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.

* * * * *

EXHIBIT 3A

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.[3839]

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

[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. <u>The Science[69] With Respect to Undue Influence</u>

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 A

MCL 700.2524 Definition of Undue Influence:

(A) A donative transfer is procured by undue influence if the alleged influencer 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. The amount of persuasion necessary to overcome a donor's free will may be less when a donor has vulnerabilities that could impair the donor's ability to withstand another's influence. In determining whether a result was produced by undue influence, the following factors are among those that may be considered:

(1) The vulnerability of the donor. Evidence of vulnerability may include, but is not limited to incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, recent loss of a spouse, estrangement from children, fear of change in living situation, or whether the alleged influencer knew or should have known of the donor's vulnerability.

(2) The alleged influencer's apparent authority. Evidence of the alleged influencer's apparent authority may include, but is not limited to, status as a fiduciary, confidante, close family member, care provider, health-care professional, legal professional, financial professional, spiritual adviser, or the donor's perception of the alleged influencer's expertise.

(3) The actions or tactics used by the alleged influencer. Evidence of actions or tactics used may include, but is not limited to:

(a) Controlling necessaries of life, medication, the donor's interactions with others, access to information, or sleep.

(b) Use of force, threat, undue flattery, intimidation, coercion, fraud or misrepresentation.

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

(d) Efforts to negatively influence the donor's perception of family members, advisors or otherwise interfere with family, business or professional relationships; or,

(e) The existence of other suspicious circumstances.

(B) For purposes of this section and MCL 700.2725, as it relates to any instrument, gift, or other transaction alleged to be the product of undue influence, the term "donor" shall mean a testator, grantor, settlor, transferor or principal. The term "instrument" shall mean any instrument, whether written, governing or otherwise.

MCL 700.2521 Burden of Proof in Undue Influence Contests; Presumption Of Undue Influence.

(a) A presumption of undue influence, whether as to an instrument, gift or transaction, is established when all of the following elements are proven to exist by a preponderance of evidence:

(1) A confidential relationship exists between the donor and the alleged influencer;

(2) The alleged influencer, or an interest represented by an alleged influencer, benefits from a transaction; and,

(3) The alleged influencer had an opportunity to influence the donor's decision in the transaction.

(b) Whether a presumption of undue influence has been established is a question for the court.

(c) If a presumption of undue influence is found to exist, and notwithstanding Section 3407, then the proponent of an instrument, recipient of a gift, or other party to a transaction, has the burden of proving, by a preponderance of evidence, that the instrument, gift, or transaction is not the product of undue influence.

(d) "Confidential relationship," for purposes of this section, means a fiduciary, reliant, or dominant-subservient relationship.

(1) A fiduciary relationship is one in which the relationship arises from a legally recognized fiduciary obligation. Examples of legally recognized fiduciary relationships include, but are not limited to the following: lawyer/client, stockbroker/investor, principal/agent, guardian/ward, trustee/beneficiary, physician/patient, accountant/client, and financial advisor/client.

(2) A reliant relationship is one where there is a relationship between the donor and alleged influencer based on special trust and confidence and may include circumstances where the donor was guided by the judgment or advice of the alleged influencer or placed confidence in the belief that the alleged influencer would act in the interest of the donor. Examples of reliant relationships include, but are not limited to, the following:

(A) The donor relies on the alleged influencer to conduct banking or other financial transactions;

(B) Where trust is placed by the donor in the alleged influencer who, as a result, gains superiority or influence over the donor;

(C) When the alleged influencer assumes control over, and responsibility for, the donor, or is placed in an express or implied position of authority to represent or act on behalf of the donor;

(D) When the donor is reliant upon the alleged influencer for care; or,

(E) When a clergy/penitent relationship exists between the donor and the alleged influencer.

(3) A dominant-subservient relationship is one where the donor is prepared to unquestioningly comply with the direction of the alleged influencer. Examples of dominant-subservient relationships include, but are not limited to, relationships between a hired caregiver and client, or relative and an ill or feeble donor, when the donor is dependent upon the alleged influencer for activities of daily living or instrumental activities of daily living.

