PROBATE & ESTATE PLANNING SECTION

Agenda and Attachments for

Friday, June 9, 2023

Meeting of Committee on Special Projects (CSP),

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 June meetings of the Committee on Special Projects (CSP) and the Council of the Probate & Estate Planning Section:

Friday, June 9, 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: June 9, 2023, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:

https://us02web.zoom.us/meeting/register/tZErceCoqz0iGNNpnZuXDb_TMGZql01fN14a

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.

Nathan Piwowarski
Section Secretary

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Officers of the Council
for 2022-2023 Term

Office	Officer
Chairperson	Mark E. Kellogg
Chairperson Elect	James P. Spica
Vice Chairperson	Katie Lynwood
Secretary	Nathan R. Piwowarski
Treasurer	Richard C. Mills

Council Members
for 2022-2023 Term

Council Member	Year Elected to Current Term (partial, first or second full term)	Current Term Expires	Eligible after Current Term?
Olson, Kurt A.	2020 (2nd term)	2023	No
Savage, Christine M.	2020 (2nd term)	2023	No
Anderton V, James F.	2020 (1st term)	2023	Yes
David, Georgette E.	2020 (1st term)	2023	Yes
Hilker, Daniel	2020 (1st term)	2023	Yes
Krueger III, Warren H.	2020 (1st term)	2023	Yes
Wrock, Rebecca K.	2021 (1st term)	2024	Yes
Glazier, Sandra D.	2021 (1st term)	2024	Yes
Hentkowski, Angela M.	2021 (2nd term)	2024	No
Mysliwiec, Melisa M. W.	2021 (2nd term)	2024	No
Nusholtz, Neal	2021 (2nd term)	2024	No
Sprague, David	2021 (1st term)	2024	Yes
Mayoras, Andrew W.	2022 (2nd term)	2025	No
Silver, Kenneth	2022 (2nd term)	2025	No
Dunnings, Hon. Shauna L.	2022 (1st term)	2025	Yes
Chalgian, Susan L.	2022 (1st term)	2025	Yes
Shelton, Michael D.	2022 (1st term)	2025	Yes
Borst, Daniel W.	2022 (1st term)	2025	Yes

Ex Officio Members of the Council

Christopher Ballard; John E. Bos; 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; 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; Harold G. Schuitmaker; 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
2022 - 2023 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 Angela Hentkowski Neil J. Marchand Kurt A. Olson David L.J.M. Skidmore Trevor J. Weston Timothy White Scott Kraemer
Annual meeting	Plan the Section's Annual Meeting	Mark E. Kellogg [as Section Chairperson]	[Chairperson 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	David L.J.M. Skidmore [as immediately previous Section Chairperson]	David Lucas Christopher A. Ballard [as previous Section Chairpersons]
Budget	Develop the Section's annual budget	Nathan R. Piwowarski [as immediately previous Section Treasurer]	Richard C. Mills Katie Lynwood [as incoming Treasurer and immediately previous Section 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	Daniel W. Borst	Christopher A. Ballard John Roy Castillo David P. Lucas 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 Michael Bartish Julia Dale Brian Heckman Richard C. Mills Kate L. Ringler
Citizens Outreach	Provide opportunities for education of the public on matters relating to probate, and estate and trust planning	Kathleen M. Goetsch	Kathleen Cieslik Michael J. McClory Neal Nusholtz Jessica M. Schilling Nicholas J. Vontroba

State Bar of Michigan
Probate and Estate Planning Section
2022 - 2023 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. Mysliwiec	meeting attendees
Court Rules, Forms, & Proceedings	Consider matters relating to probate, and estate and trust planning, and make recommendations to the Council regarding such matters	Warren H. Krueger, III	JV Anderton Susan L. Chalgian Morgan E. Cole Hon. Michael L. Jaconette Andrew W. Mayoras 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 Amy N. Morrissey Nathan R. Piwowarski [Section Secretary] Marlaine C. Teahan
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	Kurt A. Olson	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 Raymond A. Harris Phillip E. Harter Hon. Michael L. Jaconette Michael J. McClory Kurt A. Olson James B. Steward Paul S. Vaidya

State Bar of Michigan
Probate and Estate Planning Section
2022 - 2023 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	Aaron A. Bartell Howard H. Collens Georgette David Kathleen M. Goetsch Daniel S. Hilker Henry Lee Michael G. Lichterman David P. Lucas Katie Lynwood Alex Mallory Richard C. Mills Nathan Piwowarski Christine M. Savage James P. Spica David Sprague Stephen Dunn
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 David Sprague
Legislative Testimony	As requested and as available, the Members of this Committee will give testimony to the Legislature regarding legislation relating to probate, and estate and trust planning	Melisa M.W. Mysliwiec [as CSP Chair]	[Chairperson only]
Membership	Strengthen relations with Section members, encourage new membership, and promote awareness of, and participation in, Section activities	Angela Hentkowski	Kate L. Ringler Susan L. Chalgian
Nominating	Nominate candidates to stand for election as the officers of the Section and the members of the Council	David L.J.M Skidmore [as previous Section Chairperson]	David P. Lucas Christopher A. Ballard [as previous Section Chairpersons]
Planning	Periodically review and update the Section's Plan of Work	Mark E. Kellogg [as Section Chairperson]	James P. Spica Katie Lynwood Nathan Piwowarski Richard C. Mills [as Section Officers]

State Bar of Michigan
Probate and Estate Planning Section
2022 - 2023 Standing Committees

Probate Institute	Work with ICLE to plan the ICLE Probate and Estate Planning Institute	Katie Lynwood [as Section Vice Chairperson]	[Chairperson only]
Real Estate	Consider real estate matters relating to probate, and estates and trusts, and make recommendations to the Council regarding such matters	Kenneth F. Silver	Carlos Alvorado-Jorquera Jeffrey S. Ammon William J. Ard Leslie A. Butler J. David Kerr Angela Hentkowski Michael G. Lichterman Richard C. Mills 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. Mysliwiec, Managing Editor	Nancy W. Little Neil J. Marchand Richard C. Mills Diane Kuhn Huff Molly P. Petijean Rebecca K. Wrock Kurt A. Olson
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 John McFarland Richard C. Mills Neal Nusholtz Robert Labe Christine M. Savage

The Probate and Estate Planning Section Chairperson is an ex-officio Member of each Standing Committee

State Bar of Michigan
Probate and Estate Planning Section

2022 - 2023 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 James P. Spica Lawrence W. Waggoner Nazneen Hasan Christina Lejowski
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	Kurt A. Olson	Kimberly Browning Georgette David Sandra Glazier Douglas A. Mielock Neal Nusholtz Christine M. Savage James P. Spica
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 (co-Chairpersons)	JV Anderton Laura L. Brownfield Warren H. Krueger, III Richard C. Mills Mark K. Harder Kathleen Cieslik Joe Viviano
Premarital Agreements	Consider whether there should be legislation regarding marital property agreements, and	Christine M. Savage	Daniel W. Borst Sandra Glazier Kathleen M. Goetsch Patricia M. Ouellette
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

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
Uniform Power of Attorney Act	Consider the Uniform Power of Attorney Act promulgated by the Uniform Law Commission, and make recommendations to the Council regarding such matters	Christine M. Savage	Kathleen A. Cieslik David P. Lucas Alex Mallory Michael D. Shelton James P. Spica David Sprague
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	Andy Mayoras Hon. Shauna Dunnings Georgette David Katie Lynwood Elizabeth Siefker

The Probate and Estate Planning Section Chairperson is an ex-officio Member of each Ad Hoc Committee

State Bar of Michigan
Probate and Estate Planning Section

2022 - 2023 Liaisons

liaison to:	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
Law Schools	Savina Mucci
Michigan Bankers Association	David Sprague
Michigan Legal Help/Michigan Bar Foundation	Kathleen Goetsch
Michigan Probate Judges Association	Hon. Michael L. Jaconette
Probate Registers	[open]
Real Property Law Section	Kenneth Silver
Supreme Court Administrative Office	Melisa M.W. Mysliwiec
State Bar	Jennifer Hatter
Taxation Section	Neal Nusholtz
Uniform Law Commission	James P. Spica

The mission of each respective Liaison is to develop and maintain bilateral communication between such Liaison's respective association and the Probate and Estate Planning Section of the State Bar of Michigan, in 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, June 9, 2023

9:00 – 10:00* AM

*Please note the extended amount of time allocated to CSP this month.

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

Remote participation by Zoom is available. Register in advance at:
https://us02web.zoom.us/meeting/register/tZErceCoqz0iGNNpnZuXDb_TMGZql01fN14a

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. **Ken Silver – Undue Influence Ad Hoc Committee – 30 minutes**

   Re: Committee's White Paper

   The Committee has prepared a White Paper, attached as Ex 1A, setting forth a summary of the law on undue influence in Michigan and application of the presumption of undue influence, a discussion of the Restatement of Property definition of undue influence, a summary of how other states are addressing these issues, a summary of the science of undue influence, a summary of the pros and cons of the Committee's suggested statutory approach, and the Committee's proposed statutes defining undue influence and clarifying how the presumption of undue influence would be established and applied.

   The Committee requests that CSP take a public policy position in favor of the Committee's proposed statutes, but if an agreement with regard to the proposed statutes cannot be reached, the Committee seeks instruction as to whether the

work of the Committee is deemed concluded upon presentation of this White Paper.

2. **Jim Spica – Nonbanking Entity Trust Powers Ad Hoc Committee – 30 minutes**

   Re: Introduction of Legislative Proposal

   The Committee has developed a proposed Michigan Trust Company Act, which is attached as Ex 2A. Corresponding proposed amendments to EPIC are attached as Ex 2B and corresponding proposed amendments to the Qualified Dispositions in Trust Act are attached as Ex 2C. The Committee will introduce the legislative proposal.

EXHIBIT 1A

Undue Influence
Ad Hoc Committee

Committee's White Paper

Ad Hoc Committee on Undue Influence[1]

Undue Influence and the Presumption of Undue Influence

Introduction

Over the course of the past few years, the Ad Hoc committee on Undue Influence was directed to work on drafting and recommending proposed legislation with respect to the definition of undue influence and the application of the presumption of undue influence in certain circumstances. After numerous Committee meetings, including meetings with probate judges and feedback received from the Section, our Committee prepared a proposed draft of statutes defining undue influence and clarifying how the presumption of undue influence would be established and applied. The feedback obtained from Council and the Probate Section in general indicates that reaching a consensus on these two issues may be difficult.

Despite the controversy, the Committee believes that work is still needed. The oft-cited definition for undue influence in Michigan from *Kar* v *Hogan*, in turn incorporates a definition, which dates back to the 1912 case, *Nelson* v *Wiggins*[2]. Studies have identified a concern that historical cases have fallen behind the science of persuasion often identified in cases where undue influence is found to have occurred.[3] Elder financial abuse has been called "the crime of the 21st century"[4]. Yet, in Michigan courts, judges and practitioners are finding greater confusion in the case law of undue influence, particularly as to the application of the presumption of undue influence. This led to the removal of the standard civil jury instruction on the presumption of undue influence in 2014, which to date has not been replaced.

Given the Committee's perception that Council will have a difficult time reaching an agreement with regard to the proposed statutes, our Committee determined we could add value to the discussion by providing the Section with this White Paper explaining the state of the law and science with respect to undue influence as well as an outline of the pros and cons of our proposed statutory approach. If nothing else, we felt that the rest of the Probate Section could benefit from our work and that we could provide a worthwhile resource for those who practice in the area. Towards that end, this White Paper covers the following topics:

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[1] Committee members who helped draft this white paper are Kenneth Silver, Sandra Glazier, Warren Krueger, John Mabley, and Andy Mayoras. Kurt Olson also participated. Significant portions of this paper represent excerpts from Glazier, Dixon and Sweeney, *Undue Influence and Vulnerable Adults*, ABA Book Publishing 2020, or additional legal research by Sandra D. Glazier in surveying statutes, cases and scientific studies and papers published in the area of undue influence and the presumption.

[2] *Kar v. Hogan*, 172 Mich 191; 137 NW 623 (1912)

[3] *See* Dominic J. Campisi, Evan D. Winet, & Jack Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTED L.J. 371-380 (2018) (citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

[4] Kristen M. Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, 28 Prob. & Prop. (2014).

A. A brief summary of the state of the law on undue influence in Michigan and the application of the presumption.

B. A brief discussion of the Restatement of Property definition of undue influence.

C. A summary of how other states are addressing these issues.

D. A summary of the science of undue influence

E. A summary of the Pros and Cons of the Committee's suggested statutory approach.

F. The proposed Statutes

The members of the Committee seek instruction as to whether, upon submission of this White Paper, the work of our Committee should be deemed concluded.

A. Summary of the Law in Michigan

1. Definition of Undue Influence

For purposes of review, in Michigan and in many other states, there is no statutory definition of undue influence. The trend appears to be moving towards defining undue influence by statute. In the probate and estate planning context undue influence is commonly defined as influence upon the testator or settlor (hereafter "settlor") of such a degree that it overpowered the individual's free choice and caused the individual to act against his/her free will and to instead act in accordance with the will of the influencer. It often results from the abuse of a confidential or special relationship.

In Michigan, to establish undue influence, it must be shown that the settlor was subject to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. *Kar v Hogan* 399 Mich 529, 537 (1976). This definition, including a very brief explanation of what is *not* undue influence, is set forth in Michigan Model Civil Jury Instructions 170.44 pertaining to will contests and instruction 179.10 pertaining to Trusts. These two instructions were provided as part of the CSP materials on June 5, 2020. But undue influence is not limited to wills and trusts, and the definition set forth in these two jury instructions should be updated. Undue Influence can apply to any donative transfer. There is a large body of case law applying the doctrine in many different circumstances. A recitation of these cases is beyond the scope of this paper.[5]

A review of Michigan cases (published and unpublished) reflects that many other actions beyond threats, misrepresentations, undue flattery, fraud or physical or moral

[5] For an excellent discussion of the definition of undue influence, development of the science concerning vulnerable adults and the presumption of undue influence see *Undue Influence and Vulnerable Adults* by Sandra Glazier, Thomas Dixon and Thomas Sweeney, published by the Real Property, Trust and Estate Law Section of the ABA, 2020. Sandra Glazier was a participant in our committee.

coercion have been recognized as resulting in persuasive tactics that have been found to be undue. It has been recognized that undue influence is generally a process pursuant to which the wrongdoer is able to exert influence which is so great that it overpowers the settlor's free will and results in the settlor disposing of his assets in a fashion contrary to what would truly represent his intentions had the influence not occurred. *In re Spillette Estate*, 352 Mich 12, 17-18 (1958). It is a course of conduct that essentially supplants the will of the influencer for that of the settlor. *Kar v Hogan*, 399 Mich 529, fn 9; 251 NW 2d 77 (1976). Fraud need not be an element. *In re Estate of Karmey*, 468 Mich 68, 73; 659 NW 2d 796 (1976). Undue Influence can be manifest through a variety of different forms of conduct. Examples include, but are by no means limited to, situations whereby a caregiver takes advantage[6] or one family member poisons a grantor's relationship against other members of the family[7]. Further, undue Influence can apply to any donative transfer. Since there is a large body of case law applying the doctrine and in many different circumstances, a recitation of these cases is beyond the scope of this paper.[8] Nevertheless, it is the opinion of the Committee that it is time to update the definition using this large body of case law and advances in the science as discussed further below.

2. Presumption of Undue Influence

Under Michigan law a presumption of undue influence exists when a) there is a confidential or fiduciary relationship between the alleged influencer and the alleged victim of influence, b) the alleged influencer benefits from a change in a donative document and c) the alleged influencer had an opportunity to influence the alleged victim. *Kar v Hogan* 399 Mich 529 (1976). In *In re Bailey Estate*, 186 Mich 677, 691 (Mich 1915) the court recognized that "where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence". The presumption is evidentiary in nature and not statutory. Rule 301 of the Michigan Rules of Evidence provides;

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Juries, judges (and practitioners) have difficulty distinguishing the shifting burden of production from the burden of persuasion that remains, under Michigan law, with the person contesting the transaction or instrument.

The Michigan Court of Appeals *In re Estate of Mortimore*, unpublished opinion of the Michigan Court of Appeals issued May 17, 2011 (Docket No. 297280), 2011

[6] *In re Rosa's Estate*, 210 Mich 628, (1920); *In re Leone Estate*, 168 Mich App 321 (1988).
[7] *In re Hillman's Estate*, 217 Mich 142 (1921).
[8] For an excellent discussion of the definition of undue influence, development of the science concerning vulnerable adults and the presumption of undue influence see *Undue Influence and Vulnerable Adults* by Sandra Glazier, Thomas Dixon and Thomas Sweeney, published by the Real Property, Trust and Estate Law Section of the ABA, 2020. Sandra Glazier was a participant in our committee.

WL 1879737, leave denied, 491 Mich 925 (2012) determined that a preponderance of the evidence was necessary to rebut the presumption once established. This decision seems to be contrary to MRE 301 which requires that the burden of proof not shift once a presumption is established.[9]

Justice Young in his dissent of the Supreme Court's decision denying leave to appeal in *Mortimore* stated that "a will's proponent need only come forth with "substantial evidence" in rebuttal" once the presumption is established. *Id.* What constitutes "substantial evidence" was not addressed nor defined by Justice Young. Generally, the impact of the presumption and what level of evidence is necessary to rebut the presumption is an issue often litigated in Michigan and is the source of substantial confusion among litigants, counsel, judges and especially juries. It was the intent of our Committee to try to find a way to alleviate this confusion.

Six years ago, Council attempted to address the confusion with a recommendation to the Supreme Court's Committee on Model Jury Instructions that the standard jury instructions for will and trust contests concerning undue influence be modified to incorporate an instruction in the event the contestant sought to establish a presumption of undue influence. The proposed revisions were never adopted. No effort was made to update or adjust the definition of undue influence. To this day the confusion with respect to how to apply the presumption continues.

Proposed MCL 700.2725 (Exhibit A) clarifies that without a finding of undue influence a document is presumed to be valid. It is up to the contestant of the document or gift to demonstrate that the transaction was the result of undue influence by a preponderance of the evidence. The statute, as proposed, codifies how the presumption is established, consistent with Michigan law as it presently exists, but states that once established the burden shifts to the proponent to prove, by a preponderance of the evidence, that the transaction was NOT the result of undue influence. We also attempted to codify what constitutes a confidential or fiduciary relationship, also consistent with a large body of case law on point.

Application of the Presumption and flipping the burden of proof onto the proponent of the document, rather than the party objecting to the document (or transaction) may be a departure from current Michigan law, but it is also likely consistent with what actually occurs at the trial level given the difficulty judges, practitioners and juries may have in separating the burden of production from the burden of persuasion. We believe that the distinction between the burden of production and the burden of persuasion is too subtle to be consistently applied in practice. The proposed statute has the distinct advantage of clarity. Other states approach the issue from a variety of different

[9] As noted by Justice Young in his *Mortimore* dissent from the decision of the Supreme Court denying leave to appeal, once the presumption is established, requiring the proponent of a document to prove by a preponderance of the evidence that undue influence does not exist, improperly shifts the burden of proof. He also noted that the Mortimore decision appears contrary to the Supreme Court's decision in *Widmayer v Leonard*, 422 Mich 280 (1985) holding that "once a presumption is created that presumption is a procedural device which regulates the burden of going forward with the evidence and is dissipated when substantial evidence is submitted by the opponents to the presumption." *Id* @ 286.

viewpoints. Some states, like Florida and California[10] flip the burden of proof, as we are suggesting. States such as Oklahoma suggest that once established, the presumption may be overcome if the individual obtained independent advice with respect to the transaction at issue.[11] California takes this approach as well, requiring a certificate of independent advice to avoid the presumption.

B. Restatement of Property Definition of Undue Influence

To help place the discussion of undue influence, as well as the presumption in proper historical context, we thought a review of how the Restatement of Property views the issue would be helpful.

1. Undue Influence, Generally

The Restatement (Third) of Property (Wills and Donative Transfers) § 8.3 (the "Restatement") provides a definition for undue influence and a framework for litigating an undue influence claim. The Restatement provides:

> (a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.
>
> (b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.

Under the Restatement, the party contesting the donative transfer (the "contestant") has the burden of establishing undue influence.[12] The Restatement acknowledges that the contestant must usually rely on circumstantial evidence to establish the exertion of undue influence because direct evidence of a wrongdoer's conduct and the donor's subservience is rarely available.[13] Circumstantial evidence is sufficient to raise an inference of undue influence under the Restatement if the contestant proves that: (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.[14]

Although the Restatement recognizes four elements, it primarily focuses on susceptibility. The other three factors: opportunity to exert undue influence, the alleged wrongdoer's disposition to exert undue influence, and a result appearing to be the effect of undue influence, are not addressed in detail by the Restatement.

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[10] Florida Statute §733.107; Cal. Prob. Code §21380 et. seq.
[11] *White v Palmer*, 1971 OK 149. In California, the statutory presumption may not apply when a certificate of independent review is provided. Cal. Prob. Code §21384.
[12] Restatement, comment b.
[13] Restatement, comment e.
[14] Restatement, comment e.

Susceptibility focuses on the donor's physical and mental condition, specifically the donor's age, inexperience, dependence, physical or mental weakness, or any other factor that would make the donor susceptible to undue influence.[15]

2. The Presumption of Undue Influence

The presumption of undue influence, in some form, has been found to exist in all states, in recognition that in certain situations there is a strong likelihood that wrongdoing has occurred, such that when those circumstances are demonstrated to exist, a presumption will be triggered which will shift the onus (at least to some extent) to show that no wrongdoing occurred.[16]

a. Under the Restatement

The Restatement recognizes a presumption of undue influence. The presumption arises if: (1) a confidential relationship existed between the alleged wrongdoer and the donor, and (2) there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer.

i. Confidential Relationship[17]

The term "confidential relationship" encapsulates three different types of relationships: (1) fiduciary, (2) reliant, or (3) dominant subservient. In some cases, a relationship may fall into more than one of those three categories.

ii. A fiduciary relationship is one in which the confidential relationship arises from a settled category of fiduciary obligation.[18] Examples include attorney-client, agent under power of attorney and principal, or guardian and ward.

iii. A reliant relationship is one based on special trust and confidence.[19] One example is a relationship in which the donor was accustomed to being guided by the judgment or advice of the alleged wrongdoer or was justified in placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor.[20]

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[15] Restatement comment e.
[16] See, *Undue Influence California Report* 2010, supra, at p. 101-102, citing Meyers, 2005
[17] Michigan has defined a fiduciary relationship as:

> A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationship – such as trustee – beneficiary, guardian - ward, agent - principal, and attorney - client require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who, as a result, gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. *In re Karmey Estate 468 Mich 68,* 75 (2003).

But has also recognized that confidential relationships can embrace both technical fiduciary relationships as well as more informal relationship that can exist whenever one man trusts in and relies upon another. *Vant Hof v Jemison,* 291 Mich 385, 393 (1939).
[18] Restatement, comment g.
[19] Restatement, comment g.
[20] Restatement, comment g.

A relationship between a financial adviser and client or a doctor and patient would fall within this category of confidential relationship.

iv. Finally, a dominant-subservient relationship exists where a donor is subservient to the alleged wrongdoer's dominant influence. Examples include a caregiver and an ill or feeble donor or an adult child and an ill or feeble parent.[21]

b. Suspicious Circumstances

The Restatement requires that suspicious circumstances accompany a confidential relationship to give rise to the presumption of undue influence. Such circumstances raise an inference of an abuse of the confidential relationship between the alleged wrongdoer and the donor.[22]

The following factors may be considered in determining whether suspicious circumstances exist:

> (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence;
>
> (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute;
>
> (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute;
>
> (4) whether the will or will substitute was prepared in secrecy or in haste;
>
> (5) whether the donor's attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer;
>
> (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor;
>
> (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her property; and
>
> (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.[23]

[21] Restatement, comment g.
[22] Restatement, comment h.
[23] Restatement, comment h.

3. Rebutting the Presumption under the Restatement

If a contestant establishes the elements of the presumption of undue influence, the burden of going forward with the evidence shifts to the proponent of the donative transfer (the "proponent").[24] The burden of persuasion, however, always remains with the contestant. If the proponent does not present evidence to rebut the presumption, judgment as a matter of law in favor of the contestant is appropriate. The Restatement is silent on the evidentiary burden that a proponent must satisfy to rebut the presumption.

C. How Other Jurisdictions Address the Issues

Mississippi does not have a statutory presumption of undue influence. Nonetheless, in *Stover v. Davis,*[25] Mississippi's Supreme Court held that once a presumption of undue influence arising out of a confidential relationship coupled with suspicious circumstances is established, the proponent of the instrument must rebut the presumption by clear and convincing evidence.

New Jersey may apply two different standards, depending upon the circumstances presented in order to rebut the presumption of undue influence.

> Ordinarily, the burden of proving undue influence falls on the will contestant. Nevertheless, we have long held that if the will benefits one who stood in a confidential relationship to the testator and if there are additional circumstances, the burden shifts to the party who stood in that relationship to the testator. Suspicious circumstances, for purposes of this burden shifting, need only be slight. When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the will proponent to overcome the presumption. Although that burden of proof is usually discharged in accordance with the preponderance of the evidence standard, if the presumption arises from "a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney," the presumption must instead be rebutted by clear and convincing evidence.[26]

But it appears, in New Jersey, that when the suspicious circumstances are more than "slight" it may become incumbent upon the proponent of the transaction to rebut the presumption by clear and convincing evidence under some circumstances. The resulting legislation required the establishment of further study of predatory alienation. That bill defined predatory alienation as

> extreme undue influence on, or coercive persuasion or psychologically damaging manipulation of another person that results in physical or emotional harm or the loss of financial assets, disrupts a parent-child

[24] Restatement, comment f.
[25] *Stover v. Davis*, 268 So. 3d 559 (Miss. 2019).
[26] *In re Estate of Stockdale*, 196 N.J. 275, 953 A.2d 454 (2008).

> relationship, leads to deceptive or exploitative relationship, or isolates the person from family and friends.[27]

And defined undue influence as

> persuasion that overpowers a person's will, or that otherwise exerts control over a person, so as to prevent the person from acting intelligently, voluntarily, and with understanding, and which effectively destroys the person's willpower and constrains the person to act in a manner that they would not have done in the absence of such persuasion.

Arkansas. In Arkansas, the appellate court found a potentially higher standard of "beyond a reasonable doubt", generally reserved for criminal cases, might apply in certain circumstances. In *Lenderman v. Martin*[28] the court held that:

> [W]hen the burden shifts from the contestants of the testamentary document to the proponents of it, such as where there is a presumption of undue influence, the proponent can show by clear preponderance of the evidence that she took no advantage of her influence and that the testamentary gift was a result of the testator's own volition. However, where a beneficiary of a testamentary instrument actually drafts or procures it or there is a confidential relationship so dominating or so overpowering as to overcome the testatrix's free will, the proponent of the instrument must

[27] PL 2017, Chapter 64 https://legiscan.com/NJ/text/S2562/2016. An amendatory act was introduced in 2020, following the study. It reflects that:

> a. Predatory alienation occurs whenever a person or group uses predatory behaviors, such as entrapment, coercion, and undue influence, to establish a relationship with a victim and isolate the victim from existing relationships and support systems, including family and friends, with the goal of gaining and retaining sweeping control over the victim's actions and decisions.
> b. Predatory alienation tactics and other forms of undue influence are commonly used by cults, religious sects, gangs, extremist groups, human traffickers, sexual predators, domestic abusers, and other similar persons and groups, as a means to recruit members, carry out crimes, spread their belief systems, advocate their political agendas, or simply impose their will on, and exert power, control, and supremacy over, victims.
> c. There is currently a lack of adequate legal or other protection for individuals in the State who are victims of predatory alienation or other undue influence.
> d. The protection of individuals from predatory alienation and undue influence requires a delicate balancing of interests, particularly in the case of vulnerable or victimized adults. Specifically, while the State and the family members or friends of an individual may have an interest in protecting the individual from the physical and mental abuse, domestic violence, manipulation, and control that is associated with predatory alienation and other undue influence, this paternal interest must be balanced against the individual's interest in maintaining personal autonomy and the ability to make independent life decisions. e. Compulsive third party influence and control are difficult establish that an individual has fallen victim to coercive or compulsive tactics, even in cases where other forms of abuse have contributed to, or have facilitated, the victimization.
> f. The American Civil Liberties Union has concluded that, unless physical coercion or threats are used, there is no legal justification for those who have reached the age of maturity to be subjected to mental incompetency hearings, conservatorships, or temporary guardianships on the basis that they have become unwitting victims of predatory alienation or other undue influence.
> g. By establishing a system that counters the effectiveness of predatory alienation and other types of undue influence through the use of front-line prevention and consensual response efforts, such as extensive public education, proactive screening practices, the provision of therapeutic consultation to the families and friends of victims, and the provision of consensual counseling and treatment to the victims themselves, the State can properly balance the interests at stake in this area, thereby ensuring that its citizens will be better protected from predatory alienation and undue influence while continuing to exercise personal autonomy in their own lives.

