



PROBATE & ESTATE PLANNING SECTION

Attachment for

Friday, April 19, 2024

Committee on Special Projects

and

Meeting of the Council of the Probate and Estate Planning Section

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

**Probate & Estate Planning Section of the
State Bar of Michigan**

You are invited to the April meetings of the Committee on Special Projects (CSP) and
the Council of the Probate & Estate Planning Section:

Friday, April 19, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.

When: Apr 19, 2024, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZYlcuisrj4tG9z_bSuB_rd5d-qVSxKaAOmS

After registering, you will receive a confirmation email containing information about joining the meeting.

If you are calling in by phone, email your name and phone number to Angela Hentkowski

ahentkowski@stewardsheridan.com, we will put your name in a zoom user list that

will identify you by name when you call in.

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in-person and remote meetings of the Council of the Probate & Estate Planning Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects (CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate Planning Section page of the SBM website. Once those things are posted, you should be able to download them from: <http://connect.michbar.org/probate/events/schedule>.

Richard C. Mills
Section Secretary

SMITH HAUGHEY RICE & ROEGGE
213 S. Ashley St., Ste 400
Ann Arbor, MI 48104
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**Officers of the Council
for 2023-2024 Term**

Office	Officer
Chairperson	James P. Spica
Chairperson Elect	Katie Lynwood
Vice Chairperson	Nathan R. Piwowarski
Secretary	Richard C. Mills
Treasurer	Christine M. Savage

**Council Members
for 2023-2024 Term**

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Glazier, Sandra D.	2021 (1 st term)	2024	Yes
Hentkowski, Angela M.	2021 (2 nd term)	2024	No
Mysliwiec, Melisa M. W.	2021 (2 nd term)	2024	No
Nusholtz, Neal	2021 (2 nd term)	2024	No
Sprague, David	2021 (1 st term)	2024	Yes
Wrock, Rebecca K.	2021 (1 st term)	2024	Yes
Mayoras, Andrew W.	2022 (2 nd term)	2025	No
Silver, Kenneth	2022 (2 nd term)	2025	No
Dunnings, Hon. Shauna L.	2022 (1 st term)	2025	Yes
Chalgian, Susan L.	2022 (1 st term)	2025	Yes
Shelton, Michael D.	2022 (1 st term)	2025	Yes
Borst, Daniel W.	2022 (1 st term)	2025	Yes
Augustin, Ernschie	2023 (1 st term)	2026	Yes
Mallory, Alexander S.	2023 (1 st term)	2026	Yes
Anderton V, James F.	2023 (2 nd term)	2026	No
David, Georgette E.	2023 (2 nd term)	2026	No
Hilker, Daniel	2023 (2 nd term)	2026	No
Krueger III, Warren H.	2023 (2 nd term)	2026	No

Ex Officio Members of the Council

Christopher Ballard; Robert D. Brower, Jr.; Douglas G. Chalgian; Henry M. Grix; Mark K. Harder; Philip E. Harter; Dirk C. Hoffius; Shaheen I. Imami; Robert B. Joslyn; Mark E. Kellogg; Kenneth E. Konop; Marguerite Munson Lentz; Nancy L. Little; James H. LoPrete; Richard C. Lowe; David P. Lucas; John D. Mabley; John H. Martin; Michael J. McClory; Douglas A. Mielock; Amy N. Morrissey; Patricia Gormely Prince; Douglas J. Rasmussen; John A. Scott; David L.J.M. Skidmore; James B. Steward; Thomas F. Sweeney; Fredric A. Sytsma; Marlaine C. Teahan; Lauren M. Underwood; W. Michael Van Haren; Susan S. Westerman; Everett R. Zack

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Standing Committees

Standing Committee	Mission	Chairperson	Members
Amicus Curiae	Review litigants’ applications and Courts’ requests for the Section to sponsor amicus curiae briefs in pending appeals cases relating to probate, and estate and trust planning, and oversee the work of legal counsel retained to prepare and file amicus briefs	Andrew W. Mayoras	Ryan P. Bourjaily Patricia Davis Angela Hentkowski Scott Kraemer Neil J. Marchand Kurt A. Olson David L.J.M. Skidmore Trevor J. Weston Timothy White
Annual meeting	Plan the Section’s Annual Meeting	James P. Spica [as Chair]	[Chair only]
Awards	Periodically make recommendations regarding recipients of the Michael Irish Award, and consult with ICLE regarding periodic induction of members in the George A. Cooney Society	Mark E. Kellogg [as immediate past Chair]	David L.J.M. Skidmore David Lucas [as 2nd and 3rd most recent past Chairs]
Budget	Develop the Section’s annual budget	Richard C. Mills [as immediate past Treasurer]	Christine M. Savage Nathan R. Piwowarski [as incoming Treasurer and immediate past Secretary]
Bylaws	Review the Section’s Bylaws, to ensure compliance with State Bar requirements, to include best practices for State Bar Sections, and to assure conformity to current practices and procedures of the Section and the Council, and make recommendations to the Council regarding such matters	David Lucas	Christopher A. Ballard John Roy Castillo Nancy H. Welber
Charitable and Exempt Organizations	Consider federal and State legislative developments and initiatives in the fields of charitable giving and exempt organizations, and make recommendations to the Council regarding such matters	Rebecca K. Wrock	Celeste E. Arduino Robin Ferriby Brian Heckman Richard C. Mills John McFarland Kate L. Ringler Matt Wiebe
Citizens Outreach	Provide opportunities for education of the public on matters relating to probate, and estate and trust planning	Kathleen M. Goetsch	Ernschie Augustin Kathleen Cieslik David Lucas Hon. Michael J. McClory Neal Nusholtz

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Committee on Special Projects	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Melisa M.W. Mysliwicz	[Committee of the whole]
Court Rules, Forms, & Proceedings	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Georgette E. David	JV Anderton Susan L. Chalgian Hon. Michael L. Jaconette Andrew W. Mayoras Hon. Michael J. McClory Dawn Santamarina Marlaine C. Teahan
Electronic Communications	Oversee all matters relating to electronic and virtual communication matters, and make recommendations to the Council regarding such matters	Angela Hentkowski	Michael G. Lichterman Richard C. Mills [as Secretary]
Ethics & Unauthorized Practice of Law	Consider matters relating to ethics and the unauthorized practice of law with respect to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Alex Mallory	William J. Ard Raymond A. Harris J. David Kerr Neil J. Marchand Robert M. Taylor Amy Rombyer Tripp
Guardianship, Conservatorship, & End of Life Committee	Consider matters relating to Guardianships and Conservatorships, and make recommendations to the Council regarding such matters	Sandra Glazier	William J. Ard Michael W. Bartnik Kimberly Browning Kathleen A. Cieslik Georgette E. David Kathleen M. Goetsch Elizabeth Sue Graziano Raymond A. Harris Hon. Michael L. Jaconette Hon. Michael J. McClory Hon. David M. Murkowski Kurt A. Olson Nathan R. Piwowarski Katie Lynn Ringler Hon. Avery Rose Dawn Santamarina David L.J.M. Skidmore James B. Steward Paul S. Vaidya Karen S. Willard

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Legislation Development and Drafting	Consider matters with respect to statutes relating to probate, and estate and trust legislation, consider the provisions of introduced legislation and legislation anticipated to be introduced with respect to probate, and estate and trust planning, draft proposals for legislation relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Robert P. Tiplady and Richard C. Mills	Aaron A. Bartell Howard H. Collens Georgette David Stephen Dunn Kathleen M. Goetsch Daniel S. Hilker Michael G. Lichterman David P. Lucas Katie Lynwood Alex Mallory Nathan Piwowarski Christine M. Savage James P. Spica David Sprague
Legislation Monitoring & Analysis	Monitor the status of introduced legislation, and legislation anticipated to be introduced, regarding probate, and estate and trust planning, and communicate with the Council and the Legislation Development and Drafting Committee regarding such matters	Michael D. Shelton	Stephen Dunn Brian K. Elder Elizabeth Graziano Daniel S. Hilker Katie Lynwood David Sprague
Legislative Testimony	As requested and as available, the Members of the Section will give testimony to the Legislature regarding legislation relating to probate, and estate and trust planning	Melisa M.W. Mysliwicz [as CSP Chair]	[Various Section Members]
Membership	Strengthen relations with Section members, encourage new membership, and promote awareness of, and participation in, Section activities	Angela Hentkowski	Ernschie Augustin Susan L. Chalgian Kate L. Ringler
Nominating	Nominate candidates to stand for election as the officers of the Section and the members of the Council	David P. Lucas [as most senior immediate past Chair]	David L.J.M Skidmore Mark E. Kellogg [as 1st and 2nd most recent past Chairs]
Planning	Periodically review and update the Section’s Plan of Work	James P. Spica [as Chair]	Katie Lynwood Nathan Piwowarski Richard C. Mills Christine M. Savage Mark E. Kellogg [as Officers and immediate past Chair]

State Bar of Michigan
 Probate and Estate Planning Section
 2023–24 Standing Committees

Probate Institute	Work with ICLE to plan the ICLE Probate and Estate Planning Institute	Nathan Piwowski [as Vice Chair]	[Chair only]
Real Estate	Consider real estate matters relating to probate, and estates and trusts, and make recommendations to the Council regarding such matters	Angela Hentkowski	Carlos Alvarado-Jorquera Jeffrey S. Ammon JV Anderton William J. Ard Leslie A. Butler Patricia Davis J. David Kerr Angela Hentkowski Michael G. Lichterman Melisa M.W. Mysliwicz Christine Savage Michael D. Shelton David Sprague James B. Steward
State Bar & Section Journals	Oversee the publication of the Section’s Journal, and assist in the preparation of periodic theme issues of the State Bar Journal that are dedicated to probate, and estates and trusts	Melisa M.W. Mysliwicz, Managing Editor	Diane Kuhn Huff Nancy L. Little Neil J. Marchand Richard C. Mills Kurt A. Olson Molly P. Petitjean Rebecca K. Wrock
Tax	Consider matters relating to taxation as taxation relates to probate, and estates and trusts, and make recommendations to the Council regarding such matters	JV Anderton	Daniel Borst Jonathan Beer Mark DeLuca Stephen Dunn Robert Labe John McFarland Neal Nusholtz Christine M. Savage

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Standing Committee.

State Bar of Michigan
 Probate and Estate Planning Section

2023–24 Ad Hoc Committees

Ad Hoc Committee	Mission	Chairperson	Members
Assisted Reproductive Technology	Review the 2008 Uniform Probate Code Amendment for possible incorporation into EPIC with emphasis on protecting the rights of children conceived through assisted reproduction, and make recommendations to the Council regarding such matters	Nancy H. Welber	Christopher A. Ballard Edward Goldman Nazneen Hasan Christina Lejowski James P. Spica Lawrence W. Waggoner
Electronic Wills	Review proposals for electronic wills, including the Uniform Law Commission’s draft of a Uniform Law, and make recommendations to the Council regarding such matters	Kathleen Cieslik	Kimberly Browning Georgette David Sandra Glazier Douglas A. Mielock Neal Nusholtz Christine M. Savage James P. Spica David Sprague
Fiduciary Exception to the Attorney-Client Privilege	Consider whether there should be some exception to the rule that beneficiaries of an estate or trust are entitled to production of documents regarding the advice given by an attorney to the fiduciary, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	Aaron A. Bartell Ryan P. Bourjaily
Nonbanking Entity Trust Powers	Consider whether there should be legislation granting trust powers to nonbanking entities, and make recommendations to the Council regarding such matters	James P. Spica and Robert P. Tiplady	JV Anderton Laura L. Brownfield Kathleen Cieslik Elise J. McGee Mark K. Harder Richard C. Mills Carol A. Sewell Joe Viviano
Premarital Agreements	Consider whether there should be legislation regarding marital property agreements, and	Christine M. Savage	Daniel W. Borst Georgette David Stephen Dunn Sandra Glazier Angela Hentkowski David Sprague

Uniform Community Property Disposition at Death Act	Consider the Uniform Community Property Disposition at Death Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Kathleen Cieslik Richard C. Mills Christine M. Savage David Sprague Rebecca Wrock
Undue Influence	Consider the definition of undue influence and attendant evidentiary presumptions, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Sandra Glazier Hon. Michael L. Jaconette Warren H. Krueger, III John Mabley Andrew W. Mayoras Hon. David Murkowski Kurt A. Olson David L.J.M. Skidmore
Uniform Fiduciary Income & Principal Act	Consider the Uniform Fiduciary Income and Principal Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	James P. Spica	Anthony Belloli Kathleen Cieslik Marguerite Munson Lentz Richard C. Mills Robert P. Tiplady Joe Viviano
Uniform Partition of Heirs Property Act	Consider the Uniform Partition of Heirs Property Act promulgated by the Uniform Law Commission and make recommendations to the Council regarding the subject of that Act	James P. Spica	Marguerite Munson Lentz Alex Mallory Elizabeth McLachlan Christine Savage David Sprague Rebecca Wrock
Various Issues Involving Death and Divorce	Should EPIC be changed so that a pending divorce affects priority to serve in a fiduciary position; Should Council explore whether EPIC should be changed so that a pending divorce affects intestacy, elective share, exemptions and allowances, etc. Should "affinity" be defined to prevent elimination of stepchildren's gifts by operation of law after divorce or, instead, should there be an exception allowing gifts to stepchildren on a showing of, Perhaps, clear and convincing evidence demonstrating that the Settlor would not have intended the omission of the stepchild?	Daniel Borst Sean Blume	Georgette David Hon. Shauna Dunning Katie Lynwood Andy Mayoras Elizabeth Siefker

The Probate and Estate Planning Section Chair and Chair Elect are ex-officio Members of each Ad Hoc Committee.

State Bar of Michigan
Probate and Estate Planning Section

2023–24 Liaisons

Association	Liaison
Alternative Dispute Resolution Section	John Hohman
Business Law Section	Mark E. Kellogg
Elder Law and Disability Right Section	Angela Hentkowski
Family Law Section	Anthea E. Papista
Institute of Continuing Legal Education	Lindsey DiCesare and Rachael Sedlacek
Law Schools	Savina Mucci
Michigan Bankers Association	David Sprague
Michigan Legal Help/Michigan Bar Foundation	Kathleen Goetsch
Michigan Probate Judges Association	Hon. Shauna Dunnings
Probate Registers	Ryan J. Buck
Real Property Law Section	Angela Hentkowski
Supreme Court Administrative Office	Georgette E. David
State Bar	Jennifer Hatter
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

The mission of each Liaison is to develop and maintain bilateral communication between his or her association and the Probate and Estate Planning Section of the State Bar of Michigan on matters of mutual interest and concern.

(2022 - 09)

CSP Materials

**MEETING OF THE COMMITTEE ON SPECIAL PROJECTS OF THE
COUNCIL OF THE PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN**

**The Committee on Special Projects, or CSP, is our Section’s
“committee of the whole.” The CSP flexibly studies, in depth, a
limited number of topics and makes recommendations to Council.
All Section members are welcome to participate and are able to vote.**

AGENDA

Friday, April 19, 2024

9:00 AM

In person meeting at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom is available. Register in advance at:

https://us02web.zoom.us/meeting/register/tZYlcuisrj4tG9z_bSuB_rd5d-qVSxKaAOmS

After registering, you will receive a confirmation email containing information about joining the meeting. If you are calling in by phone, please email your name and phone number to Angela Hentkowski at ahentkowski@stewardsheridan.com. We will put your name in a Zoom user list that will identify you by name when you call in.

1. Christine M. Savage – Marital Agreement Ad Hoc Committee – 45 minutes

Re: Uniform Premarital and Marital Agreement Act

The Committee’s Report is attached as Exhibit 1A. The Committee will discuss SB 809, which is the Family Law Section’s version of the Uniform Premarital and Marital Agreements Act, as well as the Committee’s suggested revisions.

The Committee seeks guidance as to whether CSP would recommend that Council support (i) introducing a competing bill, or (ii) opposing the bill introduced by the Family Law Section with suggested revisions.

EXHIBIT 1A

**Marital Agreement
Ad Hoc Committee**

Committee Report

Memo

To: Probate Council

From: Marital Agreement Ad Hoc Committee

Date: April 14, 2024

Subject: Uniform Premarital and Marital Agreement Act

On April 8, 2024, the Family Law Section introduced its version of the Uniform Premarital and Marital Agreements Act ("Act") (SB 809). A copy of SB 809 is at attached Exhibit 1.

The Council's Ad Hoc Premarital and Marital Agreement Committee ("Committee") has reviewed the Act. The Committee made a few changes in an effort to stay consistent with the terms of the Uniform Act. A copy of the Act, with the Committee's revisions redlined, is attached at Exhibit 2.

During the meeting of the Committee on Special Projects, the Committee will discuss the version of the Act introduced by the Family Law Section and our Committee's marked version. Our Committee is seeking guidance as to whether the Probate Council would support (i) introducing a competing bill, or (ii) opposing the bill introduced by the Family Law Section with suggested revisions.

EXHIBIT 1
SB 809

SENATE BILL NO. 809

April 09, 2024, Introduced by Senators SHINK, SANTANA, BAYER, WOJNO and MCMORROW and referred to the Committee on Civil Rights, Judiciary, and Public Safety.

A bill to enact the uniform premarital and marital agreements act; and to determine how and when a premarital or marital agreement is enforced.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act may be cited as the "uniform premarital and
2 marital agreements act".

3 Sec. 2. In this act:

4 (1) "Amendment" means a modification or revocation of a
5 premarital agreement or marital agreement.

6 (2) "Duress" means an incident involving a threat of illegal,

1 humiliating, or unreasonable physical, financial, emotional, or
2 social damage or injury. All of the following factors are relevant
3 in a determination of duress for purposes of this subdivision:

4 (i) A threat of refusal to go forward with a marriage if a
5 premarital agreement is not signed.

6 (ii) The timing of presentment of a premarital agreement in
7 light of the public announcement of an engagement.

8 (iii) The state of wedding plans and expenditures.

9 (iv) The time until the planned wedding date.

10 (3) "Marital agreement" means an agreement between spouses who
11 intend to remain married that affirms, modifies, or waives a
12 marital right or obligation during the marriage or at separation,
13 marital dissolution, death of one of the spouses, or the occurrence
14 or nonoccurrence of any other event. The term includes an
15 amendment, signed after the spouses marry, of a premarital
16 agreement or marital agreement.

17 (4) "Marital dissolution" means the ending of a marriage by
18 court decree. The term includes divorce, dissolution, and
19 annulment.

20 (5) "Marital right or obligation" means any of the following
21 rights or obligations arising between spouses because of their
22 marital status:

23 (A) Spousal support;

24 (B) A right to property, including characterization,
25 management, and ownership;

26 (C) Responsibility for a liability;

27 (D) A right to property and responsibility for liabilities at
28 separation, marital dissolution, or death of a spouse; or

29 (E) Award and allocation of attorney fees and costs.

1 (6) "Premarital agreement" means an agreement between
2 individuals who intend to marry that affirms, modifies, or waives a
3 marital right or obligation during the marriage or at separation,
4 marital dissolution, death of one of the spouses, or the occurrence
5 or nonoccurrence of any other event. The term includes an
6 amendment, signed before the individuals marry, of a premarital
7 agreement.

8 (7) "Property" means anything that may be the subject of
9 ownership, whether real or personal, tangible or intangible, legal
10 or equitable, or any interest therein.

11 (8) "Record" means information that is inscribed on a tangible
12 medium or that is stored in an electronic or other medium and is
13 retrievable in perceivable form.

14 (9) "Sign" means with present intent to authenticate or adopt
15 a record:

16 (A) to execute or adopt a tangible symbol; or

17 (B) to attach to or logically associate with the record an
18 electronic symbol, sound, or process.

19 (10) "State" means a state of the United States, the District
20 of Columbia, Puerto Rico, the United States Virgin Islands, or any
21 territory or insular possession subject to the jurisdiction of the
22 United States.

23 Sec. 3. (a) This act applies to a premarital agreement or
24 marital agreement signed on or after the effective date of this
25 act.

26 (b) This act does not affect any right, obligation, or
27 liability arising under a premarital agreement or marital agreement
28 signed before the effective date of this act.

29 (c) This act does not apply to:

1 (1) an agreement between spouses that affirms, modifies, or
2 waives a marital right or obligation and requires court approval to
3 become effective; or

4 (2) an agreement between spouses who intend to obtain a
5 marital dissolution or court-decreed separation that resolves their
6 marital rights or obligations and is signed when a proceeding for
7 marital dissolution or court-decreed separation is anticipated or
8 pending.

9 (d) This act does not affect adversely the rights of a bona
10 fide purchaser for value to the extent that this act applies to a
11 waiver of a marital right or obligation in a transfer or conveyance
12 of property by a spouse to a third party.

13 Sec. 4. The validity, enforceability, interpretation, and
14 construction of a premarital agreement or marital agreement are
15 determined:

16 (1) by the law of the jurisdiction designated in the agreement
17 if the jurisdiction has a significant relationship to the agreement
18 or either party and the designated law is not contrary to a
19 fundamental public policy of this state; or

20 (2) absent an effective designation described in paragraph
21 (1), by the law of this state, including the choice-of-law rules of
22 this state.

23 Sec. 5. Unless displaced by a provision of this act,
24 principles of law and equity supplement this act, including a
25 court's authority under sections 23(1) and 401 of 1846 RS 84, MCL
26 552.23 and 552.401, but only to the extent necessary to achieve the
27 purposes of the statutes. Imposition of a remedy under either
28 statute does not invalidate the entire marital agreement unless the
29 agreement otherwise fails to meet the requirements of this act.

1 Sec. 6. A premarital agreement or marital agreement must be in
2 a record and signed by both parties. The agreement is enforceable
3 without consideration.

4 Sec. 7. A premarital agreement is effective on marriage. A
5 marital agreement is effective on signing by both parties.

6 Sec. 8. If a marriage is determined to be void, a premarital
7 agreement or marital agreement is enforceable to the extent
8 necessary to avoid an inequitable result.

9 Sec. 9. (a) A premarital agreement or marital agreement is
10 unenforceable if a party against whom enforcement is sought proves:

11 (1) the party's consent to the agreement was involuntary or
12 the result of duress;

13 (2) the party did not have access to independent legal
14 representation under subsection (b);

15 (3) unless the party had independent legal representation at
16 the time the agreement was signed, the agreement did not include a
17 notice of waiver of rights under subsection (c) or an explanation
18 in plain language of the marital rights or obligations being
19 modified or waived by the agreement; or

20 (4) before signing the agreement, the party did not receive
21 adequate financial disclosure under subsection (d).

22 (b) A party has access to independent legal representation if:

23 (1) before signing a premarital or marital agreement, the
24 party has a reasonable time to:

25 (A) decide whether to retain a lawyer to provide independent
26 legal representation; and

27 (B) locate a lawyer to provide independent legal
28 representation, obtain the lawyer's advice, and consider the advice
29 provided; and

1 (2) the other party is represented by a lawyer and the party
2 has the financial ability to retain a lawyer or the other party
3 agrees to pay the reasonable fees and expenses of independent legal
4 representation.

5 (c) A notice of waiver of rights under this section requires
6 language, conspicuously displayed, substantially similar to the
7 following, as applicable to the premarital agreement or marital
8 agreement:

9 "If you sign this agreement, you may be:

10 Giving up your right to be supported by the person you are
11 marrying or to whom you are married.

12 Giving up your right to ownership or control of money and
13 property.

14 Agreeing to pay bills and debts of the person you are marrying
15 or to whom you are married.

16 Giving up your right to money and property if your marriage
17 ends or the person to whom you are married dies.

18 Giving up your right to have your legal fees paid."

19 (d) A party has adequate financial disclosure under this
20 section if the party:

21 (1) receives a reasonably accurate description and good-faith
22 estimate of value of the property, liabilities, and income of the
23 other party;

24 (2) expressly waives, in a separate signed record, the right
25 to financial disclosure beyond the disclosure provided; or

26 (3) has adequate knowledge or a reasonable basis for having
27 adequate knowledge of the information described in paragraph (1).