(e) Being the donor's spouse or child, without more, is not sufficient to establish a presumption of undue influence.

(f) The definitions of "donor" and "instrument" set forth in MCL 700.2724, shall also apply to this section.

Council Materials

MEETING OF THE COUNCIL OF THE
PROBATE & ESTATE PLANNING SECTION OF THE
STATE BAR OF MICHIGAN
Friday, September 8, 2023

Regular Meeting Agenda

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

II. Monthly Reports
   - A. Lobbyist's Report (Public Affairs Associates)
   - B. Minutes of Prior Council Meeting – June (Nathan Piwowarski) – **Attachment 1**
   - C. Chair's Report (Mark Kellogg/Jim Spica) – **Attachment 2**
   - D. Treasurer's Report (Rick Mills) – **Attachment 3**

III. Committee Reports
   - A. Committee on Special Projects
   - B. Amicus Curiae
   - C. Annual Meeting
   - D. Awards
   - E. Budget
   - F. Bylaws
   - G. Charitable and Exempt Organizations
   - H. Citizens Outreach
   - I. Court Rules, Forms, and Proceedings
   - J. Electronic Communications
   - K. Ethics and Unauthorized Practice of Law
   - L. Guardianship, Conservatorship, and End of Life
   - M. Legislation Development and Drafting
   - N. Legislation Monitoring and Analysis
   - O. Legislative Testimony
   - P. Membership

Q. Nominating

R. Planning

S. Probate Institute

T. Real Estate

U. State Bar and Section Journals

V. Tax

W. Assisted Reproductive Technology

X. Electronic Wills

Y. Fiduciary Exception to the Attorney-Client Privilege

Z. Nonbanking Entity Trust Powers

AA. Premarital Agreements

BB. Uniform Community Property Disposition at Death Act

CC. Undue Influence

DD. Uniform Fiduciary Income and Principal Act

EE. Uniform Partition of Heirs Property Act – Attachment 4

FF. Uniform Power of Attorney Act

GG. Various Issues Involving Death and Divorce

IV. Good of the Order

V. Adjournment of Regular Meeting

Departments (Time Permitting)

I. Ethics (Rick Mills)

II. Legal Literature (Jim Spica)

Roundtable (Time Permitting)

Reminder: The next Probate & Estate Planning Council meeting will be **Saturday, October 14, 2023 at the Interlochen Center for the Arts, 4000 J. Maddy Pkwy, Interlochen, MI**. The Council meeting will begin (almost) immediately after the Committee on Special Projects meeting, which begins at 9:00 AM.

ATTACHMENT 1

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

I. Call to Order and Welcome (Mark Kellogg)

a. Chairperson Mark E. 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: Mark E. Kellogg, Katie Lynwood, Nathan R. Piwowarski, Richard C. Mills, James P. Spica, Jim Ryan, Christine Savage, David D. Sprague, Elizabeth Siefker, Andrew Mayoras, Angela Hentkowski, and Michael Lichterman.

b. Remote: Hon. Shawna Dunnings, Daniel Borst, David Lentz, Georgette David, James Steward, David Lucas, Jonathon Beer, Kathleen Cieslik, Kenneth Silver, Lindsay DiCesare, Mark Harder, Kurt Olson, Marguerite Lentz, Neal Nusholtz, Rebecca Wrock, Sandra Glazier, James F. Anderson, V, Susan L. Chalgian, Daniel S. Hilker, Rebecca Bechler, Warren Krueger, Patricia Davis, Nick Reister, Michael D. Shelton, Alex Mallory, Amanda Knaffla, Michael McClory, and Andrea Neighbors (administrative assistant).

III. Excused Absences (Mark Kellogg)

a. Melisa M.W. Mysliwiec,

IV. Lobbyist's Report (Public Affairs Associates)

a. Jim Ryan offered the following report:

i. EPIC bills moved out of committee. HBs 4416, 4417, 4418, and 4419 passed unanimously. The Secretary of State added amendments to HBs 4417 and 4419. Representative Filler is working on the council's amendments.

ii. Rep. Jim Haadsma has submitted language to the legislative service bureau regarding the uniform statue rule against perpetuities.