[28] *Lenderman v. Martin*, 1999 WL 407519 (Ark. Ct. App. 1999)

> prove beyond a reasonable doubt that the decedent had both the mental capacity and freedom of will to make the will legally valid.[29]

Vermont also relies on case law to shift the burden of persuasion to a proponent of a transaction once a presumption of undue influence has been established.[30]

In **Ohio**, a clear and convincing standard is required to rebut a presumption of undue influence, once established. In *Modie v. Andrews*,[31] the Ohio appellate court analyzed the shifting burdens of proof in undue influence cases as follows:

> A valid inter vivos gift requires that the donor (1) intends to make a gift of the property immediately, (2) effects a delivery of the property, and (3) relinquishes all control and dominion over the property. "The burden of showing that an inter vivos gift was made is on the donee by clear and convincing evidence."
>
> … The elements of undue influence include the following: (1) a susceptible party; (2) another's opportunity to exert influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such improper influence." "In determining whether a particular influence brought to bear upon a [donor] was 'undue,' the focus is whether the influence was reasonable, given all the prevailing facts and circumstances."
>
> "Where a fiduciary or confidential relationship exists between the donor and the donee, the transfer is regarded with suspicion that the donee may have brought undue influence to bear upon the donor." In such a case, a presumption of undue influence arises, and the donee bears the burden going forward and showing, by a preponderance of the evidence, that the gift was free from undue influence. Once the donee makes such a showing, the burden of ultimately demonstrating undue influence, by clear and convincing evidence, must be met by the party challenging the gift.[32]

In **Pennsylvania**, once the presumption of undue influence has been established, it appears that the proponent can prove the validity of the challenged disposition by clear and convincing evidence that it was not the result of undue influence.[33]

In **Oklahoma,** once the presumption of undue influence has been established, the burden of proof shifts to the party seeking to take advantage of the contested disposition and requires that they "rebut the presumption by showing that the confidential relationship

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[29] Id. internal citations omitted.
[30] *Carvalho v. Estate of Carvalho*, 2009 VT 60, 186 Vt. 112, 978 A.2d 455.
[31] *Modie v. Andrews*, C.A. NO. 19543, 2000 Ohio App. LEXIS 3333 (Ct. App. July 26, 2000).
[32] Id.
[33] In re *Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215 (1984); *Estate of Reichel*, 484 Pa. 610, 400 A.2d 1268 (1979); *In re Clark's Estate*, 461 Pa. 52, 334 A.2d 628 (1975); *In re Quein's Estate*, 361 Pa. 133, 62 A.2d 909 (1949); *Burns v. Kabboul*, 407 Pa. Super. 289, 595 A.2d 1153 (1991); *In re Estate of Simpson*, 407 Pa. Super. 1, 595 A.2d 94 (1991); *In re Mampe*, 2007 Pa. Super. 269, 932 A.2d 954 (2007); *In re Estate of Stout*, 2000 Pa. Super. 37, 746 A.2d 645 (2000).

had been severed or that the party making the disposition had competent and independent legal advice in the preparation of the will.[34]

In **Tennessee**, in order to rebut the presumption, the proponent needs to establish the fairness of the transaction by clear and convincing evidence. One way of showing that, where demonstrating fairness would be otherwise difficult, is by showing that the testator had the benefit of independent advice.[35]

In the **US Virgin Islands,** once the presumption of undue influence has been established it must be rebutted by clear and convincing evidence that "the transaction is free of undue influence and that the donor's decision to give the gift was the product of his free will".[36]

California defines undue influence as follows:

> (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
>
> (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.
>
> (2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.[37]
>
> (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
>
> (A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.
>
> (B) Use of affection, intimidation, or coercion.

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[34] *Gautier v. Gonzales-Latiner*, 25 V.I. 26 (1990),

[35] *Matter of Estate of Depriest*, 733 S.W.2d 74 (Tenn. Ct. App. 1986); *Richmond v. Christian*, 555 S.W.2d 105 (Tenn. 1977).

[36] *Gautier v. Gonzales-Latiner*, 25 V.I. 26 (1990).

[37] To provide a greater understanding of the intent behind this provision, comments regarding the legislative intent, reflect:

> Assembly Bill 140 lists family members as among those with 'apparent authority'. The intent is to describe those who occupy positions of trust and who thus might more easily unduly influence an elder. The intent is not to address who might be the natural object of an elder's bounty or to draw any particular negative inference from a family member's receipt of something (whether testamentary or inter vivos) from an elder.
> Assem. Daily J., 2013-14 Reg. Sess., Sept. 12, 2013, p. 3368.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.[38][39]

California also codified the operation and effect of the Presumption of Undue Influence.[40] As of January 1, 2020, California's statute provides that:

(a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

(1) The person who drafted the instrument.

(2) A person who transcribed the instrument or caused it to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(4) A care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than six months after the marriage, cohabitation, or domestic partnership commenced.

[38] Cal. Welfare and Institutions Code §15610.70

[39] In understanding the issue of "inequity" the author of the bill that resulted in California's enactment of this statute wrote:

> "Legislative Intent – Assembly Bill No. 140": My Assembly Bill 140 would codify the definition of undue influence to mean excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. However, an inequitable result, without more, would not be sufficient to prove undue influence, as the intent of the elder would remain paramount. Thus, a person remains free to dispose of his property, both by testamentary device and donative transfer, even if the disposition appears unfair in the eyes of others so long as the disposition results from an exercise of that person's free will. Unfairness is therefore to be determined from the standpoint of the elder.
> Assem. Daily J., 2013-14 Reg. Sess., Sept. 12, 2013, p. 3368.

[40] Cal. Probate Code §21380.

> (5) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.
>
> (6) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive.
>
> (7) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.
>
> (b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence.
>
> (c) Notwithstanding subdivision (b), with respect to a donative transfer to the person who drafted the donative instrument, or to a person who is related to, or associated with, the drafter as described in paragraph (5), (6), or (7) of subdivision (a), the presumption created by this section is conclusive.
>
> (d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.[41]

Exceptions to application of California's statutorily created presumption of undue influence exist. They include, but are not limited to, transfers to charities,[42] transfers of property valued of less than $5,000[43], instruments executed outside of California by a person who was not a resident of California at the time of execution,[44] at death transfers to spouses[45], and transfers reviewed by an independent attorney who

> counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate …[46]

which substantially comports with a form of certificate provided in the statute.[47]

Nevada, like California, has enacted a statutory presumption, which appears to be applicable to a broad array of transactions.[48] The legislature was careful to define the terms utilized (e.g. caregiver, dependent adult, independent attorney, transfer instrument,

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[41] Id.
[42] Cal. Probate Code §21382(d).
[43] Cal. Probate Code §21382(e).
[44] Cal. Probate Code §21382(f).
[45] Cal. Probate Code §21385.
[46] Cal. Probate Code §21384(a).
[47] Id.
[48] NRS 155.097(2).

transfer, etc.)[49] NRS 155.97 not only sets forth the circumstances under which a transfer will be presumed to be void and shifts the burden once the presumption of undue influence has been established to the proponent, unless certain statutory exceptions are met. NRS 155.97, but also creates an exception to the American Rule as it relates to attorney fees incurred when a transfer is determined to be void as a result of fraud, duress or undue influence. Nevada, like Mississippi, requires a high burden to rebut the presumption once established, unless certain exceptions apply. NRS 155.97 provides that:

> 1. Regardless of when a transfer instrument is made, to the extent the court finds that a transfer was the product of fraud, duress or undue influence, the transfer is void and each transferee who is found responsible for the fraud, duress or undue influence shall bear the costs of the proceedings, including, without limitation, reasonable attorney's fees.
>
> 2. Except as otherwise provided in subsection 4 and NRS 155.0975, a transfer is presumed to be void if the transfer is to a transferee who is:
>
> (a) The person who drafted the transfer instrument;
>
> (b) A caregiver of the transferor who is a dependent adult;
>
> (c) A person who materially participated in formulating the dispositive provisions of the transfer instrument or paid for the drafting of the transfer instrument; or
>
> (d) A person who is related to, affiliated with or subordinate to any person described in paragraph (a), (b) or (c).
>
> 3. The presumption created by this section is a presumption concerning the burden of proof and may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud, duress or undue influence.
>
> 4. The provisions of subsection 2 do not apply to a transfer instrument that is intended to effectuate a transfer:
>
> (a) After the transferor's death, unless the transfer instrument is made on or after October 1, 2011; or
>
> (b) During the transferor's lifetime, unless the transfer instrument is made on or after October 1, 2015.
>
> With regard to the exceptions statutorily recognized to application of the presumption, NRS 155.0975 provides that [t]he presumption established by NRS 155.097 does not apply:

[49] NRS 15.093, et seq.

1. To the spouse of the transferor.

2. To a transfer of property which is triggered by the transferor's death if the transferee is an heir of the transferor and the combined value of all transfers received by that transferee is not greater than the share the transferee would be entitled to pursuant to chapter 134 of NRS if the testator had died intestate and the transferor's estate included all non-probate transfers which are triggered by the death of the transferor.

3. Except as otherwise provided in this subsection, if the court determines, upon clear and convincing evidence, that the transfer was not the product of fraud, duress or undue influence. The determination of the court pursuant to this subsection must not be based solely upon the testimony of a person described in subsection 2 of NRS 155.097.

4. If the transfer instrument is reviewed by an independent attorney who:

(a) Counsels the transferor about the nature and consequences of the intended transfer;

(b) Attempts to determine if the intended consequence is the result of fraud, duress or undue influence; and

(c) Signs and delivers to the transferor an original certificate of that review in substantially the following form:

SAMPLE CERTIFICATE OF INDEPENDENT REVIEW

I, ... (attorney's name), have reviewed ..... (name of transfer instrument) and have counseled my client, ... (name of client), on the nature and consequences of the transfer or transfers of property to ..... (name of transferee) contained in the transfer instrument. I am disassociated from the interest of the transferee to the extent that I am in a position to advise my client independently, impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer or transfers of property in the transfer instrument that otherwise might be invalid pursuant to NRS 155.097 are valid because the transfer or transfers are not the product of fraud, duress or undue influence.

.....

(Name of Attorney) (Date)

5. To a transferee that is:

(a) A federal, state or local public entity; or

(b) An entity that is recognized as exempt under section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) or 501(c)(19), or a trust holding an interest for such an entity but only to the extent of the interest of the entity or the interest of the trustee of the trust.

6. To a transfer of property if the fair market value of the property does not exceed $3,000. The exclusion provided by this subsection does not apply more than once in each calendar year to transfers made during the transferor's lifetime. For the purposes of this subsection, regardless of the number of transfer instruments involved, the value of property transferred to a transferee pursuant to a transfer that is triggered by the transferor's death must include the value of all property transferred to that transferee or for such transferee's benefit after the transferor's death.[50]

These statutory applications are not intended to abrogate or limit common law rules or principals, unless those rules and principals are inconsistent with the NRS 155.097 and 155.0975.[51]

Arizona has also established a statutory presumption of undue influence.[52] Pursuant to AZ Rev Stat §14-2712(E), a

> governing instrument is presumed to be the product of undue influence if either:
>
> 1. A person who had a confidential relationship to the creator of the governing instrument was active in procuring its creation and execution and is a principal beneficiary of the governing instrument.
>
> 2. The preparer of the governing instrument or the preparer's spouse or parents or the issue of the preparer's spouse or parents is a principal beneficiary of the governing instrument. This paragraph does not apply if the governing instrument was prepared for a person who is a grandparent of the preparer, the issue of a grandparent of the preparer or the respective spouses or former spouses of persons related to the preparer.

AZ Rev Stat §14-2712(F) establishes that preponderance of the evidence is required to be presented by the proponent of the instrument in order to overcome the presumption.

In **Florida**, Fla. Stat. Ann. § 733.107 provides that

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[50] NRS 155.0975

[51] NRS 155.098.

[52] AZ Rev Stat Section 14-2712 (2014). However, excluded from the act are proceedings relating to the validity of a power of attorney executed pursuant to §14-5506 and the ownership of multi-party accounts established under §14-6211.

> (1) In all proceedings contesting the validity of a will, the burden shall be upon the proponent of the will to establish prima facie its formal execution and attestation. A self-proving affidavit executed in accordance with s. 732.503 or an oath of an attesting witness executed as required in s. 733.201(2) is admissible and establishes prima facie the formal execution and attestation of the will. Thereafter, the contestant shall have the burden of establishing the grounds on which the probate of the will is opposed or revocation is sought.
>
> (2) In any transaction or event to which the presumption of undue influence applies, the presumption implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof under ss. 90.301-90.304.

In another statute, **Florida** addressed the issue of spousal rights procured by fraud, duress or undue influence. In Fla. Stat. Ann. § 732.805, the legislature provided that a variety of rights would be lost unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses otherwise subsequently ratified the marriage.[53] In such situations a contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence and if ratification of the marriage is raised as a defense, the surviving spouse has the burden of establishing, by a preponderance of the evidence, the subsequent ratification by both spouses.[54]

While **Montana** has not codified its presumption of undue influence, it has codified a definition of what constitutes undue influence, which defines undue influence to consist of:

> (1) the use by one in whom a confidence is reposed by another person or who holds a real or apparent authority over the other person of the confidence or authority for the purpose of obtaining an unfair advantage over the other person;
>
> (2) taking an unfair advantage of another person's weakness of mind; or
>
> (3) taking a grossly oppressive and unfair advantage of another person's necessities or distress.[55]

Maine also has not statutorily addressed the presumption of undue influence with regard to all transactions, it has addressed it in relation to transfer of real estate or major transfer of personal property or money for less than full consideration or execution of a guaranty by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship.[56] The Maine statute

[53] Fla. Stat. Ann. § 732.805(1).
[54] Fla. Stat. Ann. § 732.805(4).
[55] Mont. Code Ann. § 28-2-407.
[56] Main Title 33: Chapter 20, Section 1022.

provides examples of relationships can qualify as being confidential or fiduciary in nature, including:

> A. A family relationship between the elderly dependent person and the transferee or person who benefits from the execution of a guaranty, including relationships by marriage and adoption;
>
> B. A fiduciary relationship between the elderly dependent person and the transferee or person who benefits from the execution of a guaranty, such as with a guardian, conservator, trustee, accountant, broker or financial advisor;
>
> C. A relationship between an elderly dependent person and a physician, nurse or other medical or health care provider;
>
> D. A relationship between the elderly dependent person and a psychologist, social worker or counselor;
>
> E. A relationship between the elderly dependent person and an attorney;
>
> F. A relationship between the elderly dependent person and a priest, minister, rabbi or spiritual advisor;
>
> G. A relationship between the elderly dependent person and a person who provides care or services to that person whether or not care or services are paid for by the elderly person;
>
> H. A relationship between an elderly dependent person and a friend or neighbor; or
>
> I. A relationship between an elderly dependent person and a person sharing the same living quarters. [and]
>
> When any of these relationships exist and when a transfer or execution is made to a corporation or organization primarily on account of the membership, ownership or employment interest or for the benefit of the fiduciary or confidante, a fiduciary or confidential relationship with the corporation or organization is deemed to exist.[57]

Georgia has statutorily addressed the issue of undue influence with regard to inter-vivos gifts. Ga. Code Ann. § 44-5-86 provides that

> A gift by a person who is just over the age of majority or who is particularly susceptible to be unduly influenced by his parent, guardian, trustee, attorney, or other person standing in a similar confidential relationship to one of such persons shall be closely scrutinized. Upon the slightest evidence of persuasion or influence, such gift shall be declared void at the

[57] *Id,* §1022 (2).

> instance of the donor or his legal representative and at any time within five years after the making of such gift.

Georgia courts had previously found that "[i]t is for the common security of mankind that gifts procured by agents, and purchases made by the agents, from their principal, should be scrutinized with a close and vigilant suspicion."[58]

Missouri has enacted a rebuttable presumption when transfers to in-home health care providers is involved, except for those related to reasonable compensation for services rendered and transfers for less than five percent of the assets of the grantor.[59]

North Dakota has legislatively created a rebuttable presumption when a trustee benefits from a transaction between the trustee and a trust beneficiary.[60] That statute provides that

> A transaction between a trustee and the trust's beneficiary during the existence of the trust or while the influence acquired by the trustee remains by which the trustee obtains any advantage from the trust's beneficiary is presumed to be entered by the trust's beneficiary without sufficient consideration and under undue influence. This presumption is a rebuttable presumption.[61]

In **North Dakota**, N.D.R. Ev. Rule 301 generally provides that, in civil cases, unless a statute or the North Dakota Rules of Evidence otherwise provides that unless a statute provides to the contrary, the "party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence".[62]

In 2015, **Illinois** created a statutory rebuttable presumption of "void transfer" when a transfer is made for the benefit of a "caregiver" and the fair market value of that transfer exceeds $20,000[63], otherwise leaving in place its common law approach to undue influence in other circumstances. For purposes of the Illinois statutory presumption, the term "caregiver" includes anyone who voluntarily or in exchange for compensation assumes responsibility for all or a portion of a person's activities of daily living. This statutory presumption may be rebutted if the transferee proves, either:

> (1) by a preponderance of the evidence that the transferee's share is not greater than what he or she would have received under an instrument in effect before he or she became a caregiver, or
>
> (2) by clear and convincing evidence that the transfer was not the result of fraud, duress or undue influence.[64]

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[58] *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).
[59] Mo. Rev. Stat. § 197.480 .
[60] N.D. Cent. Code, § 59-18-01.1.
[61] Id.
[62] N.D.R. Ev. Rule 301(b).
[63] 755 ILCS 5, Sec. 4a-5.
[64] 755 ILCS 5/4a-15.

In addition to its statutory approach relating to transfers to caregivers, Illinois has addressed undue influence in other scenarios. In *In re Estate of Burren*,[65] the Illinois appellate court found that:

> [t]o overcome a presumption of undue influence in a will contest, a fiduciary who benefits from a will must present clear and convincing evidence that in the will, the testator freely expressed his own wishes and not the wishes of the fiduciary. Courts have considered such factors as whether the fiduciary "made a full and frank disclosure of all relevant information; * * * [whether] adequate consideration was given; *and [whether the testator] had independent advice before completing the transaction*."[66]

Virginia. Recently, Virginia's Senate passed SB 1123, entitled "Will Contest; presumption of undue influence. That bill provides that "In any case contesting the validity of a decedent's will where a presumption of undue influence arises, the burden of producing evidence and the burden of persuasion as to the factual issue that undue influence was exerted over the testator shall be on the party against whom the presumption operates."[67]

The presumption of undue influence, in some form, has been found to exist in all states, in recognition that in certain situations there is a strong likelihood that wrongdoing has occurred, such that when those circumstances are demonstrated to exist, a presumption will be triggered which will shift the onus (at least to some extent) to show that no wrongdoing occurred.[68]

D. The Science[69] With Respect to Undue Influence

To understand undue influence, one needs to understand that undue influence is "not a one-time act; it involves a pattern of manipulative behaviors to get a victim to do what the exploiter wants, even when the victim's actions appear to be voluntary or are contrary to his or her previous beliefs, wishes, and actions."[70] Undue influence "occurs as the result of a process, not a one-time event."[71] These types of cases are generally very fact-dependent. At times, the tactics used to exert influence may be "similar to brainwashing techniques used by cults and hostage takers. There are also parallels to domestic violence, stalking, and grooming behaviors used by some sexual predators."[72] Consequently, a thorough understanding of the facts leading up to (and sometimes after)

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[65] *In re Estate of Burren,* 2013 IL App. (1st) 120996, 374 Ill. Dec. 85, 994 N.E.2d 1022 (App. Ct. 1st Dist. 2013), *appeal denied*, 377 Ill. Dec. 764, 2 N.E. 1045 (Ill 2013).
[66] *Id*. (internal citations omitted; emphasis added).
[67] Virginia SB 1123, https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+SB1123. This Senate Bill passed the Senate on 1/21/21 and has been referred to the Committee for Courts of Justice in the Virginia House of Representatives on 2/2/21.
[68] See, *Undue Influence California Report* 2010, supra, at p. 101-102, citing Meyers, 2005,
[69] Much of this section represents excerpts from *Undue Influence and Vulnerable Adults*, *supra.*
[70] Bonnie Brandle, Candice J. Heisler, & Lori A. Stiegel, *The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault*, 17 J. Elder Abuse Negl. 37 (2005).
[71] *Id*. at 39.
[72] *Id*.

the execution of an instrument at issue and the relationship between the individual and the influencer is needed.[73] As a general rule:

> [u]ndue influence is not exercised openly, but, like crime, seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition, as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control.[74]

Moreover, "[f]inancial exploitation is the most common form of elder abuse"[75]. Importantly, it has been recognized that

> [f]or some, victimization can be the "tipping point" that pushes the victim into poorer health. The victim's quality of life "can be jeopardized [by] declining functional abilities, progressive dependency, a sense of helplessness, social isolation, and a cycle of worsening stress and psychological decline.[76]

Having been recognized as a form of financial abuse, it is important to recognize that undue influence "may be insidious and not in front of witnesses, but fair inferences can be drawn from the facts."[77]

In 2008 the ABA Commission on Law and Aging published the results of an extensive analysis of issues relating to capacity and undue influence.[78] This publication (and models and studies cited therein) are often relied upon by professionals in assessing issues related to these areas. Following a statutory change relating to the presumption of undue influence in British Columbia, a Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, published by the British Columbia Law Institute[79], in defining undue influence, now cites to some of the very same models and studies identified in the ABA's Handbook (including the Thaler Singer, Blum IDEAL, SCAM, and Brandl/Heisler/Stengel Models.[80]

In 2008, the Psychogeriatric Association's subcommittee of an international task force undertook an extensive review of the types of factors that might be identified from a "clinical" perspective to alert an expert to the risk of undue influence[81]:

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[73] *Id*.
[74] *Walts v. Walts*, 127 Mich. 607, 611, 86 N.W. 1030, 1031 (1901).
[75] AEquitas, *The Prosecutors' Resource; Elder Abuse*, April 2017, at p. 6.
[76] Id, at p. 10.
[77] *In re Paquin's Estate*, 328 Mich. 293, 303, 43 N.W.2d 858, 862 (1950). S*ee also In re Persons Estate*, 346 Mich. 517, 532, 78 N.W.2d 235, 243 (1956).
[78] ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008).
[79] *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, Prepared for the British Columbia Law Institute by the Members of the Project Committee on Potential Undue Influence: Recommended Practices for Wills Practitioners*, BCLI Report no. 61, October 2011.
[80] Id. at p. 15.
[81] Carmelle Peisah, Sanford I. Finkel, Kenneth Shulman, Pamela S. Melding, Jay S. Luxenberg, Jeremia Heinik, Robin J. Jacoby, Barry Reisberg, Gabriela Stoppe, A. Barker, Helen Cristina Torrano Firmino & Hayley I. Bennett, *The Wills*

> (i) [S]ocial or environmental risk factors such as dependency, isolation, family conflict and recent bereavement; (ii) psychological and physical risk factors such as physical disability, deathbed wills, sexual bargaining, personality disorders, substance abuse and mental disorders including dementia, delirium, mood and paranoid disorders; and (iii) legal risk factors such as unnatural provisions in a will, or a provision not in keeping with previous wishes of the person making the will, and the instigation or procurement of a will by a beneficiary.[82]

The subcommittee found that undue influence was more likely to occur:

> (i) [w]here there is a special relationship in which the testator invests significant trust or confidence in another; (ii) where there is relative isolation (whether due to physical factors or communication difficulties) which limit free flow of information and allows subtle distortion of the truth: and, (iii) where there is vulnerability to influence through impaired mental capacity or emotional circumstances (such as withholding of affection, or persuasion on grounds of social, cultural or religious convention or obligation).[83]

In 2010, the Borchard Foundation Center on Law & Aging published a study[84] that essentially adopted the SODR model which formed the premise (at least in part) for the enactment of California's statutory definition of undue influence when it was found that:

> . . . [d]espite wide variations in the context and circumstances in which [undue influence] and coercive persuasion in general have been explored, the elements of [undue influence] are remarkably similar in each and can be reduced to four salient factors: susceptibility (of the victim), opportunity (of the influencer), disposition (of the influencer), and result.[85]

Undue Influence and Vulnerable Adults,[86] addressed a recent study on the psychology of persuasion. That study identified several (additional) categories of tactics that persuaders may employ to effect undue influence for financial gain.[87] Among the tactics identified, generally applicable to estate planning situations, are "reciprocity," "commitment and consistency," "authority," and the creation of or taking advantage of "false memories":

> **Reciprocity**: The "reciprocity" principal entails creating a debt of gratitude. While courts are reticent to apply this principle in family dynamics, it has been found that "[i]f kindness and affection result in overcoming the

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of Older People: Risk Factors for Undue Influence, *for* International Psychogeriatric Association Task Force on Wills and Undue Influence, 21 Int. Psychogeriatric., at 7-15, 10, 11 (2009).

[82] *Id*. at 7.

[83] *Id*. at 10.

[84] Mary Joy Quinn, Lisa Nerenberg, et al., *Undue Influence: Definitions and Applications*, report for The Borchard Foundation Center on Law & Aging (March 2010).

[85] Daniel A. Plotkin, James E. Spar, & Howard L. Horwitz, *Assessing Undue Influence*, 44 J. *Am. Acad. Psychiatry Law* 344-351 (September 2016), http://jaapl.org/content/44/3/344.

[86] *Undue Influence and Vulnerable Adults*, *supra* at p.67.

[87] *Id*. at 67, citing *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, *supra* at 371-380 (further citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).

testator's free agency and leave the will that of the beneficiary rather than the testator, then such constitutes undue influence."[88]

Commitment and consistency: When the "commitment and consistency" process is used, persuaders exploit the internal and interpersonal pressures often felt by individuals to justify and stand by decisions once made. Here, the persuader makes it easy for the victim to make a commitment. This tactic can be successful even with persons described as "strong-willed" or "stubborn." Once such individuals make a commitment, they tend to stick to it. Therefore, after the commitment that benefits the persuader is made, the victim is encouraged to follow through. In addition, by using this process, a "stubborn" individual may be persuaded to adopt negative perceptions of others and the belief that others are undeserving of an inheritance. Once the victim incorporates such beliefs as "facts," the "commitment and consistency" principle can make it difficult to overcome such perceptions and convince the victim that the contrary may be true.[89]

Authority: Most people have a respect for authority and a disinclination to defy authority. When the "authority" process is used, the persuader attempts to clothe himself with the trappings of authority or to recruit others, including professionals, to aid and abet the persuader, whose authority (on its own or by such affiliation) benefits the persuader's efforts for financial gain. This process abuses the perception of authority, whether that perception is created by title, education, or attire. In the context of estate planner, the persuader "will often take steps to place himself in control of the testator's finances or estate plan and then represent to the testator that he must sign off on modification or transactions because they are necessary . . . ."[90] This process abuses the trust that the victim has placed in others.

False memories: Without being ageist, studies have indicated that the elderly may be more vulnerable than capable adults to the creation of false memories, which can be induced by repetitive efforts of a predator to reframe the elder's relationship with family members or other previously favored individuals or institutions.[91]

Recently, studies have identified that a mere reliance on historical cases may not have caught up with the science of persuasion often identified and utilized in cases where undue influence is found to have occurred.[92] These studies, in part, formed the underpinnings of California's enactment of a statutory approach to undue influence and the presumptions arising out of the potential abuse of a confidential relationship in its effort to protect its vulnerable population.[93] Mary Joy Quinn, a nurse and gerontologist who was employed as a conservatorship investigator for the probate court system in

[88] *Kelley v. First State Bank of Princeton*, 81 Ill. App. 3rd 402, 414 (Ill. App. Ct. 1980), 401 N.E.2d 247, 256 (1980).
[89] Campisi, *Undue Influence*, *supra* note 37, at 373, 374.
[90] *Id*. at 377, 378.
[91] *Id*. at 367, 368.
[92] *See* Dominic J. Campisi, Evan D. Winet, & Jake Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion,* 43 ACTEC L. J. 371-380 (2018) (citing the psychological study by Robert B. Cialdini, *Influence: The Psychology of Persuasion*).
[93] See California Welfare and Institutions Code Section 15610.70,

California, and ultimately became the director of California's Probate Department, was at the forefront of studies conducted with the benefit of grant money in California to address the seemingly ever increasing issue of undue influence.[94] Her research team undertook an extensive review of literature relating to coercion and persuasion as well as a broad range of laws, focus groups and case reviews (from California and other states). Their extensive analysis, coupled with discussions with various disciplines, helped them to arrive at a framework for evaluating undue influence, including situations where the victim did or did not suffer from cognitive impairments.