28 (e) If a premarital agreement or marital agreement modifies or
29 eliminates spousal support and the modification or elimination

1 causes a party to the agreement to be eligible for support under a
2 program of public assistance at the time of separation or marital
3 dissolution, a court, on request of that party, may require the
4 other party to provide support to the extent necessary to avoid
5 that eligibility.

6 (f) A court may refuse to enforce a term of a premarital
7 agreement or marital agreement if, in the context of the agreement
8 taken as a whole:

9 (1) the term was unconscionable at the time of signing; or

10 (2) enforcement of the term would result in substantial
11 hardship for a party because of a material change in circumstances
12 arising after the agreement was signed].

13 (g) The court shall decide a question of unconscionability or
14 substantial hardship under subsection (f) as a matter of law.

15 Sec. 10. (a) In this section, "custodial responsibility" means
16 physical or legal custody, parenting time, access, visitation, or
17 other custodial right or duty with respect to a child.

18 (b) A term in a premarital agreement or marital agreement is
19 not enforceable to the extent that it:

20 (1) adversely affects a child's right to support;

21 (2) limits or restricts a remedy available to a victim of
22 domestic violence under law of this state other than this act;

23 (3) purports to modify the grounds for a court-decreed
24 separation or marital dissolution available under law of this state
25 other than this act; or

26 (4) penalizes a party for initiating a legal proceeding
27 leading to a court-decreed separation or marital dissolution.

28 (c) A term in a premarital agreement or marital agreement that
29 defines the rights or duties of the parties regarding custodial

1 responsibility is not binding on the court.

2 Sec. 11. A statute of limitations applicable to an action
3 asserting a claim for relief under a premarital agreement or
4 marital agreement is tolled during the marriage of the parties to
5 the agreement, but equitable defenses limiting the time for
6 enforcement, including laches and estoppel, are available to either
7 party.

8 Sec. 12. In applying and construing this uniform act,
9 consideration must be given to the need to promote uniformity of
10 the law with respect to its subject matter among states that enact
11 it.

12 Sec. 13. This act modifies, limits, or supersedes the
13 electronic signatures in global and national commerce act, 15 USC
14 section 7001 et seq., but does not modify, limit, or supersede
15 section 101(c) of that act, 15 USC section 7001(c), or authorize
16 electronic delivery of any of the notices described in section
17 103(b) of that act, 15 USC section 7003(b).

18 Sec. 14. This act takes effect 6 months after the effective
19 date of this act.

EXHIBIT 2

Uniform Premarital and Marital Agreement Act with Committee Revisions

1
2
3 **UNIFORM PREMARITAL AND MARITAL**
4 **AGREEMENTS ACT**
5
6

7
8 Drafted by the
9

10
11 NATIONAL CONFERENCE OF COMMISSIONERS
12 ON UNIFORM STATE LAWS
13

14
15 and by it
16

17
18 APPROVED AND RECOMMENDED FOR ENACTMENT
19 IN ALL THE STATES
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21
22
23 at its
24

25
26 ANNUAL CONFERENCE
27 MEETING IN ITS ONE-HUNDRED-AND-TWENTY-FIRST YEAR
28 NASHVILLE, TENNESSEE
29 JULY 13 - JULY 19, 2012
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34 *WITH PREFATORY NOTE AND COMMENTS*
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39 COPYRIGHT © 2012
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41 NATIONAL CONFERENCE OF COMMISSIONERS
42 ON UNIFORM STATE LAWS
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January 2, 2013

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2 **AGREEMENTS ACT**

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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

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**UNIFORM PREMARITAL AND MARITAL AGREEMENTS
ACT**

Prefatory Note

The purpose of this act is to bring clarity and consistency across a range of agreements between spouses and those who are about to become spouses. The focus is on agreements that purport to modify or waive rights that would otherwise arise at the time of the dissolution of the marriage or the death of one of the spouses.

Forty years ago, state courts generally refused to enforce premarital agreements that altered the parties' right at divorce, on the basis that such agreements were attempts to alter the terms of a status (marriage) or because they had the effect of encouraging divorce (at least for the party who would have to pay less in alimony or give up less in the division of property). Over the course of the 1970s and 1980s, nearly every state changed its law, and currently every state allows at least some divorce-focused premarital agreements to be enforced, though the standards for regulating those agreements vary greatly from state to state. The law relating to premarital agreements affecting the parties' rights at the death of a spouse had historically been less hostile than the treatment of such agreements affecting the right of the parties at divorce. The ability of a wife to waive her dower rights goes back to the 16th century English Statute of Uses, 27 Hen. VIII, c. 10, § 6 (1535). Other countries have also moved towards greater legal recognition of premarital agreements and marital agreements, though there remains a great diversity of approaches internationally. *See* Jens M. Scherpe (ed.), *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart Publishing, 2012); *see also* Katharina Boele-Woelki, Jo Miles and Jens M. Scherpe (eds.), *The Future of Family Property in Europe* (Intersentia, 2011).

The Uniform Premarital Agreement Act was promulgated in 1983. Since then it has been adopted by 26 jurisdictions, with roughly half of those jurisdictions making significant amendments, either at the time of enactment or at a later date. *See* Amberlynn Curry, Comment, "The Uniform Premarital Agreement Act and Its Variations throughout the States," 23 *Journal of the American Academy of Matrimonial Lawyers* 355 (2010). Over the years, commentators have offered a variety of criticisms of that Act, many arguing that it was weighted too strongly in favor of enforcement, and was insufficiently protective of vulnerable parties. *E.g.*, Barbara Ann Atwood, "Ten Years Later: Lingerng Concerns About the Uniform Premarital Agreement Act," 19 *Journal of Legislation* 127 (1993); Gail Frommer Brod, "Premarital Agreements and Gender Justice," 9 *Yale Journal of Law & Feminism* 229 (1994); J. Thomas Oldham, "With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades," 19 *Duke Journal of Gender and the Law* 83 (2011). Whatever its faults, the Uniform Premarital Agreement Act has brought some consistency to the legal treatment of premarital agreements, especially as concerns rights at dissolution of marriage.

The situation regarding marital agreements has been far less settled and consistent. Some states have neither case law nor legislation, while the remaining states have created a wide range of approaches. Additionally, other legal standards relating to the waiver of rights at the death of the other spouse, by either premarital agreements or marital agreements, seem to impose somewhat different requirements. *See, e.g.*, *Uniform Probate Code*, Section 2-213; *Restatement*

1 *(Third) of Property*, Section 9.4 (2003); *Model Marital Property Act*, Section 10 (1983); and
2 *Internal Revenue Code*, Sections 401 and 417 (stating when a surviving spouse's waiver of rights
3 to a qualified plan would be valid).

4
5 The general approach of this act is that parties should be free, within broad limits, to
6 choose the financial terms of their marriage. The limits are those of due process in formation, on
7 the one hand, and certain minimal standards of substantive fairness, on the other. Because a
8 significant minority of states authorizes some form of fairness review based on the parties'
9 circumstances at the time the agreement is to be enforced, a bracketed provision in Section 9(f)
10 offers the option of refusing enforcement based on a finding of substantial hardship at the time of
11 enforcement. And because a few states put the burden of proof on the party seeking enforcement
12 of marital (and, more rarely, premarital) agreements, a Legislative Note after Section 9 suggests
13 alternative language to reflect that burden of proof.

14
15 This act chooses to treat premarital agreements and marital agreements under the same
16 set of principles and requirements. A number of states currently treat premarital agreements and
17 marital agreements under different legal standards, with higher burdens on those who wish to
18 enforce marital agreements. *See, e.g.*, Sean Hannon Williams, "Postnuptial Agreements," 2007
19 *Wisconsin Law Review* 827, 838-845; Brian H. Bix, "The *ALI Principles* and Agreements:
20 Seeking a Balance Between Status and Contract," in *Reconceiving the Family: Critical*
21 *Reflections on the American Law Institute's Principles of the Law of Family Dissolution* (Robin
22 Fretwell Wilson, ed., Cambridge University Press, 2006), pp. 372-391, at pp. 382-387; Barbara
23 Atwood, "Marital Contracts and the Meaning of Marriage," 54 *Arizona Law Review* 11 (2012).
24 However, this act follows the American Law Institute, in its *Principles of the Law of Family*
25 *Dissolution* (2002), in treating the two types of agreements under the same set of standards.
26 While this act, like the American Law Institute's *Principles* before it, recognizes that different
27 sorts of risks may predominate in the different transaction types -risks of unfairness based on
28 bounded rationality and changed circumstances for premarital agreements, and risks of duress
29 and undue influence for marital agreements (*Principles of the Law of Family Dissolution*,
30 Section 7.01, comment *e*, at pp. 953-954) -this act shares the American Law Institute's view
31 that the resources available through this act and common law principles are sufficient to deal
32 with the likely problems related to either type of transaction.

1 **UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Premarital and
3 Marital Agreements Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) "Amendment" means a modification or revocation of a premarital agreement or
6 marital agreement.

7 (2) "Marital agreement" means an agreement between spouses who intend to
8 remain married which affirms, modifies, or waives a marital right or obligation during the
9 marriage or at separation, marital dissolution, death of one of the spouses, or the
10 occurrence or nonoccurrence of any other event. The term includes an amendment, signed
11 after the spouses marry, of a premarital agreement or marital agreement.

12 (3) "Marital dissolution" means the ending of a marriage by court decree. The term
13 includes a divorce, dissolution, and annulment.

14 (4) "Marital right or obligation" means any of the following rights or obligations arising
15 between spouses because of their marital status:

16 (A) spousal support;

17 (B) a right to property, including characterization, management, and ownership;

18 (C) responsibility for a liability;

19 (D) a right to property and responsibility for liabilities at separation, marital
20 dissolution, or death of a spouse; or

21 (E) award and allocation of attorney's fees and costs.

22 (5) "Premarital agreement" means an agreement between individuals who intend to marry
23 which affirms, modifies, or waives a marital right or obligation during the marriage or at

1 separation, marital dissolution, death of one of the spouses, or the occurrence or nonoccurrence
2 of any other event. The term includes an amendment, signed before the individuals marry, of a
3 premarital agreement.

4 (6) "Property" means anything that may be the subject of ownership, whether real or
5 personal, tangible or intangible, legal or equitable, or any interest therein.

6 (7) "Record" means information that is inscribed on a tangible medium or that is stored in
7 an electronic or other medium and is retrievable in perceivable form.

8 (8) "Sign" means with present intent to authenticate or adopt a record:

9 (A) to execute or adopt a tangible symbol; or

10 (B) to attach to or logically associate with the record an electronic symbol, sound,
11 or process.

12 (9) "State" means a state of the United States, the District of Columbia, Puerto Rico,
13 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction
14 of the United States.

15 *Legislative Note: If your state recognizes nonmarital relationships, such as civil unions and*
16 *domestic partnerships, consider whether these definitions need to be amended.*

17 **Comment**

18
19
20 The definition of "amendment" includes "amendments" of agreements, narrowly
21 understood, and also revocations.

22
23 The definitions of "premarital agreement" and "marital agreement" are part of the effort
24 to clarify that this act is not intended to cover cohabitation agreements, separation agreements,
25 or conventional day-to-day commercial transactions between spouses. Marital agreements and
26 separation agreements (sometimes called "marital settlement agreements") are usually
27 distinguished based on whether the couple at the time of the agreement intends for their marriage
28 to continue, on the one hand, or whether a court-decreed separation, permanent physical
29 separation or dissolution of the marriage is imminent or planned, on the other. To avoid
30 deception of the other party or the court regarding intentions, one jurisdiction refuses to enforce
31 a marital agreement if it is quickly followed by an action for legal separation or dissolution of
32 the marriage. *See Minnesota Statutes § 519.11, subd. 1a(d)(marital agreement presumed to be*

1 unenforceable if separation or dissolution sought within two years: in such a case, enforcement is
2 allowed only if the spouse seeking enforcement proves that the agreement was fair and
3 equitable).

4
5 While most premarital agreements and marital agreements will be stand-alone
6 documents, a fragment of a writing that deals primarily with other topics could also constitute a
7 premarital agreement or marital agreement for the purpose of this act.

8
9 With premarital agreements, the nature and timing of the agreement (between parties who
10 are about to marry) reduces the danger that the act's language will accidentally include types of
11 transactions that are not thought of as premarital agreements and should not be treated as
12 premarital agreements (but see the discussion of *Mahr* agreements, below). There is a greater
13 concern with marital agreements, since (a) spouses enter many otherwise enforceable financial
14 transactions, most of which are not problematic and should not be made subject to special
15 procedural or substantive constraints; and (b) there are significant questions about how to deal
16 with agreements whose primary intention may not be to waive one spouse's rights at dissolution
17 of the marriage or the other spouse's death, but where the agreement nonetheless has that effect.
18 In the terms of another uniform act, the purpose of the definition of "marital agreement" is to
19 exclude from coverage "acts and events that have significance apart from their effect" upon
20 rights at dissolution of the marriage or at the death of one of the spouses. *See Uniform Probate*
21 *Code*, Section 2-512 ("Events of Independent Significance"). Such transactions might include
22 the creation of joint and several liability through real estate mortgages, motor vehicle financing
23 agreements, joint lines of credit, overdraft protection, loan guaranties, joint income tax returns,
24 creation of joint property ownership with a right of survivorship, joint property with payment-on-
25 death provisions or transfer-on-death provisions, durable power of attorney or medical power of
26 attorney, buy-sell agreements, agreements regarding the valuation of property, the placing of
27 marital property into an irrevocable trust for a child, etc.

28
29 The shorter definition of "premarital agreement" used by the Uniform Premarital
30 Agreement Act (in its Section 1(1): "an agreement between prospective spouses made in
31 contemplation of marriage and to be effective upon marriage") had the disadvantage of
32 encompassing agreements that were entered by couples about to marry but that were not intended
33 to affect the parties' existing legal rights and obligations upon divorce or death, e.g., Islamic
34 marriage contracts, with their deferred *Mahr* payment provisions. See Nathan B. Oman,
35 "Bargaining in the Shadow of God's Law: Islamic *Mahr* Contracts and the Perils of Legal
36 Specialization," 45 *Wake Forest Law Review* 579 (2010); Brian H. Bix, "*Mahr* Agreements:
37 Contracting in the Shadow of Family Law (and Religious Law) -A Comment on Oman," 1
38 *Wake Forest Law Review Online* 61 (2011), available at <http://wakeforestlawreview.com/>.

39 The definition of "property" is adapted from the *Uniform Trust Code*, Section 103(12).

40 This act does not define "separation agreement," leaving this to the understanding, rules,
41 and practices of the states, noting that the practices do vary from state to state (e.g., that in many
42 states separation agreements require judicial approval while in other states they can be valid
43 without judicial approval).

1 A premarital agreement or marital agreement may include terms not in violation of
2 public policy of this state, including terms relating to: (1) rights of either or both spouses to
3 interests in a trust, inheritance, devise, gift, and expectancy created by a third party; (2)
4 appointment of fiduciary, guardian, conservator, personal representative, or agent for person or
5 property; (3) a tax matter; (4) the method for resolving a dispute arising under the agreement;
6 (5) choice of law governing validity, enforceability, interpretation, and construction of the
7 agreement; or (6) formalities required to amend the agreement in addition to those required by
8 this act.

9
10 **SECTION 3. SCOPE.**

11 (a) This [act] applies to a premarital agreement or marital agreement signed on or after
12 [the effective date of this [act]].

13 (b) This [act] does not affect any right, obligation, or liability arising under a premarital
14 agreement or marital agreement signed before [the effective date of this [act]].

15 (c) This [act] does not apply to:

16 (1) an agreement between spouses which affirms, modifies, or waives a marital
17 right or obligation and requires court approval to become effective; or

18 (2) an agreement between spouses who intend to obtain a marital dissolution or
19 court-decreed separation which resolves their marital rights or obligations and is signed when a
20 proceeding for marital dissolution or court-decreed separation is anticipated or pending.

21 (d) This [act] does not affect adversely the rights of a bona fide purchaser for value to the
22 extent that this [act] applies to a waiver of a marital right or obligation in a transfer
23 or conveyance of property by a spouse to a third party.

24
25 **Comment**

26
27 This section distinguishes marital agreements, which are subject to this act, both from
28 agreements that parties might enter at a time when they intend to obtain a divorce or legal
29 separation or to live permanently apart, and also from the conventional transfers of property in
30 which state law requires one or both spouses waive rights that would otherwise accrue at the
31 death of the other spouse.

32
33 Subsection (c) is meant to exclude "separation agreements" and "marital settlement
34 agreements" from the scope of the act. These tend to have their own established standards for

1
2 enforcement. The reference to "a waiver of a marital right or obligation" in Subsection (d)
3 would include the release of dower, curtesy, or homestead rights that often accompanies the
4 conveyance of real property. In general, the enforceability of agreements in Subsections (b), (c)
5 and (d) is left to other law in the state.

6
7 This section is not meant to restrict third-party beneficiary standing where it would
8 otherwise apply.

9
10 **SECTION 4. GOVERNING LAW.** The validity, enforceability, interpretation, and
11 construction of a premarital agreement or marital agreement are determined:

12 (1) by the law of the jurisdiction designated in the agreement if the jurisdiction has a
13 significant relationship to the agreement or either party and the designated law is not contrary to
14 a fundamental public policy of this state; or

15 (2) absent an effective designation described in paragraph (1), by the law of this state,
16 including the choice-of-law rules of this state.

17 **Comment**

18
19 This section is adapted from the *Uniform Trust Code*, Section 107. It is consistent with
20 *Uniform Premarital Agreement Act*, Section 3(a)(7), but is broader in scope. The section reflects
21 traditional conflict of laws and choice of law principles relating to the enforcement of contracts.
22 *See Restatement (Second) of Conflict of Laws*, Sections 186-188(1971). Section 187(2)(a) of
23 that *Restatement* expressly states that the parties' choice of law is not to be enforced if "the
24 chosen state has no substantial relationship to the parties or the transaction and there is no other
25 reasonable basis for the parties' choice" Section 187(2)(b) of the same *Restatement* holds that
26 the parties' choice of law is not to be enforced if "application of the law of the chosen state
27 would be contrary to a fundamental policy of a state which has a materially greater interest than
28 the chosen state in the determination of the particular issue" The limitation of choice of law
29 provisions to jurisdictions having some connection with the parties or the transaction tracks a
30 similar restriction in the *Uniform Commercial Code*, which restricts choice of law provisions to
31 states with a reasonable relation to the transaction (this was Section 1-105 under the UCC before
32 the 2001 revisions; and Section 1-301 in the (2001) Revised UCC Article 1).

33
34 "Significant relation" and "fundamental public policy" are to be understood under
35 existing state principles relating to conflict of laws, and "contrary to ... fundamental public
36 policy" means something more than that the law of the other jurisdiction differs from that of the
37 forum state. *See, e.g., International Hotels Corporation v. Golden*, 15 N.Y.2d 9, 14, 254
38 N.Y.S.2d 527, 530, 203 N.E.2d 210, 212-13 (1964); *Capital One Bank v. Fort*, 255 P.3d 508,
39 510-513 (Or. App. 2011) (court refused to apply law under choice of law provision because

1 contrary to "fundamental public policy" of forum state); Russell J. Weintraub, *Commentary on*
2 *the Conflict of Laws* 118-125 (6th ed., Foundation Press, 2010).

3
4 For examples of choice of law and conflict of law principles operating in this area, see,
5 *e.g.*, *Bradley v. Bradley*, 164 P.3d 537, 540-544 (Wyo. 2007) (premarital agreement had choice
6 of law provision selecting Minnesota law; amendment to agreement held invalid because it did
7 not comply with Minnesota law for modifying agreements); *Gamache v. Smurro*, 904 A.2d 91,
8 95-96 (Vt. 2006) (applying California law to prenuptial agreement signed in California); *Black v.*
9 *Powers*, 628 S.E.2d 546, 553-556 (Va. App. 2006) (Virginia couple drafted agreement in
10 Virginia, but signed it during short stay in the Virgin Islands before their wedding there; the
11 agreement was held to be covered by Virgin Islands law because there was no clear party
12 intention that Virginia law apply and because Virgin Island law was not contrary to the forum
13 state's public policy); *cf Davis v. Miller*, 7 P.3d 1223, 1229-1230 (Kan. 2000) (parties can use
14 choice of law provision to choose the state version of the Uniform Premarital Agreement Act to
15 apply to a marital agreement, even though that Act would otherwise not apply).

16
17 **SECTION 5. PRINCIPLES OF LAW AND EQUITY.** Unless displaced by a
18 provision of this [act], principles of law and equity supplement this [act].

19 **Comment**

20
21 This section is similar to Section 106 of the *Uniform Trust Code* and Section 1-103(b) of
22 the *Uniform Commercial Code*, and incorporates the case-law that has developed to interpret and
23 apply those provisions. Because this act contains broad, amorphous defenses to enforcement like
24 "voluntariness" and "unconscionability" (Section 9), there is a significant risk that parties, and
25 even some courts, might assume that other conventional doctrinal contract law defenses are not
26 available because preempted. This section is intended to make clear that common law contract
27 doctrines and principles of equity continue to apply where this act does not displace them. Thus,
28 it is open to parties, *e.g.*, to resist enforcement of premarital agreements and marital agreements
29 based on legal incompetency, misrepresentation, duress, undue influence, unconscionability,
30 abandonment, waiver, etc. For example, a premarital agreement presented to one of the parties
31 for the first time hours before a marriage (where financial commitments have been made and
32 guests have arrived from far away) clearly raises issues of duress, and might be voidable on that
33 ground. *Cf In re Marriage of Balcof*, 141 Cal.App.4th 1509, 1519-1527, 47 Cal.Rptr.3d 183,
34 190-196 (2006) (marital agreement held unenforceable on the basis of undue influence and
35 duress); *Bakos v. Bakos*, 950 So.2d 1257, 1259 (Fla. App. 2007) (affirming trial court conclusion
36 that premarital agreement was voidable for undue influence).

37
38 The application of doctrines like duress varies greatly from jurisdiction to jurisdiction:
39 *e.g.*, on whether duress can be shown even in the absence of an illegal act, *e.g. Farm Credit*
40 *Services of Michigan's Heartland v. Weldon*, 591 N.W.2d 438, 447 (Mich. App. 1998) (illegal
41 act required for claim of duress under Michigan law), and whether the standard of duress should
42 be applied differently in the context of domestic agreements compared to commercial
43 agreements. This act is not intended to change state law and principles relating to these matters.

1 Rules of construction, including rules of severability of provisions, are also to be taken
2 from state rules and principles. *Cf Rivera v. Rivera*, 243 P.3d 1148, 1155 (N.M. App. 2010),
3 *cert. denied*, 243 P.3d 1146 (N.M. 2010) (premarital agreement that improperly waived the right
4 to alimony and that contained no severability clause deemed invalid in its entirety); *Sanford v.*
5 *Sanford*, 694 N.W.2d 283, 291-294 (S.D. 2005) (applying state principles of severability to
6 conclude that invalid alimony waiver in premarital agreement severable from valid provisions
7 relating to property division); *Bratton v. Bratton*, 136 S.W.3d 595, 602 (Tenn. 2004) (property
8 division provision in marital agreement not severable from provision waiving alimony).
9 Additionally, state rules and principles will govern the ability of parties to include elevated
10 formalities for the revocation or amendment of their agreements.

11
12 **SECTION 6. FORMATION REQUIREMENTS.** A premarital agreement or marital
13 agreement must be in a record and signed by both parties. The agreement is enforceable without
14 consideration.