VI. Monthly Reports:

A. Minutes of Prior Council Meeting – April (Nathan Piwowarski) – **Attachment 1**. After a motion by Nathan Piwowarski, approved unanimously by voice vote.

B. Chair's Report (Mark Kellogg). Mr. Kellogg updated the council regarding the section's legislative efforts and a successful annual institute.

i. The lobbyists are working to get legislation introduced. Chairperson Kellogg testified to the Judiciary committee regarding House Bills 4416-4419. These bills were voted out of the House Judiciary Committee.

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

i. Rick Mills, moved for approval of the financial report. Approved by voice vote.

ii. Ex-officio John Bos passed away; Rick Mills made a donation on behalf of the council to the Capitol Area Humane Society. Mary Scott, wife of ex-officio John A. Scott passed away. Rick Mills made a donation on behalf of the council to the Munson Medical Center in memory of Mary Scott.

iii. Nathan Piwowarski moved to authorize a payment of $26,872.50 to Trevor Weston and his firm for legal services rendered in the *Shaaf v. Forbes* case in FY 2021-2022 and authorize the State Bar to release that payment to Mr. Weston's firm. Second by Jim Spica. Approved by voice vote.

D. Committee on Special Projects (Rick Mills)

i. There was a lengthy discussion regarding undue influence and the committee's proposal. No vote was taken.

ii. Jim Spica gave a presentation on behalf of the Nonbanking Entity Trust Powers Committee.

E. Tax Committee Tax Nugget (JV Anderton). JV Anderton shared the tax nugget as a written report.

VIII. Amicus Committee (Angela Hentkowski)

a. Angela Hentkowski, on behalf of the committee led a discussion regarding the Amicus Brief invitation form the Supreme Court in re guardianship of Anna-Marie Margaret Bazakis. Nathan Piwowarski moved, and was seconded by Rick Mills, that the Section , to retain amicus counsel in Bazakis (billed hourly, standard cap) and adopt the public policy position that (a) Michigan's probate courts are preempted by federal law from requiring that a representative payee create joint accounts to receive funds paid under the Social Security Act, (b) to the extent the Bazakis order requires placement of rep payee funds in a joint account, the trial court lacked jurisdiction to do so, and (c) probate courts nonetheless possess the power to require that a guardian who is also serving as rep payee render an account or disclose other documentation in reference to their management of the protected person's funds under the rep payee program, and that further the probate court may engage in other remedies as to the guardianship for mismanagement of a protected person's rep payee funds. The Secretary recorded a vote of 16 in favor, 0 opposed, 1 not voting, and 6 abstaining; the Chair declared the motion carried.

b. Nathan Piwowarski moved, and was seconded by Angela Hentkowski, to retain amicus counsel on Malloy (billed hourly, standard cap) and adopt the public policy position that (a) the distinction between powers and duties in the Malloy court of appeals opinion is correct and (b) that a professional guardian is not required to execute a power of attorney to its employees under MCL 700.5103 when they discharge the guardian's duties because they are able to do that pursuant to section 5106 sub 6. The Secretary recorded a vote of 16 in favor, 2 opposed, 2 not voting, and 3 abstaining; the Chair declared the motion carried.

X. Uniform Power of Attorney Ad Hoc Committee – Jim Spica

a. Jim Spica moved, and was seconded by Chris Savage, to adopt a public policy position to support 2023 HBs 4644-46. The Secretary recorded a vote of 13 in favor, 4 opposed, 3 not voting, and 2 abstaining; the Chair declared the motion carried.

XI. Written Reports

a. Nominating Committee

XII. Other Business (none)

XIII. Adjournment

a. Adjourned at 12:05.

Respectfully Submitted,

Nathan Piwowarski, Secretary

ATTACHMENT 2

M E M O R A N D U M

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan

From: James P. Spica

Re: Chair's Report

Date: August 26, 2023

I shall refer in my first report as Chair (on September 8, 2023) to the two items attached.