Ultimately, they developed an overall definition of undue influence that recognized two related concepts. The first was they classified as "undue influence", with a second related concept being one of "predatory alienation".[95] They defined these concepts as follows:

> "Undue Influence" is when individuals who are stronger or more powerful get weaker people to do things they would not have done otherwise, using various techniques or manipulations over time. They may isolate the weaker person, promote dependency, or induce fear and distrust of others. The abuser tries to convince the vulnerable person that friends, family members, or caregivers have malevolent motives and cannot be trusted. The related concept of "predatory alienation" is purposefully disrupting existing relationships, often through deception, to isolate people from those they trust in order to exploit, control, or take advantage of them.[96]

E. The Committee's Suggested Statutory Approach: Pros and Cons

1. Pros:

a. The proposal would establish clarity in the law for litigants, judges and juries. Many states have found it advantageous to adopt a statutory definition to clarify the law and assure more consistent case decisions. Although a determination of undue influence is in fact intensive analysis, the law developed over many years can be viewed as inconsistent. When the elements of undue influence are clearly defined, judges and juries will have a roadmap to evaluate facts and achieve greater consistency.

b. The current proposal clearly applies the doctrine of undue influence to transactions beyond the execution of wills and trust documents to identify additional documents and transactions that may involve the exercise of undue influence, such as durable powers of attorney, designations of patient advocate, creation of joint bank accounts and TOD accounts, nominations of guardians and conservatories for physically infirm individuals, deeds and real estate transactions. Having a statutory definition will also help adult protective service and prosecutors identify factors which they might look for and consider during an analysis of whether a vulnerable adult may have been

[94] Unpacking Undue Influence, https://www.elderjusticecal.org/blog-elder-justice-viewpoints/unpacking-undue-influence
[95] https://www.elderjusticecal.org/undue-influence.html
[96] Id.

subjected to financial exploitation (which may be the result of undue influence). This will serve to expand the protection provided to vulnerable adults in Michigan.

c. The proposed definition of undue influence is aligned with scientific analysis and includes a list of factors derived from studies that discussed how undue influence occurs. While the list is not exhaustive, it does provide guidance to a decision-maker where the described element or elements are found to exist. As recent studies have developed, it is becoming clear that there are a number of areas of influence that have not been recognized in the past and have a direct bearing on the decision-making process of individuals. Inclusion of tactics which may support a finding of undue influence will again provide additional guidance to, and support of, decision-makers engaged in the process of determining whether or not undue influence is to be found under the evidence presented.

d. The proposal creates clarity as to when and under what circumstances the presumption of undue influence applies, and the impact of establishing the presumption. Rather than rely on the very nuanced concept of distinguishing the burden of production and the burden of proof, the proposed statute clearly establishes who has the burden of proof, and under what circumstances. This also has the benefit of removing the analysis from a discussion of MRE 301 altogether. This will address the inconsistency that has been observed in the case law in applying MRE 301 in an undue influence case.

2. CONS:

a. The proposal to change the burden of proof to the proponent rather than the contestant, once a presumption of undue influence is triggered, is not consistent with the current Michigan case law on the subject, or the application of MR E301. An argument is made that a proponent of a document would be placed in the difficult position of proving a negative; that undue influence did not occur. Some argue that the attempt in the proposal to codify a definition of undue influence, and the departure from the direction provided in MRE 301 regarding the effect of presumptions, and Michigan case law, by modifying the effect of establishing a presumption of undue influence to impose the burden of proof going forward on the proponent of the document or transaction involved will potentially create more litigation and uncertainty than it solves.

b. The terms “equity of result” and “suspicious circumstances” as used in the proposal may interject decisions made upon personal attitudes by judges and jurors and may create inconsistent results in cases with similar fact patterns. Undue influence is not susceptible to direct proof, because of the fact that the dealings between the individuals involved are often private and secret. These described elements are intended to focus the attention of the trier of fact on the overall nature of the transaction involved, and the facts surrounding the generation of the document or action which is alleged to have been the result of undue influence.

c. The factors currently included in the proposal defining undue influence leave out factors that have been cited in decided Michigan cases, potentially

creating confusion. The list of factors contained in the proposed definition are not intended to be exhaustive or exclusive, but are intended to provide expanded guidance to the trier of fact by calling out the most common elements that seem to be involved in undue influence situations.

d. Some argue that simply adopting the definition of undue influence contained in section 8.3 of the Restatement of Property may be a better approach than the definition included in the proposal, and would address one of the major issues created in Kar v. Hogan relative to focusing on whether free will was overcome rather than how it was overcome. In addition, the argument is made that the proposed definition would bring the concept of "mind poisoning" into the deliberation process. The definition of undue influence contained in section 8.3 states: "a donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and cause the donor to make a donative transfer that the donor would not otherwise have made." The effect of the definition in section 8.3 is to invalidate donative transfers procured by undue influence, duress or fraud. In each case the test is whether the alleged action of the alleged wrongdoer caused the donor to make a donative transfer that he or she would not otherwise have made, based on the facts proved at trial. While the provision regarding undue influence is simple, the concept of the level of influence to be proved, and whether the influence overcame the ability to exercise free will independently, create a real possibility of findings by the trier of fact based on the individual's experiences and opinions regarding influence and free will, rather than the facts presented at trial.

F. Conclusions of the Committee

Hopefully the information provided will prove useful to practitioners involved in this area of practice. It is perhaps a fantasy to expect that a large contingency of lawyers and legislators will reach a consensus on this issue. However, there is a benefit to clarity. Certainly, the fog surrounding how to apply the presumption of undue influence, where applicable, needs to be lifted. This fog will not dissipate on its own and neither will the uncertainty concerning the definition of undue influence. An effort was undertaken some years ago to update the model civil jury instructions on point, but that effort failed as well.

Our committee has done a substantial amount of work in this area, and we have come to the conclusion that a legislative fix is certainly better than none. Hopefully, we can continue to move towards an identifiable resolution on these issues. Please become educated and use the information provided in your own practices.

EXHIBIT 2A

Nonbanking Entity Trust Powers Ad Hoc Committee

Proposed Michigan Trust Company Act

AN ACT to authorize small commercial trust companies, family trust companies and foreign family trust companies to exercise trust powers and otherwise act as fiduciaries for or on behalf of clients in this state.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Part 1
General Provisions

[487.16101 Short title]

SECTION 101. SHORT TITLE. This act shall be known and may be cited as the "trust company act".

SECTION 102. PURPOSES OF ACT. The purposes of this act include all of the following:

(a) To authorize and promote the organization of small commercial trust companies and family trust companies in this state.

(b) To authorize small commercial trust companies, family trust companies and foreign family trust companies to exercise trust powers and otherwise act as fiduciaries for or on behalf of clients in this state.

(c) To regulate licensed trust companies and foreign family trust companies that conduct business in this state.

(d) To safeguard the members of the public who deal with small commercial trust companies acting in a fiduciary capacity.

SECTION. 103. DEFINITIONS. As used in this act:

(a) "Associated person or relation" means, in relation to a family trust company, any of the following:

(i) An entity 25% of the equity interests in which are owned, directly or indirectly, by the company, a family client, a family member or an extended family member.

(ii) An entity that is under common control with the company or is directly or indirectly controlled by the company, a family client, a family member or an extended family member.

(iii) A trust or estate the assets of which are under common control with the company or are directly or indirectly controlled by the company, a family client, a family member or an extended family member.

(iv) The trustee or trust director referred to in subdivision (iii).

(v) The personal representative, executor, administrator, or special such fiduciary of an estate referred to in subdivision (iii).

(b) "Bank" means a bank, foreign bank or out-of-state bank as defined in sections 1201 and 1202 of the banking code of 1999, MCL 487.11201, 487.11202.

(c) "Banking code of 1999" means the banking code of 1999, 1999 PA 276, MCL 487.1110 to MCL 487.15105.

(d) "Branch office" means a trust's company physical place of business other than its principal office where 1 or more of the company's directors, managers, officers, committee members, employees or other personnel, in their capacity as such, conduct company business on a non-temporary basis. The physical place of business of an associated person or relation is not a branch office even if 1 or more of the following applies:

(i) The affiliate provides services to the affiliated family trust company.

(ii) An individual who is a director, manager, officer, committee member, agent or employee of the affiliate is also acting as a director, manager, officer, committee member, agent or employee of the affiliated company.

(e) "Client" means a person for or on behalf of whom a trust company or family trust company affiliate exercises fiduciary powers.

(f) "Client account" means a trust, estate, agency, partnership or other relationship in which a trust company is acting as a fiduciary that is distinguishable from all other relationships in which the company is acting as a fiduciary. A single client may have an interest in two or more client accounts and a trust company may hold multiple offices relating to the same client account. Two fiduciary relationships that are treated as separate for federal income tax purposes are distinct client accounts. All fiduciary relationships established solely for 1 client who is an individual or the client and his or her spouse shall be treated as 1 client account. In all other circumstances, whether 1 fiduciary relationship is distinguishable from another shall be determined based on all relevant factors, including the following:

(i) Terms of the governing instruments or governance documents, if any.

(ii) Attendant tax attributes.

(iii) The property that is subject to the relationship or relationships.

(iv) The legal form of the relationship or relationships.

(v) Identity of persons holding legal title to or beneficial interests in the property that is subject to the relationship or relationships and the extent and nature of those interests.

(g) "Client instrument" means a governing instrument or governance document to which a trust company becomes subject in connection with services the company performs for or on behalf of a client of the company.

(h) "Charitable organization" means a non-profit organization, charitable foundation, charitable trust for which 1 or more family clients, other charitable organizations, or non-profit organizations are the only current permissible distributees of trust income or principal, or any other

organization created for any purpose described in section 501(c)(3) of the internal revenue code, 26 USC 501.

(i) “Commissioner" means the director of the department.

(j) “Committee member” means a person acting as a member of a committee formed pursuant to section 407.

(k) “Confidential information” means 1 or more of the following:

(i) Any information required or permitted to be disclosed pursuant to the terms of a governing instrument or section 7814 of the estates and protected individuals code, MCL 700.7814.

(ii) The name and terms of any governing instrument, including any trust instrument, will, amendment of trust, or codicil.

(iii) State and federal tax returns.

(iv) Assignments of ownership and other transfer documents.

(v) Powers of attorney and beneficiary designation forms.

(vi) The name of any settlor, decedent, ward, protected individual or beneficiary of any family client.

(vii) Any information relating to the ownership, management, assets, income or business of a family trust company and any associated person or relation not generally known by the public, including financial statements, balance sheets, income statements, financial projections, contracts, governance documents, asset disclosures, ledgers, employee or officer information, committee or subcommittee information, internal market analyses and forecasts, sales and marketing research, commercial and strategic planning, pricing and customer information.

(viii) Any information required to be reported to or filed with the department.

(ix) Any findings of the department through any examination or investigation.

(*l*) "Control" means both of the following:

(i) In relation to an entity, the power to exercise a controlling influence over the management or policies of an entity, unless such power is solely the result of being an officer of such entity.

(ii) In relation to assets, the power to purchase, sell, encumber, transfer or otherwise exercise discretion over the asset.

(m) "Current client" means a client of a small commercial trust company who is 1 or more of the following:

(i) In relation to a trust for which the company is acting as a trustee or trust director, a trust beneficiary that is, as of the time in question, a distributee or permissible distributee of trust income or principal.

(ii) In relation to a decedent's estate for which the company is acting as a personal representative, a person who has a right to receive more than five percent of the value of the estate as the company may determine from time to time.

(iii) A ward or protected individual for whom the trust company is acting as a guardian or conservator.

(iv) A principal for whom the company is acting as an agent.

(v) A partner of a partnership for which the company is acting as a general partner.

(vi) A shareholder of a corporation for which the company is acting as a director.

(vii) As to all other relationships in which the company is acting as a fiduciary, a person who is currently eligible to receive an economic benefit from the property subject to that relationship as a result of that relationship.

(viii) A person who would otherwise become a current client as a result of an interest in a decedent's estate or revocable trust following the death of someone is not a current client unless the person is a client two years after the death in question, and in that event, the person shall be counted as a current client beginning on the second anniversary of that death.

(n) "Degrees of affinity" means degrees of relation by marriage as measured in the civil law system of determining degrees of relation.

(o) "Degrees of consanguinity" means degrees of blood-relationship as measured in the civil law system of determining degrees of relation.

(p) "Department" means the department of insurance and financial services.

(q) "Descendant" means that term as defined in section 1103 of the estates and protected individuals code, MCL 700.1103.

(r) "Designated family member" means an individual designated as provided in section 207 of this act.

(s) "Domestic trust company" means a trust company other than a foreign trust company that is authorized to exercise fiduciary powers for or on behalf of clients under this act.

(t) "Employee" means an individual other than a key employee who is or was employed by a specified person, on a fulltime basis, for a continuous period of not less than twelve months.

(u) "Entity" means a corporation, including a nonprofit corporation, limited liability company, partnership, or other non-natural legal person.

(v) "Estates and protected individuals code" means the estates and protected individuals code, 1998 PA 386 and 2009 PA 46, MCL 700.1101 to MCL 700.8206.

(w) "Executive officer" means a non-subordinate officer of an entity who may act for and bind that entity.

(x) "Extended family member" means all individuals who are related to the designated family member within ten degrees of affinity, including all of his or her lineal descendants without regard to adoption.

(y) "Family client" means an existing, prospective or former client described in subdivision (i) or (ii):

(i) With respect to a family trust company or family trust company affiliate that is an investment adviser that is not registered under the uniform securities act, MCL 451.2105 to 451.2703, or the investment advisors act of 1940, 15 U.S.C. 80b-1 to 80b-21, and that is not licensed and not applying for a license under this act, a client who is any of the following:

(A) A family member, former family member or other person who is a family client as defined in CFR § 275.202(a)(11)(G)-1(d)(4).

(B) For 1 year after a transfer of legal title resulting from the death of a family member or key employee or other involuntary transfer from a family member or key employee, a person who becomes a client as a result of the death or other involuntary transfer.

(C) Any person who was a client of the family trust company or family trust company affiliate before January 1, 2010, and who is described in subsections (1) to (3) of CFR § 275.202(a)(11)(G)-1(c).

(ii) With respect to any family trust company or family trust company affiliate not described in subparagraph (i)(A) to (i)(C), a client who is any of the following:

(A) A person described in subparagraph (i).

(B) An extended family member.

(C) A former extended family member.

(D) A current or former employee, officer, director or manager of the family trust company or any family trust company affiliate, and his or her children, stepchildren and spouse.

(E) A trustee or trust director of a trust having a settlor or beneficiary who is a person described in subparagraphs (ii)(A) to (ii)(D).

(F) An individual who is a beneficiary of a trust having a settlor who is described in subparagraphs (ii)(A) to (ii)(D).

(G) An individual who is a devisee under the will of a decedent who is described in subparagraphs (ii)(A) to (ii)(D).

(H) A descendant within five degrees of consanguinity of a spouse or former spouse of an individual described in subparagraphs (ii)(F) or (ii)(G).

(I) The estate of an individual described in subparagraphs (ii)(A) to (ii)(D), the guardian or conservator of that estate, and the individual's children, stepchildren and spouse.

(J) A charitable organization created, controlled or funded by 1 or more of the persons described in subparagraphs (ii)(A) to (ii)(D), and each director, officer, trustee and manager of such charitable organization.

(K) An entity of which at least 10% of the equity interests (by vote, income or capital) are directly or indirectly owned by 1 or more of the persons described in subparagraphs (ii)(A) to (ii)(D).

(z) "Family member" means all of the following:

(i) The designated family member.

(ii) All lineal descendants of the designated family member who are within ten degrees of consanguinity.

(iii) Each stepchild and foster child of any individual described in subparagraph (i) or (ii) who, if adopted by that individual, would be a lineal descendant of the designated family member within ten degrees of consanguinity.

(iv) All individuals for whom a family member was appointed as guardian when that individual was a minor.

(v) The spouses of the individuals described in subparagraphs (i) to (iv).

(aa) "Family trust company" means a domestic trust company that does not exercise fiduciary powers for or on behalf of any person who is not a family client. A family trust company may be a licensed family trust company, an unlicensed family trust company or a multifamily trust company.

(bb) "Family trust company affiliate" means an entity to which all of the following apply in respect of a given family trust company:

(i) It is wholly owned by 1 or more clients of the company.

(ii) It is directly or indirectly controlled by either of the following:

(A) 1 or more individuals who are family members with respect to the company.

(B) 1 or more associated persons or relations who are family clients of the company that are described in CFR § 275.202(a)(11)(G)-1(d)(5).

(iii) It has no clients other than family clients of the company.

(iv) It does not hold itself out to the public as an investment adviser or small commercial trust company.

(cc) "Fiduciary" includes a bailee, custodian, escrow agent, receiver, personal representative, funeral representative, guardian, conservator, trustee, trust director, plenary

guardian, partial guardian, successor fiduciary, agent under a power of attorney, patient advocate, receiver, conservator, liquidating agent, and custodian under Michigan uniform transfers to minors act, 1998 PA 433.

(dd) "Fiduciary powers" means in addition to the power to conduct trust business as provided in section 4401 of the banking code of 1999, MCL 487.14401, all powers that are exercisable by a fiduciary in a fiduciary capacity.

(ee) "Foreign family trust company" means a foreign trust company that, under the law that authorizes it to exercise fiduciary powers for or on behalf of clients, cannot exercise fiduciary powers for clients who are not related to each other within the degrees of consanguinity and affinity specified by that law.

(ff) "Foreign trust company" means a trust company that has its principal office in a state other than this state and is authorized to exercise fiduciary powers for or on behalf of clients by the laws of the state in which the company has its principal office or the laws of another state other than this state.

(gg) "Former extended family member" means an individual who was an extended family member but is no longer an extended family member due to a divorce or other similar event.

(hh) "Former family member" means a spouse or stepchild that was a family member but is no longer a family member due to a divorce or other similar event.

(ii) "Governance document" includes the articles of incorporation, articles of organization, bylaws, operating agreement, partnership agreement, shareholders agreement, member agreement, buy-sell agreement and each other document governing the rights, duties, privileges and powers of an entity and its owners, directors, managers, officers or other personnel.

(jj) "Governing instrument" means that term as defined in section 1104 of the estates and protected individuals code, MCL 700.1104.

(kk) "Investment advice" means advisory services that may only be provided to members of the general public in this state by a person who is registered as an investment adviser in this state or by the Securities and Exchange Commission.

(*ll*) "Investment adviser" means any person described in subsection 102a(15) of the uniform securities Act, MCL 451.2102a(e), or subsection 202(a)(11) of the investment advisors act of 1940, 15 U.S.C. 80b-2(a)(11).

(mm) "Key employee" means an individual who is any of the following with respect to a family trust company or family trust company affiliate and a spouse of such individual if the spouse holds a joint, community property, or similar shared ownership interest with the individual:

(i) The president, any vice president in charge of a principal business unit, division or function (such as administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions.

(ii) A director, trustee, general partner, or person serving in a similar capacity.

(iii) Any employee other than an employee performing solely clerical, secretarial, or administrative functions with regard to the company or affiliate who in connection with his or her regular functions or duties, participates in the investment activities of the company or affiliate, provided that such employee has been performing such functions and duties for or on behalf of the company or affiliate, or substantially similar functions or duties for or on behalf of another person, for at least 12 months.

(nn) "Licensed family trust company" means a family trust company that has received a license pursuant to section 302.

(oo) "Licensed trust company" means a small commercial trust company or licensed family trust company.

(pp) "Manager" means, in relation to a limited liability company that is not managed by its member or members, a person or persons designated to manage the company pursuant to a provision in the controlling governance document stating that the business is to be managed by or under the authority of managers, and, in relation to all other limited liability companies, the member or members of the company or, if the authority to manage the business and affairs of the company is limited to a designated member or members pursuant to a provision in the controlling governance document, the designated member or members.

(qq) "Multifamily trust company" means a family trust company formed under this act that has more than 1 designated family member.

(rr) "Person" means an individual or an entity.

(ss) "Settlor" means that term as defined in section 7103 of the estates and protected individuals code, MCL 700.7103, except that if a trustee or trust director of a given trust creates a second trust by the exercise of either a fiduciary power of appointment or a fiduciary administrative power like that described in 7820a of the estates and protected individuals code, MCL 700.7820a, the settlor or settlors of the first trust are treated as the settlor(s) of the second trust.

(tt) "Small commercial trust company" means a domestic trust company other than a family trust company that satisfies all of the requirements in section 204(1) of this act.

(uu) "Trust company" means an entity that is not a bank and is authorized to exercise fiduciary powers under this act or the laws of another state, including a family trust company, small commercial trust company and foreign trust company.

(vv) "Unlicensed family trust company" means a family trust company other than a licensed family trust company.

SECTION 104. ENTITY ACTING AS TRUST COMPANY. With respect to any particular kind of trust company, for an entity to "act as" that kind of trust company is for the entity to exercise fiduciary powers for or on behalf of clients or otherwise exercise the rights, privileges and powers of that kind of trust company.

SECTION 105. SCOPE. This act applies to all domestic trust companies and all foreign family trust companies acting as fiduciaries in this state. This act does not apply to a bank.

SECTION 106. SUPPLEMENTAL GENERAL PRINCIPLES OF LAW. General principles of common law and equity supplement this act only to the extent that they are not inconsistent with the provisions of this act.

SECTION 107. EFFECTIVE DATE. This act applies to all foreign trust companies acting in this state and to all domestic trust companies formed on or after _____.

Part 2
Formation of Trust Companies

SECTION 201. CHOICE OF FORM. A domestic trust company must be formed as either a domestic or foreign limited liability company or corporation.

SECTION 202. PRINCIPAL OFFICE. Each licensed trust company shall maintain its principal office in this state.

SECTION 203. GENERAL REQUIREMENTS APPLICABLE TO TRUST COMPANIES. An entity is eligible to act as a domestic trust company only if 1 of the following applies:

(a) The entity has a bank account with 1 or more of the following:

(i) A bank that is organized or reorganized under the laws of this state.

(ii) A bank having its principal office or a branch office in this state that is organized under the laws of another state, the District of Columbia, or a territory or protectorate of the United States whose principal office is located in a state other than this state, in the District of Columbia, or in a territory or protectorate of the United States, and whose deposits are insured by the Federal Deposit Insurance Corporation.

(iii) A national banking association chartered by the federal government under the national bank act, 12 USC 21 to 216d, that has its principal office, or a branch office located in this state.

(b) The entity maintains at its principal office original or true copies in physical or electronic form of all of its material business and financial records, including financial statements, bank statements, written consents and meeting minutes.

SECTION 204. SPECIAL REQUIREMENTS FOR ARTICLES OF INCORPORATION OR ARTICLES OF ORGANIZATION.

(1) An entity is eligible to act as small commercial trust company only if its articles of incorporation or articles of organization prohibit the entity from doing all of the following:

(a) Acting for more than 250 client accounts at any given time.

(b) Maintaining custody of intangible assets for any current client.

(2) An entity is eligible to act as a family trust company only if its articles of incorporation, articles of organization, bylaws or operating agreement prohibit the entity from exercising fiduciary powers for or on behalf of clients who are not family clients.

SECTION 205. SPECIAL REQUIREMENTS APPLICABLE TO UNLICENSED FAMILY TRUST COMPANIES.

(1) An entity is eligible to act as an unlicensed family trust company only if the entity has sent to the department by certified mail a notice of formation that complies with both of the following requirements:

(a) The notice must include the name of the entity, the address of the entity's principal office, the date of the notice and the name of each designated family member.

(b) The notice must be acknowledged by an executive officer of the entity before a notary public or other individual authorized to take acknowledgements.

(2) An unlicensed family trust company is eligible to provide investment advice only if it is permitted to act as an investment adviser in this state.

SECTION 206. CAPITAL RESERVES AND BOND; FAILURE TO MAINTAIN.

(1) Except as provided in subsection (5), a licensed family trust company shall maintain not less than $250,000 of unencumbered capital reserves.

(2) Except as provided in subsection (5), a small commercial trust company shall maintain unencumbered capital reserves of not less than the amount specified in subsection 408(2)(a).

(3) An unlicensed family trust company is not required to maintain any capital reserves.

(4) The capital reserves described in subsections (1) and (2) must be held in the form of cash, marketable securities, or governmental obligations or insured deposits that mature within 3 years after acquisition.

(5) In lieu of maintaining the unencumbered capital reserves required by subsections (1) and (2), a licensed trust company may file with the department a corporate surety bond issued by

a surety licensed by the commissioner. A bond filed pursuant to this subsection must satisfy all of the following requirements:

(a) The bond must be in addition to any other bond that may be required by law.

(b) The bond must be signed and acknowledged before a notary public or other individual authorized to take acknowledgements by both the surety and an executive officer of the trust company and filed with the department.

(c) The bond must state all of the following:

(i) That the state of Michigan is the obligee for the benefit of the trust company's clients.

(ii) That the bond is conditioned upon the faithful discharge by the trust company of all fiduciary duties according to law.

(iii) That the company and surety shall be jointly and severally liable for any claim on the bond.

(iv) That the bond is not void after the first recovery but may be proceeded against from time to time until the entire amount of the bond is exhausted.

(v) The name and license number of the company.

(vi) The name and license number of the surety.

(vii) That the surety on the bond may cancel the bond 60 days after the surety notifies the company and the department of the cancellation and that the surety is not liable for a breach of a condition occurring after the effective date of the cancellation.

(6) The cost of a bond described in subsection (5) may be paid by the bonded licensed trust company, a family trust company affiliate, a family member or a family client.

(7) A licensed trust company that does not have the capital reserves required by subsections (1) or (2) or post bond in lieu thereof pursuant to subsection (5) may apply for and receive a license under part 3 of this act, and the failure to maintain such capital reserves or post bond in lieu thereof shall not constitute grounds for revocation of any license issued under part 3 of this act. However, each director, manager, executive officer, shareholder, member or other person that directly or indirectly owns or controls that company shall be jointly and severally personally liable for all judgments entered against the company as follows:

(a) In the case of a small commercial trust company, in an amount equal to the excess of the unencumbered capital reserves required by subsections (2) over the sum of the small commercial trust company's unencumbered capital reserves and the amount of the bond, if any, filed pursuant to subsection (5) as determined at the time the action that results in a judgment against the small commercial trust company is commenced.

(b) In the case of a licensed family trust company, in an amount equal to the excess of the unencumbered capital reserves required by subsection (1) over the sum of the licensed family trust company's unencumbered capital reserves and the amount of the bond, if any, filed pursuant to subsection (5) as determined at the time the action that results in a judgment against the licensed family trust company is commenced.

SECTION 207. DESIGNATED FAMILY MEMBER.

(1) The designated family member or members of a licensed family trust company are the living or deceased individual(s) designated as such in the licensed family trust company's

application for a license under part 3 of this act.

(2) The designated family member or members of an unlicensed family trust company are the living or deceased individual(s) designated as such in the unlicensed family trust company's notice of formation required by section 205.

(3) A family trust company other than a multifamily trust company may have no more than 1 designated family member at any given time. A multifamily trust company may have no more than 3 designated family members at any given time.

SECTION 208. WORDS AND PHRASES IN TRUST COMPANY NAME.

(1) A small commercial trust company may use the words and phrases "trust," "trust company" or other words or letters in its name to indicate that the company is licensed to exercise fiduciary powers. A small commercial trust company shall not include in its name "family," "private" or other words or letters that might signify that the company exercises fiduciary powers only for or on behalf of family clients.

(2) A family trust company may use in its name "family trust company," "private trust company," "FTC," "PTC" or other words or letters to indicate that the company is authorized to exercise fiduciary powers only for or on behalf of family clients.

Part 3
Licensing of Trust Companies

SECTION 301. LICENSING REQUIREMENTS.

(1) An entity may not act as a small commercial trust company unless it is licensed under this act.

(2) A family trust company may be, but is not required to be, licensed under this act. An unlicensed family trust company has all the rights, privileges and powers of a licensed family trust company.

(3) No person shall act as a director, manager, executive officer or committee member of a licensed trust company without receiving a license from the commissioner.

SECTION 302. APPLICATION FOR LICENSE.

(1) An application by an entity for a license to act as a licensed trust company must include all of the following:

(a) The name of the entity, including all assumed and trade names.

(b) The street address of the entity's principal office.

(c) A telephone number and email address for the entity's principal office.

(d) The name, email address, telephone number and mailing address of the person authorized by the entity to receive communications from and represent the entity before the department.

(e) The name, email address, telephone number and mailing address of each director, manager, executive officer and committee member of the entity as of the time of the application.

(f) The name, email address, telephone number and mailing address of each shareholder or member of the entity and a description of the interests in the entity owned by each shareholder or member.

(g) If the entity has issued more than 1 class of shares, units, or other form of ownership interests, a description of the rights of each class of shareholder or member.

(2) If the application is for a license to act as a family trust company, then in addition to the items required by subsection (1), the application must also include the name of each designated family member.

(3) The application must be signed under penalties of perjury by the person authorized by the entity to receive communications from and represent the entity before the department. While the application is pending, the person signing it shall have a duty to supplement or correct the application upon discovering that any information contained in the application is untrue or inaccurate.

(4) The application must be accompanied by all of the following:

(a) A nonrefundable fee payable to the department in the amount of $5,000.

(b) The information required under section 303 for each of the managers, directors, executive officers and committee members of the trust company as of the time of the application.

(c) A copy of the deed, lease agreement or other instrument granting the trust company the right to occupancy of its principal office.

(d) A certified balance sheet of the entity as of a date within 30 days of the date of the application and proof satisfactory to the commissioner of the entity's unencumbered capital reserves.

(e) A copy of the instrument authorizing the person identified in subsection (1)(d) to receive communications from and represent the entity before the department.

(f) A copy of the entity's articles of incorporation or articles of organization.

(g) A copy of the entity's bylaws or operating agreement, if any.

(h) A copy of a certificate of good standing for the entity issued by the state in which the entity is organized or incorporated as of a date within 30 days of the date of the application.

(i) If the entity is formed as a foreign limited liability company or foreign corporation, a copy of a certificate of authority as provided in section 2015 of the business

corporation act, 1972 PA 284, MCL 450.5002, section 1015 of nonprofit corporation act, 1982 PA 162, MCL 450.3015, and section 1002 of the Michigan limited liability company act, 1993 PA 23, 450.5002.

(j) Any surety bond filed pursuant to section 206(5).

(5) If the application is for a license to act as a small commercial trust company, then in addition to the items required by subsection (4), the application must also be accompanied by all of the following:

(a) The entity's three-year business plan.

(b) The entity's capital plan.

(c) The entity's policies and procedures, which must include policies or procedures designed to do both of the following:

(i) Comply with federal laws designed to combat money laundering, income tax evasion, terrorist financing and other similar illegal activities to the extent such laws are applicable to non-federally regulated trust companies.

(ii) Ensure the security and confidentiality of client information and compliance with federal laws designed to protect data privacy to the extent such laws are applicable to non-federally regulated trust companies.