15 **Comment**

16
17 This section is adapted from *Uniform Premarital Agreement Act*, Section 2. Almost all
18 jurisdictions currently require premarital agreements to be in writing. A small number of courts
19 have indicated that an oral premarital agreement might be enforced based on partial performance,
20 *e.g.*, *In re Marriage of Benson*, 7 Cal. Rptr. 3d 905 (App. 2003), *rev'd*, 36 Cal.4th 1096, 116 P.3d
21 1152 (Cal. 2005) (ultimately holding that the partial performance exception to statute of frauds
22 did not apply to transmutation agreement), and at least one jurisdiction has held that a premarital
23 agreement could be amended or rescinded by actions alone. *Marriage of Baxter*, 911 P.2d 343,
24 345-346 (Or. App. 1996), review denied, 918 P.2d 847 (Or. 1996). One court, in an unpublished
25 opinion, enforced an oral agreement that a written premarital agreement would become void
26 upon the birth of a child to the couple. *Ehlert v. Ehlert*, No. 354292, 1997 WL 53346 (Conn.
27 Super. 1997). While this act affirms the traditional rule that formation, amendment, and
28 revocation of premarital agreements and marital agreements need to be done through signed
29 written documents, states may obviously construe their own equitable doctrines (application
30 through Section 5) to warrant enforcement or modification without a writing in exceptional cases.

31
32 It is the consensus view of jurisdictions and commentators that premarital agreements are
33 or should be enforceable without (additional) consideration (the agreement to marry or the act of
34 marrying is often treated as sufficient consideration). Additionally, most modern approaches to
35 premarital agreements have by-passed the consideration requirement entirely: *e.g.*, *Uniform*
36 *Premarital Agreement Act*, Section 2; American Law Institute, *Principles of the Law of Family*
37 *Dissolution*, Section 7.01(4) (2002); *Restatement (Third) of Property*, Section 9.4(a) (2003).

38
39 In some states, courts have raised concerns relating to the consideration for marital
40 agreements. The view of this act is that marital agreements, otherwise valid, should not be made
41 unenforceable on the basis of lack of consideration. As the American Law Institute wrote on the
42 distinction (not requiring additional consideration for enforcing premarital agreements, but

1 requiring it for marital agreements): "This distinction is not persuasive in the context of a legal
2 regime of no-fault divorce in which either spouse is legally entitled to end the marriage at any
3 time." *Principles of the Law of Family Dissolution*, Section 7.01, Comment c, at 947-948
4 (2002). The consideration doctrine is sometimes used as an indirect way to ensure minimal
5 fairness in the agreement, and the seriousness of the parties. *See, e.g.*, Lon L. Fuller,
6 "Consideration and Form," 41 *Columbia Law Review* 799 (1941). Those concerns for marital
7 agreements are met in this act directly by other provisions. On the conclusion that consideration
8 should not be required for marital agreements, see also *Restatement (Third) of Property*, Section
9 9.4(a) (2003), and *Model Marital Property Act*, Section 10 (1983).

10
11 **SECTION 7. WHEN AGREEMENT EFFECTIVE.** A premarital agreement is
12 effective on marriage. A marital agreement is effective on signing by both parties.

13 **Comment**

14
15 This section is adapted from *Uniform Premarital Agreement Act*, Section 4. The
16 effective date of an agreement (premarital agreement at marriage, marital agreement at signing)
17 does not foreclose the parties from agreeing that certain provisions within the agreement will not
18 go into force until a later time, or will go out of force at that later time. For example, a
19 premarital agreement may grant a spouse additional rights should the marriage last a specified
20 number of years.

21
22 Parties sometimes enter agreements that are part cohabitation agreement and part
23 premarital agreement. This act deals only with the provisions triggered by marriage, without
24 undermining whatever enforceability the cohabitation agreement has during the period of
25 cohabitation.

26
27 **SECTION 8. VOID MARRIAGE.** If a marriage is determined to be void, a premarital
28 agreement or marital agreement is enforceable to the extent necessary to avoid an inequitable
29 result.

30 **Comment**

31
32 This section is adapted from *Uniform Premarital Agreement Act*, Section 7. For example,
33 if John and Joan went through a marriage ceremony, preceded by a premarital agreement, but,
34 unknown to Joan, John was still legally married to Martha, the marriage between John and Joan
35 would be void, and whether their premarital agreement should be enforced would be left to the
36 discretion of the court, taking into account whether enforcement in whole or in part would be
37 required to avoid an inequitable result.

38
39 This section is intended to apply primarily to cases where a marriage is void due to the
40 pre-existing marriage of one of the partners. Situations where one partner is seeking a civil
41 annulment (see Section 2(3)) relating to some claims of misrepresentation or mutual mistake

1 would usually be better left to the main enforcement provisions of Sections 9 and 10.

2 **SECTION 9. ENFORCEMENT.**

3 (a) A premarital agreement or marital agreement is unenforceable if a party against whom
4 enforcement is sought proves:

5 (1) the party's consent to the agreement was involuntary or the result of duress;

6 (2) the party did not have access to independent legal representation under
7 subsection (b);

8 (3) unless the party had independent legal representation at the time the agreement
9 was signed, the agreement did not include a notice of waiver of rights under subsection (c) or an
10 explanation in plain language of the marital rights or obligations being modified or waived by
11 the agreement; or

12 (4) before signing the agreement, the party did not receive adequate financial
13 disclosure under subsection (d).

14 (b) A party has access to independent legal representation if:

15 (1) before signing a premarital or marital agreement, the party has a reasonable
16 time to:

17 (A) decide whether to retain a lawyer to provide independent legal
18 representation; and

19 (B) locate a lawyer to provide independent legal representation, obtain the
20 lawyer's advice, and consider the advice provided; and

21 (2) the other party is represented by a lawyer and the party has the financial
22 ability to retain a lawyer or the other party agrees to pay the reasonable fees and expenses of
23 independent legal representation.

1 (c) A notice of waiver of rights under this section requires language,
2 conspicuously displayed, substantially similar to the following, as applicable to the
3 premarital agreement or marital agreement:

4 "If you sign this agreement, you may be:

5 Giving up your right to be supported by the person you are marrying or to
6 whom you are married.

7 Giving up your right to ownership or control of money and property.

8 Agreeing to pay bills and debts of the person you are marrying or to whom you
9 are married.

10 Giving up your right to money and property if your marriage ends or the
11 person to whom you are married dies.

12 Giving up your right to have your legal fees paid."

13 (d) A party has adequate financial disclosure under this section if the party:

14 (1) receives a reasonably accurate description and good-faith estimate of
15 value of the property, liabilities, and income of the other party;

16 (2) expressly waives, in a separate signed record, the right to financial
17 disclosure beyond the disclosure provided; or

18 (3) has adequate knowledge or a reasonable basis for having adequate
19 knowledge of the information described in paragraph (1).

20 (e) If a premarital agreement or marital agreement modifies or eliminates spousal
21 support and the modification or elimination causes a party to the agreement to be eligible for
22 support under a program of public assistance at the time of separation or marital dissolution,
23 a court, on request of that party, may require the other party to provide support to the extent
24 necessary to

1 avoid that eligibility.

2 (f) A court may refuse to enforce a term of a premarital agreement or marital
3 agreement if, in the context of the agreement taken as a whole~~;~~

4 ~~(1) the term was unconscionable at the time of signing or the time of~~
5 ~~enforcement;~~ or

6 (2) enforcement of the term would result in substantial hardship for a party
7 because of a material change in circumstances arising after the agreement was signed}.

8 (g) The court shall decide a question of unconscionability [or substantial hardship]
9 under subsection (f) as a matter of law.

10 *Legislative Note: Section 9(a) places the burden of proof on the party challenging a*
11 *premarital agreement or a marital agreement. Amendments are required if your state wants to*
12 *(1) differentiate between the two categories of agreements and place the burden of proof on a*
13 *party seeking to enforce a marital agreement, or (2) place the burden of proof on a party*
14 *seeking to enforce either a premarital agreement or marital agreement.*

15 *If your state wants to permit review for "substantial hardship" caused by a premarital*
16 *agreement or marital agreement at the time of enforcement, Section 9(/), including the bracketed*
17 *language, should be enacted.*

18
19 **Comment**

20
21 This section is adapted from *Uniform Premarital Agreement Act*, Section 6. While this
22 section gives a number of defenses to the enforcement of premarital agreements and marital
23 agreements, other defenses grounded in the principles of law and equity also are available. See
24 Section 5.

25
26 The use of the phrase "involuntary or the result of duress" in Subsection (a)(1) is not
27 meant to change the law. There is significant and quite divergent caselaw that has developed
28 under the "voluntariness" standard of the Uniform Premarital Agreement Act and related law –
29 *e.g., compare Marriage of Bernard*, 204 P.3d 907, 910-913 (Wash. 2009) (finding agreement
30 "involuntary" when significantly revised version of premarital agreement was presented three
31 days before the wedding) *and Peters-Riemers v. Riemers*, 644 N.W.2d 197, 205-207 (N.D.
32 2002) (agreement presented three days before wedding found to be "involuntary"; court also
33 emphasized absence of independent counsel and adequate financial disclosure) *with Brown v.*
34 *Brown*, No. 2050748, 19 So.3d 920 (Table) (Ala. App. 2007) (agreement presented day before
35 wedding; court held assent to be "voluntary"), *aff'd sub. nom Ex parte Brown*, 26 So.3d 1222,
36 1225-1228 (Ala. 2009) *and Binek v. Binek*, 673 N.W.2d 594, 597-598 (N.D. 2004) (agreement
37 sufficiently "voluntary" to be enforceable despite being presented two days before the wedding);
38 *see also Mamot v. Mamot*, 813 N.W.2d 440, 447 (Neb. 2012) (summarizing five-factor test
39 many

1 courts use to evaluate "voluntariness" under the UPAA); *see generally* Judith T. Younger,
2 "Lovers' Contracts in the Courts: Forsaking the Minimal Decencies," 13 *William & Mary*
3 *Journal of Women and the Law* 349, 359-400 (2007) (summarizing the divergent interpretations
4 of "voluntary" and related concepts under the UPAA); Oldham, "With All My Worldly Goods,"
5 *supra*, at 88-99 (same). This act is not intended either to endorse or override any of those
6 decisions. One factor that courts should certainly consider: the presence of domestic violence
7 would be of obvious relevance to any conclusion about whether a party's consent to an
8 agreement was "involuntary or the result of duress."
9

10 The requirement of "access to independent counsel" in Subsections (a)(2) and (b)
11 represents the view that representation by independent counsel is crucial for a party waiving
12 important legal rights. The act stops short of requiring representation for an agreement to be
13 enforceable, *cf. California Family Code* § 1612(c) (restrictions on spousal support allowed only
14 if the party waiving rights consulted with independent counsel); *California Probate Code* §
15 143(a) (waiver of rights at death of other spouse unenforceable unless the party waiving was
16 represented by independent counsel); *Ware v. Ware*, 687 S.E.2d 382, 387-391 (W. Va. 2009)
17 (*access* to independent counsel required, and *presumption of validity* for premarital agreement
18 available only where party challenging the agreement actually consulted with independent
19 counsel). When a party has an obligation to make funds available for the other party to retain a
20 lawyer, under Subsection (b)(2), this refers to the cost of a lawyer competent in this area of law,
21 not necessarily the funds needed to retain as good or as many lawyers as the first party may
22 have.
23

24 The notice of waiver of rights of Subsections (a)(3) and (c) is adapted from the
25 *Restatement (Third) of Property*, Section 9.4(c)(3) (2003), and it is also similar in purpose to
26 *California Family Code* §1615(c)(3). It creates a safe harbor when dealing with unrepresented
27 parties by use of the applicable designated warning language of Subsection (c), or language
28 substantially similar, but also allows enforcement where there has been an explanation in plain
29 language of the rights and duties being modified or waived by the agreement.
30

31 The requirement of reasonable financial disclosure of Subsection (a)(4) and (d) pertains
32 only to assets of which the party knows or reasonably should know. There will be occasions
33 where the valuation of an asset can only be approximate, or may be entirely unknown, and this
34 can and should be noted as part of a reasonable disclosure. Disclosure will qualify as
35 "reasonably accurate" even if a value is approximate or difficult to determine, and even if there
36 are minor inaccuracies. As the Connecticut Supreme Court stated, after reviewing cases from
37 many jurisdictions on the comparable standard of "fair and reasonable disclosure," "[t]he
38 overwhelming majority of jurisdictions that apply this standard do not require financial
39 disclosure to be exact or precise. ... [The standard] requires each contracting party to provide the
40 other with a general approximation of their income, assets and liabilities" *Friezo v. Friezo*,
41 914 A.2d 533, 549, 550 (Conn. 2007). Under Subsection (d)(1), an estimate of value of
42 property, liabilities, and income made in good faith would satisfy this act even if it were later
43 found to be inaccurate.
44

45 Some commentators have urged that a waiver of the right of financial disclosure (or the
46 right of financial disclosure beyond what has already been disclosed) be valid only if the waiver
47 were signed after receiving legal advice. The argument is that it is too easy to persuade an

1 unrepresented party to sign or initial a waiver provision, and that the party waiving that right
2 would then likely be ignorant of the magnitude of what was being given up. Even when notified
3 in the abstract of the rights being given up, it would make a great deal of difference if the party
4 thinks that what was being given up was a claim to a portion of \$80,000, when in fact what was
5 being given up was a claim to a portion of \$80,000,000. However, this act follows the current
6 consensus among the states in not requiring legal representation for a waiver. One reason for not
7 requiring legal advice is that this might effectively require legal representation for all premarital
8 agreements and marital agreements. Under a requirement of legal representation, parties
9 entering agreements might reasonably worry that even if there were significant disclosure, it
10 would always be open to the other party at the time of enforcement to challenge the agreement on
11 the basis that the disclosure was not sufficient, and that any waiver of disclosure beyond the
12 amount given was invalid because of a lack of legal representation. In general, there was a
13 concern that a requirement of legal representation would create an invitation to strategic behavior
14 and unnecessary litigation.

15
16 "Conspicuously displayed" in Subsection (c) follows the language and standard of
17 Uniform Commercial Code § 1-201(10), and incorporates the case-law regarding what counts as
18 "conspicuous."
19

20 Reference in Subsection (d)(3) to "adequate knowledge" includes at least approximate
21 knowledge of the value of the property, liabilities, and income in question.
22

23 Subsection (e) as adapted from the *Uniform Premarital Agreement Act*, Section 6(b).
24 Other jurisdictions have in the past chosen even more significant protections for vulnerable
25 parties. See, e.g., *NM Stat. § 40-3A-4(B)* (premarital agreement may not affect spouse's right
26 to support); *Matter of Estate of Spurgeon*, 572 N.W.2d 595, 599 (Iowa 1998) (widow's spousal
27 allowance could be awarded, even in the face of express provision in premarital agreement
28 waiving that right); *In re Estate of Thompson*, No. 11-0940, 812 N.W.2d 726 (Table), 2012 WL
29 469985 (Iowa App. 2012) (same); *Hall v. Hall*, 4 So.3d 254, 256-257 (La. App. 2009), writ
30 denied, 9 So.3d 166 (La. 2009) (waiver of interim support in premarital agreement
31 unenforceable as contrary to public policy). This act attempts to give vulnerable parties
32 significant procedural and substantive protections (protections far beyond what was given in the
33 original *Uniform Premarital Agreement Act*), while maintaining an appropriate balance between
34 such protection and freedom of contract.
35

36 The reference in Subsection (f) to the unconscionability of (or substantial hardship caused
37 by) a term is meant to allow a court to strike particular provisions of the agreement while
38 enforcing the remainder of the agreement – consistent with the normal principles of severability
39 in that state (see Section 5 and its commentary). However, this language is not meant to prevent
40 a court from concluding that the agreement was unconscionable as a whole, and to refuse
41 enforcement to the entire agreement.
42

43 Subsection (f) includes a bracketed provision for states that wish to include a "second
44 look," considering the fairness of enforcing an agreement relative to the time of enforcement.
45 The suggested standard is one of whether "enforcement of the term would result in substantial
46 hardship for a party because of a material change in circumstances arising after the agreement

1 was signed." This language broadly reflects the standard applied in a number of states. *E.g.*,
2 *Connecticut Code* §46b-36g(2) (whether premarital agreement was "unconscionable . . . when
3 enforcement is sought"); *New Jersey Statutes* § 37:2-38(b) (whether premarital agreements was
4 "unconscionable at the time enforcement is sought"); *North Dakota Code* § 14-03.1-07
5 ("enforcement of a premarital agreement would be clearly unconscionable"); *Ansin v. Craven-*
6 *Ansin*, 929 N.E.2d 955, 964 (Mass. 2010) ("the terms of the [marital] agreement are fair and
7 reasonable ... at the time of divorce"); *Bedrick v. Bedrick*, 17 A.3d 17, 27 (Conn. 2011) ("the
8 terms of the [marital] agreement are . . . not unconscionable at the time of dissolution").
9 However, it should be noted that even in such "second look" states, case law invalidating
10 premarital agreements and marital agreements at the time of enforcement almost universally
11 concerns rights at divorce. There is little case law invalidating waivers of rights arising at the
12 death of the other spouse grounded on the unfairness at the time of enforcement.

13
14 Among the states that allow challenges based on the circumstances at the time of
15 enforcement, the terminology and the application vary greatly from state to state. Courts
16 characterize the inquiry differently, referring variously to "fairness," "hardship," "undue
17 burden," "substantial injustice" (the term used by the American Law Institute's *Principles of the*
18 *Law of Family Dissolution* § 7.05 (2002)), or just "unconscionability" at the time of
19 enforcement. In determining whether to enforce the agreement or not under this sort of review,
20 courts generally look to a variety of factors, including the duration of the marriage, the purpose
21 of the agreement, the current income and earning capacity of the parties, the parties' current
22 obligations to children of the marriage and children from prior marriages, the age and health of
23 the parties, the parties' standard of living during the marriage, each party's financial and home-
24 making contributions during the marriage, and the disparity between what the parties would
25 receive under the agreement and what they would likely have received under state law in the
26 absence of an agreement. See Brett R. Turner & Laura W. Morgan, *Attacking and Defending*
27 *Marital Agreements* (2nd ed., ABA Section of Family Law, 2012), p. 417. The American Law
28 Institute argued that courts generally were (and should be) more receptive to claims when the
29 marriage had lasted a long time, children had been born to or adopted by the couple, or there
30 had been "a change of circumstances that has a substantial impact on the parties ... [and that]
31 the parties probably did not anticipate either the change, or its impact" at the time the agreement
32 was signed. American Law Institute, *Principles of the Law of Family Dissolution* § 7.05(2)
33 (2002). One court listed the type of circumstances under which enforcement might be refused as
34 including: "an extreme health problem requiring considerable care and expense; change in
35 employability of the spouse; additional burdens placed upon a spouse by way of responsibility
36 to children of the parties; marked changes in the cost of providing the necessary maintenance of
37 the spouse; and changed circumstance of the standards of living occasioned by the marriage,
38 where a return to the prior living standard would work a hardship upon a spouse." *Gross v.*
39 *Gross*, 464 N.E.2d 500, 509-510 n.11 (Ohio 1984).

40
41 Subsection (g) characterizes questions of unconscionability (or substantial hardship) as
42 questions of law for the court. This follows the treatment of unconscionability in conventional
43 commercial contracts. See *UCC* § 2-302(1) & Comment 3; *Restatement (Second) of Contracts* §
44 208, comment f (1981). This subsection is not intended to establish or modify the standards of
45 review under which such conclusions are considered on appeal under state law.

1 Waiver or modification of claims relating to a spouse's pension is subject to the
2 constraints of applicable state and federal law, including ERISA (Employee Retirement Income
3 Security Act of 1974, 29 U.S.C. 1001 *et seq.*). *See, e.g., Robins v. Geisel*, 666 F.Supp.2d 463,
4 467-468 (D. N.J. 2009) (wife's premarital agreement waiving her right to any of her husband's
5 separate property did not qualify as a waiver of her spousal rights as beneficiary under ERISA);
6 *Strong v. Dubin*, 901 N.Y.S.2d 214, 217-220 (N.Y. App. Div. 2010) (waiver in premarital
7 agreement conforms with ERISA waiver requirement and is enforceable).

8
9 In contrast to the approach of the act, some jurisdictions put the burden of proof on the
10 party seeking enforcement of an agreement. *See, e.g., Randolph v. Randolph*, 937 S.W.2d 815,
11 820-821 (Tenn. 1996) (party seeking to enforce premarital agreement had burden of showing, in
12 general, that other party entered agreement "knowledgeably": in particular, that a full and fair
13 disclosure of assets was given or that it was not necessary due to the other party's independent
14 knowledge); *Stancil v. Stancil*, No. E2011-00099-COA-R3-CV, 2012 WL 112600 (Tenn. Ct.
15 App., Jan. 13, 2012) (same); *In re Estate of Cassidy*, 356 S.W.3d 339, 345 (Mo. App. 2011)
16 (parties seeking to enforce waivers of rights at the death of the other spouse have the burden of
17 proving that procedural and substantive requirements were met). The Legislative Note directs a
18 state to amend Subsection (a) appropriately if the state wants to place the burden of proof on the
19 party seeking enforcement of a marital agreement, a premarital agreement, or both. In those
20 jurisdictions, Subsection (a) should provide that the agreement is unenforceable unless the party
21 seeking to enforce the agreement proves each of the required elements.

22
23 Many jurisdictions impose greater scrutiny or higher procedural safeguards for marital
24 agreements as compared to premarital agreements. *See, e.g., Ansin v. Craven-Ansin*, 929 N.E.2d
25 955, 961-964 (Mass. 2010); *Redrick v. Redrick*, 17 A.3d 17, 23-25 (Conn. 2011). Those
26 jurisdictions view agreements in the midst of marriage as being especially at risk of coercion
27 (the analogue of a "hold up" in a commercial arrangement) or overreaching. Additionally, these
28 conclusions are sometimes based on the view that parties already married are in a fiduciary
29 relationship in a way that parties about to marry, and considering a premarital agreement, are not.
30 Linda J. Ravdin, *Premarital Agreements: Drafting and Negotiation* (American Bar Association,
31 2011), pp. 16-18. Also, some jurisdictions have distinguished "reconciliation agreements"
32 entered during marriage with other marital agreements, giving more favorable treatment to
33 reconciliation agreements. *See, e.g., Bratton v. Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004)
34 (summarizing the prior law in Tennessee under which reconciliation agreements were
35 enforceable but other marital agreements were void). Many other jurisdictions and The
36 American Law Institute (in its *Principles of the Law of Family Dissolution*, Section 7.01(3) &
37 Comment *b* (2002)) treat marital agreements under the same standards as premarital agreements.
38 This is the approach adopted by this act.

39 40 **SECTION 10. UNENFORCEABLE TERMS.**

41 (a) In this section, "custodial responsibility" means physical or legal custody, parenting
42 time, access, visitation, or other custodial right or duty with respect to a child.

43 (b) A term in a premarital agreement or marital agreement is not enforceable to the extent

1 that it:

2 (1) adversely affects a child's right to support;

3 (2) limits or restricts a remedy available to a victim of domestic violence

4 under law of this state other than this [act];

5 (3) purports to modify the grounds for a court-decreed separation or

6 marital dissolution available under law of this state other than this [act]; or

7 (4) penalizes a party for initiating a legal proceeding leading to a court-

8 decreed separation or marital dissolution.

9 (c) A term in a premarital agreement or marital agreement which defines the rights or

10 duties of the parties regarding custodial responsibility is not binding on the court.