JPS

Attachment 1
Dates for 2023–24 CSP/Council Meetings

SBM PROBATE & ESTATE PLANNING SECTION
Dates for 2023–24 CSP/Council Meetings

Saturday, October 14, 2023	ICA Interlochen
Friday, November 10, 2023	University Club Lansing
Friday, December 15, 2023	University Club Lansing
Friday, January 19, 2024	University Club Lansing
Friday, February 16, 2024	University Club Lansing
Friday, March 15, 2024	University Club Lansing
Friday, April 19, 2024	University Club Lansing
[May 2024]	
Friday, June 14, 2024	University Club Lansing
[July 2024]	
[August 2024]	
Friday, September 13, 2024	University Club Lansing

Attachment 2
June 21, 2023 House Judiciary Committee Testimony of Rep. Wozniak
re 2023 HBs 4644–46

Uniform Power of Attorney Act
Testimony by Representative Doug Wozniak

Madam Chair and Members of the Committee, I appreciate the opportunity to speak to the importance of replacing Michigan's Durable Power of Attorney Act with the Uniform Power of Attorney Act.

Having sponsored this same package of bills in 2020, 2022 and, again, earlier this year, you can imagine how pleased I am to have this similar package taken-up in our committee, today.

As a practicing attorney, who has specialized in the area of elder law for decades, I was very pleased, several years ago, to learn of the work being done by the Michigan Bar Association's Probate Section workgroup to align the Uniform Power of Attorney Act with other Michigan acts.

The concept of a "power of attorney" was first incorporated into the Uniform Probate Code in 1969 to offer an inexpensive method of surrogate decision making for those whose modest assets did not justify pre-incapacity planning with a trust or post-incapacity property management with a guardianship."

Fifty years after Michigan's adoption of the Durable Power of Attorney Act, the power-of-attorney is being used, by people of all economic means, for incapacity-planning, as well as convenience.

Adoption of the updated Uniform Power of Attorney Act is necessary because, over the years, Michigan, and other states, have adopted non-uniform provisions to deal with issues on which the Uniform Probate Code and the original Uniform Durable Power of Attorney Act are silent. The new act will provide uniformity on these issues and enhance the usefulness of the law.

The State Bar's Probate section workgroup spent countless hours working to ensure that the proposed legislation aligns with other state laws and is of significant benefit to the people of Michigan.

If it can not be my package of bills that is passed to implement the Uniform Power of Attorney Act in Michigan, then I encourage you to adopt the package before us, today.

ATTACHMENT 3

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			May 2023	YTD Revenue (2022-2023)	Budget (2022-2023)
	1-7-99-775-1050 Probate/Estate Planning Dues		$ 175.00	$ 115,675.00	$ 110,000.00
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		$ -	$ 455.00	$ 800.00
	1-7-99-775-1330 Subscription to Newsletter		$ -	$ -	$ -
	1-7-99-775-1470 Publishing Agreement Account		$ -	$ -	$ 500.00
	1-7-99-775-1755 Pamphlet Sales Revenue		$ -	$ -	$ -
	1-7-99-775-1935 Miscellaneous Revenue		$ 325.00	$ 650.00	$ 650.00
	Total Revenue		**$ 500.00**	**$ 116,780.00**	**$ 111,950.00**

Expenses			May 2022	Cumulative Expenses	Budget (2022- 2023)
	1-9-99-775-1111 Administrative Expenses		$ 2,562.00	$ 2,562.00	$ 10,000.00
	1-9-99-775-1127 Multi-Section Lobbying Group		$ 3,000.00	$ 24,000.00	$ 36,000.00
	1-9-99-775-1276 Meetings		$ -	$ 14,554.28	$ 45,000.00
	1-9-99-775-1283 Seminars		$ 17,710.00	$ 17,710.00	$ 15,000.00
	1-9-99-775-1297 Annual Meeting Expenses		$ -	$ -	$ 1,000.00
	1-9-99-775-1493 Travel		$ -	$ 3,545.06	$ 12,000.00
	1-9-99-775-1822 Litigation-Amicus Curiae Brief		$ -	$ -	$ 25,000.00
	1-9-99-775-1833 Newsletter		$ 100.00	$ 4,500.00	$ 13,500.00
	1-9-99-775-1868 Postage		$ -	$ -	$ 500.00
	1-9-99-775-1987 Miscellaneous		$ -	$ 3,846.80	$ 2,500.00
Total Expenses			**$ 23,372.00**	**$ 70,718.14**	**$ 160,500.00**