SECTION 303. APPLICATION FOR LICENSE TO MANAGE LICENSED TRUST COMPANY.

(1) An application for a license to act as a director, manager, executive officer or committee member of a licensed trust company shall include all of the following:

(a) The applicant's full legal name and all other names by which the applicant is known or that the applicant has used in the past.

(b) The address of the applicant's residence.

(c) The applicant's Social Security Number.

(d) The applicant's driver's license number and the name of the state that issued the license.

(e) Whether the applicant is a citizen of the United States.

(f) The applicant's telephone number.

(2) Nothing in this section shall be construed as prohibiting an individual from acting as a director, manager, executive officer or committee member of an unlicensed trust company without a license.

(3) An application to act as a director, manager, executive officer or committee member of a licensed trust company shall be signed under penalties of perjury by the applicant.

(4) The commissioner shall issue a license under this section if, after reviewing the applicant's application, the commissioner determines that applicant possesses the moral character and fitness appropriate to the management of a licensed trust company.

(5) The department may share any information in an application for a license under this section, or information the department obtains from its investigation of the application, with federal and state law enforcement agencies, other governmental agencies, and credit reporting agencies.

SECTION 304. TRUST COMPANY BRANCH OFFICES.

(1) An unlicensed family trust company may maintain 1 or more branch offices within this state and, to the extent permitted by the laws of any other state in which a branch office is located, outside of this state.

(2) A licensed trust company may maintain 1 or more branch offices within and outside this state if an application described in this subsection is approved by the commissioner. An application to open a branch office under this subsection shall include all of the following:

(a) The name of the company, including all assumed and trade names.

(b) The street address of the company's proposed branch office and each branch office of the company.

(c) The telephone number and dedicated email address, if any, for the company's proposed branch office.

(d) A copy of the deed, lease agreement or other instrument granting the company the right of occupancy of the proposed branch office.

(e) A description of the services to be provided at the proposed branch office.

(3) A foreign family trust company may maintain 1 or more branch offices within this state only if the company is licensed or otherwise supervised by a foreign regulatory agency and an application described in this subsection is approved by the commissioner. An application to open a branch office under this subsection shall include all of the following:

(a) The information described in subsection (2).

(b) The information described in subsections 302(1) to (2).

(c) The documents described in subsections 302(4)(a) to (i).

(d) The name, mailing address and telephone number of the regulatory agency that is responsible for supervising the company.

(4) An application for a license to open a branch office must be accompanied by both of the following:

(a) A nonrefundable application fee in the amount of $500.00 payable to the department.

(b) If the proposed branch office is located outside of this state, proof that the trust company is, or will be, if the commissioner's approval would be granted, permitted to open a branch office in the state in question under the laws of that state.

(5) An application for a license to open a branch office shall be signed under penalties of perjury by the person authorized to receive communications from and represent the trust company before the department. While the application is pending, the person signing the application shall have a duty to supplement or correct the application upon discovering that any information contained in the application is untrue or inaccurate.

(6) Any trust company may conduct any business at a branch office of the company that could be conducted at the company's principal office.

SECTION 305. EXPIRATION, REVOCATION AND RELINQUISHMENT OF TRUST COMPANY LICENSE.

(1) A license to act as a licensed trust company or to open a branch office shall expire on December 31 of the calendar year immediately following the calendar year in which the license was issued or last renewed.

(2) A trust company may voluntarily relinquish a license issued under this part at any time at which the trust company is not acting as a trust company. A license shall be relinquished pursuant to this subsection effective upon the department's receipt of a written statement that the trust company is not acting as a trust company signed under penalties of perjury by an authorized agent of the trust company.

SECTION 306. RENEWAL OF TRUST COMPANY LICENSE.

(1) A trust company may renew any license issued under this part by filing a renewal application with the department before the expiration of the license in question. The license being renewed shall remain effective unless and until the company receives notice from the department that its renewal application has been denied.

(2) An application for renewal of a license under this part shall include all of the following:

(a) The name of the company, including all assumed and trade names.

(b) The street address of the company's principal office and each branch office, if any.

(c) The telephone number and dedicated email address, if any, for the company's principal office and for each branch office, if any.

(d) The name, email address, telephone number and mailing address of the person currently authorized by the company to receive communications from and represent the company before the department.

(e) The name, email address, telephone number and mailing address of each current director, manager, executive officer and committee member of the company.

(f) The name, email address, telephone number and mailing address of each current shareholder or member of the company and description of the interests in the company owned by each current shareholder or member.

(g) A statement explaining whether the directors, managers, executive officers, committee members, shareholders and members of the company have changed and, if so, identifying the changes.

(h) A statement explaining whether the articles of incorporation, articles of organization, bylaws or operating agreement of the company have changed.

(i) In the case of an application to renew a license for a branch office of a foreign family company within this state, the name, mailing address and telephone number of the regulatory agency that is responsible for supervising the company.

(3) An application for renewal of a license under this section shall be signed under penalties of perjury by the person authorized by the company to receive communications from and represent the company before the department. While the application is pending, the person signing the application shall have a duty to supplement or correct the application upon discovering that any information contained in the application is untrue or inaccurate.

(4) An application for renewal of a license under this section must be accompanied by all of the following:

(a) A nonrefundable renewal fee in the amount of $1,000.00 payable to the department.

(b) The information required under section 303 for each of the initial managers, directors, executive officers and committee members of the company.

(c) A copy of the deed, lease agreement or other instrument granting the company the right to occupancy of its principal office.

(d) A certified balance sheet as of a date within 30 days of the date of the application, a certified income statement similarly dated and proof satisfactory to the commissioner of any unencumbered capital reserves or bond described in section 206.

(e) A copy of the instrument authorizing the person identified in subsection (2)(d) to receive communications from and represent the company before the department.

(f) If the articles of incorporation, articles of organization, bylaws or operating agreement of the company have changed, a copy of the affected provision or provisions of the affected document or documents.

(g) A certificate of good standing for the company issued by the state in which the company is organized or incorporated as of a date within 30 days of the date of the application.

Part 4
Management and Powers of Trust Companies

SECTION 401. NUMBER OF DIRECTORS OR MANAGERS. A small commercial trust company shall have three or more directors or managers; a family trust company shall have 1 or more directors or managers. A domestic trust company may have more than 1 class of directors or managers.

SECTION 402. INDEPENDENT LEGAL PERSONALITY; NONIMPLICATION OF DERIVATIVE RESPONSIBILITY; NONATTRIBUTION OF DISABILITIES.

(1) All of the rights, duties, privileges and powers that this act authorizes a given trust company to exercise and perform for or on behalf of the company's clients constitute legal relations subsisting directly between the company itself, as an independent legal person, and other legal persons.

(a) Any such right, duty, privilege or power exercised or performed through the actions of the company's authorized personnel is the right, duty, privilege or power of the company itself and not that, even derivatively, of any of the company's directors, managers, officers, committee members or other personnel.

(b) A provision in a client instrument that specifies criteria for eligibility to accept office or exercise discretionary powers applies to the company as an independent legal person and

not to any of the company's directors, managers, officers, committee members or other personnel as such.

(2) If a trust company enters into a contract in the performance of fiduciary duties, the company is entitled to limit its exposure to liability on the contract by disclosing to contracting parties that it acts in a representative capacity to the same extent that any other fiduciary similarly situated would be according to the laws of this state.

SECTION 403. EXCLUSIVE SUBJECT MATTER JURISDICTION OVER MATTERS CONCERNING FIDUCIARY FUNCTIONS AND INTERNAL MATTERS, RESPECTIVELY; VENUE.

(1) Except as otherwise provided in subsection (2), the probate court has exclusive subject matter jurisdiction over any matter involving a trust company to the extent that the probate court would have exclusive subject matter jurisdiction, in the same circumstances, if a natural person were in the position or positions occupied by the company. In that case, venue in the probate court shall be determined under the provisions of the estates and protected individuals code.

(2) The circuit court has exclusive subject matter jurisdiction over the internal affairs of the company, including claims concerning the liability to the company or the company's owners of the company's directors, managers, officers, committee members and other personnel. In that case, venue in the circuit court shall be in the county in which the principal office of a trust company is located.

SECTION 404. RESTRICTIONS ON DIRECTORS, MANAGERS AND COMMITTEE MEMBERS OF FAMILY TRUST COMPANIES.

(1) No person shall vote on or consent to any decision of a family trust company to the extent that the company's governance documents prohibit that person from voting on or consenting

to that decision, and unless a decision on which a person so prohibited voted or to which such a person consented is subject to more restrictive treatment under the company's governance documents, any such decision shall be given effect only to the extent that it could have been taken if each prohibited director, manager, officer, committee member or agent of the company had not voted on or consented to the decision.

(2) A person who is a beneficiary of a trust for which a family trust company has discretion to make distributions may not enter into a reciprocal agreement, express or implied, regarding the exercise of such discretion with any other beneficiary of any other trust over which the company also has discretion to make distributions.

(3) No provision in a family trust company's governance documents shall override a more restrictive provision in any client instrument: in such a case, the more restrictive provision controls.

(4) This section or any particular subsection of it shall not apply to the extent that a family trust company's articles of incorporation, articles of organization, bylaws or operating agreement provide otherwise by specific reference to this section or any particular subsection of it.

SECTION 405. AUTHORIZATION TO ACT AS FIDUCIARY; MANAGEMENT OF TRUST COMPANIES; EXERCISE OF POWERS.

(1) Subject to the provisions of this act, a family trust company or small commercial trust company is authorized to exercise trust powers and otherwise act as a fiduciary for or on behalf of clients.

(2) The business and affairs of a trust company shall be managed by or under the direction of the persons designated as the company's directors or managers, who may exercise all of the powers of the company and do all such lawful acts and things as are not prohibited by the

company's governance documents or required by those documents or applicable law to be exercised or done exclusively by the company's shareholders, members or committee members.

(3) The directors or managers of a trust company shall oversee the company's activities and services, including the exercise of fiduciary powers by the company, the determination of policies, the types of investments to be made with funds held by the company in a fiduciary capacity and the supervision and review of the actions of all officers, employees, committees and other personnel engaged by or acting on behalf of the company in the exercise of its powers.

(4) The directors or managers of a trust company may from time to time delegate some or all of their authority to 1 or more committees as provided in section 407.

(5) The shareholders or members of a trust company, as such, shall have only such powers, responsibilities and authority to act on behalf of or bind the company as are expressly provided in the company's governance documents.

SECTION 406. OFFICERS OF TRUST COMPANIES ORGANIZED AS LIMITED LIABILITY COMPANIES. A trust company organized as a limited liability company shall have such officers as may be prescribed by the operating agreement or determined by the company's manager, and except as otherwise provided in the company's articles of organization or operating agreement, the election, appointment, removal, resignation, authority and duties of such officers shall be determined as if the company were organized as a corporation, treating the managers as the board of directors for such purpose.

SECTION 407. COMMITTEES OF TRUST COMPANIES.

(1) Except as otherwise provided in a trust company's articles of incorporation, articles of organization, bylaws or operating agreement, the directors or managers of the company may commission committees to exercise specific powers and authority of the directors or managers.

The power and authority to be exercised by such a committee shall be specified in writing. Committee members commissioned under this subsection shall serve at the pleasure of the directors or managers.

(2) To the extent a trust company's governance documents require or purport to control the commissioning or conduct of 1 or more committees, those committees shall be governed by any terms or conditions for the conduct of their commissions set out in the company's governance documents, including such committees' powers and provisions for the appointment and removal of committee members. Such terms and conditions may be supplemented by the company's directors or managers in any way that is consistent with the purposes of the commission in question and with the terms or conditions pertaining to that commission as set out in the company's governance documents.

(3) The directors or managers of a family trust company may only be liable for effecting any decision made by a committee described in this section to the extent that the committee's authority to make the decision in question was conferred by the directors or managers as opposed to the company's governance documents.

(4) A committee member need not be a director, manager, officer or employee of the trust company that the committee serves. A committee commissioned under this section need not have more than 1 member.

SECTION 408. POWERS OF TRUST COMPANIES.

(1) A trust company may invest funds held for its own account other than those required or permitted to be maintained by section 206 in any type of equity securities, debt securities or other asset without being subject to the prudent investor rule in section 1502 of the estates and protected individuals code, MCL 700.1502.

(2) Except as provided in subdivisions (a) and (b) of this subsection, a trust company may exercise fiduciary powers within this state and outside this state if permitted by the laws of the foreign jurisdiction in which the trust company is acting and may exercise any of the powers described in section 4401 of the banking code of 1999, MCL 487.14401.

(a) A small commercial trust company shall not exercise fiduciary powers over more than $2,500,000 in net assets for any current client. Beginning on January 1, [2024], the amount specified by the preceding sentence shall be multiplied by the cost-of-living adjustment factor for the calendar year in which the company is acting, or if that adjustment factor is not then available, the adjustment factor for the preceding calendar year. The department of treasury shall publish the cost-of-living adjustment factor to be applied to the specific dollar amount referred to in this subsection for [2024] and each calendar year thereafter. A product resulting from application of the cost-of-living adjustment factor to a specific dollar amount shall be rounded to the nearest $1,000.00.

(b) For the purposes of determining compliance with subdivision (a), a small commercial trust company shall determine the value of any asset that is not actively traded on an established exchange by reference to the most recent written public or private professional valuation of that asset prepared within the last five years. The company may average the value of each asset and liability for which the company was exercising fiduciary powers over for the current client during the preceding three calendar years determined as of December 31 in each year.

(c) A small commercial trust company that has ceased to comply with subdivision (a) shall have 120 days from the first date of the noncompliance in question to rectify the lapse.

(d) A family trust company shall not exercise fiduciary powers for or on behalf of any client other than a family client.

(3) Subject to limitations imposed by any other statute of this state or by the governance documents of the trust company in question, a trust company has all powers that are reasonably necessary or appropriate for the conduct of activities in which this act authorizes the company to engage.

(4) A trust company may not engage in the business of banking.

SECTION 409. AUTHORIZED ACTIONS AND TRANSACTIONS FOR FAMILY TRUST COMPANY PERSONNEL; DUTY OF LOYALTY.

(1) Subject to subsection (2) and any restrictions imposed by the articles of incorporation, articles of organization, bylaws or operating agreement of the family trust company or an applicable client instrument, all of the following apply in the case of a family trust company:

(a) A director, manager, officer or committee member of the company may act as a director, manager, officer or fiduciary of an associated person or relation, including 1 that is owned in whole or in part by a client, and may receive compensation from the associated person or relation.

(b) A director, manager, officer or committee member of the company may coinvest with an associated person or relation, a family member, a client or the company itself.

(c) The company acting for its own account or on behalf of a client may purchase stocks or other securities, bonds or other indebtedness, annuities, contracts of insurance, property or other assets from an associated person or relation or family member and may purchase any such asset issued by an entity that is an associated person or relation.

(d) A family member or associated person or relation, including 1 that is owned in whole or in part by a client, may indemnify the company or an officer, director, manager or committee member of the company to the extent permitted under section 412.

(e) The company may loan money to or borrow money from an associated person or relation or family member and may deposit money with an associated person or relation.

(f) The company may receive services from an associated person or relation or a family member and may pay reasonable compensation for such services.

(g) The company may deal with the fiduciary of any trust or estate, even if the company is acting as a fiduciary of that trust or estate.

(2) A transaction described in subsection (1) is voidable by an affected client or its beneficiaries to the extent the transaction directly results in a significant financial loss to the client provided the affected client commences or, if applicable, 1 or more beneficiaries under a governing instrument to which the company is subject in connection with services the company performs for or on behalf of the client commence a judicial proceeding within 1 year after the client or beneficiary or a representative of the client or beneficiary knows of the transaction or should have inquired into the transaction's occurrence.

(3) A director, manager, officer or committee member of a family trust company may engage in any transaction not described in subsection (1) with a family member or client if 1 or more of the following apply:

(a) The transaction is not inconsistent with the terms of the applicable governing instrument, if any, and the terms of the transaction are commercially reasonable.

(b) The transaction was authorized by the terms of an applicable governing instrument.

(c) The transaction was approved by the court after notice to each affected client or its beneficiaries.

(d) Each affected client consented to the transaction, ratified the transaction, or released each director, manager, officer or committee member of the company who is a party to the transaction provided the consent, release, or ratification was not induced by improper conduct on the part of any such party.

(e) The transaction occurred or involves a contract entered into or a claim acquired by the director, manager, officer or committee member of the company, before the director, manager, officer or committee member in question became an officer director, manager, officer or committee member of the company.

(4) Except as provided in subsection (5), a family trust company that owns, as a trustee, shares or other equity interests in the company itself is not required to vote such interests in the best interests of the trust beneficiaries when electing directors or managers of the company.

(5) Subsection (4) shall not apply if the implicated governing instrument or the company's articles of incorporation, articles of organization, bylaws or operating agreement does either of the following:

(a) Expressly declares that subsection (4) of this section 409 of the private trust company act does not apply.

(b) Expressly refers to the situation in which the company owns, as a trustee, shares or other equity interests in the company itself and indicates that, in that case, the company shall vote such interests in the best interests of the trust beneficiaries when electing directors or managers of the company.

(6) A transaction between a client or family member and a family trust company or a director, manager, officer or committee member of the company is not presumed to involve any conflict of interest.

SECTION 410. TRUST COMPANY FEES.

(1) A trust company may charge a fee for its services.

(2) In addition to any other method for establishing reasonableness, a fee charged by a family trust company for acting as a fiduciary is reasonable if either of the following applies:

(a) The company employs the same method for computing the fee charged to each client account of a similar type according to a fee schedule adopted by the company and the total annual fees charged by the company for fiduciary services do not exceed one hundred and ten percent of the company's total annual operating expenses, including reasonable expenses paid to 1 or more associated persons or relations, the cost of any surety or fidelity bond, and reasonable premiums paid on policies insuring the company's directors, managers, officers, committee members, employees, other personnel or property from loss or liability.

(b) The fee is approved by the affected client, or in the case of a client account that is a trust or estate of a deceased individual, the settlor of that trust or that decedent.

(3) A fee charged by a family trust company for acting as a fiduciary in excess of that described in subsection (2) shall not be presumed to be unreasonable.

(4) In any action or proceeding concerning fees, there is a rebuttable presumption that a fee charged by a small commercial trust company is reasonable if the fee or its method of computation is specified in a fee schedule or fee agreement of the company in effect at the time the service is provided and the agency or custody principal, the trust settlor, or any other person who is entitled to be kept reasonably informed of the client account and its administration under the estates and protected individuals code, received reasonable notice of that fee schedule or fee agreement before the fee is charged.

(5) In addition to or as part of the fee for its services, a small commercial trust company may charge a fee equal to the cost of any bond obtained under section 206. Any fee charged under this subsection shall be allocated pro rata to each of the company's client accounts and shall not exceed $200 per client account.

SECTION 411. COMPENSATION OF DIRECTORS, MANAGERS, OFFICERS AND COMMITTEE MEMBERS.

(1) Except as otherwise provided in the governance documents of a trust company, the directors or managers of the company, or the person designated in the trust company's governance documents, may do both of the following:

(a) Pay compensation to each director, manager, officer or committee member of the company, which may consist of a fixed sum for attendance at meetings, an annual fee or other form of compensation.

(b) Reimburse each director, manager, officer or committee member of the company for reasonable expenses associated with the performance of that person's duties.

(2) This section does not preclude a director, manager, officer or committee member of a trust company, or an associated person or relation with respect to a family trust company, from acting in any other capacity and receiving compensation for the services the director, manager, officer or committee member renders in that other capacity.

SECTION 412. INDEMNIFICATION BY FAMILY MEMBERS, FAMILY CLIENTS AND ASSOCIATED PERSONS OR RELATIONS.

(1) In addition to all other rights of indemnification granted in accordance with the laws of this state, a family trust company, or a director, manager, officer or committee member of a family

trust company, may be indemnified by a family member, family client or an associated person or relation.

(2) A family client or associated person or relation owned or controlled by a family client for which a family trust company is acting as a fiduciary may grant indemnity under subsection (1) only to the extent that both of the following apply:

(a) The indemnity is consistent with the terms of any applicable client instrument or governance document and applicable law other than this act.

(b) The indemnity is not for conduct for which a person could not be exculpated under applicable law other than this act.

(3) In any action or proceeding involving a trust or estate of a decedent, ward or protected individual that was or is a client, each director, manager, officer or committee member of a family trust company shall be indemnified from the property of the estate or trust for and against any loss or liability suffered or expenses incurred to the same extent the director, manager, officer or committee member would be entitled to such indemnification if acting as the trustee, personal representative, conservator or guardian. The right to indemnification under this subsection includes those rights granted to fiduciaries under sections 3713(6)(e), 3715(1)(p), 3720, 7709 and 7904(1)–(2) of the estates and protected individuals code, MCL 700.3713(6)(e), MCL 700.3715(1)(p), MCL 700.3720, MCL 700.7709 and MCL 700.7904(1)–(2).

(4) The hypothetical, contrary-to-fact conditional in subsection (3) analogizing a director, manager, officer or committee member of a family trust company to a trustee, personal representative, conservator or guardian is merely for the purpose of specifying the director, manager, officer or committee member's right to be indemnified from the property of the estate or trust involved in the relevant proceeding: subsection (3) is without prejudice to the principle of

section 402(1), and the expenses for or against which a director, manager, officer or committee member is indemnified by subsection (3) include legal fees incurred in the attempt to vindicate, in the court of first instance or on appeal, the principle of section 402(1) by repudiating liability imposed by any court on the director, manager, officer or committee member in contravention of section 402(1).

Part 5
Foreign Family Trust Companies

SECTION 501. POWERS OF FOREIGN FAMILY TRUST COMPANIES.

(1) A foreign family trust company that is authorized by law other than this act to exercise fiduciary powers in this state has all of the rights, powers and privileges of a family trust company, except that a foreign family trust company that is not licensed or otherwise supervised by a regulatory agency of any state may not act as a fiduciary pursuant to an appointment by a court of this state.

(2) The directors, employees, managers, officers, committee members and other personnel of a foreign family trust company exercising fiduciary powers in this state have all of the rights, powers, privileges and immunities of the directors, employees, managers, officers, committee members and other personnel of a family trust company.

SECTION 502. REGISTERING TO DO BUSINESS. With respect to any requirement that a limited liability company or corporation register to do business in this state, a foreign family trust company is not considered to be transacting business in this state merely because it is carrying on in this state 1 or more of the following activities:

(a) Acting as a fiduciary pursuant to an appointment by a court of this state, by a resident of this state or by a person conducting business in this state.

(b) Acting as trustee of a trust having 1 or more beneficiaries who are residents of this state.

(c) Receiving services performed in this state, regardless of whether the foreign family trust company pays for such services.

(d) Performing services, for or on behalf of any family client who is a resident of this state, that are incidental to the company's acting in either of the capacities described in subsections (a) and (b).

(e) Owning an interest in an entity that transacts business in this state.

SECTION 503. DOMESTICATION OF FOREIGN FAMILY TRUST COMPANIES.

(1) A foreign family trust company may become a licensed family trust company by filing an application for a license under section 302 and complying with all other requirements under this act applicable to licensed family trust companies. Upon issuance of a license under section 302, the company shall, for purposes of this act, cease to be a foreign family trust company and shall become a licensed family trust company.

(2) A foreign family trust company may become an unlicensed family trust company by filing a notice of formation in conformance with section 205 and complying with all other requirements under this act applicable to unlicensed family trust companies. Upon filing a notice of formation under section 205, the company shall, for the purposes of this act, cease to be a foreign family trust company and shall become an unlicensed family trust company.

SECTION 504. PROHIBITION ON ADVERTISEMENTS AND SOLICITATION BY FOREIGN FAMILY TRUST COMPANIES. A foreign family trust company may not advertise its services to or solicit business from any prospective client who resides in this state for whom the company may not provide fiduciary services under the laws other than the laws of this state that authorized the company to exercise fiduciary powers for or on behalf of clients.

Part 6

Confidentiality

SECTION 601. PROHIBITION ON DISCLOSURE BY PERSONS INTERESTED IN CLIENT TRUSTS AND ESTATES.

(1) A person interested in a trust or estate of a decedent, ward or protected individual that was or is a client of a family trust company or foreign family trust company shall not disclose, publicize or otherwise disseminate to any person who has not entered into a nondisclosure agreement with the company confidential information received from a family trust company if such information is conspicuously marked as confidential.

(2) A family trust company may refuse to provide confidential information to a person interested in a trust or estate of a decedent, ward or protected individual that was or is a client if the person has not entered into a written nondisclosure agreement with the company that prohibits the person from disclosing that confidential information. The company may not refuse to share confidential information with an interested person's lawyer, accountant or tax preparer who has agreed with the company to be bound by a written nondisclosure agreement that prohibits the lawyer, accountant or tax preparer from disclosing that confidential information outside of his or her professional representation of the interested person.

(3) A person injured by the disclosure of confidential information in violation of this section, a person who is might be injured by a threatened such disclosure, or a family trust company having a person as a client who is thus injured or threatened may seek an injunction and shall be awarded attorney fees if the injunction is imposed.

(4) This section does not prohibit disclosure of confidential information by a person in response to legal process or as expressly required by law.

SECTION 602. PROHIBITION ON DISCLOSURES BY THE DEPARTMENT.

(1) Notwithstanding subsection 2109(2) of the banking code of 1999, MCL 487.12109(2), all current and former commissioners, deputies, agents, and employees of the department shall not disclose, publicize or otherwise disseminate confidential information of a trust company, or a director, manager, officer, committee member or client of a trust company, to any member of the general public.

(2) Before disclosing confidential information pursuant to subsection 2202(15) of the banking code of 1999, MCL 487.12202(15), the department shall give the affected trust company 7 days prior written notice. The affected trust company, and each affected director, manager, officer, committee member or client of that company, may commence or intervene in a judicial or administrative proceeding to prevent the disclosure of confidential information.

(3) As far as the department is concerned, any document, material, or information containing confidential information in the possession of the department is confidential by law and privileged, is not subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, is not subject to subpoena, and is not subject to discovery or admissible in evidence in any private civil action. However, the department is authorized to use all documents, materials, or information

in its possession in the furtherance of any supervisory activity or legal action brought as part of the commissioner's duties.

(4) The commissioner, or any person that received documents, materials, or information while acting under the commissioner's authority, is not permitted and may not be required to testify in any private civil action concerning any confidential documents, materials, or information described in subsection (3).

SECTION 603. CONFIDENTIALITY OF ANNUAL REPORTS AND OTHER INFORMATION.

(1) A family trust company acting as a trustee does not have the duty under section 7814(2)(a) to (c) of the estates and protected individuals code, MCL 700.7814, to provide beneficiaries with the terms of the trust and information about the trust's property and to notify qualified trust beneficiaries of the existence of the trust and the identity of the trustee to the extent the terms of the trust direct the trustee to provide such information instead to a person who does not have authority to make distribution or investment decisions for the trust and to whom the terms of the trust grant a protection power.

(2) For purposes of this section, a “protection power" is a power that allows the power holder, acting in a fiduciary capacity, to remove the trustee of the trust, direct the trustee for the benefit of the trust beneficiaries, or represent the beneficiaries in the sense described in section 7301(1) to (2) of the estates and protected individuals code, MCL 700.7301(1) to (2). A protection power may authorize the power holder to represent the trust beneficiaries in the sense described in the preceding sentence of this section without regard to the application of sections 7302 to 7304 of the estates and protected individuals code, MCL 700.7302 to 7304.

SECTION 604. SEALING OF COURT RECORDS; LIMITS ON USE OF DISCOVERY; PRIVATE ADMINISTRATIVE HEARINGS.

(1) Upon the motion of any party or interested person, a court shall seal records in any action or proceeding involving one or more of the following:

(a) A family trust company or foreign family trust company acting in its own name.

(b) The actions of a person in the person's capacity as a director, an employee, a manager, an officer, a committee member or any agent of a family trust company or foreign family trust company.

(c) A trust, estate, conservatorship, guardianship or associated person or relation for which a family trust company or foreign family trust company is acting as a fiduciary.

(2) Upon the motion of any family trust company, foreign family trust company, or director, employee, manager, officer, committee member or agent of a family trust company or foreign family trust company who has filed confidential information with the court in connection with any action or proceeding, the court shall seal the filed confidential information.

(3) Upon motion filed by any party or interested person, a court shall enter a protective order prohibiting all parties or interested persons from publishing, disseminating or otherwise disseminating any confidential information contained in any record or obtained by discovery.

(4) In any civil action or proceeding involving a client and 1 or more third parties in which a family trust company is not named as a party or interested person, the company and its associated persons or relations, directors, employees, managers, officers, committee members and other personnel may refuse to produce or disclose confidential information in response to a subpoena issued in that action or proceeding to the extent that the company would not be legally required to provide the confidential information sought by the subpoena directly to the client involved in the

action or proceeding if that client were to demand or request the information in the client's personal capacity in the ordinary course of the company's business. A refusal pursuant to this subsection shall state generally why the company would not be legally required to provide the confidential information sought by the subpoena directly to the client involved in the action or proceeding if that client were to demand or request the information in the client's personal capacity in the ordinary course of the company's business. Such a refusal shall be in a writing delivered to the party seeking the information by subpoena before the deadline for responding to the subpoena. If such a refusal is met by a motion to compel, the court shall do all of the following:

(a) Upon the motion of a person opposing the subpoena, inspect in camera any documents that are alleged to include confidential information, including without limitation documents sought by the subpoena.