11 *Legislative Note: A state may vary the terminology of "custodial responsibility" to reflect the*
12 *terminology used in the law of this state other than this act.*

13

14

Comment

15

16

This section lists provisions that are not binding on a court (this contrasts with the agreements mentioned in Section 3, where the point was to distinguish agreements whose regulation fell outside this act). They include some provisions (*e.g.*, regarding the parents' preferences regarding custodial responsibility) that, even though not binding on a court, a court might consider by way of guidance.

20

21

22

There is a long-standing consensus that premarital agreements may not bind a court on matters relating to children: agreements cannot determine custody or visitation, and cannot limit the amount of child support (though an agreed *increase* of child support may be enforceable). *E.g.*, In re *Marriage of Best*, 901 N.E.2d 967, 970 (Ill. App. 2009) ("Premarital agreements limiting child support are ... improper"), appeal denied, 910 N.E.2d 1126 (Ill. 2009); *cf Pursley Pursley*, 144 S.W.3d 820, 823-826 (Ky. 2004) (agreement by parties in a separation agreement to child support well in excess of guideline amounts is enforceable; it is not unconscionable or contrary to public policy). The basic point is that parents and prospective parents do not have the power to waive the rights of third parties (their current or future children), and do not have the power to remove the jurisdiction or duty of the courts to protect the best interests of minor children. Subsection (b)(1) applies also to step-children, to whatever extent the state imposes child-support obligation on step-parents.

34

35

There is a general consensus in the caselaw that courts will not enforce premarital agreement provisions relating to topics beyond the parties' financial obligations *inter se*. And

36

1 while some courts have refused to enforce provisions in premarital agreements and marital
2 agreements that regulate (or attach financial penalties to) conduct during the marriage, *e.g.*,
3 *Diosdado v. Diosdado*, 118 Cal. Rptr.2d 494, 496-497 (Cal. App. 2002) (refusing to enforce
4 provision in agreement imposing financial penalty for infidelity); *In re Marriage of Mehren &*
5 *Dargan*, 118 Cal.App.4th 1167, 13 Cal.Rptr.3d 522 (Cal. App. 2004) (refusing to enforce
6 provision that penalized husband's drug use by transfer of property); *see also* Brett R. Turner and
7 Laura W. Morgan, *Attacking and Defending Marital Agreements* 379 (2nd ed., ABA Section on
8 Family Law, 2012) ("It has been generally held that antenuptial agreements attempting to set the
9 terms of behavior during the marriage are not enforceable" (footnote omitted)), this act does not
10 expressly deal with such provisions, in part because a few courts have chosen to enforce
11 premarital agreements relating to one type of marital conduct: parties' cooperating in obtaining
12 religious divorces or agreeing to appear before a religious arbitration board. *E.g.*, *Avitzur v.*
13 *Avitzur*, 446 N.E.2d 136, 138-139 (N.Y. 1983) (holding enforceable religious premarital
14 agreement term requiring parties to appear before religious tribunal and accept its decision
15 regarding a religious divorce). Also, while there appear to be scattered cases in the distinctly
16 different context of separation agreements where a court has enforced the parties' agreement to
17 avoid fault grounds for divorce, *e.g.*, *Massar v. Massar*, 652 A.2d 219, 221-223 (N.J. App. Div.
18 1994); *cf Eason v. Eason*, 682 S.E.2d 804, 806-808 (S.C. 2009) (agreement not to use adultery
19 as defense to alimony claim enforceable); *see generally* Linda J. Ravdin, *Premarital Agreements:*
20 *Drafting and Negotiation* (ABA, 2011), p. 111 ("In some fault states, courts may enforce a
21 provision [in a premarital agreement] that waives fault"), there appears to be no case law
22 enforcing an agreement to avoid *no-fault grounds*. This act follows the position of the American
23 Law Institute (*Principles of the Law of Family Dissolution*, Section 7.08(1) (2002)), that
24 agreements affecting divorce grounds in any way should not be enforceable.

25
26 It is common to include escalator clauses and sunset provision in premarital agreements
27 and marital agreements, making parties' property rights vary with the length of the marriage. *Cf*
28 *Peterson v. Sykes-Peterson*, 37 A.3d 173, 177-178 (Conn. App. 2012), cert. denied, 42 A.3d 390
29 (Conn. 2012) (rejecting argument that sunset provision in premarital agreement is unenforceable
30 because contrary to public policy). Subsection (b)(4), which makes provisions unenforceable
31 that penalize one party's initiating an action that leads to the dissolution of a marriage, does not
32 cover such escalator clauses. Additionally, nothing in this provision is intended to affect the
33 rights of parties who enter valid covenant marriages in states that make that alternative form of
34 marriage available.

35
36 Section 10 does not purport to list all the types of provisions that are unenforceable.
37 Other provisions which are contrary to public policy would also be unenforceable. See Section
38 5.

39 SECTION 11. LIMITATION OF ACTION. A statute of limitations applicable to an
40 action asserting a claim for relief under a premarital agreement or marital agreement is tolled
41 during the marriage of the parties to the agreement, but equitable defenses limiting the time for
42 enforcement, including laches and estoppel, are available to either party.

1 **Comment**

2
3 This Section is adapted from *Uniform Premarital Agreement Act*, Section 8. As the
4 Comment to that Section stated: "In order to avoid the potentially disruptive effect of
5 compelling litigation between the spouses in order to escape the running of an applicable statute
6 of limitations, Section 8 tolls any applicable statute during the marriage of the parties
7 However, a party is not completely free to sit on his or her rights because the section does
8 preserve certain equitable defenses."
9

10 **SECTION 12. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

11 applying and construing this uniform act, consideration must be given to the need to promote
12 uniformity of the law with respect to its subject matter among states that enact it.

13 **SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**

14 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
15 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
16 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
17 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section
18 7003(b).

19 **[SECTION 14. REPEALS; CONFORMING AMENDMENTS.**

20 (a) [Uniform Premarital Agreement Act] is repealed.

21 (b) [Uniform Probate Code Section 2-213 (Waiver of Right to Elect and of Other Rights)]
22 is repealed.

23 (c) [. . .]

24 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect ...

Council Materials

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

Friday, April 19, 2024

Regular Meeting Agenda

- I. Commencement (Jim Spica)
 - A. Call to Order and Welcome
 - B. Zoom Roll Call
 - C. Confirmation of In-Person Attendees
 - D. Excused Absences

- II. Monthly Reports
 - A. Lobbyist's Report (Public Affairs Associates)
 - B. Minutes of Prior Council Meetings (Rick Mills) – **Attachment 1**
 - C. Report of Electronic Motions (Rick Mills)
 - 1. Support for the Institute for Continuing Legal Education (**Attachment 2**)
 - 2. Public Policy Position in Opposition to Proposed Treasury Anti-Money Laundering Regulation (**Attachment 3**)
 - C. Chair's Report (Jim Spica)
 - D. Chair-Elect's Report (Katie Lynwood)
 - E. Treasurer's Report (Christine Savage) – **Attachment 4**

- III. Committee Reports
 - A. Committee on Special Projects (Mysliwicz)
 - B. Amicus Curiae (Mayoras) – **Attachment 5**
 - C. Annual Meeting (Spica)
 - D. Awards (Kellogg)
 - E. Budget (Mills)
 - F. Bylaws (Lucas)
 - G. Charitable and Exempt Organizations (Wrock)
 - H. Citizens Outreach (Goetsch)
 - I. Court Rules, Forms, and Proceedings (David)

- J. Electronic Communications (Hentkowski)
 - K. Ethics and Unauthorized Practice of Law (Mallory)
 - L. Guardianship, Conservatorship, and End of Life (Glazier)
 - M. Legislation Development and Drafting (Tiplady and Mills)
 - N. Legislation Monitoring and Analysis (Shelton)
 - O. Legislative Testimony (Mysliwicz)
 - P. Membership (Hentkowski)
 - Q. Nominating (Lucas)
 - R. Planning (Spica)
 - S. Probate Institute (Piwowarski)
 - T. Real Estate (Hentkowski)
 - U. State Bar and Section Journals (Mysliwicz)
 - V. Tax (Anderton)
 - W. Assisted Reproductive Technology (Welber)
 - X. Electronic Wills (Cieslik)
 - Y. Fiduciary Exception to the Attorney-Client Privilege (Krueger)
 - Z. Nonbanking Entity Trust Powers (Spica and Tiplady)
 - AA. Premarital Agreements (Savage)
 - BB. Uniform Community Property Disposition at Death Act (Spica)
 - CC. Undue Influence (Silver)
 - DD. Uniform Fiduciary Income and Principal Act (Spica)
 - EE. Uniform Partition of Heirs Property Act (Spica)
 - GG. Various Issues Involving Death and Divorce (Borst and Blume)
- IV. Good of the Order
 - V. Adjournment of Regular Meeting

Departments (Time Permitting): Legal Literature (Jim Spica)

Roundtable (Time Permitting)

Reminder: The next Probate & Estate Planning Council meeting will be Friday, June 14, 2024 at the **University Club of Michigan State University, 3435 Forest Road, Lansing, Michigan**

48910. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM.

ATTACHMENT 1

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

Friday, March 15, 2024

Minutes

I. Commencement (Jim Spica)

A. Call to Order and Welcome

Chairperson Spica called the meeting to order at 10:20 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

Angela Hentkowski, Christine Savage, Kathleen Cieslik, Sandra Glazier, Melisa M.W. Mysliwiec, Hon. Michael McClory, Sara Nicholson, David P. Lucas, Marguerite Lentz, David Lentz, Elizabeth Siefker, Gabriel Lively, Julie McCowan, Lindsey DiCesare (ICLE), Ponce D. Clay, Patricia Davis, Daniel W. Borst, Michael Shelton, Rachael Sedlacek (ICLE), Neal Nusholtz, Nathan Piwowarski, Rebecca Bechler (Public Affairs Associates), Kenneth Silver, Georgette David, Warren Krueger, Mark E. Kellogg, James Steward, and Andrea Neighbors (administrative assistant)

C. Confirmation of In-Person Attendees

James P. Spica, Katie Lynwood, Richard C. Mills, Ernschie Augustin, Daniel Hilker, David Sprague, Susan L. Chalgian, Michael Lichterman

D. Excused Absences

Alexander S. Mallory, Rebecca Wrock, Hon. Shauna Dunning, and Andrew Mayoras

II. Monthly Reports

A. Lobbyist's Report (Public Affairs Associates)

- i. The EPIC Omnibus package has been signed by the Governor.
- ii. The Powers of Appointment Act/USRAP technical amendments, HB 4863 and 4864, are on the House floor.
- iii. The Unitrust Act has been introduced and is sitting in House Judiciary

- iv. The Uniform Partition of Heirs Property Act, HB 4924, passed the House and is in the Senate.
 - v. There are new drafts of the ART legislation from the Legislative Services Bureau.
 - vi. There has been no progress regarding the Guardianship Reform Package.
- B. Minutes of Prior Council Meeting – February (Richard Mills) – **Attachment 1**.
David Sprague moved to accept the February minutes as drafted. Katie Lynwood seconded the motion carried. The motion carried.
- C. Chair's Report (Jim Spica)
- i. Lorraine New sent a note to Jim Spica commenting on the award created in George Gregory's name stating:

"It is said that while a name is spoken, it continues to be remembered. Please thank the Council for honoring him in this way knowing the good work that the Council does, I'm sure there will be many worthy recipients."
 - ii. There will be a luncheon following the June council meeting at the University Club; those wishing to attend will be asked after the April Council meeting to register by a date certain (yet to be specified) in May.
- D. Chair Elect's Report (Katie Lynwood): No report.
- E. Treasurer's Report (Christine Savage)
Ms. Savage reported that we will be receiving monthly report from the State Bar.

III Committee Reports

- A. Committee on Special Projects (Mysliwicz):
- i. CSP participated in a discussion related to the proposed Anti-Money Laundering Regulations for Residential Real Estate Transfers. A straw-poll was taken as to whether CSP recommends Council simply coattail on other larger organization's work on this front or whether we recommend this issue be referred to the Real Estate Committee for further analysis. A slim majority of those present were in favor of recommending this issue be referred to the Real Estate Committee to determine what action to take, but at a minimum to reach

out to other national organizations who may be working on comments to determine if we might join in their comments. Jim Spica then referred this to Angela Hentkowski as chair of the Real Estate Committee and Rick Mills indicated that he will put Angela in contact with the committee handling this for the ABA.

- ii. CSP participated in a discussion related to the Death with Dignity Act bill package. Our lobbyists informed us that a hearing will be held on this package of bills, but until we know whether it will move forward, we can likely just get potential comments ready without inserting ourselves at this time. The committee will go back and evaluate the bills to ensure that there are protections included/enhanced in the areas that impact our section so that, if this legislation moves forward, we are prepared to offer comments without taking any sort of position on whether we support or oppose the bills.
- 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.
- G. Charitable and Exempt Organizations (Wrock). Rick Mills reported that the next meeting the committee will begin drafting revisions to the Michigan Nonprofit Corporations Act.
- H. Citizens Outreach (Goetsch): No report.
- I. Court Rules, Forms, and Proceedings (David): Ms. David reported that she contacted Rebecca Schnelz at SCAO to get the list of forms that they were working on in connection with the passage of the Omnibus. They also discussed a rule change regarding requesting publication of unpublished opinions that come out of the Court of Appeals.
- J. Electronic Communications (Hentkowski): No report.
- K. Ethics and Unauthorized Practice of Law (Mallory): David Sprague reported that the committee has met twice this month. The council discussed the purpose

of the committee.

- L. Guardianship, Conservatorship, and End of Life (Glazier): Ms. Glazier reported that the committee will continue to monitor the legislation that the committee is actively involved in.
- M. Legislation Development and Drafting (Mills/Tiplady): Mr. Mill reported the committee will be meeting regarding the *Dice v. Zimmerman* legislation.
- N. Legislation Monitoring and Analysis (Shelton). No report.
- O. Legislative Testimony (Mysliwicz): No report.
- P. Membership (Hentkowski): Ms. Hentkowski reported that they have 11 scholarship applications for the Probate Institute. The committee will have a further report next month.
- Q. Nominating (Lucas): Mr. Lucas reported that the Nominating Committee is watching and will have a report within the next few months.
- R. Planning (Spica): No report.
- S. Probate Institute (Piwowarski): No report.
- T. Real Estate (Hentkowski): No report.
- U. State Bar and Section Journals (Mysliwicz): No report.
- V. Tax (Anderton): Christine Savage emphasized that the tax nugget supplemental attachment is a brief description of the Corporate Transparency Act.
- W. Assisted Reproductive Technology (Welber): No report.
- X. Electronic Wills (Cieslik): Ms. Cieslik reported that the committee met regarding HB 4654, which was introduced May 2023, in which Council took a public policy against. Representatives Breen and Fink are responding to some of the Council's points that are in the supplemental materials. The representatives seem open to substantial revisions to HB 4654. The committee

is looking for direction on whether they should be drafting legislation in what they believe are safeguards to the lack thereof in the current bill.

- Y. Fiduciary Exception to the Attorney-Client Privilege (Krueger): No report.
 - Z. Nonbanking Entity Trust Powers (Spica): No report.
 - AA. Premarital Agreements (Savage): No report.
 - BB. Uniform Community Property Disposition at Death Act (Spica): No report.
 - CC. Undue Influence (Silver): Mr. Silver reported that the committee has been collecting comments from the judiciary which has been overwhelmingly in favor of continuing the committee's work of coming up with statutory language.
 - DD. Uniform Fiduciary Income and Principal Act (Spica): Mr. Spica reported that the Unitrust Act has a Republican sponsor in the House who seems to have lost interest in moving the Section's legislative initiatives.
 - EE. Uniform Partition of Heirs Property Act (Spica): Mr. Spica reported that House bill needs a substitute in the Senate, and that he will forward the changes that were provided to the House sponsor to the Section lobbyist.
 - FF. Various Issues Involving Death and Divorce (Borst/Blume): Mr. Borst reported that he received an email from Hon. Dunnings and will bring it to the committee.
- III. Good of the Order
- Dan Hilker reported that a probate register can review accountings from conservators but cannot review accountings from DD guardians of the estate, as those have to go directly to the judge. The probate registers would like this fixed. Mr. Hilker will be submitting that proposal to the Legislative Development and Drafting Committee in the near future.
- IV. Adjournment of Regular Meeting at 11:59 a.m.

Respectfully Submitted,

Richard C. Mills, Secretary

The next Council meeting will be held on Friday, April 19, 2024.

ATTACHMENT 2

FW: ICLE Requests for the Probate Council

From: Mills, Richard C. (rmills@shrr.com)

To: pepsectioncouncil@yahoo.com

Date: Monday, April 15, 2024 at 11:09 AM EDT

From: Jeff Kirkey <jkirkey@icle.org>

Sent: Wednesday, March 27, 2024 9:12 AM

To: 'Nathan Piwowarski' <nathan@mwplegal.com>; 'James Spica' <spica@mielderlaw.com>; 'Katie Lynwood' <klynwood@blhlaw.com>; Mills, Richard C. <rmills@shrr.com>; 'csavage@lowelaw.net' <csavage@lowelaw.net>

Cc: Lisa Geherin <geherinl@icle.org>; Bethany Malmgren <malmgren@icle.org>; Rachael M. Sedlacek <rmsted@icle.org>; Pam Gillespie <pgilespi@icle.org>

Subject: ICLE Requests for the Probate Council

Hi Katie, Chris, Jim, Rick and Nathan,

I hope you're all doing well. I'm writing with a couple ideas, and I'm hoping council will share our excitement.

SPONSORSHIP REQUESTS

1. CHOATE – From 2014-2017, the Probate Section generously supported ICLE's Experts in Estate Planning series starting with Natalie Choate (2014), Susan Bart (2015) and Kim Kamin (2016) and Natalie Choate again (2017) by helping to cover speaker honoraria and travel expenses. In 2017 the Section contributed \$6,000 to bring Natalie Choate to MI. Lisa Geherin and I have been in touch with Natalie about presenting in 2024. She now teaches half-day seminars for \$5500. This would be livestreamed using Zoom plus recorded for ongoing access. With all of the SECURE Act changes, it feels like the perfect time to bring back the retirement assets guru. We're aiming for Tuesday, October 22, 2024. ICLE has an arrangement with the Litigation Section where the Section covers speaker fees for nationally known experts at the "Masters in Litigation" series. Would the Section consider covering Natalie's honorarium? Our goal with the Zoom presentation is for estate planners statewide to take advantage of Natalie's wisdom. Of course, the Section would be listed as co-sponsoring the program, and Section members would receive a substantial discount on the registration fee.
2. UPOAA and OMNIBUS REFERENCE CARD - we are considering providing a handy, printed resource to all registrants at the upcoming Probate Institute in May and June. Already, ICLE has created charts summarizing the changes brought by UPOAA and Omnibus. Nathan and Mark Harder have helped ICLE assemble these. We think attendees would appreciate receiving these as a condensed handout that they can use as a reference back at their offices. We're shooting for something like ICLE's Evidence-At-A-Glance reference card and we're playing with potential formats right now. We're hoping that it could be a single card combining both charts, but it may end up being two cards. These won't come cheap so we're hoping the Section would consider raising its Probate Institute sponsorship from \$17,000 to \$19,000 to help bankroll this special giveaway item to all registrants. We would add the Section's logo to the card as its sponsor. P.S. right now we have 225 registered for Acme and 91 in Novi. We're about 50 ahead of last year with 8 weeks to go. We would probably make about 800 of the cards and potentially sell these too.

From a timing perspective, ideally we'd hear back from you ASAP about the reference cards. If the Section will support this endeavor, our editors and design team need to jump on it by April 1. Sorry for the quick turnaround – this is a new idea that we think will be valued by attendees. We always value the Section's support of great CLE for the Michigan estate planning community. Thanks very much for considering these requests!

Jeff



Jeff Kirkey
Chief Learning Officer
phone 734-936-3434 | fax 877-229-4351
The Institute of Continuing Legal Education
www.icle.org

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ATTACHMENT 3

These comments are being submitted on behalf of the Michigan Probate & Estate Planning Section. The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,488 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

Although the Michigan Probate & Estate Planning Section agrees that money laundering activities have a negative effect on the United States economy and there should be efforts to curtail such activities, the Section believes that, as applied to Trusts, the Proposed Rule for Code of Federal Regulations Section 1031.320 are over-broad in the breadth of individuals impacted and imposes an undue burden on those required to report relative to the impact it would have in deterring money laundering activities through the use of Trusts. The Section opposes the proposed regulations as currently drafted:

1. The proposed regulations are over-broad and will impose reporting requirements on transfers by ordinary citizens that have absolutely nothing to do with the types of transactions which the government is concerned about.
2. The number of transactions which must be reported is voluminous and unduly burdensome relative to the goals of the regulations - it is not unusual for even a small office to handle or recommend numerous transfers each week.
3. The additional transaction costs, plus potential liability, for an estate planning law office to agree to handle the required reporting means that the reporting duty will remain with the ordinary estate planning client who is ill equipped to understand what is required under these rules, thus resulting in unintentional non-compliance and significant civil and criminal penalties for ordinary citizens that are unrelated to “money laundering”.
4. With the sheer volume of reports that would be required, the agency will not be realistically able to separate “suspicious” reports from the vast number of customary transactions related to ordinary estate planning. Therefore, the scope of the reporting requirements must be substantially narrowed to target those that are likely to present a “money laundering” scenario without creating an undue burden on ordinary citizens.
5. An enormous amount of private & confidential personal information will be collected to meet these reporting requirements, which in turn presents significant risk of such private and confidential information being leaked or otherwise accessed by third parties.
6. It is unlikely that those whose goal is to engage in illegal “money laundering” will accurately provide the required information. It is only those who are trying to comply honestly that will do so, unnecessarily burdening law-abiding Americans.

Ordinary United States citizens utilize revocable and sometimes irrevocable trusts, to assist in carrying out their estate planning goals, which often includes transfers of real estate ownership that involves a trust - usually (although not always) created by the transferor person. These are not “Real Estate Investment Trusts” (“REITS) (or similar entities), which are entirely different.

A reportable transfer should NOT include the creation of a self-settled revocable or irrevocable trust, wherein the grantor/settlor(s) of the Trust have created such a trust for the benefit of the grantor(s) or members of their family. The inclusion of these "transfers" as reportable transfers does not serve the goals of the Proposed Rule. Also, please be aware that in Michigan, as in most states, an estate planning trust (whether revocable or irrevocable) is not an “entity” and does not hold title to any real estate - the trustee holds the title for the purposes and beneficiaries identified in the trust. Further, those purposes and beneficiaries can change over time creating an ongoing undue burden upon the affected law-abiding citizen.