Net Income		**$ (22,872.00)**	**$ 46,061.86**	**$ (48,550.00)**
General Fund plus Net Income (Running Total)		$ 278,083.46	**$ 278,083.46**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	May 2023		
Beginning Deposit Fund Balance	**$ -**	$ 1,844.44		
Revenue		$ -		
Withdrawls		$ -		
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			June 2023	YTD Revenue (2022-2023)	Budget (2022-2023)
	1-7-99-775-1050 Probate/Estate Planning Dues		$ 140.00	$ 115,815.00	$ 110,000.00
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		$ -	$ 455.00	$ 800.00
	1-7-99-775-1330 Subscription to Newsletter		$ -	$ -	$ -
	1-7-99-775-1470 Publishing Agreement Account		$ -	$ -	$ 500.00
	1-7-99-775-1755 Pamphlet Sales Revenue		$ -	$ -	$ -
	1-7-99-775-1935 Miscellaneous Revenue		$ -	$ 650.00	$ 650.00
	Total Revenue		**$ 140.00**	**$ 116,920.00**	**$ 111,950.00**

Expenses			June 2022	Cumulative Expenses	Budget (2022- 2023)
	1-9-99-775-1111 Administrative Expenses		$ -	$ 2,562.00	$ 10,000.00
	1-9-99-775-1127 Multi-Section Lobbying Group		$ 3,000.00	$ 27,000.00	$ 36,000.00
	1-9-99-775-1276 Meetings		$ 2,719.02	$ 17,273.30	$ 45,000.00
	1-9-99-775-1283 Seminars		$ -	$ 17,710.00	$ 15,000.00
	1-9-99-775-1297 Annual Meeting Expenses		$ -	$ -	$ 1,000.00
	1-9-99-775-1493 Travel		$ 1,405.30	$ 4,950.36	$ 12,000.00
	1-9-99-775-1822 Litigation-Amicus Curiae Brief		$ 26,872.50	$ 26,872.50	$ 25,000.00
	1-9-99-775-1833 Newsletter		$ 4,300.00	$ 8,800.00	$ 13,500.00
	1-9-99-775-1868 Postage		$ -	$ -	$ 500.00
	1-9-99-775-1987 Miscellaneous		$ -	$ 3,846.80	$ 2,500.00
Total Expenses			**$ 38,296.82**	**$ 109,014.96**	**$ 160,500.00**

Net Income		**$ (38,156.82)**	**$ 7,905.04**	**$ (48,550.00)**
General Fund plus Net Income (Running Total)		$ 239,926.64	**$ 239,926.64**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	June 2023		
Beginning Deposit Fund Balance	**$ -**	$ 1,844.44		
Revenue		$ -		
Withdrawls		$ -		
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			July 2023	YTD Revenue (2022-2023)	Budget (2022-2023)
	1-7-99-775-1050 Probate/Estate Planning Dues		$ -	$ 115,815.00	$ 110,000.00
	1-7-99-775-1055 Probate/Estate Stud/Affil Dues		$ -	$ 455.00	$ 800.00
	1-7-99-775-1330 Subscription to Newsletter		$ -	$ -	$ -
	1-7-99-775-1470 Publishing Agreement Account		$ -	$ -	$ 500.00
	1-7-99-775-1755 Pamphlet Sales Revenue		$ -	$ -	$ -
	1-7-99-775-1935 Miscellaneous Revenue		$ -	$ 650.00	$ 650.00
	Total Revenue		**$ -**	**$ 116,920.00**	**$ 111,950.00**