(b) Grant the motion to compel only if the court determines that the company would be required to provide the confidential information sought by the subpoena directly to the client involved in the action or proceeding if that client were to demand or request the information in the client's personal capacity in the ordinary course of the company's business.

(c) Award attorney fees incurred in opposing the motion to compel by the company, its associated persons or relations, directors, employees, managers, officers, committee members or other personnel if the motion to compel is denied for any reason. For purposes of this subdivision, attorney fees incurred in opposing the motion to compel include attorney fees incurred in preparing the written refusal delivered pursuant to this subsection, in determining that such a refusal is warranted, and in responding to communications concerning the refusal by or on behalf of the party seeking the information by subpoena.

(5) Subsection (4) shall not be construed as either expanding the scope of discovery that

would otherwise be permissible or narrowing the grounds for discovery sanctions in the action or proceeding to which subsection (4) applies.

(6) An order granting a motion to compel that is described in subsection (4) is appealable as of right to the court of appeals, and enforcement of the order must be stayed while an appeal is pending.

(7) For the purposes of this section, the term "records" means that term as defined by reference in Michigan Court Rule 8.119(A).

(8) All administrative hearings involving a family trust company, a branch office of a foreign family trust company, or the actions of a person in the person's capacity as a director, an employee, a manager, an officer, a committee member or any agent of a family trust company, shall be private and not open to the public.

SECTION 605. ATTORNEY CLIENT PRIVILEGE. Any communication between an attorney and a trust company acting as a fiduciary is privileged and protected from disclosure to the same extent as if the company were not acting as a fiduciary, regardless of whether the attorney is compensated using the property of a client or a client account administered by the company.

Part 7
Regulation of Licensed Trust Companies and Branch Offices

SECTION 701. JURISDICTION OF THE DEPARTMENT. The department shall have jurisdiction over and administer the laws relating to licensed trust companies and foreign family trust company branch offices in this state. The commissioner may promulgate rules under the administrative procedures act of 1969 as he or she considers necessary to effectuate the purposes and to enforce this act. The commissioner may prescribe 1 or more forms to be used in communications with the department that are required or permitted under this act.

SECTION 702. AUDITS AND EXAMINATIONS.

(1) A licensed trust company is subject to examination under section 2202 of the banking code of 1999, MCL 487.12202, except that subsection 2202(3), MCL 487.12202(3), shall not apply.

(2) The commissioner may periodically examine a branch office of a foreign family trust company to the same extent that the commissioner would be permitted to examine the branch office if the company were a licensed trust company. Any such examination shall be limited to the activities of the branch office during the examination period, which shall not cover more than the 36 months immediately preceding the examination. In its examination, the commissioner shall, absent manifest error, accept and rely upon the most recent examination report or similar documentation concerning the branch office, if any, issued by the regulatory agency that is responsible for supervising the company in question.

SECTION 703. FEES.

(1) A licensed trust company shall pay an annual supervisory fee.

(a) In the case of a licensed small commercial trust company, the annual supervisory fee shall be $1,500.00.

(b) In the case of a licensed family trust company, the annual supervisory fee shall be $3,000.00.

(2) The commissioner shall provide an invoice of the supervisory fee on or before September 30 of each year. A licensed trust company must pay the annual supervisory fee on or before December 31 of that year.

(3) The commissioner shall periodically establish a schedule of fees to be paid for applications and examinations.

(4) The commissioner may charge reasonable fees for furnishing and certifying copies of documents or serving notices required under this act.

(5) The commissioner shall base the fees established under subsections (3) and (4) on the estimated cost to the department of conducting the activities for which the fees are imposed. No fee charged to a trust company shall be greater than the amount prescribed by this act or the amount charged to a bank for a similar activity or service.

(6) To the extent any fees, penalties, or fines assessed under this act are unpaid when due, the commissioner may, after providing proper notice, maintain an action for the recovery of the fees, penalties, or fines plus interest and costs.

(7) The fees, expenses, compensation, penalties, and fines collected under this act are not refundable.

(8) The state trust company regulatory fund is established in the department of treasury. All of the following apply to the state trust company regulatory fund:

(a) The fund shall consist of the following:

(i) Fees, expenses, compensation, penalties, and fines received or collected under this act.

(ii) Money appropriated to the fund.

(iii) Donations of money made to the fund from any source.

(iv) Interest and earnings from fund investments.

(b) Money in the fund at the close of a fiscal year shall remain in the fund and shall not revert to the general fund.

(c) Upon appropriation, the department shall use the money in the fund only for trust company regulatory purposes, as determined by the commissioner.

(d) The state treasurer shall direct the investment of the fund.

(e) The department is the administrator of the fund for auditing purposes.

SECTION 704. NOTICES OF LICENSE RENEWAL. On or before September 30 of each year, the department shall notify each licensed trust company and foreign family trust company having a branch office in this state that its license under section 302 or 304, as applicable, will expire on December 31 of that year. The notice shall include or provide access to a blank application for renewal of the license that is expiring.

SECTION 705. DECLARATORY RULINGS, ORDERS, OR DETERMINATIONS.

(1) The commissioner may issue declaratory rulings in accordance with the administrative procedures act of 1969, or issue orders requested by application authorizing 1 or more trust companies to exercise powers not specifically authorized by this act.

(2) In the exercise of its discretion under subsection (1), the commissioner shall consider the purposes of this act, the ability of the trust company to exercise any additional power in a safe and sound manner, and whether similar powers are exercisable by other trust companies.

SECTION 706. REGULATION OF FOREIGN FAMILY TRUST COMPANIES.

(1) If the commissioner determines that a branch office of a foreign family trust company in this state is acting in violation of the laws of this state or that the activities of the branch office are being conducted in an unsafe or unsound manner, the commissioner may undertake enforcement actions and proceedings as would be permitted if the branch office were that of a licensed family trust company.

(2) Any notice or order issued by the commissioner relating to a branch office of a foreign family trust company shall be served in accordance with section 2313 of the banking code of 1999,

MCL 487.12313, with a copy sent to the foreign regulatory agency that is responsible for supervising the company.

(3) If the commissioner determines that a foreign trust company is acting in this state in violation of the laws of this state, the commissioner shall notify the state in which the foreign trust company is licensed, if any, and the attorney general of this state.

SECTION 707. ENFORCEMENT POWERS. A licensed trust company shall be treated as an "institution" for the purposes of part 3 of chapter 2 of the banking code of 1999, 487.12301-.12203, provided, however, that for those purposes, in relation to a licensed trust company, both of the following apply:

(1) The term "director" or "board of directors" as used in sections 2036 and 2309 of the banking code of 1999, MCL 487.12306, 487.12309, shall include managers and committee members.

(2) The word "depositors" as used in section 2036 of the banking code of 1999, MCL 487.12306, shall denote "clients" within the meaning of this act.

SECTION 708. APPLICATION FILING AND PROCESSING. An application under this act must be filed and processed in accordance with subsections (2) to (10) of section 2302 of the banking code of 1999, MCL 487.12302(2)–(10).

Part 8
Dissolution and Merger of Trust Companies

SECTION 801. APPLICATION OF CORPORATE OR COMPANY LAW. Except as otherwise provided in this part, the laws of the state of a domestic trust company's organization or incorporation govern all aspects of the company's dissolution, winding-up and merger, including the transmission or publication of notice to any person that is not a client, in connection with the company's dissolution or merger.

SECTION 802. DISSOLUTION OF LICENSED TRUST COMPANIES.

(1) Any person who files an action seeking to dissolve a licensed trust company must provide notice of the action to the department. The commissioner may intervene in any action seeking to dissolve a licensed trust company.

(2) A licensed trust company may not voluntarily dissolve until the commissioner has approved an application for dissolution filed by the company. An application for dissolution may not be filed with the department unless the persons whose consent is necessary to dissolve the company have, subject to the department's approval of the application, consented to the company's dissolution.

(3) A domestic trust company that has filed an application for dissolution shall not accept new client accounts but may continue to act as a fiduciary for any existing client for the purpose of winding up the company's affairs.

(4) An application for dissolution on a form approved by the commissioner shall be signed by the person authorized by the licensed trust company to receive communications from and represent the company before the department.

(5) The commissioner may examine any licensed trust company that has filed an application for dissolution to determine whether the rights of the company's clients, members or shareholders have been violated and may demand such information as the commissioner requires for that purpose.

(6) The commissioner shall not approve an application for dissolution filed by a licensed trust company unless the company has ceased to act as a fiduciary for all of the company's clients or the commissioner's approval is expressly conditioned on the company's ceasing to act as a fiduciary for any client.

(7) The commissioner shall approve an application for dissolution unless the commissioner finds that the company has not safely and soundly administered all of the company's client accounts following the company's last examination, the rights of the company's clients, members or shareholders have been materially violated or that the company's dissolution is otherwise not in conformity to law. In deciding whether to approve an application for dissolution, the commissioner shall consider a client's, member's or shareholder's prior ratification, release or consent, the applicable limitations period governing the company's conduct, including the limitations periods imposed by section 803, and the effect of any judicial order discharging the company or notice to claimants of the company required or permitted by law other than this act.

(8) The commissioner's decision to approve an application for dissolution does not discharge a licensed trust company from liability for its fiduciary conduct or any claims that may be asserted by its creditors.

SECTION 803. NOTICE OF DISSOLUTION TO FORMER CLIENTS.

(1) A domestic trust company shall notify its clients and former clients in writing of the company's pending dissolution. If the company is a licensed trust company, written notice under this section must not be given until the company has filed the application for dissolution required by section 802. If the company is an unlicensed family trust company, written notice under this section must not be given until the company has filed a certificate of dissolution or its equivalent with the state in which the company is organized or incorporated. The written notice must include all of the following:

(a) A mailing address where claims can be sent.

(b) A statement that the company in dissolution may demand sufficient information to permit it to make a reasonable judgment whether a claim should be accepted or rejected.

(c) The deadline by which any claim must be received, which must not be less than whichever of the following is applicable:

(i) Six months from the effective date of the written notice if the notice is given by an unlicensed trust company.

(ii) Three months from the effective date of the written notice if the notice is given by a small commercial trust company.

(iii) Forty-five days from the effective date of the written notice if the notice is given by a licensed family trust company.

(d) A statement that all claims will be barred if not received by the deadline.

(2) A domestic trust company in dissolution shall publish notice to any client or former client whose address or whereabouts could not be ascertained on diligent inquiry. The notice must be published once each week for 8 consecutive weeks and shall include the information specified in subsection (1), except that the deadline by which any claim must be received must not be less than whichever of the following is applicable:

(a) Twelve months from the first publication date if the company is an unlicensed trust company.

(b) Six months from the first publication date if the company is a small commercial trust company.

(c) Three months from the first publication date if the company is a licensed family trust company.

(3) Notices described in subsections (1) and (2) do not constitute an admission by the issuing domestic trust company in dissolution that a client or former client to whom notice is directed has a valid claim against the company.

(4) A claim against a domestic trust company in dissolution is barred if either of the following applies:

(a) A client or former client who was given notice under subsections (1) or (2) does not mail the claim to the mailing address provided in the notice by the stated deadline.

(b) A client or former client who was given notice under subsections (1) or (2) whose claim was rejected in writing by the company in dissolution does not commence an action or proceeding to enforce the claim within 90 days from the effective date of the rejection.

(5) The effective date of notice given under subsection (1) or (4)(b) is the earliest of the following:

(a) The date the notice is received.

(b) Five days after the notice is deposited in the United States mail as evidenced by the postmark if the notice is mailed postpaid and correctly addressed.

(c) The date shown on the return receipt if the notice is sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(6) The effective date of notice published under subsection (2) is the date of the last publication of the 8 publications required by that subsection.

SECTION 804. MERGER OF TRUST COMPANIES.

(1) Subject to the other requirements in this section, two or more trust companies may merge if the surviving trust company will continue to qualify as a trust company immediately after the merger.

(2) A licensed trust company may not merge with another trust company unless the licensed trust company will be the surviving trust company, or the commissioner has approved an application for merger filed by the licensed trust company. The application for merger on a form

approved by the commissioner shall be signed by the person authorized by the licensed trust company to receive communications from and represent the company before the department.

(3) The commissioner shall approve an application for merger unless the commissioner finds that the surviving trust company would not continue to qualify as a trust company after the merger or would otherwise be unable to administer the client accounts of and act as a fiduciary for the clients of each constituent trust company in a safe and sound manner. In deciding whether to approve an application for merger, the commissioner may consider the results of any prior examination of the surviving trust company conducted during the previous 5 years and may demand such information as the commissioner requires for making the findings required by this subsection. The commissioner shall not deny an application for merger merely because the surviving trust company is not a licensed trust company.

(4) A domestic trust company may merge with a foreign trust company if the merger is permitted by the law under which each foreign constituent trust company is organized and each foreign constituent trust company complies the law to which it is subject in effecting the merger.

(5) Within 30 days following a merger involving an unlicensed family trust company, the surviving trust company shall file a notice of merger with the department. The notice of merger under this subsection must include the name of each constituent trust company, the name of the surviving trust company, the address of the surviving trust company's principal office, the date of the notice, the name of each designated family member, if any, and the effective date of the merger.

(6) A surviving trust company possesses all the rights, interests, privileges and is subject to all the restrictions, disabilities, liabilities, and duties of each of constituent trust company. Upon the merger of two or more companies under this section, title to all property, real, personal, and mixed, held by a constituent trust company is thereby automatically transferred to the surviving

trust company, and shall not revert or be in any way impaired by reason of this act.

(7) A surviving trust company and enjoys the same and all rights of property and interests, including appointments, designations, and nominations and all other rights and interests as a fiduciary, in the same manner and to the same extent as those rights and interests were held or enjoyed by each constituent trust company at the time of the merger. If a constituent trust company at the time of merger was acting under appointment of any court as a fiduciary, the surviving trust company is subject to removal by a court of competent jurisdiction.

(8) A surviving trust company shall file with each court or other public tribunal, agency, or officer in any state by which any of its constituent trust companies have been appointed as a fiduciary, and in the court file of each estate, suit, or any other proceeding in which any of them has been acting as a fiduciary, an affidavit setting forth the fact of merger, the name of each constituent trust company, the name of the surviving trust company, the location of its principal office, and the amount of its unencumbered capital reserves and any bond obtained under section 206.

(9) The liability of any constituent trust company and the rights or remedies of the creditors of, or other persons transacting business with the constituent trust company shall not be altered or impaired as the result of a consolidation.

(10) The liability of any shareholder, member, director, manager, officer or committee member of a constituent trust company and the rights or remedies of the creditors of, or other persons transacting business with the shareholder, member, director, manager, officer or committee member as such shall not be altered or impaired as the result of a consolidation.

EXHIBIT 2B

Nonbanking Entity Trust Powers Ad Hoc Committee

Proposed Amendments to EPIC

A bill to amend 1998 PA 386, entitled "estates and protected individuals code," by amending sections 7105, 7110, 7409 and 7703a as amended by 2009 PA 46, 2010 PA 325, 2018 PA 664, and 2023 PA __.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700. 2722[Reserved]

[Reserved]

700.7105 Duties and powers of trustee; provisions of law prevailing over terms of trust

Sec. 7105. (1) Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary.

(2) The terms of a trust prevail over any provision of this article except the following:

(a) The requirements under section 7401 and 7402(1)(c) and (e) for creating a trust.

(b) The duty of a trustee to administer a trust in accordance with section 7801.

(c) The requirement under section 7404 that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve.

(d) The durational limits specified in section 7408 for trusts for the care of animals and in section 7409 for other noncharitable purpose trusts.

(e) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(f) The effect of a spendthrift provision, a support provision, and a discretionary trust provision on the rights of certain creditors and assignees to reach a trust as provided in part 5.

(g) The power of the court under section 7702 to require, dispense with, or modify or terminate a bond.

(h) The power of the court under section 7708(2) to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.

(i) Except as permitted under section 7809(2), the obligations imposed on a trust protector in section 7809(1).

(j) Except as provided in section 7409a and section [16]603 of the of the trust company act, MCL [487.16]603, ~~The~~ the duty under section 7814(2)(a) to (c) to provide beneficiaries with the terms of the trust and information about the trust's property, and to notify qualified trust beneficiaries of an irrevocable trust of the existence of the trust and the identity of the trustee.

(k) The power of the court to order the trustee to provide statements of account and other information pursuant to section 7814(4).

(l) The effect of an exculpatory term under section 7809(8) or 7908.

(m) The rights under sections 7910 to 7913 of a person other than a trustee or beneficiary.

(n) Periods of limitation under this article for commencing a judicial proceeding.

(o) The power of the court to take action and exercise jurisdiction.

(p) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in sections 7203 and 7204.

(q) The requirement under section 7113 that a provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

700.7110 Others treated as qualified [trust] beneficiaries

Sec. 7110. (1) A charitable organization expressly named in the terms of a trust to receive distributions under the terms of a charitable trust has the rights of a qualified trust beneficiary under this article if 1 or more of the following are applicable to the charitable organization on the date the charitable organization's qualification is being determined:

(a) The charitable organization is a distributee or permissible distributee of trust income or principal.

(b) The charitable organization would be a distributee or permissible distributee of trust income or principal on the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions.

(c) The charitable organization would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(2) A person appointed to enforce a trust created for the care of an animal under section 7408 or another noncharitable purpose trust under section 7409 has the rights of a qualified trust beneficiary under this article.

(3) During the nondisclosure period of a trust described in section 7409a, a person granted a nondisclosure correlative right or protection power over the trust has the rights of a qualified trust beneficiary under this article.

(4) A person granted a protection power pursuant to section [16]603 of the of the trust company act, MCL [487.16]603, has the rights of a qualified trust beneficiary under this article.

(5) The attorney general of this state has the following rights with respect to a charitable trust having its principal place of administration in this state:

(a) The rights provided in the supervision of trustees for charitable purposes act, 1961 PA 101, MCL 14.251 to 14.266.

(b) The right to notice of any judicial proceeding and any nonjudicial settlement agreement under section 7111.

700.7402 Creating trust; requirements

Sec. 7402. (1) A trust is created only if all of the following apply:

(a) The settlor has capacity to create a trust.

(b) The settlor indicates an intention to create the trust.

(c) The trust has a definite beneficiary or is either of the following:

(i) A charitable trust.

(ii) A trust for a noncharitable purpose under section 7409 or a trust for the care of an animal under section 7408.

(d) The trustee has duties to perform.

(e) The same person is not the sole trustee and sole beneficiary.

(2) A trust beneficiary is definite if the trust beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(3) A power in a trustee to select a trust beneficiary from an indefinite class is valid only in a charitable trust.

700.7408 Trust for care of pet

Sec. 7408. (1) A trust may be created to provide for the care of a designated domestic or pet animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than 1 domestic or pet animal alive during the settlor's lifetime, upon the death of the last surviving such animal.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal(s) for which the trust is created may request the court to appoint a person to enforce the trust or to remove a person appointed.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

700.7409 Noncharitable purpose trust

Sec. 7409. Except as otherwise provided in section 7408 or by another statute, the following rules apply:

(a) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. Except as provided in subsection (b), ~~The~~ the trust may be performed by the trustee according to the trust's terms for up to 25 years, but no longer, whether or not the terms of the trust contemplate a longer duration.

(b) To the extent that a trust created for a noncharitable purpose without a definite or definitely ascertainable beneficiary is a legacy organization holding trust, the durational limit specified in subsection (a) does not apply, and the trustee(s) of the trust may own the relevant voting interest and exercise the attendant voting rights and other privileges of ownership in accordance with the terms of the trust for as long as the legacy organization has a qualifying purpose.

(c~~b~~) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(~~e~~d) Except as provided in this subsection, property of a trust authorized by this section may be applied only to its intended use~~,~~.

(i) Subject to subdivision (ii), the court may determine that the value of the property of a trust authorized by this section exceeds the amount required for the intended use.

(ii) For purposes of this subsection, the intended use of a voting interest in a legacy organization is only the voting of the interest and exercise of any other attendant ownership privileges for the pursuit of the legacy organization's qualifying purpose or purposes. The court may not determine that the value of a legacy organization holding trust's voting interests in 1 or more legacy organizations exceeds the amount required for the intended use of those voting interests. Furthermore, the court may determine that the value of such a

trust's property other than the trust's voting interests in 1 or more legacy organizations exceeds the amount required for the intended use of the voting interests only if a petition seeking such a determination is filed by either the trustee of the legacy organization holding trust or a person appointed pursuant to subsection (c) to enforce the trust and only if the court finds that the petitioner has proved by clear and convincing evidence that property of the trust other than the trust's voting interests in 1 or more legacy organizations is not required for either the intended use of the trust's voting interests or any other purpose that the trustee is authorized by this section, as of the time of the petition, to pursue prospectively.

(iii) Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

(e) As used in this section:

(i) A "legacy organization" is a family trust company or foreign family trust company described in sections [16]103(q) and 103(z) of the trust company act, MCL [487.16]103(q) and (z), or a nonprofit corporation as defined in section 108 of the nonprofit corporations act, 1982 PA 162, MCL 450.2108.

(ii) A trust without a definite or definitely ascertainable beneficiary is a "legacy organization holding trust" to the extent that the trustee(s) own(s) a voting interest in a legacy organization.

(iii) A legacy organization has a "qualifying purpose" while it is either of the following:

(A) Acting primarily as a fiduciary pursuant to the trust company act 20__ PA __, MCL [487.16]101 to [487.__]___.

(B) Acting primarily to promote 1 or more charitable or social-welfare purposes described in sections 501(c)(3) to (c)(4) of the internal revenue code, 26 USC 501(c)(3)–(4).

700.7703a Rules of construction; nonfiduciary powers under a trust; power of direction to trust director; duties and limitations of trust director and trustee; liability; applicability of rules to trusteeship; definitions

Sec. 7703a. (1) Excepting the rules of construction in subsection (2), this section does not apply to:

(a) A power of appointment that is intended to be held by the donee in a nonfiduciary capacity.

* * * * *

(6) If a trust director is licensed, certified, or otherwise authorized or permitted by law other than this section to provide health care in the ordinary course of the director's business or practice of a profession, to the extent the director acts in that capacity, the director has no duty or liability under this section. The immunity described in this subsection does not apply to an organization described in subsection (24)(f) that employs, contracts for services with, or is owned or managed by a person or persons who are licensed, certified, authorized, or permitted to provide health care to the extent the licensed, certified, authorized, or permitted person(s) act(s) in the capacity of health-care provider(s) pursuant to a power of direction granted to the organization or to another organization described in subsection (24)(f).

* * * * *

(24) As used in section:

(a) "Breach of trust" includes a violation by a trust director or trustee of a duty imposed on that director or trustee by the terms of the trust or by this article.

(b) "Directed trustee" means a trustee that is subject to a power of direction.

(c) "Donee" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(d) "Power of appointment" means that term as defined in section 2 of the powers of appointment act of 1967, 1967 PA 224, MCL 556.112.

(e) "Power of direction" means a power over a trust granted by the terms of the trust to the extent the power is exercisable while the person to whom it is granted is not serving as a trustee. Power of direction includes a power over the investment, management, or distribution of trust property or other matters of trust administration. Power of direction does not include the powers described in subsection (1).

(f) "Trust director" means an organization permitted to exercise trust powers in this state as described in section 1105(2) of the banking code of 1999, 1999 PA 276, MCL 487.11105, a domestic trust company as defined in section [16]103 of the trust company act 20__ PA __, MCL [487.16]103, or an individual, if that person is granted a power of direction whether or not either of the following applies:

(i) The terms of the trust refer to the person as a trust director.

(ii) The person is a beneficiary or settlor of the trust.

700.7801 Administration of trust; duties of trustee

Sec. 7801. Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, and except as provided in section [16]409(4) of the trust company act 20__ PA __, MCL [487.16]409(4), for the benefit of the trust beneficiaries, and in accordance with this article.

700.7802 Duty of loyalty

Sec. 7802. (1) Except as provided in section [16]409(4) of the trust company act 20__ PA __, MCL [487.16]409(4), ~~A~~ a trustee shall administer the trust solely in the interests of the trust beneficiaries.

* * * * *

(6) Except as provided in section [16]409(4) of the trust company act 20__ PA __, MCL [487.16]409(4):

(a) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the trust beneficiaries.

(b) If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers to manage the corporation or enterprise in the best interests of the trust beneficiaries.

* * * * *

EXHIBIT 2C

Nonbanking Entity Trust Powers Ad Hoc Committee

Proposed Amendments to Qualified Dispositions in Trust Act

A bill to amend 2016 PA 330, entitled “qualified dispositions in trust act,” by amending section 1042.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

700.1042 Definitions

Sec. 2. As used in this act:

(a) "Advisor" means a person who is given authority by the terms of a trust instrument to remove, appoint, or both, 1 or more trustees or to direct, consent to, approve, or veto a trustee's actual or proposed investment or distribution decisions. A person is considered an advisor even if the person is denominated by another title, such as trust protector. Any person may serve as an advisor.

* * * * *

(r) "Qualified trustee" means a person, other than the transferor, who meets all of the following conditions:

(i) For an individual, the individual is a resident of this state or, in all other cases, is an organization permitted to exercise trust powers in this state as described in section 1105(2) of the banking code of 1999, 1999 PA 276, MCL 487.11105, or a domestic trust company as defined in section [16]103 of the trust company act 20__ PA ___, MCL [487.16]103~~authorized by the law of this state to act as a trustee and whose activities are subject to supervision by the department of insurance and financial services, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision~~.

(ii) The person maintains or arranges for custody in this state of some or all of the property that is the subject of the qualified disposition and administers all or part of the trust in this state.

(iii) The person's usual place of business where some of the records pertaining to the trust are kept is located in this state or, if the person does not have such a place of business, the person's residence is in this state. For a corporate trustee, the usual place of business is the business location of the primary trust officer.

* * * * *

Council Materials

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, June 9, 2023

Agenda

I. Call to Order and Welcome (Mark Kellogg)

II. Zoom Roll Call Confirmation of Attendees (Mark Kellogg)

III. Excused Absences (Mark Kellogg)

IV. Lobbyist's Report (Public Affairs Associates)

V. Monthly Reports:

- A. Minutes of Prior Council Meeting – March (Nathan Piwowarski) – **Attachment 1**
- B. Chair's Report (Mark Kellogg)
- C. Treasurer's Report (Rick Mills)
  1. Financial report – **Attachment 2**
  2. Approval or ratification of amicus counsel payment for services rendered in the prior fiscal year – **Attachment 3**
- D. Committee on Special Projects (Melisa Mysliwiec)
- E. Tax Committee Tax Nugget (JV Anderton)
- F. Membership Committee (Angela Hentkowski)

VI. Oral Reports

- A. Amicus Committee (Andrew Mayoras) – **Attachment 4**
- B. Uniform Power of Attorney Ad Hoc Committee – Clean-up vote re: public policy position re UPOAA (something to the effect that the Section has no objection to HBs 4597–4599 to the extent that they are identical to HBs 4644–4646)
- C. Nominating Committee – **Attachment 5**

VII. Written Reports

VIII. Other Business

IX. Adjournment

Reminder: The Council does not meet in July and August. The next Probate & Estate Planning Council meeting will be **Friday, September 8, 2023**. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM. To register for participation in the September 8, 2023 meeting via Zoom, visit https://us02web.zoom.us/meeting/register/tZwvdOutpjsrHtVU3CQ2uVmw29TkIi4zthQh.

ATTACHMENT 1

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, April 14, 2023
Minutes

I. Call to Order and Welcome (Mark Kellogg)

a. Mr. Kellogg called the meeting to order 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.

II. Zoom Roll Call Confirmation of Attendees (Mark Kellogg)

a. In person: Katie Lynwood, Nathan R. Piwowarski, Richard C. Mills, James F. Anderson, V, Susan L. Chalgian, Hon. Shauna Dunnings, Daniel S. Hilker, Melisa M.W. Mysliwiec, Michael D. Shelton, David Sprague, Elizabeth Siefker, and Michael Lichterman.

b. Remote: Andrew Mayoras, Angela Hentkowski, Rebeca Bechler, Christine Caswell, Christine Savage, Christopher Caldwell, Daniel Borst, David Lentz, Georgette David, James Spica, James Steward, Jim Ryan, John McFarland, Kathleen Cieslik, Kenneth Silver, Lindsay DiCesare, Marguerite Lentz, Mark E. Kellogg, Neal Nusholtz, Rachel Estelle, Rebecca Wrock, Sandra Glazier, Sean Blume, Stephen Dunn, and Andrea Neighbors (administrative assistant).

III. Excused Absences (Mark Kellogg)

a. Warren Krueger

IV. Lobbyist's Report (Public Affairs Associates)

a. Becky Bechler offered the following report:

i. EPIC Omnibus has been introduced as HBs 4416, 4417, 4418, and 4419.

ii. Uniform Power of Attorney Act blueback is ready for introduction next week.

iii. Have communicated with Sen. Chang's staff regarding the Section's Rule Against Perpetuities and Power of Appointment proposals.

iv. Reps. Lightner and Posthumus have both requested bills regarding remote signatures and witnessing.

v. Closely monitoring SBs 253, 254, 255, 256, and 258.

vi. We have a well-developed proposal for vehicle transfer-on-death designations. Becky and Jim are working to find multiple sponsors, as this package requires 8 bills (and most legislators are limited to 5 bill requests per month).

b. Ms. Glazier moved that the Section adopt a public policy position opposing SBs 253, 255, and 256 (Section has concerns regarding potentially unintended consequences of these proposals). Second by Mr. Hilker. Adopted (20 yes, 1 abstain, 2 absent).

c. Ms. Glazier moved that the Section adopt a public policy position opposing SBs 254 and 258 as drafted (with the same explanation proffered as to last session's EATF bills). Second by Mr. Hilker. Adopted (21 yes, 1 absent)

V. Monthly Reports:

A. Minutes of Prior Council Meeting – March (Nathan Piwowarski) – **Attachment 1**. Item IV(a) corrected to identify Graham Filler and Item VI(e) corrected to change "Tiplady" to "Labe." Motion by Mr. Piwowarski, second by Mr. Sprague. Adopted by voice vote.