ATTACHMENT 4

Probate and Estate Planning Section: 2023-2024
Treasurer's Monthly Activity Report

Carry-Over Fund Balance from 2022-2023		Carry Over Balance
Fund Balance-Probate/Estate Planning Section		\$ 221,440.20

Revenue		February 2024	YTD Revenue (2023-2024)	Budget (2023-2024)
7-141-40080 Probate/Estate Planning Dues		\$ 1,015.00	\$ 114,205.00	
7-141-40085 Probate/Estate Affiliate Dues		\$ -	\$ 560.00	
7-141-42025 Seminar Revenue		\$ -	\$ -	
7-141-42820 Subscription to Newsletter		\$ -	\$ -	
7-141-42175 Hein Publishing Agreement/Royalties		\$ -	\$ -	
7-141-42830 Publications Revenue		\$ -	\$ -	
7-141-42690 Miscellaneous Revenue		\$ -	\$ 325.00	
Total Revenue		\$ 1,015.00	\$ 115,090.00	\$ -

Expenses		February 2024	Cumulative Expenses	Budget (2023-2024)
7-141-67010 Administrative Services		\$ -	\$ 2,182.50	
7-141-67115 Legislative Consulting		\$ 3,000.00	\$ 15,000.00	
7-141-65075 LlistServ		\$ -	\$ -	
7-141-67065 Community Support, Donations & Sponsorships		\$ -	\$ -	
7-141-62315 Meetings		\$ 1,016.00	\$ 10,419.41	
7-141-65420 Seminar Expenses		\$ -	\$ -	
7-141-67140 Networking Events		\$ -	\$ -	
7-141-67020 Annual Meeting		\$ -	\$ -	
7-141-65540 Speaker Expenses		\$ -	\$ -	
7-141-61200 Travel		\$ -	\$ 7,161.85	
7-141-64005 Telephone		\$ -	\$ -	
7-141-64025 Books & Subscriptions		\$ -	\$ -	
7-141-65090 Recognition		\$ -	\$ -	
7-141-67015 Amicus Brief		\$ -	\$ 13,700.00	
7-141-64015 Printing & Copying		\$ -	\$ -	
7-141-65460 Newsletter/Publication		\$ 4,300.00	\$ 8,700.00	
7-141-64010 Postage		\$ -	\$ -	
7-141-64020 Dues		\$ -	\$ -	
7-141-64055 Miscellaneous		\$ -	\$ -	
Total Expenses		\$ 8,316.00	\$ 57,163.76	\$ -

Net Income		\$ (7,301.00)	\$ 57,926.24	\$ -
General Fund plus Net Income (Running Total)		\$ 279,366.44	\$ 279,366.44	\$ -

Hearts and Flowers Fund Carry Over Balance		Carry Over Balance	February 2023	
Beginning Deposit Fund Balance		\$ -		
Revenue				
Withdrawals				
Total Fund				

State Bar of Michigan
Parent Company : State Bar of Michigan : Sections
Sections Income Statement - Probate and Estate
Feb 2024

Financial Row	Amount (Feb 2024)	Amount YTD (Oct 2023 - Feb 2024)	Last FY YTD (Oct 2022 - Feb 2023)
Income			
42690 - Miscellaneous Revenue	\$0.00	\$325.00	\$325.00
40085 - Section Affiliate Dues	\$0.00	\$560.00	\$455.00
40080 - Section Dues	\$1,015.00	\$114,205.00	\$115,220.00
Total Income	\$1,015.00	\$115,090.00	\$116,000.00
Expenses			
67010 - Administrative Services	\$0.00	\$2,182.50	\$0.00
67015 - Amicus Brief	\$0.00	\$13,700.00	\$0.00
67115 - Legislative Consulting	\$3,000.00	\$15,000.00	\$15,000.00
62315 - Meetings	\$1,016.00	\$10,419.41	\$12,138.28
64055 - Miscellaneous	\$0.00	\$0.00	\$2,500.00
65460 - Newsletter/Publication	\$4,300.00	\$8,700.00	\$4,400.00
61200 - Travel	\$0.00	\$7,161.85	\$2,858.89
Total Expenses	\$8,316.00	\$57,163.76	\$36,897.17
Increase or Decrease in Net Position	(\$7,301.00)	\$57,926.24	\$79,102.83
Net Position, Beginning Of year	\$221,440.20	\$221,440.20	\$232,021.60
Net Position, End of Period	\$214,139.20	\$279,366.44	\$311,124.43

State Bar of Michigan
Parent Company : State Bar of Michigan : Sections
Probate & Estate Section Expense Detail Report
From Oct 2023 to Feb 2024

Account	Date	Type	Document Number	Memo	Linked Bill: Bill To	Description	Debit	Credit	Total Net Amount
60000 - Operating Expenses - Non-Labor							\$0.00	\$0.00	\$0.00
61200 - Travel							\$0.00	\$0.00	\$0.00
	10/24/2023	Journal	JE1595	10/13/2023 travel	Hentkowski, Angela	10/13/2023 travel		\$550.50	-\$550.50
	10/24/2023	Journal	JE1596	10/13/2023 travel	Hentkowski, Angela	10/13/2023 travel	\$550.50		\$550.50
	10/24/2023	Journal	JE1594	10/13/2023 travel	Hentkowski, Angela	10/13/2023 travel	\$550.50		\$550.50
	10/30/2023	Journal	JE1712	10/6/2023 Travel	Andrea Christine Neighbors	10/6/2023 Travel	\$480.93		\$480.93
	11/13/2023	Journal	JE1981	10/13/2023 Travel	David Lucas	10/13/2023 Travel	\$427.56		\$427.56
	11/20/2023	Journal	JE2097	10/9/2023 travel	James Spica	10/9/2023 travel	\$2,945.53		\$2,945.53
	11/20/2023	Journal	JE2092	10/18/2023 Travel	Daniel Hilker	10/18/2023 Travel	\$355.17		\$355.17
	11/20/2023	Journal	JE2094	9/8/2023 & 10/12/2023 travel	Melisa Mysliwiec	9/8/2023 & 10/12/2023 travel	\$681.81		\$681.81
	11/20/2023	Journal	JE2093	10/13/2023 Travel	Mark Kellogg	10/13/2023 Travel	\$359.53		\$359.53
	12/19/2023	Journal	JE3032	Oct-Nov 2023 Meeting Travel	Nathan Piwowarski	Oct-Nov 2023 Meeting Travel	\$238.55		\$238.55
	12/19/2023	Journal	JE3034	10/13/2023 Meeting Travel	Rebecca Wrock	10/13/2023 Meeting Travel	\$420.84		\$420.84
	1/17/2024	Journal	JE3373	Christine Savage Probate AM 10-14-2023	Christine Savage	Christine Savage Probate AM 10-14-2023	\$357.27		\$357.27
	1/23/2024	Journal	JE3485	Katie Lynwood 10-13-2023 meeting travel	Katie Lynwood	Katie Lynwood 10-13-2023 meeting travel	\$344.16		\$344.16
Total - 61200 - Travel							\$7,712.35	\$550.50	\$7,161.85
62315 - Meetings							\$0.00	\$0.00	\$0.00
	10/24/2023	Journal	JE1597	9/2023-9/2024 Zoom	Hentkowski, Angela	9/2023-9/2024 Zoom	\$158.89		\$158.89
	11/20/2023	Journal	JE2095	10/23/2023 Probate Meeting	University Club of MSU 3435 Forest Road	10/23/2023 Probate Meeting	\$1,005.00		\$1,005.00
	12/19/2023	Journal	JE3030	10/13/2023 Probate Law Meeting	James Spica	10/13/2023 Probate Law Meeting	\$5,802.52		\$5,802.52
	1/17/2024	Journal	JE3385	University Club Probate Law 12-15-2023	University Club of MSU	University Club Probate Law 12-15-2023	\$1,421.00		\$1,421.00
	1/31/2024	Journal	JE3633	University Club Probate Law 1/19/2024	University Club of MSU	University Club Probate Law 1/19/2024	\$1,016.00		\$1,016.00
	2/27/2024	Journal	JE4033	University Club Probate Law 02-16-2024	University Club of MSU	University Club Probate Law 02-16-2024	\$1,016.00		\$1,016.00
Total - 62315 - Meetings							\$10,419.41	\$0.00	\$10,419.41
65460 - Newsletter/Publication							\$0.00	\$0.00	\$0.00
	11/13/2023	Journal	JE1986	Probate Law Journal	Regents U of M/ICLE	Probate Law Journal	\$4,300.00		\$4,300.00
	1/31/2024	Journal	JE3648	January 2024 E Blast Expense		1/30 Read the Winter Newsletter Now (e-blast)	\$100.00		\$100.00
	2/7/2024	Journal	JE3716	ICLE Probate Law Journal	Regents U of M/ICLE	ICLE Probate Law Journal	\$4,300.00		\$4,300.00
Total - 65460 - Newsletter/Publication							\$8,700.00	\$0.00	\$8,700.00
67010 - Administrative Services							\$0.00	\$0.00	\$0.00
	11/27/2023	Journal	JE2196	10/1/2023-10/27/2023 service	Andrea Christine Neighbors	10/1/2023-10/27/2023 service	\$1,156.50		\$1,156.50
	1/22/2024	Journal	JE3480	Andrea Neighbors Nov 23 - Dec 23	Andrea Christine Neighbors	Andrea Neighbors Nov 23 - Dec 23	\$1,026.00		\$1,026.00
Total - 67010 - Administrative Services							\$2,182.50	\$0.00	\$2,182.50
67015 - Amicus Brief							\$0.00	\$0.00	\$0.00
	12/19/2023	Journal	JE3043	Bazakis Amicus Brief	Lipson Neilson P.C.	Bazakis Amicus Brief	\$13,000.00		\$13,000.00
	1/17/2024	Journal	JE3377	Lipson Neilson Probate Law 01-09-2024	Lipson Neilson P.C.	Lipson Neilson Probate Law 01-09-2024	\$700.00		\$700.00
Total - 67015 - Amicus Brief							\$13,700.00	\$0.00	\$13,700.00
67115 - Legislative Consulting							\$0.00	\$0.00	\$0.00
	10/18/2023	Journal	JE1441	October 2023	Public Affairs Associates	October 2023	\$3,000.00		\$3,000.00
	10/30/2023	Journal	JE1724	November 2023	Public Affairs Associates	November 2023	\$3,000.00		\$3,000.00
	12/18/2023	Journal	JE2981	December 2023	Public Affairs Associates	December 2023	\$3,000.00		\$3,000.00
	1/17/2024	Journal	JE3383	Public Affairs Probate Law January 2024	Public Affairs Associates	Public Affairs Probate Law January 2024	\$3,000.00		\$3,000.00
	2/6/2024	Journal	JE3706	Public Affairs Probate Law February 2024	Public Affairs Associates	Public Affairs Probate Law February 2024	\$3,000.00		\$3,000.00
Total - 67115 - Legislative Consulting							\$15,000.00	\$0.00	\$15,000.00
Total - 60000 - Operating Expenses - Non-Labor							\$57,714.26	\$550.50	\$57,163.76

ATTACHMENT 5

Amicus Curiae Committee
Probate and Estate Planning Section of the State Bar of Michigan

Application for Consideration

If you believe that you have a case that warrants involvement of the Probate and Estate Planning Section of the State Bar of Michigan (“Section”), based upon the Section’s Policy Regarding Consideration of Amicus Curiae Matters, please complete this form and submit it to the Chair of the Amicus Curiae Committee, along with all relevant pleadings of the parties involved in the case, and all court orders and opinions rendered.

Date 04/02/2024

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Attach Additional Sheets as Required

Name of Case In re: Ruth A. Adams Trust, Court of Appeals Docket No. 367207; Barry County
Probate Court Case No. 22-029341-TT
Parties Involved Jacqueline Hughes, Petitioner; Kristine Morehouse, Personal Representative and
trustee; Highpoint Community Bank, Hastings, MI, co-trustee

Current Status Interlocutory appeal in the Michigan Court of Appeals

Deadlines None presently. The probate cases are stayed pending appeal. Appellate briefing is complete,
but no oral argument date yet.

Issue(s) Presented In a case where Petitioner asserts a trust/estate was improperly funded with
assets which Petitioner now claims entitlement to, can/should the probate court enjoin the use of
those trust/estate assets to pay trust/ estate expenses, including the trustee's attorney fees, to defend
against the Petitioner's claims?

Michigan Statute(s) or Court Rule(s) at Issue MCL 700.3720; MCL 700.7904(2).

Common Law Issues/Cases at Issue _____

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? See attached sheet.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? See attached sheet.

*****No attorney who is representing any party in the action or is affiliated with a firm representing any party in the action may address the Council or the Committee for Special Projects (CSP) with regard to the application. All attendees at the meeting who are affiliated with a firm representing any party in the action shall be excused from the meeting during consideration of the application.*****

Application for Consideration

Attachment

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? **This case may broadly impact whether a fiduciary can use assets pursuant to MCL 700.3720 or MCL 700.7904(2) to fulfill the fiduciary's duty to defend the estate/trust in litigation where there has not been (nor could be) any finding of wrongdoing by the fiduciary. If the Court of Appeals determines that the probate court properly enjoined the use of trust assets to pay attorney fees here, and subsequently erred by modifying that injunction to allow some fees to be paid, a precedent would be set where a mere claim of improper funding of a trust (or the improper acquisition of assets by a testator) could result in a successor trustee/personal representative being prohibited from using trust/estate assets to defend a claim against the trust/estate. The involvement of the Probate and Estate Planning Section may cause the Court of Appeals to more carefully analyze and consider the broader impact of its decision.**

This case involves the two separate trusts of a husband and wife. The husband and wife were married for decades. The husband had a child from a prior marriage. Each trust provided that at the settlor's death the assets of the trust would be funded to a family trust, unless the surviving spouse elected to receive the funds outright (the "spousal election"). Under the terms of each trust instrument, so long as there were estate tax implications, there was no restriction on the surviving spouse's right to exercise to exercise the spousal election other than the surviving spouse had to file a document with a court indicating the election was made. After the husband died, the wife consulted with her attorney to exercise the spousal election. However, no document exercising the spousal election was filed with a court. Nevertheless, whatever assets were in the husband's trust were distributed to the wife.

Approximately 14 years after the husband's death, the wife died. The husband's adult daughter filed a petition alleging that the wife breached the trust by removing assets from the husband's trust and depositing those assets in the wife's trust. The petitioner is not a beneficiary of the wife's trust. The trustee of the wife's trust has sought to defend the trust against the petitioner's claim. After the Court of Appeals affirmed (in a prior order) that the spousal election had not been properly exercised, the probate court enjoined the trustee from using assets of the wife's trust to pay attorney fees to defend against the petitioner's claims. That ruling was made despite that there has been no finding of what, if any, assets in the wife's trust were funded from the husband's trust, and despite other valid defenses raised by the trustee. When the trustee of the wife's trust sought to resign because the trustee could not fulfill her fiduciary duties due to a lack of access to assets, the probate court sought to modify the injunction to allow at least some of the trustee's attorney fees to be paid. The Petitioner has challenged the modification.

The fundamental issue is whether, despite the plain language of MCL 700.3720 and MCL 700.7904(2), a court can enjoin a trustee from accessing trust funds to defend the trust where

there is no accusation that the trustee has either engaged in wrongdoing or is acting bad faith in defending the trust.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? **This decision will significantly impact the Section's practitioners and their clients. In this case, the Court of Appeals could potentially sanction a procedure whereby a trial court could enjoin the use of trust or estate assets to pay attorney fees any time a claim is raised that assets were improperly funded into a trust or estate. The inability to pay costs and fees would significantly impair (or effectively prevent altogether) trustees and personal representatives from fulfilling their fiduciary responsibilities to defend against such claims, and will provide disaffected beneficiaries or other third parties with an incentive to make such claims, knowing that the claim cannot be effectively defended by the trustee or personal representative.**

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In the Matter of the

Court of Appeals Case No. 367207

RUTH A. ADAMS TRUST
u/a/d January 4, 2005

Barry County Probate Court Case No.
22-029341-TT

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APPELLEE KRISTENE MOREHOUSE'S BRIEF ON APPEAL

****Oral Argument Requested****

Dated: January 16, 2024

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STATEMENT OF JURISDICTION

The Probate Court’s Order Modifying Preliminary Injunction was entered on **March 14, 2023** (not July 19, 2023 as alleged by Appellant). Appellant timely filed a Motion for Reconsideration, and the Probate Court denied that motion in an Order dated July 19, 2023. This Appellee does not contest that Appellant timely filed a Claim of Appeal within 21 days thereafter, on August 8, 2021. Respectfully, this Appellee continues to assert that this Honorable Court lacks jurisdiction to hear the instant appeal, because the Order appealed from is not a “final order” of the Probate Court, as defined by MCR 5.801(A)(2). Appellee’s arguments in this regard have previously been submitted to this Court, in Appellee’s Motion to Dismiss Claim of Appeal and briefing in support thereof, which are incorporated herein by reference, and which Motion was denied by this Court pursuant to an Order dated October 19, 2023. This Appellee seeks to preserve those arguments for further appeal, if necessary, and therefore restates and incorporates by reference its prior objections to this Court’s exercise of jurisdiction over this matter as an appeal of right.

STATEMENT OF QUESTIONS INVOLVED

I. DOES THE PROBATE COURT’S ORDER MODIFYING PRELIMINARY INJUNCTION, ALLOWING APPELLEE MOREHOUSE TO SEEK PAYMENT OF ATTORNEYS’ FEES FROM THE RUTH A. ADAMS TRUST, VIOLATE THE LAW-OF-THE-CASE DOCTRINE, WHERE THIS COURT’S PRIOR OPINION DETERMINED THAT RUTH ADAMS FAILED TO PROPERLY EXERCISE HER SPOUSE’S RIGHT TO HAVE THE ASSETS OF THE JOHN R. ADAMS TRUST TRANSFERRED TO THE RUTH A. ADAMS TRUST, BUT REMANDED THE MATTER TO THE PROBATE COURT FOR DETERMINATION OF OTHER CLAIMS, ISSUES AND DEFENSES WHICH AFFECT THE ULTIMATE ENTITLEMENT TO THOSE TRUST FUNDS?

Appellee Morehouse answers: No.

Appellant answers: Yes.

The Probate Court answered: No.

II. DID THE PROBATE COURT DENY APPELLANT DUE PROCESS WHEN IT DETERMINED TO MODIFY THE PRELIMINARY INJUNCTION TO ALLOW MOREHOUSE TO SEEK PAYMENT OF ATTORNEYS FEES, WHERE MOREHOUSE HAD SOUGHT APPROVAL TO RESIGN AS TRUSTEE SPECIFICALLY AND EXPRESSLY BECAUSE OF THE PRELIMINARY INJUNCTION WHICH PROHIBITED HER FROM SEEKING PAYMENT OF ATTORNEYS’ FEES FROM TRUST FUNDS?

Appellee Morehouse answers: No.

Appellant answers: Yes.

The Probate Court answered: No.

III. DID THE PROBATE COURT ABUSE ITS DISCRETION WHEN IT MODIFIED THE PRELIMINARY INJUNCTION IN THIS MATTER TO “UNFREEZE” UP TO \$150,000 OF RUTH A. ADAMS TRUST FUNDS TO PERMIT APPELLEE MOREHOUSE TO SEEK PAYMENT OF ATTORNEYS’ FEES INCURRED ON REMAND IN THIS MATTER?

Appellee Morehouse answers: No.

Appellant answers: Yes.

The Probate Court answered: No.

STATEMENT OF FACTS

A. Background

These cases all concern the John R. Adams Trust (“JRA Trust”) and the Ruth A. Adams Trust (“RAA Trust”). This very contentious litigation has been before this Court on several prior occasions.

In 2005, John R. Adams created the JRA Trust, naming himself and his wife Ruth as Trustees. (See Appellant’s Appendix (“App”), Tab A.)¹ The Trust also provided that in the event of John’s death, Appellee Highpoint Community Bank, f/k/a Hastings City Bank (hereinafter “Highpoint”) would become a successor co-trustee, along with Ruth. John R. Adams died in November 2005.

The JRA Trust also included a provision granting Ruth Adams a Spouse’s Right, whereby Ruth Adams would have the right to receive all JRA Trust assets, free and clear of the trust, by exercising that right in accordance with the terms set forth in the JRA Trust. (App. Tab A, p. 4). One of those terms included the requirement to file a writing evidencing her exercise of the right with the probate court. *Id.* After John’s death, Ruth Adams, with the approval and acquiescence of Highpoint, purported to execute a document by which she exercised the Spouse’s Right contained in the JRA Trust, transferring all of the property held in the JRA Trust to her own trust, the RAA Trust. (App., Tab C). It is not disputed that this writing was not filed with any court.

Ruth Adams died in October 2019. Appellee Kristene Morehouse (“Appellee”) is the Personal Representative of Ruth’s Estate, as well as the Trustee of the RAA Trust. Appellant

¹ Citations throughout this Brief are to Appellant’s Appendix, dated October 3, 2023.

Jackie Hughes (“Appellant” or “Hughes”) is John Adams’ daughter.² In 2020, Hughes submitted claims against Ruth’s Estate and the RAA Trust for the value of property that had been previously transferred from the JRA Trust to the RAA Trust by Ruth. These claims were disallowed by Appellee. What has followed is a multiplicity of litigation and claims.

B. Hughes’ Lawsuit Regarding Trust Assets.

First, Appellant filed suit against Appellee and Highpoint, seeking a return of the assets transferred to the RAA Trust during Ruth’s lifetime, or damages equal to the value of those assets. (App., Tab E, p. 37). In addition, Appellant has separately sued Highpoint for breach of fiduciary duty and breach of loyalty, and Highpoint has asserted cross-claims against Appellee in her capacity as personal representative of the Ruth Adams estate and as Trustee of the RAA Trust. (App., Tab K, p. 150). These numerous cases have all been consolidated in the Barry County Probate Court.

The Trial Court initially ruled that Ruth’s exercise of the Spouse’s Right was proper, and that JRA Trust assets distributed to the RAA Trust during Ruth Adams’ lifetime should remain in the RAA Trust, free of any claim by the JRA Trust or its beneficiaries. (App., Tab H, p.146). That ruling was reversed by this Court in an Opinion dated January 27, 2022 (COA Docket Nos. 354677 and 356119) (App. Tab N, p. 240), which reinstated Appellant Hughes’ claims for damages as to the value of the assets transferred to the RAA Trust. Significantly, however, this Court did not order the RAA Trust assets to be returned to the JRA Trust. Instead, the case was remanded to the Probate Court for litigation and determination of any defenses asserted by Appellee or Highpoint (including statute of limitations and/or laches), as well as for an ultimate determination of

² In the proceedings below, Ms. Hughes’ children Darcey Barry and Jonna Jackson are co-plaintiffs. However, the Claim of Appeal in the instant matter only identifies Ms. Hughes as the sole Appellant.

Appellant's damages, if any, to be determined by the Trial Court in the first instance. *See In re: John R. Adams Trust*, unpublished COA Opinion dated January 27, 2022, slip op. at 8 (Docket Nos. 354677 and 356119) (hereinafter referred to as the "January 27, 2022 Opinion") (App. Tab N at pp. 247-248). That litigation remains pending. Extensive discovery has already been conducted and remains open; the case is set for trial in the future.

Importantly, and contrary to Appellant's suggestions, Appellee has not "waived" any defenses, including those previously identified by this Court, nor has the Trial Court ever entered any Order so holding. Moreover, it is simply not the case that there are no remaining unresolved issues of fact or law in this case. The Probate Court has never made any such finding, nor has Appellant here ever brought any Motion for Summary Disposition before the Probate Court. Thus, and contrary to Appellant's various assertions, there has never been any determination by any Court that Appellants are entitled to the assets of the RAA Trust, or that those assets are, in fact, actually all assets of the JRA Trust. Those are issues which remain open for a trial in this matter, which will ultimately determine whether, and to what extent (if any), Plaintiffs may be entitled to the assets of the RAA Trust. The matter remains pending for trial, with numerous issues to be determined by the Trial Court in the first instance, including, but not limited to, the statute of limitations and laches defenses, as well as the issue of Appellant's damages (if any), along with Defendant Appellee's claims for reformation of the JRA Trust.

C. The Probate Court's Preliminary Injunction

In conjunction with the above-described litigation, Appellant sought a temporary restraining order and preliminary injunction from the Probate Court to "freeze" the assets of the RAA Trust, based on her claim that those were in fact assets of the JRA Trust. (App. Tab O, p. 249). The Probate Court entered a temporary restraining order on February 14, 2022, and following

a hearing subsequently converted that to a Preliminary Injunction by order dated March 16, 2022. (See App. Tab P, p. 252 and Tab V, p. 339). The Preliminary Injunction, as originally entered, freezes all the assets of the RAA Trust and prohibits any further distributions from the RAA Trust.