Expenses			July 2022	Cumulative Expenses	Budget (2022- 2023)
	1-9-99-775-1111 Administrative Expenses		$ -	$ 2,562.00	$ 10,000.00
	1-9-99-775-1127 Multi-Section Lobbying Group		$ 3,000.00	$ 30,000.00	$ 36,000.00
	1-9-99-775-1276 Meetings		$ -	$ 17,273.30	$ 45,000.00
	1-9-99-775-1283 Seminars		$ -	$ 17,710.00	$ 15,000.00
	1-9-99-775-1297 Annual Meeting Expenses		$ -	$ -	$ 1,000.00
	1-9-99-775-1493 Travel		$ 1,071.28	$ 6,021.64	$ 12,000.00
	1-9-99-775-1822 Litigation-Amicus Curiae Brief		$ -	$ 26,872.50	$ 25,000.00
	1-9-99-775-1833 Newsletter		$ -	$ 8,800.00	$ 13,500.00
	1-9-99-775-1868 Postage		$ -	$ -	$ 500.00
	1-9-99-775-1987 Miscellaneous		$ -	$ 3,846.80	$ 2,500.00
Total Expenses			**$ 4,071.28**	**$ 113,086.24**	**$ 160,500.00**

Net Income		**$ (4,071.28)**	**$ 3,833.76**	**$ (48,550.00)**
General Fund plus Net Income (Running Total)		$ 235,855.36	**$ 235,855.36**	$ -

Hearts and Flowers Fund Carry Over Balance	Carry Over Balance	July 2023		
Beginning Deposit Fund Balance	**$ -**	$ 1,844.44		
Revenue		$ -		
Withdrawls		$0.00		
Total Fund		$ 1,844.44		

ATTACHMENT 4

M E M O R A N D U M

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan

From: James P. Spica

Re: Uniform Partition of Heirs Property Act (UPHPA) ad Hoc Committee Chair's Report

Date: August 29, 2023

The Committee recommends that the Council adopt a public policy position in favor of 2023 HB 4924, which is an act to adopt the Uniform Partition of Heirs Property Act. The copy of the bill attached reflects some suggestions lately offered by the Committee to the bill's sponsor, but the Committee urges the Council to endorse the bill regardless of whether the changes are made.

JPS

August 29, 2023 UPHPA Committee Chair's Report

Attachment
2023 HB 4924 (with Committee comments)

JPS SUGGESTIONS
8/29/23

HOUSE BILL NO. 4924

ADOPT THE UNIFORM PARTITION OF HEIRS PROPERTY ACT BY AMENDING

LONG TITLE

July 20, 2023, Introduced by Rep. Dievendorf and referred to the Committee on Judiciary.

A bill to ~~amend~~ 1961 PA 236, entitled

"Revised judicature act of 1961,"

~~by amending~~ section 3304 (MCL 600.3304) and ~~by~~ adding chapter 34.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 3304. **(1)** All persons holding lands as joint tenants or, **subject to chapter 34,** as tenants in common may have those lands partitioned.

(2) Chapter 34 supplements this chapter, and, if an action is governed by chapter 34, it supersedes the provisions of this chapter that are inconsistent with chapter 34.

CHAPTER 34

PARTITION OF HEIRS PROPERTY

Sec. 3401. This chapter ~~may~~ shall be known as the "uniform partition of heirs property act" and may be cited.

Sec. 3402. As used in this chapter:

(a) "Ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual.

(b) "Collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant.

(c) "Descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual.

(d) "Determination of value" means a court order determining the fair market value of heirs property under section 3406 or 3410 or adopting the valuation of the property agreed to by all cotenants.

(e) "Heirs property" means real property held in tenancy in common that satisfies all of the following requirements at the filing of an action to partition real property:

(*i*) There is no agreement in a record binding all the cotenants that governs the partition of the property.

(*ii*) One or more of the cotenants acquired title from a relative, whether living or deceased.

(*iii*) Any of the following apply:

(A) Twenty percent or more of the interests are held by cotenants who are relatives.

(B) Twenty percent or more of the interests are held by an

individual who acquired title from a relative, whether living or deceased.

(C) Twenty percent or more of the cotenants are relatives.

(f) "Partition by sale" means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under section 3410.

(g) "Partition in kind" means the division of heirs property into physically distinct and separately titled parcels.

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

(i) "Relative" means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this chapter.

