spica thanked the Council for its formal endorsement (pursuant to the vote described above) of the committee's legislative proposal.
- AA. Premarital Agreements (Savage): The Family Law Section is reviewing the appropriate bills and looking at the Uniform Premarital Agreement Act. The committee will be reconvening and will have a further report at the Council meeting in November.
- BB. Uniform Community Property Disposition at Death Act (Spica): Committee chair Jim Spica reported that a draft legislative proposal is in the works.
- CC. Undue Influence (Silver): There will be a presentation by this committee at the November CSP meeting.
- DD. Uniform Fiduciary Income and Principal Act (Spica): Committee chair Jim Spica reported that the Unitrust Act proposal, HB 5710 (2023) will be before the House Judiciary Committee at a hearing on Wednesday, October 18.
- EE. Uniform Partition of Heirs Property Act (Spica): Committee chair Jim Spica reported that the uniform act has been proposed by Rep. Dievendorf.

- FF. Uniform Power of Attorney Act (Savage). Committee chair Chris Savage reported that she and Jim Spica had provided testimony to the Senate Judiciary Committee, and that the uniform act had since been voted out of that committee.
- GG. Various Issues Involving Death and Divorce (Borst/Blume): Katie Lynwood reported that the committee has met and will provide update at an upcoming Council meeting.
- III. Good of the Order: Nothing forthcoming
- IV. Adjournment of Regular Meeting at 11:51 p.m.

Respectfully Submitted,

Richard C. Mills, Secretary

The next Council meeting will be held on Friday, November 10, 2023.