Appellee initially sought leave to appeal in this Court from the Probate Court's interlocutory order granting the Preliminary Injunction. (COA Docket #360945). Appellee argued that she was obligated, as personal representative of Ruth's estate and as trustee of the RAA Trust, to defend against the claims of Appellant (as well as the cross-claims of Highpoint). Further, Appellee is statutorily entitled to pay any costs incurred in defending those entities against litigation from the assets of the respective estate and the RAA Trust.³ Initially, this Court, in lieu of granting leave to appeal, entered an Order (the "September 8, 2022 Order") remanding the matter to the Probate Court with directions to make a determination on the record as to whether any modification of the injunction, to allow Appellee to access RAA Trust assets to pay for the costs of defending against Hughes' suit. (COA Docket #360945, Order dated September 8, 2022). Appellant then filed a Motion for Reconsideration in this Court. That motion was granted; the September 8, 2022 Order was vacated, and instead this Court simply denied Appellee's Application for Leave to Appeal "for failure to persuade the Court of the need for immediate appellate review." (COA Docket #360945, Order dated October 17, 2022).

D. Appellee's Petition for Approval of Resignation

Left with no means to pay for the cost of defending against Appellant's and Highpoint's claims, and unable to finance the defense of those claims from her own pocket, on November 21, 2022, Appellee filed a Petition with the Probate Court seeking approval to allow her to resign as Trustee for the RAA Trust. (App. Tab Y, p. 342). Appellee's Petition very specifically laid out

³ MCL 700.3720 and MCL 700.7904(2).

the sole reason for her wanting to resign, being the inability to access RAA Trust funds to pay the costs of defending these claims, due to the Probate Court’s Preliminary Injunction. *See* App. Tab Y at pp. 353-354 (“Morehouse cannot defend against Hughes’ claims and Highpoint Community Bank’s claims without access to Trust funds.”)

After a hearing on the Petition held on January 18, 2023, the Trial Court agreed that, in lieu of Appellee resigning as trustee, it would modify the Injunction and allow her to access a portion of those assets (up to \$150,000) for the purpose of paying her attorney fees. (App Tab Z, transcript of 1/18/23 hearing, p. 418). This ruling was ultimately embodied in the probate court’s March 14, 2023 Order Modifying Injunction. Significantly, the Petition had also sought approval of certain Trust Accountings, including the payment of attorneys’ fees using the assets of the RAA Trust, and unpaid attorneys’ fees incurred after the entry of the temporary restraining order on February 14, 2022. The Probate Court modified the Injunction to permit the Trustee to pay fees incurred prior to the issuance of the preliminary injunction in February 2022, and to access up to \$150,000 in RAA Trust assets for payment of fees.⁴

Following this decision, Appellant and her co-plaintiffs then moved to disqualify Judge Doherty. Plaintiffs’ Motion to Disqualify, 2/1/2023. The Motion to Disqualify argued that the decision to modify the existing Injunction demonstrated Judge Doherty’s bias against Appellant and impacted their due process rights. The Motion to Disqualify was heard on March 1, 2023, and

⁴ Appellant timely filed a Motion for Reconsideration of the March 14, 2023 Order Modifying Injunction (App. Tab AA and BB); that motion was denied by the Probate Court after several months’ consideration in an Order dated July 19, 2023 (App. Tab CC and DD). The Order being appealed in this matter has been referred to as the “July 19, 2023 Order Modifying Injunction;” however, the probate court’s July 19th Order simply denied reconsideration. To avoid confusion, Appellee will refer simply to the “Order Modifying Injunction” or the “March 14th Order.”

subsequently denied by the Probate Court. 3/13/2023 Order. Thereafter, Appellant sought *de novo* review of the Motion to Disqualify, pursuant to MCR 2.003(D)(3)(a). The State Court Administrator referred the matter to Ninth Circuit Court Judge Kenneth N. Barnard.⁵ In a Decision and Order dated May 22, 2023, Judge Barnard affirmed the Probate Court’s denial of the Motion to Disqualify. Appellant Hughes then filed a delayed Application for Leave to Appeal in this Court on June 28, 2023, which was denied by this Court in an order dated November 29, 2023.

In addition, following the probate court’s denial of her Motion for Reconsideration of the Order Modifying Injunction, Appellant Hughes filed the Claim of Appeal which gives rise to the instant appeal, on August 9, 2023. Appellant asserts that she has an appeal of right from the March 14th Order because it is a “final order” as defined in MCR 5.801(A)(2)(x): A final order “allowing or disallowing an account, fees or administrative expenses.” Appellee asserted, by Motion to Dismiss Claim of Appeal, that this Order is in fact not a final order, and thus this appeal should be dismissed for lack of jurisdiction. This Court denied Appellee’s Motion to Dismiss pursuant to an Order dated October 19, 2023, and thus the instant appeal has continued forward.

ARGUMENT

I. THE PROBATE COURT’S MODIFICATION OF THE PRELIMINARY INJUNCTION DOES NOT VIOLATE THE LAW-OF-THE-CASE DOCTRINE.

A. Law-Of-The-Case Doctrine and Standard of Review

Appellant claims that any modification of the Probate Court’s prior preliminary injunction freezing the assets of the RAA Trust violates the law-of-the-case doctrine. “The law-of-the-case doctrine is a judicially created, self-imposed restraint designed to promote consistency throughout the life of a lawsuit.” *Rott v. Rott*, 508 Mich. 274, 286; 972 N.W.2d 789 (2021). The idea is that

⁵ Judge Doherty is the Chief Judge of the Barry County Trial Court.

“if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *Id.* at 287, citing *Grievance Administrator v. Lopatin*, 462 Mich. 235, 259-260; 612 N.W.2d 120 (2000) (quoting *CAF Investment Co. v. Saginaw Twp.*, 410 Mich. 428, 454; 302 N.W.2d 164 (1981)). “Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.” *Lopatin*, 462 Mich. at 260. Whether the law-of-the-case doctrine was properly invoked and to what extent it applies to a case are questions of law which are reviewed *de novo* on appeal. *Rott, supra*, 508 Mich. at 286. *See also Lenawee Co. v. Wagley*, 301 Mich. App. 134, 149; 836 N.W.2d 193 (2013).

B. The Law-Of-The-Case Doctrine Does not Bar the Probate Court's Order Modifying Preliminary Injunction Because this Court Expressly Ordered a Remand to Determine the Ultimate Disposition of Assets of the RAA Trust.

Here, Appellant asserts that it is the “law of the case” that the assets currently held in the RAA Trust are, irrevocably and definitively, assets of the JRA Trust, that neither the RAA Trust nor Ruth Adams' Estate has any claim whatsoever on those assets. Appellant thus argues, essentially, that there are no more issues to litigate or try in this matter regarding entitlement to those assets, and the Probate Court's order modifying the preliminary injunction to unfreeze a portion of those assets so that Appellee can seek payment of the RAA Trust's legal expenses violates the law-of-the-case doctrine. However, no such findings have ever been made by this Court, or by the Probate Court. Thus, the law-of-the case doctrine is completely inapplicable here.

Appellant's entire argument is premised on a flawed interpretation of this Court's prior ruling in its Opinion, dated January 27, 2022, in Dockets # 354677 and 356119. In that Opinion, this Court determined that Ruth Adams failed to properly exercise her Spouse's Right. **That is**

the only ruling that is the “law of the case” here. Appellant claims that this Court’s prior ruling goes even further and means that Appellant has an unequivocal and uncontested right to all of the assets of the RAA Trust. But that is decidedly not what this Court’s January 27, 2022 Opinion determined. Importantly, this Court recognized that merely determining whether Ruth Adams properly exercised her Spouse’s Right was not determinative of all of the issues in this case. That is precisely why this Court ordered the matter remanded to the Probate Court, rather than directing that judgment be entered in favor of Appellant, which this Court surely could have done if it believed that Hughes was unequivocally and irrevocably entitled to the assets of the RAA Trust at that time.

Ruth Adams’ failure to properly exercise her Spouse’s Right is not the end of the story. The transfer of assets from the JRA Trust to the RAA Trust **may** not have been proper, and Appellant **may** have a claim for damages against one or both of the Co-Trustees of the JRA Trust for a wrongful distribution of those trust assets. However, it is equally the case that any such claim by Appellant **may be barred by an applicable statute of limitations, or by the equitable doctrine of laches. Further, such claims may be negated by an action seeking reformation of the JRA Trust, which is also being pursued in the Probate Court.** Additionally, Ruth Adams was entitled to distributions from the JRA Trust during her lifetime. Thus, a calculation must be made of what Ruth Adams was entitled to receive from the JRA Trust during her lifetime to determine what amount, if any, she was not entitled to receive.

These are all issues which this Court intentionally left unresolved in its prior Opinion of January 27, 2022, and are the issues that are presently being litigated in the Probate Court. Further, and contrary to Appellant’s claims, there has been no determination or final order from the Probate Court with regard to any of these issues. Significantly, Appellant has never brought any motion for summary disposition or other dispositive motion before the Probate Court on these, or any

other issues in this case. Extensive discovery has been pursued and is continuing in the Probate Court. Thus, any suggestion by Appellant that there are no issues or claims left to be litigated below are patently false.

Appellant erroneously asserts that there is no statute of limitations, laches, or any other claim remaining for trial in this matter. This argument is entirely specious and completely unsupported by any decision of either this Court or the lower court.

Appellant asserts that this Court has already determined that her claims are not barred by the statute of limitations in its July 21, 2022 Order in Docket No. 360337, and that is therefore also “law of the case.” This is an erroneous assertion that completely misstates this Court’s July 21, 2022 Order. That Order simply stated: “[Appellant’s] complaint is not barred by the one-year limitations period in MCL 700.7905(1)(a) ...” This is simply one particular statute of limitations. It is not a holding by this Court that no statute of limitations defense could apply. The Probate Court has not addressed, analyzed, or ruled upon any motion for dismissal of Appellant’s claims barred as a statute of limitations. As noted above, Appellant has not brought any summary disposition motion before the Probate Court on this, or any other issue in this case. In any event, however, even if the statute of limitations defense were somehow foreclosed by this statement, there still remain the issues of laches, as well as Appellee’s claim for reformation of the JRA Trust and the ultimate determination of Hughes’ damages, if any, in light of the fact that Ruth Adams was entitled to distributions from the JRA Trust during her lifetime.

Both this Court and the Probate Court have recognized that numerous issues remain to be tried in this action. Moreover, as the Trustee of the Ruth A. Adams Trust, Appellee has an absolute duty to defend that Trust against the Appellant’s claims. As the Probate Court noted, it would be incredibly unfair – both to the Trust and to the adversarial process – to force Appellee to vigorously defend the RAA Trust, but at the same time deny her the wherewithal to do so by not allowing her

to retain and pay legal counsel. The Probate Court's Order Modifying Preliminary Injunction should be affirmed by this Court.

C. On Remand, Appellee Has a Statutory Duty and Obligation to Vigorously Oppose the Claims of Hughes and Highpoint Community Bank on Behalf of the RAA Trust Beneficiaries and Cannot Be Required to Finance that Obligation from her Personal Assets.

Appellee, as trustee of the RAA Trust, is a fiduciary. MCL 700.7801; MCL 700.7802; MCL 700.7810. Appellee has never been accused of any wrongdoing while serving as Trustee. Michigan law does not require Appellee (or any successor Trustee) to finance the administration of the RAA Trust with personal assets. The eleven beneficiaries of the RAA Trust could bring a breach of trust action against Appellee if she does not perform her fiduciary duties and defend the Trust and the settlor's intent. As Trustee and Personal Representative, Appellee must engage income tax professionals and file income tax returns, engage financial professionals to assist with managing trust assets, and engage attorneys to assist with administering the trust and complying with her fiduciary duties. Moreover, the beneficiaries of the RAA Trust surely would not agree with the various claims asserted by Appellant and Highpoint Community Bank. Appellee has a duty as Trustee to defend against the claims asserted by Appellant. Appellee is bound by a duty of loyalty under MCL 700.7802 to "administer the trust solely in the interest of the trust beneficiaries."

This Court has previously determined that further litigation in the Probate Court is required in order to determine whether Appellant has any viable claims against the RAA Trust or against the Co-Trustees of the JRA Trust. Appellee is duty-bound to oppose those claims on behalf of the Estate of Ruth Adams, Deceased, and for the benefit of the RAA Trust beneficiaries. Furthermore, there has been no claim or assertion by Appellant or any other party that Appellee is not defending the proceedings in the probate court in good faith, as she is required to do.

Appellee is not, however, required to finance such defense at her own expense. A personal representative or a trustee who defends an estate or a trust against a proceeding in good faith is entitled to receive, from either the estate or the trust proceeds, necessary expenses and disbursements including reasonable attorneys' fees. MCL 700.3720; MCL 700.7904(2). But in the present case, Appellee was effectively barred from doing so, by virtue of the existing preliminary injunction which froze all of the assets of the RAA Trust. Thus, Appellee faces a significant and substantial dilemma: On the one hand, she is required to contest the claims of Appellant and Highpoint against the Estate of Ruth Adams, Deceased, and RAA Trust, but she is prevented from being able to pay any attorneys' fees or other costs of doing so from the assets of the RAA Trust because of the preliminary injunction.

Appellee made the choice to seek to resign as Trustee since she could not, under the circumstances, fulfill her statutory duties. In response, the Probate Court made the rational decision to "unfreeze" a portion of the RAA Trust assets, so that Appellee could seek to pay her attorneys and could defend against the claims to be determined on remand. Appellee cannot defend against Appellant's claims and Highpoint's claims without access to Trust funds.

The Probate Court's Order Modifying Preliminary Injunction strikes an appropriate balance between the competing interests. It merely modifies the existing injunction to make a portion of the RAA Trust assets – up to \$150,000 – "unfrozen" for purposes of paying legal fees. This is not (as Appellant would have this Court believe) an order which authorizes Appellee to immediately distribute that amount out of the RAA Trust – it merely makes that pool of Trust assets "unfrozen" and available for subsequent applications to the Probate Court to approve distributions for legal fees.

II. THE PROBATE COURT'S ORDER MODIFYING PRELIMINARY INJUNCTION DID NOT DEPRIVE APPELLANT OF DUE PROCESS.

A. Standard of Review

Appellant asserts that the Probate Court denied her due process by modifying the preliminary injunction *sua sponte* and (allegedly) without notice. Appellant's argument fails both as a matter of law and fact. Whether a party has been afforded due process is a question of law, which is reviewed *de novo* by this Court on appeal. *Reed .v Reed*, 265 Mich. 131,157; 693 N.W.2d 825 (2005). Due process is a "flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v. LaGrant*, 286 Mich. App. 483,485; 781 N.W.2d 853 (2009). "The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard." *Id.*

B. The Probate Court Did Not Deny Appellant Due Process By Modifying the Preliminary Injunction.

Appellant claims that the Probate Court's decision to modify the Preliminary Injunction in response to Appellee's Petition for Approval of Resignation was a complete "surprise" to Appellant, was not raised in any of the parties' pleadings or briefing, and therefore was fundamentally unfair to her. Appellant claims that the situation in this case is analogous to that faced by the plaintiff in the *Al-Maliki* case cited by her. In *Al-Maliki*, an auto negligence case, the defendant sought summary disposition based solely on the argument that the plaintiff had not suffered a serious impairment of bodily function. *Id.* at 484. After oral argument, the trial court granted summary disposition *sua sponte* on the issue of causation, even though causation was not raised as a ground for dismissal in the defendant's motion, and despite the fact that defendant had conceded the issue of causation in her motion. *Id.* at 486-487. This Court reversed, holding that the trial court's *sua sponte* determination on an issue that was never raised by the parties

themselves, and which the plaintiff had no meaningful opportunity to respond to, was a denial of due process. *Id.* at 487-488.

Here, Appellant cannot seriously claim that the Probate Court's decision to modify the preliminary injunction was entirely without notice to Appellant or was a "surprise." The Court's ruling followed a hearing on Appellee's Petition for Approval of Resignation and Accounting and Appointment of Successor Trustee ("Appellee's Petition"). Appellee's Petition was prompted by, and explicitly makes repeated reference to, the fact that Appellee does not have any means to pay legal fees without access to the RAA Trust Funds. (Appellee Petition, ¶19). ("Morehouse cannot defend against Hughes' claims and Highpoint Community Bank's claims without access to trust funds.") Further, the Petition also specifically describes the Court's existing preliminary injunction and how that injunction prohibits her from accessing trust funds to pay for legal fees, despite the fact that Appellee is legally obligated, as trustee, to defend against the claims asserted by Hughes and Highpoint Community Bank. (Appellee Petition, ¶¶16-18). Finally, the Appellee's Petition expressly states that Appellee desires to resign as trustee because she cannot finance the defense of the RAA Trust from her personal assets, due to the preliminary injunction. (Appellee Petition, ¶20). ("In light of the foregoing, Appellee now intends to resign as trustee of the Trust.")

Appellee's Petition goes to great lengths to describe the difficulties created by a situation where she is legally bound to defend the Trust and its beneficiaries from the claims of third parties, but is prevented, due to the Probate Court's existing preliminary injunction, from accessing any Trust funds to do so.

Appellant cannot suggest to this Court that it was "surprised" or completely unprepared for the Probate Court to consider modifying the preliminary injunction in response to Appellee's Petition. Further, Appellant had every opportunity in her written response to address and respond

to Appellee's assertions that Appellee could not continue to function as trustee without access to the RAA Trust funds but chose not to. This is not a deprivation of Appellant's due process.

These facts show that *Al-Maliki* is entirely distinguishable from the present situation. First, *Al-Maliki* was an automobile negligence case where the trial court granted summary disposition to a party on grounds – causation – that were never raised at all by the parties. (Indeed, the moving party had conceded that the causation element was satisfied). In contrast, in this case Appellee specifically raised the issue of the preliminary injunction and the fact that the inability to access RAA Trust funds to pay legal fees was causing her to seek to resign as trustee. Appellee's Petition is replete with references by Appellee that she cannot continue to litigate these matters without being able to pay attorneys' fees, and that she is prevented from doing so by virtue of the preliminary injunction. It simply cannot be said that Appellant somehow "lacked notice" that those very issues would be considered by the Probate Court in dealing with Appellee's Petition, or that the Probate Court might conceivably want to address the issue of whether the injunction should be modified in response to Appellee's concerns about lack of access to the RAA Trust funds.

Further, any possible due process violation was remedied when Appellant was permitted to fully brief the issue of modifying the preliminary injunction in her Motion for Reconsideration. In that motion, Appellant did not present any new evidence (unlike the plaintiff in *Al-Maliki*), and her motion was properly denied under MCR 2.119(F). Moreover, Appellant's Motion for Reconsideration was not summarily denied, as in *Al-Maliki*; on the contrary, the Probate Court considered Appellant's Motion for over three months (from April 3, 2023 until July 19, 2023) before denying it. To the extent that Appellant asserts that *Al-Maliki* requires that a court must not deny a motion for reconsideration in order to satisfy due process, Appellant reads that decision far too broadly.

The issues of the preliminary injunction and Appellee’s inability to access the RAA Trust funds to pay her legal fees were clearly before the Probate Court and were repeatedly raised in Appellee’s Petition. Appellant cannot claim that she did not have notice or any meaningful opportunity to respond to those issues; moreover, Appellant had the opportunity to fully brief them in her Motion for Reconsideration. Appellant was clearly not denied any due process here, and the Probate Court’s Order Modifying Preliminary Injunction should be affirmed.

III. APPELLANT’S CLAIM THAT THE PROBATE COURT’S ORDER MODIFYING PRELIMINARY INJUNCTION IS AN ABUSE OF DISCRETION BECAUSE IT WAS MOTIVATED BY PERSONAL ANIMUS IS UNSUPPORTED BY ANY EVIDENCE.

A. Standard of Review

Appellant asserts, with no evidentiary support whatsoever, that the Probate Court’s Order Modifying Preliminary Injunction was motivated by that Court’s “personal disagreement” with the outcome and because Appellee could not afford litigation without access to the RAA Trust funds. Therefore, Appellant argues, the Order is an abuse of discretion.

This Court reviews a lower court’s decisions and orders regarding a preliminary injunction for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v. Pontiac*, 482 Mich. 1, 8; 753 N.W.2d 595 (2008). An abuse of discretion occurs when a decision falls outside of the range of reasonable and principled outcomes. *Id.*

B. The Probate Court’s Order Modifying Injunction Was Not the Result of “Personal Disagreement.”

The Probate Court’s Order Modifying Preliminary Injunction was not the result of the Court’s “personal disagreement.” Appellant claims that the basis for the Probate Court’s decision “seemed” to be that Appellant did not deserve the assets of the RAA Trust, but that claim is utterly unsupported by any evidence whatsoever. Indeed, what the Probate Court said in modifying the preliminary injunction was that, since a trial on the issues regarding entitlement to the RAA Trust

assets was required, the adjudicative process would be enhanced by ensuring that Appellee was able to pay an attorney to represent those interests in the litigation. To that end, the Court authorized “unfreezing” of up to \$150,000 of RAA Trust assets for payment of reasonable attorney fees, which would allow Appellee to seek reimbursement to pay those fees in the future. Appellant claims this is an abuse of discretion because this Court had already determined that the funds in the RAA Trust were improperly distributed to it and are actually property of the JRA Trust. But, as detailed in the arguments presented above (*supra*, §I. B, pp. 7-11), this is not true because there are numerous arguments about why Appellant may not recover any damages or that Appellant’s damages, if any, may be significantly reduced because Ruth Adams was unquestionably entitled to receive distributions from the JRA Trust during her life. These are issues which remain to be litigated in this case, and it would be fundamentally unfair to expect Appellee to litigate those issues with no means to pay attorneys’ fees or other costs associated therewith from Trust assets.

The Probate Court’s decision represents an imminently reasonable and principled outcome in this matter and therefore is not an abuse of discretion.⁶ As the Probate Court noted, giving Appellee access to the RAA Trust to pay her legal fees will ensure vigorous advocacy, which only enhances the dispute resolution process. Otherwise, Appellee (or any successor Trustee, including a public administrator) is faced with the dilemma of being obligated to contest Appellant’s (and Highpoint’s) claims but being practically unable to do so. The Probate Court sought to remedy this situation and crafted a reasonable and principled solution. As such, this Court should affirm the Probate Court’s Order Modifying Preliminary Injunction.

⁶ Similarly, and contrary to Appellant’s claim, the Probate Court’s determination to allow payment of prior legal fees incurred by the RAA Trust in defending this matter is not an abuse of discretion. Allowance of these fees was expressly sought in Appellee’s Petition (*see* App. Tab Y, p. 355-356) and Appellant had every opportunity to object to the same.

CONCLUSION AND RELIEF REQUESTED

For all of the above-stated reasons, Appellee Kristine Morehouse respectfully submits that this Honorable Court should AFFIRM the Probate Court’s Order Modifying Preliminary Injunction.

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Dated: January 16, 2024

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CERTIFICATE OF COMPLIANCE

In accordance with MCR 7.212(B), the undersigned certifies that the foregoing brief contains 5,332 words as computed by the Microsoft Word word-count feature and is formatted with one inch margins, 12-point Times New Roman font, and double spaced text, except for block quotations and footnotes.

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STATE OF MICHIGAN

MI Court of Appeals

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**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

In the Matter of the RUTH A. ADAMS
TRUST Dated January 4, 2005, as
Amended and restated.

COA Case No. 367207

Barry County Probate Ct.
2022-029341-TT
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APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Probate Court issued its order modifying the preliminary injunction that is in place to allow Trustee Kristene Morehouse to pay up to \$150,000 in attorney fees and administrative expenses and its order denying reconsideration on the same day, July 19, 2023. (07/19/23 Order; 07/19/23 Order Modifying Preliminary Injunction). Jackie Hughes timely filed her claim of appeal on August 8, 2023, within 21 days. MCR 7.204(A)(1)(a), (d). This Court has jurisdiction pursuant to MCR 5.801(A)(2)(x).