Sec. 3403. (1) This chapter applies to an action to partition real property filed after the effective date of this chapter.

(2) In an action to partition real property under chapter 33, the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property must be partitioned under this chapter unless all of the cotenants otherwise agree in a record.

(3) This chapter supplements chapter 33. However, if an action is governed by this chapter, it supersedes the provisions of chapter 33 that are inconsistent with this chapter.

Sec. 3404. (1) This chapter does not limit or affect the method by which service of a complaint may be made in an action to partition real property.

(2) If the plaintiff in an action to partition real property seeks notice by publication and the court determines that the

property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post and maintain, while the action is pending, a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

Sec. 3405. If the court appoints ~~guardians or guardians ad litem~~ under chapter 33, each ~~guardian or guardian ad litem~~ must be disinterested and impartial and must not be a party to or a participant in the action to partition real property.

Sec. 3406. (1) Except as otherwise provided in subsections (2) and (3), if the court determines that the property that is the subject of an action to partition real property is heirs property, the court shall determine the fair market value of the property by ordering an appraisal under subsection (4).

(2) If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

(3) If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

(4) If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the

court.

(5) If an appraisal is conducted under subsection (4), the court shall, not later than 10 days after the appraisal is filed, send notice to each party with a known address. The notice must state all of the following:

(a) The appraised fair market value of the property.

(b) A statement that the appraisal is available at the clerk's office.

(c) A statement that a party may file with the court an objection to the appraisal not later than 30 days after the notice is sent, stating the grounds for the objection.

(6) If an appraisal is filed with the court under subsection (4), the court shall conduct a hearing to determine the fair market value of the property not sooner than 30 days after a copy of the notice of the appraisal is sent to each party under subsection (5), whether or not an objection to the appraisal is filed under subsection (5)(c). In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

(7) After a hearing under subsection (6), but before considering the merits of the action to partition real property, the court shall determine the fair market value of the property and send notice to the parties of the value.

Sec. 3407. (1) If a cotenant requests partition by sale, the court shall, after determining the value of the property under section 3406, send notice to the parties that any cotenant except a cotenant that requested partition by sale may buy all the interests of the cotenants that requested partition by sale.

(2) Not later than 45 days after the notice is sent under subsection (1), a cotenant except a cotenant that requested

partition by sale may give notice to the court that the cotenant elects to buy all the interests of the cotenants that requested partition by sale.

(3) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under section 3406 multiplied by the cotenant's fractional ownership of the entire parcel.

(4) After the expiration of the period in subsection (2), the following rules apply:

(a) If only 1 cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall notify all the parties of that fact.

(b) If more than 1 cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant.

(c) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall send notice to all the parties of that fact and resolve the action to partition real property under section 3408(1) and (2).

(5) If the court sends notice to the parties under subsection (4)(a) or (b), the court shall set a date, not sooner than 60 days after the date the notice was sent, by which electing cotenants must pay their apportioned price to the court. After this date, all of the following rules apply:

(a) If all electing cotenants timely pay their apportioned price to the court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them.

(b) If no electing cotenant timely pays the price apportioned to the cotenant, the court shall resolve the action to partition real property under section 3408(1) and (2) as if the interests of the cotenants that requested partition by sale were not purchased.

(c) If 1 or more but not all of the electing cotenants fail to pay the apportioned price on time, the court, on motion, shall give notice to the electing cotenants that paid the apportioned price of the interest remaining and the price for all the interest.

(6) Not later than 20 days after the court gives notice under subsection (5)(c), any cotenant that paid the price apportioned to the cotenant may elect to purchase all of the remaining interest by paying the entire price for the remaining interest to the court. After the 20-day period, the following rules apply:

(a) If only 1 cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall promptly issue an order reallocating the interests of all of the cotenants and disburse the amounts held by the court to the persons entitled to them.

(b) If no cotenant pays the entire price for the remaining interest, the court shall resolve the action to partition real property under section 3408(1) and (2) as if the interests of the cotenants that requested partition by sale were not purchased.