B. Chair's Report (Mark Kellogg). Mr. Kellogg updated the Council regarding the Section's ongoing legislative initiatives and the upcoming ICLE Probate and Estate Planning Institute.

i. Mr. Spica called the Chair-Elect's report to Council the Council's attention. Mr. Spica The Chair's dinner will be held on October 13 at the Interlochen Center for the Arts.

ii. Michigan ACTEC fellows dining Thursday October 12, with October 13 AM meeting. Mr. Spica polled the ACTEC members as to whether they might attend the Chair's Dinner if invited. A significant number would be pleased to attend if invited. The Section might pay for 24 additional dinners.

iii. Mr. Spica recommended that the Council invite the Fellows to attend the Chair's dinner at the Section's expense. Mr. Kellogg moved, Ms. Lynwood seconded. Approved by voice vote.

C. Treasurer's Report (Rick Mills) – Budget approval – **Attachment 2**

i. Mr. Mills, on behalf of the Budget Committee, moved that we adopt the proposed annual budget. Approved by voice vote.

D. Committee on Special Projects (Melisa Mysliwiec)

i. Ms. Mysliwiec, as CSP chair, moved that Council adopt a public policy position as follows: The Probate and Estate Planning Section opposes HB 4295, HB 4297, HB 4301, and SB 213 to the extent these bills would eliminate the right of an emancipated minor to marry because marriage may confer significant benefits under Michigan law. The Section is supportive of the elements of these bills that would remove a minor's marriage as a basis for emancipation in Michigan. And the Section is neutral as to all other aspects of these bills. Motion passed (19 yes, 2 abstain, 2 absent).

ii. Ms. Mysliwiec reported that the CSP reviewed and discussed both the Ad Committee Premarital and Marital Agreement's suggested modifications to the Uniform Premarital and Marital Agreement Act and the Family Law Section's suggested modifications to the Uniform Premarital and Marital Agreement Act. At this point, there is a consensus that the Committee has the authority it needs to proceed with discussions with the Family Law Section and lobbyists about the Uniform Premarital and Marital Agreement Act, and our Section's goals with respect to the same.

E. Tax Committee Tax Nugget (JV Anderton). Mr. Anderton shared the tax nugget concerning gift tax, which was prepared by Mark Deluca.

F. Membership Committee (Angela Hentkowski). Ms. Hentkowski, as committee chair, recommended approval of the four applications for Institute scholarships. Adopted by voice vote.

VI. Oral Reports. Ms. Mysliwiec noted that the upcoming theme issue of the Bar Journal is forthcoming.

VII. Written Reports (none)

VIII. Other Business (none)

IX. Adjournment

a. Adjourned at 11:13.

Respectfully Submitted,

Nathan Piwowarski, Secretary

The next Council meeting will be held on Friday, September 8, 2023.

ATTACHMENT 2

Probate and Estate Planning Section: 2022-2023
Treasurer's Monthly Activity Report

Carry-Over Fund Balance from 2019-2020		Carry Over Balance
	1-5-00-775-0001 Fund Bal-Probate/Estate Plan	$ 232,021.60

Revenue			March 2023	YTD Revenue (2022-2023)	Budget (2022-2023)
	1-7-99-775-1050 Probate/Estate Planning Dues		$ 210.00	$ 115,430.00	$ -
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		$ -	$ 455.00	$ -
	1-7-99-775-1330 Subscription to Newsletter		$ -	$ -	$ -
	1-7-99-775-1470 Publishing Agreement Account		$ -	$ -	$ -
	1-7-99-775-1755 Pamphlet Sales Revenue		$ -	$ -	$ -
	1-7-99-775-1935 Miscellaneous Revenue		$ -	$ 325.00	$ -
	Total Revenue		**$ 210.00**	**$ 116,210.00**	**$ -**

Expenses			March 2022	Cumulative Expenses	Budget (2022- 2023)
	1-9-99-775-1111 Administrative Expenses		$ -	$ -	$ -
	1-9-99-775-1127 Multi-Section Lobbying Group		$ 3,000.00	$ 18,000.00	$ -
	1-9-99-775-1276 Meetings		$ 795.00	$ 12,933.28	$ -
	1-9-99-775-1283 Seminars		$ -	$ -	$ -
	1-9-99-775-1297 Annual Meeting Expenses		$ -	$ -	$ -
	1-9-99-775-1493 Travel		$ -	$ 2,858.89	$ -
	1-9-99-775-1822 Litigation-Amicus Curiae Brief		$ -	$ -	$ -
	1-9-99-775-1833 Newsletter		$ -	$ 4,400.00	$ -
	1-9-99-775-1868 Postage		$ -	$ -	$ -
	1-9-99-775-1987 Miscellaneous		$ 1,346.80	$ 3,846.80	$ -
Total Expenses			**$ 5,141.80**	**$ 42,038.97**	**$ -**

Net Income		**$ (4,931.80)**	**$ 74,171.03**	**$ -**
General Fund plus Net Income (Running Total)		$ 306,192.63	**$ 306,192.63**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	March 2023		
Beginning Deposit Fund Balance	**$ -**	$ 1,850.14		
Revenue		$ 105.00		
Withdrawls		$ 110.70		
Total Fund		$ 1,844.44		

Probate and Estate Planning Section: 2022-2023
Treasurer's Monthly Activity Report

Carry-Over Fund Balance from 2019-2020		Carry Over Balance
	1-5-00-775-0001 Fund Bal-Probate/Estate Plan	$ 232,021.60

Revenue			April 2023	YTD Revenue (2022-2023)	Budget (2022-2023)
	1-7-99-775-1050 Probate/Estate Planning Dues		$ 70.00	$ 115,500.00	$ -
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		$ -	$ 455.00	$ -
	1-7-99-775-1330 Subscription to Newsletter		$ -	$ -	$ -
	1-7-99-775-1470 Publishing Agreement Account		$ -	$ -	$ -
	1-7-99-775-1755 Pamphlet Sales Revenue		$ -	$ -	$ -
	1-7-99-775-1935 Miscellaneous Revenue		$ -	$ 325.00	$ -
	Total Revenue		**$ 70.00**	**$ 116,280.00**	**$ -**

Expenses			April 2022	Cumulative Expenses	Budget (2022- 2023)
	1-9-99-775-1111 Administrative Expenses		$ -	$ -	$ -
	1-9-99-775-1127 Multi-Section Lobbying Group		$ 3,000.00	$ 21,000.00	$ -
	1-9-99-775-1276 Meetings		$ 1,621.00	$ 14,554.28	$ -
	1-9-99-775-1283 Seminars		$ -	$ -	$ -
	1-9-99-775-1297 Annual Meeting Expenses		$ -	$ -	$ -
	1-9-99-775-1493 Travel		$ 686.17	$ 3,545.06	$ -
	1-9-99-775-1822 Litigation-Amicus Curiae Brief		$ -	$ -	$ -
	1-9-99-775-1833 Newsletter		$ -	$ 4,400.00	$ -
	1-9-99-775-1868 Postage		$ -	$ -	$ -
	1-9-99-775-1987 Miscellaneous		$ -	$ 3,846.80	$ -
Total Expenses			**$ 5,307.17**	**$ 47,346.14**	**$ -**

Net Income		**$ (5,237.17)**	**$ 68,933.86**	**$ -**
General Fund plus Net Income (Running Total)		$ 300,955.46	**$ 300,955.46**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	April 2023		
Beginning Deposit Fund Balance	**$ -**	$ 1,844.44		
Revenue		$ -		
Withdrawls		$ -		
Total Fund		$ 1,844.44		

ATTACHMENT 3

Nathan Piwowarski

From: Nathan Piwowarski
Sent: Wednesday, May 31, 2023 4:40 PM
To: Andy Mayoras; Rick Mills; James Spica; Katie Lynwood; Mark Kellogg
Subject: Re: EXT: Re: EXT: Amicus expense in Schaaf v Forbes

Andy - Thank you. I didn't recall that this covered two phases of briefing. From my perspective, the most important thing is "good process," which entails laying out the details to Council and giving it an opportunity to authorize the bill (or not!). | N

From: Andy Mayoras <awmayoras@brmmlaw.com>
Sent: Wednesday, May 31, 2023 4:24 PM
To: Nathan Piwowarski <nathan@mwplegal.com>; Rick Mills <rmills@marcouxallen.com>; James Spica <spica@mielderlaw.com>; Katie Lynwood <klynwood@bllhlaw.com>; Mark Kellogg <mkellogg@fraserlawfirm.com>
Subject: RE: EXT: Re: EXT: Amicus expense in Schaaf v Forbes

I don’t recall one way or the other. I don’t regularly discuss that, but I sometimes discuss on a case by case basis.

Looking back over this, Trevor and his firm (note he switched firms between the two appeals) did both the original brief in 2019 and the new one in 2022. I’m assuming this bill was just for the 2022 work, right?

I did go back through my memo’s and emails for both amicus discussions and don’t see anything indicating a discussion of fees or a cap. Trevor did send Chris Ballard a retainer agreement to sign in 2019 and I don’t see any response email or indication if it was signed or not, but the draft retainer agreement didn’t mention the cap.

It is possible that Trevor may not have known, and its also possible that the work on the 2022 brief was more extensive than usual. He is on the amicus committee, and my assumption is that everyone on the committee that’s served for a while (like Trevor) knows that there is a cap.

Again, I think he should be offered the opportunity to present a motion and ask for approval of the higher amount if he chooses. He may not – he might simply accept the cap. But for most cases, I think that $15,000 is sufficient.

Andy

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Rated by Super Lawyers – State of Michigan (2014 - 2015, 2019 – 2022) (Estate & Trust Litigation)
Top Attorneys in Michigan by Hour Detroit Michigan (2014 - 2015, 2019 – 2022)
Institute of Continuing Legal Education Mediation and Advanced Mediation Training
State Bar of Michigan: Probate & Estate Planning Section Elected Committee Member
Co-Author of the best-selling book, *Trial & Heirs: Famous Fortune Fights!*

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Click here for my full bio.

From: Nathan Piwowarski <nathan@mwplegal.com>
Sent: Wednesday, May 31, 2023 4:02 PM
To: Andy Mayoras <awmayoras@brmmlaw.com>; Rick Mills <rmills@marcouxallen.com>; James Spica <spica@mielderlaw.com>; Katie Lynwood <klynwood@bllhlaw.com>; Mark Kellogg <mkellogg@fraserlawfirm.com>
Subject: EXT: Re: EXT: Amicus expense in Schaaf v Forbes

Andy - Do you remember discussing a fee limit with amicus counsel? Do the amicus committee, as a matter of course, give something to amicus counsel confirming the budget?

From: Andy Mayoras <awmayoras@brmmlaw.com>
Sent: Wednesday, May 31, 2023 3:57 PM
To: Nathan Piwowarski <nathan@mwplegal.com>; Rick Mills <rmills@marcouxallen.com>; James Spica <spica@mielderlaw.com>; Katie Lynwood <klynwood@bllhlaw.com>; Mark Kellogg <mkellogg@fraserlawfirm.com>
Subject: RE: EXT: Amicus expense in Schaaf v Forbes

Thanks Nathan.

This is the first I'm hearing of this. My personal perspective is that $15,000 is sufficient to cover the costs of an amicus brief except in unusual cases. If the author in a particular instance wants to present a motion seeking payment of a greater amount, then he or she is welcome to do so and the council can discuss and vote.

Andy

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Recognized by New York Times – Top Attorneys in Michigan (2014 - 2015, 2019 – 2022)
Rated by Super Lawyers – State of Michigan (2014 - 2015, 2019 – 2022) (Estate & Trust Litigation)
Top Attorneys in Michigan by Hour Detroit Michigan (2014 - 2015, 2019 – 2022)
Institute of Continuing Legal Education Mediation and Advanced Mediation Training
State Bar of Michigan: Probate & Estate Planning Section Elected Committee Member
Co-Author of the best-selling book, *Trial & Heirs: Famous Fortune Fights!*

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Click here for my full bio.

From: Nathan Piwowarski <nathan@mwplegal.com>
Sent: Wednesday, May 31, 2023 3:09 PM
To: Rick Mills <rmills@marcouxallen.com>; James Spica <spica@mielderlaw.com>; Katie Lynwood <klynwood@bllhlaw.com>; Mark Kellogg <mkellogg@fraserlawfirm.com>; Andy Mayoras <awmayoras@brmmlaw.com>
Subject: EXT: Amicus expense in Schaaf v Forbes

I am including Andy Mayoras on this message because he may have some additional institutional history.

On May 23, I was presented with a bill from Trevor Weston's firm. Mr. Weston was amicus counsel on the *Schaaf* matter. In his correspondence, he acknowledges that this was the first time he had presented the bill.

There are two issues associated with the bill, one easy and the other potentially difficult.

First, the easy part. The State Bar of Michigan operates on an accrual basis. At the end of the 2022 FYE, Becky asked if there were any accrued expenses that needed to be addressed before the State Bar addressed our books. I *erroneously* told her we did not. In fact, the unbilled expense from Mr. Weston's firm should have been booked in the 2022 fiscal year. Fortunately, this can be fixed by having the current Treasurer or Chairperson instruct Becky and Alpa at the State Bar that we want to pay the bill now, and that it should have been booked to the prior fiscal year. They have to inform the SBM's auditor, but that is the likely sum of our and the SBM's inconvenience.

Second, the potentially difficult part. Mr. Weston's firm has invoiced us in the amount of $26,872.50. Here is what I found in the June 2022 minutes (which are in turn found on page 35 of the September 2022 council packet):

> Amicus Committee (Andy Mayoras) – Discussion of Michigan Supreme Court Amicus invitation for: Cindy Schaaf, Colleen M. Fryer, and Gwen Mason v. Charlene Forbes. No attendees were required to leave the room due to a conflict of interest. Andy Mayoras motioned, and Jim Spica seconded, that the section should file an amicus brief and, in its brief, should take the position that the circuit court was vested with Subject Matter Jurisdiction of the complaint, which sought a determination of interests in the subject property and partition, under MCL 700.1302 and 1303. The Secretary recorded a vote of 15 in favor, 1 opposed, 7 not voting, and 0 abstaining and the Chair declared the motion carried. Andy Mayoras motioned, and David Sprague seconded that in its amicus brief, the section should take the position that Michigan law does not allow a trust to hold real property Joint Tenants with Right of Survivorship (JTWROS) because a trust is not a natural person or entity and cannot hold property at all. A trustee can hold real property JTWROS if there is a specified measuring life in the deed and that life is measured by the lifetime of a natural person, not an entity or trust. The Section cannot answer this question with analyzing the deeds themselves, but if the deeds were clear that the real property was held JTWROS by a trustee with a measuring life specified that is a natural person, then they could be valid. The Secretary recorded a vote of 15 in favor, 0 opposed, 7 not voting, and 1 abstaining, and the Chair declared the motion carried. On behalf of the Amicus Committee, Andy Mayoras motioned to appoint Trevor Weston as the author of the brief as consistent with the public policy position taken during the meeting. A voice vote was taken, and all were in favor, with no objections, and the Chair declared that the motion carried.

In December of 2021, we adopted a revised amicus policy that states we typically do not pay more than $15,000 unless Council approves. The June 2022 minutes do not reflect that, and I do not recall the particulars of our discussions when approving the Schaaf amicus motion. I have copied Andy in part because he may recall differently.

I suggest that I share this information with Council, and then we probably would need to vote to ratify any payment in excess of $15,000.00 (if that is indeed what the Council chooses to do).

In the meantime, Becky and Alpa have held off on making the payment to Mr. Weston's firm on our behalf.

Thank you,

Nathan Piwowarski
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general line: (231) 775-1391

web: http://www.mwplegal.com/attorneys/nathan-piwowarski

ATTACHMENT 4

MEMORANDUM

TO: **Probate Council**

FROM: **Angela Hentkowski**

SUBJECT: **Amicus Brief Invitation from Supreme Court**
In Re Guardianship of Anna-Marie Margaret Bazakis

Date: **May 31, 2023**

Overview

The Supreme Court issued an Order dated April 21, 2023, inviting our Section to submit an Amicus Brief. The Family Law Section, Elder Law & Disability Rights, and Social Security Lawyers Section were also invited to submit briefs. The Supreme Court Order reads in part as follows:

> The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether the probate court's order requires appellant to place AM's social security benefits into a joint account held by both the appellant and the appellee; and (2) if so, whether such order is prohibited by principles of federal preemption. See Foster v Foster, 505 Mich 151 (2020).

The case involves whether a Representative Payee was ordered to place SSI benefits into a joint account, and if so, whether such order is prohibited by Federal law.

Facts & Lower Court Rulings

Mother and Father are co-guardians to their developmentally disabled, adult daughter. As noted by the Court of Appeals:

> In the judgment of divorce, the parties were awarded joint physical and legal custody of AM, who is developmentally disabled. AM lives equally with both parents, living at each parent's home on a two-week basis. The parties also agreed to be and are AM's coguardians.

Years after the divorce, the mother applied for Social Security Disability benefits for the daughter

and was designated by the Social Security Administration as the daughter's representative payee. The parents were involved in a lengthy dispute about whether the mother was providing sufficient information to the father regarding the SSI benefits.

The Probate Court ruled that (1) mother would remain as representative payee; (2) if there is portal access to the SSI account mother is to provide access to father; (3) mother is to create a new bank account and provide father with the password; (4) all of daughter's bank accounts are to be joint with the co-guardians; and (5) if mother receives as representative payee a monthly check from the Social Security Administration, she is to provide a photocopy to father, and 50% of each check would go to the father through an account chosen by his counsel.

In its published opinion, the Court of Appeals stated that the main issue on appeal was whether the probate court's order requiring the representative payee mother to pay half of the disabled, adult daughter's monthly SSI benefits to the father co-guardian is preempted by the Social Security Act (SSA), and spends most of its opinion discussing federal preemption, when and how it applies.

The Court of Appeals also stated that the probate court entered its order in an attempt to equally distribute the SSI benefits between the parties, as they are both co-guardians of their disabled adult daughter and both have physical custody of her on an equal basis. The Court of Appeals then held that the probate court had subject matter jurisdiction to enter the order, as a guardianship proceeding comes within the probate court's limited jurisdiction.

However, the Court of Appeals also held that state courts cannot order a representative payee to direct benefits in a certain manner, and therefore the Probate Court order requiring the mother to direct 50% of the monthly SSI benefits to father conflicted with at least 42 USC 1383(a)(2)(A)(ii)(I), and potentially 42 USC 407(a). In other words, this part of the Probate Court order was preempted by Federal law.

The mother also argued that the Probate Court ordered her to place daughter's SSI benefits into a joint account with both co-guardians on the account, along with the daughter. However, the Court of Appeals viewed the Probate Court order as requiring mother "to set up a new account with only

[daughter] being named on the account, but both [mother] and [father] **have passwords to access account information**." The Court of Appeals held that even if mother's interpretation of the Probate Court Order was correct, "there is no authority holding that an individual receiving benefits cannot hold a joint account," and the Probate Court did not err when it ordered that all of the accounts in the daughter's name be held jointly between her co-guardians.

Analysis

The Supreme Court requested briefs addressing: (1) whether the probate court's order requires appellant to place the daughter's social security benefits into a joint account held by both the appellant and the appellee; and (2) if so, whether such order is prohibited by principles of federal preemption.

Attached is the Probate Court Order. The committee believes the Probate Court Order is vague, and can be interpreted in multiple ways.

If the Probate Court intended to Order that the representative payee account be joint with the father, which the Court of Appeals affirmed, then the Committee believes that such Order is prohibited by 42 USC 407(a). The Representative Payee account is not the daughter's account. It is the mother's bank account in her capacity as Representative Payee for her daughter. The daughter has no authority to access or use the funds in the account. Accordingly, it is not the daughter's account, and on that basis, alone, the Probate Court order cannot not reach the representative payee account.

If the Probate Court did not intend to Order the Representative Payee account to actually be joint, the Committee believes the father **still cannot have access to funds in the Representative Payee account**. To allow access violates the anti-attachment provisions of 42 USC 407(a). The requirements of 42 USC 407 are broad and all encompassing, and can only be circumscribed by Congress. The only basis on which Social Security funds can be attached is to pay federal tax liability, child support, and student loans. In addition, allowing someone other than the representative payee access to a representative payee account not only is in direct defiance of 42 USC 407(a), it places the representative payee at risk. The representative payee, by law is

personally liable for the funds in the account. A representative payee cannot be placed in a position where someone else could have access to and use the funds in a way that is not permitted. But if the Probate Court order was intended to allow the father, co-guardian, **access account information only,** then the question of whether that is allowed under federal law is less clear.

As such, the Committee unanimously recommends that the Probate Council authorize an amicus brief in response to the Supreme Court invitation, and to take the position that Probate Court Order is vague, but if it is interpreted to require the representative payee account to be joint with access to funds by the father, co-guardian (who is not a representative payee), then the Probate Court Order violated Federal law, which preempts such a ruling. The Committee recommends that Lipson Neilson P.C., author the brief.

STATE OF MICHIGAN

IN THE PROBATE COURT FOR SAGINAW COUNTY

IN THE MATTER OF ANNA-MARIE BAZAKIS,	FILE NO. 20-140294-DD
An individual with a developmental disability	HON. PATRICK J. McGRAW

CURTIS C. WARNER P59915
ATTORNEY FOR PETITIONER CHRISTY BOMBA
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ATTORNEY FOR PETITIONER ANDREW BAZAKIS
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989-753-4441
bptm@ameritech.net

ORDER

AT A SESSION OF SAID COURT, HELD IN THE COURTHOUSE,
IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN,
ON THE 11 DAY OF AUGUST, 2021

PRESENT: HON. PATRICK J. McGRAW, PROBATE JUDGE

This Court held a hearing on Tuesday, June 8, 2021 with all counsel present.

The Court heard various motions on that day including a Motion to Compel, a Response to the Motion to Compel, a Motion to be Compliant with Court Orders, a Motion to Set Up Communications for Yearly Treatment, a Request for Sanctions, a Request for Response to the Motion to Compel, a Motion and Memorandum to Quash. The Court read all documents ahead of time and asked the parties to make their oral arguments on that day regarding their respective motions.

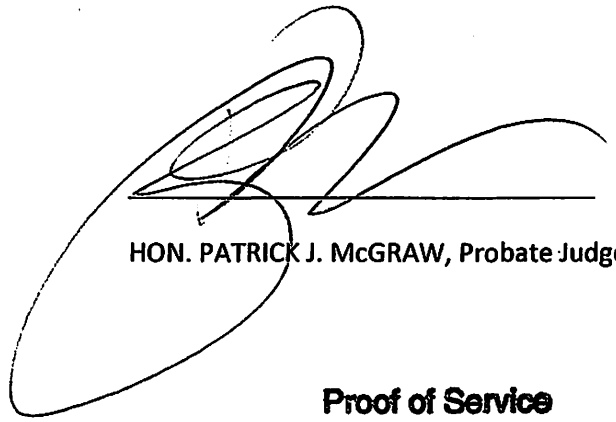
Subsequently the Court directed counsel for Bazakis to prepare an Order reflecting the Court's opinion. Counsel for Bazakis submitted a proposed Order, counsel for Christy Bomba objected and responded and asked that the Motions be set for hearing.

The Court has reviewed the objections and responses over the transcript that was filed. The Court is preparing its own Order in order to make sure that one exists that the Court feels is proper. The Court's reasoning for doing so is for judicial economy and efficiency, the lack of cordiality amongst counsel, the expenses being incurred by the parties due to the ridiculous amount of argument and papers and law filed regarding contents of an order.

IT IS ORDERED AS FOLLOWS:

1. Mother Christy Bomba remain as payee.
2. If there is a portal access, Christy Bomba is to provide any type of access she is given to father Andrew Bazakis. ***{In the meantime Mother, Christy Bomba, is to set up a new account at a new bank so that a new password to that new account can be made and given to Father, Andrew Bazakis, so that both parties have access to a new account with a new password that only reflects the account of Anna Marie Bazakis}***
3. If she only receives a check every month from Social Security, then she is to make a photocopy of the check and then provide that photocopy to Mr. Picard and father Andrew Bazakis. Fifty percent of that Social Security check should go to Mr. Picard's ILOTA account or a Zelle whichever Mr. Picard chooses. ***{Mother shall make a copy of the means of deposit and provide that to Andrew Bazakis, in the event direct deposits are made.}***
4. The Medicaid card is to be given to the father, Andrew Bazakis, with proof filed with counsel, the GAL and the Court.
5. All of Anna Bazakis' bank accounts are to be joint with the Co-Guardians.
6. Our Family Wizard is to be used for all communications and also allow the GAL access to Our Family Wizard. The parties will split the cost of setting up Our Family Wizard and any cost associated with using that form of communication.
7. My Chart portal is to be set up with an e-mail address that all parties are to be able to use and access. The parties are to work with the GAL to set that My Chart portal up and not change that e-mail address without a Court Order.
8. Father, Andrew Bazakis, will be responsible for scheduling all medical & dental appointments and follow-ups. Father, Andrew Bazakis, is to inform mother, Christy Bomba of all appointments within 12 hours of being set up or scheduled. Failure to do so by father, Andrew Bazakis, will result in sanctions of $500 for each violation. ***{Any appointments already set up will remain as scheduled. Mother, Christy Bomba is to provide an email to Mr. Picard immediately of all appointments already set up}***
9. Dr. Solomon will choose the adult psychiatrist.
10. A Bridge card is to be exchanged monthly and only used in the current month, not to be used for anything that is re-loaded during the month should that party happen to have it when it is re-loaded.
11. The Motion to Quash is GRANTED.

12. The Court's prior Order as to Easter will remain.
13. The Court's prior Order on birthdays will also remain.



HON. PATRICK J. McGRAW, Probate Judge

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all interested parties and/or attorney(s) to the above cause at their respective addresses disclosed on the pleadings on 8-4-21

By:

X U.S. Mail ___ Fax
___ Hand delivered ___ E-mail
___ Other

Signature Cheryl Allen

STATE OF MICHIGAN

COURT OF APPEALS

In re Guardianship of ANNA-MARIE MARGARET BAZAKIS

CHRISTY BOMBA, Coguardian of ANNA-MARIE MARGARET BAZAKIS, a legally protected person,

Appellant,

v

ANDREW BAZAKIS, Coguardian of ANNA-MARIE MARGARET BAZAKIS, and ANNA-MARIE MARGARET BAZAKIS,

Appellees.

FOR PUBLICATION
June 23, 2022
9:20 a.m.

No. 358276
Saginaw Probate Court
LC No. 20-140294-DD

Before: RONAYNE KRAUSE, P.J., and MURRAY and O'BRIEN, JJ.

MURRAY, J.

Appellant Christy Bomba appeals by right the August 4, 2021, order granting appellee Andrew Bazakis's motion to compel Bomba to comply with the court's January 5, 2021, order regarding Supplemental Security Income (SSI) benefits for their daughter, Anna-Marie Margaret Bazakis (AM). The court additionally confirmed the same order regarding parenting time and ordered Bomba to provide Bazakis with access to bank accounts related to AM. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND

The disputes between the parties surround the parenting time available to Bomba and the legality of a court order regarding AM's SSI payments. In the judgment of divorce, the parties were awarded joint physical and legal custody of AM, who is developmentally disabled. AM lives equally with both parents, living at each parent's home on a two-week basis. The parties also agreed to be and are AM's coguardians.

Years after the divorce, Bomba applied for Social Security Disability benefits for AM and was designated by the Social Security Administration as AM's representative payee.[1] By early 2021, it was determined that AM was entitled to a $794 monthly SSI payment, and she also received a $2,381 SSI disbursement for back payments.

Soon after, disputes arose between the parties on several fronts. With respect to the SSI benefits, Bazakis was of the opinion that Bomba was failing to provide him information on the SSI application submitted on AM's behalf, information relative to the benefits awarded, and information (such as account numbers and passwords) for the account where the benefits were deposited. Regarding parenting time, the parties were unable to agree on a holiday schedule, so Bazakis moved the court to enter one for them.

The court ultimately entered an order on January 5, 2021, ordering that parenting time should continue alternating on a two-week basis and that AM spends Mother's Day with Bomba and Father's Day with Bazakis. It further split December 22 to December 24, December 24 to December 26, Thanksgiving Day, and Easter based on even and odd years. The parties were also ordered to maintain the normal two-week rotation, and there would be no special holiday schedule for other, specifically named holidays. With respect to the SSI payments, the court ordered that the Social Security Administration be informed of the parties' guardianship status and that any SSI payments received be split by the parties.

That order, however, did not resolve the parties' differences. Thus, a few months later, Bazakis moved to compel compliance with the court's January 5, 2021, order, asserting (amongst other things not relevant on appeal) that the Social Security Office refused to discuss AM's benefits or disbursements with him because he was not listed as a copayee or coguardian. Bazakis also argued that he could not access AM's online information because Bomba refused to provide "website portal access."