STATEMENT OF THE QUESTIONS INVOLVED

First Question:

Did the Probate Court err when it failed to follow the law of the case by disregarding this Court's prior opinions and orders and reversing its position as to the preliminary injunction protecting assets that belong to the John R. Adams Trust?

Appellant answers: Yes.

The Probate Court answered: No.

Second Question:

Did the Probate Court err when it *sua sponte* decided to modify the preliminary injunction without providing Jackie Hughes notice and an opportunity to brief the issue and be heard?

Appellant answers: Yes.

The Probate Court answered: No.

Third Question:

Did the Probate Court abuse its discretion when it modified the preliminary injunction simply because it personally disagreed with the outcome and because the Ruth A. Adams Trust could not afford litigation without using funds belonging to the John R. Adams Trust?

Appellant answers: Yes.

The Probate Court answered: No.

Fourth Question:

Did the Probate Court abuse its discretion when it allowed Kristene Morehouse to pay up to \$150,000 in attorney fees from trust assets without any consideration of the reasonableness of the fees?

Appellant answers: Yes.

The Probate Court answered: No.

INTRODUCTION

This is the fifth appeal to come to this Court from the above-captioned cases. Thus far, every prior appeal has been decided in Appellant Jackie Hughes' favor. This Court previously determined that assets were wrongfully transferred from the John R. Adams Trust to the Ruth A. Adams Trust, leaving open only the possibility that a defense such as statute of limitations or laches might bar recovery. Yet, those defenses were never raised.

After this Court's above-mentioned decision, the Probate Court entered an order freezing assets of the Ruth A. Adams Trust on the basis that most, if not all (later determined to be all), of the assets did not belong in that Trust to begin with and would need to be transferred back to the John R. Adams Trust. The Trustee of the Ruth A. Adams Trust, Kristene Morehouse, appealed, and this Court denied leave to appeal the Probate Court's decision.

Afterwards, the Probate Court reversed its own decision and decided to permit Morehouse to spend the remaining assets in the Ruth A. Adams Trust, which this Court determined were wrongfully transferred there to begin with, on her attorney fees. The Probate Court's decision will likely prevent Jackie Hughes from ever obtaining any relief in this case, if not reversed by this Court. Moreover, the Probate Court made this decision without the issue being raised or set for hearing. This Court should reverse the Probate Court's decision because (1) it violates the law of the case from this Court's prior decisions in the appeals between these parties, (2) the Probate Court denied Jackie Hughes due process of law, (3) the Probate Court had no legitimate basis for modifying the injunction, and (4) the

Probate Court allowed Morehouse to access up to \$150,000 in disputed assets for attorney fees without any determination of the reasonableness of such fees.

STATEMENT OF FACTS

Background

This is the sixth of a series of appeals involving Appellant Jackie Hughes and the John R. Adams Trust, a trust created by John Adams—Jackie’s father—on January 4, 2005. Kristene Morehouse, Appellee, represents the estate of Ruth A. Adams, John Adams’ former spouse, and the Ruth A. Adams Trust. Highpoint Community Bank, a second Appellee, is a former Trustee of the John R. Adams Trust.

These parties have been before this Court many times now, in Dockets 354677, 356119, 360337, and 360945. Every one of these appeals has been resolved by this Court in favor of Appellant Jackie Hughes. Yet, the litigation continues. There is one other currently pending appeal in Docket Nos. 366669, 366687, 366688, and 366689. A summary of the proceedings thus far follows:

The John R. Adams Trust

The John R. Adams Trust provided for most of the Trust’s property to go into a Family Trust upon John’s death (in practice, this turned out to be all of his property), and the rest to go to his spouse, Ruth. (01/04/05 John R. Adams Trust No. 1, ¶ 3.3(a)-(c)). With regards to the Family Trust, he provided,

(3) **Residue.** At my Spouse’s death, Trustee shall distribute the remaining trust property, together with any income not distributed during my Spouse’s lifetime, under the provisions of Paragraph 3.4 below.

(01/04/05 John R. Adams Trust No. 1, ¶ 3.3(c)(3)). Paragraph 3.4 requires that the remaining trust property be held in trust for the benefit of Appellant

Jackie Hughes and her children. (01/04/05 John R. Adams Trust No. 1, ¶ 3.4).

John's Trust, however, provided his wife with a Spouse's Right, which was the source of the dispute between the parties in the first two appeals. It stated as follows:

(e) **Spouse's Right.** My Spouse shall have the right to receive free from trust all or any portion of the property which otherwise would have been held by Trustee under this Agreement after my death, but **only by filing, with the court** which has (or would have had if my estate were probated) domiciliary jurisdiction of my estate, a writing evidencing exercise of that right. The writing shall make specific reference to this provision of this Agreement, be signed by my Spouse personally, and shall be filed with the court after my death and not later than 5:00 pm, current local time, one month prior to the initial due date for filing the federal estate tax return in my estate. **Failure of my Spouse to file the writing shall constitute an irrevocable disclaimer of any rights under this paragraph.**

(01/04/05 John R. Adams Trust No. 1, ¶ 3.3(e) (emphasis added)).

John's Death and the Aftermath

On November 19, 2005, John Adams died. (06/10/20 Hearing, p. 4). The Successor Trustees of his Trust were Ruth and Highpoint Community Bank. (01/04/05 John R. Adams Trust No. 1, ¶ 4.1). Although Kristene Morehouse alleged that Ruth exercised the Spouse's Right on April 11, 2006, it is undisputed that the writing that purported to exercise the right was never filed with any court. (04/11/06 Exercise of Spouse's Right; 04/21/20 Trustee's Petition for Instruction, ¶ 8, Case No. 2020-028513-TT). Nonetheless, all of the assets of the John R. Adams Trust were distributed to Ruth Adams during her lifetime pursuant to her purported exercise of the Spouse's Right, except for the real property located at 9596 Lawrence Road in Nashville, Michigan ("Nashville Property"). (04/21/20

Trustee's Petition for Instruction, ¶¶ 10, 12-13, Case No. 2020-028513-TT). Jackie was never informed of the alleged exercise of the Spouse's Right.

Litigation is commenced, leading to this Court's January 27, 2022 decision

Ruth Adams died on October 21, 2019. (04/21/20 Trustee's Petition for Instruction, ¶ 11, Case No. 2020-028513-TT). Kristene Morehouse was appointed Trustee of Ruth's Trust and Personal Representative of her estate. On January 8, 2020, Jackie served a Statement and Proof of Claim on Kristene claiming entitlement to three real properties that were transferred from the John R. Adams Trust to Ruth Adams and then to Ruth's Trust, as well as any yet to be discovered assets that may have been transferred pursuant to the purported exercise of the Spouse's Right.¹ (02/28/20 Complaint, Ingham County Circuit Court Case No. 20-141-CZ, ¶¶ 10, 12, 13.CC-DD, Exhibit 1 to 06/03/20 Jackie L. Hughes' Response to Trustee's Petition for Instructions, Case No. 2020-028513-TT). Jackie claimed entitlement to the properties because they were improperly transferred by Ruth to her own trust, without proper exercise of the Spouse's Right by filing a writing in the court. (02/28/20 Complaint, Ingham County Circuit Court Case No. 20-141-CZ, ¶ 13). Kristene disallowed the claim, and Jackie and her two daughters then commenced a civil action in Ingham County Circuit Court against Kristene on February 28, 2020. (02/28/20 Complaint, Ingham County Circuit Court Case No. 20-141-CZ, ¶¶ 14-15).

While the civil action was pending in Ingham County, the remaining Trustee of the John R. Adams Trust, Highpoint Community Bank, filed a petition for instruction in Barry County Probate Court, **Case No. 2020-028513-TT (first Barry County case involving these parties)**, requesting instruction as to what to do with the single remaining asset of the John R. Adams Trust—the Nashville Property. (04/21/20 Trustee's Petition for Instruction, Case No. 2020-028513-TT). Although Jackie's civil

¹ Notably, Jackie Hughes attempted to initiate a decedent's estate action in Barry County, first, but the Barry County Court declined to do so. (01/07/20 Petition for Probate and/or Appointment of Personal Representative, Case No. 2020-28415-DE; 02/05/20 Hearing, p. 10, Case No. 2020-28415-DE).

action was initially filed in Ingham County, it was transferred to Barry County, Case No. **2020-000735-CZ (second Barry County case involving these parties)**, and both it and the petition for instruction were decided by Judge Doherty. The Probate Court determined that the Nashville Property would remain in the John R. Adams Trust but any property that was already transferred out of the trust and to Ruth would remain where it was. (08/12/20 Order, Case No. 2020-028513-TT). The civil action was dismissed. (12/17/20 Dismissal, Case No. 2020-000735-CZ; 01/14/21 Order, Case No. 2020-000735-CZ).

Jackie and Kristene Morehouse both appealed. This Court upheld the Probate Court's decision as to the Nashville Property, but reversed the Probate Court's decision as to other property that was transferred out of the John R. Adams Trust. (01/27/22 COA Opinion, Docket Nos. 354677 and 356119). **This Court expressly found that the Spouse's Right was not properly exercised and was, thus, not a proper basis for the transfer of any property out of the John R. Adams Trust.** (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119). This Court further **reversed the dismissal of the civil action and reinstated that action.** (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119).

The Lawsuit against Highpoint Community Bank

Jackie and her two daughters commenced a second civil action, **2021-000713-CZ (third Barry County case involving these parties)**, on October 12, 2021, against Highpoint Community Bank, alleging breach of fiduciary duty and breach of loyalty. (10/12/21 Complaint, Case No. 2021-000713-CZ). On November 30, 2021, Highpoint filed a motion to dismiss the case, in part on the basis that Jackie's claims were time barred pursuant to MCL 700.7905(1)(a), which provides,

(a) A trust beneficiary shall not commence a proceeding against a trustee for breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed

the trust beneficiary of the time allowed for commencing a proceeding.

(11/30/21 Brief in Support of Highpoint Community Bank’s Motion to Dismiss, p. 7).

After this Court reversed the Probate Court in the prior appeals, this Court reversed this decision of the Probate Court as well. (07/21/22 COA Order, Docket No. 360337). This Court expressly concluded that the one-year statute of limitations did not apply because Jackie was never provided a report that disclosed the time allowed for commencing a proceeding. (07/21/22 COA Order, Docket No. 360337).

Jackie’s Motion for a Temporary Restraining Order

On February 3, 2022, Jackie filed an Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust. (02/03/22 Jackie L. Hughes’ Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT). She filed revised motions on February 14 and 16, 2022. (02/14/22 Jackie L. Hughes’ Revised Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT; 02/16/22 Jackie L. Hughes’ Second Revised Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT). In her motion, she asked that “any trust assets that were improperly removed from the John R. Adams Trust . . . remain at status quo pending the March 16, 2022 3:15 pm Status Conference.” (02/16/22 Jackie L. Hughes’ Second Revised Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, ¶ 8, Case No. 20-28513-TT).

On February 14, 2022, the Probate Court entered a temporary restraining order. (02/14/22 Order, Case No. 20-28513-TT). Kristene Morehouse filed responses and objections on February 14 and 18, 2022.

(02/14/22 Response and Objection to Jackie L. Hughes' Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT; 02/18/22 Response and Objection to Jackie L. Hughes' Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT). She argued, first, that the Probate Court could not enter a temporary restraining order before the period of time for filing an appeal to the Michigan Supreme Court of this Court's prior opinion had expired. (02/14/22 Response and Objection to Jackie L. Hughes' Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT). In her second response, she argued that a preliminary injunction was improper because Jackie has an adequate remedy at law and Kristene Morehouse required access to trust funds to fulfill her fiduciary duty to defend the trust. (02/18/22 Response and Objection to Jackie L. Hughes' Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, pp. 2-3, Case No. 20-28513-TT). She further argued that Jackie was unlikely to succeed on the merits of her claims for the return of the John R. Adams Trust's property, Jackie would not suffer irreparable injury if an injunction was denied, and Kristene Morehouse and other beneficiaries of the Ruth A. Adams Trust would suffer significant harm if an injunction was granted. (02/18/22 Response and Objection to Jackie L. Hughes' Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, pp. 8, 13, Case No. 20-28513-TT).

The Probate Court denied Kristene Morehouse's objections after a hearing, and denied reconsideration. (02/23/22 Hearing, p. 28, Case No. 20-28513-TT; 03/16/22 Order, Case No. 20-28513-TT). This time, Kristene Morehouse appealed. This Court denied the application for leave to appeal. (10/17/22 COA Order, Docket No. 360945).

The Probate Court's Sudden Change of Mind

On November 21, 2022, Kristene Morehouse filed a petition to allow her to resign as trustee of the Ruth A. Adams Trust, **Case No. 22-029341-TT (fourth Barry County case involving these parties)**. (11/17/22 Petition for Approval of Resignation and Final Account of Trustee and Appointment of Successor Trustee, Case No. 22-029341-TT). Morehouse argued that she needed to resign because the Probate Court froze the assets of the Ruth A. Adams Trust and she could not afford to fund the defense of the Trust from her own pocket. (01/18/23 Hearing, pp. 14-15). She further asked the Court to approve her final accounting and allow her outstanding attorney fees of \$90,000 to be paid from the Trust. (01/18/23 Hearing, p. 16).

The petition was heard on January 18, 2023. (01/18/23 Hearing). At the beginning of the hearing, the Probate Court acknowledged that the request to resign was the only issue before the Court on that date. (01/18/23 Hearing, p. 4). Nonetheless, the Probate Court expressed concern that it would be unable to have a fair trial on the issues of laches and statute of limitations if the Ruth A. Adams Trust had no defense. (01/18/23 Hearing, p. 19).

Jackie's counsel argued that based on this Court's prior opinion and the discovery conducted, the Ruth A. Adams Trust essentially has no assets. This Court ruled that the assets transferred from the John R. Adams Trust to the Ruth A. Adams Trust were improperly transferred, and there were no contributions to the Ruth A. Adams Trust that had not come from the John R. Adams Trust. (01/18/23 Hearing, p. 20). Moreover, there had never been any pleading filed raising the issues of laches or statute of limitations. (01/18/23 Hearing, p. 20). The Probate Court strangely appeared to remark that Jackie Hughes should have raised the issue of statute of limitations herself. (01/18/23 Hearing, p. 20). According to the Probate Court, the funds improperly transferred to the Ruth A. Adams Trust could still be defended through laches or statute of limitations. (01/18/23 Hearing, p. 21).

The Probate Court eventually asked Morehouse's attorney whether she would prefer to resign or continue as trustee with assets unfrozen so she could pay her attorney fees. (01/18/23 Hearing, p. 30). Jackie Hughes

argued that Morehouse should be released as trustee due to her inability to afford her attorney fees and a public administrator should be appointed as trustee, but the assets should remain frozen. (01/18/23 Hearing, p. 31). Morehouse, on the other hand, stated she would be willing to continue to act as trustee if allowed to access trust funds to pay her attorney fees. (01/18/23 Hearing, p. 32).

The Probate Court ultimately stated there was no public administrator so the Probate Court would keep Morehouse as trustee and allow her to access \$150,000 from the trust to defend the trust. (01/18/23 Hearing, p. 34). The Probate Court further explained as follows:

Like it or not, if Ruth Adams had properly filed a piece of paper with this Court and transferred the one asset that she failed or forgot to transfer, all of the assets could have went into the Ruth Adams Trust.

I just – it seems to me that this case from the beginning with logical level heads should have just been resolved. But that’s fine. We will have a trial on this matter, but I’m not going to do it without the – with tying the hands behind the back of someone that’s required to defend the trust.

Whether or not you feel, this is about principle and they should never have tried to take the assets in the first place, the fact is they could have taken them all if they did it the right way and actually filed the paper with the Court even though they said it was impossible. They certainly could have filed a trust action to – to meet the criteria of the escape clause that was in the original trust.

So, as far as I’m concerned, everybody’s getting what they deserve right now and if you would prepare that order, Mr. Russell.

(01/18/23 Hearing, pp. 34-35).

Jackie's Motion for Reconsideration

On April 3, 2023, Jackie Hughes filed a motion for reconsideration. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Motion for Reconsideration). She argued all of the following:

- (1) That the Probate Court denied her due process when it modified the preliminary injunction without the issue being before it, depriving Jackie of an opportunity to respond;
- (2) That Morehouse misrepresented her lack of funds to pay her attorney fees by ignoring funds outside the Trust that the Ruth A. Adams estate possessed;
- (3) That the Probate Court incorrectly assumed that at least some assets in the Ruth A. Adams Trust belong to it;
- (4) That Morehouse has no valid statute of limitations or laches defense;
- (5) That the Probate Court allowed Morehouse to remove trust assets without proof that her attorney fees were reasonable; and
- (6) That the Probate Court assumed Morehouse has participated in good faith in these proceedings.

(04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, pp. 3-12).

On July 19, 2023, the Probate Court denied reconsideration and entered its final written order on the issue. (07/19/23 Order; 07/19/23 Order Modifying Preliminary Injunction). This appeal followed.

LEGAL STANDARD

Whether law of the case applies is a question of law subject to review de novo. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Likewise, "[w]hether a party has been afforded due process is a question of law," which is reviewed de novo. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). A trial

court's decision whether to dissolve a preliminary injunction is reviewed for an abuse of discretion. *Huron Valley Hosp v Dep't of Pub Health*, 92 Mich App 175, 179; 284 NW2d 758 (1979). The reasonableness of attorney fees charged by a trustee is, likewise, reviewed for an abuse of discretion. *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989).

ARGUMENT

I. The Probate Court erred when it failed to follow the law of the case by disregarding this Court's prior opinions and orders and reversing its position as to the preliminary injunction protecting assets that belong to the John R. Adams Trust.

Preservation of Issue. This issue was preserved by Jackie Hughes' repeated insistence at the January 18, 2023 hearing and in her motion for reconsideration that the Probate Court was violating this Court's opinions and orders. (01/18/23 Hearing, pp. 19-21; 04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, p. 2; 06/29/23 Supplement to Motion for Reconsideration).

The "law of the case" doctrine provides that a ruling by an appellate court on a particular issue binds both the appellate court and trial courts with respect to that issue. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). That is, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Id.*

In *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 726; 209 NW2d 843 (1973), this Court examined and explained the differences among the doctrines of res judicata, collateral estoppel, and law of the case. This Court explained that res judicata and collateral estoppel provide parties with a *final* decision on litigated questions that cannot be relitigated in a *subsequent lawsuit*. *Id.* at 727. The law of the case doctrine, by contrast, accords finality to litigated issues *within the same cause of action*. *Id.* at

729. It offers parties “a measure of certainty” as to litigated issues until the cause of action is fully litigated, including retrials and appeals. *Id.* The primary purpose of the doctrine, thus, is to maintain consistency and avoid reconsideration of matters once decided **during the course of a single continuing lawsuit**. *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992).

A. This Court’s determination that assets were improperly transferred from the John R. Adams Trust to the Ruth A. Adams Trust is law of the case, and the Probate Court had no authority to order that assets belonging to the John R. Adams Trust be used to fund the Ruth A. Adams Trust’s litigation defense.

As detailed in Appellant’s Statement of Facts, the parties to the present appeal have been before this Court many times now, in Dockets 354677, 356119, 360337, and 360945, and every one of these appeals has been resolved by this Court in favor of Appellant Jackie Hughes. On January 27, 2022, this Court held unequivocally that Ruth failed to properly exercise the Spouse’s Right and that her estate has no claim to any remaining trust property:

Although Ruth executed a document in an attempt to exercise the Spouse’s Right, she did not file a writing to that effect with the probate court as required by John’s trust. And per the trust’s unambiguous terms, this failure constituted “an irrevocable disclaimer of any rights under” section 3.3(e). Accordingly, **Ruth had no right to receive trust property pursuant to this provision and her estate has no claim for any remaining trust property.**

(01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119 (emphasis added)).

This Court went on to hold that trust property was not properly distributed to Ruth during her lifetime and that Morehouse provided no persuasive argument as to how the transfers could be deemed proper:

However, Ruth's failure to validly exercise the Spouse's Right compels us to **reverse the probate court's ruling that trust property was properly distributed to Ruth during her lifetime** pursuant to the Spouse's Right. **Morehouse has provided no persuasive argument or authority as to how those distributions can be deemed proper** given the lack of a court filing evidencing Ruth's exercise of the Spouse's Right.

(01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119 (emphasis added)). This Court further noted in a footnote that "Morehouse does not assert that Ruth in fact received trust assets pursuant to a different trust provision." (01/27/22 COA Opinion, p. 8 n.12, Docket Nos. 354677 and 356119).

This Court's January 27, 2022 decision is law of the case and cannot be contradicted by the Probate Court on remand. But the Probate Court itself acknowledged,

[P]art of the Court of Appeals order was they found that transfer to be invalid. So, they're saying that **all those assets are still in the John Adams Trust or should be.**

(02/23/22 Hearing, pp. 14-15 (emphasis added)). That was the basis for the Probate Court's initial freeze of assets.

MCL 700.7813(3) specifically requires the return of assets that are improperly distributed from a trust to a beneficiary:

(3) Unless the distribution or payment can no longer be questioned because of adjudication, estoppel, or other limitation, **a distributee or claimant that receives property that is improperly distributed or paid from a trust shall return the property and any income and gain from the property since distribution, if the recipient has the property. If the recipient does not**

have the property, the recipient shall pay the value of the property as of the date of distribution or payment and any income and gain from the property since distribution.

(emphasis added).

When the Probate Court suddenly reversed itself almost a year later, it never explained how the assets that were supposed to be in the John R. Adams Trust could be used to pay the Ruth A. Adams Trust's attorney fees. Instead, the Probate Court seemed to be reconsidering the very validity of this Court's January 27, 2022 decision:

Like it or not, if Ruth Adams had properly filed a piece of paper with this Court and transferred the one asset that she failed or forgot to transfer, all of the assets could have went into the Ruth Adams Trust.

I just – it seems to me that this case from the beginning with logical level heads should have just been resolved. But that's fine. We will have a trial on this matter, but I'm not going to do it without the – with tying the hands behind the back of someone that's required to defend the trust.

Whether or not you feel, this is about principle and they should never have tried to take the assets in the first place, the fact is they could have taken them all if they did it the right way and actually filed the paper with the Court even though they said it was impossible. They certainly could have filed a trust action to – to meet the criteria of the escape clause that was in the original trust.

So, as far as I'm concerned, everybody's getting what they deserve right now and if you would prepare that order, Mr. Russell.

(01/18/23 Hearing, pp. 34-35).

The only other rationale the Probate Court provided was that the Ruth A. Adams Trust could not afford to defend itself without using the funds that

were improperly transferred from the John R. Adams Trust. But a trial court does **not** have the authority to order one party to fund the opposing party's litigation simply because the opposing party does not have the ability to pay. The American Rule is that each party is generally responsible for his or her own attorney fees. *Haliw v City of Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005).

Thus, the Probate Court violated the law of the case when it allowed the Trustee of the Ruth A. Adams Trust to use funds this Court determined were improperly transferred to it from the John R. Adams Trust to fund the Ruth A. Adams Trust's litigation defense.

B. There is no statute of limitations or laches defense to be tried.

This Court's January 27, 2022 opinion left open one possible argument for Morehouse to make on remand: whether Appellant's action was time barred by laches or statute of limitations. (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119). A statute of limitations defense, however, must be raised in a party's first responsive pleading. MCR 2.116(C)(7), (D)(2). These defenses were left for *Morehouse* to raise in the probate court, if applicable. (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119). She never did so. (01/18/23 Hearing, p. 20).