(c) If more than 1 cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among the paying cotenants, based on each paying the

cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall promptly issue an order reallocating all of the cotenants' interests, disburse the amounts held by the court to the persons entitled to them, and promptly refund any excess payment held by the court.

(7) Not later than 45 days after the court sends notice to the parties under subsection (1), a cotenant entitled to buy an interest under this section may request that the court authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

(8) If the court receives a timely request under subsection (7), the court, after a hearing, may deny the request or authorize the requested additional sale on those terms as the court determines are fair and reasonable, subject to both of the following limitations:

(a) A sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under subsections (1) to (6) have been paid to the court and those interests have been reallocated among the cotenants as provided in subsections (1) to (6).

(b) The purchase price for the interest of a cotenant that did not appear is based on the court's determination of value under section 3406.

Sec. 3408. (1) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants under section 3407, or, if after conclusion of the buyout under

section 3407, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in section 3409, finds that partition in kind will result in great prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by 2 or more parties to have the requesting parties' individual interests aggregated.

(2) If the court does not order partition in kind under subsection (1), the court shall order partition by sale under section 3410 or, if no cotenant requested partition by sale, the court shall dismiss the action.

(3) If the court orders partition in kind under subsection (1), the court may require that 1 or more cotenants pay 1 or more other cotenants so that the payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(4) If the court orders partition in kind, the court shall allocate to the cotenants who are unknown, cannot be located, or are the subject of a default judgment, if the cotenant's interests were not represented under section 3407, a part of the property representing the combined interests of these cotenants as determined by the court, and this part of the property must remain undivided.

Sec. 3409. (1) In determining whether partition in kind would result in great prejudice to the cotenants as a group under section 3408, the court must consider all of the following:

(a) Whether it is practicable to divide the heirs property among the cotenants.

(b) Whether partition in kind would apportion the property in a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale would likely occur.

(c) Evidence of the collective duration of ownership or possession of the property by a cotenant and 1 or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other.

(d) A cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant.

(e) The lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property.

(f) The degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property.

(g) Any other relevant factor.

(2) The court shall not consider any 1 factor in subsection (1) to be dispositive without weighing the totality of all relevant factors and circumstances.

Sec. 3410. (1) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.

(2) If the court orders an open-market sale and the parties,

not later than 10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the real estate broker and establish a reasonable commission. If the parties do not agree on a real estate broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The real estate broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(3) If the real estate broker appointed under subsection (2) obtains, within a reasonable time, an offer to purchase the property for not less than the determination of value, the real estate broker must comply with the reporting requirements in section 3411 and the sale may be completed in accordance with the requirements of state law other than this chapter.

(4) If the real estate broker appointed under subsection (2) does not obtain, within a reasonable time, an offer to purchase the property for not less than the determination of value, the court, after a hearing, may do any of the following:

(a) Approve the highest outstanding offer, if any.

(b) Redetermine the value of the property and order that the property continue to be offered for an additional time.

(c) Order that the property be sold by sealed bids or at an auction.

(5) If the court orders a sale by sealed bids or an auction, the court shall set the terms and conditions of the sale. If the court orders an auction, the auction must be conducted under chapter 33.

(6) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

Sec. 3411. (1) Unless required to do so within a shorter time under chapter 33, a real estate broker appointed under section 3410(2) to offer heirs property for open-market sale shall file a report with the court not later than 7 days after receiving an offer to purchase the property for not less than the value determined under section 3406 or 3410.

(2) The report required by subsection (1) must contain all of the following information:

(a) A description of the property to be sold to each buyer.

(b) The name of each buyer.

(c) The proposed purchase price.

(d) The terms and conditions of the proposed sale, including the terms of any owner financing.

(e) The amounts to be paid to lienholders.

(f) A statement of contractual or other arrangements or conditions of the broker's commission.

(g) Other material facts relevant to the sale.

Sec. 3412. In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact ~~a~~ uniform partition of heirs property act.

→ THE

[ADD SEC 3413]

SEC. 3413.

CODA TO JPS SUGGESTIONS FOR HB 4924

CHAPTER

~~**SECTION 13. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.**~~ This ~~[act]~~ modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).