Ultimately, the court ordered that (1) Bomba would remain as AM's representative payee; (2) if there is portal access to the SSI account Bomba should provide access to Bazakis; (3) Bomba was to create a new bank account exclusively for AM and provide Bazakis with the password; (4) all other of AM's bank accounts should be joint with the coguardians; (5) if Bomba receives as representative payee a monthly check from the Social Security Administration, she was to provide a photocopy to Bazakis, and 50% of each check would go to Bazakis through an account chosen by his counsel, and (6) its previous order regarding both Easter and AM's birthday would remain in effect.

II. ANALYSIS

[1] We do not consider Bazakis's Exhibit F on appeal, titled "A Guide for Representative Payees," as it was not part of the lower court record. MCR 7.210(A)(1); *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009).

A. JURISDICTION OVER THE APPEAL

As a preliminary issue, Bazakis argues that this Court lacks jurisdiction over this appeal because the probate court's August 4, 2021, order was not a final order since it merely reiterated rulings from the court's August 17, 2020, and January 5, 2021, orders. We reject this argument.

The "final judgment" or "final order" definitions in MCR 7.202 apply for purposes of determining whether a judgment or order of the circuit court or Court of Claims is appealable of right to this Court under MCR 7.203(A)(1). MCR 5.801(A), however, defines the probate court orders that are appealable of right to this Court. In particular, MCR 5.801(A)(3) defines "a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding under the Estates and Protected Individuals Code" as appealable of right. Bosakis offers no legal authority holding that an amended order that affects the interests of an interested person with finality cannot be a final order. Here, the August 4, 2021, order appealed from provides specific instructions on how to handle the SSI payments and provides that the court's prior order on birthdays and holidays will remain in effect. Thus, the order affects with finality Bomba's interests in those matters, making the order appealable of right under MCR 5.801(A).

B. JURISDICTION TO ORDER DISBURSEMENT OF SSI BENEFITS

Turning to the merits, the main issue on appeal is whether the probate court's order requiring Bomba to pay half of AM's monthly SSI benefits to Bazakis is preempted by the Social Security Act (SSA),[2] and therefore void because the probate court lacked subject-matter jurisdiction to enter it. Our review of the legal question of whether a federal law preempts state action is de novo, *Foster v Foster*, 505 Mich 151, 165; 949 NW2d 102 (2020), as it is with the interpretation of statutes, *id*, and with the general question of whether a court has subject-matter jurisdiction. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

The Supremacy Clause of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [US Const, art VI, cl 2.]

"There are three types of federal preemption: express preemption, conflict preemption, and field preemption." *In re Vansach Estate*, 324 Mich App 371, 390; 922 NW2d 136 (2018) (quotation marks and citation omitted). Express preemption occurs when a federal statute contains a clause expressly addressing preemption. *Ter Beek v City of Wyoming*, 495 Mich 1, 11; 846 NW2d 531 (2014). Federal preemption can also be implied, which is the category conflict and field preemption occupy. *Grand Trunk Western R Co v City of Fenton*, 439 Mich 240, 243-244; 482 NW2d 706 (1992). Conflict preemption occurs when "there is a 'positive conflict' between [a federal statute and a state law] such that they 'cannot consistently stand together.' " *Ter Beek*,

[2] The SSA is administered by the Social Security Administration, 42 USC 901(a), and the Administration is led by the Social Security Commissioner. 42 USC 902(a).

495 Mich at 11. Field preemption exists when Congress intends to foreclose any state regulation in the area, regardless of whether the state regulation is consistent with federal standards. *Foster*, 505 Mich at 166. See also *Grand Trunk Western R Co*, 439 Mich at 243-244 (Preemption may be express where Congress has explicitly stated its intent to preempt state law; "field," where state law regulates conduct in a field that Congress has intended to occupy exclusively; or "conflict," where state law is in actual conflict with federal law).[3]

There is a presumption against preemption when Congress has legislated on matters over which states traditionally govern. *Ter Beek*, 495 Mich at 10. See also *Biondo v Biondo*, 291 Mich App 720, 724; 809 NW2d 397 (2011) ("Generally, federal law does not preempt laws governing divorce or domestic relations, a legal arena belonging to the states rather than the United States.") and *English v Gen Electric Co*, 496 US 72, 79; 110 S Ct 2270; 110 L Ed 2d 65 (1990) (stating where "the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest" (internal quotations and citations omitted)). Because "probate matters traditionally have been nearly the exclusive concern of the states, there is a presumption against preemption of state law." *Witco Corp v Beekhuis*, 38 F3d 682, 687 (CA 3, 1994).

It is also true, both as a common-sense matter and as a principle of federalism, that state courts generally possess concurrent sovereignty with federal courts in deciding cases under federal law. *Burt v Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013). The Supreme Court has "consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v Levitt*, 493 US 455, 458; 110 S Ct 792; 107 L Ed 2d 887 (1990). See also *Stone v Powell*, 428 US 465, 493, n35; 96 S Ct 3037; 49 L Ed 2d 1067 (1976) ("In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the (consideration of Fourth Amendment claims) than his neighbor in the state courthouse.' "); *Huffman v Pursue, Ltd*, 420 US 592, 611; 95 S Ct 1200; 43 L Ed 2d 482 (1975) (rejecting the argument that "state judges will not be faithful to their constitutional responsibilities"); *Worldwide Church of God v McNair*, 805 F2d 888, 891 (CA 9, 1986) ("[S]tate courts are as competent as federal courts to decide federal constitutional issues."). Consequently, a "litigant may still enforce rights pursuant to the Federal law in state courts unless the Constitution or Congress has, expressly

[3] As Justice VIVIANO has noted, "[i]t is difficult to determine when a field has been impliedly preempted by a statute. At bottom, field preemption is really a species of conflict preemption, in that it is triggered when a legal provision trenches upon (i.e., conflicts with) a statute's occupation of a field. That a conflict lies at the heart of field preemption is important to keep in mind because it is very easy for the field-preemption analysis to exalt extratextual purpose above statutory text. The reason is that field preemption essentially implies additional statutory clauses beyond the statute's text, clauses that mandate preemption. In addition, choosing the correct field definition is difficult and critical because defining the field at a certain level of generality becomes the entire game." *Bronner v City of Detroit*, 507 Mich 158, 179; 968 NW2d 310 (2021)(VIVIANO, J., *concurring*) (quotation marks, brackets, and citations omitted).

or impliedly, given a Federal court exclusive jurisdiction over the subject matter." *Marshall v Consumers Power Co*, 65 Mich App 237, 244; 237 NW2d 266 (1976).[4]

Because there is no explicit statement by Congress expressing federal preemption on issues involving a representative payee's handling of social security benefits, we must determine whether implied preemption exists. Bomba does not specify if her argument is based upon field or conflict preemption, and the case she leads with, *Philpott v Essex Co Welfare Bd*, 409 US 413; 93 S Ct 590; 34 L Ed 2d 608 (1973), does not speak to any form of federal preemption. Instead, the *Philpott* Court held that the mandates of 42 USC 407 applied to the state's attempt to obtain social security benefits as reimbursement for housing costs, notwithstanding any state law. *Id*. Thus, it appears the court was applying conflict preemption, even though it did not expressly say so. We conclude that this matter is resolved through a straight-forward application of conflict preemption.

The most relevant provision of the Social Security Act at issue is 42 USC 407(a), which provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. [42 USC 407(a).]

Several years back, this Court examined 42 USC 407(a) and concluded that SSI benefits are protected from legal processes–even once deposited into the recipient's account–until converted into another source, and a state court order conflicting with the statute is preempted:

> The protection afforded to money received as Social Security benefits extends before and after the benefits are received. *Philpott v Essex Co Welfare Bd*, 409 US 413, 415-417; 93 S Ct 590; 34 L Ed 2d 608 (1973). See also *State Treasurer v Abbott*, 468 Mich 143, 155; 660 NW2d 714 (2003); *Whitwood, Inc v South Blvd Prop Mgt Co*, 265 Mich App 651, 654; 701 NW2d 747 (2005). The fact that the payments have been made does not make them lose their character as Social Security benefits or make them subject to legal process. To the contrary, the protections of 42 USC 407(a) apply, by their terms, to "moneys paid or payable" (emphasis added); the fact that benefits have been paid and may be on deposit in a recipient's bank account does not shed them of that protection until they are in some way converted into some other kind of asset. *Philpott*, 409 US at 415–417. Thus, even after a recipient receives SSDI benefits and deposits them into a bank account,

[4] All of our published decisions have precedential effect under the rule of stare decisis. MCR 7.215(C)(2). However, published decisions issued after November 1, 1990 that are on point with a particular issue must be followed by this Court *without discretion* (though we can express our reasons why we would prefer not to, and seek a polling of the Court to hold a conflict panel, see MCR 7.215(J)(1)), whereas older published opinions *should* be followed by this Court unless "important prudential considerations" compel us to do otherwise. *2000 Baum Family Trust v Babel*, 488 Mich 136, 180 n 26; 793 NW2d 633 (2010).

> the SSDI benefits are still protected by 42 USC 407(a). *Whitwood*, 265 Mich App at 654. When a state court order attaches to Social Security benefits in contravention of 42 USC 407(a), the attachment amounts to a conflict with federal law, and such a conflict is one "that the State cannot win." *Bennett v Arkansas*, 485 US 395, 397; 108 S Ct 1204; 99 L Ed 2d 455 (1988). [*In re Lampert*, 306 Mich App 226, 234-235; 856 NW2d 192 (2014)].

Accord: *Biondo*, 291 Mich App at 727-728.

In certain circumstances, the Social Security Act also allows for benefits to be paid to a recipient's representative payee:

> Upon a determination by the Commissioner of Social Security that the interest of such individual would be served thereby, such payments shall be made, regardless of the legal competency or incompetency of the individual or eligible spouse, to another individual, or an organization, with respect to whom the requirements of subparagraph (B) have been met (in this paragraph referred to as such individual's "representative payee") for the use and benefit of the individual or eligible spouse. [42 USC 1383(a)(2)(A)(*ii*)(I).]

The Commissioner has the authority to define the term "use and benefit," 42 USC 1383(a)(2)(A)(*iv*), and to determine if a representative payee has misused benefits. 42 USC 1383(a)(1)(A)(*iii*). A misuse of benefits by the representative payee "occurs in any case in which the representative payee receives payment under this subchapter for the use and benefit of another person and converts such payment, or any part thereof, to a use other than for the use and benefit of such other person." 42 USC 1383(a)(2)(A)(*iv*).

Importantly, the SSA also addresses how a representative payee can use the recipient's benefits. For example, "[b]enefits of an individual may not be paid to any other person pursuant to subparagraph (A)(ii) if . . . such person's benefits under this subchapter, subchapter II, or subchapter VIII are certified for payment to a representative payee during the period for which the individual's benefits would be certified for payment to another person." 42 USC 1383(a)(2)(B)(*iii*)(VII). Benefits may not be paid to "a creditor of such individual who provides such individual with goods or services for consideration." 42 USC 1383(a)(2)(B)(*iii*)(III). However, this provision does not apply if the creditor is a relative residing in the same household as the individual, 42 USC 1383(a)(2)(B)(*v*)(I), or a legal guardian or legal representative of the individual, 42 USC 1383(a)(2)(B)(*v*)(II).

That the SSA contains great detail in both describing what a representative payee can and cannot do with the recipient's benefits, and in the oversight placed upon representative payees, was recognized by the Supreme Court in *Washington State Dep't of Social and Health Services v Keffeler*, 537 US 371, 376-377; 123 S Ct 1017; 154 L Ed 2d 972 (2003):

> Detailed regulations govern a representative payee's use of benefits. Generally, a payee must expend funds "only for the use and benefit of the beneficiary," in a way the payee determines "to be in the [beneficiary's] best interests." 20 CFR § § 404.2035(a), 416.635(a). The regulations get more specific

> in providing that payments made for "current maintenance" are deemed to be "for the use and benefit of the beneficiary," defining "current maintenance" to include "cost[s] incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." § § 404.2040(a), 416.640(a). Although a representative payee "may not be required to use benefit payments to satisfy a debt of the beneficiary" that arose before the period the benefit payments are certified to cover, a payee may discharge such a debt "if the current and reasonably foreseeable needs of the beneficiary are met" and it is in the beneficiary's interest to do so. § § 404.2040(d), 416.640(d). Finally, if there are any funds left over after a representative payee has used benefits for current maintenance and other authorized purposes, the payee is required to conserve or invest the funds and to hold them in trust for the beneficiary. § § 404.2045, 416.645.

The SSA also contains a thorough administrative process through which a representative payee's appointment can be challenged. The act specifically provides that "[a]ny individual who is dissatisfied with a determination by the Commissioner of Social Security to pay such individual's benefits to a representative payee . . . shall be entitled to a hearing by the Commissioner of Social Security, and to judicial review of the Commissioner's final decision . . ." 42 USC 1383(a)(2)(B)(*xi*). The judicial review is to be filed exclusively in federal court. 42 USC 405(g).

The probate court entered its order in an attempt to equally distribute the SSI benefits between the parties, as they are both coguardians of AM and both have physical custody of her on an equal basis. Presumably, as Basakis argues, the probate court entered the order in this guardianship proceeding under MCL 700.1302. Hence, the probate court had subject matter jurisdiction to enter the order, as a guardianship proceeding comes within the probate court's limited jurisdiction. See MCL 700.1302(c) and *Biondo*, 291 Mich App at 727. Instead, the question is whether this part of the order conflicts with the mandates of the SSA and, if so, which prevails. We hold that the order requiring that Bomba direct one-half of AM's monthly SSI benefits to Basakis conflicts with at least 42 USC 1383(a)(2)(A)(*ii*)(I), and potentially 42 USC 407(a).

The probate court order conflicts with the federal requirement that the *representative payee* determines (consistent with federal guidelines) how to best allocate the SSI benefits for the "use and benefit of" AM. 42 USC 1383(a)(2)(A)(*ii*)(I). This statute is clear in that only the representative payee can decide what to do with the SSI benefits awarded to the recipient, and other statutes are clear in what limits there are in allocating the benefits. The probate court's order directing how Bomba—the representative payee—is to allocate AM's benefits conflicts with these laws and, under the Supremacy Clause, the federal law controls over a conflicting state court order.[5]

[5] Though our conclusion that the probate court's order violates 42 USC 1383(a)(2)(A)(*ii*)(I) is sufficient to resolve this portion of Bomba's appeal, we are unconvinced that this portion of the order conflicts with 42 USC 407(a). Although, as confirmed by the *In re Lampart* Court, 306

Although Bazakis has not cited any relevant[6] authority in support of the probate court order, the majority of foreign state jurisdictions addressing this issue have held that a state court order requiring a representative payee to make a specific payment on behalf of the recipient conflicts with, and thus is preempted by, these same provisions of the SSA. These decisions are persuasive. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008).

In holding that state courts cannot order a representative payee to direct benefits in a certain manner, our sister states have used both conflict preemption and field preemption. See, e.g., *Boulter v Boulter*, 113 Nev 74, 79; 930 P2d 112 (1997) (explaining that, pursuant to 42 USC 407(a), even if the social security benefit is deposited into the recipient's bank account, the district court "is not empowered to compel [the recipient] to pay those benefits to [another]"); *In re Guardianship of Smith*, 17 A3d 136, 140; 2011 ME 51 (2011) (holding that an order requiring the representative payee to deposit a portion of the child's social security benefit into a bank account subject to the joint control of another was preempted because it conflicted with federal statutes and regulations); *Silver v Pinskey*, 981 A2d 284, 299; 2009 PA Super 183 (2009) (concluding that the order requiring the father to split a social security derivative benefit with the mother effectively dispensed with the federal statutes as a whole); *Brevard v Brevard*, 74 NC App 484, 488; 328 SE2d 789 (1985) (explaining that 42 USC 407(a) applies to funds that have been disbursed in concluding that the court did not have the power to order a father, the representative payee, to pay the benefits he received on behalf of the children to the court or to the mother);[7] *In re Ryan W*, 434 Md 577, 596; 76 A3d 1049 (2013) (holding that federal law divested state courts of subject-matter jurisdiction and that a representative payee's allocations of benefits was not subject to state

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Mich App at 236, 42 USC 407(a) contains a broad mandate on the inability to obtain a recipient's benefits through writs, attachment, or other similar legal process, that provision only applies when one is seeking to "discharge or secure discharge of an allegedly existing or anticipated liability." *Keffeler*, 537 US at 385. Here, it is less than clear whether the ordered payments to Bazakis were in part for a prior debt, thus making Bazakis a creditor and making 42 USC 407(a) applicable. And, even if it was in part for an existing debt, there is an exception for payments to both a relative residing in the same household as the individual, 42 USC 1383(a)(2)(B)(*v*)(I), and a legal guardian of the individual, 42 USC 1383(a)(2)(B)(*v*)(II).

[6] The only decision cited on this issue is *In re Vansach Estate*, but there is nothing in that opinion even referencing representative payees. Instead, that Court addressed the transferring of assets for purposes of Medicaid eligibility. See *In re Vansach Estate*, 324 Mich App at 390. The majority of Bomba's remaining authority concerns a court's authority to appoint a representative payee, not whether a state court can order the representative payee to make certain payments.

[7] However, the North Carolina Court of Appeals later held that state courts are not preempted from ordering the specific use of SSI benefits by a representative payee on the ward's behalf. *In re JG*, 186 NC App 496, 504-505; 652 SE2d 266 (2007). A year later, another panel of that court held that *Brevard* was the controlling law until the North Carolina Supreme Court ruled differently. *O'Connor v Zelinske*, 193 NC App 683, 694; 668 SE2d 615 (2008).

review); and *Peace v Peace*, 234 Ariz 546, 548; 323 P3d 1197 (App, 2014) (employing field preemption and holding that an order designating where benefits were to be sent was preempted).[8]

As her final argument regarding the SSI benefits, Bomba argues that the probate court could not have ordered her to place AM's SSI benefits into a joint account with both coguardians on the account, along with AM.[9] Initially, we point out that our reading of the order is not necessarily the same as Bomba's. We read paragraph two of the order to require Bomba to set up a new account with only AM being named on the account, but both Bomba and Bazakis have passwords to access account information. In any event, even if Bomba's reading of the order is correct, there is no authority holding that an individual receiving benefits cannot hold a joint account. On the contrary, when accounting for a disabled individual's funds, the Code of Federal Regulations provides as follows for determining the resources of a person receiving SSI:

> (c) Jointly-held account—
>
> (1) Account holders include one or more SSI claimants or recipients. If there is only one SSI claimant or recipient account holder on a jointly held account, we presume that all of the funds in the account belong to that individual. If there is more than one claimant or recipient account holder, we presume that all the funds in the account belong to those individuals in equal shares. [20 CFR 416.1208.]

Because the federal regulations expressly contemplate that an account may be held jointly with an SSI recipient, or that multiple SSI recipients might share a joint account, it stands to reason that an SSI recipient can in fact hold an account jointly with a nonrecipient. The probate court did not err when it ordered that all of the accounts in AM's name would be held jointly between her coguardians.[10]

C. BIRTHDAY VISITATION

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[8] Although the probate court could not order Bomba to split the benefits with Bazakis, nothing seems to preclude the court from considering Bomba's use of those benefits for AM while she is residing with her, for purposes of child support or other relevant matter. See, e.g., *In re Marriage of Stephenson and Papineau*, 302 Kan 851, 875-876; 358 P3d 86 (2015) and *LaMothe v LeBlanc*, 193 Vt 399, 414; 2013 VT 21; 70 A3d 977 (2013).

[9] Bomba has not waived this issue. A waiver is an intentional relinquishment or abandonment of a known right. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). In the trial court, Bomba repeatedly and vociferously opposed adding Bazakis to the account that she had as AM's representative payee. Although Bomba proposed to create an account at a neutral bank so that providing Bazakis with the password would not allow Bazakis to access her other bank accounts, that offer was not an intentional relinquishment of the argument that the court could not order her to create a joint account for AM.

[10] Bomba is correct that the probate court did not have jurisdiction to enter an order regarding who should be AM's representative payee. However, because the order did not purport to change AM's representative payee, but simply confirmed what the SSA did, there was no remedy for this error.

Next on our plate is Bomba's argument that the probate court erred by failing to consider AM's preferences when deciding with whom she would spend her birthday and Easter. According to Bomba, AM should be able to celebrate Easter holy days with both parents on their respective holy days and spend time with each parent on her birthday.

This Court reviews for an abuse of discretion the probate court's dispositional rulings concerning guardianship. *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). The court abuses its discretion when its decision falls outside the range of reasonable outcomes. *Id*. at 329.

MCL 330.1628(1) provides that the court may appoint a guardian for a person with a developmental disability. Before doing so, "the court shall make a reasonable effort to question the individual concerning his or her preference regarding the person to be appointed guardian, and any preference indicated shall be given due consideration." MCL 330.1628(2). MCL 330.1637(1) provides that the individual's guardian may petition the court for "a discharge or modification order . . ." The court's order may, among other things, "[m]ake any other order that the court considers appropriate and in the interests of the individual with a developmental disability." MCL 330.1637(4)(e). The court must "set[] forth the factual basis for its findings . . ." MCL 330.1637(4).

As far as we can discern, no provision of the Mental Health Code provides that the probate court must take the developmentally disabled person's preference into account other than when deciding the person to be appointed as the disabled person's guardian. Bomba fails to provide any legal basis to extend this statute to circumstances under which the court resolves a dispute between coguardians. *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000).[11]

D. SANCTIONS

As her final argument, Bomba challenges the trial court's failure to decide the motion for sanctions that she filed against Bazakis. However, as Bazakis argues, Bomba waived any argument regarding sanctions.

A waiver is an intentional relinquishment or abandonment of a known right. *Quality Prod & Concepts Co*, 469 Mich at 374. An affirmative expression of assent constitutes a waiver. *Id*. at 378. In contrast, a failure to timely assert a right constitutes forfeiture. *Id*. at 379. "Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention." *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008).

Towards the end of the relevant motion hearing, the following exchange took place following the parties' arguments regarding AM's birthday and Easter:

[11] Bomba relies on *In re Neal*, 230 Mich App 723, 729 n 5; 584 NW2d 654 (1998), for the proposition that the court needs to consider the developmentally disabled person's preference. However, *Neal* only discusses the disabled person's preference for who will be appointed guardian, but that issue is not being argued by Bomba, and the order did not appoint AM's guardian.

THE COURT. Anything else?

MR. PICARD [counsel for Bazakis]. Not from us.

MR. WARNER [counsel for Bomba]. No, Your Honor.

Because during the hearing at which the parties' motions were being addressed, Bomba expressly stated that she had nothing else, even though the trial court had not addressed her motion for sanctions, Bomba has waived this argument. Bomba cannot challenge on appeal the probate court's failure to decide her motion when she failed to raise her motion for sanctions to the probate court's attention.[12]

In any event, there was no abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Bomba based her arguments for sanctions on the allegedly frivolous and vexations nature of Bazakis's pleadings. However, it is not likely that, had the probate court addressed Bomba's motion for sanctions, the result of the proceedings would have been different because it is not reasonably probable that the court would have sanctioned Bazakis after siding with him on each issue. And, even though some of Bomba's arguments have succeeded on appeal, nothing from the probate court record reveals that the pleadings challenged were frivolous or otherwise sanctionable.

The probate court's order is reversed to the extent it directs Bomba how to allocate AM's benefits, and in all other respects, we affirm. This matter is remanded for further proceedings. We do not retain jurisdiction. Nor do we award costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien

[12] Had Bomba not affirmatively advised the trial court that she had nothing else, the trial court's failure to address her motion could not be held against her. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

April 21, 2023

164652

In re Guardianship of ANNA-MARIE MARGARET BAZAKIS.

CHRISTY BOMBA, Coguardian of ANNA-MARIE MARGARET BAZAKIS, a legally protected person,
Appellant,

v

SC: 164652
COA: 358276
Saginaw PC: 20-140294-DD

ANDREW BAZAKIS, Coguardian of ANNA-MARIE MARGARET BAZAKIS, and ANNA-MARIE MARGARET BAZAKIS,
Appellees.

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On order of the Court, the application for leave to appeal the June 23, 2022 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether the probate court's order requires appellant to place AM's social security benefits into a joint account held by both the appellant and the appellee; and (2) if so, whether such order is prohibited by principles of federal preemption. See *Foster v Foster*, 505 Mich 151 (2020).

The Family Law, Probate and Estate Planning, Elder Law & Disability Rights, and Social Security Lawyers Sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order

Michigan Supreme Court
Lansing, Michigan

April 27, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

165018
165020

In re Guardianship of MARY ANN MALLOY.

_____

DARREN FINDLING, Coguardian of MARY ANN MALLOY, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,
Plaintiffs-Appellees,
and

PATRICK MALLOY, Coguardian of MARY ANN MALLOY, a legally protected person, and KATHREN MALLOY,
Plaintiffs,

v

SC: 165018
COA: 358006
Oakland PC: 2020-393904-CZ

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

_____/

In re Guardianship of DANA JENKINS.

_____

DARREN FINDLING, Guardian of DANA JENKINS, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,
Plaintiffs-Appellees,

v

SC: 165020
COA: 358021
Oakland PC: 2020-393903-CZ

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Appellant.

_____/

On order of the Court, the applications for leave to appeal the October 13, 2022 judgment of the Court of Appeals are considered. We direct the Clerk to schedule oral argument on the applications. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether the Court of Appeals properly construed and applied the relevant provisions of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, in determining that there is a genuine issue of material fact whether the guardianship services provided by the appellee and the appellee firm were "lawfully rendered" so as to be payable under MCL 500.3107 of the no fault act, MCL 500.3101 *et seq*.

The Probate and Estate Planning Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in these cases may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *In re Guardianship of Mary Ann Malloy*, Docket No. 165018, only.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 27, 2023

Clerk

t0420

STATE OF MICHIGAN

COURT OF APPEALS

In re Guardianship OF MARY ANN MALLOY.

DARREN FINDLING, Coguardian of MARY ANN MALLOY, a legally protected person, and DARREN FINDLING LAW FIRM, PLC,

Plaintiffs-Appellees,

and

PATRICK MALLOY, Coguardian of MARY ANN MALLOY, a legally protected person, and KATHREN MALLOY,[1]

Plaintiffs,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION
October 13, 2022
9:05 a.m.

No. 358006
Oakland Probate Court
LC No. 2020-393904-CZ

In re Guardianship of DANA JENKINS.

[1] The probate court's April 2019 Order Regarding Modification of Guardianship identified Kathren Malloy and Darren Findling as coguardians. A May 21, 2021 Letters of Guardianship filed with the probate court identified Patrick Malloy as a coguardian with Darren Findling. The Letters of Guardianship were filed after entry of the order appealed in this matter. Accordingly, both Kathren Malloy and Patrick Malloy are listed as plaintiffs, though it does not appear that Kathren Malloy is currently a coguardian of Mary Ann Malloy.

DARREN FINDLING, Guardian of DANA JENKINS, a legally incapacitated person, and DARREN FINDLING LAW FIRM, PLC,

Plaintiffs-Appellees,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

No. 358021
Oakland Probate Court
LC No. 2020-393903-CZ

Before: SWARTZLE, P.J., and CAVANAGH and REDFORD, JJ.

REDFORD, J.

In the cases before the Court, in the context of two persons who are the subject of guardianships necessitated by two different motor vehicle accidents, we address the powers and duties of a guardian under MCL 700.5314, and the distinction between the delegation of a duty and a power of a guardian under MCL 700.5103 and MCL 700.5106.

The matters arise out of separate motor vehicle accidents after which guardianships were established for the two wards. This Court ordered the consolidation of these two appeals. *In re Guardianship of Mary Ann Malloy*, unpublished order of the Court of Appeals, entered July 5, 2022 (Docket Nos. 358006 and 358021). In Docket No. 358006, defendant appeals by leave granted[2] the probate court's order granting the Malloy plaintiffs'[3] motion for partial summary disposition, and denying defendant's countermotion for summary disposition. In Docket No. 358021, defendant appeals by leave granted[4] the probate court's order granting the Jenkins

[2] On March 23, 2022, our Supreme Court, in lieu of granting leave to appeal, remanded this case to this Court for consideration as on leave granted. *In re Guardianship of Malloy*, ___ Mich ___; 970 NW2d 886 (2022).

[3] Regarding Docket No. 358006, because multiple individuals in this matter share the last name of Malloy, for clarity, we will refer to plaintiff, Darren Findling, as "plaintiff"; plaintiff, Darren Findling Law Firm, PLC, as "plaintiff firm"; plaintiff, Patrick Malloy, as "Patrick"; plaintiff, Kathren Malloy, as "Kathren"; and the ward, Mary Ann Malloy, as "Malloy." Further, we collectively refer to plaintiffs, Darren Findling, Darren Findling Law Firm, PLC, Patrick Malloy, and Kathren Malloy, as the "Malloy plaintiffs."

[4] On March 23, 2022, our Supreme Court, in lieu of granting leave to appeal, remanded this case to this Court for consideration as on leave granted. *In re Guardianship of Jenkins*, 970 NW2d 889 (Mich, 2022).

plaintiffs'[5] motion for partial summary disposition and denying defendant's countermotion for summary disposition.