The only time a statute of limitations defense has been raised in these cases is by Highpoint Bank, and it failed. (01/26/22 Hearing, pp. 15-16; 07/21/22 COA Order, Docket No. 360337). This Court concluded that the statute of limitations did not bar Jackie Hughes' claims. (07/21/22 COA Order, Docket No. 360337). This decision is, likewise, law of the case.

The Probate Court justified its decision to allow Morehouse to use the funds that should be in the John R. Adams Trust by stating that there needed to be a trial on the issues of laches and statute of limitations. (01/18/23 Hearing, pp. 19, 21). Jackie's counsel objected, however, that those issues had never even been raised by the opposing parties. (01/18/23 Hearing, p. 20).

The Probate Court, thus, erred when it relied upon these unraised and invalid defenses to modify the preliminary injunction.

C. The preliminary injunction issue has been heavily litigated and a reversal of position goes against the policies behind the law of the case doctrine.

Appellant Jackie Hughes filed her first motion requesting a temporary restraining order on February 3, 2022, and a temporary restraining order was entered on February 14, 2022—almost a year before the Probate Court reversed itself. (02/03/22 Jackie L. Hughes’ Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT; 02/14/22 Order, Case No. 20-28513-TT). Appellee Kristene Morehouse filed two responses to the motion. (02/14/22 Response and Objection to Jackie L. Hughes’ Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT; 02/18/22 Response and Objection to Jackie L. Hughes’ Ex Parte Motion for Temporary Restraining Order regarding all Assets, Monies, and/or Property in Connection with the John R. Adams Trust, Case No. 20-28513-TT). A hearing was then held on the motion on February 23, 2022, and Kristene Morehouse’s objections were denied. (02/23/22 Hearing, p. 28, Case No. 20-28513-TT).

Kristene Morehouse filed a motion for reconsideration, which was also denied. (03/07/22 Morehouse's Motion for Reconsideration, Case No. 20-28513-TT; 03/16/22 Order, Case No. 20-28513-TT). Morehouse then appealed, and this Court denied leave to appeal. (10/17/22 COA Order, Docket No. 360945). In short, this issue has been argued multiple times by the parties, and both the Probate Court and this Court decided in Appellant Jackie Hughes’ favor every time prior to January 18, 2023.

This Court has held that when this Court denies an interlocutory application for leave to appeal “for lack of merit on the grounds presented,” that determination is law of the case and the issue will not be redetermined in a subsequent appeal after a final order. *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 143-145; 946 NW2d 812 (2019). By contrast,

when this Court denies an application for leave to appeal because the Court was not persuaded that immediate appellate review was necessary, no merits determination has been made and parties are free to challenge the order once again *when appealing the final order*. *Id.* at 144 n.6.

Although this Court in the present case denied leave to appeal “for failure to persuade the Court of the need for immediate appellate review,” which is not generally a decision on the merits and does not generally preclude an appeal of the same issue **after a final judgment**, there are several reasons that this Court should not allow this issue to be reopened yet again. First, the very nature of a preliminary injunction makes this Court’s denial of interlocutory leave to appeal essentially a decision on the merits of a preliminary injunction. The purpose of a preliminary injunction is to preserve the status quo **pending a trial and final decision on the merits of the case**. *Attorney Gen v Thomas Solvent Co*, 146 Mich App 55, 61; 380 NW2d 53 (1985). Once issued, a preliminary injunction must be obeyed until overturned on direct appeal. *Reed v Soltys*, 106 Mich App 341, 350; 308 NW2d 201 (1981). But once there is a final decision on the merits of the case, there is no longer a preliminary injunction to be challenged.

Second, this issue was reraised and redecided *before* a final decision on the merits in the case. Failing to apply the law of the case doctrine in such a context would suggest that a party could repeatedly reraise and re-appeal (by interlocutory application) the same issue *prior* to a final judgment. This seems to go against the policies underlying the law of the case doctrine. The fact that an issue may be appealed a second time after a final judgment does not mean the issue should be subject to continuous reconsideration and re-litigation *prior* to that final judgment.

Third, this Court clearly *considered* the merits of the issue in this instance. On September 8, 2022, this Court originally ordered that the case would be remanded to the Probate Court because Morehouse was entitled to use assets of the Ruth A. Adams Trust to pay her reasonable attorney fees as trustee. (09/08/22 COA Order, Docket No. 360945). Jackie Hughes filed a motion for reconsideration on September 22, 2022. (09/22/22 Hughes’ Motion for Reconsideration). In her motion, Jackie explained that there are two trusts at issue in these cases: the John R. Adams Trust and the Ruth A. Adams Trust.

The John R. Adams Trust originally had the assets in question. The assets were wrongfully transferred out of that trust and into the Ruth A. Adams Trust. Kristene Morehouse is trustee of only the Ruth A. Adams Trust, and not the John R. Adams Trust. The basis for the preliminary injunction was that the Ruth A. Adams Trust does not actually have assets with which to pay its own attorney fees because the only assets in the trust were wrongfully transferred into it from the John R. Adams Trust and need to be returned to it. (02/23/22 Hearing, pp. 14-15).

The Probate Court itself stated previously that because the assets were found to have been improperly transferred from the John R. Adams Trust to the Ruth A. Adams Trust, they either legally are now assets of the John R. Adams Trust or should be transferred back to it. (02/23/22 Hearing, pp. 14-15). There is no dispute that Kristene Morehouse would be permitted to use funds of the Ruth A. Adams Trust to defend the trust, if the Trust properly had any funds, but she cannot use the funds of the John R. Adams Trust to pursue litigation against that trust. (02/23/22 Hearing, p. 27). Highpoint Bank, the trustee of the John R. Adams Trust, agreed that the assets should be preserved. (02/23/22 Hearing, p. 25). Ultimately, the Probate Court concluded that because the assets in question need to be returned to the John R. Adams Trust, Morehouse had no entitlement to use them as trustee of the Ruth A. Adams Trust. (02/23/22 Hearing, p. 28).

On October 17, 2022, this Court granted reconsideration, and that is when it denied leave to appeal. (10/17/22 COA Order, Docket No. 360945). In doing so, this Court had to make a determination that its prior conclusion that Morehouse was entitled to use the assets to pay her attorney fees was incorrect. But after 8 months were spent litigating the issue in the Probate Court and Court of Appeals, the Probate Court ultimately reconsidered the issue once again on January 18, 2023, and decided the exact opposite. Again, this seems to go against the entire reason for the law of the case doctrine's existence.

Importantly, this does not mean that a prior decision may *never* be revisited. The law of the case doctrine does not prevent an issue from being revisited where the facts have materially changed. *Kuebler v Kuebler*, ____ Mich App ____ (2023) (Docket No. 362488).

In *Huron Valley Hosp v Dep't of Pub Health*, 92 Mich App 175, 177; 284 NW2d 758 (1979), the trial court followed this framework as to the dissolution of a preliminary injunction. Intervenors filed a motion to dissolve the preliminary injunction, which the trial court initially denied because no material change in circumstances justified dissolution of the preliminary injunction. *Id.* at 177-178. Several months later, the defendants filed a new motion to dissolve the preliminary injunction, providing several affidavits in support, and the trial court granted it, finding that “there *now* is presented irreparable and immediate harm to the defendant.” *Id.* at 178.

In the present case, however, there was no material change of circumstances whatsoever. The Probate Court’s reasons for suddenly modifying the preliminary injunction seemed to stem from (1) disagreement with the merits of this Court’s prior decision and (2) concern about Morehouse’s inability to afford attorney fees. There were no new facts or changed circumstances. The mere fact that Morehouse was going to resign should not change a determination that the Ruth A. Adams Trust had no funds of its own to spend on attorney fees. The John R. Adams Trust is not legally required to fund litigation for a separate trust.

II. The Probate Court erred when it *sua sponte* decided to modify the preliminary injunction without providing Jackie Hughes notice and an opportunity to brief the issue and be heard.

Preservation of Issue. This issue was preserved by Jackie Hughes’ arguments in her motion for reconsideration. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson’s Brief in Support of Their Motion for Reconsideration, pp. 3-4).

“Due process is a flexible concept, the essence of which requires fundamental fairness.” *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). “The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard.” *Id.* This Court has expressly held that where a trial court raises an issue *sua*

sponte, it denies a party due process of law if it does not provide the party a meaningful opportunity to brief and argue the issue. *Id.* at 485-489.

Al-Maliki was an automobile negligence case in which the defendant moved for summary disposition, arguing solely that the plaintiff did not suffer a serious impairment of a body function. *Id.* at 484. At oral argument, the trial court raised the issue of causation *sua sponte* and granted summary disposition to the defendant on the basis that there was no evidence the automobile accident caused the plaintiff's injuries. *Id.*

The plaintiff argued on appeal that the plaintiff had been deprived of due process of law when the trial court raised the causation issue *sua sponte* and gave the plaintiff no opportunity to respond to it. *Id.* at 485. The fact that the plaintiff was able to respond at the hearing was insufficient where the plaintiff had no opportunity to brief the issue and no notice that it would be raised at the hearing. *Id.* at 487-488. Moreover, the fact that the plaintiff filed a motion for reconsideration and the trial court denied it without analysis was insufficient to render the error harmless. *Id.* at 488.

Here, similarly, the Probate Court *sua sponte* decided to modify the preliminary injunction when the issue of whether to dissolve or modify the injunction was not before it. Kristene Morehouse did not file a petition to dissolve or modify the preliminary injunction. She only filed a petition to resign as trustee. (11/17/22 Petition for Approval of Resignation and Final Account of Trustee and Appointment of Successor Trustee, Case No. 22-029341-TT). In fact, at the beginning of the hearing, the Probate Court acknowledged that the request to resign was the only issue before the Court on that date. (01/18/23 Hearing, p. 4). The Probate Court ultimately decided to *sua sponte* raise the issue of whether to modify the preliminary injunction, without any prior notice to Jackie Hughes and without affording Jackie Hughes an opportunity to brief the issue. Although Jackie moved for reconsideration, the Probate Court, just like the trial court in *Al-Maliki*, denied the motion without any further explanation or analysis. (07/19/23 Order).

The Probate Court denied Jackie Hughes due process of law when it modified the preliminary injunction without affording her notice and a meaningful opportunity to be heard on the issue.

III. The Probate Court abused its discretion when it modified the preliminary injunction simply because it personally disagreed with the outcome and because the Ruth A. Adams Trust could not afford litigation without using funds belonging to the John R. Adams Trust.

Preservation of Issue. This issue was preserved by Jackie Hughes' arguments in her motion for reconsideration. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, pp. 4-7).

MCL 700.1309 expressly grants a probate court authority to issue an injunction to protect trust property:

Upon reliable information received from an interested person, county or state official, or other informed source, including the court's files, **the court may enter an order in a proceeding to do either or both of the following:**

...

(b) **Enjoin a person subject to the court's jurisdiction from conduct that presents an immediate risk of waste, unnecessary dissipation of an estate's or trust's property,** or jeopardy to an interested person's interest. . . . An enjoined person shall be given a prompt hearing, if requested, to show cause why the order should be terminated.

As mentioned above, this Court held in its January 27, 2022 opinion that Ruth Adams (and, thus, the Ruth A. Adams Trust) did not properly receive assets from the John R. Adams Trust:

. . . Ruth's failure to validly exercise the Spouse's Right compels us to **reverse the probate court's ruling that**

trust property was properly distributed to Ruth during her lifetime pursuant to the Spouse's Right. **Morehouse has provided no persuasive argument or authority as to how those distributions can be deemed proper** given the lack of a court filing evidencing Ruth's exercise of the Spouse's Right.

(01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119 (emphasis added)).

MCL 700.7813(3) specifically requires the return of assets that are improperly distributed from a trust to a beneficiary:

(3) Unless the distribution or payment can no longer be questioned because of adjudication, estoppel, or other limitation, **a distributee or claimant that receives property that is improperly distributed or paid from a trust shall return the property and any income and gain from the property since distribution, if the recipient has the property. If the recipient does not have the property, the recipient shall pay the value of the property as of the date of distribution or payment and any income and gain from the property since distribution.**

(emphasis added). Indeed, even the Probate Court itself acknowledged,

[P]art of the Court of Appeals order was they found that transfer to be invalid. So, they're saying that **all those assets are still in the John Adams Trust or should be.**

(02/23/22 Hearing, pp. 14-15 (emphasis added)).

The Probate Court's only reasons for modifying the preliminary injunction seemed to be that Jackie Hughes did not "deserve" the assets and that Morehouse could not afford litigation without the assets. (01/18/23 Hearing, pp. 34-35). But a trial court cannot disregard what this Court itself held was the plain language of the John R. Adams Trust simply because the trial court personally disagrees with the outcome. Nor does the trial court have the authority to order one party to fund the opposing party's litigation

simply because the opposing party does not have the ability to pay. *See Haliw v City of Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). Thus, modifying the preliminary injunction on these bases was an abuse of discretion.

IV. The Probate Court abused its discretion when it allowed Kristene Morehouse to pay up to \$150,000 in attorney fees from trust assets without any consideration of the reasonableness of the fees.

Preservation of Issue. This issue was preserved by Jackie Hughes' arguments in her motion for reconsideration. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, p. 11).

The Probate Court's July 19, 2023, order allowed Morehouse to pay "up to \$150,000" in attorney fees from the disputed trust assets. (07/19/23 Order). But Morehouse provided nothing but a total number of attorney fees owed to the Probate Court. She did not produce an itemized statement detailing how the fees were incurred in order to establish their reasonableness. Jackie Hughes objected to the reasonableness of the amount of fees the Probate Court was awarding in her motion for reconsideration and requested a hearing on the issue. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, p. 11). The Probate Court simply denied reconsideration without explanation and never conducted any analysis of the reasonableness of the requested fees. (07/19/23 Order).

"An attorney is entitled to receive reasonable compensation for necessary legal services he performs on behalf of the estate, in an amount approved by the court." *In re Krueger Estate*, 176 Mich App 241, 248; 438 NW2d 898 (1989). In determining what constitutes a reasonable fee, "the court should consider, among other factors, the amount of time spent, the amount of money involved, the character of the services rendered, the skill and experience necessary, and the results obtained." *Id.*

Significantly, the burden of proof on these considerations rests on the party claiming a right to that compensation. *Id.* at 249. When the requested compensation is objected to by an affected party,

the attorney must append to an accounting, petition, or motion in which compensation is claimed a written description of services performed, a summary of the work done by the attorney, and any other information that may be helpful to the court in determining compensation.

Id. “[T]he attorney's burden of proving reasonable compensation . . . includes providing a statement of the amount of time spent by the attorney in performing the services described and the presentation of some evidence in support thereof.” *Id.* “Without such a statement, the probate court and this Court are without any means of determining the reasonableness of the requested compensation.” *Id.*

Because Morehouse did nothing to substantiate her attorney fee bills, and the Probate Court awarded them over Jackie Hughes’ objection without performing any of the required analysis of reasonableness, the Probate Court abused its discretion when it allowed Morehouse to spend “up to \$150,000” from trust assets on attorney fees.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Jackie Hughes respectfully requests that this Court reverse the Probate Court’s July 19, 2023 order modifying the preliminary injunction to allow Morehouse to spend up to \$150,000 in trust assets.

Respectfully submitted,

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**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

In the Matter of the RUTH A. ADAMS
TRUST Dated January 4, 2005, as
Amended and restated.

COA Case No. 367207

Barry County Probate Ct.
2022-029341-TT
Hon. William M. Doherty

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APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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REPLY TO APPELLEE'S STATEMENT OF FACTS

For the most part, Appellee Morehouse correctly states the facts of this case in her Statement of Facts. However, Morehouse and Appellant Hughes disagree on two important issues that Morehouse discussed within her Statement of "Facts": (1) the meaning of this Court's January 27, 2022 decision; and (2) whether Appellee has "waived" any defenses.

With regards to this Court's opinion, Morehouse states,

[T]his Court did not order the RAA Trust assets to be returned to the JRA Trust. Instead, the case was remanded to the Probate Court for litigation and determination of any defenses asserted by Appellee or Highpoint (including statute of limitations and/or laches), as well as for an ultimate determination of Appellant's damages, if any, to be determined by the Trial Court in the first instance.

(Morehouse's Brief on Appeal, pp. 2-3).

In her Argument section, she expounds further on what she means by the above quoted text:

Ruth Adams' failure to properly exercise her Spouse's Right is not the end of the story. The transfer of assets from the JRA Trust to the RAA Trust **may** not have been proper, and Appellant **may** have a claim for damages against one or both of the Co-Trustees of the JRA Trust for a wrongful distribution of those trust assets. However, it is equally the case that any such claim by Appellant **may be barred by an applicable statute of limitations, or by the equitable doctrine of laches. Further, such claims may be negated by an action seeking reformation of the JRA Trust, which is also being pursued in the Probate Court.** Additionally, Ruth Adams was entitled to distributions from the JRA Trust during her lifetime. Thus, a calculation must be made of what Ruth Adams was entitled to receive from the JRA Trust during her lifetime to determine what amount, if any, she was not entitled to receive.

These are all issues which this Court intentionally left unresolved in its prior Opinion of January 27, 2022, and are the issues that are presently being litigated in the Probate Court.

(Morehouse's Brief on Appeal, p. 8). But these statements by Morehouse mischaracterize this Court's prior opinion.

This Court held unequivocally not only that Ruth failed to properly exercise the Spouse's Right but that **the property distributed to Ruth during her lifetime was improperly distributed to her** and that Ruth Adams **had no other legitimate basis for the transfers:**

Although Ruth executed a document in an attempt to exercise the Spouse's Right, she did not file a writing to that effect with the probate court as required by John's trust. And per the trust's unambiguous terms, this failure constituted "an irrevocable disclaimer of any rights under" section 3.3(e). Accordingly, **Ruth had no right to receive trust property pursuant to this provision and her estate has no claim for any remaining trust property.**

...

Ruth's failure to validly exercise the Spouse's Right compels us to **reverse the probate court's ruling that trust property was properly distributed to Ruth during her lifetime** pursuant to the Spouse's Right. **Morehouse has provided no persuasive argument or authority as to how those distributions can be deemed proper given the lack of a court filing evidencing Ruth's exercise of the Spouse's Right.**

(01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119 (emphasis added)). This Court further noted in a footnote that **"Morehouse does not assert that Ruth in fact received trust assets pursuant to a different trust provision."** (01/27/22 COA Opinion, p. 8 n.12, Docket Nos. 354677 and 356119 (emphasis added)).

Morehouse’s statement that this Court merely determined that “[t]he transfer of assets from the JRA Trust to the RAA Trust **may** not have been proper” is simply false. This Court clearly determined that the transfer was improper. (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119). This Court further held that all distributions to Ruth were improper because she did not in fact receive trust assets pursuant to a different trust provision. (01/27/22 COA Opinion, p. 8 n.12, Docket Nos. 354677 and 356119).

The **only** possible arguments this Court left open were statute of limitations and laches. (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119). But even in her brief on appeal, Morehouse does not explain how laches or a statute of limitations defense might apply and express that she is pursuing those defenses. Instead, she states that she is “pursuing” a claim of reformation—something else entirely. (01/27/22 COA Opinion, p. 8, Docket Nos. 354677 and 356119).

With regards to the defenses of statute of limitations and laches, Morehouse claims that she has not waived any defenses. (Morehouse's Brief on Appeal, p. 3). But Morehouse does not explain why this is so or cite anything in the record at all. Morehouse points to nowhere she has made arguments regarding statute of limitations or laches and no explanation as to how these arguments will have any merit in the future. She does not even state which statute of limitations she believes applies to this case. At the January 18, 2023, hearing, Hughes raised the fact that there had never been any pleading filed raising the issues of laches or statute of limitations. (01/18/23 Hearing, p. 20). Morehouse has offered nothing to the contrary to demonstrate that she has, in fact, raised the defenses or even believes they have actual merit. The only claim Morehouse seems to legitimately wish to pursue is a claim for reformation—something beyond what this Court remanded for in its prior decision.

ARGUMENT

- I. **Appellee Morehouse significantly mischaracterizes what has already been decided in this case, and places too much weight on her alleged “need” to have funds to defend the Ruth Adams Trust when a litigant is never entitled to payment of its attorney fees with funds that do not belong to it.**

Appellee Morehouse attempts to frame this appeal as being based on the notion that there are no issues whatsoever to litigate in the Trial Court proceedings. But the core issue on appeal is not whether all other issues are fully and finally resolved but rather **what should be done with the assets in the meanwhile?** Nowhere in Appellee Morehouse’s brief does Appellee Morehouse claim that the RAA Trust has assets that did not wrongfully come from the JRA Trust. It is seemingly undisputed that the RAA Trust’s only assets came from the JRA Trust. It is also clear from this Court’s prior opinion that this Court determined that transfer was done improperly. Appellee Morehouse, nonetheless, contends that the assets that undisputedly are only in the RAA Trust as the result of the improper transfer must remain in her hands throughout these proceedings and must be used to fund the RAA Trust’s litigation.

This appeal is not about whether Morehouse may raise claims she believes the RAA Trust has in the Trial Court proceedings. This appeal simply asserts that the RAA Trust should not be paying for its litigation with the JRA Trust’s assets. The question is whether the assets wrongfully transferred from the JRA Trust to the RAA Trust should be treated as “belonging” to the RAA Trust in the present or if they should be set aside and not expended by either party.

Morehouse wants assets that were undisputedly never supposed to be transferred from the JRA Trust to be used by her to fund her arguments that the JRA Trust should be reformed so she can keep the assets. Unfortunately, if she is permitted to do this and she fails, the JRA Trust does not get the money back because it was already spent on litigation.

If Morehouse wishes to argue that the assets that were not properly transferred from the JRA Trust to the RAA Trust should be transferred

anyway because the JRA Trust should be reformed to allow the transfer, she should do so on her own (or the RAA's own) dime. Her reformation arguments should not be funded by assets that are only "hers" if the reformation arguments succeed.

Lastly, Morehouse suggests that it would be unfair if the RAA Trust could not litigate because it has no assets with which to pay for litigation. This, however, is simply the reality of litigation. The American Rule is that each party is generally responsible for his or her own attorney fees. *Haliw v City of Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005). The JRA Trust is not responsible for paying for litigation against itself. The fact that the RAA Trust received money from an improper transfer should not now entitle it to that money for the entire course of this litigation, to fund any arguments the RAA Trust could possibly conceive of making. The mistake should be undone and the RAA Trust's litigation for more assets should be on its own dime. A freeze of assets for the duration of the litigation was a reasonable compromise.

II. Morehouse does not make any argument regarding the Trial Court's failure to determine what amount of attorney fees would be "reasonable."

The Probate Court's July 19, 2023, order allowed Morehouse to pay "up to \$150,000" in attorney fees from the disputed trust assets. (07/19/23 Order). But Morehouse provided nothing but a total number of attorney fees owed to the Probate Court. She did not produce an itemized statement detailing how the fees were incurred in order to establish their reasonableness. Jackie Hughes objected to the reasonableness of the amount of fees the Probate Court was awarding in her motion for reconsideration and requested a hearing on the issue. (04/03/23 Jackie L. Hughes, Darcey Barry and Jonna Jackson's Brief in Support of Their Motion for Reconsideration, p. 11). The Probate Court simply denied reconsideration without explanation and never conducted any analysis of the reasonableness of the requested fees. (07/19/23 Order).

Because Morehouse did nothing to substantiate her attorney fee bills, and the Probate Court awarded them over Jackie Hughes' objection without

performing any of the required analysis of reasonableness, the Probate Court abused its discretion when it allowed Morehouse to spend “up to \$150,000” from trust assets on attorney fees.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, Jackie Hughes respectfully requests that this Court reverse the Probate Court’s July 19, 2023 order modifying the preliminary injunction to allow Morehouse to spend up to \$150,000 in trust assets.

Respectfully submitted,

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