Because we conclude that the trial court correctly determined that many of the duties performed on behalf of the wards were able to be delegated by the court-appointed guardian, we affirm in part. Because there is a factual question as to whether or not actions taken on April 23, 2019 and April 24, 2019, on behalf of both wards were delegable by the court-appointed guardian, we reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

A. DOCKET NO. 358006

On August 10, 1979, Malloy suffered serious injuries including a traumatic brain injury from a motor vehicle accident. She is a legally incapacitated individual. She lived with her mother, who served as her coguardian and caregiver for approximately 40 years after the 1979 accident, though Malloy moved to a group home for 24-hour care and supervision after her mother sustained a fall. Plaintiff, Patrick, and Kathren, were later named Malloy's coguardians. The court appointed plaintiff, an attorney and professional fiduciary, as Malloy's legal guardian. Defendant is Malloy's no-fault insurer. Plaintiff provided legal and guardianship services for Malloy through plaintiff firm. Malloy's estate incurred fees and costs totaling $8,040.45 for services provided by her coguardians and plaintiff firm. Defendant refused to pay for the legal and guardianship services for Malloy provided by plaintiff and plaintiff firm. In six letters sent to plaintiff between August 13, 2019 and July 23, 2020, defendant indicated that it would "not consider reimbursement without additional information" because it did "not appear Ms. Malloy's guardian performed the guardianship services being claimed."

The Malloy plaintiffs filed a complaint against defendant in Oakland Probate Court, requesting that defendant pay Malloy's coguardians or plaintiff firm fees and costs associated with the care, recovery, and rehabilitation of Malloy in the amount of $8,040.45 plus interest, attorney fees, and costs. The Malloy plaintiffs alleged that defendant was "responsible for payment of fiduciary and attorney fees and costs incurred which are allowable expenses and that are reasonably necessary" for Malloy's care, recovery, or rehabilitation pursuant to MCL 500.3107. Further, the Malloy plaintiffs asserted that defendant refused to pay the proper no-fault benefits to the estate of Malloy, Malloy's coguardians, and plaintiff firm. Defendant filed an answer and asserted in its affirmative defenses that the "services allegedly provided by [the Malloy] Plaintiffs were not lawfully rendered."

The Malloy plaintiffs moved for partial summary disposition under MCR 2.116(C)(9) and (C)(10), arguing that fees and costs for a ward's guardianship "are allowable expenses compensable by the No-Fault Insurance Carrier under the no[-]fault act no matter who provides

[5] Regarding Docket No. 358021, we refer to plaintiff, Darren Findling, as "plaintiff"; plaintiff, Darren Findling Law Firm, PLC, as "plaintiff firm"; and the ward, Dana Jenkins, as "Jenkins." Further, we collectively refer to plaintiffs, Darren Findling and Darren Findling Law Firm, PLC, as the "Jenkins plaintiffs."

them." Further, the Malloy plaintiffs asserted that a guardian "may employ an attorney, perform work themselves, and/or employee [sic] others, and all of those services are compensable under the no-fault act, MCL 500.3101 *et seq*., if they are for the care, recovery and rehabilitation of the ward." Defendant responded to the Malloy plaintiffs' motion for partial summary disposition and filed a countermotion for partial summary disposition pursuant to MCR 2.116(I)(2). Defendant argued that no authority—including MCL 700.5103 or MCL 700.5106—supported the Malloy plaintiffs' claim that plaintiff could delegate his guardianship duties to employees at his firm. The probate court granted the Malloy plaintiffs' motion for partial summary disposition, reasoning that plaintiff did not violate MCL 700.5103 because he delegated only duties and not his guardianship powers, and he remained responsible for the delegated duties.[6]

B. DOCKET NO. 358021

On November 20, 2013, Jenkins suffered a traumatic brain injury as a pedestrian in a motor vehicle accident. The court appointed plaintiff, an attorney and professional fiduciary, as Jenkins's legal guardian because Jenkins is a legally incapacitated individual. Defendant is the no-fault insurer for Jenkins. Plaintiff and plaintiff firm provided legal and guardianship services to Jenkins, and Jenkins's estate incurred fees and costs in the amount of $28,853.59 between March 27, 2019 and February 1, 2020. Defendant refused to pay for services provided by plaintiff and plaintiff firm on behalf of Jenkins. In six letters sent to plaintiff between August 16, 2019 and June 17, 2020, defendant indicated that it would "not consider reimbursement" for "[g]uardian services completed by someone other than" plaintiff.

The Jenkins plaintiffs filed a complaint against defendant in Oakland Probate Court, requesting that defendant pay plaintiff or plaintiff firm fees and costs associated with the care, recovery, and rehabilitation of Jenkins. The Jenkins plaintiffs alleged that defendant was "responsible for payment of fiduciary and attorney fees and costs incurred which are allowable expenses and that are reasonably necessary" for Jenkins's care, recovery, or rehabilitation pursuant to MCL 500.3107. Further, the Jenkins plaintiffs asserted that defendant had refused to pay the proper no-fault benefits to Jenkins's estate, plaintiff, and plaintiff firm. Defendant answered the Jenkins plaintiffs' complaint. Defendant asserted that the "services allegedly provided by [the Jenkins] Plaintiffs were not lawfully rendered." The Jenkins plaintiffs moved for partial summary disposition pursuant to MCR 2.116(C)(9) and (C)(10), making virtually identical arguments as those made by the Malloy plaintiffs in their motion for partial summary disposition. Defendant responded to the Jenkins plaintiffs' motion for partial summary disposition and filed a countermotion for partial summary disposition pursuant to MCR 2.116(I)(2) similar to the response and countermotion filed by defendant in Docket No. 358006. The probate court heard the Jenkins plaintiffs' motion along with the Malloy plaintiffs' motion, and the court granted both motions in favor of the Malloy plaintiffs and Jenkins plaintiffs, and denied defendant's countermotions for summary disposition.

[6] The Oakland Probate Court heard the Malloy plaintiffs' motion for partial summary disposition at the same time as the Jenkins plaintiffs' motion for partial summary disposition. The court granted both motions.

II. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 242; 964 NW2d 50 (2020) (citation omitted). A party may move for summary disposition when the "opposing party has failed to state a valid defense to the claim asserted against him or her." MCR 2.116(C)(9). "When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim." *Slater v Ann Arbor Public Schs Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). "Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers." *Id*. "Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 425-426. When the trial court considers documentation beyond the pleadings, a motion for summary disposition is properly reviewed under MCR 2.116(C)(10). *McJimpson v Auto Club Group Ins Co*, 315 Mich App 353, 357; 889 NW2d 724 (2016).

A trial court may properly grant a motion for summary disposition pursuant to MCR 2.116(C)(10) "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists." *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (quotation marks omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7, quoting *Quinto*, 451 Mich at 363 (quotation marks omitted). Our "review is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). We review questions of statutory interpretation de novo. *Sterling Hts Pain Mgt, PLC v Farm Bureau Gen Ins Co of Mich*, 335 Mich App 245, 249 n 1; 966 NW2d 456 (2020).

III. ANALYSIS

Because the arguments of defendants, the Malloy plaintiffs, and the Jenkins plaintiffs, and the applicable statutes and legal reasoning in both consolidated cases in this matter are virtually identical, we address both appeals together.

Defendant essentially argues that it could refuse to pay and has no liability to pay no-fault benefits to the Malloy plaintiffs and the Jenkins plaintiffs because guardianship services were

provided to Malloy and Jenkins by individuals other than plaintiff. Specifically, defendant contends that plaintiff alone could provide guardianship services and because he had his law firm staff perform his duties he cannot obtain no-fault benefits for such services because MCL 700.5103 only allows a guardian to delegate his role to another person for 180 days if the guardian executed a power of attorney to the person and notified the court. Defendant contends that because of plaintiff's failure to comply with MCL 700.5103, the guardianship services were not lawfully rendered. We disagree.

These appeals require us to interpret the no-fault act and the way it intersects with the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., and determine whether the probate court properly applied the law. "The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the statutory language." *Dep't of Talent & Economic Dev/Unemployment Ins Agency v Great Oaks Country Club, Inc*, 507 Mich 212, 226; 968 NW2d 336 (2021) (quotation marks and citation omitted). "Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning . . . ." *Id*. at 226 (quotation marks and citation omitted). "[C]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). "Provisions must be read in the context of the entire statute so as to produce a harmonious result." *Mericka v Dep't of Community Health*, 283 Mich App 29, 38; 770 NW2d 24 (2009). "When the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). "If a statute does not define a word, it is appropriate to consult dictionary definitions to determine the plain and ordinary meaning of the word." *Epps v 4 Quarters Restoration, LLC*, 498 Mich 518, 529; 872 NW2d 412 (2015).

The no-fault act provides that "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). MCL 500.3107(1)(a) provides that "personal protection insurance benefits are payable for . . . (a) [a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." "[I]f a person is so seriously injured in an automobile accident that it is necessary to appoint a guardian . . . for that person, the services performed by the guardian . . . are reasonably necessary to provide for the person's care" and are allowable expenses under MCL 500.3107. *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195, 198; 543 NW2d 4 (1995).

EPIC governs the appointment of a guardian for an incapacitated person and sets forth in MCL 700.5314 a guardian's powers and duties. MCL 700.5314 plainly distinguishes between a guardian's powers and duties. The two terms are not interchangeable. A guardian's powers to the extent granted by the court under MCL 700.5306 include the power to establish the ward's residence, MCL 700.5314(a); give consent or approval to enable the ward to receive medical care, mental health care, professional care, counseling, treatment, or service, MCL 700.5314(c); execute, reaffirm, revoke a ward's do-not-resuscitate order with some requirements, MCL 700.5314(d); execute, reaffirm, revoke a ward's nonopiod directive, MCL 700.5314(f); execute, reaffirm, revoke a physician's orders for scope of treatment for the ward with some requirements, MCL 700.5314(g); take action to compel persons responsible to support the ward, to pay money

for the ward's welfare, and apply money and property for the ward's support, care, and education, MCL 700.5314(i).

A guardian's duties include being responsible for the ward's care, custody, and control and communicating and consulting with the ward if possible before making decisions, MCL 700.5314. A guardian also has the duty to make provisions for the ward's care, comfort, maintenance, and when appropriate education, secure services for the ward's mental and physical well-being, care for and protect the ward's personal and real property or dispose of it if in the ward's best interest, MCL 700.5314(b). Further, if a guardian executes a do-not-resuscitate order, the guardian has the duty to visit, communicate, and consult with the ward and consult directly with the ward's attending physician, MCL 700.5314(d). Similarly, respecting physician orders for scope of treatment, a guardian has the duty to visit, communicate, and consult with the ward about such orders, MCL 700.5314(h). A guardian has the duty to report at least annually the ward's condition and the ward's estate to the court, MCL 700.5314(j). Under MCL 700.5106, among other duties, a professional guardian appointed by the court has the duty to "ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided."

MCL 700.5103 governs a guardian's delegation of powers and in relevant part provides:

> (1) By a properly executed power of attorney, . . . a guardian of a . . . legally incapacitated individual may delegate to another person, for a period not exceeding 180 days, any of the . . . guardian's powers regarding care, custody, or property of the . . .ward . . . .
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> * * *
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> (4) If a guardian for a . . . legally incapacitated individual delegates any power under this section, the guardian shall notify the court within 7 days after execution of the power of attorney and provide the court the name, address, and telephone number of the attorney-in-fact.

Defendant contends that plaintiff had the obligation but failed to satisfy any of the requirements set forth in MCL 700.5103 by not executing and granting powers of attorney to his law firm staff members to act as guardian, by not providing the probate court with names or contact information of his staff members, and by delegating his entire role as guardian to his law firm staff. To support its argument that plaintiff violated MCL 700.5103, defendant asserts that, under EPIC, MCL 700.1101 *et seq.*, a guardian's duties and power to act are indivisible. According to defendant, MCL 700.5314[7] delineates a guardian's powers and duties, and this statute establishes

[7] MCL 700.5314 provides, in part:

> If meaningful communication is possible, a legally incapacitated individual's guardian shall consult with the legally incapacitated individual before making a major decision affecting the legally incapacitated individual. To the extent a guardian of a legally incapacitated individual is granted powers by the court

that duties flow from powers because it directs the guardian to perform certain tasks and melds these duties with the power to do so. We disagree.

Defendant's interpretation of EPIC overlooks the statutory language in which the Legislature makes distinctions between "duties" and "powers." The probate court highlighted that EPIC uses the word "power" in MCL 700.5103(1) and the word "duties" in MCL 700.5106(6). As noted above, "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *US Fidelity & Guaranty Co*, 484 Mich at 14.

Defendant seeks to rely on Michigan's State Court Administrative Office (SCAO) form PC 633 which cites MCL 700.5103, which states that a guardian delegating his or her powers to "notify the court when you delegate duties under a durable power of attorney." SCAO recommendations, memorandums, interpretations, and forms, however, are not binding authority. See *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 260; 792 NW2d 781 (2010) (stating that "an agency's interpretation is not binding on this Court and it cannot overcome the statute's plain meaning.").

EPIC does not define "power" or "duties." According to *Black's Law Dictionary*, "power" is defined as

> 1. The ability to act or not act; esp., a person's capacity for acting in such a manner as to control someone else's responses. 2. Dominance, control, or influence over another; control over one's subordinates. 3. The legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another. [*Black's Law Dictionary* (11th ed)].

Black's Law Dictionary defines "duty" as

> 1. A legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right. [*Black's Law Dictionary* (11th ed)].

Accordingly, when granted a power pursuant to EPIC by a court, a guardian is authorized and holds the legal right to alter the "rights, duties, liabilities, or other legal relations" of the ward.

Regarding Docket No. 358006, plaintiff largely delegated the performance of duties to other individuals to assist in his care of his wards. He did not delegate powers. Therefore, he did not violate MCL 700.5103 as defendant contends. Specifically, billing records of plaintiff and plaintiff firm indicate that services performed by others—that is, other individuals at plaintiff firm

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> under section 5306, the guardian is responsible for the ward's care, custody, and control, but is not liable to third persons because of that responsibility for the ward's acts. In particular and without qualifying the previous sentences, a guardian has all of the following powers and duties, to the extent granted by court order . . . .

who were delegated tasks by plaintiff to perform on behalf of Malloy—included attending meetings with Malloy's doctors, attending guardianship visits, attending team meetings with Malloy's family, telephone conferences with Patrick and Kathren, and meeting at a Social Security Administration office. Defendant points out in its brief on appeal that other tasks that plaintiff delegated included preparing Malloy's annual guardian report, overseeing Malloy's work program, and attending a hearing to modify Malloy's guardianship. Virtually every task delegated to staff members by plaintiff did not alter the "rights, duties, liabilities, or other legal relations" of Malloy. *Black's Law Dictionary* (11th ed). Rather, these delegated tasks, such as telephone conferences with Patrick and Kathren, were merely "legal obligation[s] that [were] owed or due to [Malloy] and that [needed] to be satisfied." *Black's Law Dictionary* (11th ed).

However, we agree with defendant that there is a genuine issue of material fact regarding whether plaintiff violated MCL 700.5103 when he delegated tasks that altered the "rights, duties, liabilities, or other legal relations" of Malloy without complying with the requirements of MCL 700.5103. Specifically, there is a genuine issue of material fact that preparing for a hearing to modify Malloy's guardianship on April 23, 2019, and attending an April 24, 2019 hearing regarding the petition to modify Malloy's guardianship altered Malloy's rights and legal relations. Plaintiff appears to have assigned these two tasks to employees at his law firm but it is unclear whether and to what extent plaintiff engaged the services of the law firm or individuals and if he did so on behalf of the ward. Because these hearings involved adding and removing Malloy's coguardians, these tasks altered Malloy's rights and legal relations—an act fitting the definition of a power. *Black's Law Dictionary* (11th ed). Therefore—because plaintiff did not prepare for or attend the April 24, 2019 hearing himself—there is a genuine issue of material fact regarding whether plaintiff delegated his guardianship powers as to these two tasks and, in doing so, violated MCL 700.5103. Because there is a genuine issue of material fact as to whether plaintiff delegated his guardianship powers as to the preparation for and attendance at a hearing to modify Malloy's guardianship, there is also a genuine issue of material fact as to whether these services were "lawfully rendered" within the meaning of the no-fault act and whether these services are compensable under the no-fault act. Therefore, the probate court erred in granting partial summary disposition in favor of the Malloy plaintiffs with regard to these two tasks.

Similarly, regarding Docket No. 358021, plaintiff largely delegated duties—and not powers—to other individuals as it relates to Jenkins's guardianship. Therefore, he did not violate MCL 700.5103 as to nearly all delegated tasks. Specifically, the Jenkins plaintiffs' billing records indicate that services performed by individuals other than plaintiff on behalf of Jenkins included attending guardianship visits and communicating with Jenkins. Defendant also notes in its brief on appeal that services provided on behalf of Jenkins by individuals other than plaintiff included coordinating Jenkins's care needs, reviewing medical reports, meeting with Jenkins's doctors, meeting with individuals from Jenkins's banks, and meeting with officials from the Social Security Administration. Similar to Docket No. 358006, virtually every task delegated to these staff members by plaintiff did not alter the "rights, duties, liabilities, or other legal relations" of Jenkins. *Black's Law Dictionary* (11th ed). Nearly all of these delegated tasks were merely "legal obligation[s] that [were] owed or due to [Jenkins] and that [needed] to be satisfied." *Black's Law Dictionary* (11th ed).

However, we again agree with defendant that a genuine issue of material fact exists regarding whether plaintiff violated MCL 700.5103 by delegating tasks that altered the "rights,

duties, liabilities, or other legal relations" of Jenkins without complying with the requirements of MCL 700.5103. Specifically, viewing the evidence in a light most favorable to defendant, there is a genuine issue of material fact regarding whether preparing for a hearing to modify Jenkins's guardianship on April 23, 2019, and attending an April 24, 2019 hearing regarding the petition to modify Jenkins's guardianship altered Jenkins's rights and legal relations. Plaintiff appears to have assigned these two tasks to employees at his law firm but it is unclear whether and to what extent plaintiff engaged the services of the law firm or the individuals and if he did so on behalf of the ward. Because these hearings involved modifying Jenkins's guardianship and adding or removing a guardian, these tasks altered Jenkins's rights and legal relations—an act fitting the definition of a power. *Black's Law Dictionary* (11th ed). Therefore, because plaintiff did not prepare for or attend the April 24, 2019 hearing himself, there is a genuine issue of material fact regarding whether plaintiff delegated his guardianship powers as to these two tasks and, in doing so, violated MCL 700.5103. Because a genuine issue of material fact exists as to whether plaintiff improperly delegated his guardianship powers to modify Jenkins's guardianship, there is also a genuine issue of material fact as to whether these services were "lawfully rendered" and whether these services are compensable under the no-fault act. Therefore, the probate court erred in granting summary disposition in favor of the Jenkins plaintiffs with regard to these two tasks.

Defendant also argues that the probate court erred in determining that a guardian's duties and power to act were divisible. Defendant asserts that the probate court's determination "threw discord between MCL 700.5103 and [MCL 700.5314.]" Defendant notes that MCL 700.5103's "reference to a guardian's 'powers' naturally includes the guardian's duties in light of the indivisible nature of the two under EPIC." We disagree.

As previously discussed MCL 700.5314 distinguishes between the powers and duties of a guardian. Although both duties and powers are discussed in MCL 700.5314, duties and powers of a guardian bear separate qualities that comport with the definitions described above. For example, while MCL 700.5314(a) lists the establishment of "the ward's place of residence" as a power of the guardian, this establishment is referring to a guardian's "ability to alter . . . the rights, duties, liabilities, or other legal relations" of the ward. *Black's Law Dictionary* (11th ed). Conversely, the portion of the statute instructing the guardian to "visit the ward within [three] months after the guardian's appointment" establishes a duty—that is, a "legal obligation that is owed" to the ward. *Black's Law Dictionary* (11th ed). Accordingly, defendant's contention that "powers" and "duties" are inseparable lacks merit. Further, there is no discord between MCL 700.5103 and MCL 700.5314. The references to both powers and duties in MCL 700.5314 also demonstrates that the Legislature intended that these two terms have different meanings under EPIC, and do not constitute the same things.

Further, as both the Malloy and Jenkins plaintiffs' briefs point out, MCL 700.5106 demonstrates that the Legislature anticipated that a guardian would employ or task other individuals with caring for a ward. MCL 700.5106(5) and (6) provide:

> (5) A professional guardian appointed under this section shall establish and maintain a schedule of visitation so that an individual associated with the professional guardian who is responsible for the ward's care visits the ward within 3 months after the professional guardian's appointment and not less than once within 3 months after each previous visit.

> (6) A professional guardian appointed under this section shall ensure that there are a sufficient number of employees assigned to the care of wards for the purpose of performing the necessary duties associated with ensuring that proper and appropriate care is provided.

MCL 700.5106 expressly permits that "an individual associated with the professional guardian" may be "responsible for the ward's care" and that a professional guardian "shall ensure that there are a sufficient number of employees assigned to the care of wards" in order to carry out the necessary duties. The plain language of the statute demonstrates that the Legislature contemplated that individuals other than the guardian would perform duties on behalf of a ward.

Accordingly, the probate court was correct in part and erred in part.

Specifically, a genuine issue of material fact exists regarding whether plaintiff delegated tasks that altered the "rights, duties, liabilities, or other legal relations" of Malloy and Jenkins when he allowed other individuals to prepare for and attend hearings regarding the modification of Malloy's and Jenkins's guardianships. Because "an insurer is required to pay benefits only for treatment lawfully rendered," there also remains a genuine issue of material fact regarding whether defendant is responsible for the payments for these two tasks in each case. *Sterling Hts Pain Mgt, PLC*, 335 Mich App at 249.

Respecting all other contested matters, the probate court properly granted plaintiffs' motions and denied defendant's motions.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh

BARRON, ROSENBERG,
MAYORAS & MAYORAS, P.C.

MEMORANDUM

To: Probate Council
From: Andrew W. Mayoras, Chair of Amicus Committee
Subject: Amicus Brief Invitation from Supreme Court
Date: May 26, 2023

Overview

The Supreme Court issued an order dated April 27, 2023, inviting our Section to submit an amicus brief. The case involves whether a professional guardian lawfully renders services when an employee or another person performs services for the ward, without complying with MCL 700.5103. Section 5103 permits delegation of powers by a guardian or parent through a properly executed power of attorney, provided that the probate court must be notified within seven days, including identifying information for the attorney-in-fact.

Both the Probate Court (in two consolidated cases) and Court of Appeals ruled that a 700.5103 only applies to "powers" of the guardian, and MCL 700.5314 sets out different "powers" and "duties". Powers may only be delegated through Section 5103, while duties of a professional guardian may be delegated to employees without the formalities of 5103. The COA opinion relied in part on MCL 700.5106, which expressly permits professional guardians to use employees to perform "the necessary duties associated with ensuring that proper and appropriate care is provided." MCL 700.5106(6). The Court of Appeals remanded as to one select set of services performed, relying on the Black's Law Dictionary definitions of both "power" and "duty", because those particular services presented a question of fact as to whether they altered the legal rights of the ward.

The decision was published, issued on October 31, 2022. The Supreme Court has not yet decided to grant leave, but instead directed supplemental briefs and the scheduling of oral arguments on the application.

The Amicus Committee recommends filing an amicus brief and advocate to affirm the Court of Appeals decision.

Facts & Lower Court Ruling

This case arises out of a No Fault dispute for reimbursement of services performed by a guardian.

In two consolidated cases arising in Oakland County Probate Court, a professional guardian sought payment of guardianship services under the No Fault Act from the insurance carrier. The insurer refused to pay for the services, arguing they were not "lawfully performed" because the services were not personally performed by the named guardian and the guardian did not comply with the formal power of attorney requirements to delegate powers under MCL 700.5103. It is important to note that the case does not turn on No Fault law, but rather, on EPIC. As such, it would directly impact all professional guardians throughout the State of Michigan.

The Probate Court ruled in favor of the guardian, determining that MCL 700.5314 distinguishes between powers and duties. While powers can only be delegated under the formal requirements of 700.5103 (which admittedly were not met in the cases), duties could be delegated by professional guardians under 700.5106. All submitted services were found to be exercised as duties, not powers, in the Probate Court rulings.

The Court of Appeals affirmed as to the large majority of services performed. It relied on Black's Law Dictionary in distinguishing between a "power" and "duty". Specifically, a "power" included the right to alter the "rights, duties, liabilities, or other legal relations" of the ward, and these could only be delegated through formal compliance with Section 5103. So any services performed that altered the rights of the ward could only be delegated through a formal power of attorney under 5103. Other services, such as visiting the ward, medical care management, etc., constituted "duties" and did not have to be delegated formally.

The Court of Appeals determined that only a one set of services performed met the definition of a "power". Specifically, the guardian included billings for preparing for and attending court hearings on petitions to modify the guardianships. If the guardianship was modified, that of course would directly impact the rights and/or legal relations of the ward, so this fell squarely within the definition of a power, according to the opinion.

The Court of Appeals found that the record was unclear as to whether these services were performed by employees who were engaged to perform services by a law firm. In other words, it appears clear that if the guardian engaged counsel to prepare for and attend these hearings, then those services would not be required to be delegated through a formal power of attorney under 5103. Because the Court of Appeals determined this small subset of submitted services created a question of fact, it remanded analysis as to those particular services only.

The insurer then filed an application for leave to the Supreme Court, arguing that all of the services were unlawfully rendered and it should not matter whether each service performed was a duty or a power. The guardian argues that the Court of Appeals analysis was correct. Neither brief addressed whether the

Court of Appeals appropriately applied the power/duty test to the services related to the petitions to modify guardianship.

The Supreme Court scheduled oral arguments and specifically directed supplemental briefs on the issue of whether the Court of Appeals properly construed EPIC in determining that a question of fact existed as to whether the guardian services were lawfully rendered.

Analysis

The committee agreed that the Court of Appeals' ruling was correct.

First, it is important to note that it would be practically impossible for professional guardians to create multiple powers-of-attorney for each employee and notify the court of each attorney-in-fact for each duty delegated. The Reporters Comment to 700.5103 specifies it was "designed for anticipated absences for travel, medical care, or other interruptions in the availability of the parent or guardian." It is questionable whether it ever applies to professional guardians at all. In fact, 5103 does not state that the only way to delegate a power was through that section; just that it was a way for a guardian or parent to do so for up to 180 days.

Second, 700.5106 more specifically applies to professional guardians and clearly allows for visits by an "individual associated with the professional guardian" under 5106(5) as well as "employees assigned to the care of wards for the purpose of performing the necessary duties..." under 5016(6). Because 5106 does not require compliance with 5103, those employee services should be permitted without compliance with 5103.

Third, 700.5314 clearly and specifically uses the terms "power" and "duty" separately, with some services falling under one term and others falling under the other term. Section 5103 only applies to "powers" not "duties."

Fourth, the Committee agreed that for services performed by a non-attorney employee of a guardian that related to a hearing for a petition to modify should be considered an exercise of "power".

There was a minor disagreement among Committee members who participated in the discussion. The majority favored affirming the Court of Appeals in totality, agreeing with the dividing line between a "power" and a "duty." The only service found to be a "power" in the case presented was related to a petition to modify guardianship, which most members believed should be attended by either named guardian personally, an attorney, or an attorney-in-fact under 5103.

The minority view of the Committee is that there should be no power/duty dividing line, and professional guardians should not have to comply with 5013 for any service. There are other "powers" that could arise in other cases beyond just that particular service found to be a power in these cases. Indeed, Section 5314 includes many different "powers", including giving medical consent, establishing residences, and to execute a physician's order. Under this published decision, none of those powers could be delegated without compliance with 5103. Section 5106 is the more specific section for professional guardians, and 5103 does not mandate that it is the only way to delegate a power. In other words, the minority view of the Committee was to advocate for the ruling to be affirmed, but for a different reason - namely, that 5106 applied to professional guardians and 5103 does not, so no delegation by a professional guardian need comply with 5103, regardless of the power/duty distinction. Concerns of attending court hearings by non-attorneys is already governed by ethics rules applying to practicing law without a license.

The majority of Committee participants felt that if 5103 was meant to apply only to non-professional guardians, it would have stated as such, and if that is the desired goal, it should achieved legislatively, not judicially. In other words, most of the Committee members who participated in the discussion believe that professional guardians should be made to comply with 5103 for services that are considered to be "powers", such as preparing for or attending a hearing on a petition to modify.

As such, the Committee unanimously recommends that the Probate Council authorize an amicus brief in response to the Supreme Court invitation, and to take the position that the Court of Appeals decision was correct. The majority of the Committee members who participated in the discussion recommend that we seek to affirm for the same reasoning expressed in the opinion. The Committee recommends that Barron, Rosenberg, Mayoras & Mayoras, P.C., author the brief.

ATTACHMENT 5

Report of the Nominating Committee
To the Probate & Estate Planning Council of the State Bar of Michigan
June 9, 2023

The Nominating Committee of the Probate and Estate Planning Section of the State Bar of Michigan consists of Christopher Ballard, David Lucas, and David Skidmore.

The Committee reminds the Council and Section that under Sections 4.2.3 and 5.2 of the Section's By-Laws the incumbent Chairperson Elect assumes the office of Chairperson upon the conclusion of the Section's annual meeting. Therefore, the Committee does not nominate a candidate for Chairperson of the Section, and the incumbent Chairperson Elect, James P. Spica, will succeed to the office of Chairperson without action by the Committee, Council or Section.

The Committee met and pursuant to Section 4.1 of the Section By-Laws, the Committee nominates the following individuals for the positions shown opposite their names:

Chairperson Elect	Katie Lynwood
Vice Chairperson	Nathan Piwowarski
Secretary	Richard C. Mills
Treasurer	Christine M. Savage

For the Council for a second three-year term:

James F. Anderton
Georgette E. David
Daniel Hilker
Warren H. Krueger III

For the Council for an initial three-year term:

Ernscie Augustin
Alexander S. Mallory

Respectfully submitted,

Christopher A. Ballard, Chair